

**10415 Commerce, LLC v BBC Dev., LLC**

2018 NY Slip Op 33664(U)

April 12, 2018

Supreme Court, Saratoga County

Docket Number: 20171873

Judge: Thomas D. Nolan

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STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

10415 COMMERCE, LLC,

Plaintiff,

-against-

**DECISION AND ORDER**

**RJI No. 45-1-2017-1291**

**Index No. 20171873**

BBC DEVELOPMENT, LLC, HRATCHIA BARDAKJIAN,  
NAYERI BARDAKJIAN, RAFFI BARDAKJIAN and  
GEORGE MEKHJIAN,

Defendant.

**PRESENT: HON. THOMAS D. NOLAN, JR.**  
**Supreme Court Justice**

APPEARANCES: GIRVIN & FERLAZZO, P.C.  
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In this action commenced on July 7, 2017 between real estate development investors, plaintiff, a California limited liability company, sues defendant BBC Development, LLC (BBC), a New York limited liability company and its alleged three members, Hratchia Bardakjian (Hratchia), the organizer and managing member, and his siblings, Nayeri Bardakjian (Nayeri) and Raffi Bardakjian (Raffi), and a nonmember, Hratchia's brother-in-law, George Mekhjian (George).

This is the third lawsuit involving some of these parties over which this court has

presided.<sup>1</sup>

In its complaint, plaintiff seeks a declaratory judgment determining the ownership rights and interests of the three Bardakjian defendants in BBC and for judgment setting aside certain conveyances of real property made by BBC and the transfer of the ownership interest of Hratchia in BBC to his siblings based on Debtor and Creditor Law § § 273, 276 and 276-a as fraudulent and without fair consideration and otherwise seeks judgment restraining defendants from further liquidating or disposing of BBC's assets.

Defendants, pre-answer, move for an order pursuant to CPLR 3211 (a) (5) dismissing the complaint on allegations that the plaintiff's three causes of action are barred by the statute of limitations in that this action was not commenced within six (6) years of the challenged property and ownership transfers and, alternatively, on the contention that the prosecution of plaintiff's claims are barred by the doctrines of res judicata and claim preclusion. Defendants' motion is supported by the verified complaint and copies of several documents, including the complaint and dismissal order in the action of Yegiyants v Bardakjian (index No. 20094721) and documents from defendant Hratchia's bankruptcy proceeding in California and certain of BBC's corporate records.

In opposition, plaintiff submits the affidavit of Arman Yegiyants and copies of other documents from defendant Hratchia's bankruptcy proceeding, a copy of decisions and awards

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<sup>1</sup>Bardakjian v Yegiyants, Sup Ct, Saratoga County, index No. 20132756. This action seeking damages for malicious prosecution was dismissed in 2017 for plaintiff's failure to comply with discovery scheduling orders. Yegiyants v Bardakjian, Sup Ct, Saratoga County, index No. 20094721. This action seeking damages for fraud and deceit and for breach of contract arising out of the activities of BBC Development, LLC was dismissed in 2013 when plaintiff failed to oppose defendants' summary judgment motion.

issued in an arbitration proceeding between the plaintiff and Hratchia concerning California real estate dealings (Exhibit B to Verified Complaint) and a copy of pleadings and affidavits submitted in the concluded New York litigations referenced in Footnote 1.

### **Background**

To place this dismissal motion in context, a brief review of the parties' business dealings is set forth. In 2004, Arman Yegiyants (Arman) and defendant Hratchia formed plaintiff, each owning 50%, to invest in and develop real estate in California. According to plaintiff's complaint, in 2008 Hratchia allegedly breached his fiduciary duty to plaintiff by transferring to himself two of the plaintiff's properties, namely 703 East Angelino and 707 East Angelino, Burbank, California, allegedly worth \$3.2 million, and also by appropriating \$235,000.00 in cash. Again, Hratchia also allegedly formed, owned, and managed defendant BBC, a real estate venture, with his siblings, Nayeri and Raffi, which acquired between 2001 and 2006 four properties in the Capital District region of New York State. Plaintiff alleges that in 2006 it loaned \$602,900.00 to BBC and alleges that prior to 2008 Arman loaned an additional \$123,453.00 to BBC.

In 2008, plaintiff and Arman, after learning of Hratchia's alleged transfer and defalcation of plaintiff's assets, commenced litigation in California over such conduct which resulted in an arbitration award on April 26, 2016 which confirmed Hratchia's defalcations and fraud by "clear and convincing evidence" and which resulted in a judgment in June 2017 in plaintiff's favor directing that Hratchia convey title to the two Burbank properties back to plaintiff and awarding to plaintiff punitive damages of \$250,000.00 and attorneys' fees and costs of \$277,762.00 to be paid by Hratchia.

