

Tzolis v RB Estates LLC
2008 NY Slip Op 30200(U)
January 18, 2008
Supreme Court, New York County
Docket Number: 0104022/2007
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT.

PART 49

Index Number : 104022/2007
TZOLIS, SOTERIOS (STEVE)
vs.
RB ESTATES LLC
SEQUENCE NUMBER : # 001
DISMISS VERIFIED COMPLAINT

Justice

INDEX NO. 104022-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

Lead 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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 2008

Am Cl

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 : IAS PART 49

-----X
SOTERIOS (STEVE) TZOLIS and VICKY TZOLIS,
individually and in the right and on behalf of
PENNINGTON PROPERTY CO. LLC,

Plaintiffs,

-against-

Index No. 104022/07

RB ESTATES LLC and 316 PENNINGTON LLC,

Defendants.

-----X

FILED

JAN 25 2008

NEW YORK
COUNTY CLERK'S OFFICE

Herman Cahn, J.:

Motion sequence numbers 001 and 002 are consolidated for purposes of disposition.

In sequence number 001, defendant RB Estates LLC moves to dismiss, with prejudice, the first amended complaint¹ asserted against it, CPLR 3211 (a) (1) and (a) (7). In sequence number 002, defendant 316 Pennington LLC moves to dismiss the first amended complaint asserted against it, CPLR 3016 (b) and 3211 (a) (1) and (a) (7).

By letter dated October 18, 2007, plaintiffs voluntarily discontinued the cross motion to consolidate this action with Tzolis v Wolff (Sup Ct, NY County, Index No. 108353/05 ["the prior action"]).

Steve Tzolis and Vicky Tzolis together hold a minority interest in nominal plaintiff Pennington Property, the former owner of property known as Hotel Pennington, located at 316

¹ While defendants' initial motion papers were directed at the original complaint, defendants do not oppose plaintiffs' service and filing of a first amended complaint with their opposition papers and address their reply arguments to the legal viability of the amended complaint (see Def RB Estates LLC Reply Memo; Def 316 Pennington LLC Reply Memo).

West 95th Street in Manhattan. They commenced this action on behalf of themselves and Pennington Property to void the September 2006 sale of the hotel property and the transfer of a long-term lease by 316 Pennington to RB Estates.

Previously, in May 2005, the hotel property had been sold and the lease transferred by Pennington Property to 316 Pennington. In the prior action, which is still pending, plaintiffs seek to void the 2005 sale and lease transfer as unauthorized. Plaintiffs also seek to recover monetary damages on claims of breach of fiduciary duty and aiding and abetting breach of fiduciary duty. Plaintiffs filed a notice of pendency of the prior action.

By decision and order in the prior action, entered on March 23, 2006, the court severed and dismissed the first and second causes of action for a judgment declaring unauthorized and void the 2005 property sale and lease transfer, and directed the Clerk of the Court to vacate the notice of pendency (see Tzolis v Wolff, 12 Misc 3d 1151[A], 2006 WL 1310621, at *11-12. [Sup Ct, NY County 2006] ["the March 23 Order"], affd as mod 39 AD3d 138 [1st Dept 2007]). The court held, in pertinent part, that plaintiffs, although members, lacked standing to bring a derivative action on behalf of Pennington Property, a limited liability company (see id. at *5; CPLR 3211 [a] [3]). In so holding, the court relied in large measure on the Appellate Division, Second Department's decision in Hoffman v Unterberg (9 AD3d 386, 388-89 [2d Dept 2004]), and noted the absence of a ruling by the First Department on the issue of whether a member of a limited liability company may bring a derivative action on behalf of the company (see Tzolis v Wolff, 12 Misc 3d 1151[A]).

The court also held legally viable the third, fourth and sixth causes of action for breaches of a fiduciary duty owed to the individual plaintiffs by some of the individual defendants,

allegedly by selling the hotel property well below market value and by failing to disclose the existence of a conflict of interest (see id. at *8-10).

The Clerk of the Court vacated the notice of pendency on March 24, 2006.

Plaintiffs appealed the branches of the March 23 Order dismissing the first and second causes of action and vacating the notice of pendency, but did not seek a CPLR 5519 stay of the order. Defendants cross-appealed the portions of the March 23 Order in which the court held legally cognizable the third and fourth causes of action for breach of fiduciary duty in connection with the allegedly unauthorized property sale and lease transfer.

By order entered on February 8, 2007, the First Department affirmed as modified in part and reversed in part the March 23 Order, to the extent appealed from. The First Department declined to follow the Second Department and reinstated the first and second causes action and the notice of pendency on the ground that limited liability company members do have a common-law right to assert derivative claims on behalf of the company (see Tzolis v Wolff, 39 AD3d 138, 142-43 [1st Dept 2007]). In so holding, the First Department reasoned that, "[b]ecause a limited liability company structure blends key aspects of both the partnership and corporate forms, sharing similar characteristics of each, a fortiori, there is no reason to deprive members of limited liability companies of the same important right to bring a derivative action possessed by the members of limited partnerships and corporations" (id. at 143). The First Department also affirmed this court's holdings that the claims of breach of fiduciary duty and aiding and abetting breach of fiduciary duty were legally viable (id. at 146).

On September 20, 2006, 316 Pennington significantly amended and modified the lease and granted Pennington Realty LLC, its affiliate and the lessee, a 30-year extension of the lease

term, a rent reduction, a right of first refusal to purchase the hotel property and other benefits.

The next day, September 21, 2006, 316 Pennington sold the hotel property to RB Estates, subject to the long-term lease, for \$1.2 million and transferred the lease to RB Estates.

Plaintiffs then commenced the instant action for a judgment declaring void the 2006 property sale and lease transfer as not made in good faith, on allegations that RB Estates had constructive knowledge of the prior action and equity claims, purchased the property in secret and paid far less than market value. In the first amended complaint, plaintiffs seek a judgment declaring the 2006 property sale and lease transfer void, imposing a constructive trust on the property and enjoining defendants from selling or otherwise disposing of the hotel property. Plaintiffs also assert claims for violations of Debtor and Creditor Law §§ 273-a², 273, 275 and 276 on allegations that defendants secretly went forward with the 2006 property sale and lease transfer with the intent to hinder, delay and defraud plaintiffs. Plaintiffs seek only equitable relief and do not seek any monetary relief in the first amended complaint.

In separate motions, each defendant now seeks dismissal of the first and second causes of action for a judgment declaring void the 2006 property sale and lease transfer and imposing a constructive trust on the hotel property on the grounds that plaintiffs failed to protect their rights, if any, to contest the 2005 sale and transfer by failing to obtain a stay of the March 23 Order. Defendants contend that, therefore, 316 Pennington had the absolute right to convey the property to anyone, including RB Estates, on the date of the closing.

In opposition, plaintiffs contend that RB Estates is not a bona fide purchaser for value and

² By letter dated October 18, 2007, plaintiffs voluntarily discontinued the fourth cause of action asserted in the first amended complaint for violation of Debtor and Creditor Law § 273-a.

had constructive knowledge that the 2005 sale by Pennington Property to 316 Pennington was not properly authorized and was the subject of the prior action. Plaintiffs further contend that, by operation of law and equity, title to the property belongs to Pennington Property.

Each defendant's motion to dismiss is granted.

The Court of Appeals has unequivocally held that, when a notice of pendency is vacated and the aggrieved party fails to seek a stay pending appeal of the vacating order, the property owner has the unrestricted ability to transfer clear title (see Da Silva v Musso, 76 NY2d 436, 438 [1990]). "It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal" (id. at 440; see Asher v Gigante, 21 AD3d 916, 917 [2d Dept 2005]; Matter of Vetri, 208 AD2d 755, 755 [2d Dept 1994]).

Contrary to plaintiffs' contention, the pendency of the appeal affecting title to the property and the prior action to void the 2005 sale does not mandate avoidance of the 2006 closing, in the absence of a notice of pendency. The Court of Appeals held that "while an appeal from a final judgment or order may leave an inchoate shadow on the rights defined therein, those rights are nonetheless fully enforceable in the absence of a judicially issued stay pending disposition of the appeal" (id.). The Court of Appeals explained that:

Since the ability to transfer clear title is a natural incident of [property] ownership, it follows that when a complaint involving title to or the right to possess and enjoy real property has been dismissed on the merits and there is no outstanding notice of pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim

(id.; Sakow v 633 Seafood Rest. Inc., 1 AD3d 298, 299 [1st Dept 2003]; P.A.C.W.S., Ltd. v

Reineke, 175 AD2d 154, 155 [2d Dept 1991]; Da Silva v Suozzi, English, Cianciulli & Peirez, P.C., 233 AD2d 172, 177 [1st Dept 1996]).

Further, whether RB Estates had knowledge, either actual or constructive, of the pending appeal or of the vacated notice of pendency is not legally significant. A cancelled notice of pendency has no effect "on subsequent purchasers, including those with actual knowledge of pending litigation or actual knowledge of the notice of pendency when it was still valid" (Zev Cohen, LLC v Fidelity Natl. Title Ins. Co., 15 Misc 3d 798, 807 [Sup Ct, Kings County 2007], [citing Da Silva v Musso, 76 NY2d at 444]).

Having failed to protect their rights by failing to obtain a stay pending appeal of the March 23 Order, plaintiffs cannot now assert individual or derivative claims to void the 2006 sale and transfer by 316 Pennington. For this reason as well, plaintiffs' claims to impose a constructive trust on the hotel property, to enjoin defendants from selling or otherwise disposing of the property, and for breach of Debtor and Creditor Law §§ 273, 275, and 276 are not legally cognizable. Therefore, defendants' motions to dismiss the first amended complaint are granted.

Accordingly, it is

ORDERED that motion sequence number 001 is granted and the first amended complaint is dismissed with costs and disbursements to defendant RB Estates LLC as taxed by the Clerk of the Court; and it is further

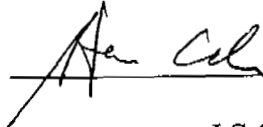
ORDERED that permission to withdraw the cross motion is granted; and it is further

ORDERED that motion sequence number 002 is granted and the first amended complaint is dismissed with costs and disbursements to defendant 316 Pennington LLC as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 18, 2008

ENTER:



A handwritten signature in black ink, appearing to read 'J.S.C.', is written over a horizontal line.

J.S.C.

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE