

Stein v Doukas

2009 NY Slip Op 33380(U)

September 3, 2009

Supreme Court, Suffolk County

Docket Number: 07-5623

Judge: Peter Fox Cohalan

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This opinion is uncorrected and not selected for official publication.

ORDERED that this cross-motion (005) by the plaintiff pursuant to CPLR §3212 granting summary judgment and directing the defendants to return to the plaintiff either in money or profits, conveyance and/or assignment of all properties situated and described as the Loudon Avenue Lots, Amityville, New York, is denied.

The complaint herein claims that Doukas is an officer, director and shareholder of WKYA Holding Corporation (hereinafter WYKA) and MD STAT, LLC (hereinafter MD Stat) and also owns Telcor Co. LLC (hereinafter Telcor). WYKA is the mortgagee of the premises known as 81 Loudon Avenue and 366 Broadway, Amityville, New York (hereinafter Brunswick Hospital). MD Stat is the landlord of BH Realty Group, LLC (hereinafter BH Realty), which leasehold relates to the parking lot and heliopad servicing Brunswick Hospital and both are located at Loudon Avenue. The amount of the combined monies paid on the mortgage and leasehold is \$37,083.34 per month, payable to WYKA, which check Doukas negotiates each month and retains 100% of the money. MD Stat is the landlord entitled to rents for the parking area and heliopad, but the mortgage and leasehold payments are combined in one payment instrument. The complaint asserts that Doukas has nefariously arranged the transfer, sale and hypothecation for properties owned by the plaintiff, son of decedent Benjamin M. Stein, and his family members, said property value exceeding \$40,000,000. Benjamin M. Stein, founded Brunswick Hospital in 1951 and amassed extensive holdings in real estate surrounding Brunswick Hospital *i.e.* the Loudon Avenue Lots, Amityville, New York consisting of 40, 60, 80, 120 Loudon Avenue which the plaintiff alleges the defendants have illegally transferred and sold to Breslin Realty Development Corp. for the price of \$27,200,000. The plaintiff claims that the signatures on the title reports evidencing the transactions are all forgeries. The plaintiff further claims that the plaintiff has not been paid any monies for the sale of these properties and that Doukas has wrongfully retained all the monies due on the BH Realty property. The plaintiff now seeks an order attaching all payments currently due on the aforementioned obligations in that Doukas maintains dual United States of America and Greek citizenship and may flee the jurisdiction of New York, has abandoned his family, and has secreted himself from all concerned parties.

In the first cause of action the plaintiff seeks an order attaching and turning over payments made by BH Realty to WYKA. In the second cause of action the plaintiff seeks a money judgment for exemplary damages against the defendants due to their unconscionable and nefarious criminal intent in the transfers of the properties that shocks the conscious of the community. In the third cause of action the plaintiff seeks an attachment and turnover of all proceeds of the transactions and the alleged fraudulent transfers involving the Loudon Avenue Lots, Amityville, New York. In the fifth cause of action, the plaintiff seeks an accounting of all the cash proceeds and other things of value obtained by the defendants' alleged transactions.

The defendants have served an answer, dated March 13, 2007, and have counter-claimed against the plaintiff asserting the plaintiff has obtained an attachment and other provisional remedies against the defendants, damaging the defendants in the amount of \$75,000. A second counterclaim states that due to the plaintiff's lies, defamatory and false allegations, the defendants have suffered lost business income in the amount of \$5,000,000. The third counterclaim sounds in defamation. The fourth counterclaim asserts a claim for malicious prosecution. In the fifth counterclaim the defendants seek punitive damages on the

basis of the plaintiff's defamatory and false allegations. A sixth counterclaim is for intentional infliction of emotional distress.

MOTION (003)

In motion (003) the plaintiff seeks an order compelling the defendants to reply to outstanding discovery demands. In support of the application, the plaintiff has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint and defendants' answer; a copy of the preliminary conference order; demand for a bill of particulars, dated July 30, 2007; a copy of a letter to the counsel for Doukas seeking to obtain responsive pleadings to proceed with the depositions; and a copy of a letter, dated September 4, 2007, to the counsel for the defendants.

CPLR §3124 provides that, "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under §3123, the party seeking disclosure may move to compel compliance or a response."

