Sayles v Ferone
2018 NY Slip Op 32489(U)
October 2, 2018
Supreme Court, New York County
Docket Number: 654336/2013
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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RONALD SAYLES, Individually and as the Executor of the
Estate of William F. Sayles,
Plaintiff,

-against-

PENNY FERONE, Individually and as the Executrix of the
Estate of Michael Ferone,
Defendant.
---x
PENNY FERONE,
Third-Party Plaintiff,

-against-

ALAN DREZIN, ESQ.,
Third-Party Defendant.
---x

Index No.: 654336/2013

Mot. Seq. No. 006

DECISION AND ORDER

MELISSA A. CRANE, J.S.C.:

In this property dispute, third-party defendant Alan Drezin, Esq. moves to for summary judgment pursuant to CPLR 3212, to dismiss third-party plaintiff Penny Ferone's third-party complaint in its entirety.

BACKGROUND

In the early 1970s, plaintiff Ronald Sayles and his late father, William Sayles (collectively "Sayles"), purchased real property located at 224 Richardson Street, Brooklyn, New York (the "Property," further identified as Lots 19 and 76) (Drezin Memo of Law NYSCEF Doc. 146, p. 2; Sayles Deposition NYSCEF Doc. 140, p. 24). Plaintiff permitted the late Michael Ferone, the defendant and third-party plaintiff's husband (collectively "Ferone"), to park his work trucks at the Property that, at that time, was a vacant lot. In the 1970s, several years after their acquisition of the Property, Sayles moved out of state (*id*). Sayles and Ferone orally agreed that defendant would pay rent, remit property taxes, and generally maintain the Property.

The Property was bifurcated into two lots (Lots 19 and 76) after Ferone allegedly failed to remit property tax payments to the City of New York ("NYC") (the "Property Bifurcation"). In or about 1986, NYC foreclosed on Lot 76 because of the unpaid property taxes (Drezin Memorandum of Law, p. 3). In late 2004, Ferone commenced an adverse possession lawsuit against Sayles (the "Adverse Possession Action") (Index No. 29571/2004) (Drezin Affidavit NYSEF Doc. 127, ¶ 6). Alan Drezin ("third-party defendant" or "Drezin") represented Sayles in the Adverse Possession Action (*id*). In February 2008, following a bench trial in Kings County Supreme Court, the Court held Ferone was not entitled to possession or title to the Property (*id*). Defendant appealed the Adverse Possession Action's ruling (*id* ¶ 8-10). In late 2008, prior to appellate argument, Sayles and Ferone entered into a settlement agreement (the "Settlement Agreement") (*id*). The parties agreed to sell the Property and stipulated to divide the proceeds: 60% to Sayles and 40% to Ferone (October 29, 2008 Settlement Agreement NYSEF Doc. 128).

In 2012, Lot 19 allegedly sold for $450,000 (the "Sale Proceeds") (Drezin Affidavit ¶ 14). Drezin acted as the seller's attorney (representing Sayles) (*id*). Drezin does not submit an engagement letter evincing this attorney-client relationship. Drezin deposited the buyer of Lot 19's sale deposit into his attorney escrow/trust account (*id* at ¶ 15). Following the sale, Drezin remitted all of the Sale Proceeds to Sayles, notwithstanding that he was a signatory to the Settlement Agreement, that required 60/40 division of the Sale Proceeds (*id* ¶ 8). After the closing, Drezin reports receiving $20,000 in attorney fees incurred for representing Sayles in the closing and various other legal matters (*id* ¶ 21; NYSEF Doc. 133). Ferone never received her allotted portion of the Sale Proceeds (Drezin Affidavit ¶ 9). Drezin argues that he relied on Sayles' to disburse the Sale Proceeds (*id* ¶ 18).

