

Rivercity Realty Corp. v Cohen

2010 NY Slip Op 30236(U)

February 1, 2010

Supreme Court, New York County

Docket Number: 103198/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.

PART 10

Index Number : 103198/2009

RIVERCITY REALTY CORP.

vs
COHEN, IRWIN B.

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

status conference set for 3/11/10 @ 9:30am

Dated: 2/1/10

J.J.G.
HON. JUDITH J. GISCHE, s.c.
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):

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Supreme Court of the State of New York
County of New York:: Part 10

Rivercity Realty Corp.

Plaintiff,

Decision/Order

-against-

Index# 103198/09
Mot. Seq. # 002

Irwin B. Cohen, Gerald S. Kaufman,
Stuart E. Seigel and 31-02 74th Avenue
Associates, L.P.

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of
this (these) motion(s):

PAPERS	NUMBERED
Notice of Motion.....	1
KHB affirm. Dated 7/22/09, exhibits.....	2
NDW affid. Dated 9/09/09, exhibits.....	3
KHB affirm. Dated 10/12/09, exhibits.....	4

FILED

FEB 03 2010

NEW YORK
COUNTY CLERK'S OFFICE

Gische, J.

Upon the aforementioned papers the decision and order of the court is as follows:

Defendants Gerald S. Kaufman ("Kaufman") and Stuart E. Seigel
("Seigel")(collectively "moving defendants") jointly move pursuant to CPLR § 3211(a)(7)
for an order dismissing the amended complaint in its entirety. They also seek an order
granting them legal fees. Plaintiff, Rivercity Realty Corp. ("Rivercity") opposes the
motion.

Plaintiff's amended complaint contains five separate causes of action, all of which
arise out of an agreement made between the parties on December 31, 1992. The five
causes of action are respectively for: enforcement of a security interest (First cause of
Action); an accounting (Second Cause of Action); conversion (Third Cause of Action);

breach of contract (Fourth Cause of Action) and breach of trust (Fifth cause of action).

The underlying agreement is annexed as exhibit A to the amended complaint ("1992 agreement"). The moving defendants claim that the causes of action are each barred by the applicable statute of limitations. In any event, the moving defendants claim that the complaint otherwise fails to state claims upon which relief can be granted. The moving defendants finally claim that they are entitled to the legal fees they incurred in connection with the defense of this action. Rivercity opposes the motion in its entirety.

Motion to Dismiss

On a motion to dismiss pursuant to CPLR § 3211 *et al*, the pleading is to be afforded a liberal construction; and the facts as alleged in the complaint must be accepted by the court as true and are to be accorded every favorable inference. Leon v. Martinez, 84 NY2d 83 (1994); Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court will consider whether, accepting all of the plaintiff's facts, they support the causes of action asserted. Where the motion to dismiss is based upon the existence of documentary evidence (CPLR § 3211 [a] [1]), such evidence must definitively dispose of all of plaintiff's claims. Goshen v. Mutual Life Insurance Co., 98 NY2d 314 (2002); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st Dep't 1995).

If a motion to dismiss is based upon the affirmative defense that a claim is time barred, once the defendant establishes that defense, the burden then shifts to the plaintiff to "aver evidentiary facts that the case falls within an exception to the Statute of Limitations" (Assad v. City of New York, 238 AD2d 456 [2nd Dept 1997] *lv dismiss* 91 NY2d

[* 4]
848 [1997]).

Giving the complaint the benefit of every favorable inference, the complaint alleges that: the parties to this action, along with others, were parties to a settlement agreement made December 31, 1992 ("1992 agreement"). Under the 1992 agreement, in exchange for the release of other outstanding obligations, the moving defendants and Irving Cohen obligated themselves to pay Rivercity Realty Corp. the sum of \$1,758,157 plus 12% interest pursuant to a note ("1992 note"). The maturity date on the 1992 note was December 31, 1994.

Since the parties differently characterize their obligations under the 1992 agreement, the court quotes the pertinent parts of the 1992 agreement as follows:

"2.2 (a) In consideration for the releases being granted in connection with the Atlanta Property and the LIC Property, the SIG note is being amended to increase the principal amount thereof to \$1,758,157 and to provide that interest shall accrue thereon at 12% per annum commencing on the date hereof. Principal and all accrued interest shall be payable at maturity on the second anniversary of the date hereof. Siegel and Kaufman shall guarantee payment of the SIC Note, which guaranty shall (i) be secured by and a direct assignment of the proceeds distributable to Seigel and/or Kaufman from 31-02 Associates, and (ii) be non-recourse except to the extent that Seigel and/or Kaufman receive any funds from 31-02 Associates.

