

<b>Pesa v Dayan</b>
2012 NY Slip Op 30367(U)
January 30, 2012
Supreme Court, Nassau County
Docket Number: 000865-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**

**Justice Supreme Court**

-----X  
**MARIO A. PESA, CHRISTOPER F. PESA,  
FRANK PESA and CAMILLO JOHN PESA,**

**Plaintiffs,**

**-against-**

**MARK DAYAN, YOSHI TOLETANO,  
SOUTHPOINT, INC. and DREW LONTOS,**

**Defendants.**

**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Index No: 000865-11**

**Motion Seq. No: 2**

**Submission Date: 11/30/11**

**The following papers having been read on this motion:**

**Notice of Motion, Affirmation in Support and Exhibits.....X**

**Affirmation in Opposition.....X**

**Reply Affirmation .....X**

This matter is before the Court for decision on the motion filed by Defendants Mark Dayan ("Dayan"), Yossi Toledano ("Toledano") and Southpoint, Inc. ("Southpoint") (collectively "Defendants") on November 4, 2011 and submitted on November 30, 2011.<sup>1</sup> For the reasons set forth below, the Court grants the motion and dismisses the Complaint in its entirety.

**BACKGROUND**

**A. Relief Sought**

Defendants move for an Order, 1) pursuant to CPLR § 3211, dismissing the First,

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<sup>1</sup> As discussed *infra*, the Court previously dismissed the Complaint as against Defendant Drew Lontos.

Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Causes of Action, and the Complaint, against the Defendants; or, alternatively 2) pursuant to CPLR § 3212, awarding summary judgment dismissing the Complaint against the Defendants.

Plaintiffs oppose the motion.

#### B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated August 30, 2011 ("2011 Decision") (Ex. F to Johnson Aff. in Supp.) in which the Court granted the motion by Defendant Drew Lontos ("Lontos") to dismiss the Complaint. In the 2011 Decision, the Court outlined, *inter alia*, 1) the nature of the dispute, which relates to Plaintiffs' purchase of three properties ("Properties") located in Far Rockaway, Queens County, New York from Yoma Development Group, Inc. ("Yoma") in which Dayan and Toletano were shareholders, and Dayan, Toletano and Lontos were officers, 2) the allegations and causes of action set forth in the Complaint, 3) the allegations in a related prior action ("Queens Action") titled *Mario A. Pesa, Christopher F. Pesa, Frank Pesa and Camillo John Pesa v. Yoma Development Group, Inc. and Southpoint, Inc.*, Queens County Index Number 15986-07, 4) the similarities between the complaint from the Queens Action ("Queens Complaint") and the Complaint in the instant action, and 5) the specifics of a decision in the Queens Action dated October 28, 2008 ("Queens Decision"). The Court incorporates the 2011 Decision by reference herein as though set forth in its entirety.

In the Queens Decision (Ex. E to Johnson Aff. in Supp.), the Court, *inter alia*, 1) granted Southpoint's cross motion for summary judgment and dismissed the Queens Complaint against Southpoint; 2) denied plaintiffs' motion to join Dayan and Lontos as additional defendants; and 3) granted the branch of the cross motion by plaintiffs for partial summary judgment in their favor as against defendant Yoma on the issue of liability for breach of contract. As noted in the 2011 Decision, the Court in the Queens Action entered a judgment in favor of the plaintiffs and against Yoma in the sum of \$836,309.13.

#### C. The Parties Positions

Defendants submit that the reasoning and legal authority that supported the 2011 Decision apply equally to moving Defendants and, therefore, the Complaint should be dismissed

against them as well. Defendants also argue that the 2011 Decision is *res judicata* as to Plaintiffs' claims. Defendants submit, further, that even if Plaintiffs' claims were not barred by collateral estoppel or *res judicata*, they are nonetheless insufficient as a matter of law because Southpoint is not a debtor in light of the dismissal and entry of judgment in Southpoint's favor in the Queens Action. If Plaintiffs were unhappy with that result, Defendants argue, their remedy was to reargue or appeal the Queens Decision, which they did not do.

Plaintiffs oppose Defendants' claims, noting that eleven out of fourteen of the causes of action in the Complaint are based on violations of Sections 273 and 276 of the Debtor and Creditor Law ("DCL") and are "the strength of the plaintiff's claims against Dayan, Toletano & Southpoint" (Stock Aff. in Opp. at ¶ 2) (emphasis in original). Plaintiffs describe Defendants' arguments regarding the legal insufficiency of the fraudulent conveyance claims as "misplaced" (*id.*). Plaintiffs argue that, under New York law, a creditor may recover for the fraudulent transfer of the debtor's assets from Defendants who are either transferees of the assets or beneficiaries of the conveyances. Thus, in light of Plaintiffs' allegations that Dayan, Toletano and Southpoint were either transferees of the assets, or beneficiaries of the conveyance from Yoma to Southpoint, they are subject to liability under the DCL.

Plaintiffs also argue that the instant action is not foreclosed by the Queens Action and Queens Decision in light of the fact that 1) the Queens Complaint did not assert causes of action, or make reference to, the DCL; 2) the Queens Decision only addressed Lontos' liability for fraud, not any DCL violation; and 3) the Queens Decision did not discuss the liability of Dayan, Toletano or Southpoint under the DCL.

In reply, Defendants argue that 1) Plaintiffs may not seek recovery regarding the Properties in light of the fact that they were ultimately purchased by an individual for fair consideration without knowledge of any alleged fraud, and Plaintiffs entered into a settlement agreement with that purchaser leaving the purchaser with ownership and possession of the Properties; and 2) in light of the fact that the Queens Decision granted summary judgment in favor of Southpoint, Plaintiffs may not pursue this action; Plaintiffs had the opportunity, and knowledge of the relevant events, to allow them to raise the DCL claims in the Queens Action but did not do so.

## RULING OF THE COURT

### A. Res Judicata and Collateral Estoppel

CPLR § 3211(a)(5) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the bases that the cause of action may not be maintained because of collateral estoppel or *res judicata*. The doctrine of *res judicata* operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding. *Luscher v. Arrua*, 21 A.D.3d 1005, 1006-07 (2d Dept. 2005), quoting *Koether v. Generalow*, 213 A.D.2d 379, 380 (2d Dept. 1995). Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue. *Luscher*, 21 A.D.3d at 1007. The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a full and fair opportunity to litigate. *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2004). Furthermore, under New York's transactional analysis approach to *res judicata*, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy. *Richter v. Sportsmans Properties, Inc.*, 82 A.D.3d 733, 735 (2d Dept. 2011), citing *Matter of Hunter*, 4 N.Y.3d 260, 269 (2005), quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981).

### B. Application of these Principles to the Instant Action

The Court grants Defendants' motion to dismiss the Complaint based on the Court's conclusion that the instant action against Defendants is precluded by the Queens Decision. The Queens Complaint and the Complaint make similar allegations regarding Defendants' participation in fraudulent transactions involving the Properties. Plaintiffs had a full and fair opportunity to litigate those allegations in the Queens Action, and judgment was issued 1) in favor of Southpoint, and 2) in favor of plaintiff on certain claims. In addition, the Court in the Queens Action denied plaintiffs' motion to join Dayan and Lontos as additional defendants. Moreover, the claims in the Complaint arise out of the same transaction or series of transactions that were the subject of the Queens Action, even though they are based on different theories and seek a different remedy. Although they elected not to, Plaintiffs could have asserted fraudulent

conveyance claims in the Queens Action whose claims are clearly based on the same transactions set forth in the Complaint. In light of the foregoing, the Court concludes that the Complaint is barred by the doctrines of *res judicata* and collateral estoppel and dismisses the Complaint in its entirety.

All matters not decided herein are hereby denied.

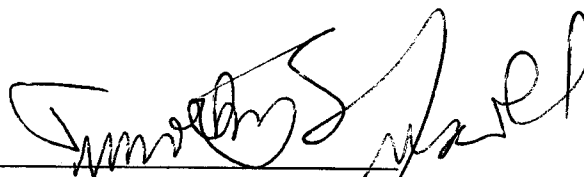
This constitutes the decision and order of the Court.

The Complaint is dismissed.

DATED: Mineola, NY

January 30, 2012

ENTER

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

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**ENTERED**

FEB 03 2012

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**