

Barone v Barone
2013 NY Slip Op 34094(U)
January 23, 2013
Supreme Court, Queens County
Docket Number: 9162/12
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES,
Justice

FRANK A. BARONE,

Plaintiff,

-against-

GILMA POSADA BARONE a/k/a MARIA G.
BARONE, Individually, as Officer and Shareholder
of BARONE PROPERTIES, INC., and as Officer
and Shareholder of BARONE PROPERTIES II, INC.,
BARONE PROPERTIES, INC., and BARONE
PROPERTIES II, INC.,

Defendant.

PART 17

Index No.: 9162/12
Motion Date: 1/09/13
Motion Cal. No. 4
Seq. No. 3

The following papers numbered 1 to 19 read on this motion to Reargue, Renew and Amend the Complaint and the cross-motion to dismiss the Amended Complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavit-Exhibits.....	1 - 4
Affirmation in Opposition-Affidavit-Exhibits.....	5 - 8
Notice of Cross-Motion -Affirmation-Exhibits.....	9 - 12
Affidavit in Opposition-Affirmation -Exhibits.....	13 - 16
Reply Affirmation.....	17 - 18
Memo of Law.....	19

Plaintiff's moves to Reargue or Renew the prior order of this Court dated July 17, 2012. Plaintiff also seeks, pursuant to CPLR 3025, leave to Amend the Complaint. That portion of the motion seeking Reargument is denied. There has been no showing that this Court overlooked or misapprehended facts or law upon the prior application.

That portion of Plaintiff's motion which seeks to Renew the prior order of this Court dated July 17, 2012 is based upon (i) a letter, dated July 23, 2012, from Aburndale Improvement Association, Inc., ("AIAI") a civic association in the area of the Circle Mall which is owned and operated by Barone Properties. In the AIAI letter it outlines four complaints against the operation of various properties located in Queens, New York. The Defendants demonstrate, in opposition to the motion that the second, third and fourth itemized complaints are against properties which belong to other entities with no apparent link to Defendants. The first itemized complaint addresses the vegetation planted at the Mall as varying from that shown on plans, early morning deliveries to one of the tenants at the Mall and parking issues at or near other Mall tenants. These complaints while clearly important to the AIAI and area residents are not shown to be known to Defendants or of a nature sufficient to base provisional remedies upon, as Plaintiff seeks. Accordingly, the motion to Renew is also denied.

The last portion of the motion is for leave, pursuant to CPLR 3025(b), to amend the complaint essentially to add Barone Properties, Inc. and Barone Properties II, Inc. as additional party defendants. The Amended Verified Complaint is similar to the original Complaint except for the adding of the two corporate defendants Except to the extent set forth below, that portion of the motion is granted.

Defendants cross-move to dismiss the Amended Verified Complaint on the grounds of Collateral Estoppel (CPLR 3211[a][5]); that the Constructive Trust cause of Action fails to state a cause of action (CPLR 3211[a][7]); and, that plaintiff's first and fourth causes of Action are time barred (CPLR 3211[a][5]). The Amended Complaint asserts five causes of action: first, for a constructive trust; second, for an accounting; third, for fraud; fourth, for unjust enrichment; and, fifth, for the appointment of a receiver.

Defendants' collateral estoppel argument is based upon Plaintiff having signed the Surrogate's Court petition to enter his brother's will for probate. That will provided that his wife, the prime defendant in this action would receive all of his property, real and personal. Plaintiff alleges that prior to his death, his older brother and he owned and operated a real estate business in which they purchased and sold commercial properties, as well as managing them while owned. Plaintiff asserts that they began their real estate ventures using the profits from a car dealership they jointly owned. Plaintiff also insists that they shared the income and profits from the real estate business equally. While the size of the estate was considerable, totaling in excess of the nearly \$41,000,000 set forth in his estate tax return, Plaintiff insists that at the time he acquiesced in this transfer to the estate in order to save the estate from major tax liabilities and because he was promised to be treated as though he had a 50% interest. Those tax liabilities would have also affected Plaintiff's alleged 50% interest. The record, however, shows that Plaintiff signed a 10-year employment agreement

with Barone Properties, Inc. which showed a specified salary and was signed by the corporation by Gilma Posada Barone as owner and sole shareholder of the Corporation. At the end of the period, renewal 10-year employment contract was prepared and signed in a similar fashion. Plaintiff asserts that notwithstanding the written contracts, his brother's widow continued the prior arrangement and paid him 50 % of the profits from the real estate business.

It would appear that for whatever reason, Plaintiff was motivated to help the estate. It was not until some time thereafter that Defendant's conduct toward him changed as did Plaintiff's motivations.

Collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point. *Schwartz v. Public Administrator of County of Bronx*, (24 NY2d 65, 71, 298 N.Y.S.2d 955 [1969]). To invoke the doctrine, the issue as to which preclusion is sought must be identical with the issue decided or necessarily decided in the prior proceeding and the party presently precluded must have had a full and fair opportunity to contest the decision now said to be controlling. In *Gilberg v Barbieri*, 53 NY2d 285, 441 N.Y.S.2d 49 (1981), the court held that the earlier proceeding had to be as important and serious as the latter proceeding. Thus, the Court held that an earlier City Court trial resulting in a conviction for harassment which is not a crime would not be held as collateral estoppel for a later suit for \$250,000 in damages for civil assault. The Court of Appeals therefore held

***that when collateral estoppel is in issue, the question as to whether a party had a full and fair opportunity to litigate a prior determination, involves a practical inquiry into "the realities of litigation. A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation" (see, also, Restatement, Judgments 2d [Tent Draft No. 3], § 88). A consideration of those factors in this case leads to the conclusion that the City Court harassment conviction should not be given conclusive effect in the civil action for damages.

There is no indication that Plaintiff was separately represented by counsel in the Surrogate's Court proceeding. Furthermore, there was no litigation and therefore no opportunity or need to litigate the point.

Accordingly, like the situation in *Gilberg v Barbieri*, 53 NY2d 285, 441 N.Y.S.2d 49 (1981), collateral estoppel will not be employed to bar Plaintiff's claim.

The equitable claim for the imposition of a constructive trust is governed by the six-year Statute of Limitations of CPLR 213 (1), which begins to run at the time of the alleged wrongful conduct, giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered: *Goco v. Rannani*, 65 A.D.3d 664, 665, 883 N.Y.S.2d 919 (2d Dep't 2009); *Mazzone v Mazzone*, 269 A.D.2d 574, 703 N.Y.S.2d 282 (2d Dep't 2000); *Mattera v Mattera*, 125 A.D.2d 555, 556-557 (2d Dep't 1986). Here, the action was commenced more than six years after the allegedly wrongful transfer of the property by the deed dated July 19, 1996. This action was not commenced until 2012. Accordingly, the first

Cause of action is dismissed as time barred. Other grounds for dismissal of the first cause of action are not addressed because they are moot.

With regard to Plaintiff's Second cause of action for an accounting. The "right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *LoGerfo v. Trustees of Columbia Univ. in City of New York*, 35 A.D.3d 395, 827 N.Y.S.2d 166 (2d Dep't 2006) (citations omitted.) Moreover, a relationship providing for the division of profits will give rise to a fiduciary obligation on the part of the parties where there is an agreement to also share losses. *Id.* At this early stage of the case this Court will allow the plaintiff to proceed on both legal and equitable causes of action. Construing the pleadings generously "to allege whatever can be fairly implied on any aspect of the facts," the complaint adequately states a cause of action for an accounting (see *Nastasi v Nastasi*, 26 AD3d 32, 37, 805 N.Y.S.2d 585 [2d Dep't 2005]).

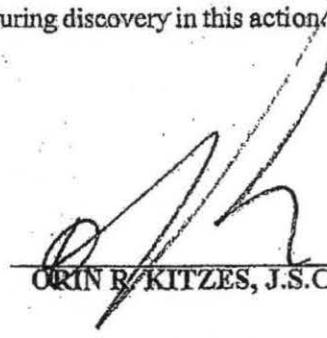
The law is settled that in order to establish fraud, the following elements must be demonstrated: (1) misrepresentation of a material fact; (2) scienter; (3) justifiable reliance; and (4) injury or damages. *Gouldsbury v Dan's Supreme Supermarket*, 154 AD2d 509 (2d Dep't 1989,) (lv denied 75 NY2d 701). Plaintiff's allegations in his complaint allege the existence of a fraud, and consequently, the third cause of action stands.

The fourth cause of action alleges a cause of action for unjust enrichment which defendant contends is time barred. "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant

will obtain such benefit without adequately compensating plaintiff therefor." (*Nakamura v Fujii*, 253 AD2d 387, 390; see, *MT Property, Inc. v Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751; *Smith v Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598, 600, 741 N.Y.S.2d 100 [2d Dep't 2002]). The statute of limitations for a claim of unjust enrichment is 6 years pursuant to CPLR 213(1). Plaintiff alleges that notwithstanding the written contract between the parties, he was paid 50% of the income from the running of the real estate business, but that defendants thereafter failed and refused to pay him based on his alleged 50% ownership interest. That cause of action runs from the failure to pay which occurred within 6 years of the commencement of this action. Accordingly, the fourth cause of action is sustained.

With regard to Plaintiff's continued demand that he be provided access to contents of certain file cabinets is granted to the extent that Defendants shall not dispose of them and such papers and files shall be made available during discovery in this action. (CPLR 3101(a).

Dated: January 23, 2013



ORIN R. KITZES, J.S.C.