

Shilon v New Upreal LLC
2021 NY Slip Op 30146(U)
January 11, 2021
Supreme Court, Kings County
Docket Number: 522522/2019
Judge: Peter P. Sweeney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 522522/2019
Motion Date: 12-7-20
Mot. Seq. No.: 3-4

-----X
JOSEPH SHILON also known as YOSSHI SHILON,

Plaintiff,

-against-

DECISION/ORDER

NEW UPREAL LLC, 154 LENOX LLC.
and BOAZ GILAD,

Defendants.

-----X

Upon the following e-filed documents, listed by NYSCEF as item numbers 30-35, 36, 38, 41-44, the motions are decided as follows:

The Proposed Intervenor-Plaintiff, Guy Gissin (“Gissin”), in his capacity as Claims Trustee ("Claims Trustee") for holders of various bonds (the "Bondholders") or other debt instruments issued by Brookland Upreal Limited, moves by Order to Show Cause for leave to intervene in the action pursuant to CPLR §§ 1012 and 1013 and to file the proposed Intervenor Complaint Instanter that was filed along with his application (**Motion Seq. No. 3**). By separate notice of motion, plaintiff JOSEPH SHILON also known as YOSSHI SHILON, moves to enter a default judgment against defendant BOAZ GILAD for failing to timely appear in the action (**Motion Seq. No. 4**). Both motions are consolidated for disposition.

Background:

Plaintiff commenced this action alleging, *inter alia*, that the defendants NEW UPREAL LLC (“New Upreal”), 154 LENOX LLC (“154 Lenox”) and BOAZ GILAD (“Gilad”) defaulted on a Promissory Note/Restatement Agreement/Guaranty (“the Restatement Agreement”). Plaintiff alleges that prior to execution of the agreement, plaintiff made certain “advances” for the benefit of New Upreal and 154 Lenox and that on or about September 1, 2018, “New Upreal and 154 Lenox entered into the Restatement Agreement to “record” these advances. Pursuant to the Restatement Agreement, New Upreal promised to pay to the plaintiff the principal sum of \$4,414,441.00 and 154 Lenox and Gilad agreed to guarantee New Upreal’s obligations under the

agreement (Verified Complaint, ¶ 9). Plaintiff alleges that the defendants are in default under the Restatement Agreement and seek judgment for the amount allegedly owed.

In their answer, NEW UPREAL LLC and 154 LENOX, the only defendants that have appeared in the action, denied all of the material allegations in the complaint and raised various affirmative defenses to the effect that the Agreement was a sham. They alleged that “Plaintiff’s claims are barred because of “Unclean Hands” or because Plaintiff is in pari delicto”, that “Plaintiff’s claim is barred because the loan was procured, administered and managed by deceptive and fraudulent practices under state and federal law, including, “predatory lending”, and that “Plaintiff’s actions are barred because it did not lend Defendants any funds.”

The Proposed Intervenor:

Gissin is the “Claims Trustee” pursuant to a Deed of Trust issued by Brookland Upreal Limited (“Brookland”) and pursuant to a certain court order issued by the District Court of Tel Aviv- Yafo, Israel on May 28, 2019 and is allegedly authorized to file claims and manage legal proceedings on behalf of the various holders of Brookland bonds. He alleges that during 2014 and 2015, Brookland issued bonds in the aggregate principal amount of NIS 247 Million to the Bondholders pursuant to two Deeds of Trust, one dated May 26, 2014 and another dated November 29, and that the aggregate principal amount of the Bonds pursuant to the Company’s last financial reports published (for the second quarter of 2018) was approximately NIS 150 Million. He alleges that Brookland, through a number of holding companies, invested the proceeds of Brookland bonds in various real estate development projects in and around Brooklyn, New York, including some of which are owned by defendant New Upreal.

Gissin alleges that defendant New Upreal engaged in certain misconduct including, using the bond proceeds to prefer certain investors and creditors over the interests of New Upreal’s other creditor and diverting assets that should have been repaid to Bondholders to other parties not entitled to such assets. Gissin further alleges that New Upreal signed the Agreement for the benefit of Yossi Shilon, without any consideration to New Upreal for a fictitious loan which was never granted to it. He maintains that he intends to prove that New Upreal and Lenox were insolvent at the time the Restatement Agreement was executed, or were rendered insolvent thereby, and that each received no value at all in exchange. In sum and substance, Gissin contends that the execution of the Restatement Agreement was a sham and that the parties to the

Agreement are attempting to divert assets to the plaintiff which the bondholders would otherwise be entitled to.

Pursuant CPLR § 1013¹, the court, in its discretion, may permit a person to intervene “when the person's claim or defense and the main action have a common question of law or fact” (CPLR 1013; *see Roman Catholic Diocese of Brooklyn, N.Y. v. Christ the King Regional High Sch.*, 164 A.D.3d 1394, 1396, 84 N.Y.S.3d 182; *Trent v. Jackson*, 129 A.D.3d 1062, 11 N.Y.S.3d 682). Where there are common questions of law and fact and intervention will not unduly delay the action or prejudice a substantial right of any party, intervention should be allowed (*Teichman by Teichman v. Community Hosp. of Western Suffolk*, 87 N.Y.2d 514, 522, 640 N.Y.S.2d 472, 663 N.E.2d 628). “Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted ‘where the intervenor has a real and substantial interest in the outcome of the proceedings’ ” (*Global Team Vernon, LLC v. Vernon Realty Holding, LLC*, 93 A.D.3d at 820, 941 N.Y.S.2d 631, quoting *Wells Fargo Bank, N.A. v. McLean*, 70 A.D.3d 676, 677, 894 N.Y.S.2d 487; *see Berkoski v. Board of Trustees of Inc. Vil. of Southampton*, 67 A.D.3d 840, 843, 889 N.Y.S.2d 623; *Perl v. Aspromonte Realty Corp.*, 143 A.D.2d 824, 825, 533 N.Y.S.2d 147).

Here, the answering defendants and Gissin both claim that the Restatement Agreement is a sham. The main action and the proposed Intervenor Complaint Instanter therefore present common questions of law and fact. Since there has been no discovery in the main action, allowing Gissin to intervene in the action will not delay the action or prejudice a substantial right of any party. The Court notes that plaintiff, the only party that objects to the intervention, is not claiming that Gissin’s application to intervene is untimely. Most importantly, Gissin has

¹ CPLR § 1013 provides that:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

substantial interest in the outcome of the main action. If prevails on his claim that the Restatement Agreement was a sham and unenforceable, defendants' assets would remain available to pay New Real's obligations to the Bondholders and would not be fraudulently diverted to the plaintiff.

Turning to plaintiff's motion for order pursuant to CPLR § 3215 granting plaintiff a default judgment against defendant Boaz Gilad due to his failure to appear in the action, the motion is granted without opposition to the extent that an inquest on the issue of damages against the defaulting defendant will be held at the time of trial.

Accordingly, it is hereby

ORDRED that the motion of Gissin to intervene is **GRANTED** and the proposed Intervenor Complaint Instanter filed along with his application will be deemed filed and served as of the date of entry of this order; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant Boaz Gilad is **GRANTED** without opposition to the extent that an inquest on the issue of damages against the defaulting defendant will be held at the time of trial.

This constitutes the decision and order of the Court.

Dated: January 11, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020