

**Toscano v 4B's Realty VIII Southampton Brick &  
Tile LLC**

2010 NY Slip Op 33765(U)

April 9, 2010

Supreme Court, Suffolk County

Docket Number: 07-34946

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 12-17-09  
ADJ. DATE 1-7-10  
Mot. Seq. # 004 - MG; CASEDISP

<p>ANGFLO TOSCANO and ANGELA TOSCANO, : :  Plaintiffs, : :  - against - : :  4B'S REALTY VIII SOUTHAMPTON BRICK : &amp; TILE LLC, BERT BRODSKY and : BARNETT BROWN, : :  Defendants. :</p>	<p style="text-align: center;">X</p> <p>RICHARD A. KRASLOW, P.C. Attorney for Plaintiffs 425 Broad Hollow Road, Suite 206 Melville, New York 11747</p> <p>LYNN, GARTNER &amp; DUNNE, LLP Attorneys for Defendants 330 Old Country Road, Suite 103 Mineola, New York 11501</p> <p style="text-align: center;">X</p>
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Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 18 - 26; Replying Affidavits and supporting papers 27 - 28; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint is granted.

This is an action by plaintiffs to quiet title pursuant to Real Property Actions & Proceedings Law Article 15 by cancelling a deed of real property known as No Number Leecon Court (Leecon Court property) in Southampton, New York that was allegedly conveyed for no consideration by defendants' *fraudulent inducement*. Plaintiff Angelo Toscano (Angelo) and defendant 4B's Realty VIII Southampton Brick & Tile, LLC (4 B's Realty VIII) were owners of Southampton Brick and Tile, LLC (Southampton Brick), a wholesaler and retailer of masonry and tile products. Defendants Bert E. Brodsky (Brodsky) and Barnett Brown (Brown) jointly owned defendant 4B's Realty VIII.

Plaintiffs allege that plaintiff Angela Toscano (Angela), wife of plaintiff Angelo Toscano, had owned the Leecon Court property since 1994 and was induced in October 2006 by defendants, through her husband, to convey said property to defendant 4 B's Realty VIII as a condition of continued negotiations for the division of Southampton Brick. In addition, plaintiffs allege that Angelo had a beneficial interest in said property. According to plaintiffs, they were promised by defendants that the

transfer of the Leecon Court property would be effective only upon completion of the agreement for the division of Southampton Brick, the deed would not be recorded, and Angelo would be credited the agreed valuation of the property, \$1.2 million at closing. Plaintiffs also allege that notwithstanding defendants' representations, the deed was recorded in the Suffolk County Clerk's Office on November 2, 2006 and almost immediately thereafter defendants terminated negotiations for the division of Southampton Brick. They further allege that plaintiffs reasonably relied on defendants' representations only to realize after execution of the deed that defendants' representations were false and that defendants at all times intended to convert the Leecon Court property for their own use, to the exclusion and detriment of plaintiffs.

By their complaint, plaintiffs allege a first cause of action for cancellation of the deed; a second cause of action for fraud; a third cause of action for unjust enrichment; and a fourth cause of action for conversion. In their answer, defendants allege that they had no communications with Angela with respect to the Leecon Court property and admit that Angela executed a deed transferring title to said property to defendant 4 B's Realty VIII on October 20, 2006.

In a related action entitled, 4B's Realty 1530 CR39, LLC, Plaintiff, against Angelo Toscano, Southampton Brick and Tile, LLC, United States of America, State of New York, ABC Corp., XYZ Corp., Defendants, under index number 07-35097, 4B's Realty 1530 CR 39, LLC, whose members were also Brodsky and Brown, sought to foreclose a mortgage on real property owned by Angelo located at 1530 County Road 39 (1530 County Road 39 property) in Southampton, New York on which Southampton Brick was a tenant.<sup>1</sup> The counterclaim in Angelo's answer in said action and the complaint of the third-party action entitled, Angelo Toscano, Third-Party Plaintiff, against Bert E. Brodsky and Barnett Brown, Third-Party Defendants, alleged a first cause of action for fraud resulting in conversion of the Leecon Court property containing the same allegations as found in the second and fourth causes of action in the instant action.

Said action was removed to United States District Court, Eastern District of New York by defendant United States of America where plaintiff 4B's Realty 1530 CR 39, LLC was granted summary judgment on its complaint by memorandum of decision and order dated March 12, 2009 (Spatt, J.) (*see*, **4B's Realty 1530 CR 39, LLC v Toscano**, 08-CV-2694, 2009 WL 702011[EDNY Mar. 12, 2009]). Subsequently, by memorandum of decision and order of the Federal District Court dated November 7, 2009 (Spatt, J.), plaintiff 4B's Realty 1530 CR 39, LLC was granted summary judgment dismissing Angelo's counterclaim and the third-party defendants were granted summary judgment dismissing Angelo's third-party complaint. With respect to its dismissal of Angelo's third-party claims, the Federal District Court held in its November 7, 2009 decision that Angelo's bare allegations of fraud were belied by the letters between his own attorney and the then attorney for Brodsky and Brown which letters were devoid of any reference to the alleged oral representations and by Angelo's own inaction after the deed to Leecon Court was recorded. The Federal District Court pointed out that Angelo was a sophisticated

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<sup>1</sup> There is another related contract action entitled, Southampton Brick & Tile, LLC and 4B's Realty VIII Southampton Brick and Tile, LLC, Plaintiffs, against Southampton Tile & Marble Corp. and Angelo Toscano, Defendants, under index number 07-20976.

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businessman represented by counsel in an arms-length transaction with his business partners who assumed the business risk of failing to memorialize the alleged oral representations and failed to demonstrate that he reasonably relied on those representations in agreeing to transfer the Leecon Court property.

Defendants now move for summary judgment dismissing the complaint based on the doctrines of res judicata and collateral estoppel and the relationship of privity between the plaintiffs as well as based on documentary evidence.

In opposition to the motion, plaintiffs contend that based on the Operating Agreement of Southampton Brick dated May 2003, they had no affirmative obligation to make an additional capital contribution to Southampton Brick or to otherwise contribute the Leecon Court property and that the capital account of Angelo maintained by Southampton Brick does not indicate that Angelo was ever credited with the fair market value of the Leecon Court property. In addition, plaintiffs contend that the Federal District Court decision does not have preclusive effect on the first, third and fourth causes of action herein or upon the claims of Angela, the fee owner of the Leecon Court property who has no ownership interest in Southampton Brick.

Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action (*see, Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 347 [1999]). As a general rule, "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" (*see, Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d at 347 quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in the 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 (*Ryan v New York Tel. Co.*, 62 NY2d 494, 501-502 [1984]; *Breslin Realty Dev. Corp. v Shaw*, \_\_\_ AD3d \_\_\_, 893 NYS2d 95, 99 [2d Dept 2010]). Once the party seeking the benefit of collateral estoppel establishes that the identical issue was "material" (emphasis supplied) to a prior judicial or quasi-judicial determination, the party to be estopped bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see, id.*).

"[T]he term privity \* \* \* denominates a rule \* \* \* to the effect that under the circumstances, and for the purposes of the case at hand, a person may be bound by a prior judgment to which he was not a party of record. It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action" (*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]; *Bayshore Family Partners, L.P. v Foundation of Jewish Philanthropies of Jewish Federation of Greater Fort Lauderdale*, 270 AD2d 374 [2d Dept 2000], *lv denied* 95 NY2d 756 [2000]).

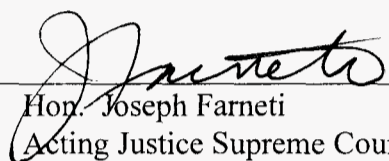
Here, all of the claims of the instant action are barred by the doctrines of res judicata and collateral estoppel (*see, Fitzgerald v Hudson Natl. Golf Club*, 35 AD3d 533 [2d Dept 2006]). The

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instant action seeks relief in the form of cancellation of the deed and reconveyance of the Leecon Court property or recovery of the value of the property based on the alleged fraudulent transfer of the Leecon Court property. However, claims to recover damages for the alleged fraudulent transfer without compensation of the Leecon Court property were clearly decided against Angelo in the Federal District Court action where he had a full and fair opportunity to litigate the matter (*see, Licini v Graceland Florist, Inc.*, 32 AD3d 825, 827 [2d Dept 2006]). In addition, his wife Angela is bound by the Federal District Court's decision inasmuch as her interests were represented by her husband and their attorney in said action. Therefore, plaintiffs Angelo and Angela are barred from maintaining the present action (*see Fitzgerald v Hudson Natl. Golf Club, supra*).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: April 9, 2010

  
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Hon. Joseph Farneti  
Acting Justice Supreme Court

FINAL DISPOSITION     NON-FINAL DISPOSITION