

Singh v Fruhman

2010 NY Slip Op 30267(U)

February 1, 2010

Supreme Court, Nassau County

Docket Number: 3328/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

AMAR JIT SINGH,

Plaintiff,

INDEX No. 3328/09

MOTION DATE: Nov. 12, 2009
Motion Sequence # 001

-against-

HARRY FRUHMANN,

Defendant.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Sur-Reply Affirmation in Opposition..... X
- Affidavit in Support..... X
- Affirmation in Response..... X
- Reply Affidavit..... X
- Memorandum of Law..... XX
- Supplemental Memorandum of Law..... XX
- Reply Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to CPLR Rules 3211(a)(1), (5), (6) and (7), dismissing the counterclaim of defendant-counterclaimant Harry Fruhman, and for such other and further relief as to the Court may seem just and proper, is determined as hereinafter set forth.

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The plaintiff and defendant were principals in the bankruptcy of Brunswick Hospital (hereinafter "BH"); the plaintiff as C.E.O. of BH, was to contribute \$1.5 million to the Creditor Trust, and the defendant was to continue as the C.F.O. of an entity known as BH Realty Group LLC to own the realty underlying BH. The defendant was to continue in ownership when he contributed \$750,000; he did not, but continued in management for some period of time. The bankruptcy plan of reorganization then terminated the defendant's ownership interest but the plaintiff's ownership continued by his contribution of \$1.5 million into the bankruptcy. The defendant has counterclaimed for the elimination of his interest in the hospital and salary. There is an outstanding action in Suffolk County, by the defendant, inter alia, in the nature of a derivative action of BH Realty, Inc.

The plaintiff asserts that the Bankruptcy Court order confirming the bankruptcy plan for BH is a final judgment that bars the defendant's counterclaim on the theory of issue preclusion. Counsel for the plaintiff argues that insofar as the counterclaim alleges that the Bankruptcy Plan was obtained by fraud, such claim must be brought in Bankruptcy Court. Counsel also argues that pursuant to Bankruptcy Law, the defendant had a time limitation of 180 days from the date of the entry of the order of confirmation to file his claim, and because the Confirmation Order was entered on October 17, 2007, the defendant is statutorily barred from interposing his claim.

The Trustee for the Creditors' Committee avers that the Confirmation Order confirms the plaintiff's assertion of his contribution and the legal effect of that contribution, its timing, and that the plaintiff has a sound factual position.

The defendant notes that nowhere in this litigation is there an affidavit from the plaintiff himself; and that two of the plaintiff's claims are the same as that which was asserted in the plaintiff's answer (as defendant) in the Suffolk action. He asserts that the plaintiff may have made a loan to BH as part of the Settlement Agreement and received a sum of money as part payment on the Note; that the plaintiff's infusion of \$1.5 million in cash to BH was not made from the plaintiff but from BH, in violation of the Bankruptcy plan and done without the knowledge of the Bankruptcy Court, and the Creditors' Committee. He argues that his counterclaim does not collaterally attack the Bankruptcy plan but seeks damages for the plaintiff's fraud against him. His counsel argues that such an action is independent of and can be adjudicated outside of Bankruptcy Court. He contends that the defendant's counterclaim is not barred by res judicata because pertinent case law posits otherwise, in that the identical issue was not adjudicated in the Bankruptcy Court; that the Bankruptcy Law does not bar this claim because, inter alia, the plaintiff's "new value" was

not an issue in the confirmation of the Plan.

In reply, the plaintiff avers that, in fact, he did make the \$1.5 million contribution to BH but did not make it until after the defendant's ownership and employment was terminated. Counsel asserts that the defendant has no legal standing to assert the counterclaim because he did not contribute any "new value" to BH and his ownership interest was extinguished by the Plan, and any fraud claim would have to be brought by BH or the Creditors' Committee. He repeats the arguments that: the defendant's counterclaim is barred by the principle of res judicata by the Bankruptcy Confirmation Plan and Order; and that this counterclaim is improper and time-barred.

In an authorized "sur-reply", the defendant argues that the plaintiff's proof of payment does not demonstrate the plaintiff's categorical conclusion of his obligation under the Plan and does not disprove the viability of the counterclaim herein. He also questions the Trustee's account relative to the disposition of the monies, and disputes the plaintiff's rationale as to his delay in making the contribution. He argues that it was his (defendant's) decision to be removed from the BH account for personal financial reasons.

In an authorized response to the "sur-reply", plaintiff's counsel points out the inconsistencies and mis-statements that he asserts are made by defendant and his attorney.

DECISION

CPLR 3211(a)(1), (5), (6) and (7) provides as follows:

"(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or
5. the cause of action may not be maintained because of 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; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action”.

The essence of the plaintiff’s position rests upon the impact of the Confirmation Plan and Order of the U.S. Bankruptcy Court, and the occurrence of the timely payment into the created Creditor Trust. The Trustee has described, in detail, the relevant transactions and supported those transactions with the appropriate documentation. While the Confirmation Plan provides for the nullification of the Plan and Order in the absence of the timely contribution, there is no documentation of that nullity. The enunciation of the facts as substantiated by the Trustee sets forth the presentation of the applicable case law which clearly requires a dismissal of the counterclaims herein. Pertinent to the principle of res judicata, (Sure-Snap Corporation v State Street Bank & Trust Company, 948 F.2d 869, 1991), BH, the debtor herein, appropriately notified, inter alia, the defendant herein of sufficient information to make an informed decision regarding his claims, sufficient enough for him to make his claim, thus barring re-litigation in this forum. There is no doubt that the Confirmation Order and Plan of the Bankruptcy Court had a preclusive effect, and res judicata is further effectuated by the defendant’s lack of standing to sue. As set forth by the Appellate Division, 2nd Department, in Caprer v Nussbaum (36 AD3d 176, 825 NYS2d 55, 2006),

“Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant’s request”.

Herein, by the constant participation by this defendant in the proceeding before the

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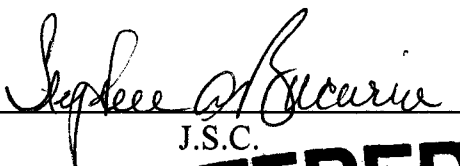
Bankruptcy Court and his lack of contribution of “new value” so as to vest an interest in the BH, as reorganized, the defendant’s interest was extinguished by the Confirmation Order and Plan (see 8315 Fourth Ave. Corporation, 172 B.R. 725, E.D.N.Y., 1994).

Pursuant to 11 USC§1144 and Rule 7001(5) of the Bankruptcy Court Rules, a claimant must move to revoke the Confirmation Order and Plan within 180 days of the entry of such order, herein such entry date was October 19, 2007, and the interposition of the instant counterclaim did not occur until after such interval, the counterclaim is barred.

Accordingly, the plaintiff’s motion is **granted** and the defendant’s counterclaim is **dismissed**.

A Preliminary Conference has been scheduled for March 22, 2010 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client’s schedule for the purpose of setting **firm** deposition dates.

Dated FEB 01 2010


J.S.C.

ENTERED

FEB 02 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE