

Miracle Inn, LLC v First Am. Intl. Bank

2012 NY Slip Op 31106(U)

April 2, 2012

Supreme Court, Queens County

Docket Number: 6765/11

Judge: Augustus C. Agate

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----x
MIRACLE INN, LLC and LI SHEN,

Index No.: 6765/11

Plaintiffs

Motion Dated:
July 19, 2011

-against-

Cal. No.: 21

FIRST AMERICAN INTERNATIONAL BANK,
AMERASIA BANK, LIHONG DONG and
LUJING LAI,

Defendants.

m# 1

-----x

The following papers numbered 1 to 38 read on this motion by defendants Lihong Dong and Lujing Lai (i) to dismiss the action pursuant to CPLR 3211(a)(4) on the ground that there is a prior action pending between the same parties for the same cause of action in this court and (ii) to dismiss the complaint as against defendant Lujing Lai pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction; cross motion by plaintiffs (i) for an order consolidating this action with the action pending under Index No. 1950/09 (ii) for an order fixing the venue in this county for a joint trial with the action pending under Index No. 5699/10 in this court and (iii) to vacate the note of issue filed under Index No. 1950/09; cross motion by defendant Amerasia Bank to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211(a)(1); and cross motion by defendants Lihong Dong and Lujing Lai "for judgment on the pleadings."

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	1 - 4
3 Notices of Cross Motion - Affidavits - Exhibits.	5 - 15
Affirmations in Opposition - Exhibits	16 - 26
Replying Affirmations	27 - 38

Upon the foregoing papers it is ordered that this motion and these three cross motions are decided as follows:

This action arises out of a contract whereby the defendants Lihong Dong and Lujing Lai were to purchase the Best Western Marshall Manor in Horseheads, New York from the plaintiffs. Pursuant to the contract, the defendants were required to prove

on or before December 2005 that they had \$600,00.00 cash to consummate the closing. The closing never occurred, and various lawsuits relating to this transaction were commenced.

The complaint in the instant action alleges that defendants Dong and Lai, in an attempt to mislead and defraud the plaintiffs, provided forged and altered bank documents to plaintiffs as proof that they had the necessary \$600,000.00 cash to consummate the closing. The complaint further alleges that the individual defendants, in conjunction with defendants First American International Bank and Amerasia Bank, prepared and presented to the plaintiffs false and altered deposit slips and bank statements. The complaint alleges causes of action sounding in (1) fraud and misrepresentation, (2) violations of General Business Law § 349, (3) tortious interference with a contract, (4) civil conspiracy, (5) prima facie tort and (6) breach of duty as against the bank defendants.

Defendants Dong and Lai now move to dismiss this action pursuant to CPLR 3211(a)(4) on the ground that there is a prior action pending in this court between the same parties for the same cause of action. In order for a court to dismiss an action on the ground that there is another action pending between the same parties for the same cause of action, there must be sufficient identity as to both the parties and the causes of action asserted in the respective actions. With respect to the parties, the requirement is that there be "substantial identity." (White Light Prods., Inc. v On the Scene Prods., Inc., 231 AD2d 90, 93-94 [1997].) Although the joinder of additional defendants, in itself, need not result in the defeat of a motion pursuant to CPLR 3211(a)(4), it is essential that the prior action be for the same cause of action as the instant one. (Kent Dev. Co. v Liccione, 37 NY2d 899, 901 [1975].)

The causes of action alleged in the instant complaint are not completely similar to the ones alleged in the prior action pending under Index No. 1950/09. As noted above, the complaint asserts that the individual defendants acted in conjunction with the bank defendants to defraud the plaintiffs and seeks relief against these bank defendants. The prior action does not involve the banks and alleges fraud, breach of contract and defamation per se against the individual defendants. There are additional causes of action in the instant complaint that are not part of the prior action. Thus, the branch of the motion to dismiss the action pursuant to CPLR 3211(a)(4) is denied.

The branch of the motion to dismiss the complaint as against defendant Lujing Lai on the ground of lack of personal

jurisdiction pursuant to CPLR 3211(a)(8) is denied.

The annexed affidavit of service for defendant Lujing Lai avers that defendant Lai was served by leaving a copy of the summons and complaint with defendant Lihong Dong, described as "co-occupant" on April 6, 2011, followed by a mailing to defendant Lai. (see CPLR 308[2].) Defendant Lai submits an "affidavit" stating that the service was defective since only one copy of the summons and complaint was delivered to defendant Dong. He claims that no copy of the summons and complaint was delivered specifically for him to defendant Dong. According to defendant Lai, the one copy of the summons and complaint that was delivered to defendant Dong constituted service only upon her.

Generally, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service (see Wells Fargo Bank, NA v Chaplin, 65 AD3d 588, 589 [2009]; Household Fin. Realty Corp. of N.Y. v Brown, 13 AD3d 340, 341 [2004].)

In the matter at hand, the moving papers do not contain an affidavit from defendant Dong. Such affidavit is necessary since she is the person allegedly served on behalf of defendant Lai. Thus, defendant Lai has not submitted sufficient evidence to rebut the presumption of proper service herein.

The court also notes that the "affidavit" of defendant Lai is procedurally defective. First, it does not contain a proper New York caption with the court the action is venued in. It is merely titled "Affidavit of Lujiang Lai." (see Midland Funding LLC v Loreto, 34 Misc 3d 1232(A) [2012].) Although the document is sworn, it fails to state anywhere that it is "true under penalty of perjury." (see CPLR 2106.)

The branch of the cross motion by plaintiff to vacate the note of issue in the action pending under Index No. 1950/09 is denied as moot. The court's computer indicates that the note of issue in that action was vacated on March 7, 2012.

With respect to the branch of the cross motion for consolidation, a motion for consolidation or joint trial pursuant to CPLR 602(a) rests within the sound discretion of the trial court. (Mattia v Food Emporium, Inc., 259 AD2d 527, 527 [1999]; McDutchess Bldrs., Inc. v Dutchess Knolls, Inc., 244 AD2d 534, 535 [1997].) Absent prejudice to a substantial right of the opposing party, consolidation or a joint trial is proper where common questions of law and fact exist. (CPLR 602[a]; D'Abreau v

American Bankers Ins. Co. of Fla., 261 AD2d 501, 502 [1999];
Raboy v McCrory Corp., 210 AD2d 145, 147 [1994]; Stephens v
Allstate Ins. Co., 185 AD2d 338, 339 [1992].)

The court finds that since the actions herein arise out of the same transaction and involve common facts, consolidation would be proper and result in a more expeditious trial. Indeed, the interest of judicial economy outweighs any inconvenience to the parties herein.

Thus, the branch of the cross motion for consolidation is granted, and this action, bearing Index No. 6765/11 shall be consolidated with Action No. 1, bearing Index No. 1950/09, in this Court for all purposes under Index No. 1950/09; and it is further

ORDERED, that the Clerk of the Court, upon being served with a certified copy of this order with notice of entry, is directed to transfer all papers filed under Index No. 6765/11 to the file of Index No. 1950/09; and it is further

ORDERED, that the caption of the Consolidated Action shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
-----X
MIRACLE INN, LLC and LI SHEN

Index No. 1950/09

Plaintiffs,

- against -

LIHONG DONG, LUJIANG LAI, FIRST AMERICAN
INTERNATIONAL BANK and AMERASIA BANK,

Defendants.

- - - - -X,

and it is further

ORDERED, that a copy of this order with notice of entry be served on all parties to the actions consolidated and the Clerk of Queens County.

The court notes that pursuant to an order dated October 21,

2011, the action pending under Index No. 1950/09 was combined for purposes of a joint trial with the actions pending under Index No. 5699/10 and 21491/10 in this court. Thus, in view of the consolidation granted herein, the title of the cases combined for joint trial shall now read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X

MIRACLE INN, LLC AND LI SHEN

Plaintiffs

ACTION NO. 1

Index No. 1950/09

- against -

LIHONG DONG and LUJIANG LAI, FIRST AMERICAN
INTERNATIONAL BANK and AMERASIA BANK

Defendants.

- - - - -X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

- - - - -X

D&D SUNSHINE LLC, LIHONG DONG, and
LUJIANG LAI,

Plaintiffs,

Action No. 2

Index No. 5699/10

- against -

MIRACLE INN, LLC and LI SHEN,

Defendants.

-----X,

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

- - - - -X

MIRACLE INN, LLC and LI SHEN,

Plaintiffs,

Action No. 3

Index No. 21491/10

- against -

JUN QIU,

Defendant.

-----X.

The court further notes that inasmuch as the note of issue was vacated in all three actions, there will be no delay as a result of the combination of these cases.

The cross motion by defendant Amerasia Bank to dismiss the complaint insofar as asserted against it is denied.

On a motion to dismiss a complaint on the ground that there is a defense founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence submitted must "resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim." (Del Pozo v Impressive Homes, Inc., 29 AD3d 621, 622 [2006] [quoting Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 [2003]; Dodge v King, 19 AD3d 359, 360 [2005].)

Here, the cross movant has failed to present documentary evidence which resolves all factual issues as a matter of law. The claims against defendant Amerasia are based upon, in part, fraud and misrepresentation. The bank statement annexed to the cross motion does not eliminate all factual issues raised herein.

Finally, the cross motion by defendants Dong and Lai for a "judgment on the pleadings" is denied without prejudice to renewal. The defendants Dong and Lai made the original motion to dismiss. A cross motion can only be served by a party upon the moving party. (CPLR 2215; see Dugas v Bernstein, 5 Misc 3d 818, 825 [2004].) Inasmuch as defendants Dong and Lai are the original moving parties, their separate cross motion is improper.

Accordingly, the motion by defendants Lihong Dong and Lujing Lai to dismiss the complaint is denied in its entirety.

The branch of the cross motion by the plaintiffs for an order of consolidation is granted as set forth above.

The branch of the cross motion by the plaintiffs for an order fixing the venue in this county for a joint trial with the action pending under Index No. 5699/10 is granted to the extent set forth above.

The branch of the cross motion by the plaintiffs to vacate the note of issue filed under Index No. 1950/09 is denied as moot.

The cross motion by defendant Amerasia Bank to dismiss the complaint insofar as asserted against it is denied.

The cross motion by defendants Lihong Dong and Lujing Lai

"for judgment on the pleadings" is denied without prejudice to renewal.

Date: April 2, 2012

AUGUSTUS C. AGATE, J.S.C.