

Estate of Curcio v Gomez

2007 NY Slip Op 33193(U)

October 1, 2007

Supreme Court, New York County

Docket Number: 0603210/2006

Judge: Barbara Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Justice

ESTATE OF THERESA CURCIO

INDEX NO. 603210/09

- v -

JAMES H. GOMEZ

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 05 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10/1/07

BARBARA R. KAPNICK S.C. J.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
ESTATE OF THERESA CURCIO,

Plaintiff,

-against-

JAMES H. GOMEZ and JOSEPH JANNETTY,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 603210/06
Motion Seq. No. 001

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

This is an action for damages and attorney's fees arising from defendants' alleged breach of unconditional guarantees and a separate payment agreement, both of which guaranteed the payments due on a Mortgage Note.

On or about March 6, 1990, Esperia Eugenia Curcio a/k/a Jean Curcio and Theresa Curcio (the "Curcio Sisters") sold the building they owned at 183 Bleecker Street to an entity known as 183 Bleecker Street Associates ("183 Bleecker"), a partnership in which defendants James H. Gomez and Joseph Jannetty were apparently the sole partners. 183 Bleecker is allegedly now defunct.

At the time of the sale, in addition to receiving other consideration, the Curcio Sisters took back a Note in the amount of \$499,000 from 183 Bleecker.¹

¹ Both of the Curcio Sisters have since passed away, and the plaintiff Estate is now the sole beneficiary of the payments due under the Note.

In November of 1991 the Curcio Sisters, 183 Bleecker and the defendants entered into an agreement amending the Note by, inter alia, extending the payment schedule for the pay off of the Note, revising the interest provisions, reducing the amount of the Note to \$274,000 and providing that the individual defendants would guarantee the obligations established by the Note. Defendants Gomez and Jannetty also agreed to give the Curcio Sisters a separate unconditional guarantee to further secure the Note payments.

Plaintiff alleges that defendants made payments on the Note through June 2006 but failed to make any payments thereafter.

Plaintiff's original Complaint dated September 2, 2006 set forth a first cause of action for breach of the Unconditional Guarantee Agreements, and a second cause of action seeking attorneys' fees, plus costs, expenses and disbursements from the defendants under the terms of the Unconditional Guarantee Agreements and the November Amendment Agreement.

Plaintiff now moves 1) for leave to serve an Amended Complaint pursuant to CPLR § 3025(b) to add an additional cause of action (delineated as the First Cause of Action in the Amended Complaint) for breach of the terms of the November Amendment Agreement; and 2) to direct the defendants to appear for depositions.

Plaintiff argues that the additional cause of action in the Amended Complaint simply adds a new basis for holding the defendants liable for the default in their agreement to fully payoff the obligation that was the subject of the original Complaint.

Defendant Gomez' attorney submitted a letter to this Court dated June 7, 2007 advising that "Mr. Gomez will not oppose Plaintiff's motion seeking leave to amend the complaint, but reserves the right to serve an amended answer to the amended complaint in the event the motion is granted. My client will appear for deposition once the pleading issues are resolved by the Court or otherwise."

Defendant Jannetty has submitted papers in opposition alleging that "this action comes as a shock" to him since his business relations with defendant Gomez ended over 15 years ago and he believed that defendant Gomez was fully responsible to pay off the Note pursuant to an agreement with another Partnership in which he (defendant Gomez) was a partner. Specifically, he argues that the motion should be denied since 1) plaintiff has failed to meet its burden of setting forth a reasonable excuse for its delay in asserting the proposed new cause of action and failed to explain why it chose not to assert the proposed new cause of action in the

original complaint; 2) plaintiff has failed to submit an affidavit of merits from a person with actual first hand knowledge; 3) the proposed cause of action, as well as the original causes of action, are meritless since plaintiff is an estate which is not a legal entity that has standing in this Court; 4) the proposed new claims are barred by the Statute of Limitations since the last payment made in the name of the debtor, 183 Bleecker, was by check dated February 5, 2001, more than six years before plaintiff sought to add this claim; and 5) if permission to amend the Complaint is granted, defendant Jannetty will be prejudiced in that the new cause of action will potentially permit plaintiff to defeat the statute of limitations and revive liability that has already expired.

In its reply papers, plaintiff additionally seeks leave to add Dr. Frank Accardi, the Executor of the Estate of Theresa Curcio, as a plaintiff in this action in order to resolve the issue as to standing. Plaintiff also argues that the defendants cannot possibly claim that they are surprised or prejudiced by the new cause of action since plaintiff's original Complaint discussed the November Amendment Agreement and specifically stated that defendants Gomez and Jannetty were parties to that agreement and agreed to be bound by its covenants and provisions.

Finally, plaintiff argues that since defendant Gomez continued to make payments due on the Mortgage Note through June of 2006, the Statute of Limitations on defendants' obligations to make payments under the guarantees did not begin to run until then. Even if the Statute has run, plaintiff argues that the new claim "relates back" to the time of the filing of the original Complaint.

Defendant Jannetty contends that plaintiff intentionally made a tactical choice in the original Complaint to sue only on the guarantees and not on the mortgage or note and therefore is not entitled to the benefit of the relation back doctrine.

Leave to amend a pleading should be "freely given" (CPLR 3025[b]) "as a matter of discretion in the absence of prejudice or surprise" (citations omitted), although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. (citation omitted). Therefore, a motion for leave to amend a pleading "must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (citation omitted).

Zaid Theatre Corp. v Sona Realty Co., 18 A.D.3d 352, 354-355 (1st Dep't 2005).

Here, plaintiff has failed to submit an affidavit of merits to support its new claim or any evidentiary proof to rebut defendant Jannetty's opposition to the motion that could be considered upon a motion for summary judgment.

Accordingly, plaintiff's motion to amend the Complaint is granted to the extent of permitting plaintiff to add Dr. Frank Accardi, the Executor of the Estate of Theresa Curcio as an additional party plaintiff in this action, and to assert the additional cause of action against defendant Gomez only.

The caption shall be amended to read as follows:

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

-----X
ESTATE OF THERESA CURCIO and
FRANK ACCARDI, as Executor of the
Estate of Theresa Curcio,

Plaintiffs,

Index No. 603210/06

-against-

JAMES H. GOMEZ and JOSEPH JANNETTY,

Defendants.

-----X

Plaintiff, shall serve the Amended Complaint, in accordance with the terms of this Order, upon counsel for both defendants within 20 days of entry.

Defendants shall have 20 days thereafter to serve Answers to the Amended Complaint.

Plaintiffs' counsel is further directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office and the County Clerk, who shall mark their records to reflect the amended caption.

A further conference to schedule depositions of the defendants and any other outstanding discovery shall be held in IA Part 12, 60 Centre Street, Room 341 on December 5, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: ~~September~~ ^{October} 1, 2007


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
OCT 05 2007
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