Gillen v McCarron
2013 NY Slip Op 33886(U)
March 18, 2013
Sup Ct, Suffolk County
Docket Number: 09-35644
Judge: Hector D. LaSalle
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[* 1]

SHORT FORM ORDER

INDEX No. 09-35644
CAL No. 12-01027OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 10-16-12
ADJ. DATE 12-11-12
Mot. Seq. # 004 - MG; CASEDISP

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THOMAS J. GILLEN, Individually and as Trustee of THE GILLEN LIVING TRUST,

Plaintiff,

- against -

JOHN T. MCCARRON and JOHN T. MCCARRON, P.C.,

Defendants.

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Upon the following papers numbered 1 to 56 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 23 - 51 ; Replying Affidavits and supporting papers 52 - 56 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

Plaintiffs commenced this action pursuant to Judiciary Law § 487 to recover damages which they allegedly sustained as a result of defendants' deceitful conduct while representing a non-party in several underlying lawsuits. Defendant John T. McCarron ("McCarron") is an attorney licensed to practice within the State of New York. Defendant John T. McCarron, P.C. ("P.C.") is a New York professional corporation and McCarron is its principal. Defendants represented or assisted in the representation of Ronald, Linda, and Kristen Johanson, and the LKE Family Limited Partnership ("non-parties") in several underlying actions in which plaintiffs were the adversary.[1] In their complaint

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[1]Defendants appeared on behalf of the non-parties in two Supreme Court actions, two of three summary proceedings in the District Court, and in appeals to the Appellate Division and the Appellate Term.

plaintiffs allege that defendants made deliberately deceitful statements in three separate lawsuits and in three appeals involving the underlying matters, in violation of Judiciary Law § 487.

More particularly, plaintiffs allege that defendants represented non-parties in defending a landlord tenant eviction proceeding instituted by plaintiffs (which was eventually dismissed due to a technical defect in plaintiffs' notice to quit), followed by their representation of non-parties in prosecuting an action against plaintiffs seeking specific performance, an injunction against their eviction by plaintiffs, and other relief, which included the filing of a notice of pendency against plaintiffs' realty. Plaintiffs commenced a second non-payment eviction proceeding in District Court and on December 19, 2006, moved for summary judgment dismissing the action of the non-parties in the Supreme Court. On June 25, 2007, approximately six months later, the Court granted the motion, dismissing the non-parties complaint, and cancelled their lis pendens. On behalf of his clients, defendants moved for reargument and appealed the Supreme Court determination. Plaintiffs now contend that in each of the instances noted herein, defendants made false and deceitful statements with regard to his clients being "ready, willing, and able" to close title in connection with the underlying matters.

Plaintiffs further contend that defendants submitted various proposed orders to show cause to the Supreme and Appellate Courts seeking various relief "to prevent the lawful eviction process and the recovery of rent" to their unlawful detriment. Additionally, although the outcome was not affected by same, plaintiffs allege that defendants made requests to the Supreme and Appellate Courts noting on many occasions that "no prior application has been made for the relief requested herein" or that they only advised the Court of one prior request and deceitfully hid others. Plaintiffs maintain that these actions hindered and delayed their ability to obtain possession of their realty for over one year. Defendants, on behalf of the non-parties, commenced a second Supreme Court action. Plaintiffs allege that the complaint, along with memorandum and affirmations prepared by defendants in opposition to plaintiffs' summary judgment motion to dismiss this second action, contained deceitful statements regarding, *inter alia*, title to the realty and the non-parties' ability to close title on the property. Ultimately, the second Supreme Court action was dismissed and second notice of pendency cancelled (the Appellate Division subsequently upheld the dismissal.)

In connection with an appeal from the summary judgment decision in the first Supreme Court action to the Appellate Division, plaintiffs allege that defendants falsely and deceitfully certified an incomplete and incorrect record which caused a delay in their recovery of the realty and contributed to their damages. Additionally, plaintiffs contend that plaintiffs made false and deceitful representations to the Appellate Division and to the Suffolk County District Court when making various requests for stays of eviction, a frivolous and deceitful motion containing false statements in their brief in a motion to dismiss plaintiffs' appeal concerning rent arrears, and three motions to the District Court for relief from a rent arrears award which contained false and deceitful statements. In total, plaintiffs allege that defendants made hundreds of misrepresentations to the various Courts or their adversaries involving several proceedings before the Appellate Division, Appellate Term, Supreme Court and District Court in connection with a real estate matter.

