

Jericho Group Ltd. v Midtown Dev., L.P.

2008 NY Slip Op 32687(U)

September 8, 2008

Supreme Court, New York County

Docket Number: 600566/07

Judge: Charles E. Ramos

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

PRESENT: CE Ramos
Justice

PART 53

Index Number : 600566/2007

JERICO GROUP

INDEX NO. _____

vs

MIDTOWN DEVELOPMENT

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

OTHER

C

MOTION CAL. NO. _____

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

FILED

SEP 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Motion is decided in accordance with
accompanying Memorandum Decision.

Dated: 9/8/08

[Signature]
HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----X
JERICHO GROUP LTD.,

Plaintiff,

Index No. 600566/07

-against-

MIDTOWN DEVELOPMENT, L.P., EDWARD
IMPERATORE and MAURICE STONES,

Defendants.
-----X

FILED
SEP 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

Motion sequence 001 and 003 are consolidated for disposition.

In motion sequence 001, defendant Midtown Development, L.P. (Midtown) moves to cancel two notices of pendency (CPLR 6515 [c]). Jericho cross-moves for leave to amend the complaint.

In motion sequence 003, defendants Midtown, Edward Imperatore, and Maurice Stone (together, Defendants) move for summary judgment of the complaint. Jericho cross-moves for summary judgment as to liability (CPLR 3212).¹

Background²

In June of 2002, Jericho and Midtown entered into a contract (Contract) for the sale of land (Property) in midtown Manhattan.

¹ In arguments held on Jericho's cross-motion to amend the complaint, the Court directed that, for purposes of determining Defendants' motion for summary judgment, the proposed amended complaint was the operative pleading. Notwithstanding that direction, the court did not rule on Jericho's cross-motion to amend the complaint, which will be addressed herein.

² The following facts are taken from the parties' Rule 19-A Statement of Undisputed Facts, the pleadings, and decisions of this court or the Appellate Division, as indicated.

The protracted procedural history of this case mandates in-depth recitation.

The Contract granted to Jericho, the purchaser, a period of time (Study Period) to evaluate the Property, within which Jericho retained the right to cancel the Contract and seek the return of its deposit. Section 29 (a) of the Contract obligated Midtown to make available documents and other material in its possession concerning the condition of the Property, at Jericho's request.

Before the expiration of the Study Period, Jericho learned of an oil spill on a parcel of land adjacent to the Property, and asked Midtown, through its principals, defendants Imperatore and Stone, for documents or other information relating to it. Additionally, Jericho asked Midtown for exhibits to a development agreement between Midtown and Amtrak (Amtrak Exhibits).

Defendants represented that they did not have any relevant documents in their possession, and that Jericho should obtain documents through a Freedom of Information Act request or directly from Amtrak.

Jericho informed Midtown that it would be compelled to conditionally cancel the Contract subject to receiving the requested documents, but sought to extend the Study Period, that Midtown. Midtown allegedly agreed to extend the Study Period, but thereafter returned the \$250,000 Contract deposit to Jericho.

Subsequently, Jericho obtained documents from the New York Department of Environmental Control (NYDEC) that established that Midtown had recently been in contact with the NYDEC regarding the oil spill and that it had been substantially remediated.

In 2004, Jericho instituted the prior action against

Defendants, alleging that Midtown intentionally breached the Contract, by failing to provide documents in its possession relating to the condition of the Property, wrongfully repudiated Jericho's acceptance of Midtown's proposal to extend the Study Period, and failed to disclose certain affiliated relationships. Jericho sought specific performance, and damages for breach of contract and fraud.

The theory of Jericho's complaint was that, after executing the Contract, Midtown discovered that the Property was more valuable because the oil spill had been substantially remediated at the NYDEC's expense. Consequently, Midtown sought to give the impression that there were environmental problems with the Property, making the transaction appear less desirable to Jericho.

Defendants filed a motion to dismiss the complaint for failure to state a cause of action and documentary evidence (CPLR 3211 [a] [1], [7]). On May 12, 2005, this Court denied the motion, and Defendants appealed.

Decision I

In August of 2006, the Appellate Division reversed this Court's denial of Defendants' motion to dismiss on the law, and dismissed the complaint and entered judgment in favor of Defendants (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006]) (Decision I).

The Appellate Division determined that Jericho's breach of contract claim, based upon Midtown's alleged deliberate failure

to comply with its obligations to provide documents, was defectively pled. First, the Appellate Division stated that Jericho's claims for breach of contract and specific performance were barred by its own cancellation of the Contract and recovery of the down payment. Additionally, the Appellate Division stated that, even if Midtown had willfully breached the Contract, Jericho's allegations of willful breach were either contradicted by documentary evidence, or "premised on a misreading of Midtown's obligations under paragraph 29(a)," that obligated Midtown to provide documents (*id.* at 298-99).

