

Minor v Combo Stores Co.

2010 NY Slip Op 31286(U)

May 14, 2010

Sup Ct, Nassau County

Docket Number: 016437/09

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

LISA MINOR and LISA MINOR AS THE
TRUSTEE OF THE TRUST UWO SHIRLEY
COOPERMAN, DECEASED, FBO ELLEN
ABRAMS,

INDEX No. 016437/09

MOTION DATE: April 6, 2010
Motion Sequence # 001, 002, 003,
004

Plaintiffs,

-against-

COMBO STORES COMPANY, P&S REALTY
COMPANY, SONS REALTY COMPANY,
INITIAL REALTY COMPANY, FLATLANDS
MANAGEMENT COMPANY, QUEENS
SYNDICATE COMPANY, CAMBRIDGE V, LLC,
QUINCY V, LLC, VICTOR VITLIN, JANICE
SHEINBERG, ROBERT FEINERMAN and
SHELLY HERMAN, AS EXECUTRIX OF THE
ESTATE OF STEPHEN COOPERMAN,

Defendants.

The following papers read on this motion:

- Notice of Motion..... XX
- Cross-Motion..... XX
- Affirmation in Opposition..... XX
- Affirmation in Support..... X
- Reply Affirmation XX

Motion by defendant Shelly Herman as executrix to dismiss the complaint for lack

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of personal jurisdiction or as barred by the statute of limitations is denied. Motion by plaintiffs for a default judgment is **denied**. Motion by the other defendants to dismiss on the ground of another action pending is **denied**. Motion by the other defendants to disqualify plaintiff's counsel is **denied**. Motion by defendant Shelly Herman for relief from her default in appearing is **denied** as academic.

This is an action for an accounting. Plaintiff Lisa Minor is the executrix of Shirley Cooperman, who died on September 20, 2000. At the time of her death, Shirley Cooperman was a partner in defendant Combo Stores Company and defendant Queens Syndicate Company, which own commercial property located in Queens. Shirley Cooperman was also a partner in defendant Flatlands Management Company and defendant P & S Realty Company, which own commercial property located in Brooklyn. Shirley Cooperman was also a partner in defendant Sons Realty Company and defendant Initial Realty Company, which own commercial property located in Nassau. Plaintiff is also a partner in the various partnerships in her own right.

Defendant Cambridge V, LLC is the general partner of Combo Stores. Defendant Quincy V, LLC is a partner in Queens Syndicate. Defendants Victor Vitlin, Janice Sheinberg, and Robert Feinerman are members of the management committees of Combo Stores and Queens Syndicate.

Shirley Cooperman's will provides that plaintiff and Stephen Cooperman would each receive a 1/3 share of the residuary estate. The remaining 1/3 of the residuary estate was to be placed in trust for the benefit of Ellen Abrams. On December 13, 2000, letters testamentary and of trusteeship were issued to Stephen Cooperman by the Nassau County Surrogate's Court. On September 7, 2005, Stephen Cooperman executed a "Receipt, Release, and Refunding Agreement," whereby Stephen received his share of Shirley Cooperman's estate and agreed to indemnify the estate against any liability which would have been chargeable against the property distributed to him.

Stephen Cooperman died on February 18, 2008. On April 3, 2008, letters of trusteeship with respect to the Ellen Abrams Trust were issued to plaintiff by the Surrogate's Court. Letters testamentary with respect to Shirley Cooperman's estate were granted to plaintiff on April 9, 2008.

At the time of his death, Stephen Cooperman was a resident of Great Barrington, Massachusetts. Defendant Shelly Herman is the executrix of Stephen Cooperman's estate, having received letters testamentary from a Massachusetts probate court.

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On May 14, 2008, Combo Stores and Queens Syndicate commenced an action against Stephen Cooperman's estate in the U.S. District Court for the District of Massachusetts based upon Cooperman's management of those partnerships prior to his demise (3:08-CV-30095). On May 22, 2008, Cambridge and Quincy commenced a proceeding against Minor, as executrix of Shirley Cooperman's estate, in the Nassau County Surrogate's court for unjust enrichment. Cambridge and Quincy's unjust enrichment claim is based upon certain distributions which Shirley Cooperman received with respect to the Combo Stores, Queens Syndicate, and Initial properties. Shirley Cooperman received these distributions pursuant to an assignment which she received in 1981 from Hyman Kamen of his rights under the so-called "Kamen Agreement."

On November 11, 2008, Shelly Herman, on behalf of Stephen Cooperman's estate, commenced an action against plaintiff in Massachusetts Superior Court, Berkshire County. On December 17, 2008, Initial, Sons, P & S, and Flatlands Realty commenced an action against Stephen Cooperman's estate in the U. S. District Court for the District of Massachusetts based upon Cooperman's management of those partnerships (3:08-CV-30235). In the federal lawsuits, Stephen Cooperman's estate counterclaimed based upon its interest in the partnerships. Additionally, Stephen Cooperman's estate filed a third party claim against the management committees of the partnerships and named the plaintiff as a third party defendant. On February 26-27, 2009, the parties involved in the Massachusetts federal lawsuits engaged in a mediation in Nassau County.

On February 27, 2009, the parties entered into a mediation settlement agreement which purports to "settle any and all claims among and between the parties." The settlement agreement provides that Stephen Cooperman's estate retains the house which he owned in Great Barrington, Massachusetts. The agreement provides that tangible personal property, other than household goods, shall be auctioned and distributed 70% to the partnerships and 30% to Stephen's estate. The agreement provides that Lisa Minor shall transfer certain funds which were held in a Massachusetts bank to the partnerships. The agreement provides that the partnerships shall retain certain distributions withheld from Stephen's estate, and the estate shall transfer its interests in the partnerships to the partnerships. The agreement provides that Stephen's estate shall transfer the estate bank accounts to the partnerships. The agreement provides that any interest of Stephen's estate in the "Kamen Agreement" shall be null and void. The agreement provides that Lisa Minor and the Ellen Abrams Trust shall be paid all "distributions and other payments from the partnerships presently being sequestered by the partnerships." The agreement provides that general releases shall be executed by all parties, except that the "Kamen lawsuit" pending in the Nassau Surrogate's

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Court was not covered by the releases. In the agreement, the partnerships acknowledge that Lisa Minor and Stephen's estate entered into a separate settlement in the Berkshire County action. In the agreement, Lisa Minor, individually and as trustee of the Ellen Abrams Trust, agrees to cooperate fully with the partnerships to convert the partnerships to limited liability companies. The settlement agreement is signed by all parties, including plaintiff.

Pursuant to the settlement agreement, the parties executed a "Mutual Release" dated February 27, 2009. In the mutual release, the parties released each other from "any and all claims and causes of action." However, in the mutual release, the parties acknowledged that there was a dispute concerning plaintiff's rights under the "Kamen Agreement," both individually and as trustee under the Ellen Abrams Trust. The parties further acknowledged that the dispute was subject to a lawsuit pending in the Nassau County Surrogate's Court, and the lawsuit was excluded from the mutual release.

This action for an accounting was commenced on August 14, 2009. In the first cause of action, plaintiff seeks an accounting with respect to the affairs of Combo Stores. In the second cause of action, plaintiff seeks an accounting with respect to the affairs of Queens Syndicate. In the third cause of action, plaintiff seeks a declaratory judgment that the mediation settlement agreement does not cover her claims for an accounting.

Defendant Shelly Herman moves to dismiss the complaint for lack of personal jurisdiction. Herman argues that the estate has no contacts with New York. CPLR § 302(a) provides that a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent, transacts any business within the state as to a cause of action arising from the transaction of business. Prior to his demise Stephen Cooperman was involved in the management of all six of the partnerships. Plaintiff's causes of action for an accounting relate to the properties located in Queens. Thus, plaintiff's causes of action for an accounting arise from activity carried on by Stephen Cooperman in New York state. Moreover, Stephen Cooperman had additional contact with New York by virtue of having received letters testamentary from the Nassau Surrogate's Court. Since Stephen Cooperman transacted business in New York, the court may exercise personal jurisdiction over his executrix with respect to a cause of action arising from the transaction. Defendant Shelly Herman's motion to dismiss for lack of personal jurisdiction is **denied**.

Defendant Shelly Herman argues that any claim asserted by plaintiff pursuant to the receipt, release, and refunding agreement is barred by the one year time limit applicable to claims against decedent's estates in Massachusetts probate proceedings.

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The court notes that SCPA § 1802, the corresponding provision in New York probate proceedings, is not a statute of limitations (*In re Estate of Cipriani*, 24 Misc.3d 1204A [Surr. Ct. 2009]). Defendant has not established that the Massachusetts provision is a statute of limitations. CPLR § 202 provides that “An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.” Plaintiff is a New York resident. Moreover, the cause of action for an accounting with respect to New York real property accrued in New York. Defendant Shelly Herman’s motion to dismiss the complaint based upon the Massachusetts statute of limitations is **denied**.