Following the sale of Lot 19, Ferone's attorney began pursuing his client's unpaid portion of the Sale Proceeds. The parties dispute over the Sale Proceeds became contentious (*id* ¶ 23-

31). In late 2012 or early 2013, only after the closing had occurred, plaintiff avers to have first learned of the 1986 Property Bifurcation (*id* ¶ 23). In December 2013, Sayles commenced this action (Complaint NYSEF Doc. 1). Sayles alleges that the combined value of Lots 19 and 76 exceeds $800,000 (*id* at ¶ 29). Sayles seeks to recover damages because Ferone's failure to pay property taxes triggered NYC to foreclosure on Lot 76, and thus the value of the property initially leased to Ferone (Lots 19 and 76) was reduced by at least $350,000 (*id*). Ferone counterclaimed against Sayles asserting damages because of Sayles' failure to comply with the Settlement Agreement and remit Ferone's share of the Sale proceeds (Answer NYSEF Doc. 4).

On March 6, 2014, Ferone filed her third-party complaint and impleaded Drezin for his purported failure to ensure compliance with the Settlement Agreement. The third-party complaint asserted four causes of action against Drezin: (Claim 1) aiding and abetting Sayles' breach of the Settlement Agreement, (Claim 2) aiding and abetting conversion, (Claim 3) breach of fiduciary duty, and (Claim 4) aiding and abetting unjust enrichment. On September 18, 2014, following oral argument on Drezin's motion to dismiss the third-party complaint, Justice Eileen Rakower, declined to dismiss Claims 2 and 3 under CPLR 3211(a)(7) and 3016(b). Ferone then voluntarily withdrew Claim 1. The Appellate Division First Department held that Ferone could sustain her aiding and abetting conversion claim at the pleading stage because "Drezin allegedly took affirmative steps to prevent the proceeds from the sale of property from being distributed in accordance with a settlement agreement between plaintiff and third-party plaintiff. Drezin allegedly afforded substantial assistance to his client by concealing the sale of the property from third-party plaintiff and her attorney and directing the buyer to wire the sale proceeds directly into plaintiff's account at a small out-of-state bank, rather than depositing the proffered check into his escrow account" (Third Party Complaint NYSEF Doc. 5; *Sayles v Ferone*, 137 AD3d 486 [1st Dept 2016]). The aiding and abetting conversion claim became Ferone's only remaining

cause of action against Drezin after the Appellate Division First Department dismissed Ferone's breach of fiduciary duty cause of action (137 AD3d 486).

On July 27, 2016, Drezin moved to dismiss the remaining aiding and abetting conversion claim (Mot. Seq. No. 005). On February 2, 2017, this court, in a decision by Justice Eileen Rakower, denied Drezin's motion for summary judgment (NYSEF Doc. 117). On July 25, 2017, the parties filed their Note of Issue (NYSEF Doc. 121). On December 6, 2017, 134 days after the parties filed their Note of Issue, Drezin again moved for summary judgment (NYSEF Doc. 124). In this motion for summary judgment, Drezin recycles the affidavits, memorandum of law, and approximately sixteen of seventeen exhibits submitted in support of Mot. Seq. No. 005 (*c.f.* Crance Affirmation NYSEF Docs. 87 and 126; *c.f.* Drezin Affidavit NYSEF Docs. 88 and 127; *c.f.* Drezin Memo of Law NYSEF Docs. 105 and 146; and *c.f.* Drezin Exhibits A-P NYSEF Docs. 89-104 and 128-143). Drezin's novel substantive submissions in support of this motion include the three-page affirmation of Attorney Michael Cohen, and the newly acquired bank records of Sayles found in Exhibit Q (NYSEF Docs. 125 and 144, respectively).

DISCUSSION

A. Drezin's demonstrates good cause for his late filing of this summary judgment motion.

Ferone argues this motion must be denied as a matter of law because Drezin's motion violates CPLR 3212(a), which requires that a motion for summary judgment "in a[n] non-commercial case, such as this be filed no later than one hundred twenty days after the filing of the Note of Issue" (Reda Affirmation ¶ 4-5). CPLR 3212(a) requires that all summary judgment motions be made "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (CPLR 3212). A movant's failure to comply with time conditions prescribed by CPLR 3212(a) requires denial of the untimely motion, unless good cause for the delay is demonstrated (*Brill v City of New York*, 2 NY3d 648, 652 [2004];

Kershaw v Hosp. for Special Surgery, 114 AD3d 75 [1st Dept 2013]). This "good cause" requirement is strictly construed, and the movant must demonstrate a satisfactory reason for the delay (*Brill*, 2 NY3d 648). The goal of this statuary reading is to "end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*id* at 652).

Drezin argues that this court should exercise its discretion and extend CPLR 3212(a)'s filing requirements because he assumed this court tolled the applicable 120-day deadline via a one-word email (Cohen Secondary Affirmation NYSEF Doc. 148 ¶ 1-2).[1] The court finds that Drezin has demonstrated good cause for its delayed filing of this motion. Even though Drezin never sought further clarification concerning this action's motion deadlines, and Drezin did not file the revised scheduling order referenced in his electronically filed letter (NYSEF Doc. 123). Attorney Cohen's sworn affirmation sufficiently articulates that his misinterpretation of this court's email response caused the filing delay. Because it was the fault of the court in writing such a short email, this court will consider the merits of the Drezin's second summary judgment motion. For the following reasons, the court denies the motion.

B. Drezin's second motion for summary judgment.

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], *citing Winegrad v New York Univ.*

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[1] On November 13, 2017, nine days before the expiration of the 120-day post note of issue motion deadline, Drezin's attorney sent an email to chambers expressing an intent to file a renewed summary judgment motion (*id*, NYSEF Doc. 149). In its reply, this court explained that it prefers to hold pre-motion conferences before motions are filed and offered to conduct a phone conference (*id*). Drezin's counsel replied to the court and noted the approaching 120-day motion deadline, informed the court it would be e-filing a pre-motion telephone conference letter, and advised the court that he would propose several dates and times for the telephone conference (*id*). The court replied "ok" (*id*). Drezin's counsel did not request the court extend the 120-day motion deadline nor did he request confirmation that motion deadline was tolled.

Med. Ctr., 64 NY2d 851, 853 [1985]). If the movant fails to make this showing, the motion must be denied (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Subsequently, the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (*Zuckerman v New York*, 49 NY2d 557, [1980]; *People ex rel. Spitzer v Grasso*, 50 AD3d 535 [1st Dept 2008)]).

Conversion includes the use of funds designated for a particular purpose for an unauthorized purpose (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]; *135 Bowery LLC v Beach Channel Shoppers Mart Co., LLC*, 159 AD3d 457 [1st Dept 2018]). The elements aiding and abetting conversion are: (1) existence of an underlying conversion, (2) the aider and abettor's knowledge of this conversion, and (3) the aider and abettor rendered substantial assistance to the primary tortfeasor, that aided the achievement of the underlying conversion (*Duran v Bautista*, 47 Misc 3d 1207(A) [NY Sup 2015]; *Dangerfield v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2006 WL 335357, at *5 [SDNY Feb. 15, 2006]). Thus, the viability of Ferone's aiding and abetting conversion claim against Drezin hinges upon her eventual showing that Sayles converted the monies that Ferone seeks to recover (*Dickinson v Igoni*, 76 AD3d 943, 945 [2d Dept 2010]; *Brown v Mohammed*, 31 Misc 3d 1225(A) [Sup Ct 2011]).

The Appellate Division First Department determined that Ferone sufficiently pled her claim for aiding and abetting conversion (*Sayles*, 137 AD3d 486). Although a plaintiff's burden to defeat a defendant's motion for summary judgment is more exacting than that to overcome a motion to dismiss, Ferone demonstrates the existence of triable issues of fact. The record establishes Drezin, as a signatory to the Settlement Agreement, understood Sayles' obligation to distribute forty percent of the sale proceeds to Ferone. Drezin was aware that Sayles and Ferone's had a contentious relationship as he had represented Sayles in the Adverse Possession Action. Despite this knowledge, Drezin affirms that he did not contact Ferone to disclose the

pending sale of Lot 19 because, under the Settlement Agreement, Drezin was not required to provide such notice (Drezin Affidavit ¶ 12). Ferone rejects this argument distinguishing Drezin's disclosure obligations from the knowledge and assistance elements of aiding and abetting conversion (Reda Affirmation NYSEF Doc. 150 ¶ 8, 19-20). The parties do not dispute that Drezin did not notify Ferone of the pending sale. Drezin's exclusive transfer of the Sale Proceeds to Sayles provided Sayles with the opportunity allegedly to exercise improper dominion over Ferone's funds and complete the alleged conversion.

On the one hand, Drezin argues that Ferone cannot maintain her aiding and abetting conversion claim against him because Drezin cannot be held liable for his client's failure to comply with the Settlement Agreement (Drezin Memo of Law, p. 8). On the other, Drezin argues that the Sayles representations to pay Ferone per the terms of the Settlement Agreement shields him from liability, because Drezin did not know Ferone would not receive her share of the Sale Proceeds (*id*, p. 10). Drezin supports this motion by attesting that he took time to confirm that Sayles would adequately distribute Sale Proceeds per the terms of the Settlement Agreement, yet he fails to argue that he exercised the same care to ensure Ferone waived her right of first refusal under the Settlement Agreement (Drezin Affidavit ¶ 16, 18). Drezin cannot have it both ways. This inconsistency is an example of the outstanding issues of facts and credibility concerns that preclude summary judgment in favor of Drezin.

Ultimately, the viability of Ferone's aiding and abetting conversion claim stands or falls with the underlying tort (*Dickinson*, 76 AD3d at 945). If Ferone's claim for conversion against Sayles falls, then so too will Ferone's aiding and abetting conversion claim against Drezin. Here, it is undisputed that Drezin was aware of the Settlement Agreement and directly negotiated its strict distribution terms (*Bankers Tr. Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 [1st Dept 1992]). Further, the parties do not dispute that Ferone did not receive her

forty percent allotment under the Settlement Agreement after Drezin wired all the Sale Proceeds and Sayles failed to disperse funds to Ferone. There are triable issues of fact as to whether Drezin's actions and failure to apprise Ferone of Lot 19's pending sale contributed to Ferone's damages (*Swift Funding, LLC v Isacc*, 144 AD3d 471, 472 [1st Dept 2016]; *Bankers Tr. Co.*, 187 AD2d 384, 385). Therefore, summary judgment is inappropriate because the evidence Drezin proffers (including Exhibit Q) is inadequate to resolve the issues of fact concerning the "nexus between the aider and abettor and the [alleged] primary… tortious act" (*id*; *Natl. Westminster Bank USA v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]).

Moreover, notwithstanding the aforementioned issues of fact, this motion is meritless because Drezin's fails to supply sufficient new evidence in support of this second summary judgment motion. "As a general rule, multiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause" (*Alam v Uddin*, 160 AD3d 915, 917 [2d Dept 2018]). A court should deny a party's second summary judgment motion if the moving party could have raised all the underlying arguments on the prior motion (*Courthouse Corp. Ctr., LLC v Schulman*, 89 AD3d 672 [2d Dept 2011]).

Here, sixteen of seventeen exhibits annexed to this motion Drezin presented to support his first motion for summary judgment. The court denied that motion (NYSEF Doc. 117). Moreover, this motion relies on the very same affidavits, depositions, affirmations (excluding NYSEF Doc. 125), and transcripts Drezin supplied in connection with his first summary judgment motion. Attorney Cohen's affirmation fails to present any argument that demonstrates the new Exhibit Q supports the merits of Drezin's second summary judgment motion (NYSEF Doc. 125; *see 535-545 Fee, LLC v Evrotas Enterprises, Inc.*, 2018 WL 575474, at *2 [Sup Ct, New York County 2018]). Exhibit Q merely confirms a previously established undisputed fact–

Drezin's client never remitted funds to Ferone per the Settlement Agreement. Therefore, the court denies Drezin's second summary judgment motion because this motion relies on all underlying arguments from Drezin's first summary judgment motion (*Courthouse Corp. Ctr., LLC*, 89 AD3d 672).

Accordingly, it is

ORDERED that the court denies third-party defendant Drezin's motion for summary judgment.

Dated: New York, New York

October 2, 2018

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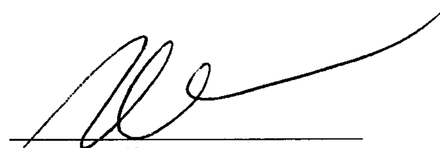

Hon. Melissa Crane

HON. MELISSA A. CRANE
J.S.C.