

Watkins v J C Land Dev. Ltd.

2009 NY Slip Op 33278(U)

October 28, 2009

Supreme Court, Suffolk County

Docket Number: 30678-2007

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 08-26-2009
 Motion Submit Date: 09-03-2009
 Motion Sequence No's.: 007 MD

WILLIAM WATKINS a/k/a CHIP
WATKINS, individually and as a shareholder
on behalf of J C LAND DEVELOPMENT,
LTD.,

Plaintiff,

-against-

J C LAND DEVELOPMENT LTD, JOHN
CENCI and CHRISTOPHER BRADSHAW,

Defendants.

X

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ORDERED, that the motion (motion sequence number 007) by plaintiff pursuant to CPLR §2221(e) is denied in its entirety.

In this shareholder's derivative action, this is a motion by plaintiff seeking leave to renew its opposition to (1) the motion for summary judgment by defendants J.C. Land Development Corp. ("J.C. Land") and John Cenci ("Cenci"); (2) the motion to dismiss by defendant Christopher Bradshaw ("Bradshaw"); and (3) the motion to cancel the notice of pendency filed by plaintiff. By Order (PINES, J.) dated June 19, 2009, this Court granted the motion by J.C. Land and Cenci to for summary judgment and dismissed the action; in light thereof, the Court denied the motion to dismiss by Bradshaw as moot and canceled the notice of pendency.

The gravamen of the motion to dismiss was that plaintiff, Watkins, should be judicially estopped from claiming an ownership interest in J.C. Land based on certain contradictions between the allegations that form the basis for the complaint in this case and statements Watkins made in a certain Presentence

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Report (“PSR”) which were purportedly relied upon by a federal judge when sentencing Watkins. Specifically, on March 5, 1999, Watkins pled guilty before Judge Jed S. Rakoff of the Southern District of New York, of conspiracy to violate narcotic laws under 21 U.S.C. §841(b)(1)(B). Although the sentencing guidelines mandated imposition of a monetary fine, Judge Rakoff waived the fine, finding that “(no) fine will be imposed because the Court made a finding that, in his present circumstances and in the foreseeable future, (Watkins) will not be able to pay any material fine”. In the instant case however, Watkins claims that he and Cenci formed JC Land on March 25, 1999 and that he provided \$600,000 (including cash of \$130,000) toward its formation.

Based on these disparities and contradictions, Cenci sought disclosure of the PSR, yet plaintiff resisted disclosure requiring Cenci to move before Judge Rakoff for an Order releasing the PSR. By Order dated June 9, 2009, Judge Rakoff granted the motion to produce those portions of the PSR relating to “Watkins’ financial condition, along with all probation records containing statements made by respondent concerning his financial condition.” Judge Rakoff found that Cenci demonstrated a compelling need for disclosure of the PSR to “meet the ends of justice”, stating that “(i)n the New York action and dissolution proceeding, however, (Watkins) alleges that on or about March 25, 1999, i.e., twenty days after (Watkins) pleaded guilty before this Court, he and (Cenci) formed a real estate development company, and that, beginning less than a month after being incarcerated, respondent invested approximately \$600,000 in that corporation”. Further, Judge Rakoff found that “(a)fter pleading guilty, (Watkins) provided certain information to the probation department concerning his finances for use in his PSR. At (Watkins’) sentencing hearing, the Court adopted the factual findings of the PSR,..., and, as noted, declined to impose any fine based on its determination concerning (Watkins’) inability to pay”.

Based upon the foregoing, this Court, in its June 19, 2009 Order found that defendants had demonstrated entitlement to summary judgment on the ground of judicial estoppel. The Court held that since Watkins’ obtained a judgment in his favor (to wit, the waiver of a monetary fine) based upon assertions of penury and lack of assets before the Federal Court, this Court would not permit him “to litigate his claims to real property or accountings based on funds he now states he began transferring at the precise time of his contradictory statements to probation, relied on by a federal judge.” Therefore the Court granted summary judgment and dismissed the action.

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Plaintiff now seeks leave to renew its opposition to the motion for summary judgment, the motion to dismiss by Bradshaw and the motion to vacate the notice of pendency. Plaintiff states that he has now obtained a full copy of the PSR and concluded that it contains inaccuracies regarding plaintiff's ability to pay a fine. Instead, plaintiff claims that the PSR stated that the Probation Department found that he was able to pay a fine but that they did not recommend a fine "based on familial obligations". Plaintiff argues that the Court relied on the erroneous assertion that he was unable to pay a fine, and that if the Court had the full PSR, it would not have concluded that judicial estoppel barred the within action. Thus, plaintiff urges the Court to grant renewal, and upon renewal, deny the motion for summary judgment, the motion to dismiss and the motion to vacate the notice of pendency.

Defendants Cenci and Bradshaw separately oppose the motion to renew. Cenci argues that this Court relied upon Judge Rakoff's Order and the findings contained within such Order in granting the motion for summary judgment dismissing the action based upon judicial estoppel. Watkins benefitted from the factual findings in the PSR that he could not pay a fine and he received leniency. Cenci asserts that Watkins withheld the nature of his assets when he was sentenced and Judge Rakoff relied on such representations when he waived the fine. Moreover, Cenci notes that plaintiff has strenuously objected to the production of the PSR during the course of the litigation, even refusing to permit an *in camera* inspection of the document. Cenci argues that plaintiff has made the same arguments before Judge Rakoff which were rejected in his June 9, 2009 Order. Likewise, Bradshaw argues that Watkins has failed to satisfy the requirements of a motion for leave to renew and states that if the PSR had relevant information, Watkins should have obtained it earlier and permitted its disclosure.

Plaintiff submits reply papers and Cenci submits a sur-reply, both reiterating their arguments on this motion.

Essentially, plaintiff is claiming that errors existed in the PSR, and Judge Rakoff and this Court relied on those errors. Such argument is without merit in that this Court relied on Judge Rakoff's June 9, 2009, portions of which it quoted in its June 19, 2009 Order and again in this Decision and Order. If, as plaintiff claims, certain provisions of the PSR were inaccurate, his remedy lies solely before Judge Rakoff, and not this Court. It is the Court's understanding that plaintiff has moved before Judge Rakoff for an Order pursuant to Federal Rules of Civil Procedure Rule 60(a) to correct certain alleged mistakes of fact contained in the PSR. Such motion is *sub judice*. Thus, it would be inappropriate for this Court

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to grant leave to renew based upon alleged errors in the PSR as such is clearly within the purview of the Federal Court. The motion for leave to renew is therefore denied in its entirety.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: October 28, 2009
Riverhead, New York


EMILY PINES
J. S. C.