

Lavian v Bleier

2010 NY Slip Op 31542(U)

June 10, 2010

Supreme Court, New York County

Docket Number: 112767/09

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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SHAHRAM DAVID LAVIAN,	:
	:
Plaintiff,	:
	:
-against-	:
	:
JACK (JACOB) BLEIER, ESQ., ESQUIRE	:
CORPORATE NETWORKS, INC., DIVERSIFIED	:
CORPORATE SERVICES INT'L, INC., JODIE	:
SKIBINSKY, JERRY JOSEPH,	:
	:
Defendants.	:
-----X	

Index No. 112767/09
DECISION AND ORDER
Motion Sequence: 003

MELVIN L. SCHWEITZER, J.:

This is a motion for summary judgment to dismiss an action recently commenced in September 2009 by Shahram David Lavian against defendants. The action seeks to open a new front in a ten-year old proceeding before the court under BCL § 1104 stemming from a bitter dispute between two former friends and business partners in which Soheil Darvish has sought court orders to dissolve each of three corporations. Mr. Darvish has contended throughout that both he and Mr. Lavian are each 50% owners of each corporation. Mr. Lavian disputed Mr. Darvish's ownership holdings in one of the three companies, Haslacha, Inc., and alleged that he is the sole owner of that company, which was formed to acquire and renovate an apartment building in Manhattan.

In the dissolution proceeding, the court (Cahn, J.) referred the issue of Mr. Darvish's ownership (both past and present) of Haslacha to Special Referee Lancelot B. Hewitt. Referee Hewitt commenced an evidentiary hearing in 2006 which continued over a year and a half, after which he filed a Report of his findings of fact and conclusions of law which determined that

Messrs. Darvish and Lavian each was and is a 50% owner of Haslacha. Justice Cahn thereafter confirmed Referee Hewitt's Report. Mr. Lavian's subsequent appeals seeking to press his claim that he is the sole Haslacha shareowner were dismissed by the Appellate Division, First Department.

Mr. Lavian's new action here is brought against two corporate filing companies located in Albany, New York, Esquire Corporate Networks and Diversified Corporate Services International, Inc. and their principals (now husband and wife), who voluntarily testified at a deposition in 2003, portions of which were read into evidence by both sides at the hearing before Referee Hewitt; and against an attorney, Jack Bleier, who retained the Esquire firm to attend to the formalities of Haslacha's corporate formation, and who testified at the hearing.

In bringing these new parties before the court, Mr. Lavian alleges that they conspired to deprive him of his claim that he was the sole owner of Haslacha. Among other things, Mr. Lavian points to the deposition testimony of Ms. Skibinsky (read at the hearing) and the hearing testimony of Mr. Bleier, as well as Esquire having failed to turn over certain documents pertaining to its corporate file on Haslacha which allegedly would have been of benefit to him at the hearing. Mr. Lavian's causes of action include conspiracy, violation of General Business Law § 349 (deceptive acts by persons in business), infliction of emotional distress, breach of the covenant of good faith, tortious interference with contract, fraud on the court and violation of Part 130 of the Rules of the court.

Defendants' motion here¹ seeks dismissal on the basis of *res judicata*, collateral estoppel, the absolute immunity conferred upon witnesses in judicial proceedings and the statute of limitations.

The court heard oral argument on the motion on May 12, 2010 and here grants summary judgment in favor of the moving defendants dismissing the complaint as against them.

The court concludes that Mr. Lavian's claims in this action are barred by the doctrine of collateral estoppel because all of the acts alleged in the amended complaint here are directed at the very same issue litigated before Referee Hewitt, that is, Mr. Lavian's claim that he was the sole owner of Haslacha. This issue has been fully and finally determined against Mr. Lavian's position. Here, Mr. Lavian alleges that defendants conspired to deprive him of his sole ownership by their adverse testimony and other acts which kept evidence of his alleged ownership from being considered by the court. In this regard, however, the court concludes that the findings and conclusions of Referee Hewitt below already are dispositive.²

¹ Mr. Bleier does not join in this motion as there is a motion by Mr. Lavian pending against him for a default for his alleged failure to answer the complaint here.

² Referee Hewitt reached the following findings and conclusions, among others:

- (15) Additionally, I find that the witnesses who testified on behalf of Darvish were credible (*id.*). Conversely, I find that the witnesses who testified on behalf of the respondents were not credible, specifically with respect to their testimony that Lavian was the sole owner of the 345 East 54th Street property (*id.*).
- (16) Further, I find that the totality of documentary evidence, including, but limited to, purchase agreements, mortgages, promissory notes, guarantees, and other documents executed by Darvish with regard to the various transactions he testified to overwhelmingly corroborate such testimony.
- (17) Moreover, I find that given the conduct intention, and relationship of Darvish and Lavian with respect to the purchase, renovation and sale of the Spencer Street property, and subsequent purchase, renovation and sale of numerous properties through various corporations formed by them, as well as the sharing of the proceeds from the sale of such properties on a 50/50 basis, the "business arrangement" formed by the Darvish and Lavian demonstrates the existence of a

The doctrine of 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 causes of action are the same. *Ryan v New York Telephone Company, supra*, 62 NY2d 494, at 500. The concept of *res judicata*, embraces not only those matters which are actually litigated before a court, but also those relevant issues which could have been litigated. *In re Hoffman*, 287 AD2d 119, 733 NYS2d 168 (1st Dept 2001). *Lusher v Arrua*, 21 AD3d 1005 (2d Dept 2005). Under New York's transactional approach to *res judicata*, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories, or if seeking different remedy. *O'Brien v City of Syracuse*, 54 NY2d 353 (1981). In order for Mr. Lavian to prevail on his theories that the moving defendants are the reason he lost his claim of total ownership of Haslacha, he would have to show that, but for defendants' testimony and the documentary evidence they allegedly did not produce, he would have prevailed before Referee Hewitt. But as is clear from the Referee's findings and conclusions, these issues pertaining to

partnership, which was created by them for the express purpose of purchasing, renovating and selling properties (*see Brodsky v Stadlen, supra*). Indeed, the evidence of the parties' intention to form a partnership is clear from the sharing of profits, joint management and control, compensation, and contribution of capital (*id.*)

- (18) I further find that Haslacha, Inc. was a corporation ultimately formed by the partnership created by Darvish and Lavian for the purpose of purchasing the 3457 East 54th Street property, and that, as in all prior transactions involving the partnership, Darvish was a 50/50 shareholder in the corporation (i.e. Haslacha, Inc.) through which the property was purchased, and that he is therefore also entitled to a 50/50 share in any sale of the 347 East 54th Street property.
- (19) The fact that no shares in Haslacha, Inc. were ever issued to Darvish is irrelevant with regard to his status as a shareholder in the corporation, given the conduct and practice of the parties in the past with respect to the creation of previous corporations without the issuance of shares (*see In the Matter of Rappaport v Jillen Security Corp., supra*).

Mr. Darvish's ownership share in Haslacha have been fully litigated before him. They cannot be relitigated again here.

That Mr. Lavian's prior conduct leading up to the hearing before Referee Hewitt caused a preclusion order to be entered against *his* introduction of certain documentary evidence because he had failed to produce the requested documents in discovery does not demonstrate that the hearing before Referee Hewitt was not a fair one as to him. A judgment issued as a result of an order of preclusion is in fact a judgment on the merits and must be given collateral estoppel effect. *See Strange v Montifiore Hospital and Medical Center*, 59 NY2d 737 (1983); *Tejeda v 750 Gerard Properties Corp.*, 272 AD2d 124 (1st Dept 2000); *Yates v Roco Co.*, 48 AD3d 800 (2d Dept 2008); *Kanat v Ochsner*, 301 AD2d 456 (1st Dept 2003); *In re Abady*, 22 AD3d 71 (1st Dept 2005). In any event, the very document that Mr. Lavian wanted to call to this court's attention *viz.* his purported ownership, a Certificate of Incorporation filed at the time the corporation's name was changed to Haslacha, was, in fact, introduced into evidence by Mr. Darvish's attorney (*see* n 16 of Referee Hewitt's Report). In fact, Mr. Bleier, Mr. Lavian's attorney when the corporation was formed, was cross-examined extensively about that document. Counsel for movants also points out that there were 15 witnesses called before Referee Hewitt, and 10 of them were called by Mr. Lavian. Mr. Lavian also was afforded an opportunity to take the stand himself and tell his side of the story, but he chose not to do so.

Mr. Lavian's argument that he was not an actual party to the dissolution proceeding and thus cannot be bound by its result is specious. The law of collateral estoppel is clear that one need not be a formal party to a prior proceeding for the doctrine to be applicable. It is sufficient that he was a participant. The Court of Appeals and First Department have held that a non-party

who controlled a litigation is in privity with the parties thereto and bound by the orders rendered under principles of *res judicata* and collateral estoppel. *Watts v Swiss Bank Corp.*, 27 NY2d 270 (1970); *Lumbermans Mutual Casualty Company v 606 Restaurant, Inc.*, 31 AD3d 334 (1st Dept 2006).

In sum, Mr. Lavian's claim here that the conduct of these defendants is what caused him to lose the earlier proceeding before Referee Hewitt, Justice Cahn and the First Department is nothing more than a collateral attack on the findings and conclusions pertaining to his share ownership in that earlier proceeding and it is barred by the doctrine of collateral estoppel.

The court also concludes that the defendants in this new lawsuit, Mr. Bleier who testified at the hearing before Referee Hewitt; and also Esquire, Ms. Skibinsky and Mr. Joseph, who voluntarily testified at depositions in 2003, which deposition transcripts were read into evidence at the trial before Referee Hewitt, thus enjoy absolute immunity from subsequent damages as they were integral parts of the judicial process. *Briscoe v LaHue*, 460 US 325, 103 S Ct 1108 (1983). In *Katz v Morgenthau*, 709 F Supp 1219 (SDNY 1989), the plaintiff sued various witnesses and participants in a criminal proceeding, for civil damages. The plaintiff in *Katz*, alleged that the various witnesses were coached, and that they conspired and colluded against him. Citing *Briscoe v LaHue*, the District Court held that even if the witnesses were coached, all witnesses, whether private parties or government officials, have absolute immunity from damage liability in connection with their participation in actions and proceedings. The New York Court of Appeals has recognized the same immunity. *Mosher-Simmons v County of Allegany*, 99 NY2d 214, 753 NYS2d 444 (2002).

Finally, it is clear to the court that in this, Mr. Lavian's latest effort to keep alive his court-considered and rejected claim to sole ownership of Haslacha by suing witnesses and participants in

the earlier dissolution proceeding, he has crossed the line of what this court will tolerate when it comes to litigation tactics. This is an example of a vexatious lawsuit that already appears to have cost these tangential participants in the judicial process real money to defend themselves against allegations stemming from their prior involvement in this litigation saga. In this court's view these defendants are deserving of compensation in the form of an imposition of sanctions against the plaintiff equal to the amount of the legal fees and costs they have and will incur to extricate themselves from their involuntary involvement here. Accordingly, the court will set an inquest date at which time defendants are to establish what their respective legal fees and costs have been in connection with defending this action, and this sum shall be awarded to them to be paid by the plaintiff.

Based upon the foregoing, it is hereby

ORDERED that movants motion for summary judgment dismissing the complaint as against them is granted; and

ORDERED that the parties are to contact the Clerk of the court to schedule an inquest date at which time the amount of legal fees and costs that the court will award as sanctions in accordance with this decision will be determined.

June 10, 2010

FILED
 JUN 21 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Mark R. Acunzio
 J.S.C.