In 2009, apparently after plaintiff and Arman learned of Hratchia's transfers of plaintiff's assets, BBC then, allegedly to frustrate plaintiff's and Arman's future ability to collect any future judgment they might obtain against Hratchia, transferred properties it owned, including one parcel to defendant George. And, as well, in 2009, Hratchia allegedly took steps to surrender both his ownership interest and capital account in BBC to his siblings.

In 2009, Arman commenced an action (Index No. 20094721) in New York against Hratchia, George, Nayeri, and BBC in which he alleged that he was a 50% member and owner of BBC and that BBC and Hratchia transferred, without authority and without fair consideration, a property it owned to George and further sought an accounting of BBC's activities from 2003 to 2008 and sought to recover the loans made to BBC by Arman and plaintiff. As noted in footnote 1, that action was dismissed in 2013 when plaintiff Arman failed to oppose defendants' Hratchia Bardakjian, George Mekhjian, Nayeri Bardakjian, and BBC Development, LLC summary judgment motion. The motion was based on the defendants' contention that Arman had no equity interest in BBC. The order specified that the dismissal was "with prejudice" and that determination established that Arman was not a partner in the New York venture.

The California lawsuits and arbitration proceeding between plaintiff, Arman, and Hratchia were delayed for extended periods and stayed as the result of Hratchia's bankruptcy filing.<sup>2</sup> In the bankruptcy proceeding as detailed in an order filed November 3, 2016, the court stated (page 31) that Hratchia and his sibling Nayeri in October 2016 made sworn declarations in that proceeding to the effect that Hratchia as of August 2009, "no longer had any interest in

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<sup>2</sup>In re: Hratchia K. Bardakjian (Case No. 2:15 bk 16559 sk, U.S. Bankruptcy Ct, Cent. Distr of Calif, Los Angeles Division, Klein, J.)

[BBC]”, which statements conflicted with representations Hratchia made to a New York court in March 2013 stating the opposite, namely that he still held a membership interest in BBC and had signed documents as a “member” of BBC. The Bankruptcy Court then concluded (at page 32) of its order filed November 3, 2016:

These irreconcilable inconsistencies regarding Hratchia’s ownership interest in BBCD lead the Court to conclude that Hratchia chose to claim an interest in BBCD when it served his purpose - in the New York litigation and in the Commerce Case - but not when it would harm his interest - in this [Bankruptcy] Case. Therefore, after weighing the evidence, the Court concludes that Hratchia misrepresented to the [Bankruptcy] Court the true facts regarding his interest in BBCD and he improperly failed to disclose his interest in BBCD on his bankruptcy schedules.

Again, in this complaint, plaintiff alleges that in 2009 after the California litigations over Hratchia’s alleged fraudulent transfers of plaintiff’s assets had been initiated or were expected to be initiated, all defendants in this action collectively engaged in a purposeful plan and scheme to divest Hratchia of all apparent interest in BBC in an effort to render Hratchia insolvent and for BBC to divest itself of valuable assets. Plaintiff contends that, contrary to documents allegedly created in 2009 showing Hratchia conveyed all interest in BBC to his siblings, Hratchia signed a proof of claim filed February 19, 2013 in his Bankruptcy proceeding that he was then still a member of defendant BBC. Again, the complaint further contends that BBC in 2009 transferred a property to defendant Mekhjian for \$637,000.00 and that there is no proof that BBC ever received in exchange any funds from Mekhjian.

Now, the general principles on defendants’ motion. As defendants recognize, the court must give plaintiffs’ complaint a liberal construction, accept its allegations as true, and afford the plaintiffs every possible favorable inference. Chanko v American Broadcasting Cos., Inc., 27

NY3d 46,52 (2016). And, “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a CPLR 3211 motion to dismiss”. EBI v Goldman Sachs & Co., 5 NY3d 11, 19 (2005). To justify dismissal at this stage on the grounds alleged, the evidence relied upon must conclusively establish a complete defense. Beal Savings Bank v Sommer, 8 NY3d 318, 324 (2007).

Once again, in their motion, defendants first contend the action has been commenced too late - more than six years after the complained about transfers occurred in 2009. Alternatively, defendants contend that the action is barred the doctrines res judicata and claim preclusion stemming from this court’s dismissal of Arman Yegiyants’s 2009 (Index No. 20094721) action. Defendants argue that plaintiff should be considered in privity with Arman and thus plaintiff is barred from again raising issues related to BBC’s ownership and transfers of assets.

First, the statute of limitations issue. Defendants’ motion is based on the assertion that plaintiff’s first cause of action seeking a declaratory judgment accrued at the latest, in August 2009 when Hratchia’s ownership interest in BBC was allegedly transferred to his siblings and when a property in Menands, New York was conveyed to defendant George and also that plaintiff’s fraud causes of action, under the discovery rule, accrued at the latest in April 2015 when Hratchia, in his bankruptcy filing, failed to include a membership or ownership interest in BBC on his asset list.

In opposition, plaintiff agrees that a six year limitations period applies to all three of its causes of action if the corporate resolution providing for transfer of Hratchia’s ownership interest and capital account dated August 21, 2009 is determined by the court to be an authentic and valid document but argues that, at minimum, a triable issue exists over the authenticity of that

resolution and points out the resolution was not disclosed to plaintiff until 2016 and that Hratchia made conflicting sworn statements concerning his ownership interest in BBC in his bankruptcy proceeding and in the concluded litigation before this court, statements, as noted above, which led the Bankruptcy Court to conclude that Hratchia held an interest in BBC in 2016.<sup>3</sup>

“Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from ‘inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding or in a prior proceeding.’” Clifton Country Road Assoc. v Vinciguerra, 252 AD2d 792, 793 (3<sup>rd</sup> Dept 1998) (citations omitted). The purpose of the doctrine is to protect the integrity of the judicial process and to prevent abuse when “a party obtains relief by maintaining one position, and later, in a different action maintaining a contrary position” (citation omitted). This policy would not be served by limiting its application to cases where the legal position at issue was ruled upon in the context of a judgment”. D&L Holdings, LLC v RCG Goldman Co., 287 AD2D 65, 71-72 (1<sup>st</sup> Dept 2001). In short, a party may not take a position different from a position that was earlier advanced even if its interests have changed in the meantime. Green Harbour Homeowners’ Assn. v Ermiger, 128 AD3d 1142 (3<sup>rd</sup> Dept 2015).

Here, the Bankruptcy Court in its 2016 order rejected Hratchia’s claim that he divested his interest in BBC in 2009 and determined that he still retained in 2016 an interest in BBC. That decision controls because Hratchia is estopped from now advocating a position that he transferred all interest in BBC in 2009. Thus, defendants’ argument that plaintiff’s causes of action are time-barred lacks merit and dismissal on that ground is not warranted.

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<sup>3</sup>In Yegiyants v Bardakjian, Sup Ct, Saratoga County, index No. 20094721, plaintiff Yegiyants contended that he held a 50% ownership interest in BBC.



Turning to the defendants' second ground for dismissal, *res judicata* and claim preclusion, sometimes also called collateral estoppel. An issue or claim raised and decided against a party in an earlier action cannot be raised or re-litigated in a later action by that party or a party deemed to be in privity with the party. Buechel v Bain, 97 NY2d 295, 303 (2001). To prevail on its motion, defendants must demonstrate that a decisive issue in this action was decided in a prior action against the plaintiff or someone in privity with the plaintiff and if that is established, the party sought to be precluded, here the plaintiff, to avoid the preclusive effect of the decision, must demonstrate that it or the party in privity with it did not have a full and fair opportunity to contest the prior determination. Buechel v Bain, *supra*.


Again, this court presided over the prior action in which Arman contended he was a 50% owner of BBC and sought certain relief based on that contention. Arman's action was dismissed with prejudice. Now plaintiff, a business entity in which Arman and Hratchia, concededly are 50% owners and which is now a significant judgment creditor of Hratchia's, seeks to set aside certain transactions of BBC as fraudulent as part of its effort to collect its judgment. To succeed, plaintiff must establish that Hratchia has retained an ownership interest in BBC in addition to establishing that BBC transferred assets fraudulently and/or for less than fair consideration. The first element is established since defendant Hratchia is estopped by the Bankruptcy Court ruling from denying that he has an ownership interest in BBC. The issue of whether BBC transferred assets fraudulently or without fair consideration, however, was never decided in the earlier New York litigation. Thus, regardless of whether Arman can be considered in privity with plaintiff, plaintiff is not collaterally estopped from litigating the issues of fair consideration or that otherwise fraudulent transfers were made in this action.


Defendants' pre-answer motion to dismiss plaintiff's complaint is denied, without costs.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for plaintiff. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiff is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: April 12, 2018  
Saratoga Springs, New York

ENTERED  
Craig A. Hayner  
  
Saratoga County Clerk

  
HON. THOMAS D. NOLAN  
Supreme Court Justice  
SARATOGA COUNTY  
CLERK'S OFFICE  
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ENTERED