

Davey v Costello

2013 NY Slip Op 30591(U)

March 26, 2013

Supreme Court, New York County

Docket Number: 602139/05

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

PETER F. DAVEY,
Plaintiff,
- v -
BRIAN COSTELLO,
Defendant.

Index No.: 602139/05
Motion Date: 10/26/12
Motion Seq. No.: 03
Motion Cal. No.: _____

FILED
MAR 27 2013
NEW YORK
COUNTY CLERKS OFFICE

The following papers, numbered 1 through 5 were filed on this motion for summary judgment

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1, 2	_____
3, 4	_____
5	_____

Cross-Motion: Yes No

Defendant BRIAN COSTELLO (Costello) moves, pursuant to CPLR 3211 (a) (1) and (a) (5), and 3212 to dismiss the complaint as against it. Defendant alternatively moves to dismiss all claims because plaintiff did not obtain Court permission prior to filing a new case. The court shall grant such motion.

Plaintiff pro se argues that the court should deny defendant Costello's motion for summary disposition of this action as it is untimely pursuant to CPLR 3212(a).

In Rossi v Arnot Ogden Med Ctr, 252 AD2d 778, 780 (3d Dept 1998), Justice Graffeo for a unanimous Second Department wrote, in pertinent part:

Supreme Court also did not abuse its discretion in allowing Chiota to serve a late motion for summary

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

plaintiff, a pro se attorney, against his former wife and Kelly & Knaplund, counsel for his former wife in the divorce action.

This court sua sponte judicially notices that the court records show that plaintiff filed his Note of Issue on February 27, 2009. The court records show that the Certificate of Readiness for Trial portion of plaintiff's Note of Issue states, in pertinent part, "The case is not ready for trial subject to open discovery". Justice Braun, to whom the action was assigned at the time, sua sponte struck the matter from the trial calendar, though he apparently did not vacate the note of issue even though there is some authority supporting his power to do so in light of plaintiff's Certificate of Readiness that stated that the case was not ready for trial. See Rossi, supra, at 780. Plaintiff is correct that the Note of Issue was never vacated and that the defendant Costello filed his motion for summary judgment on September 12, 2011, well beyond the 120 day limitation set forth in CPLR 3212(a). However, a further review of the history of this action establishes that defendant Costello has shown good cause for the delay.

Entries in the court record establish that Kiernan J. Sullivan, Esq., defendant Costello's original attorney died on March 4, 2010. Just one month later, on April 10, 2010, the firm of Wrobell & Schatz, LLP appeared on defendant Costello's behalf and served and filed a Notice of Appearance. A month after, that

firm served and filed a "motion in limine" memorandum of law, while the action was still before Justice Braun. Then on September 12, 2011, one month prior the time that Justice Braun's recused himself, Wrobell & Schatz, defendant Costello's substituted firm, served and filed a motion for summary judgment.

The death of defendant Costello's attorney, which occurred approximately eight months after the deadline for filing dispositive motions under CPLR 3212(a) coupled with a prior order of Judge Madden, outlined below, which permanently enjoined pro se plaintiff Davey from commencing any further actions related to his 2004 divorce in this court without prior permission, establishes good cause. In fact, in this very action, Justice Braun granted the motions of defendants former wife and her former lawyers, who were co-defendants of defendant Costello, finding that plaintiff's claims were barred by res judicata based on two previous actions, one before Justice Diamond Index No. 112002/01, Motion Seq. 01 and the other before Justice Madden Index No. 116183/2003 Motion Seq. 01.¹ Justice Braun's order

¹ Defendant Costello appends to his moving papers, copies of the decisions in such previous actions. Pro se plaintiff Davey sought review in the Court of Claims (Davey v State of New York, 2005-029-503) of the orders dated March 6, 2003 and September 10, 2003 that he alleged were wrongfully issued by Justice Shapiro, Westchester County Supreme Court. The Court of Claims dismissed such claims upon the doctrine of judicial immunity. Such dismissal was affirmed on appeal before the Appellate Division, Second Department. Unfortunately, pro se plaintiff did not perfect his appeal from either the Judgment of Divorce dated July 6, 2004 or the prior orders of Justice Shapiro, before the Appellate Division, Second Department, which would have been the proper recourse. Assuming arguendo that the Judge Shapiro overlooked controlling precedent that held "that prior to entry of a judgment altering a legal relationship between parties granting divorce, separation or annulment, courts may not direct the sale of marital property held by spouses

dated September 15, 2007 granting the co-defendants' application to find plaintiff in civil contempt for violating a legal mandate of the court and directing plaintiff to purge the contempt by paying counsel fees and costs to co-defendants in amount of \$28,309.97, was unanimously affirmed on appeal, 57 AD3d 230 (1st Dept 2008).

In the action before Justice Madden, by Order dated July 12, 2004, the court found that "as it appears that Peter Davey has exhausted all other viable avenues of litigation concerning this matter, he shall be required to obtain permission from the court before bringing any further litigation in this court related to this matter."

The court finds that this action against defendant Costello is related to the issues that were the subject of the order issued by Justice Madden which required plaintiff to obtain permission before bringing any further litigation. Plaintiff's argument that because defendant Costello was never a part of any prior action, plaintiff was not barred by res judicata from

as tenants by the entirety unless the parties have consented to the sale", (Moran v Moran, 77 AD3d 443 [1st Dept 2010]), plaintiff's remedy was to seek review of such orders by such intermediate appellate court, which he neglected to do. Instead, in addition to the above referenced actions, he commenced Davey v Costello, (Westchester County Supreme Court Index No. 10220/05) and Davey v Dolan, (US Courts, SDNY, 05 Civ 5513), the latter in which Judge Holwell by order dated September 26, 2006 permanently enjoined Davey from pursuing further federal litigation that in any way relates to any matter arising out of his matrimonial dispute without first obtaining the authorization of the District Court or from pursuing any state litigation in that same category without appending the District Court's opinion and order of injunction to his first filings.

commencing an action against Costello, is unpersuasive. Any finding of liability against defendant Costello, a bona fide purchaser for value, would depend upon a finding of fraudulent intent on the part of defendant Kelly, defendant Costello's immediate grantor (Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc v 31 Mount Morris Park, LLC, 76 AD3d 465 [1st Dept 2010]), which plaintiff cannot establish based upon the doctrine of collateral estoppel. See also Schwartz v Public Adm'r of County of Bronx, 24 NY2d 65 (1969). Ergo, the action against defendant Costello is a related matter and the complaint against him is barred by collateral estoppel. Further, as plaintiff has failed to obtain permission before interposing a claim against defendant Costello, his action is improper under the permanent injunction issued by Justice Madden and must be dismissed as he never sought permission from the court before commencing this action.

Accordingly, it is hereby

ORDERED that defendant Brian Costello's motion for summary judgment is GRANTED and the complaint is dismissed with costs and disbursements to defendant Costello as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment.

This is the decision and order of the court.

Dated: March 26, 2013

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

FILED

MAR 27 2013

**NEW YORK
COUNTY CLERK'S OFFICE**