Jacobson v Fein, Such & Crane, Llp
2021 NY Slip Op 32589(U)
December 6, 2021
Supreme Court, Kings COunty
Docket Number: Index No. 521449/2020
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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YOSEF YITZCHAK JACOBSON,

Plaintiff,

-against-

FEIN, SUCH & CRANE, LLP, MARK K. BROYLES, CRAIG K. BEIDEMAN, MIRANDA L. JAKUBEC, TRUIST BANK f/k/a BRANCH BANKING AND TRUST COMPANY, and JOHN AND JANES DOES 1-10,

Defendants.

and

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Nominal Defendant.
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Index No.: 521449/2020
Motion Date: 8-16-21
Mot. Seq. No.: 1

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers , the motion is decided as follows:

Defendants Fein, Such & Crane, LLP ("FSC"), Mark K. Broyles ("Broyles"), Craig K. Beideman ("Beideman"), and Miranda L. Jakubec ("Jakubec") (collectively "the moving defendants") move for an Order (i) pursuant to CPLR 3211(a)(1), (5), and (7) dismissing all claims asserted against them by the plaintiff Yosef Yitzchak Jacobson ("plaintiff") in his complaint.

Background:

The plaintiff, YOSEF YITZCHAK JACOBSON, commenced this action seeking damages under Judiciary Law § 487[1] alleging that the defendants, the attorneys who represented

[1] Judiciary Law § 487 provides that an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party' is liable to the injured party for treble damages" (*see also, Izmirligil v. Steven J. Baum, P.C.*, 180 A.D.3d 767, 771, 119 N.Y.S.3d 503).

the plaintiff bank in a foreclosure action entitled *Branch Banking and Trust Company v. Yosef Yitzchak Jacobson, et. al.;* Supreme Court, Kings County; Index No. 20325/2012 (the "foreclosure action") committed a series of fraudulent and deceitful acts in the foreclosure action which resulted in the entry of a Judgment of Foreclosure and Sale on October 15, 2018. Plaintiff alleges, among other things, that the defendants falsely certified the promissory note ("Note") that had been transferred to the plaintiff in the action and then submitted the Note to the court in connection with a motion for summary judgment. Plaintiff also alleges that the defendants submitted fraudulent evidence to support the claim that that Mr. Jacobson was served with a 90-day notice pursuant to RPAPL 1304 prior to the commencement of the foreclosure action.

The defendants claim that plaintiff's claims are barred by the doctrine of res judicata and constitute an improper collateral attack on the Judgment of Foreclosure and Sale entered in the foreclosure action. The defendants further claim that some of plaintiff's claims are time barred.

Discussion:

A. Defendants' Motion pursuant to CPLR 3211(a)(7)

In deciding a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff "the benefit of every possible favorable inference" (*Leon v. Martinez,* 84 N.Y.2d 83, 87). The Court's task is to determine if the complaint states a cause of action, and if from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*see 511 West 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker*, LLP, 38 AD3d 34, 38).

Applying these principles, plaintiff's complaint states a cause of action under Judiciary Law § 487. The evidentiary submissions of the defendants did not show that the material facts claimed by the plaintiff to be facts were not facts at all and that no significant dispute exists regarding them (*see Izmirligil v. Steven J. Baum, P.C.,* 180 A.D.3d 767, 771, 119 N.Y.S.3d 503, 507–08). In *Izmirligil,* the plaintiff alleged that that the attorneys who represented a bank in a foreclosure action violated Judiciary Law § 487 by, *inter alia*, colluding with others to forge an assignment and file a foreclosure action using a complaint containing false allegations to deceive the court and others. The Court denied defendants' motion to dismiss finding that their evidentiary submissions did not show that the material facts claimed by Izmirligil to be facts were not facts at all and that no significant dispute exists regarding them (*see Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). Defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is therefore denied.

B. Collateral Attack

It is settled law that a party who has lost a case as a result of alleged fraud or false testimony cannot collaterally attack the judgment in a separate action for damages against the party who adduced the false evidence (*Specialized Indus. Servs. Corp. v. Carter*, 68 A.D.3d 750, 751–752, 890 N.Y.S.2d 90; *see Newin Corp. v. Hartford Acc. & Indem. Co.,* 37 N.Y.2d 211, 217, 371 N.Y.S.2d 884, 333 N.E.2d 163; *Crouse v. McVickar,* 207 N.Y. 213, 100 N.E. 697). In such circumstances, the party's "sole remedy lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the ... judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action" (*Yalkowsky v. Century Apts. Assoc.*, 215 A.D.2d 214, 215, 626 N.Y.S.2d 181; *see Specialized Indus. Servs. Corp. v. Carter*, 68 A.D.3d at 751–752, 890 N.Y.S.2d 90). Here, however, the plaintiff is not collaterally attacking the judgment entered in the foreclosure action (*see Izmirligil v. Steven J. Baum, P.C.*, 180 A.D.3d 767, 771, 119 N.Y.S.3d 503, 507–08; *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 15, 874 N.Y.S.2d 868, 903 N.E.2d 265). The plaintiff is seeking to vacate the Judgment of Foreclosure and Sale in the foreclosure action, nor has the plaintiff sued Branch

Banking and Trust Company or any of the other defendants in the foreclosure action. Plaintiff asserted claims are only against the attorneys who represented Branch Banking and Trust Company in the foreclosure action and is seeking monetary damages pursuant to Judiciary Law § 487 due to their alleged misconduct. Judiciary Law § 487 does not require plaintiff to seek this relief in the foreclosure action (*see, Melcher*, 135 A.D.3d at 554, 24 N.Y.S.3d 249). Thus, this action is not an improper collateral attack on the Judgment of Foreclosure and Sale entered in the foreclosure action (*see Melcher v. Greenberg Traurig LLP*, 135 A.D.3d 547, 554, 24 N.Y.S.3d 249; *Chevron Corp. v. Donziger*, 871 F.Supp.2d 229, 261–262; *see generally Stewart v. Citimortgage, Inc.*, 122 A.D.3d 721, 722, 996 N.Y.S.2d 638).

C. Res Judicata:

"Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Blue Sky, LLC v. Jerry's Self Stor., LLC*, 145 A.D.3d 945, 946, 44 N.Y.S.3d 173; *see Gramatan Home Inv. Corp. v. Lopez*, 46 N.Y.2d 481, 485, 414 N.Y.S.2d 308, 386 N.E.2d 1328). "One linchpin of res judicata is an identity of parties actually litigating successive actions against each other…"(*Simmons v. Trans Express Inc.*, 37 N.Y.3d at 111, 148 N.Y.S.3d 178, 170 N.E.3d 733). Here, the doctrine of res judicata does not apply since the defendants were not parties to the foreclosure action and the Court rejects defendants' contention that they were in privity with the plaintiff in the foreclosure action (see *Izmirligil*, 180 A.D.3d at 771, 119 N.Y.S.3d at 507).

D. Collateral Estoppel

Collateral estoppel, or issue preclusion, " 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same' " (*Bank of N.Y. Mellon v. Chamoula*, 170 A.D.3d 788, 790, 96 N.Y.S.3d 148, quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487). "The doctrine of collateral estoppel has two requirements: (1) "the identical issue necessarily must have been decided in the prior action and be decisive of the present action," and (2) "the

party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 482 N.E.2d 63; *see Ackman v. Haberer*, 111 A.D.3d 1378, 1379, 975 N.Y.S.2d 283). Here, plaintiff's claims that underlie his causes of action for violations of Judiciary Law § 487 were not addressed in the foreclosure action.

E. Statute of Limitations

Defendants' assertion that some of the claims are time barred is without merit. This action is governed by the six-year statute of limitations set forth in CPLR § 218(8) that applies to causes of action sounding in fraud (see *Melcher v. Greenberg Traurig, LLP*, 23 N.Y.3d 10, 11 N.E.3d 174). A cause of action for fraud does not accrue until every element of the claim, including injury, can truthfully be alleged (*see New York City Transit Auth. v. Morris J. Eisen, P.C.*, 276 A.D.2d 78, 85–86, 715 N.Y.S.2d 232, 237; *Maharam v. Maharam*, 235 A.D.2d 226, 652 N.Y.S.2d 506). Plaintiff's claims accrued no earlier than October 15, 2018, when the Judgment of Foreclosure and Sale was entered in the foreclosure action, the time that the plaintiff suffered an actual injury. For this reason, none of the claims asserted in the action, which was commenced on November 2, 2020, were time barred.

F. The Conspiracy Claims

The tenth cause of action for civil conspiracy to commit a Judiciary Law § 487 violation must be dismissed because plaintiff fails to state a viable claim. New York does not recognize a substantive tort of conspiracy (*Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458, 924 N.Y.S.2d 376, 377–78 and conspiracy to commit a fraud is never of itself a cause of action (*see Agostini v. Sobol*, 304 A.D.2d 395, 757 N.Y.S.2d 555).

The court has considered defendants' remaining arguments in support of the motion and find them to be unavailing.

Accordingly, it is hereby

ORDRED that defendants' motion is **GRANTED** solely to the extent that the tenth cause of action is **DISMISSED** for failure to state a cause of action.

This constitutes the decision and order of the Court.

Dated: December 6, 2021

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020