Defendants now move for summary judgment claiming that they only acted as zealous advocates for the non-party clients in the underlying matters, that the arguments asserted by them were based upon

information supplied to them by their client, and that because plaintiffs sought but did not receive an award of costs or a sanction award on at least eleven (11) occasions, they are barred by the doctrines of collateral estoppel and res judicata from seeking relief under Judiciary Law §487. Defendants claim that plaintiffs' failure to appeal or to move to reargue the denials of the costs or sanctions requests, bars them from bringing this action to collaterally attack those rulings. Although defendants concede that they inadvertently erred in preparing the record they submitted to the Appellate Division, they contend that the Appellate Division's denial of plaintiffs' request for sanctions in connection thereto bars them from seeking a recovery now for this same conduct.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from re-litigating 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, 478 NYS2d 823 [1984]; ***Breslin Realty Dev. Corp. v Shaw***, 72 AD3d 258, 263, 893 NYS2d 95 [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.*). A Judiciary Law §487 cause of action is not barred by the doctrine of res judicata if the cause of action did not arise out of the factual transaction which was the subject matter of the first action; nor is it barred by the doctrine of collateral estoppel if the claim was not litigated in the first action, or the evidence relied upon was discovered subsequent to the judgment in the first action (***Specialized Indus. Serv. Corp. v Carter***, 68 AD3d 750, 890 NYS2d 90 [2d Dept 2009]). However, if the allegations of the Judiciary Law § 487 claim are predicated upon the same conduct of the underlying lawsuit and a full and fair opportunity to contest the alleged wrongful conduct was given, they would be barred by the doctrines of res judicata and collateral estoppel (***Zito v Fischbein Badillo Wagner Harding***, 80 AD3d 520, 915 NYS2d 260 [1st Dept 2011]; ***Cramer v Sabo***, 31 AD3d 998, 818 NYS2d 680 [3d Dept 2006], *appeal denied* 8 NY3d 801, 830 NYS2d 9 [2007]; ***Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.***, 13 AD3d 296, 787 NYS2d 267 [1st Dept 2004], *appeal denied* 4 NY3d 707, 796 NYS2d 581 [2005]). Plaintiffs' remedy lies in the underlying lawsuit, not in a second plenary action, where the underlying court was aware of the allegations upon which

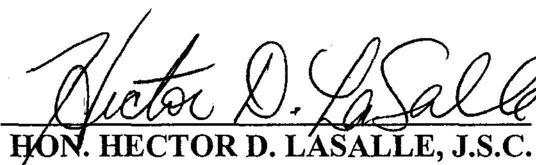
plaintiff brings his Judiciary Law § 487 claim (*see* ***Izko Sportswear Co., Inc. v Flaum***, 63 AD3d 687, 879 NYS2d 724 [2d Dept 2009]; ***Melnitzky v Owen***, 19 AD3d 201, 796 NYS2d 612 [1st Dept 2005]; ***Hansen v Werther***, 2 AD3d 923, 767 NYS2d 702 [3d Dept 2003]; ***Yalkowsky v Century Apt. Assoc.***, 215 AD2d 214, 626 NYS2d 181 [1st Dept 1995]).

Here, where defendants contend that on no less than eleven occasions plaintiffs unsuccessfully requested that the various courts impose sanctions or award costs in connection with the allegedly improper conduct of defendants, and where the said Courts were aware of or advised of all of the allegedly improper or deceitful conduct of defendants, they have established that the same issues were addressed by a prior judicial determination and are barred by the doctrines of res judicata and collateral estoppel (***Ryan v New York Tel. Co.***, *supra*; ***Breslin Realty Dev. Corp. v Shaw***, *supra*). Thus, in order to avoid a dismissal based upon the said doctrines, the burden shifts to plaintiffs to show that in the underlying matters they did not have a full and fair opportunity to be heard on those issues (*id*). Plaintiffs merely maintain that the res judicata defense is frivolous and claim that the denial of sanctions by the other Courts "establishes nothing". They fail to establish that they did not have a full and fair opportunity to be heard on the issues, despite the fact that the claims are based upon the same conduct of which they complained in the underlying lawsuits. Additionally, plaintiffs' failure to appeal or move to reargue the denials of costs or impositions of sanctions in the underlying matters, does not thereafter permit them to seek redress in the form of a second plenary action pursuant to Judiciary Law § 487 (***Izko Sportswear Co., Inc. v Flaum***, *supra*; ***Melnitzky v Owen***, *supra*; ***Hansen v Werther***, *supra*; ***Yalkowsky v Century Apt. Assoc.***, *supra*).

Accordingly, defendants' request for summary judgment is granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: March 18, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION