SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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EMIC CORP., F/K/A APPLE MORTGAGE CORP.,

Plaintiff,

Index No. 153977/2016
Motion Sequence 001

-against-

Decision, Order And Judgment

RICHARD BARENBLATT, DAVID BREITSTEIN, KEITH FURER, KEVIN UNGAR AND GUARDHILL FINANCIAL CORP.,

Defendants.

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CARMEN VICTORIA ST. GEORGE, J.S.C.:

In December of 2013, Apple Mortgage Corporation (Apple) commenced an action in federal court against Richard Barenblatt, Keith Furer, David Breitstein, and Kevin Ungar, all of whom are defendants in this case. The federal complaint alleged that on September 3, 2013 the defendants, all former officers or employees of Apple, resigned from the company abruptly and went to work for Guardhill Mortgage Corporation (Guardhill). Both Apple and Guardhill are mortgage brokerage firms. The complaint accused the defendants of stealing Apple's proprietary client database and its mortgage database, and copying their own email and other records for their own use before erasing the information from Apple's computers. Presumably, this alleged theft was for the defendants' use at Guardhill. The federal complaint asserts eleven causes of action based on this alleged theft, including breach of the duty of loyalty, violations of the Computer Fraud and Abuse Act, and tortious interference with Apple's contracts with its clients. The

defendants' answer included the assertion of counterclaims against Apple. Judge John G. Koeltl of the United States District Court for the Southern District of New York presided over the action.

In early February of 2014, Apple sold its assets to Sterling National Bank (Sterling). The contract of sale expressly transferred Apple's business, assets, and rights to Sterling. Subsequently, the defendants moved for summary judgment.[1] Judge Koeltl granted the defendants' motion in an order filed on February 16, 2016, basing his decision on the fact that, having sold its assets to Sterling, Apple lacked standing to proceed (*Apple Mortgage Corp. v Barenblatt*, 162 F. Supp. 3d 270 [S.D.N.Y. 2016]). The court rejected Apple's argument that it had not intended to transfer its right to pursue this litigation to Sterling, stating:

> The plain language of the contract is clear. Apple does not have the right to pursue this action against the defendants because it sold this right to Sterling. There is no triable issue of material fact as to Apple's lack of standing. Thus, Apple's claims should be dismissed without prejudice for lack of jurisdiction.

(*Id.* at 282).

According to defendants here, prior to the issuance of this decision the federal court had supervised "several years of litigation, including extensive document discovery and numerous depositions (including the deposition of Guardhill)" (Schoenstein Aff. in Support of Defendants' Motion [Schoenstein Aff.], at ¶ 7). Moreover, they state, at oral argument on the motions for dispositive relief, Judge Koeltl stated on the record that Apple had transferred its claims to Sterling. Defendants submit copies of the federal court order and of the pertinent pages from the transcript.

Apple did not appeal this decision or seek reargument. Instead, on May 4, 2016, Apple, now named EMIC Corporation (EMIC), and Sterling signed an amendment to the purchase agreement which states, as is critical here, EMIC and Sterling "wish to amend the Purchase Agreement solely to confirm that pursuant thereto, [Sterling] did not acquire from APPLE" the right to pursue claims against the defendants or against

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[1] Apple brought a separate motion for summary judgment, and in response the defendants cross-moved for summary judgment on the issue of Apple's liability on the defendants' counterclaims.

Guardhill. One week later, EMIC commenced this action. Plaintiff sues the defendants from the federal action as well as Guardhill. The complaint notes the federal court order dismissing its prior lawsuit. It adds, however, that "[e]vidence submitted on the summary judgment motion confirmed" that the parties did not intend to transfer Apple's claims in the lawsuit to Sterling (Complaint, ¶ 16) and it references the May 4 amendment to the purchase agreement. For these reasons, EMIC claims, it now has standing. Moreover, for its statement of facts, EMIC relies heavily on the statements in the federal court ruling. The complaint asserts four causes of action against the individual defendants and a fifth cause of action against Guardhill.

Currently, defendants bring a pre-answer motion to dismiss this case. They argue that this is "a transparent attempt to escape the Court's ruling in the Federal Action" (Memorandum of Law in Support, at p. 1), and that res judicata and collateral estoppel bar this lawsuit. Citing cases such as *Fallek v. Becker, Achiron & Isserlis* (246 AD2d 394, 395 [1st Dept 1998]), they assert that because the federal court ruled on the standing issue, the amendment to the purchase agreement cannot alter the effect. Relying on *Bardi v Warren County Sheriffs Dept.* (260 AD2d 763, 765 [3rd Dept 1999]), and *Cruz v Kamlis Dresses & Sportswear Co.* (238 AD2d 103, 104 [1st Dept 1997]), they argue that the federal court's order granting summary judgment has a preclusive effect.

In opposition, EMIC argues that res judicata does not bar this action. This is because, according to EMIC, "a dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes" (quoting *Pullman Group, LLC v Prudential Insurance Co. of America*, 297 AD2d 578, 578 [1st Dept 2001], *lv dismissed*, 99 NY2d 610 [2003], and citing *Tap Holdings, LLC v Orix Finance Corp.* 109 AD3d 167, 177 [1st Dept 2013]). EMIC points out that collateral estoppel requires that the issues in the two cases are the same, the issue was litigated and decided in the first action, the parties had a "full and fair" opportunity to litigate in the earlier case, and the issue in question "was necessary to support a valid and final judgment on the merits" (Citing *Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [quoting *Alamo v McDaniel*, 44 AD3d 149, 153 (1st Dept 2007)]). EMIC states that two of the prongs have not been satisfied. First, it reiterates that the ruling on standing was not a ruling on the merits of its claim. Second, it claims that, due to the purchase agreement amendment, the standing issue before this Court is different from the issue that

was before the federal court. Relying on *Springwell Navigation Corp. v Sanluis Corp., S.A.* (81 AD3d 557, 557 [1st Dept 2011]) and *Pullman Group, LLC v Prudential Insurance Company of America* (297 AD2d 578, 578 [1st Dept 2002]), EMIC argues that the amendment provides it with new rights which entitle it to proceed with this action.

In reply, defendants argue that the federal court issued an order on the merits on the issue of standing, and that EMIC had a full and fair opportunity to argue this issue in federal court. Defendants also distinguish between the cases upon which EMIC relies, involving decisions on motions to dismiss, and the case at hand, which involved a decision on motions for summary judgment following the extensive discovery. They reject EMIC's position that the standing issue has changed. They emphasize that the amendment states that it merely confirms the meaning of the purchase agreement. Thus, defendants argue, EMIC is trying to circumvent the federal court decision on standing before a new arbiter, and its effort is barred by collateral estoppel. They additionally argue that res judicata applies, and that the inclusion of GuardHill as a new defendant does not alter this because of GuardHill's privity with the original defendants.

After reviewing the parties' arguments, the Court grants the motion to dismiss. The Court notes that the federal court expressly ruled on Apple's lack of standing under the existing contract (*Apple Mortgage Corp.*, 162 F. Supp. 3d at 282). Although a dismissal on the issue of standing is not dispositive on the merits of the complaint (*see Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 14 [2008]), it obviously is dispositive on the issue of standing. By arguing to the contrary, EMIC misconstrues the import of the cases on which it relies. Moreover, the current lawsuit admittedly arises from the identical set of facts; indeed, EMIC relies on the federal court decision for much of its recitation of the facts and, in paragraph fifteen of the complaint, acknowledges that the claims are the same. Therefore, even though some claims have been articulated differently and the prior defendants' employer has been added as a defendant, this case is barred (*See, e.g., Wietschner v. Dimon*, 139 AD3d 461 [1st Dept 2016]).

Finally, the Court rejects EMIC's argument that the new document confers standing on it. The new document states that it is a confirmation of the purchase agreement. The federal court ruled that there was no standing under the purchase agreement. EMIC's recourse was to appeal or reargue the federal court's

decision, or move to renew based on the amended purchase agreement. EMIC should not have prepared a new document and tried to get a different ruling from a different court.

Based on the above, it is

ORDERED that the motion is granted and the action is dismissed. The Clerk is directed to enter a judgment of dismissal.

Dated: 2/5, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.