Tooker v Schwartzberg
2015 NY Slip Op 31620(U)
August 17, 2015
Supreme Court, Suffolk County
Docket Number: 9463/14
Judge: Paul J. Baisley

Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 9463/14
MOTION DATE: 1/29/15
MOTION NO.: 004 MG; 005 MG
006 MG

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MARIE GUERRERA TOOKER,

Plaintiff,

-against-

DAVID A. SCHWARTZBERG, RICHARD HANDLER, RYAN McKEON, WINDLES, MARX, LANE & MITTENDORF, LLP, VINCENT FERRO, DAVID REILLY, RAYMOND GRASING, ERNEST RANALLI and JOHN AND JANE DOES 1-10,

Defendants.

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PLAINTIFF *PRO SE*:
MARIE GUERRERA TOOKER
1040 Flanders Road
Flanders, New York 11901

DEFENDANTS' ATTORNEYS:
GARCIA AND STALLONE, ESQS.
2076 Deer Park Avenue
Deer Park, New York 11729

HERRICK FEINSTEIN LLP
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New York, New York 10016

CAHN & CAHN
22 High Street, Suite 3
Huntington, New York 11743

WINDELS, MARX, LANE
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156 West 56th Street, Suite 23
New York, New York 10019

DAVID SCHWARTZBERG
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Melville, New York 11747

Upon the following papers numbered 1 to 23 read on this motion to dismiss complaint ; Notice of Motion/ Order to Show Cause and supporting papers 1-2; 3-8; 12-23 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 9-11 Replying Affidavits and supporting papers__; Other__; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the following motions are consolidated for purposes of this determination:

1. The pre-answer motion (motion sequence no. 004) of defendant Vincent Ferro for an order pursuant to CPLR R. 3211(a)(7) dismissing all claims raised against him in the amended complaint dated September 3, 2014 with prejudice, and pursuant to 22 NYCRR §130-1 awarding attorneys' fees and costs to Mr. Ferro;

2. The motion (motion sequence no. 005) of defendant Windels Marx Lane & Mittendorf, LLP for an order pursuant to CPLR R. 3211(a)(3), (a)(5) and (a)(7) dismissing plaintiff Marie Guerrera's amended complaint with prejudice as against the moving defendant and, pursuant to 22 NYCRR §130-1.1, sanctioning plaintiff's frivolous conduct by awarding moving defendant its costs and legal fees; and

3. The motion (motion sequence no. 006) of defendants Richard Handler and Ryan McKeon for an order dismissing plaintiff's complaint in its entirety and/or as against Richard Handler pursuant to CPLR R. 3025(a), CPLR R. 3211(a)(1), (a)(3), (a)(4), (a)(5), (a)(7) and (a)(8), and against Ryan McKeon pursuant to CPLR R. 3025(a), CPLR R. 3211(a)(1), (a)(3), (a)(5), (a)(7) and (a)(8) CPLR R. 3212; and it is further

ORDERED that the motions are granted, and the complaint and amended complaint are dismissed in their entirety pursuant to CPLR R. 3211(a)(7); and it is further

ORDERED that the Court finds that the actions of plaintiff Marie Guerrera Tooker in commencing and continuing the instant action when the lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of plaintiff, is frivolous within the meaning of 22 NYCRR §130-1.1, and the Court hereby awards the moving defendants costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from such frivolous conduct; and it is further

ORDERED that a hearing will be held before the undersigned on August 27, 2015 at 11:00 a.m. to determine the amount of costs to be imposed on plaintiff pursuant to 22 NYCRR §130-1.1.

Pro se plaintiff Marie Guerrera Tooker commenced this action on May 8, 2014 against various attorney defendants purporting to seek damages for claims arising out of a prior mortgage foreclosure action in which Ms. Tooker was a nominal defendant (hereinafter referred to as the "foreclosure action"). [1] The mortgaged property was owned by several corporations of which Ms. Tooker was the sole owner, and she was served with the summons and complaint in the foreclosure action as a "John Doe" occupant of the subject property. The mortgaged premises were ultimately sold pursuant to a judgment of foreclosure and sale and a deficiency judgment was entered against Ms. Tooker's three corporations. Ms. Tooker thereafter interposed numerous *pro se* motions in the foreclosure action on behalf of herself and her corporations seeking to vacate the foreclosure sale and set aside the deficiency judgment, all of which were denied for various technical and other defects, including, in particular, Ms. Tooker's failure to comply with the statutory requirement that corporations appear by counsel (CPLR §321(a)), as well as Ms. Tooker's status as a defaulting "John Doe" defendant against whom no allegations were asserted.

Ms. Tooker thereafter commenced a separate *pro se* action in this Court, under Index No. 5488/2014 (hereinafter referred to as *Tooker I*)[2], against various participants in the foreclosure action in which she reasserted substantially all of the claims and allegations that had previously been determined and rejected by the Court in the foreclosure action. The amended verified complaint in *Tooker I*, which set forth three causes of action for "theft of personal property,"

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[1] *Quest Ventures, Ltd. v. Abbess Farm, Ltd., et al.*, Sup Ct Suffolk Cty, Index No. 8935/2008.

[2] *Marie Guerrera Tooker, Abbess Farm, Ltd., Abbotts Village, Ltd., Guerrera Estates, Ltd. v. Quest Ventures, Ltd., Salvatore Guerrera, David A. Schwartzberg, Advantage Title Agency, David Reilly, David DeRosa, Island Properties, Directional Lending, Richard Handler and John and Jane Does 1-20,*

"fraud," and malicious interference with prospective economic advantage to achieve unjust enrichment and tortiorous interfernce" [*sic*] was dismissed pursuant to a short-form order of this Court (BAISLEY, J.) dated March 26, 2015 based on, *inter alia*, plaintiff's lack of standing, res judicata/collateral estoppel, and failure to state a cause of action.

Less than two months after she commenced *Tooker I*, and while *Tooker I* was still pending, Ms. Tooker commenced the instant *pro se* action (hereinafter referred to as *Tooker II*) by filing a summons and complaint. Plaintiff thereafter filed an amended complaint. Named as defendants herein are eight attorneys/law firms that were directly or peripherally involved in the foreclosure action, including the attorney of record for the plaintiff therein, the receiver appointed by the Court, and the attorney for the title company, all of whom were also named as defendants in *Tooker I*. Although the pleaded causes of action are nominally different – "fraud upon the court" and "Judiciary Law §487" – the allegations set forth in the amended complaint herein all arise out of the previously concluded foreclosure action and are substantially the same as those in *Tooker I*.

Also like the complaint in *Tooker I*, plaintiff's amended complaint herein, dated September 3, 2014, is a lengthy and rambling diatribe that, while long on conclusions, is woefully short on facts. Typical of her allegations, which comprise 87 paragraphs and 30 pages, are the following: "This is an action pursuant to N.Y. Jud. Law § 487 against defendant attorneys who are engaged in fraud upon the court, deceit, and collusion. Through abuse of the legal process. The complaint against these attorneys is for them being engaged in a chronic and extreme pattern of legal delinquency and by its proximately caused plaintiff to sustain damages" (¶1). Plaintiff continues: "Whereby, these acts committed by defendants were engaged in Deceit in the Practice of Law during the course of plaintiff's legal proceedings and collateral wrongful acts. Essentially defendants committed a massive degree of fraud to 'subvert the integrity of the court itself'" (¶2). Plaintiff alleges that "Defendants' torturous [*sic*] conduct was committed through material misrepresentations and concealment of the truth in order to mislead; evidence and witness tampering, deception, fraud, false dealing, filing false claims and colluding" (¶3). Plaintiff further alleges that she "is complaining of defendants' professional misconduct of, extortion, bribery, abuse of official power, maintenance of a known false claim, and abusive litigation; false statements to the court, in pleadings and other documents; unjustified initiation or continuation of litigation, and misconduct in the litigation and business dealings" (¶5). Plaintiff further alleges, upon information and belief, that "defendants were aware of the crimes of trespass, extortion, cruelty to animals, robbery, criminal mischief, assault with a deadly weapon, grand larceny, Defendant Richard Handler came to the property and witnessed it himself, and fired Chris Strepple who was hired by David DeRosa to terrorize my children and I and forcing us to be homeless" (¶12).

It appears, as nearly as the Court is able to discern from plaintiff's convoluted, vituperative pleading, that plaintiff is alleging, as she did in the foreclosure action and in *Tooker I*, that a portion of the foreclosed property was not subject to the mortgages that were foreclosed, that the appointment of a receiver in the foreclosure action was improper, that the valuation of the foreclosed property was fraudulent, that the plaintiff in the foreclosure action obtained a sheriff's deed through fraud, and that the deficiency judgment obtained in the foreclosure action was based on a fraudulent affidavit of service.

Other than her conclusory allegations, however, plaintiff has set forth no facts to establish that the movants, or any of the defendants, committed a fraud on the Court or violated Judiciary Law §487 in connection with the foreclosure action. With regard to the former, the Court of Appeals recently held that:

> "in order to demonstrate fraud on the court, the non-offending party must establish by clear and convincing evidence that the offending 'party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action" [citations omitted]. A court must be persuaded that the fraudulent conduct, which may include proof of fabrication of evidence, perjury, and falsification of documents concerns 'issues that are central to the truth-finding process' [citation omitted]. Essentially, fraud upon the court requires a showing 'that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense'" [citations omitted] (*CDR Creances S.A.S v Cohen*, 23 NY3d 307 [2014]).

As to the latter, Judiciary Law §487 provides that "An attorney or counselor who: 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party...[i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." The plaintiff has the burden of pleading and proving that the attorney, whether in a physical appearance or by any oral or written statement communicated to the Court or any party, intended to deceive the Court or that party (*Dupree v Voorhees*, 102 AD3d 912 [2d Dept 2013]; *Amalfitano v Rosenberg*, 533 F3d 117 [2d Cir 2008]).

Plaintiff's allegations herein fail to meet the foregoing standards (*Godfrey v Spano*, 13 NY3d 358 [2009]).

Moreover, the record and the submissions reflect that plaintiff had no individual interest in the foreclosed properties, that she did not execute the subject mortgages in her individual capacity, she was not personally liable as obligor or guarantor of the debt of her corporations, and the deficiency judgment was not entered against her personally. Accordingly, plaintiff has no standing to assert any of the claims put forth herein (*Matter of Amona v County of Orange*, 123 AD3d 1117 [2d Dept 2014]), and cannot establish that she sustained any damages as a result of the defendants' allegedly fraudulent conduct in the foreclosure action.

Additionally, all of plaintiff's claims regarding defendants' allegedly fraudulent actions were previously raised and determined in the foreclosure action. Accordingly, plaintiff's claims herein are barred by principles of res judicata and/or collateral estoppel (*Gillen v McCarron*, 126 AD3d 670 (2d Dept 2015]).

Finally, it appears that plaintiff's action is jurisdictionally defective. Where a summons and complaint are timely filed but not served, service of a substantively similar amended summons and complaint may be proper when it is served during the 120-day period when service of the original pleadings was required under CPLR §306-b (*Schroeder v Good Samaritan*

Hospital, 80 AD3d 744 [2d Dept 2011]). The Court's records reflect that plaintiff commenced this action on May 8, 2014 by filing a summons and complaint. Plaintiff's filing of an amended complaint, without leave of court, on September 9, 2014 was outside the 120-day period of CPLR §306-b. Moreover, the County Clerk file does not reflect that plaintiff ever filed affidavits of service of either the original complaint or the amended complaint on any of the defendants.

In light of all of the foregoing, defendants' motions are granted and plaintiff's complaint and/or amended complaint are dismissed.

The Court finds that the actions of plaintiff in commencing and continuing this action when the lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of plaintiff, is frivolous within the meaning of 22 NYCRR §130-1.1, and the Court hereby awards the moving defendants costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from such frivolous conduct. A hearing will be conducted before the undersigned on August 27, 2015 at 11:00 a.m. to determine the amount of costs to be imposed on plaintiff pursuant to 22 NYCRR §130-1.1.

Dated: August 17, 2015

PAUL J. BAISLEY. JR.

J.S.C.