As to Jericho's claim concerning the alleged extension of the Study Period, the Appellate Division determined that documentary evidence submitted on the motion contradicted Jericho's assertion that the parties agreed to an extension of the Study Period (*id.* at 299).

The Appellate Division dismissed the fraud claim on the ground that Jericho's allegation that Midtown intentionally breached the Contract by failing to provide documents could not constitute actionable fraud, because a claim for fraud cannot arise where the only alleged fraud relates to a party's intent to breach a contractual obligation (*id.* at 300).

Discovery

While the appeal that eventually resulted in Decision I was pending, discovery in the action continued under the supervision of this Court.

In response to document demands, Midtown produced

correspondence between Midtown and the NYDEC, including an additional 100 pages of documents containing information about the NYDEC's remediation of the oil spill (NYDEC Documents), in addition to information establishing that the long sought after Amtrak Exhibits, did not exist.

Jericho filed its Note of Issue, and Defendants moved for summary judgment. In the interim, Decision I was rendered. Defendants withdrew their motion for summary judgment, and this Court directed the clerk to enter a judgment of dismissal consistent with Decision I.

On the basis of documents obtained during discovery, Jericho moved to reargue Decision I claiming newly discovery evidence, but Jericho withdrew the motion and instead, sought relief in this Court.

Motion to Vacate the Judgment

Jericho's motion to vacate the judgment and dismissal of its complaint was based upon newly discovered evidence and fraud (CPLR 5015 [a] [2], [3]).

The basis for Jericho's motion³ was that the NYDEC Documents, that were in Midtown's possession during the Study Period, and information relating to the Amtrak Exhibits, namely, that they did not exist, amounted to new evidence that demonstrated Midtown's breach of the Contract and fraud. Additionally, Jericho argued that the documents demonstrated that

³ For a full recitation of Jericho's allegations and arguments in support of its motion, see this Court's decision dated February 2, 2007 (February 2007 Decision).

Defendants had committed a fraud on the court and the Appellate Division, insofar as Defendants represented, in support of their original motion to dismiss the complaint, that they had complied with their contractual obligation to produce documents during the Study Period.

This Court denied relief based upon the discovery of new evidence, finding that Jericho knew of the correspondence between Midtown and the NYDEC before the action was filed, and could have submitted the documents in opposition to Defendants' motion to dismiss the complaint (February 2007 Decision, 11).

Nonetheless, the Court determined that Jericho presented sufficient evidence of fraud and misconduct on the part of Midtown, insofar as it admitted to the existence and non-existence of documents that it previously represented that it did not have in its possession. This Court granted the motion to vacate the judgment on that basis, but determined that it could not reinstate the complaint.

Thereafter, Midtown appealed, while Jericho instituted this action, alleging causes of action for fraud, specific performance, declaratory judgment, breach of contract, violation of Judiciary Law § 487, and damages arising out of the Contract to purchase the Property, and Defendants' conduct during the Study Period and discovery in the prior action.

Decision II

The Appellate Division reversed the February 2007 Decision on the law, and directed that judgment be re-entered (*Jericho*

Group, Ltd. v Midtown Development, L.P., 47 AD3d 463 [1st Dept 2008]) (Decision II).

In Decision II, the Appellate Division determined that Jericho's claim as to the recently disclosed documents did not go "to the very means by which the judgment was procured," but to "defendant's compliance with its contractual obligation to produce documents, i.e., the underlying transaction," and thus, did not avail itself to vacate the judgment (*id.*). Finally, the Appellate Division stated, "in any event, plaintiff [Jericho] fails to show fraud in the underlying transaction."

Subsequently, the Appellate Division denied Jericho's post-appeal motions for reargument and permission to appeal to the Court of Appeals.

Discussion

A. Defendants' Motion for Summary Judgment

Defendants move for summary judgment of the proposed amended complaint,⁴ on the grounds of *res judicata* and collateral estoppel, and to cancel the notices of pendency.

Jericho cross-moves for summary judgment as to liability, and to amend the complaint.

A judgment resulting from the grant of a motion for failure to state a cause of action for defect in pleading is not *res*

⁴ Defendants move under CPLR 3212 for summary judgment, although issue has not been joined. Because the motion is predicated primarily on the ground that the action may not be maintained because of *res judicata* and collateral estoppel, the motion will be treated as one for dismissal pursuant to CPLR 3211 (a) (5).

judicata of the merits of the entire case (*Hodge v Hotel Employees and Restaurant Employees Union Local 100 of AFL-CIO*, 269 AD2d 330, 330 [1st Dept 2000]; *Amsterdam Sav. Bank, FSB v Marine Midland Bank, N.A.*, 140 AD2d 781, 781-82 [1st Dept 1988]; *Siegel*, NY Prac § 276 [4th ed]). Thus, a judgment on such motion will not bar a second action brought on the same claims, where the defects or omissions adjudged to be present in the first action are remedied by the pleading in the second action (*id.*).