(b) Seigel and Kaufman agree to take no action with respect to 31-02 Associates without the consent of Rivercity...Further, Seigel and Kaufman agree that, on demand by Rivercity, they shall convey their interests in 31-02 Associates to Rivercity or its designee in exchange for cancellation of the guaranty of the SIG note."

No payments were made when the 1992 note matured in December 1994.

Rivercity, however, took no steps to enforce its rights under the agreement until this action was brought in 2009. Rivercity claims that the reason it took no until 2009, was

that it was unaware that 31-02 Associates had any assets against which the debt could be satisfied. It is not disputed at this time that 31-02 Associates did not, in fact, have any assets in December 1994 or during the six year period that followed.

In 2001, Kaufman and Seigel sued Cohen ("Cohen litigation") as individuals and also as 31-02 Associate partners, claiming that Cohen had misappropriated a business opportunity that they alleged belonged to 31-02 Associates. Rivercity claims that Kaufman and Seigel concealed the Cohen litigation from it and that such concealment violated the agreement prohibition against 31-02 Associates acting without Rivercity's consent. In February 2009, the moving defendants settled the Cohen litigation, from which they were to receive the sum of \$3,500,000.

Rivercity claims that the settlement proceeds are really an asset of 31-02 Associates and that such assets were pledged as security under the 1992 agreement to pay off the note guaranteed by Seigel and Kaufman.

On its first cause of action, Rivercity seeks the Cohen litigation settlement proceeds in which it claims it has a security interest under the 1992 agreement. On the second cause of action, Rivercity seeks an accounting of the settlement monies. On the third cause of action, Rivercity claims that by receiving the settlement monies, the moving defendants have converted such monies. On the fourth cause of action, Rivercity claims a breach of the 1992 agreement. On the fifth cause of action, Rivercity seeks the imposition of a constructive trust over the settlement proceeds.

Preliminarily, and to the extent that the moving defendants seek to dismiss the second and fifth causes of action respectively for an accounting and the imposition of a contractive trust, the motion is granted. Both such causes of action are predicated upon

the existence of a fiduciary relationship between them and plaintiff. Rocchio v. Biondi, 40 AD3d 615 (1st dept. 2007); Trepuk v. Frank, 104 AD2d 780 (1st dept. 1984).

Rivercity does not dispute the moving defendants' claim that, as a matter of law, they do not owe plaintiff any fiduciary duty under the facts alleged in this case. Sommer v. PMEC Assoc. & Co., 88 Civ. 2537 (JFK) 1992 WL 196748 (SDNY 1992); Bond Purchase LLC v. Patriot Tax Credit Props., 746 A2d 842 (Del. Ch. 1999).¹

There also can be no real dispute that the fourth cause of action for breach of the 1992 agreement is barred by the applicable six year statute of limitations. CPLR § 213(2). The debt due under the 1992 agreement was payable on 12/31/94. When the debt went unpaid on that date, Rivercity had until 12/31/00 to commence an action for breach of contract. See: First Nat. City Trust Co. v. Conserta, 29 Misc2d 166 (NY Sup., Suffolk Co., 1961). Having failed to commence a breach of contract action within the applicable time, the fourth cause of action for breach of contract is dismissed. The moving defendants argue that first and third causes of action are likewise barred by the applicable six year statute of limitations. Rivercity argues, however, that the remaining causes of action are based upon their efforts to enforce a security interest in 31-02 Associates assets, which is not barred by the statute of limitations because they did not accrue until the security interest came into being.

Rivercity argues that its rights to sue on the note and its rights to sue to recover the collateral securing the note are two separate causes of action. In this regard Rivercity analogizes its situation to that of the right to separately sue on a debt and a

¹In any event, since the court finds for the reasons stated later in this decision that the this action is time barred, such causes of action would otherwise be dismissed.

mortgage. Seaman's Bank v. Smadbeck, 293 NY 91 (1944); Cracco v. Cox, 66 AD2d 447 (4th dept. 1979). Rivercity then goes on to argue that the two claims accrued at different times. While acknowledging that its right to sue on the debt itself accrued on 12/31/94 when the debt went unpaid, Rivercity nonetheless claims that its right to sue to recover the collateral did not accrue until the 2009 settlement of the Cohen litigation, because before then, there was no collateral to recover. Rivercity does not dispute that each of these claims is governed by a six year statute of limitations. CPLR 213.

The moving defendants, on the other hand, argue that under conventional statute of limitations doctrine, a statute of limitations begins to run when the wrong accrues, which in this case is when the debt came due. They argue that at that point Rivercity had the right to collect the collateral and the fact that the collateral had no value at that time is not significant for statute of limitations purposes.

The court agrees with the moving defendants that the cause of action to sue on the collateral accrued when the underlying debt went unpaid. The fact that the collateral had no value at that time does not, as Rivercity argues, extend the statute of limitations until such time as the collateral did have value.

A cause of action accrues upon the occurrence of all events essential to the claim such that the plaintiff would be entitled to judicial relief. Utica Mutual Ins. v. Avery, 261 AD2d 802 (3rd dept. 1999). In this case, the right to collect the collateral existed beginning 12/31/94, when the underlying debt matured. Indeed under the 1992 agreement, on 12/31/94 the only permissible source of payment was the collateral itself, because the debt was otherwise non-recourse. It was the fact that the collateral had no value which created the default and the actionable wrong. See: Vigilant Insurance

Company of America, 87 NY2d 36 (1995); Mutual Life Insurance Co. v. United States Hotel Co., 82 Misc. 632, (Ny Sup Ct. 1913).

Rivercity argues that its right to the collateral could not have legally attached until the collateral actual came into being. The concept of attachment, which concerns issues of priority to collateral, is not the same thing as when a claim accrues for statute of limitations purposes. See: UCC 9-203 et. seq. In this regard the cases relied upon by Rivercity, which pertain only to the issue of attachment and priority to collateral, do not command a different result. Both Marine Midland Bank v. Conerty Pontiac-Buick, Inc. (77 Misc2d 311 [NY Sup Ct 1974]) and In re: Howard Appliance Corp., (91 BR 204 [EDNY 1988] rev'd in part 874 F2d 88 [2nd Cir. 1989]) hold that a security interest in after acquired property cannot attach until the debtor has the collateral. They do not address the issue of the statute of limitations.

Nor does the parties agreement call for the occurrence of a contingent event which would otherwise forestall the running of a statute of limitations. See: Bonner v. Guerrieri, NYLJ 1/14/10 p26 c1 (NY Co. Sup. Ct.). In this regard, the agreement does not provide that Rivercity's right to the collateral only exists if and when the collateral has an ascertainable value. The right to the collateral was directly tied to the obligation to pay the debt itself.

Rivercity is not availed by its reliance on the legal distinction between an action to foreclose mortgages and an action on the underlying debt. While two separate actions for relief may be brought, both actions accrue at the time of the default on the underlying debt.

Legal Fees

A successful party in a litigation may not recover attorneys fees, except where authorized by the parties' agreement, statutory provision or court rule. Chase Manhattan Bank, NA, v. Each Individual Underwriter, 258 AD2d 1 (1st dept 1999). Paragraph 5.4 of the 1992 agreement is entitled "Enforcement of Agreement" and it provides in pertinent part: "the party which prevails in any such action shall be entitled to recover from the other party the costs and expenses, including reasonable attorneys' fees and disbursement (including reasonable fees and disbursements incurred in connection with the appellate proceedings), that the prevailing party incurs in connection with such action." The action referred to in such provision is "any action to enforce any provision of this Agreement."

At bar the moving defendants have prevailed and consequently they are entitled to recover reasonable attorneys fees under paragraph 5.4 of the 1992 agreement.

In connection with the amount of fees requested, the only information submitted by the moving defendants is invoices reflecting amounts that they were billed to defend against the granting of a preliminary injunction motion. They also seek to submit invoices in connection with the instant motion to dismiss. Any award of attorneys fees is subject to a determination of reasonableness. The record before the court is insufficient for the court to determine the amount of fees to be awarded. The court, therefore, refers the issue of the amount of legal fees to be awarded to the moving defendants to a Special Referee to hear and report his/her findings back to the court.

Conclusion

In accordance with this decision it is hereby:

ORDERED that defendant Gerald S. Kaufman and Stuart E. Selgel's motion to

dismiss the complaint is granted in its entirety and the complaint, as to them, is hereby dismissed and it is further

ORDERED that plaintiff Rivercity Realty Corp. is obligated to pay the reasonable attorney fees incurred by the moving defendants in connection with their defense of this action, and it is further

ORDERED that the issue of the amount of the reasonable attorney fees incurred by the moving defendants is hereby referred to a Special Referee to hear and report his/her findings back to the court and it is further

ORDERED that the moving defendants are directed to file a copy of this decision with the clerk for the Office for the Special Referees within 60 days of this decision so that a hearing may be calendared in accordance herewith and it is further,

ORDERED that the remaining parties are to appear for a status conference on **March 11, 2010 at 9:30 a.m.** at which point the parties should be prepared to discuss what, in any, issues remain in this action; no further notifications will be sent and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, NY
February 1, 2010

SO ORDERED:

J.G. J.S.C.

FILED
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