Feldman v Harari
2019 NY Slip Op 33853(U)
December 6, 2019
Supreme Court, Queens County
Docket Number: 704671/19
Judge: Leonard Livote
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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE LEONARD LIVOTE IA Part 33
Acting Supreme Court Justice

Application of Alon Feldman,

for the judicial dissolution of Harari Realty Corp., a New York Corporation pursuant to Section 1104-A of the Business Corporation Law

- vs -

Yair Harari, the other holder of shares representing fifty one percent of the votes of all outstanding shares of Harari Realty Corp. Entitled to vote in an election of directors
Respondents

Index Number 704671/19

Motion Date 8/13/19

Motion Seq. No. 1

FILED
DEC 19 2019
COUNTY CLERK
QUEENS COUNTY

The following papers EF numbered below read on this motion by respondent Yair Harari for, inter alia, an order pursuant to CPLR 3211(a)(4) dismissing the petition for the judicial dissolution of Harari Realty Corp.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	9-36
Answering Affidavits - Exhibits	38-64
Reply Affidavits	65-72

Upon the foregoing papers it is ordered that the motion is denied without prejudice to renewal.

I. Background

Petitioner Alon Feldman (Alon Feldman or Feldman) owns 98 shares of common stock in Harari Realty Corp, (the subject corporation), which amounts to a 49% ownership interest, and respondent Yair Harari (Harari) owns 102 shares of common stock, which amounts to a 51% ownership interest in the company. Harari Realty Corp. owns real property known as 417 15th Street, Brooklyn, New York which has been improved by an apartment building.

On or about January 4, 2013, Asaf Feldman (a non-party to the instant special proceeding) began an action in the New York State Supreme Court, County of Kings against Harari Realty Corp. and Yair Harari (*Feldman v. Harari Realty Corp*, Kings County Index No. 500055/13). The complaint asserted five causes of action, the first, for the imposition of a constructive trust, the second for an accounting of the gross rents and profits generated by the property and a judgment for sums found to be due, the third, for a judgment against the defendants, the fourth for a permanent injunction against the defendants prohibiting, inter alia, the sale of the property, and the fifth, for a judgment against the defendants. The Kings County action concerned a joint venture or partnership agreement relating to the subject corporation between Asaf Feldman and Yair Harari. The complaint alleged that notwithstanding their fiduciary relationship as joint venturers, the corporation and Harari refinanced the property owned by the corporation for $1,700,000 without Asaf Feldman's consent, and he did not receive any of the cash proceeds from the refinancing. Moreover, the defendants allegedly refused to account to Asaf Feldman for his share of the rents and profits, and the defendants allegedly did not pay Asaf Feldman his 50% share of the rents and profits. The defendants allegedly had also wrongfully began an eviction proceeding against Asaf Feldman who allegedly had a right to occupy an apartment in the building owned by the subject corporation.

On or about April 23, 2015, Asaf Feldman and Yair Harari entered into a stipulation of settlement, and they contemporaneously entered into an amended shareholders agreement. Pursuant to the agreement, in or about November , 2015, the former transferred his shares to petitioner Alon Feldman, who now has a 49% interest in the subject corporation.

In 2017, Alon Feldman began an action in the New York State Supreme Court, County of Kings against Yair Harari and Harari Realty Corp. (*Feldman v. Harari*, Kings County Index No. 512023/17). The defendants moved to dismiss the lawsuit, and by a decision and order dated September 5, 2017, the Honorable Leon Ruchelsman granted the motion. The court stated: " This lawsuit was commenced wherein it is alleged that the defendants breached their fiduciary duty and committed fraud and consequently the plaintiff seeks dissolution of the corporation. *** The primary basis upon which the motion to dismiss is based is the settlement agreement. The settlement agreement states that 'the court will ask [sic] to retain jurisdiction over the action for the sole purpose of enforcing the parties settlement agreement.' *** Thus, without examining any of the substantive issues, plaintiff has failed to present any evidence why a new action was commenced. Therefore, this is an improper forum upon which to explore these issues." In effect, Judge Ruschelman dismissed the action before him, which included a cause of action for the dissolution of the subject corporation, on the ground that the 2013 action was another action pending.

On or about July 23, 2018, Alon Feldman began another action in the New York State Supreme Court, County of Kings against Yair Harari, individually and derivatively (*Feldman v. Harari*, Kings County Index No. 524995/2018). According to the complaint's preliminary statement: " This action revolves around Yair Harari in conjuction with defendants Edwin Torres and Liberty Management mis-managing the assets and income of Harari Realty Corp, in among other ways attempting to create illegal units and illegal construction practices." Feldman alleged that, inter alia, (1) the defendants had constructed an illegal apartment in the basement of the building, causing dangerous conditions to develop and violations to accrue, (2) Harari failed to repair or replace parts of the front facade that were in a dangerous condition, (3) Harari had used assets of the corporation to pay for his personal attorney, and (4) Harari had taken out mortgages in the past without shareholder consent and was threatening to again do so in the future. In addition to causes of action seeking damages, the complaint's sixth cause of action sought the dissolution of the corporation pursuant to section 702 of the LLC Law [sic]. However, the defendants moved to dismiss the action, and by a decision and order dated December 10, 2018, the Honorable Leon Ruschelman dismissed the complaint. While Feldman argued that the 2018 action did not "specifically concern the settlement agreement," Harari argued that the 2018 action was "essentially the identical lawsuit [the 2017 action] the court has already determined could [sic: should] not have been commenced." Judge Ruschelman agreed with Harari. In effect, he again determined that Feldman could not bring an action for the dissolution of the subject corporation because the 2013 action was a prior action pending.

On March 18, 2019, petitioner Alon Feldman began the instant special proceeding for the dissolution of Harari Realty Corp. pursuant to Business Corporation Law §§1104-a. and 1111.The amended verified petition alleges that, inter alia, (1) there is a deadlock between Feldman and Harari, (2) Harari is diverting assets of the corporation, (3) Harari and the corporation constructed an illegal apartment in the basement of the subject property which created a dangerous condition and caused violations to accrue, (4) Harari has failed to disclose information to Feldman and has not permitted him to examine corporate books and records, (5) Feldman has not been paid according to the terms of the shareholders agreement, (6) Harari has failed to replace parts of the front facade which is in a dangerous condition, and (7) Harari has threatened to encumber the property with mortgages without Harari's consent.

In or about August, 2019, after the instant special proceeding was begun, Asaf Feldman or Alon Feldman made a motion in the 2013 Brooklyn action. In an order dated August 7, 2019, the Honorable Sylvia Ash determined: " Movant's application to add Alon Feldman individually and as a shareholder of Harari Realty Corp. to the caption is granted...All other requests for relief by both parties are denied."

The respondents submitted the instant motion on August 13, 2019

II. Discussion

A. Another Action Pending

A court may dismiss an action pursuant to CPLR 3211(a)(4) where (1) there is a "substantial identity of the parties" (*Nakazawa v. Horowitz*, 50 AD3d 985, 986, [2nd Dept. 2008]; *Montalvo v. Air Dock Systems*, 37 AD3d 567[2nd Dept 2007]), (2) the two actions are "sufficiently similar" (*Aurora Loan Servs., LLC v. Reid*, 132 AD3d 788, 788, [2nd Dept . 2015);*Montalvo v. Air Dock Systems, supra*; and (3) the relief sought is "the same or substantially the same." (*Aurora Loan Servs., LLC v. Reid, supra,788; Montalvo v. Air Dock Systems, supra.)* "The critical element is that both suits arise out of the same subject matter or series of alleged wrongs" (*Cherico, Cherico & Assoc. v. Midollo*,67 AD3d 622, 622, [2nd Dept 2009];[internal quotation marks omitted]; *Aurora Loan Servs., LLC v. Reid, supra.*)

The papers submitted by the parties on August 13, 2019 do not permit this court to make an informed determination about whether the 2013 action is a prior pending action within the scope of CPLR 3211(a)(4). The papers do not explain to the court why Alon Feldman was added as a party to the 2013 Brooklyn action pursuant to the order dated August 7, 2019, what allegations he has made or will make , and what relief he has sought or will seek. The papers do not inform the court, for example, whether Alon Feldman was added merely as the successor party in interest (*see*, CPLR 1018) to the joint venture / partnership agreement or whether he was added for a different purpose, such as the assertion of a cause of action for the dissolution of the subject corporation. The papers do not inform the court about what occurred at the court conference scheduled for September 24, 2019. Moreover, the respondents raised the August 7, 2019 order of Judge Ash for the first time in reply papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Dannasch v. Bifulco*, 184 AD2d 415, 417, [1st Dept.1992]; *Harleysville Ins. Co. v. Rosario*, 17 AD3d 677 [2nd Dept 2005].)The August 7, 2019 order of the Brooklyn court amounts to a new ground for making the instant motion, and, consequently , the petitioner did not have an opportunity to address Judge Ash's order.

Because of the recent developments in the 2013 action, this branch of the motion will be denied without prejudice to renewal.

B. Res Judicata and Collateral Estoppel

Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding ***." (*Sterngass v. Soffer*, 27 AD3d 549, 549-550 [2nd Dept 2006]; *Sandhu v. Mercy Med. Ctr.*, 54 AD3d 928 [2nd Dept. 2008].) Under the transactional approach to the doctrine of res judicatata ," once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." (*O'Brien v. City of Syracuse*, 54 NY2d 353, 357[1981]; *Sandhu v. Mercy Med. Ctr., supra.*) The determination of what "factual grouping" amounts to a "transaction" or "series of transactions" for res judicata purposes depends on such factors as the relation of the facts in time, space, and origin. (*See*, *Smith v. Russell Sage College,* 54 NY2d 185 [1981]; *Manko v. Gabay*, 175 AD3d 484 [2nd Dept 2019].) The causes of action relating to the breach of the shareholder's agreement, the subject of the 2013 action, presented different parties, facts, issues, and demands for relief than those presented in the instant special proceeding for the dissolution of the subject corporation. This special proceeding is not barred by the doctrine of res judicata.

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same ***." (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 500 [1984]; *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343 [1999]; *Altegra Credit Co. v. Tin Chu*, 29 AD3d 718 [29 AD3d 718 [2nd Dept., 2006].) The respondents argue that the prior orders of Judge Ruschelman have a collateral estoppel effect on the issue of whether the instant action is barred because of another action pending. This court will not grapple with the collateral estoppel problem at the present time, but will wait until further information is provided concerning the events transpiring in the 2013 action. Indeed, the issue may have been mooted. This branch of the motion will also be denied without prejudice to renewal.

Dated: December 6, 2019

A.J.S.C.

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