

Cuni v 834 Riverside Dr., Hous. Dev. Fund Corp.

2012 NY Slip Op 32989(U)

October 25, 2012

Supreme Court, New York County

Docket Number: 100716/12

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

FILED

PEDRO CUNI,

INDEX No. 100716/12

NOV 15 2012

-against- Plaintiff, **NEW YORK COUNTY CLERK'S OFFICE**

MOTION DATE _____

834 RIVERSIDE DRIVE, HOUSING DEVELOPMENT
FUND CORP. et al.,

MOTION SEQ. No. 003

Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1, 2

Answering Affidavits- Exhibits _____

Replying Affidavits _____

3

CROSS-MOTION: YES NO

FILED

Upon the foregoing papers, it is ordered that this motion is:

NOV 15 2012

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM **NEW YORK COUNTY CLERK'S OFFICE**

Dated: 10/25/12.

DMGM

Check one: FINAL DISPOSITION

DONNA M. MILLS, J.S.C.

NON-FINAL DISPOSITION

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 58

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PEDRO CUNI,

Plaintiff,

Index No.: 100716/12

-against-

834 RIVERSIDE DRIVE, HOUSING
DEVELOPMENT FUND CORPORATION,
IVELISSE HARASME, HUSSEIN DAVIS,
RENEE MASON, KYLIN WANG, IRA JONES
CIMINI, ERNEST FERNANDEZ,

Defendants.

-----x

DONNA MILLS, J.:

Defendant/cross-complainant 834 Riverside Drive, Housing Development Fund Corporation (834 Riverside) moves, pursuant to CPLR 3215, for a default judgment against co-defendant Ernest Fernandez (Fernandez) because Fernandez has failed to appear or answer the cross complaint. Fernandez cross-moves to dismiss the cross complaint.

BACKGROUND

This case concerns 834 Riverside's action to evict plaintiff Pedro Cuni (Cuni), which action was consolidated with this action by this court on March 21, 2012. The instant action was instituted by Cuni against 834 Riverside and its board of directors, alleging that the defendants herein owed Cuni the sum of \$50,000.00. Defendants herein then asserted a cross claim against Fernandez, alleging: (1) fraud, breach of fiduciary duty

and conversion (handling cooperative's financial transactions, selling apartments contrary to the bylaws); (2) fraud, breach of duty and conversion (renting apartments and keeping rents for personal use); (3) an order to have Fernandez produce the books and records of the cooperative; (4) indemnification; (5) fraud, breach of fiduciary duty and conversion against Fernandez and Renee Mason (Mason) (sale of apartment 3D contrary to bylaws); and (6) fraudulent conveyance of apartment 3C by Fernandez and Mason to one of their relatives. Fernandez was the past president of the cooperative board that managed 834 Riverside.

834 Riverside's attorney avers that he spoke to the attorney who represented Fernandez with respect to Cuni's summons and complaint and asked whether he would be willing to accept service for Fernandez on the cross complaint, which 834 Riverside's attorney states that he agreed to do. Thereafter, 834 Riverside's attorney served a copy of the summons and complaint asserting 834 Riverside's cross claims on March 27, 2012 on Fernandez' attorney, and mailed him an additional copy on June 1, 2012. Motion, Exs. D & E. To date, 834 Riverside claims that Fernandez has failed to respond to the cross claims, and that he failed to appear on the scheduled court date of May 25, 2012. 834 Riverside's attorney states that neither Fernandez nor his attorney has requested additional time in which to respond to the cross claims.

In opposition to the instant motion, and in support of his own motion, Fernandez states that Cuni previously initiated a claim against him, in which Cuni obtained a judgment against Fernandez in the sum of \$50,000.00, which settled all claims with respect to that sum of money and property ownership interests. Cross Motion, Ex. A. When the present action was initiated naming Fernandez as a co-defendant, this court dismissed the action as asserted against Fernandez, based on the doctrine of collateral estoppel. Cross Motion, Ex. B. Fernandez' attorney states that, once the action was dismissed as against Fernandez, on March 21, 2012, his attorney-client relationship with Fernandez terminated.

The cross complaint was not personally served on Fernandez, and Fernandez' attorney avers that his office was never served with a copy of the cross complaint. The attorney states that the first time that he knew about the cross complaint was when the mailed copy was received by his office on or about June 4, 2012. Fernandez' attorney argues that, based on the method of service employed by 834 Riverside, Fernandez had 30 days in which to respond; i.e., July 4, 2012; however, the instant motion was served on July 3, 2012. Moreover, Fernandez' attorney avers that he never agreed to accept service of the cross complaint, because by that time the attorney-client relationship with Fernandez was over, and that no one in his office ever spoke to 834 Riverside's

attorney agreeing to accept such service.

With respect to the specifics of the cross complaint, Fernandez maintains that: (1) the allegations of fraud appearing in the first and second cross claims are insufficiently specific to be maintained; (2) the third cross claim, to produce books and records, should be dismissed because there is no such cause of action; (3) the fourth cross claim should be dismissed because there was no contract of indemnification between the parties and any implied right to indemnification does not exist because all of Fernandez' alleged wrongdoings were ratified by the board; (4) the fifth and sixth cross claims should be dismissed because Fernandez' interest in the subject apartments was disclosed and both sales were approved by the board. In addition, Fernandez claims that the fifth and sixth cross claims must be dismissed because they failed to name a necessary party: the purchasers of the apartments.

In opposition to the cross motion, and in reply to the opposition to its motion, 834 Riverside says that, on April 13, 2012, Fernandez' attorney made a motion seeking sanctions against Cuni (Reply, Ex. A), which is after said attorney asserts that his attorney-client relationship with Fernandez was terminated. As a consequence, 834 Riverside maintains that service upon him for Fernandez was proper.

With respect to Fernandez' cross motion, 834 Riverside first

asserts that it is untimely, since the cross complaint was served on March 27, 2012, and again on June 1, 2012, Fernandez had to serve his cross motion within 30 days thereafter, which he failed to do. 834 Riverside claims that although the cross motion is dated July 1, 2012, the envelope in which it arrived bore no postmark indicating the day that it was actually mailed.

In addition, 834 Riverside challenges Fernandez' cross motion substantively by claiming that: (1) the first two cross claims are sufficiently specific to withstand dismissal at this pre-discovery stage; (2) the third cross claim does state a cause of action because, as a former board member and president, Fernandez is obligated to provide such books and records as part of his fiduciary duties; (3) the fourth cross claim for indemnification is based on a breach of fiduciary duty; and (4) the fifth and sixth cross claims should not be dismissed because Fernandez failed to provide any legal argument for their dismissal, basing his request on potential evidentiary support. Further, 834 Riverside says that the fifth and sixth cross claims are based on fraud and breach of fiduciary duty, which do not require any additional parties.

Fernandez has not filed any reply to 834 Riverside's opposition to his cross motion.

DISCUSSION

CPLR 3215 (a) states, in pertinent part:

"[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him."

"To avoid the entry of a default judgment, [Fernandez is] required to demonstrate a reasonable excuse for the default and a meritorious defense to the action. The determination of what constitutes a reasonable excuse lies within the sound discretion of the court [internal citations omitted]."

Grinage v City of New York, 45 AD3d 729, 730 (2d Dept 2007).

In the case at bar, the court notes that, in its reply, 834 Riverside no longer asserts that it served Fernandez' attorney based on a telephone conversation with said counsel in which Fernandez' attorney allegedly agreed to accept service on Fernandez' part. Rather, 834 Riverside claims that, based on motions filed by said attorney on behalf of Fernandez, prior to the filing and service of the cross complaint, said attorney is still considered to be Fernandez' counsel for matters relating to the underlying action. See CPLR 2103; *Rivera v Glen Oaks Village Owners, Inc.*, 29 AD3d 560 (2d Dept 2006).

It is noted that this is not an instance in which the allegedly defaulting party is seeking to vacate a default judgment but, rather, is a situation in which the allegedly defaulting party is challenging the imposition of such penalty. Based on the affidavits provided by the parties, there appears to be some discrepancy regarding the service, and Fernandez has, under these circumstances, provided a reasonable excuse for the

delay. Further, 834 Riverside has failed to demonstrate that it suffered any prejudice. *Pagan v Four Thirty Realty LLC*, 50 AD3d 265 (1st Dept 2008). Moreover, based on 834 Riverside's second mailing on June 1, 2012, and Fernandez' response on July 1, 2012, there does not appear to have been any delay in response.¹

As a consequence of the foregoing, 834 Riverside's motion seeking a default judgment against Fernandez is denied.

CPLR 3211 (a), "Motion to dismiss cause of action", states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

* * *

(7) the pleading fails to state a cause of action"

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 87-88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted]." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999),

¹Although 834 Riverside questions the date of the cross motion, it has not provided any evidence that contradicts the date appearing on the cross motion; hence, the court must accept that date as accurate.

affd 94 NY2d 659 (2000).

That branch of Fernandez' cross motion seeking to dismiss the first and second cross claims asserted against him is granted.

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

“[A] mere recitation of the elements of fraud is insufficient to state a cause of action’ (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 1999]). Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).”

In the case at bar, in the first two cross claims, 834 Riverside alleges various, unspecified acts that it alleges constitute fraud, breach of fiduciary duty and conversion, which is insufficient to withstand a motion to dismiss. CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception.

In the instant matter, 834 Riverside's allegations of fraud and other misconduct with respect to these two cross claims are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b).

That branch of Fernandez' cross motion seeking to dismiss

the third cross claim asserted against him, to produce the books and records of the cooperative, is granted.

Whereas a cause of action seeking production of a cooperative's books and records may be entertained as a cause of action rather than a form of relief pursuant to an allegation of a violation of Real Property Law § 339-w, no such allegation appears in 834 Riverside's cross complaint. *Schottenstein v Windsor Tov, LLC*, 2009 WL 1905162, 2009 NY Misc LEXIS 5933, 2009 NY Slip Op 31407 (Sup Ct, NY County 2009), *affd* 85 AD3d 546 (1st Dept 2010). Therefore, this cross claim is dismissed.

That branch of Fernandez' cross motion seeking to dismiss 834 Riverside's fourth cross claim for indemnification is denied. 834 Riverside may maintain a cause of action for indemnification based on Fernandez' alleged breach of fiduciary duty as an officer and director of the cooperative. See *511 West 232nd Owners Corp. v Jennifer Realty Company*, 10 AD3d 573 (1st Dept 2004).

Lastly, that branch of Fernandez' cross motion seeking to dismiss the fifth and sixth cross claims is denied.

In his argument, Fernandez maintains that such claims will be found to be unwarranted based on the evidence which he has not provided as an attachment to his motion. Under these circumstances, Fernandez has failed to make a prima facie showing that these cross claims should be dismissed. In addition, the

court agrees with 834 Riverside that, since these cross claims are based on a breach of fiduciary duty, no other parties are necessary to proceed with the claims. See generally *Greene v Pouchie*, 2010 WL 1654067, 2010 NY Misc LEXIS 1822, 2010 NY Slip Op 30933(U), (Sup Ct, Nassau County 2010).

CONCLUSION

Based on the foregoing it is hereby

ORDERED that defendant 834 Riverside Drive, Housing Development Fund's motion seeking a default judgment on its cross claims as asserted against Ernest Fernandez is denied; and it is further

ORDERED that the branch of Ernest Fernandez' cross motion seeking to dismiss the first, second and third cross claims as asserted against him is granted and those cross claims are dismissed; and it is further

ORDERED that the branch of Ernest Fernandez' cross motion seeking to dismiss the fourth, fifth and sixth cross claims as asserted against him is denied; and it is further

ORDERED that Ernest Fernandez is directed to serve an answer to the cross complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status
conference in Room 574, 111 Centre Street, on December 7,
2012, at 10:00 A.M.

Dated: 10/25/12

ENTER:

Donna Mills

Donna Mills, J.S.C.

DONNA M. MILLS, J.S.C.

FILED

NOV 15 2012

**NEW YORK
COUNTY CLERK'S OFFICE**