

Canino v Sterling Natl. Bank

2007 NY Slip Op 30644(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0603887/2005

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

James Casino

INDEX NO.

603887/05

MOTION DATE

- v -

MOTION SEQ. NO.

002

Steering National Bank

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is determined in accordance with the annexed decision and order.

FILED

APR 10 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 4, 2007

April 4, 2007

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

JAMES CANINO,

Plaintiff,

-against-

INDEX NO. 603887/05

STERLING NATIONAL BANK, JOHN GALLO
and ARUN PATEL,

Defendants.

-----X

STERLING NATIONAL BANK, JOHN GALLO
and ARUN PATEL

Third-Party Plaintiffs,

-against-

MARIO J. BIAGGI, JR., KEITH ALLEN ORLEAN,
PHILLIP CERVONE and M.A. FUNDING, INC.,

Third-Party Defendants.

-----X

JOAN A. MADDEN, J.:

FILED

APR 10 2007

COUNTY OF NEW YORK

In this action for damages for breach of contract, breach of fiduciary duty, fraud and negligence, third-party defendant Mario J. Biaggi, Jr. ("Biaggi") moves for an order dismissing the third-party claim for fraud on the grounds of collateral estoppel. Biaggi also moves for an order consolidating the instant action with the action entitled Sterling National Bank v. Mario J. Biaggi, Jr., Keith Allen Orlean and Phillip Cervone, Index No. 60401504, Supreme Court, New York County (hereinafter "the Sterling action").¹ Defendants/third-party plaintiffs Sterling

¹Biaggi has withdrawn that portion of his motion to dismiss the third-party complaint, which was based on a violation of CPLR 1007.

National Bank, John Gallo and Arun Patel, oppose the motion.

In the instant action, defendants interposed a third-party action which includes a Fourth Cause of Action for fraud against third-party defendants Biaggi, Cervone and Orlean. In seeking to dismiss that fraud claim, Biaggi asserts that it “duplicate[s] almost verbatim the allegations of fraud contained in plaintiff’s complaint filed in” the Sterling action, and that Sterling should “be collaterally estoppel from reasserting the same contentions of fraud in the instant lawsuit,” since the court denied Sterling’s motion to sever the fraud claim and dismissed it. In opposing dismissal of its third-party claim for fraud in this action, Sterling acknowledges that such claim is “virtually identical” to the fraud claim asserted in the Sterling action. Sterling argues, however, that the fraud claim in the instant action is not barred by collateral estoppel, since the court’s dismissal of the fraud claim in the Sterling action was not on the merits. Sterling also argues that dismissal is not warranted, since the fraud claims are identical and the court already held in the Sterling action that it was adequately pleaded.

The motion to dismiss is granted. By a decision and order dated September 28, 2006, this court awarded Sterling partial summary judgment as to the issue of liability on its breach of guaranty claims against the three named defendants, Biaggi, Orlean and Cervone. The three named defendants were also awarded summary judgment dismissing Sterling’s claim for fraud, since the fraud claim sought a money judgment against the same defendants that was identical to the money judgment sought in the breach of guaranty claims. The court concluded that “[w]here as here, Sterling’s damages are the same regardless of the theory of liability, it can only recover those damages once” and since judgment was awarded to Sterling on its guaranty claims, “the alternative theory of liability based on fraud is rendered academic, and must be dismissed.” The

court also denied as moot, Sterling's motion to sever its fraud claim for discovery.

Sterling's third-party claim for fraud in the instant action is barred under the doctrines of collateral estoppel and res judicata, as Sterling concedes that the instant fraud claim is identical to the fraud claim that was asserted and dismissed in the Sterling action. See Matter of Hunter, 4 NY3d 260 (2005); Kaufman v. Eli Lilly & Co., 65 NY2d 449 (1985). Contrary to Sterling's assertion, that dismissal was on the merits, as the court found that Sterling's breach of guaranty and fraud claims were different theories of liability seeking the same damages against the same parties, and that Sterling could only recover those damages once. Thus, since Sterling is entitled to just one recovery of those damages in connection with its breach of guaranty claims in the Sterling action, it is, therefore, precluded from asserting another concededly identical claim for fraud seeking to recover those same damages against the same parties in the instant action. See North American Van Lines, Inc. v. American International Companies, ___ AD3d ___, 2007 WL 898947 (1st Dept 2007); Dorsey v. Medical Society of the State of New York, 294 AD2d 129 (1st Dept 2002). Hence, the Fourth Cause of Action for Fraud in the third-party complaint is dismissed in its entirety with prejudice as against third-party defendants Biaggi, Cervone and Orlean.

Biaggi also moves for an order consolidating the instant action with the Sterling action. Consolidation is not warranted, as few, if any, common questions of law or fact exist between the two cases. See Cronin v. Sordoni Skanska Construction Corp., 36 AD3d 448 (1st Dept 2007). Moreover, the cases are at different stages of discovery, and consolidation would result in undue delay of the Sterling action. See Barnes v. Cathers & Dembrosky, 5 AD3d 122 (1st Dept 2004). First, in the Sterling action, since Sterling was awarded partial summary judgment on the issue of

liability as to its breach of guaranty claims and all other claims and counterclaims were dismissed, all issues as to liability have been eliminated from that case, and the sole remaining issue for trial is the amount of damages to which Sterling is entitled. Second, the plaintiff in the instant action, James Canino, is not a party in the Sterling action. Third, even though discovery has not been completed in either action, the cases are at completely different stages of discovery and consolidation would unduly delay the resolution of the Sterling Action, since discovery in that action is limited to the damages issues, and discovery in instant action encompasses issues of both liability and damages, in connection with Canino's several claims for breach of contract, breach of fiduciary duty, fraud and negligence. Thus, Biaggi's motion for consolidation is denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss the Fourth Cause of Action for Fraud in the third-party complaint is granted, and the Fourth Cause of Action for Fraud in the third-party complaint is dismissed in its entirety with prejudice as against Mario J. Biaggi, Jr., Keith Allen Orlean and Phillip Cervone, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion for consolidation is denied; and it is further

ORDERED that the parties are directed to appear for the conference previously scheduled for April 12, 2007 at noon in Part 11, Room 351, 60 Centre Street.

DATED: April 4, 2007

FILED
APR 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.