Rosenblum v Steinmetz

2017 NY Slip Op 30660(U)

April 4, 2017

Supreme Court, Kings County

Docket Number: 508809/2015

Judge: Sylvia G. Ash

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At an IAS Term, Comm-11 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 4th day of April, 2017.

PRESENT:

HON. SYLVIA G. ASH,
Justice.

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ABRAHAM ROSENBLUM,

Plaintiff(s),

- against -

SOLOMON STEINMETZ, USHER STEINMETZ, 989 REALTY CORP., 989 4th AVE REALTY LLC, 528 JACKSON, LLC, 528 JACKSON REALTY LLC, S&E FOUNDATION and U&E FOUNDATION,

Defendant(s).

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DECISION AND ORDER

Index # 508809/2015

Mot. Seq. 2-4

The following papers numbered 1 to 8 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6 - 8

Upon the foregoing papers, Defendants' motion to dismiss Plaintiff's complaint and for summary judgment as to certain Defendants is denied. Plaintiff's cross-motion to amend his complaint is granted.

Background

According to the Second Verified Amended Complaint ("Complaint"), Plaintiff, ABRAHAM ROSENBLUM, brings this action to enforce the terms of a settlement agreement entered into between Plaintiff and Chaim Mayer ("Mayer"),[1] on the one hand, and individual Defendants Solomon and Usher Steinmetz ("Steinmetz Defendants"), on the other, with respect to several joint

[1] Plaintiff represents that Mayer assigned all of his interest in this litigation to Plaintiff pursuant to a written assignment dated October 11, 2012.

ventures dealing with parcels of real property (hereinafter referred to as "Parcels"). Relevant to this action are two agreements - one entitled "Final Agreement" entered into in April 2008 ("April Agreement") and the other entitled "Settlement Agreement" entered into in July 2008 ("July Agreement"), with the latter agreement incorporating the former agreement by reference (collectively referred to as "Agreements").

According to the July Agreement, title and control of the Parcels were to be transferred to the Steinmetz Defendants who were to "keep current" with all mortgage payments on two properties. The two properties are 987-993 4th Avenue in Brooklyn, New York ("4th Avenue Property") and 528 Jackson Avenue in Bronx, New York ("Jackson Property"). In the event the Steinmetz Defendants "materially default[ed]" under the loan obligations, among other things, title to the Parcels were to be transferred back to Plaintiff. The phrase "keep current" is defined in a subsequent paragraph to mean "not receiving any notice of default or notice of acceleration owing to a default from the respective lender."

The July Agreement further provides that, to ensure compliance with the "transfer back" provisions, the parties would appoint a mutually acceptable trustee to hold shares in the entities and be appointed a director and member of said entities to ensure signatory power over the entities. And that the Steinmetz Defendants, "after gaining legal and equitable ownership of the entities will sign a deed restriction enjoining transfer without the trustee's signature on a conveyance."

Plaintiff's Complaint alleges the following breaches of the Agreements: (1) on May 14, 2009, the Steinmetz Defendants caused title to the Jackson Property to be conveyed to 528 Jackson Realty LLC, an entity under their complete ownership and control; (2) on May 14, 2009, the Steinmetz Defendants caused title to the 4th Avenue Property to be conveyed to 989 4th Avenue Realty LLC, an entity under their complete ownership and control; (3) Steinmetz Defendants failed to transfer shares of the LLC companies holding title to the Parcels to the named "trustee," Rabbi Eisenberger, and further failed to appoint him as member and director of the subject LLC companies; (4) Steinmetz Defendants failed to comply with arbitration clause despite receipt of demand to arbitrate on or around April 9, 2013; and (5) on January 24, 2015, the Steinmetz Defendants sold the 4th Avenue Property to a third party without giving Plaintiff the right of first refusal as set forth in the April Agreement.