Moreover, newly discovered evidence, or fraud or other misconduct of a party may be a basis to vacate a prior judgment (CPLR 5015 [a] [2], [3]), but generally may not be the basis for a second action (*In re New York Diet Drug Litigation*, 47 AD3d 586 [1st Dept 2008]; but see *Sucher v Kutscher's Country Club*, 113 AD2d 928, 930-32).

Decision I was rendered before an answer was filed and discovery taken, was based upon defects in pleading and documentary evidence, and did not address factual issues that came to light during discovery, that Jericho seeks to raise in the second action. However, Jericho elected to present the evidence gathered during discovery, that was unavailable to this Court and the Appellate Division when the original motion to dismiss the complaint was determined, by moving to vacate the judgment of dismissal pursuant to CPLR 5015 (a) (2) and (3).

Jericho's motion to vacate the prior judgment was based upon two arguments: that the NYDEC Documents and information relating to the non-existence of the Amtrak Exhibits amounted to new

evidence that, if introduced at trial, would have resulted in a different result. Additionally, Jericho argued that Defendants committed a fraud on the court by representing to this Court and the Appellate Division in support of its motion to dismiss the complaint that it had complied with its contractual obligations to produce documents during the Study Period, while the documents disclosed demonstrated that it did not.⁵

This Court, in the February 2007 Decision, and the Appellate Division, in Decision II, addressed the documentary evidence that was produced during discovery and that formed the basis of Jericho's motion to vacate the judgment of dismissal, but that was either not submitted or unavailable to Jericho in opposition to the original motion to dismiss the complaint. This Court rejected Jericho's argument that the NYDEC Documents and Amtrak Exhibits constituted newly discovered evidence that would have produced a different result in the prior action (February 2007 Decision, 11, 14), a finding that the Appellate Division did not disturb in its reversal of the February 2007 Decision. The Appellate Division based its reversal upon this Court's determination that Jericho demonstrated fraud and misconduct on the part of Defendants in their procurement of the judgment.

⁵ Vacatur of a judgment on the ground of newly discovered evidence under CPLR 5015 (a) (2) requires the movant to establish that the new evidence, if introduced at trial, would probably have produced a different result, and that it would have gone to the factual issues in the case. Vacatur of a judgment may also be sought under CPLR 5015 (a) (3) for fraud or other misconduct of an adverse party.

Finally, the Appellate Division concluded that Jericho otherwise did not demonstrate fraud in the underlying transaction (Decision II, 463-64).

Nonetheless, Jericho seeks to maintain this second action for fraud, specific performance, breach of contract, and violation of Judiciary Law § 487. Jericho largely reiterates the allegations of the first complaint, while adding factual allegations concerning the production of documents during discovery in the first action, and Defendants' representations made to this Court and the Appellate Division in opposition to the original motion to dismiss the complaint (PAC, ¶¶ 29-107, 135-188).

However, the issues that Jericho seeks to raise in this action were materially and necessarily resolved. First, in Decision I, the Appellate Division determined that Jericho's own cancellation of the Contract barred it from seeking specific performance, absent a showing that Midtown had deliberately or willfully breached its contractual obligations, and that documentary evidence undermined Jericho's claim of willful breach (Decision I, 298-99).

Subsequent to disclosure of the NYDEC Documents and the non-existence of the Amtrak Exhibits, Jericho elected to pursue a motion to vacate the judgment. In the February 2007 Decision, this Court rejected the argument that the documents constituted newly discovered evidence, which determination was not disturbed by the Appellate Division. Additionally, notwithstanding the

Appellate Division's determination that the newly disclosed documents did not demonstrate that Defendants procured the judgment by fraud, the Appellate Division determined that Jericho failed to "show fraud in the underlying transaction" (Decision II, 464).

This Court is bound by the Appellate Division's determination that the newly disclosed documents did not establish that Defendants engaged in fraudulent misconduct in performing under the Contract. The resolution of this issue against Jericho precludes the maintenance of this action, based upon the same transaction and allegations of wrongdoing.

Therefore, because the issues raised in this action were materially and necessarily determined against Jericho in the first action, maintenance of this action would constitute an improper collateral attack on the prior judgment of dismissal (*Statter v Statter*, 2 NY2d 668, 674-75 [1957]; see also *Clapp v Leboeuf, Lamb, Leiby & MacRae*, 286 AD2d 643, 643 [1st Dept 2001]; *Marshall v Grant*, 521 F Supp 2d 240, 246 [ED NY 2007]).

Jericho relies upon *Smith v Russel Sage College* (54 NY2d 185, 193-94 [1981], *rcarg denied* 55 NY2d 878 [1982]), arguing that this action should not be barred because the fraud alleged could not have been raised in the prior action because of the Defendants' conduct.

However, the Defendants' conduct that came to light during discovery in the first action, including Defendants' concealment and/or misrepresentation of the existence and whereabouts of the

NYDEC Documents and the Amtrak Exhibits, were known to Jericho in the first action. It is precisely this conduct that was already raised by Jericho in its motion to vacate the judgment under CPLR 5015 (a) (2) and (3), and decided against it in the February 2007 Decision and Decision II.

Jericho additionally argues that its new claims include issues that were not decided in the prior action, including that it is entitled to specific performance notwithstanding its own cancellation of the Contract. Jericho's new theory is that its cancellation should be equitably rescinded, because it cancelled the Agreement as the result of Midtown's bad faith and willful breach of its contractual obligation to provide documents.

However, *res judicata* bars not only claims that were actually litigated, but also claims that could have been litigated if they arose from the same transaction (*Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 292 [1st Dept 2005]). Thus, Jericho is barred from pursuing its claim for specific performance based upon a different theory, because it arises out of the same transaction that was already litigated in the prior action.

Further, collateral estoppel precludes Jericho from asserting the claim for specific performance, because the issues of Jericho's cancellation of the Contract as barring it from seeking specific performance and failure to demonstrate Defendants' fraud in breaching the Contract, were already determined in the prior action (*see Parker v Blauvelt Volunteer*

Fire Co., Inc., 93 NY2d 343, 347-48 [1999]). In light of its post-appeal motions to reargue and permission to appeal to the Court of Appeals, that were both denied, Jericho undoubtedly had a full and fair opportunity to contest the issues (*id.*).

Finally, Jericho argues that the Appellate Division's failure to indicate that dismissal was "with prejudice," establishes that the first action was not brought to a final conclusion on the merits.

Ordinarily, where the court specifies that the dismissal is without prejudice, *res judicata* does not preclude assertion of the same claim or issue in a second action (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999]).

However, the Appellate Division did not expressly state whether dismissal was with or without prejudice. Nonetheless, there is no indication in Decisions I or II that the Appellate Division intended to preserve Jericho's right to maintain a second action based upon the same transaction (*see* Restatement [Second] of Judgments §§ 20, comment i; 24, comment a-b, d; 26 [1] [b]). Thus, the dismissal of the first action is entitled to *res judicata* effect barring this action.

Defendants' motion to dismiss based upon *res judicata* and collateral estoppel is granted.

B. Jericho's Cross-Motion to Amend the Complaint

Jericho's cross-motion to amend the complaint is denied, based upon the application of the doctrine of *res judicata* (*Lake Anne Realty Corp. v Planning Bd., Town of Blooming Grove*, 262

AD2d 413, 414 [2d Dept 1999]).

C. Jericho's Cross-Motion for Summary Judgment

Jericho's cross-motion for partial summary judgment as to liability is also barred by the doctrine of res judicata.

In any event, the motion is premature. A motion for summary judgment pursuant to CPLR 3212 is premature prior to issue having been joined by service of an answer (CPLR 3212 [a]; *City of Rochester v Chiarella*, 65 NY2d 92, 101-02 [1985]; *Sonny Boy Realty, Inc. v City of New York*, 8 AD3d 171, 172 [1st Dept 2004], affirmed 4 NY3d 858 [2005]). The motion is not available to a pleader to foreclose a responsive pleading before an opponent has had a chance to answer (*id.*).

The cross-motion for summary judgment, initiated prior to the Court's determination of Jericho's motion to amend the complaint and Defendants' service of an answer, is premature.

Therefore, Jericho's cross-motion for summary judgment is denied.

D. Defendants' Cross-Motion to Cancel the Notices of Pendency. Finally, Midtown moves to cancel the notices of pendency, that were filed subsequent to this Court's cancellation of Jericho's first notice of pendency in September of 2006.

Except in a foreclosure action, a party may not file a notice of pendency in which a previously filed notice of pendency affecting the same property has been cancelled (CPLR 6516 [c]). Therefore, the successive notices of pendency, filed after this Court's cancellation of Jericho's first notice of pendency, must

be cancelled.

Accordingly, it is

ORDERED that defendant Midtown Development, I.P.'s motion to cancel two notices of pendency (002) is granted; and it is further

ORDERED that Jericho Group Ltd.'s cross-motion for leave to amend the complaint is denied; and it is further

ORDERED that defendants' motion for summary judgment (003) is granted, and it is further

ORDERED that Jericho Group Ltd.'s cross-motion for partial summary judgment is denied; and it is further

ORDERED that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

Dated: September 8, 2008

ENTER:

J.S.C.

HON. CHARLES E. RAMOS

FILED

SEP 16 2008

COUNTY CLERK'S OFFICE
NEW YORK