

93 Bowery Holdings LLC v Yip Shuen Ng

2010 NY Slip Op 31304(U)

May 26, 2010

Supreme Court, New York County

Docket Number: 104013/2009

Judge: Louis B. York

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

5.26.10
a.c.f.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

93 Bowery Holdings

INDEX NO. 104013/09

Yip Shuen Ng.

MOTION DATE _____

MOTION SEQ. NO. 001

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 IS DECIDED TO ACCORD WITH THE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/26/10

Luy
J.S.C.

LOUIS B. YORK
NON-FINAL DISPOSITION
J.S.C.

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

*Supreme Court of the State of New York
County of New York*

Index No. 104013/2009

Part 2

Decision/Order

93 BOWERY HOLDINGS LLC,

Plaintiff,

**Present:
Hon. Louis B. York
Justice, Supreme Court**

– against –

YIP SHUEN NG,

FILED
MAY 27 2010
CO. CLERK
NEW YORK
DEPUTY CLERK'S OFFICE

York, J.S.C.:

In this lawsuit, plaintiff seeks damages from defendant for losses it incurred when defendant prepared and recorded a fraudulent deed, which purportedly conveyed the plaintiff's property to defendant.

Plaintiff purchased the property at 91-93 Bowery on November 1, 2005. In February of 2006 plaintiff's bank ("the bank") notified plaintiff that a deed had been recorded purportedly conveying the property to defendant. Plaintiff immediately informed his attorney. As a result of his conduct with respect to this and some other properties the Manhattan District Attorney's Office brought criminal charges against defendant. Plaintiff and defendant reached a settlement in which defendant acknowledged his wrongdoing, agreed to execute a correction deed back to plaintiff and to never engage in such activity again.

In November 2008, the bank apprised plaintiff that defendant executed and recorded a second fraudulent deed conveying plaintiff's property to defendant. Plaintiff notified his attorney of defendant's activity. The Manhattan District Attorney's Office arrested and indicted defendant. In addition, plaintiff commenced this action against defendant. In this lawsuit plaintiff contends defendant's conduct is illegal, fraudulent and done without plaintiff's knowledge or consent of plaintiff. Further, plaintiff claims that defendant's actions have infringed on plaintiff's title to the property. Plaintiff seeks punitive damages in the sum of \$100,000.00, compensatory damages in the sum of \$100,000.00 and attorney's fees.

On April 14, 2009, the Sheriff of Bergen County personally served defendant with a Summons and Verified Complaint. Defendant failed to answer within 30 days of service. Plaintiff's counsel wrote to defendant on May 20, 2009, informing defendant that plaintiff was moving for default judgment. Further, plaintiff's attorney advised defendant to contact his attorney. Now plaintiff moves for default judgment. In response, defendant does not cross move but requests a stay pending the resolution of his criminal action. Defendant offers no argument explaining his default or stating why default judgment should not be granted. Moreover, in opposition defendant states that default should not be entered until the conclusion of defendant's criminal case.

First, the court rejects defendant's request for a stay. A party must make a motion in order to obtain affirmative relief, and defendant fails to do so here. See Myung Chun v. North American Mortgage Corp., 285 A.D.2d 42, 46, 729 N.Y.S.2d 716, 719 (1st Dept. 2001); Bauer v. Facilities Development Corp., 210 A.D.2d 992, 992, 621 N.Y.S.2d 815, 816 (4th Dept. 1994).

Further, even if defendant had made a cross-motion, he would have had to provide a legal justification for the stay. Here, defendant does not provide any basis for the relief he seeks.

Second, the Court turns to plaintiff's motion for default judgment. A plaintiff may move for a default judgment "when a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." CPLR §3215 (a). Though plaintiff served defendant with the complaint, defendant not only failed to answer in a timely fashion but offers no valid reason for this failure. Moreover, plaintiff has set forth a prima facie case and defendant has not challenged plaintiff's statement that he filed the deed fraudulently. Furthermore, defendant does not appear to be ready to answer the complaint. Instead, at Court conferences his attorney acknowledged that his client filed the deed but sought more time to resolve his criminal case prior to addressing this matter. As defendant has not shown either a reasonable excuse or a meritorious defense, the Court grants the motion on the issue of liability. See Matone v. Sycamore Realty Corp., 50 A.D.3d 978, 978, 858 N.Y.S.2d 202, 203 (2nd Dept. 2008), lv denied, 11 N.Y.3d 715, 873 N.Y.S.2d 533 (2009).

As for damages, plaintiff's original complaint seeks \$100,000.00 in compensatory damages, \$100,000.00 in punitive damages, and \$10,000.00 in attorney's fees. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. Lauders v. Steinberg, 39 A.D.3d 57, 75, 828 N.Y.S.2d 36, 49 (1st Dept. 2007). To obtain compensatory damages for the filing of a fraudulent deed plaintiff must suffer an economic harm due to defendant's conduct. Plaintiff must be able to show it has

suffered a loss due to defendant's conduct. The burden resides with plaintiff to show the court it suffered damages from the fraudulent conveyance. See id.

The complaint in this action seeks compensatory damages but does not set forth an explanation as to how it incurred financial loss. Moreover, Real Property Law 239, upon which plaintiff relies, entitles plaintiff to a ruling that defendant's title is void or invalid but does not award either attorney's fees or other damages. At conference plaintiff asserts that construction has been delayed but the Court cannot locate evidence in the motion papers or a statement in the affidavit or affirmation detailing the delays. The only evidence of damages exists in the affidavit of plaintiff's managing agent, which refers to "a cloud upon our title" and "substantial legal fees." Tun Aff. at ¶ 8. If the legal fees were incurred in attempts to clear the title, then they are compensable. The attorney's fees associated with this action are not for the reasons set forth below. Therefore, a hearing is required to establish the amount of concrete damages which plaintiff has sustained as a direct result of defendant's actions.

In addition, plaintiff seeks punitive damages. However, plaintiff has not established a prima facie case for punitive damages. Punitive damages punish reprehensible conduct and deter its future conduct. Frankson v. Brown & Williamson Tobacco Corporation, 67 A.D.3d 213, 218-19, 886 N.Y.S.2d 714, 719 (2nd Dept 2009) Plaintiff offers the court no evidence that defendant will engage in similar activity in the future or that defendant's conduct was of such an egregious nature that it must be punished by punitive damages. Further, punitive damages are not generally available in fraud and deceit cases. See Crispino v. Greenpoint Mortgage Corporation, 2 A.D.3d 478, 479, 769 N.Y.S.2d 553, 555 (2nd Dept. 2003); Bobash, Inc. v. Festinger, Index No.

03908/05, 15 Misc.3d 1114 (A), 839 N.Y.S.2d 431 (Sup. Ct. Kings County March 30, 2007)(avail at 2007 WL 969435, at *4).

Plaintiff argues that punitive damages nonetheless are proper because this is a prima facie tort. To obtain punitive damages on this theory, however, plaintiff must show “(1)intentional infliction of harm (2) causing special damages (3) without excuse or justification (4) by an act or series of acts that would otherwise be lawful. Amodie v. New York State Chiropractic Ass’n, 160 A.D.2d 279, 282, 553 N.Y.S.2d 713 , 716 (1st Dept 1990). The motive must be one of disinterested malevolence. Id.

After careful consideration, the Court concludes that an award of punitive damages is not appropriate. For one thing, plaintiff has not pled a cause of action for prima facie tort because the conduct in question is not “otherwise lawful.” See id. Indeed, defendant is being criminally prosecuted for the offense. For another, plaintiff has not shown that defendant’s motive is disinterested malevolence. Instead, according to the report which Chris Napierala of Sentencing Alternatives prepared in connection with defendant’s criminal case, defendant is fixated on avenging the wrong he believes was done to his family by the purported theft of the property in question. Defendant’s intent – to reclaim property he believed was his – does not constitute “disinterested” malevolence because the purpose was not solely to harm plaintiff. See Bainton v. Baran, 287 A.D.2d 317, 318, 731 N.Y.S.2d 161, 163 (1st Dept. 2001). Moreover, Dr. N.G. Berrill of the New York Center for Neuropsychology & Forensic Behavioral Science, upon whose evaluation Mr. Napierala based his conclusions, found that defendant has a delusional disorder and dementia which may have caused or contributed to his behavior. According to the report, prior to his disorder defendant, now 83 years old, had some personal difficulties and/or

harbored anger over the purported theft of his father's properties,¹ but he had led an exemplary life. This raises the possibility that his criminal conduct was the result of mental disease and further militates against a conclusion that punitive damages are appropriate. Finally, plaintiff has not shown the fraud was aimed at the general public. See Vitra, Inc. v. Soho House, LLC, 50 A.D.3d 529, 529, 856 N.Y.S.2d 100, 101 (1st Dept. 2008).

Finally, the complaint contains a claim for attorney's fees. However, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." Atlantic Development Group, LLC v. 296 East 149th Street, LLC, 70 A.D.3d 528, 529, 895 N.Y.S.2d 392, 393 (1st Dept. 2010)(citation and internal quotation marks omitted); Baker v. Health Management, 98 N.Y.2d 80, 88, 745 N.Y.S.2d 741, 746 (2002). Plaintiff does not set forth any statutory or contractual basis for attorney's fees and also does not cite a court rule allowing for fees in this instance. Therefore, the court denies plaintiff's request.

Based on the above, therefore it is

ORDERED plaintiff's motion for summary judgment is granted on default on the issue of liability, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant and it is further

ORDERED that this matter is referred to the Referee's Clerk, who is directed upon filing of a copy of this order to place this action on the appropriate referee's calendar. The Referee shall hear and decide the amount due in compensatory damages and enter a Judgment thereon

¹ In addition, defendant – who came to the United States upon his father's death – was told by relatives that his father had been poisoned by those who took his property.

and it is further

ORDERED that the portions of the motion that seek punitive damages and attorney's fees are denied.

Dated: 5/26/10

ENTERED:



Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**

FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE