

Abead Realty v Brief Justice Carmen & Kleiman, LLP
2007 NY Slip Op 32364(U)
July 24, 2007
Supreme Court, New York County
Docket Number: 0600183/2007
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 600183/2007

ABEAD REALTY

vs

BRIEF JUSTICE CARMEN &

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

JUL 31 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/24/07


MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

ABEAD REALTY,

Plaintiff,

- against -

BRIEF JUSTICE CARMEN AND KLEIMAN, LLP
and IRA KLEIMAN, ESQ.,

Defendants.

_____ x

Index No.: 600183/07

DECISION/ORDER

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In this legal malpractice action, plaintiff Abeam Realty (Abeam) alleges, among other things, that its former attorneys, defendants Brief Justice Carmen and Kleiman, LLP and Ira Kleiman, Esq. (collectively "Kleiman"), committed malpractice by settling an action against Abeam without Abeam's authorization. Defendants move to dismiss this action, pursuant to CPLR 3211(a)(1), (5) and (7), on the ground that Abeam's claims are barred by collateral estoppel.

The underlying action (Yerushalmi v Abeam Realty Corp., Sup Ct, Bronx County, Index No.25531/04) was brought against Abeam to enforce an option to purchase real property. Abeam moved in that action to vacate the settlement on the ground that Ronit Adler, an officer of Abeam Realty, did not consent to or authorize the settlement. By decision dated March 24, 2006, the Court (Renwick, J.) denied the motion to vacate, reasoning that Ronit Adler's "behavior" at the court appearance at which the settlement was placed on the record demonstrated that "she in fact acquiesced to the parties' agreement," and that "[t]he Court finds no fraud, collusion, mistake or

accident occurred at the March 7, 2005 hearing with respect to the stipulation * * *, and the stipulation must therefore be strictly enforced.” On a motion to reargue, Abead argued, as it does in the instant action, that pursuant to Business Corporation Law § 909, the settlement could not have been authorized by Abead unless its majority shareholder, Shoshana Adler, approved the settlement.¹ By decision dated December 19, 2006, the Court (Renwick, J.) granted leave to reargue, noting that Abead had moved to reargue on the ground that “Abed [sic] did not consent to the stipulation.” The court then held:

The Court addressed this contention in the [prior] Order and relies on the reasoning stated therein. It bears mention, however, that both parties were represented by counsel who first discussed the issues at a sidebar with the Court and then with their respective clients present. As the hearing transcript reflects, following the off the record discussion at the bench, both parties agreed to the terms of the stipulation as reiterated by the Court on the record. The attorneys were given ample opportunity to clarify the terms of the stipulation * * *. The Court thus holds that the stipulation, as reflected in the hearing transcript of March 7, 2005, was made in open court and is therefore binding on the parties.

The doctrine of collateral estoppel bars the relitigation of issues that have been actually litigated and necessarily decided in a prior action. (Kaufman v Eli Lilly & Co., 65 NY2d 449 [1985].) There are two requirements governing the application of collateral estoppel: (1) “the identical issue necessarily must have been decided in the prior action and be decisive of the present action”; and (2) “the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination.” (Id. at 455. See also Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343 [1999].)

¹While Abead now claims that Ronit Adler did not have the authority to approve the settlement on behalf of the corporation, it is noted that the motion to vacate the settlement was supported by an affidavit of Ronit Adler in her capacity as an officer of Abead and as trustee under the will of Abraham Adler.

Abead's claim that it did not authorize the settlement in the underlying action was expressly raised in Abead's motion to vacate the settlement and its motion to reargue such motion, and this claim was denied on the merits by Justice Renwick's orders determining the motions. Abead's claim of malpractice in the instant action, to the extent based on the Kleiman defendants' allegedly unauthorized entry into the stipulation on Abead's behalf, is accordingly barred by the doctrine of collateral estoppel. (See, e.g., Speken v Moore, 6 AD3d 198 [1st Dept 2004], lv denied 3 NY3d 608, cert denied 544 US 948 [2005]; Choi v Dworkin, 230 AD2d 780 [2d Dept 1996], lv denied 89 NY2d 805. Compare Richter v Davidson & Cohen, P.C., 25 AD3d 595 [2d Dept 2006] [plaintiff not collaterally estopped from raising issue of whether defendant law firm had actual authority to settle his case where such issue was not identified as a subject for determination in the underlying action].)

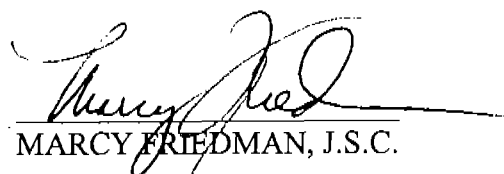
Abead's claim of malpractice is also based on defendants' failure to protect its rights in the underlying action or to pursue all remedies available to Abead in litigating the underlying action. (See Complaint, ¶ 25.) In particular, Abead complains that by entering into the stipulation, Kleiman waived valuable rights, including Abead's rights under the lease with plaintiffs in the underlying action to determine the fair market value of the property upon the exercise of plaintiffs' option. (See Adler Aff. In Opp., ¶ 20; Steinitz Aff. In Opp., ¶ 17.) In the motion in the underlying action to vacate the stipulation, Abead argued that the stipulation was the product of mistake, misunderstanding and overreaching. (Memo. Of Law In Support of Motion to Vacate at 6-8. [Ex. B to Instant Motion to Dismiss].) This argument was squarely rejected by the March 24, 2006 order of the Court denying the motion to vacate. All of the bases for plaintiff's malpractice claim are therefore barred by collateral estoppel.

The court has considered plaintiff's other arguments and finds them without merit.

It is accordingly hereby ORDERED that the motion of defendants Brief Justice Carmen and Kleiman, LLP and Ira Kleiman, Esq. is granted to the extent of dismissing the complaint in its entirety; and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 24, 2007


MARCY FRIEDMAN, J.S.C.

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