In this action the plaintiff claims that on June 20, 2007 a preliminary conference was conducted and an order was issued directing that a demand for a bill of particulars be served on or before July 30, 2007; a bill of particulars be served on or before August 30, 2007; names and addresses of all eyewitnesses and notice witnesses, statements of opposing parties and photographs be provided on or before July 30, 2007; demand for discovery and inspection be served on or before July 30, 2007; and that responses to discovery and inspection be served on or before August 30, 2007. On July 30, 2007, the defendants were served by mail with a demand for a verified bill of particulars and demand for discovery and inspection. The defendants were contacted on August 31, 2007 by facsimile concerning court-ordered depositions scheduled for September 4, 2007 and the plaintiff also requested responses to the discovery demands and advised that in the absence of responses that depositions would be adjourned. The defendants were again contacted on September 4, 2007 wherein discovery demands were requested. On or about September 4, 2007, the defendants requested three weeks within which to respond to the plaintiff's discovery demands, and such extension was provided by the plaintiff.

The plaintiff claims that to date the defendants have not provided responses to the plaintiff's discovery demands. The defendants only oppose the plaintiff's motion for summary judgment and have not demonstrated compliance with either the preliminary conference order or the plaintiff's demands.

Accordingly, motion (003) by the plaintiff is granted and the defendants are directed to comply with the outstanding discovery set forth above within thirty days of the date of this order and shall produce the defendants for examinations before trial within sixty days of the date of this order, or the defendants' answer shall be stricken.

MOTION (004)

In cross-motion (004) the defendants seek an order dismissing the first through fifth causes of action pursuant to CPLR §3211(a)(1),(3),(5) and (10), and pursuant to CPLR §3212

dismissing the first through fifth causes of action on the basis that no issue of fact exists and the plaintiff is barred by the doctrines of collateral estoppel, issue preclusion, claim preclusion, satisfaction and accord, and res judicata, and they seek a further order dismissing the fifth cause of action on the basis that the plaintiff has failed to name a necessary party and has failed to sue in the capacity of a shareholder as required by the Business Corporation Law.

CPLR §3211(e) provides that "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading." The Court finds that Doukas has waived CPLR §3211(a)(1), a defense founded upon documentary evidence, and has also waived CPLR §3211(a)(3), that the party asserting the cause of action has not legal capacity to sue, as neither defense was raised in the answer. Here, Doukas has served an answer which has raised the affirmative defenses, inter alia, that the plaintiff is collaterally estopped due to the stipulation or agreements, dated September 21, 2001 and July 24, 2004, thus encompassing CPLR §3211(a)(5). CPLR §3211 (e) further provides that "A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted;...." Here Doukas has also moved pursuant to CPLR §3211(a)(10), that the Court should not proceed in the absence of a person who should be a party. Therefore, this post-answer motion is addressed pursuant to CPLR §3212.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. For summary judgment to be granted it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been produced, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979], *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion the defendants have submitted, inter alia, an attorney's affirmation; copy of the stipulation of settlement in *Singh et al v Brunswick Hospital et al*, Index No. 01-23503; copy of Judgment by Confession dated, July 18, 2003, in *Blair International, Inc. v Douglas N. Stein, M.D. and Brunswick Toxicology, Inc.*, in the

amount of \$300,000 plus disbursements in the amount of \$225; copy of an agreement between Benjamin M. Stein and Doukas and MD Stat dated September 21, 2001; copy of an Order to Show Cause, dated February 12, 2007; copy of the preliminary conference Order, dated June 20, 2007; copy of defendants' answer; summary of transaction for closing; report of closings between J. Stewart McLaughlin, Esq. Receiver, MD Stat and BH Realty; copy of deed filed June 20, 2005; acknowledgment by Doukas, dated December 9, 2004.

For collateral estoppel to operate, the material facts or questions in issue must have been judicially determined and conclusively settled by a judgment rendered in that action (*Fleischer et al v Uccelini et al*, 81 Misc2d 22, 365 NYS2d 722). Collateral estoppel "precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*State of New York v Lunking and LJR Enterprises, Inc.* 2003 NY Slip op 51389U, 2003 NY Misc Lexis 1378 [2003]).

In this case, the documentary evidence fails to conclusively demonstrate the claim by Doukas that the motion should be dismissed as a matter of law or that the plaintiff is barred from commencing this action by collateral estoppel, issue preclusion, claim preclusion, satisfaction and accord or res judicata. The stipulation of settlement submitted by Doukas is incomplete without all the supporting exhibits. In *Singh et al. v Brunswick Hospital et al* (supra), the plaintiff and Doukas were both named defendants. Therefore, an action between the plaintiff and Doukas was not resolved by the stipulation of settlement entered into on July 12, 2004 and it has not been demonstrated that there has been a final disposition as between the parties in this action arising out of the prior action and stipulation of settlement. Nor can it be determined from the submissions if the same property is involved in this action and whether there were additional transactions or transfers of the properties after the stipulation was entered into, whether Doukas or anyone else had the authority to sell such property, and what the interests of Doukas and the plaintiff in the property were after the stipulation of settlement was entered. At a closing on November 9, 2004, the plaintiffs in *Singh et al v. Brunswick Hospital et al* (supra) released an option to purchase the entire premises granted to them under the prior agreement, the subject of that litigation.

Although an agreement between Benjamin M. Stein, M.D. and his wife Claire Stein (the plaintiff's parents) and Doukas, dated September 21, 2001, has been submitted, there are several contingencies and prohibited transactions listed in the agreement. This Court cannot determine whether the contingencies or prohibited transactions occurred and whether the agreement was rendered null and void and thus terminated.

The defendants also seek an order dismissing the complaint on the basis that the plaintiff did not sue in the capacity of a shareholder, has failed to name a necessary party, and because he is not a shareholder, does not have voting trust certificates or a fiduciary relationship with the corporate entity, cannot maintain a cause of action for an accounting.

A document, dated November 5, 2004, submitted by the moving defendants indicates

that Doukas and the plaintiff are 50%-50% partners in WYKA, MD Stat and Doukas. It is not known whether that partnership still exists. But then, counsel for the defendants argue that the plaintiff has never been a shareholder or member in either WYKA or MD Stat. Therefore, the defendants' submissions raise factual issues concerning whether the plaintiff is or was a partner in WYKA, MD Stat or Doukas.

The Court finds that the moving defendants have failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint as a matter of law as there are many factual issues as stated above which preclude the same. Based upon the paucity of evidence submitted by the defendants, and because discovery is not complete and because the defendants have not submitted a supporting affidavit or copy of a deposition transcript in support of this motion, the defendants' motion for summary judgment dismissing the complaint is both premature and fails to comport with CPLR §3212(b).

Accordingly, motion (004) which seeks an order granting summary judgment is denied without prejudice to re-submission upon the completion of discovery.

MOTION (005)

In cross-motion (005), the plaintiff has moved pursuant to CPLR §3212 seeking an order granting summary judgment and directing the defendants to return to the plaintiff either in money or profits, conveyance and/or assignment of all properties situated and described as the Loudon Avenue Lots. In support of the application, the plaintiff has submitted, inter alia, an attorney's affirmation; a copy of a subpoena, dated April 25, 2008; a copy of an affidavit by Doukas; copies of the transcripts of the examination before trial of Robert Curcio, Jr. a non-party witness, dated July 24, 2008, and several pages of the continued deposition of Doukas, dated May 12, 2008, in the matter pending under Index No. 06-19964, ***Island Associates Real Estate, Inc. v Ted Doukas, 60 Loudon Corp., 4 Loudon Corp., Nosal Realty, LLC, MD Stat, LLC, and Titleist Realty, Inc.***; and a copy of a summons and complaint in the action ***Ted Doukas, Individually and as a 50% Beneficial Owner of the Shares of Stock of East Shore Road Holding Corp. v Shanta Millikarjuna, Individually and as a 50% Owner of the Shares of Stock of East Shore Road Holding Corp. and East Shore Road Holding Corp.***

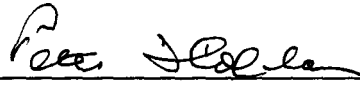
The defendants have submitted in opposition to the plaintiff's motion, inter alia, an attorney's affirmation; a copy of articles of incorporation of WYKA; a copy of the corporate charter of WYKA, dated September 8, 2003, State of Nevada; a copy of a certificate of capital stock for WYKA with "SPECIMEN" as the registered holder; a copy of the document dated, September 1, 2006, indicating Doukas as the president, secretary, treasurer and director of WYKA with its agent of service listed as Incorp Services, Inc.; and a copy of a promissory note in the amount of \$9,500,000 naming Benjamin M. Stein, M.D. as payor and MD Stat as payee, dated September 21, 2001.

Because the plaintiff's motion is not supported with an affidavit by the plaintiff or a copy of a deposition transcript of the plaintiff, the plaintiff's application for summary judgment does not comply with CPLR §3212(b). Further, the plaintiff has failed to demonstrate entitlement to summary judgment as a matter of law as there are many factual issues which preclude the same. This motion for summary judgment is premature as discovery is incomplete (see,

Ferrara v Maio, supra) as well and it does not permit this Court to determine upon the evidence submitted that the plaintiff is entitled to an order directing the defendants to return to the plaintiff either in money or profits, conveyance and/or assignment of all properties situated and described as the Louden Avenue Lots.

Accordingly, the plaintiff's motion (005) for summary judgment is denied without prejudice to re-submission upon the completion of discovery.

Dated: September 3, 2009



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION