

Pondview Corp. v Blatt
2009 NY Slip Op 32850(U)
November 24, 2009
Supreme Court, New York County
Docket Number: 603858/07
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

PONDVIEW CORP. and PARKFIELD PROPERTIES,
as assignee of EXCHANGE AUTHORITY LLP,
Trustee of the Almeida Parkfield Exchange
Trust, as Tenants in Common,

Plaintiffs,

Index No.: 603858/07

Motion Date: 06/18/09

Motion Seq. No.: 02

Motion Cal. No. _____

- v -

ANDREW BLATT, individually and as Personal
Representative of the ESTATE OF ELEANOR
BLATT; ANDREW BLATT, as successor in
interest to Eleanor Blatt and d/b/a as
TAPPAN ZEE MANOR; RUSSAND, INC.; TAPPAN
SENIOR MANAGEMENT CORP.; the ESTATE OF ANN
ISER, individually, and as Personal
Representative of the ESTATE OF WILLIAM
ISER; LYNN ISER and STEPHEN ISER,
individually, and as Successor Personal
Representatives of the ESTATE OF WILLIAM
ISER, Personal Representatives of the
ESTATE OF ANN ISER, and Trustees of the
Trust Created Pursuant to Article "FIFTH"
of the Last Will and Testament of William
Iser for the Benefit of Ann Iser,

Defendants.

FILED
DEC 07 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

The following papers, numbered 1 to 8 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1 - 3	
4, 5	
6 - 8	

Cross-Motion: Yes No

Upon the foregoing papers,

This is a motion by defendants Russand, Inc., the Estate of
Ann Iser, individually, and as Personal Representatives of the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Estate of William Iser, Lynn Iser and Stephen Iser as Successor Personal Representatives of the Estate of William Iser, Personal Representative of the Estate of Ann Iser and Trustees of the Trust Created Pursuant to Article "FIFTH" of the Last Will and Testament of William Iser for the Benefit of Ann Iser (together, Iser defendants), for an order, pursuant to CPLR 3211 (a) (4), (7) and (8), dismissing the complaint as against them.

Plaintiffs oppose the motion and cross-move for an order granting them leave to amend their verified complaint. Defendants Andrew Blatt, individually, and as Personal Representative of the Estate of Eleanor Blatt, Andrew Blatt, as Successor in Interest to Eleanor Blatt and doing business as Tappan Zee Manor, and Tappan Zee Senior Management Corp. (together, "Blatt" defendants) join the Iser defendants in opposing the cross motion.

The aspect of the Iser defendants' motion which seeks a dismissal of the complaint as against Lynn Iser and Stephen Iser in their individual capacities is rendered moot by plaintiffs' discontinuance, without prejudice, of those precise claims. The underlying facts as relevant to the balance of the motions, are as follows.

In or about November 1992, William Iser, as president of defendant Russand, Inc. (Russand) purchased premises located at 51 Mountainview Ave., Nyack, New York (premises) from Daytop Village Foundation, Inc. with the intent to convert them into an

Adult Home. Working with the New York State Department of Social Services, Russand and Eleanor and David Blatt, the daughter and son-in-law of William Iser, acquired the necessary approval to establish a 100-bed assisted living facility (Adult Home). On July 22, 1996, landlord Russand, by David Blatt in his capacity as treasurer, and Eleanor Blatt as tenant, executed a written lease (1996 Lease) pursuant to which Eleanor Blatt was permitted to occupy and operate the Premises as an Adult Home for a period of 10 years. Under the 1996 Lease, Eleanor Blatt was obligated to pay landlord Russand a fixed net rent for each year, payable in equal monthly payments. This totaled \$159,618.65, plus real estate taxes, per month.

On or about July 26, 1996, Eleanor Blatt filed an assumed business name, a "d/b/a" certificate, with the Rockland County Clerk, stating that she was doing business at the Premises under the name "Tappan Zee Manor." On or about September 30, 1996, Russand, as title holder, obtained a non-recourse Department of Housing and Urban Development (HUD) loan in the amount of \$11.2 million, for use in connection with the purchase, conversion and refurbishment of the Premises into an Adult Home.

On May 29, 1998, the Village of Nyack issued a Certificate of Occupancy for the use of the Premises as an adult home, and on June 5, 1998, HUD issued an Operating Certificate to Eleanor

Blatt with respect to her operation of "Tappan Zee Manor." The HUD certificate had an expiration date of May 31, 2002.

The 1996 Lease was supplanted by a new 10-year lease, dated June 18, 1998 (1998 Lease), which was executed by William Iser as landlord for Russand, and by Eleanor Blatt as tenant. As under the prior lease, Eleanor Blatt was obligated to pay Russand the fixed net rent for each year, in equal monthly payments of \$159,618.65, plus real estate taxes. Tappan Zee Manor opened for business in 1998 with Eleanor Blatt as its operator. In March 1999, Russand hired Eleanor Blatt's son, defendant Andrew Blatt, to be the acting director of the Adult Home.

On May 27, 2001, Eleanor Blatt passed away, and on June 26, 2001, the Surrogates Court of Rockland County appointed Andrew Blatt as the administrator of his mother's estate. In this capacity, Andrew Blatt incorporated a new entity under the name of Tappan Zee Senior Management Corp., and assigned to himself or to "his designee or any corporation that he may appoint or form," his mother's right, title and interest in the 1998 Lease. Soon thereafter, by Addendum to Lease (Addendum), dated July 31, 2001, and signed by William Iser for Russand, and Andrew Blatt for Tappan Zee Senior Management Corp., the rent portion of the 1998 Lease was reduced to 16% of the original amount. Specifically, the rent portion was amended to read "The Fixed Net Rent for each year shall be adjusted to \$300,000 per year payable in equal

monthly installments" (\$25,000.00 per month) with real estate taxes to be paid directly by the tenant to the tax collecting agencies.

It is undisputed that Russand's failure to make its mortgage payments, ab initio, resulted in the nonjudicial foreclosure sale of the Premises on April 26, 2002. A successful bid of \$6,050,000.00 resulted in an October 4, 2002 closing in which title was placed in the names of plaintiff Pondview Corp. (Pondview) and The Exchange Authority, LLP (Exchange). Almost immediately, Pondview and the Exchange sought all records and documentation pertaining to the Adult Home and its residents, and they served a 30-day notice to terminate tenancy upon the family-based and related entities Russand, Tappan Zee Senior Management Corp., Andrew Blatt, Chai Realty Corp., and AndriSSa Management, Ltd. When compliance with the demands was not forthcoming, the purchasers commenced an action under Supreme Court, Rockland County Index No. 822/03 (Rockland County action), also referred to by the parties as the prior action. In that action, Pondview and The Exchange Authority, LLP, as Trustee of the Almeida Parkfield Exchange Trust, as tenants in common plaintiffs, sought, among other things, an order ejecting defendants (Russand, Tappan Zee Senior Management Corp., Andrew Blatt, Chai Realty Corp., and AndriSSa Management, Ltd.) from the Premises; the appointment of an interim operator and a temporary

receiver; and an order declaring that all records and documents, all rents and use and occupancy in the amount of \$159,618.65 per month, from October 4, 2002 forward, are plaintiffs' property.

The Rockland County action for law (monetary) and equitable relief, has been intensely contested and, as this court learned during oral argument on June 18, 2009, has apparently not been fully resolved. Motion practice in that action resulted in various court decisions and orders, including those of Justice George M. Bergerman, dated March 24, 2004, and Justice Mary H. Smith, dated November 14, 2005, each of which details aspects of the dispute.

Based upon a review of those decisions, it is evident that, despite their best efforts, plaintiffs' successes in the Rockland County action have been piecemeal and costly in time as well as money. It is also evident that their inability to fully succeed in that action prompted plaintiffs Pondview and Parkfield Properties, as assignee of the Exchange Authority LLP, Trustee of the Almeida Parkfield Exchange Trust, as Tenants in Common (Parkfield), to commence the instant action by filing of a summons and complaint, dated November 19, 2006, and demanding relief stemming from the same HUD foreclosure sale of the Adult Home.

Issues raised in the prior action pertaining to the ejectment of any and all defendants are no longer part of this

dispute. The allegations contained in plaintiffs' Supreme Court, New York County complaint and proposed amended complaint accuse the defendants of fraud and deceit, and seek both equitable and monetary damages. More specifically, the instant action centers around the authenticity of the Addendum and claimed damages stemming from the Addendum's reduction of the net monthly rent figure from \$154,618.65 to \$25,000.00.

Plaintiffs submit the affidavit of Pondview's vice president, Robert Almeida, to explain, among other things, that shortly after they acquired title to the facility:

[Andrew] Blatt sought our agreement to slash his rental obligation under the Lease from \$254,618.65 monthly plus real estate taxes to \$25,000.00 a month . . . In fact, in a letter dated January 2, 2003, Blatt's attorney, Zafrin, wrote our attorney to "propose that we enter into modification of the existing lease providing for an initial rental for the first five years of \$300,000 per annum . . . Obviously, if the purported Addendum - which was not yet heard of or seen by anyone - existed, the rent would have already been reduced to \$300,000 per annum. However, it was not until much later, after we rejected the proposal to reduce the rent that the Addendum first appeared when Blatt and his attorneys gave us a copy. We submit that the Addendum was fraudulently created.

Plaintiffs allege that Andrew Blatt created and backdated the Addendum not simply to reduce the rent owed each month, but to obtain, among other things, the June 25, 2002 designation by the State Department of Health of Andrew Blatt as the temporary operator of the Adult Home, and the renewal, more than once, of Andrew Blatt's temporary operator's license. As a result, Andrew

Blatt was able to retain possession and control of the facility, including income derived therefrom, and to deny same to plaintiffs who had paid more than \$6 million for the facility at the HUD foreclosure sale.

The Blatt defendants contend that, because all the facts concerning the subject Addendum were known to plaintiffs when they filed the prior action, they should have raised them in that action, and that it is now improper to submit them before a second court (Mancini v Hardscrabble Commons Assocs., 31 AD3d 719, 720 [2nd Dept 2006]). Their alternative argument, which is echoed by the Iser defendants, is that plaintiffs raised these issues unsuccessfully before Justice Smith; therefore, they are collaterally estopped from raising these issues in this action. Plaintiffs argue that Justice Smith, in her written opinion, did not reach the issues surrounding the disputed rent addendum.

Instead of moving, as they could, for a change of venue, defendants seek a pre-answer dismissal under CPLR 3211 (a) (4), on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." The second clause of the statute, however, provides that "the court need not dismiss upon this ground but may make such order as justice requires."

In their arguments, both plaintiffs and defendants present plausible interpretations of Justice Smith's decision and order

of November 14, 2005. Under these circumstances, it is more appropriate for the Rockland court to resolve any questions the parties may have with respect to that order.

It is evident that the Rockland and New York County actions involve common questions of law and fact, and that any differences between individuals and/or entities named as defendants in each action stem from plaintiffs' concern that their attempt to achieve judicial redress not be frustrated by the Isler/Blatt family and permutations of their various corporate entities. Rather than dismiss the New York action, a more reasonable course to follow would be to consolidate for joint trial this action with the prior action in Rockland County. See Harrison v Harrison, 16 AD3d 206, 207 (1st Dept 2005) ("Where two actions involving identical issues are pending in separate counties, the actions should be consolidated pursuant to CPLR 602 in the county where the first action was commenced absent special circumstances"). As the court presiding over the earlier action, it is the court most familiar with the parties as well as with any prior proceedings, and it is in the best position to clarify and/or make any further determinations related to issues of rent, use and occupancy, and the authenticity of the Addendum. It is therefore, the determination of this court, that in the interest of justice, judicial economy, and in order to avoid inconsistent results, this matter should be consolidated and transferred to

Rockland County to be heard with the related prior action. See Kramer, Levin, Nessen, Kamin & Frankel v International 800 Telecom Corp., 190 AD2d 538, 539 (1st Dept 1993) (transfer of related action " absence of statutory authority is not a bar"); Cosmos Forms v Furst, 172 AD2d 403 (1st Dept 1991); see also Public Serv. Mut. Ins. Co. v ITT Hartford Group, 249 AD2d 78, 78-79 (1st Dept 1998).

Turning to plaintiffs' cross-motion to amend their complaint, despite the fact that leave to amend pleadings is ordinarily freely given (CPLR 3025 [b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]), the better course in this instance is for the cross-motion to be decided by the Rockland County Court.

Accordingly, it is

ORDERED that pursuant to CPLR 3211 (a) (4) and 602 (a) this action is transferred from this court to the Supreme Court, County of Rockland, to be jointly heard with the related action already pending under Rockland County Index No. 822/03, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Rockland, upon service of a copy of this order with notice of entry; and it is further

ORDERED that payment of appropriate fees to effectuate the transfer is waived; and it is further

ORDERED that the motion and cross motion are denied without prejudice to renew before the Supreme Court, Rockland County.

This is the decision and order of the court.

Dated: NOV 24 2009

ENTER:

Debra A. James
J.S.C.
DEBRA A. JAMES
J.S.C.

FILED
DEC 07 2009
NEW YORK
COUNTY CLERK'S OFFICE