

241 Fifth Ave. Hotel LLC v Nader & Sons LLC

2016 NY Slip Op 31755(U)

September 20, 2016

Supreme Court, New York County

Docket Number: 652082/2012

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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241 FIFTH AVE. HOTEL LLC and HAZAK
ASSOCIATES LLC,

Plaintiffs,

-against-

NADER & SONS LLC, SISCO ENTERPRISES,
LLC, NADER HAKAKIAN, KAY HAKAKIAN,
and BESHMADA LLC,

Defendants.

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DECISION AND ORDER

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JEFFREY K. OING, J.:

Relief Sought

Defendants Nader & Sons, LLC ("Nader & Sons"), Sisko Enterprises, LLC ("Sisko"), Nader Hakakian, and Kay Hakakian move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint.

Factual Background

Plaintiff 241 Fifth Ave. Hotel LLC ("241 Fifth") was formed on March 20, 2007. At that time, Beshmada LLC ("Beshmada") and Hazak Associates LLC ("Hazak") were its sole members, each holding a fifty percent interest in that entity (Compl., ¶¶ 8-9). Under 241 Fifth's Limited Liability Company Agreement (the "LLC Agreement"), no member could sell, assign or otherwise transfer its interest in 241 Fifth without the written consent of the

other members (LLC Agreement at § 9.01, Castro Affirm., Ex. E). 241 Fifth's main asset was the Manhattan real property located at 241 Fifth Avenue (the "Premises") (Compl., ¶ 8).

In June 2008, Nader & Sons and/or Sisko made certain loans totaling \$12.5 million (the "Loan") to Namco Capital Group, Inc. ("Namco") (Compl., ¶¶ 15-16). In connection with the Loan, Namco and Beshmada, among others, entered into a Loan Pledge and Security Agreement dated June 12, 2008 (the "Pledge Agreement") pursuant to which Beshmada pledged its interest in 241 Fifth to Nader & Sons and Sisko as security for the payment of the Loan (Pledge Agreement, Castro Affirm. in Opp., Ex. D). Subsequently, in a Partial Settlement Agreement dated January 18, 2010 (the "Partial Settlement"), Beshmada assigned all of its interest in 241 Fifth to Nader & Sons and Sisko (Partial Settlement at §§ 2-4, Castro Affirm., Ex. H).

On June 19, 2009, Beshmada filed for Chapter 7 Bankruptcy in the United States District Court for the Central District of California (the "California Bankruptcy Action") (Bankruptcy Action Docket, Cohen Affirm., Ex. F).

On or about June 23, 2011, the Premises went into foreclosure (Compl., ¶ 45). On January 21, 2014, plaintiffs filed an Amended and Restated Proof of Claim in the California

Bankruptcy Action seeking over \$33 million in damages sustained as a result of the loss of the Premises (Amended Proof of Claim at ¶¶ 3, 7-8, Cohen Affirm., Ex. E). In the Amended Proof of Claim, plaintiffs alleged that Beshmada's assignment of its interest in 241 Fifth prevented plaintiffs from refinancing the mortgage on the Premises and, as a result, caused the foreclosure of the Premises (Amended Proof of Claims at ¶¶ 3, 7-8; Cohen Affirm., Ex. E).

On May 6, 2015, the Bankruptcy Court concluded that, while Beshmada's entry into the Pledge Agreement was a breach of article 9.01 of 241 Fifth's operating agreement, Beshmada's entry into the Pledge Agreement and performance of the transaction contemplated therein were not the legal or proximate cause of 241 Fifth's loss of the Premises and did not otherwise damage 241 Fifth or Hazak (Findings of Fact and Conclusions of Law at ¶¶ 19, 21, 23, Cohen Affirm., Ex. C). The Bankruptcy Court further found that Beshmada's entry into the Partial Settlement and performance of the transaction contemplated thereby was not a breach of Article 9.01 of the 241 Fifth Operating Agreement and was not the legal or proximate cause of the loss of the Premises and did not cause any damage to 241 Fifth or Hazak (Id. at ¶¶ 20, 22, 24). In light of these findings, the Bankruptcy Court issued

an order disallowing plaintiffs' claim in that action in its entirety with prejudice (Bankruptcy Court Order, Cohen Affirm., Ex. P).

In this action, plaintiffs allege that the Pledge Agreement and the Partial Settlement prevented 241 Fifth from refinancing, extending or replacing its mortgage for the Premises, leading to the foreclosure on the Premises, and asserts claims against Sisko, Nader & Sons, and Nader and Kay Hakakian (the principals of Nader & Sons) for: tortious interference with plaintiffs' prospective economic advantage and plaintiffs' contractual rights as well as inducement of Beshmada's breach of its fiduciary duty to plaintiffs. Plaintiffs also assert claims against Beshmada for breach of the LLC Agreement's implied covenant of good faith and fair dealing.

Discussion

The record demonstrates that the Bankruptcy Court has already determined that Beshmada's actions in executing or carrying out the Pledge Agreement or Partial Settlement were not the legal or proximate cause of the alleged harm to plaintiffs in this action -- the loss of the Premises. The threshold issue is whether the doctrine of collateral estoppel bars plaintiffs from asserting their claims in this action.

Collateral estoppel "precludes a party from re-litigating an identical issue decided against that party in a prior proceeding where there was a full and fair opportunity to litigate that issue" (Becker v State, 274 AD2d 532, 532 [2d Dept 2000]). New York applies the law of the rendering jurisdiction to determine the collateral estoppel effect of the decisions of sister states (GATX Flightlease Aircraft Co. Ltd. v Airbus S.A.S., 15 Misc 3d 1143(A) [Sup Ct, NY County 2007], affd sub nom. In re GATX Flightlease Aircraft Co. Ltd., 40 AD3d 445 [1st Dept 2007]). In this case, California law would apply to the analysis.

In California, the application of collateral estoppel requires that the issue sought to be precluded from re-litigation is identical to an issue in the former proceeding that was actually litigated and necessarily decided on the merits and that this decision was final (Harmon v Kobrin (In re Harmon), 250 F3d 1240, 1245 [9th Cir. Cal. 2001] [internal citations omitted]). In addition, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding" (Id.).

The dispositive issue here -- whether the execution of the Pledge Agreement or Partial Settlement led to the foreclosure and loss of the Premises -- is identical to that decided in the

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California Bankruptcy Action. There is no dispute that this issue was actually litigated in the California Bankruptcy Action and that the determination of that issue was necessary to the Bankruptcy Court's ultimate determination (see Lucido v Superior Ct., 51 Cal 3d 335, 342 [1990] ["necessarily decided" means "only that the issue not have been "entirely unnecessary" to the judgment in the initial proceeding"])). There is also no dispute that this determination was on the merits and final (see Siegel v Fed. Home Loan Mortg. Corp., 143 F3d 525, 529 [9th Cir 1998] [the allowance or disallowance of "a claim in bankruptcy is binding and conclusive on all parties or their privies, and ... [is] in the nature of a final judgment"])). Finally, there can be no dispute that plaintiffs are the same parties whose Amended Proof of Claim was disallowed in the California Bankruptcy Action.

Plaintiffs oppose defendants' motion with an untimely 45-page opposition brief. Nonetheless, consideration will be given in light of the fact that defendants have not established that they were prejudiced by the two-day delay in its submission (Dinnocenzo v Jordache Enterprises Inc., 213 AD2d 219, 219 [1st Dept 1995]; CPLR 2214[b]). In addition, while plaintiffs' brief exceeded the page limit requirements of 22 NYCRR § 202.70, Rule

17, by twenty pages, these excess pages are largely irrelevant to the matter at hand and will be disregarded to that extent (Aish Hatorah New York, Inc. v Fetman, 48 Misc 3d 1207(A), at *8 n 2 [Sup Ct, Kings County 2015]).

In their brief, plaintiffs argue that because their claims for tortious interference with contractual rights and prospective economic advantage could not be asserted in the California Bankruptcy Action, these claims cannot be barred in this action (Opp. Br. at p. 12). This argument ignores the fact that an essential element of these tortious interference claims -- damages caused by the purported interference (see Foster v Churchill, 87 NY2d 744, 749-50 [1996] [tortious interference with contract]; Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183 [tortious interference with prospective business relations]) -- are precluded by the Bankruptcy Court's determination.

Plaintiffs also argue that the decision of Justice O. Peter Sherwood in Hazak Associates LLC v Nader & Sons LLC (Index No. 652965/2011) that Beshmada's assignment of its interest in 241 Fifth was unauthorized and therefore null and void (see 7/3/2012 Decision and Order, Castro Affirm., Ex. J) supports their opposition to defendants' motion. That argument is unavailing.

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Contrary to plaintiffs' reading, Justice Sherwood's decision does not affect the disposition of this matter. While the assignment was null and void, the Bankruptcy Court has determined that this invalid assignment did not cause the harm plaintiffs allege here.

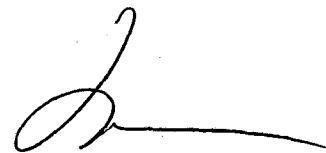
Under those circumstances, collateral estoppel precludes plaintiffs from establishing the element of causation or damages necessary for their claims here (Cicchetti v Gen. Acc. Ins. Co. of New York, 272 AD2d 500, 500 [2d Dept 2000] [implied covenant of good faith and fair dealing]; Foster v Churchill, 87 NY2d 744, 749-50 [1996] [tortious interference with contract]; Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183 [tortious interference with prospective business relations]; Harris v Seward Park Housing Corp., 79 AD3d 425, 426 [1st Dept. 2010] [breach of contract]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and it is hereby dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/20/16



HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.