Emerald Invs. Ltd. v Toms
2014 NY Slip Op 31712(U)
July 1, 2014
Supreme Court, New York County
Docket Number: 150359/2014
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

EMERALD INVESTORS LIMITED,

Plaintiff,

-against-

NEWBY TOMS,

Defendant.

INDEX NO. 150359/2014
MOTION DATE 05-28-2014
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for Summary Judgment in Lieu of Complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion for summary judgment in lieu of Complaint and plaintiff's motion dismissing defendant's counterclaim for breach of contract are granted.

Bank Leumi Trust Company of New York (herein "Leumi") obtained judgments by confession against the defendant in relation to a personal guarantee given by defendant as security for payment of an obligation of 52 East 41st Street Associates (see Index No. 102336/1996 and 111227/1996) in the amount of $560,517.22 and $318,568.40 (herein "Judgments"). On August 22, 1996, Leumi assigned its rights to the judgments to Emerald Investors Limited who in turn, by General Assignment dated December 31, 2012, assigned the Judgments to plaintiff.

More than ten (10) years have elapsed since the filing of the Judgments and plaintiff asserts that no part of the Judgments have been paid. Plaintiff now moves to renew the Judgments by summary judgment in lieu of complaint.

Defendant opposes the motion arguing that plaintiff 1) lacks standing to bring the instant motion; 2) the motion fails to state any statutory basis for the relief sought; and 3) the assignment of the judgments was not properly recorded. In its opposition, defendant asserts a breach of contract counterclaim. Under Motion Sequence 002, plaintiff moves pursuant to CPLR 3211(a)(5) to dismiss defendant's counterclaim.

Defendant claims that plaintiff breached a Legal Services Agreement from 2001 entered into with a New Jersey law firm, and breached an Antenuptial Agreement to which defendant was a party. Defendant made these arguments,

litigated these issues, and received adverse rulings in two (2) separate actions within the New Jersey Superior Court. Plaintiff annexes the pleadings and transcripts from the prior actions in the New Jersey Superior Court.

Collateral estoppel precludes a party from relitigating an issue raised and decided in a prior action and "preclusion only applies to an issue that was "actually litigated, squarely addressed and specifically decided" (U.S. Fidelity & Guar. Co. v. American Re-Insurance Co., 93 A.D.3d 14, 24, 939 N.Y.S.2d 307, 314 [1st. Dept.] citing to, Ross v. Medical Liab. Mut. Ins. Co., 75 N.Y.2d 825, 826, 552 N.Y.S.2d 559, 551 N.E.2d 1237 [1990]). "To successfully invoke this doctrine, two requirements must be met. First, the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action. Second, the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action" (Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP, --- N.Y.S.2d ----, 2014 N.Y. Slip Op. 03961, at 3 [1st Dept., 2014] citing to, City of New York v. Welsbach Elec. Corp., 9 N.Y.3d 124, 128, 848 N.Y.S.2d 551, 878 N.E.2d 966 [2007]). "The party seeking to invoke collateral estoppel bears the burden of establishing identity of issue" (Id., citing to, Auqui v. Seven Thirty One Ltd. Partnership, 22 N.Y.3d 246, 255, 980 N.Y.S.2d 345, 3 N.E.3d 682 [2013]).

The adverse rulings against defendant declared that any authority defendant may have had under the 2001 Legal Services Agreement expired on November 13, 2002 and that defendant has no authority to act on behalf of plaintiff. In a separate New Jersey Superior Court action, the court held that the doctrine of collateral estoppel applied to the subsequent action because the identical issues were raised, the action arose from the same transaction or chain of events, and the issues raised were already litigated and decided.

Defendant raises the same issues and arguments in his counterclaim for breach of contract and he is collaterally estopped from relitigating this matter. Defendant had a full and fair opportunity to litigate this issue in the New Jersey Superior Court actions.

Plaintiff met its burden of establishing identity of the issues. Plaintiff's motion to dismiss the breach of contract counterclaim under Motion Sequence 002 is granted. This court now addresses the motion for summary judgment in lieu of complaint under Motion Sequence 001.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material

factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420).

A party may commence an action by motion for summary judgment in lieu of complaint when the action is based upon an instrument for the payment of money only or upon any judgment (Goodyear Tire & Rubber Co. v. Azzaretto, 103 A.D.3d 880, 962 N.Y.S.2d 220 [2nd Dept. 2013]); see CPLR 3213.

A New York judgment is good for 20 years [see CPLR 211(b)]. CPLR 5014 provides in part that "an action upon a money judgment entered in a court of the state may only be maintained between the original parties to the judgment." "An assignee of a judgment is an original party to the judgment for the purpose of renewing a judgment lien" (Cadle Co. v. Biberaj, 307 A.D.2d 889, 763 N.Y.S.2d 751 [1st Dept., 2003] citing to, Saxe v. Peck, 139 A.D. 419, 124 N.Y.S. 14 [3rd Dept., 1910]).

CPLR 5014 authorizes the entry of a renewal judgment with a new twenty (20) year life when the judgment is nearing the end of its first ten (10) years without having been satisfied. "The Legislature enacted CPLR 5014 to give a judgment creditor an opportunity to extend the life of the lien by commencing an action for a renewal judgment" (Premier Capital, LLC, Appellant, v Best Traders, Inc., 88 A.D.3d 677, 930 N.Y.S.2d 249, 250-251 [2nd Dept., 2011] citing to, Gletzer v Harris, 12 NY3d 468, 473, 909 N.E.2d 1224, 882 NYS2d 386 [2009]). "However, CPLR 5014(1) also permits a judgment creditor to commence an action for a renewal judgment where 10 years have elapsed since the judgment was originally docketed" (Id., citing to Schiff Food Prods. Co., Inc. v M & M Import Export, 84 AD3d 1346, 1348, 924 N.Y.S.2d 158, 159-160 [2nd Dept., 2011]).

Plaintiff has presented evidence in admissible form - the Judgments and assignments of judgments along with proof of filings at the Clerk's Office - to make a prima facie showing of entitlement to judgment as a matter of law. Defendant has not produced contrary evidence to rebut plaintiffs prima facie showing.

This action for a renewal judgment is timely. More than ten (10) years have passed since the Judgments were filed thereby allowing the lien to lapse. However, not more than twenty (20) years have passed since the Judgments were filed, thereby allowing plaintiff to obtain a new twenty (20) year judgment and a new ten (10) year lien (see Gletzer v. Harris, 12 N.Y.3d 468, 882 N.Y.S.2d 386, 909 N.E.2d 1224 [2009]).

Plaintiffs have standing to sue. Business Corporation Law 1312 requires foreign corporations doing business in New York to apply for authorization to conduct business within the state before maintaining an action. Business Corporation Law 1301(b) provides that "without excluding other activities which may not constitute doing business in this state, a foreign corporation shall not be considered to be doing business in this state, for the purposes of this chapter,

by reason of carrying on in this state any one or more of the following activities: (1) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting settlement thereof or the settlement of claims or disputes."

Defendant does not offer evidence that plaintiff is doing business within the State and is required to obtain authorization to do business within the state in order to maintain this action. Plaintiff may maintain this action pursuant to BCL 1301. Summary judgment in lieu of complaint is appropriate.

Accordingly, it is ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is granted, and it is further,

ORDERED, that plaintiff may submit a renewal judgment and lien against defendant in the amount of $560,517.22, minus $843.90, plus interest thereupon at the statutory interest rate from February 7, 1996, and it is further,

ORDERED, that plaintiff may submit a renewal judgment and lien against defendant in the amount of $318,568.40, plus interest thereupon at the statutory interest rate from June 24, 1996, 1996, and it is further,

ORDERED, plaintiff's motion to dismiss defendant's Counterclaim for breach of contract is granted and the Counterclaim is dismissed, and it is further,

ORDERED that the Clerk of Court enter judgment accordingly.

ENTER:

Dated: July 1, 2014

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE