

**ACE Holding, LLC v New York State Off. of the State
Comptroller**

2009 NY Slip Op 32523(U)

October 15, 2009

Supreme Court, New York County

Docket Number: 101714/2009

Judge: Walter B. Tolub

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

WALTER B. TOLUB

PRESENT:

PART 15

Index Number ~~401714/2009~~
 ACE HOLDING LLC
 vs
 NEW YORK STATE
 Sequence Number : 001
 DISMISS

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
 OCT 20 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 10/10/09

WALTER B. TOLUB

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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
ACE HOLDING, LLC and ANDREA WILKINSON,

Plaintiff,

Index No. 101714/2009
Mtn. Seq. 001

-against-

NEW YORK STATE OFFICE OF THE STATE
COMPTROLLER, ALAN HEVESI, In His Official
Capacity and Individually, THOMAS SANZILLO,
In His Official Capacity and Individually,
THOMAS DINAPOLI, In His Official Capacity
and Individually, THE COMMUNITY PRESERVATION
CORPORATION and ANDERS TOMSON,

Defendants.
-----x

FILED
OCT 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is Defendants The Community Preservation Corporation
(CPC) and Anders Tomson's motion to dismiss pursuant to CPLR
§3211.

Facts

By way of background, Plaintiff Andrea Wilkinson, commenced
essentially the same action in July of 2004. The 2004 action was
brought against the CPC and Mr. Tomson (Prior Action) involving a
mortgage loan that Ms. Wilkinson's company, ACE Holding, LLC
(ACE) [a non-party in the Prior Action], applied for and received
for the renovation of nine townhouses. The Prior Action,
entitled Andrea Wilkinson and Dan Donzelli v. CPC and Anders
Tomson, Index No. 110445/2004 alleged discrimination and
retaliation in violation of: (1) The Consumer Protection Credit
Protection Act §701[a][1] as amended, the Equal Credit

Opportunity Act, 15 U.S.C. §1691 *et seq*; the Civil Rights Act of 1866, 42 U.S.C. §1981; (3) the Fair Housing Act, 42 U.S.C. §3601, *et seq*; (4) the New York State Executive Law , Human Rights Law §§ 290 *et seq*; and (5) the New York City Human Right's Law, NYC Administrative Code, Title 8; (6) breach of contract, breach of fiduciary duty and tortuous interference. That case was dismissed with prejudice pursuant by Justice Lehner on March 10, 2009.

The underlying facts of the Prior Action are the same as in this action. Specifically, as stated in Justice Lehner's decision, Ms. Wilkinson is the 100% interest owner, president and general manager of Ace. At the time of the Prior Action, Ace was in bankruptcy proceedings. Through Ace, Ms. Wilkinson purchased Pasture Townhouses (Townhouses) in Albany County. Ace hired Mr. Donzelli (a non-party to the current action) as a contractor for the Townhouses' rehabilitation.

Ace sought financing from CPC to renovate the Townhouses. As part of the application process, Ms. Wilkinson met with Mr. Tomson, who was the regional director and senior vice president of CPC. Mr. Tomson had the authority to review Ace's loan and made recommendations to CPC's mortgage committee.

Ms. Wilkinson claimed that she felt Mr. Tomson was demeaning and condescending towards her. The loan was approved, however, Ms. Wilkinson claimed that her loan process was delayed causing

an increase in costs and late payments to Mr. Donzelli.

At some point, Ms. Wilkinson sought financing for another project, the Fishy Fry Project. Mr. Tomson informed Ms. Wilkinson that it was unlikely that CPC would lend her additional funds. And, in fact, financing for the Fishy Fry Project was later rejected.

CPC and Mr. Tomson argued that Ace's Townhouse loan had to be accelerated and that a foreclosure action had to be commenced because Ace was delinquent in payments. Ms. Wilkinson claimed that the delays, the rejection of her loan application for the Fishy Fry Project and the inadequate handling of her financing were based on racial discrimination.

In the Prior Action CPC and Mr. Tomson argued, *inter alia*, that CPC lent money to Ace, not Ms. Wilkinson, and that their decisions were based upon the problems dealing with Ace/Ms. Wilkinson in the Townhouse Project.

Defendants CPC and Tomson filed a motion for summary judgment in the Prior Action. On March 10, 2009, Justice Lehner granted the summary judgment motion and dismissed Ms. Wilkinson's complaint in its entirety with prejudice (Defendants' Ex. E). In the decision Justice Lehner stated that:

Here, Wilkinson, who individually was not an applicant for the loan, has failed to raise a triable issue as to whether any of the problems Ace was having in financing the development of the Townhouses was the result of any actionable racial or gender

discrimination by defendants. The alleged comments of Tomson on which the discrimination claims are premised do not demonstrate such discriminatory animus as to state a claim under the pleaded statutes. Any damages sustained by Ace caused by improper actions by defendants are claims of Ace, which should be handled in its bankruptcy proceeding.

Defendants have set forth evidence of a legitimate non-discriminatory basis for the decision not to approve a loan for the Fishy Fry Project based upon delays and cost overruns in the Townhouse Project. Since Wilkinson has not shown evidence that this was a pretext, she has not met her burden of showing that intentional discrimination occurred.

(Defendants' Ex. E p 5-6).

Ms. Wilkinson is now appealing that decision and order.

This Action

On February 6, 2009, prior to Justice Lehner's decision, Plaintiffs [Ace and Ms. Wilkinson] commenced this action. Plaintiffs' complaint asserts claims against CPC and Tomson based upon the same facts and circumstances as the Prior Action.

In this action, Plaintiffs claim that CPC and Mr. Tomson engaged in discrimination and retaliation in violation of: (1) the New York State Executive Law, Human Rights Law §§ 290 et seq (NYSHRL); (2) New York State Civil Rights Law §40-c (NYCRL); (3) the New York State Constitution Article I and XI; and (4) the New York City Human Rights Law, NYC Administrative Code Title 8 (NYCHRL) in relation to the mortgage that was the subject of the Prior Action as well as the second loan mortgage application

6] submitted by Ace for the Fishy Fry Project. Plaintiffs also state claims for breach of contract, breach of fiduciary duty and tortuous interference with a contract.

By this pre-answer motion, CPC and Mr. Tomson, move to dismiss the complaint in its entirety with prejudice (CPLR §3211 [a][1] and [a][5]) arguing that the action is barred on the grounds of res judicata and collateral estoppel.

Discussion

Claims by Ms. Wilkinson

Plaintiffs argue, *inter alia*, that Ms. Wilkinson's claims should not be barred because Justice Lehner's dismissal of the action is on appeal.

CPLR §3211[a][5] provides that a party may move for judgment dismissing one or more causes of action asserted against his on the ground that "the cause of action may not be maintained because of an arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment release, res judicata, statute of limitations, or statute of frauds" (CPLR §3211[a][5]).

"The doctrine of res judicata is designed to put an end to a matter once duly decided. It forbids the re-litigation of the matter as an unjustified duplication, an unwarranted burden on the courts as well as on opposing parties." (New York Practice, Fourth Ed., David Seigel, §442 at 747 [West Publishing Co.

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2005]). Its main predicate is that the party against whom the doctrine is being invoked has already had a day in court, and that if it was not satisfactory, then the proper course of action is an appeal and not an attempt to re-litigate in a separate action (Id.).

"In its technical sense, res judicata is applicable only when a party is attempting to re-litigate her whole cause of action; it intervenes in that instance to foreclose *not only matters litigated, but also those which might have been litigated* (*emphasis added Id. at 747 citing Schuylkill Fuel Corp. v. B&C Beiberg Realty Corp., 250 NY 304 [1929]*). This is known as "claim preclusion" (Restatement of Judgments, 2d, §27). In other words, res judicata applies to situations in which a party is foreclosed from something in a later action because of something that happened or failed to happen in an earlier action (New York Practice, Fourth Ed., David Seigel, §442).

As a general rule the res judicata doctrine requires a final judgment on the merits (Id. §444). "In New York an order entered on a motion is ordinarily entitled to the same res judicata and collateral estoppel treatment that a judgment gets, as long as the other requisites of those doctrines - finality, opportunity to contest, identity of the issues, etc. - are met. . . An order granting a motion for summary judgment, for example, should get res judicata treatment in an attempted second action." (Id. §445

at 752 citing Vavolizza v. Kreiger, 33 NY2d 351, 352 [1974]).

In the present case, five of the causes of action brought by Ms. Wilkinson against CPC and Mr. Tomson are identical to the Prior Action [alleged New York State and City Human Rights Law violations, breach of contract, breach of fiduciary duty, and tortuous interference with contract]. These identical causes of action, arising from the same underlying transactions alleged, are being brought by Ms. Wilkinson for the second time against CPC and Mr. Tomson. Additionally, any new claims brought in this action could have been litigated in the Prior Action.

Contrary to Ms. Wilkinson's arguments, the claims in the Prior Action were brought to a final conclusion on the merits by Justice Lehner (Defendants' Ex. E).

As such, Ms. Wilkinson's commencement of the instant action is precisely the conduct that the doctrine of res judicata was designed to prevent. Accordingly, all of Ms. Wilkinson's claims, including claims not raised in the Prior Action are barred.

Claims by Ace

Plaintiff Ace argues that it has not had a full and fair opportunity to be heard in the Prior Action as it was not a party to that action.

Collateral estoppel is the principle by which a party who has had a full opportunity to litigate a particular issue, cannot reasonably demand another opportunity to do so (New York

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Practice, Fourth Ed., David Seigel, §457). Generally, collateral estoppel, or "issue preclusion", may not be used by or against a party to the first action because that would deny that person a hearing and raises questions of due process (Id. §458). However, a non-party may be collaterally estopped from commencing an action, or defending one, when it is in privity with the party who lost the first action (Id.).

Control of the earlier litigation is the key feature. The Second Restatement holds bound one who, although not a party to the earlier action "controls or substantially participates in the control" of the case presented by a party in the first action. Whether the participation or control is ample enough to generate the estoppel is at root a sui generis question and will be decided as such.

* * *

So does a merger of interests. A corporation in the second action, for example, may be held bound by the results in an earlier action if a party to the earlier action was the sole or main shareholder of the corporation and the court is convinced on the facts that one can be said to have been doing the bidding for the other.

(Id. at 770 citing Restatement, 2d, Judgments §39; Warren v. County of Monroe, 51 Misc.2d 292 [Sup. Ct., Monroe County, 1966]).

Here, the realities of the Prior Action were such that Ace, the entity through which Ms. Wilkinson [100% owner, president and manager of Ace] purchased the Townhouses and the entity that sought financing from the CPC, was the most appropriate party to have been a Plaintiff. And in fact, Justice Lehner noted this in

his decision: "Here, Wilkinson, who individually was not an applicant for the loan. . . Any damages sustained by Ace caused by improper actions by defendants are claims of Ace. . . ." (Defendants' Ex. E. P 5-6).

When examining whether Ace had a full and fair opportunity to be heard, courts consider "the nature of the forum and the importance of the claim in the prior litigation, the incentive to litigate and the actual extent of the litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation" (Gilberg v. Barbieri, 52 NY2d 285 at 289 [1981]).

Ms. Wilkinson's claims in the Prior Action were directly related to Ace because technically it was Ace that applied for the loan and it is the loan which forms Ms. Wilkinson's claims for discrimination and retaliation. Ms. Wilkinson had five years to name Ace as a party in the Prior Action and failed to do so even though Ace has always been centrally relevant to Ms. Wilkinson's allegations.

Moreover, Ms. Wilkinson and Ace were in privity as there is a sufficiently close relationship between the two that the interests on Ace were represented by Ms. Wilkinson who is vested with the authority of representation (Phillips v. Kidder Peabody & Co., 750 F. Supp. 603 [SDNY 1990]).

A close look at this action, the Prior Action and Justice Lehner's March 10, 2009 decision reveal that the Prior Action was decided on the merits and that Ace did in fact litigate the Prior Action through Ms. Wilkinson.


Accordingly, it is

ORDERED that Defendants' motion to dismiss the Complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/15/09



HON. WALTER B. TOLUB, J.S.C.

FILED
OCT 20 2009
COUNTY CLERK'S OFFICE
NEW YORK