In their motion to dismiss the Complaint pursuant to CPLR 3211, Defendants argue that documentary evidence shows that Plaintiff and Mayer agreed to accept a one-time payment of

$50,000.00 in lieu of any and all obligations set forth in the Agreements. In support, Defendants attach two checks in the amount of $25,000.00 each, made payable to Abraham Weisel ("Weisel"), who the Defendants state was the attorney for the mediator that negotiated the final settlement of all disputes among the parties. Defendants also proffer Weisel's affidavit which states that, by accepting a one-time payment, "[t]he understanding and intent of the plaintiff and Chaim Mayer was that the plaintiff and Chaim Mayer release the defendants of any and all obligations and all liabilities which defendants may have had pursuant to the terms of the Agreements..."

In the alternative, Defendants argue that the statute of limitations bars Plaintiff's action. Specifically, that the breach of the Agreements complained of by Plaintiff occurred on May 11, 2009, the date the Jackson Property and 4th Avenue Property were transferred to the new entities. Because Plaintiff's cause of action is one sounding in breach of contract, which has a six-year statute of limitations, Plaintiff's complaint, filed on July 16, 2015, is time-barred.

By way of a separate motion, Defendants also move for summary judgment dismissing Plaintiff's complaint as against Defendants, S&E Foundation ("S&E") and U&E Foundation ("U&E")(together "Foundations"), on the grounds that there are no triable issues of fact. In support, Defendants submit affidavits from the Foundation's respective trustees, Solomon and Usher Steinmetz, affirming, respectively, that S&E and U&E "have not engaged in any transactions, whatsoever, with 989 REALTY CORP., 989 4th AVE REALTY LLC, 528 JACKSON LLC, 528 JACKSON REALTY LLC, since 2007."

In opposition to Defendants' motions and in support of his cross-motion to amend his complaint, Plaintiff argues that the two checks made out to Weisel do not constitute the type of unambiguous evidence required to "utterly refute" Plaintiff's allegations, and further, that Defendants fail to proffer a supporting settlement agreement, release, email or any other correspondence corroborating Defendants' self-serving story about the origin and purpose of the two checks from Weisel. By way of affirmation, Plaintiff states that the April Agreement called for a payment of $50,000.00, which was modified from $150,000.00, but that he has no idea what the two checks were actually for.

Plaintiff also contends that the statute of limitations has not run on his claims because the earliest possible accrual date for his First, Second and Fourth Causes of Action is July 22, 2013, the date when Plaintiff was legally entitled to demand relief. Pursuant to the Agreements, Plaintiff contends that he was not entitled to demand relief due to the Steinmetz Defendants' breach until a

Notice of Default was given by the lender and the Steinmetz Defendants' subsequent failure to cure within 30 days. Further, that his Third and Fourth Causes of Action pertain to the Steinmetz Defendants' failure to comply with the purchase option provision in the April Agreement, which was breached on January 8, 2015, when the Steinmetz Defendants sold the 4th Avenue Property to a third party without giving Plaintiff the right of first refusal.

Even if the Court were to accept the accrual date proffered by Defendants, Plaintiff argues that the tolling of the statute of limitations period under CPLR 204[b] applies because the Agreements contain a broad arbitration clause calling for all disputes to be submitted to either "Rav Eisenberger and/or Shmiel Eisenberger." Further, that on April 9, 2013, Plaintiff sent the Steinmetz Defendants a first demand to participate in rabbinic Beit Din arbitration. However, that the Steinmetz Defendants defaulted on their obligation to participate and, accordingly, on May 15, 2015, the Beit Din granted Plaintiff permission to pursue his action in state court.

In the alternative, Plaintiff argues that Defendants should be equitably estopped from asserting the statute of limitations defense because they avoided the arbitration process and their delays precipitated the delay in commencement of this action.

With regards to the summary judgment motion, Plaintiff contends that the motion is frivolous because it merely contains conclusory denials of the allegations in the Complaint which, at this stage of the proceedings, without the benefit of discovery, is premature.

In reply, Defendants argue that the Beit Din summons received by them was from a random Beit Din that was not agreed to by the parties. Further, that the summons failed to set forth the requisite information as required under CPLR 7503 and therefore, cannot be deemed a "demand to arbitrate" under that provision.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the court may grant dismissal when 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007][*citations omitted*]). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-97 [2d Dept 2010]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as

'documentary evidence' in the proper case" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]). "Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence" (*25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

Here, Defendants' evidence, in the form of two bank checks made out to Weisel, fails to utterly refute Plaintiff's allegations or establish their defense as a matter of law. In addition, the accompanying affidavit of Weisel fails to meet the requirements for documentary evidence.

Turning then to Defendants' statute of limitations argument, "[t]he general rule applicable to contract actions is that a six-year Statute of Limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation" (*Squeri v Moriches Assocs.*, 307 AD2d 260, 261 [2d Dept 2003]). Where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete (CPLR 206[a]). However, CPLR 206[a][1] provides a tolling provision which applies to claims in which a right grows out of the receipt or detention of money or property by a trustee, agent, attorney or other person acting in a fiduciary capacity (*Bernstein v La Rue*, 120 AD2d 476, 477 [2d Dept 1986]). In such cases, the time within which the action must be commenced shall be computed from the time when the person having the right to make the demand discovered the facts upon which the right depends (*Id.*; *see also Inforna v Sir Formal of Massapequa, Inc.*, 141 AD2d 507, 507 [2d Dept 1988]). "CPLR 206[a][1] thus 'imposes a discovery accrual rule for fiduciary relationships analogous to that which tolls the statute in cases of fraud'" (*Order of the Teachers of the Children of God, Inc. v ...*, 2002 NY Misc. LEXIS 2030, 2002 NY Slip Op 30123(U), *19 [Suffolk Cty 2002][*citing* 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 206.02]).

Here, the Steinmetz Defendants' breach of the Agreements could not have occurred until the right to make the demand was complete, which, according to Plaintiff, occurred in 2013 when the lender issued a notice of default. While the Court acknowledges the possibility of an earlier accrual date (*see Oaks v Taylor*, 30 AD 177 [3d Dept 1898]), because CPLR 206[a] is applicable herein, as a matter of law, the accrual date cannot be the breach date of May 14, 2009, as asserted by Defendants.

Moreover, to the extent that the individual parties are considered fiduciaries of one another as business partners, there is an issue as to the applicability of CPLR 206[a][1], which would impose

an accrual date based on when Plaintiff discovered the facts upon which the right to make the demand depends. However, neither party has asserted any facts as to this issue.

In addition, Plaintiff's claim that the Steinmetz Defendants breached the Agreements by failing to comply with the right of first refusal clause when selling the 4th Avenue Property to a third-party is a separate breach under the Agreements and is timely asserted.

For the reasons set forth above, Defendants' motion to dismiss Plaintiff's complaint based on statute of limitations grounds must be denied. Additionally, in the event that any of Plaintiff's claims were time-barred, the Court finds that the tolling provision of CPLR 204[b] would apply to the circumstances presented herein (*see Joseph Francese, Inc. v Enlarged City Sch. Dist.*, 95 NY2d 59, 63-64 [2000]).

Finally, with regards to Defendants' motion for summary judgment dismissing Plaintiff's complaint as against S&E and U&E, the motion is denied without prejudice to renew. This pre-discovery motion is premature considering that the only evidence proffered in support of S&E and U&E's motion for summary judgment consist of affidavits denying Plaintiff's allegations.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss (mot. seq. 2) is DENIED; it is further

ORDERED that Defendants' motion for summary judgment (mot. seq. 3) is DENIED with leave to renew; and it is further

ORDERED that Plaintiff's motion to amend his complaint (mot. seq. 4) is GRANTED.

This constitutes the Decision and Order of the Court.

E N T E R,

SYLVIA G. ASH, J.S.C.