Plaintiff moves pursuant to CPLR § 3215 for a default judgment against defendant Shelly Herman with respect to the third cause of action for a declaratory judgment based upon her failure to appear or plead. The granting of a default judgment pursuant to CPLR 3215 is subject to the court’s discretion (*Muller v Want & Ender*, 55 AD3d 696 [2d Dept 2008]). Because defendant Herman moved to dismiss the complaint for lack of personal jurisdiction, she did not default in appearing in the action. Plaintiff’s motion for a default judgment against defendant Shelly Herman is denied. Defendant shall serve her answer within 15 days of service of a copy of this order. Defendant Shelly Herman’s motion to be relieved of her default in appearing is denied as academic.

Defendants Combo Stores, P & S Realty, Sons Realty, Initial Realty, Flatlands Management, Queens Syndicate, Cambridge V, Quincy V, Vitlin, Sheinberg, and Feinerman move to dismiss the complaint pursuant to CPLR 3211(a)(4) on the ground of another action pending, the Massachusetts federal court case brought by Queens Syndicate and Combo Stores. The federal court granted a motion by the plaintiffs in the federal action for enforcement of the mediation settlement agreement. A motion by Lisa Minor to vacate the federal court order granting enforcement of the settlement agreement is pending.

CPLR 3211(a)(4) provides that a party may move for judgment dismissing a cause of action asserted against him 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 court need not dismiss upon this ground but may make such order as justice requires. A court has broad discretion as to the disposition of an action when another action is pending (*Feustal v Rosenblum*, 24 AD3d 549 [2d Dept 2005]). The court may dismiss an action pursuant to this section where there is substantial identity of parties for the same cause of action (Id). The two actions must be “sufficiently similar,” and the relief sought

must be “the same or substantially the same.”

The issue of the enforceability of the mediation settlement agreement is before the Massachusetts federal court. However, the mediation settlement does not cover plaintiff’s claims for an accounting which are before this court. Stipulations of settlement are to be construed like any other contracts, in accordance with the parties’ intent which is generally discerned from the four corners of the document itself (*IDT Corp v Tyco Group*, 13 NY3d 209, 214 [2009]). The court notes that the Massachusetts federal action brought by Queens Syndicate and Combo Stores is based upon “financial irregularities” which occurred while Stephen Cooperman was the managing partner of those partnerships. Lisa Minor was not a defendant in that action and was brought into the other federal action only as a third party defendant. Despite the broad language in the settlement referring to “any and all claims,” the court construes the settlement as referring to the partnerships’ claims against Stephen Cooperman’s estate, and Stephen Cooperman’s estate’s claims against the partnerships, rather than plaintiff’s claims against Combo Stores and Queens Syndicate for an accounting. Indeed, the mutual release terminating the federal action specifically excludes the proceeding in the Surrogate’s Court to determine plaintiff’s rights under the Kamen Agreement. Moreover, the federal court settlement agreement provides that Lisa Minor and the Ellen Abrams Trust will be paid their distributions which were “sequestered” by the partnerships. Because the claims in the Massachusetts federal action and the present case are not sufficiently similar, defendants’ motion to dismiss the complaint for another action pending is **denied**. Defendants’ motion for a stay is similarly **denied**.

Defendants move to disqualify plaintiff’s counsel Robert Ross on the ground that “Stephen Cooperman, during his lifetime, hired Robert A. Ross to provide legal services with respect to the partnerships.” Rule 1.9(a) provides that “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing” (22 NYCRR § 1200.0). Defendants also assert that Ross will divulge confidential information if allowed to represent plaintiff.

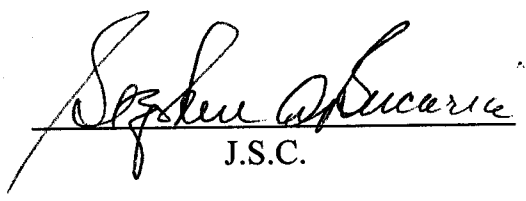
Ross denies having previously represented the partnerships and denies having acquired any information protected by the attorney-client privilege in his representation of Stephen Cooperman with regard to the partnerships. Under the DR 5-108, the predecessor disciplinary rule, a party seeking disqualification of its adversary’s lawyer was required to prove that there was an attorney-client relationship between the moving party and opposing counsel, the matters involved in both representations are substantially

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related, and the interests of the present client and former client are materially adverse (*Jamaica Public Service v AIU Ins.*, 92 NY2d 631, 636 [1998]). Although Ross previously represented Stephen Cooperman, the moving defendants have failed to establish an attorney client relationship with Ross. Defendants' motion to disqualify Ross as plaintiff's counsel is denied.

So ordered.

Dated 14 May 2010


J.S.C.

ENTERED
MAY 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE