Laufer v Skillman Estates, LLC
2014 NY Slip Op 31357(U)
May 23, 2014
Sup Ct, Kings County
Docket Number: 503414/2013
Judge: Ann T. Pfau
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At an IAS Term, Part Commercial 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of May, 2014.

PRESENT:

HON. ANN T. PFAU,

Justice.

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MOSHE C. LAUFER, SYNAGOGUE, CONGREGATION ZICHRON YEHUDA,

Plaintiffs,

-against-

SKILLMAN ESTATES, LLC, EASTERN CAPITAL GROUP LLC, MOSHE JUNGER, MOSES ROSNER, MENDY ROSNDER, SEYFARTH SHAW LLP, John Doe Attorneys 1 - 10, and John Does 1 - 10,

Defendants.

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DECISION and ORDER

Index No. 503414/2013

The following papers were read on motion 03, 04 and 05:

The notices of motion and notice of cross-motion, supporting Affidavits (Affirmations) and Exhibits Annexed, opposing Affidavits (Affirmations) and Exhibits Annexed, Reply Affidavits (Affirmations) and Exhibits Annexed were electronically filed with the New York State Courts Electronic Filing (NYSCEF) system in connection with these motions.

In motion sequence 03, defendants Mendy Rosner and Moshe Rosner (Rosner Defendants) move to dismiss for lack of personal pursuant to CPLR 3211(a)(8). In motion sequence 04, defendants Eastern Capital Group LLC and Seyfarth Shaw LLP (ECG

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Defendants) move to dismiss on the grounds of res judicata and collateral estoppel pursuant to CPLR 3211(a)(5), and for failure to state a cause of action pursuant to CPLR 3211(a)(7). In motion sequence 05, the Rosner Defendants and defendant Skillman Estates, LLC cross-move to dismiss on the grounds of res judicata and collateral estoppel. The motions are decided as follows.

Facts

Defendants Moshe Junger and Moses Rosner were members of defendant Skillman Estates LLC (Skillman). Skillman owned real property in the Williamsburg neighborhood of Brooklyn, and was the sponsor of a proposed condominium project on the property. Plaintiff Moshe C. Laufer (Laufer) alleges that, on August 17, 2004, he entered an agreement with Skillman to purchase a 1/12 interest in Skillman's property (Verified Complaint, ¶ 13), and simultaneously Skillman entered into a contract to sell plaintiffs an interest in condominium units in the building (*id.*, ¶ 14).[1] Laufer complained that Skillman, Rosner and Junger breached the agreements, and commenced a Beth Din arbitration proceeding, which in time resulted in an award in Laufer's favor in the amount of $1,551,000 and specific performance, which award was confirmed by this court, resulting in a judgment on default in the amount of $1,551,000, entered on November 2, 2009 under index number 25173/2008.

[1] For a more detailed description of the facts, see the Decision and Order dated September 30, 2013, in *Eastern Capital Group, LLC v Skillman Estates, LLC, et al.*, index no. 3217/2008, annexed to the Montag Aff., Ex. F.

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Defendant Eastern Capital Group LLC (ECG) was the mortgagee on the property, and upon Skillman's default, it commenced a mortgage foreclosure proceeding (Foreclosure Action, index number 3217/2008) in August 2008 (Aff. of Jerry A. Montag, Esq. In Support of Motion to Dismiss, ¶ 8) . Laufer appeared by counsel in the Foreclosure Action, with cross-claims and counterclaims asserting a vendee's lien arising from his November 2, 2009 judgment against Skillman (*id.*). ECG moved for summary judgment and the appointment of a referee to compute, which was granted over Laufer's opposition (*id.,* at ¶ 9, and Decision, dated December 16th, 2010, Ex. A to Montag Aff.).

In early 2012, ECG entered into a forbearance agreement with Rosner, Junger and Skillman, which was so-ordered by Justice Hinds-Radix of this court on April 27, 2012, and filed on May 18, 2012 (Forbearance Agreement, Montag Aff., Ex. C). Among other things, the Forbearance Agreement provided that Junger transferred his interest in Skillman to Rosner; that Skillman and Rosner waived any objection to the entry by ECG of a judgment of foreclosure and sale; ECG discontinued the action as against Junger, and waived any deficiency claim against Junger, Rosner or Skillman if they complied with the terms of the Forbearance Agreement; and ECG agreed that, in the event the property was successfully converted to a condominium, Rosner's son, defendant Mendy Rosner, could purchase Unit 4B for $300,000.

ECG then moved for an order confirming the referee's report and for a judgment of foreclosure and sale. The Forbearance Agreement was annexed to the motion (Maytag Aff., ¶ 17). Laufer cross-moved to hold the judgment of foreclosure and sale in abeyance pending discovery and a determination of his claim that his vendee's lien had priority (*see* Decision, dated October 17, 2012, annexed to Montag Aff., Ex. C,

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1-2). Justice Hinds-Radix granted ECG's motion and denied Laufer's cross-motion, finding "no merit to Laufer's claim that he possesses a vendee's lien which is superior to plaintiff's mortgages" (*id.*, at 5). She further found that Laufer's November 2, 2009 judgment declaring that he had a vendee's lien was not binding on ECG, which was not a party to that action (*id.*, at 4). A judgment of foreclosure and sale was issued on December 28, 2012 (Montag Aff., Ex. E). By an order to show cause dated May 29, 2013, Laufer moved to renew and reargue the decision granting ECG a judgment, and upon renewal and re-argument, vacating the judgment and permitting discovery. In part, plaintiffs maintained that the Judgment should be vacated because Rosner misrepresented his ownership interest in Skillman in the Forbearance Agreement, and that Rosner and Junger lacked authority to bind Skillman with respect to that agreement or the mortgage documents upon which ECG brought suit. That motion was denied for reasons explained in the decision and order dated September 13, 2013 (Montag Aff., Ex. F). As part of that order, the court noted that Laufer's cross-claims against Rosner and Junger were not resolved, and a conference was scheduled to address them (*id.*, 8).

Plaintiffs then commenced this action, with four causes of action (*see* Verified Complaint). Plaintiffs contend that the Forbearance Agreement was made with the intent to render Skillman without assets and to hinder, delay or defraud Laufer's ability to collect on his judgment against Skillman (*id.*, at ¶ 66). The first cause of action asks for a judgment against all defendants for the $1,551,000 owed under the November 2, 2009 judgment. The second and third causes of action seek to enjoin the conveyance of Unit 4B to Mendy Rosner, and seeks to have the unit transferred to plaintiffs herein. The fourth cause of action, which is the only claim directed against defendant Seyfarth Shaw, seeks

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treble damages under Judiciary Law § 487 under the theory that the Forbearance Agreement was intended to shield Skillman's assets from Laufer, and also was intended to deceive the court.

Rosner Defendants' Motion to Dismiss for Lack of Personal Jurisdiction

The Rosner Defendants argue that substitute service allegedly made upon a "Ms. Rosner" as a person of suitable age and discretion is inadequate. When the motion was made, however, counsel for the Rosner Defendants was not aware that plaintiff had filed affidavits by a process server of "nail and mail" service pursuant to CPLR 308(4) upon the Rosner Defendants . The plaintiff has the burden of proving that jurisdiction was obtained over defendants by proper service (*Spangenberg v Chaloupka*, 229 AD2d 482 [2d Dept 1996]). Generally, a process server's affidavit of service constitutes prima facie proof of service (*Rox River 83 Partners v Ettinger*, 276 AD2d 782 [2d Dept 2000]), and gives rise to a presumption of proper service (*Household Fin. Realty Corp. v Brown*, 13 AD3d 340, 341 [2d Dept 2004]). Here, plaintiffs have met their prima facie burden of showing proper service with the process server's affidavits of service. However, the Rosner Defendants offered affidavits in reply that rebut the presumption of proper service with specific facts to rebut the statements in the process server's affidavits (*Scarano v. Scarano*, 63 AD3d 716 [2d Dept 2009]). Accordingly, an evidentiary hearing is required to determine if service was properly made.

Motions to Dismiss On Theories of Res Judicata and Collateral Estoppel, and the Judiciary Law § 487 Claim.

Generally, the plaintiff's allegations in the complaint are presumed true in a motion to dismiss under CPLR 3211 (*Williams v Williams*, 23 Y2d 592, 595-596 [1969]), but bare conclusions of law as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept 1985], *aff'd*, 66 NY2d 946 [1985]).

In *Yerg v Bd of Educ. Of Nyack Union Free School Dist.*, the Appellate Division, Second Department, stated the following:

> New York has adopted the transactional analysis approach in deciding res judicata issues (*see, O'Brien v City of Syracuse*, 54 NY2d 353; *Smith v Russell Sage Coll.*, 54 NY2d 185, *rearg denied* 55 NY2d 878; *Matter of Reilly v Reid*, 45 NY2d 24). Under this doctrine, "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 upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, supra, at 357). "When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping' * * * the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions" (*O'Brien v City of Syracuse*, at 357-358).

141 AD2d 537, 538 (2d Dept 1985).

Here, the claims alleged in the Verified Complaint against the ECG Defendants arise from the Forbearance Agreement, which was known to plaintiffs before ECG moved for judgment of foreclosure and sale. Plaintiffs were a party to the foreclosure action, and Laufer opposed and cross-moved against ECG's motion for a judgment of foreclosure and sale. There are no facts alleged in the Verified Complaint to explain or justify why the claims against the ECG Defendants are raised now, rather than when the

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parties litigated the significance of the vendee's lien and the Forbearance Agreement in the Foreclosure Action. To the extent that plaintiffs did raise these issues, they were litigated to a final conclusion. Indeed, Laufer argued repeatedly, and without success, that his vendee's lien took precedence.

Even though the legal theory raised in this proceeding is not identical to that set forth in the mortgage proceeding, the claims against the ECG are barred under the doctrine of res judicata. Moreover, the claims against Seyfarth Shaw and the John Doe attorneys, presumably meant to include Seyfarth Shaw attorneys, are barred under the doctrine of collateral estoppel because they are entirely derivative of the attorneys' representation of ECG in the prior action, and of its role in presenting the Forbearance Agreement to the court.

As relevant, Judiciary Law § 487 provides that an attorney is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" is "guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action". The Verified Complaint alleges, among other things, that the transfer of Unit 4B to Mendy Rosner was substantially below-market, that Rosner misrepresented his ownership interest in Skillman, and that the Forbearance Agreement was executed with the intent to shield Skillman from Laufer and to deceive the court so it would issue a judgment of foreclosure and sale. If, as plaintiffs contend, the Forbearance Agreement was material to the court's decision in that respect, the issue could and should have been raised with the court when Laufer opposed ECG's motion and he cross-moved against it.

The ECG Defendants also correctly argue that the Verified Complaint is silent as to who was deceived by the Forbearance Agreement, so it fails to state a claim under Judiciary Law § 487 (*see Elsky v KM Ins. Brokers*, 139 AD2d 691 [2d Dept 1988] ["While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support]).

Finally, the Rosner Defendants also move to dismiss under a res judicata and collateral estoppel theory. That motion is granted in part to the extent that the fourth cause of action under Judiciary Law § 487 is dismissed as against them. Not only is there no allegation of who was deceived by the Forbearance Agreement, there is no allegation that the Rosner Defendants are attorneys subject to that statute. The motion is denied, however, with respect to the claim that Skillman and Rosner entered into the Forbearance Agreement with the intent to hinder or delay Laufer's ability to collect his judgment. This claim was not conclusively litigated in the prior action. Indeed, the Decision and Order dated September 30, 2013, specifically states that the claims involving Skillman and Rosner were not concluded. Mendy Rosner also should remain in the action as an interested party based upon the allegation that he retains a contingent interest in Unit 4B. Accordingly, it hereby is

ORDERED that the motion by the Rosner Defendants to dismiss under CPLR 3211(a)(5) for lack of personal jurisdiction (motion sequence 03) is granted to the extent that a traverse hearing is directed; and it further is

ORDERED that the hearing on the issue of whether plaintiffs properly and timely served the summons and complaint on the moving defendants is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy hereof be sent by my staff to the Kings County Administrative Judge for Civil Matters with a request that this matter be referred to the Special Referee clerk in Part 82 to arrange a date for the reference to a Special Referee; and it further is

ORDERED a final decision on this issue shall abide the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine the issues; and it further is

ORDERED that the motion by the ECG Defendants to dismiss under CPLR 3211(a)(5) and (7) (motion sequence 04) is granted, and the complaint hereby is severed and dismissed as against defendants Eastern Capital Group LLC and Seyfarth Shaw LLP, and John Doe Attorneys 1 - 10, and the Clerk shall enter judgment accordingly, with costs and disbursement to the ECG Defendants as taxed; and it further is

ORDERED that the cross-motion by the Rosner Defendants and Skillman (motion sequence 05) is granted to the extent that the fourth cause of action alleging a claim under Judiciary Law § 487 is dismissed, and the motion is otherwise denied.

E N T E R,

Ann T. Pfau
J. S. C.