

JFK Holding Co. LLC v City of New York

2010 NY Slip Op 32894(U)

October 12, 2010

Supreme Court, New York County

Docket Number: 114577/09

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

SFK Holdings

INDEX NO. 114577/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 42

- v -

City

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 *is decided in accordance with the annexed decision.*

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/12/10

CYNTHIA S. KERN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
JFK HOLDING COMPANY LLC and J.F.K.
ACQUISITION GROUP,

Plaintiffs,

Index No. 114577/09

-against-

DECISION/ORDER

THE CITY OF NEW YORK and DEPARTMENT OF
HOMELESS SERVICES and THE SALVATION ARMY,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	
Exhibits.....	

UNFILED JUDGMENT
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Plaintiffs JFK Holding Company LLC and J.F.K. Acquisition Group (together, "JFK") commenced the instant action to recover damages incurred when defendants allegedly failed to meet their contractual obligations. Defendants the City of New York and the Department of Homeless Services ("DHS") (together, the "City") now move to dismiss the complaint on the grounds that the action is barred by res judicata and the pleading fails to state a case of action for fraud and negligent misrepresentation. Defendant the Salvation Army also moves to dismiss the complaint against it on the grounds that the action is barred by res judicata and that plaintiff fails

to state a cause of action for breach of contract or for breach of the implied covenant of good faith and fair dealing. These motions are consolidated for purposes of disposition. For the reasons set forth more fully below, the City's motion and the Salvation Army's motions are both granted.

The relevant facts are as follows. JFK leased the premises known as Carlton House (the "Premises") to the Salvation Army. The lease (the "Lease") was for a term of 5 years and dated October 1, 2002. Pursuant to the Lease, the Salvation Army was to occupy and use the Premises as a homeless shelter, which it would operate. The Lease specifically acknowledged that the Salvation Army was entering the Lease solely in order to fulfill its obligations to DHS pursuant to a separate agreement (the "Services Agreement") with DHS to operate the facility. The Lease provided that if the City terminated the Services Agreement, the Salvation Army could terminate the Lease with thirty days written notice and payment of a \$10 million early termination fee. This is exactly what happened. In July 2005 the City announced the closing of the shelter which was operated at the Premises and on September 28, 2005, the City paid the \$10 million fee to the Salvation Army which, in turn, paid it to JFK. The Lease also contained a provision obligating the Salvation Army to restore the Premises to its pre-Lease condition.

The procedural history is as follows. In August 2008, JFK commenced an action against the City and DHS (the "Prior Action") alleging that the City breached an oral contract to assume all outstanding obligations under the Lease. In a decision dated May 13, 2009, the Supreme Court, Justice Milton A. Tingling, denied the City's motion to dismiss the complaint. The First Department reversed that decision in a decision dated December 8, 2009, holding that any oral agreement made by the City is invalid and unenforceable "since, pursuant to NY City Charter

394(b) and 328(a), any enforceable agreement with the City must be in writing, approved as to form by the Corporation Counsel, and registered with the Comptroller.” The Salvation Army was not named as a defendant in the Prior Action.

The City’s motion to dismiss plaintiff’s complaint based on the doctrine of res judicata is granted. Pursuant to that doctrine, “a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter.” *In re Hunter*, 4 N.Y.3d 260, 269 (2005). This bar applies not only to claims that were actually litigated “but also to claims that could have been raised in the prior litigation.” *Id.* Specifically, “[o]nce 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 a different remedy.” *Fifty CPW Tenants Corp. v Epstein*, 16 A.D.3d 292 (1st Dept 2005) (citations omitted).

JFK’s claims are barred by res judicata because the present claims arise out of the same transaction as the claims in the Prior Action. In the Prior Action, JFK sued the City for breach of an alleged oral agreement to assume all obligations under the Lease. In the current action, JFK asserts in its first cause of action that the City committed fraud by promising to assume the Lease obligations while knowing at the time that it never intended to do so. In its second cause of action, for negligent misrepresentation, JFK similarly asserts that the City promised to assume all obligations under the Lease while knowing that it would not do so. The contract claim in the Prior Action and the claims in the instant action therefore all arise out of the Lease and a purported oral agreement related to the Lease. The basis of both complaints is the same: that the City promised to assume the obligations under the Lease and then did not. Thus, although in the

Prior Action the cause of action is denominated as one for breach of contract and in the current action they are denominated as fraud and negligent misrepresentation, the causes of action are nearly identical and are based upon the same facts. Therefore, JFK's current action is barred by the doctrine of res judicata.

Moreover, plaintiff's argument that it was unaware of the fraud that forms the basis of its current complaint and therefore it could not have raised those allegations in the Prior Action is without merit. No facts have changed since plaintiff brought the Prior Action. There is no reason JFK could not have amended its complaint in the Prior Action to assert a cause of action for fraud. The stay in the Prior Action applied only to discovery and did not bar JFK from amending its complaint accordingly. Because JFK's claims against the City are barred by res judicata, the court need not address the City's argument that JFK fails to state a cause of action for fraud and negligent misrepresentation.

The court now turns to the Salvation Army's motion to dismiss. On a motion to dismiss, the allegations of the complaint must be taken as true. *See EBC I, Inc. v Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). JFK asserts two causes of action against the Salvation Army. It asserts a claim for breach of contract, alleging that the Salvation Army had a duty under the Lease to return the Premises in its pre-Lease condition and did not do so, that it failed to meet certain financial obligations under the Lease, and that it failed to use commercially reasonable efforts to enforce its rights against the City upon termination of the Lease, as required explicitly by the Lease. JFK also asserts a claim for breach of the implied covenant of good faith and fair dealing, alleging that the Salvation Army failed to take necessary steps to ensure that the City would enable the Salvation Army to meet its obligations under the Lease.

The Salvation Army is not entitled to dismissal of the causes of action against it on the grounds of res judicata because it is not in privity with the City. It is true that the doctrine of res judicata means that “a judgment in a prior action is binding not only on the parties to that action, but on those in privity with them.” *Green v Santa Fe Industries, Inc.*, 70 N.Y.2d 244, 253 (1987). “Generally, to establish privity the connection between the parties must be such that the interests of the non party can be said to have been represented in the prior proceeding.” *Id.* (citations omitted). “It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action and possibly coparties to a prior action.” *Bayshore Family Partners, L.P. v Foundation of Jewish Philanthropies of the Jewish Federation of Greater Fort Lauderdale*, 270 A.D.2d 374 (2nd Dept 2000).

In the instant case, the Salvation Army fails to establish that it is in privity with the City for purposes of res judicata. Not only does it not fall into any of the enumerated categories but there is no other evidence that the Salvation Army’s interests were represented in the Prior Action. The City and the Salvation Army do not have an identity of interests in these litigations. Rather, because the Salvation Army is a party to the Lease and the City is not, their interests are diverse. In fact, the court has already held that the City has no liability under the contract. The Salvation Army’s claim that it was “controlled” by the City is insufficient to establish privity. Furthermore, the Salvation Army fails to establish that it was an “agent” of the City acting in a “purely representative capacity.” The Salvation Army actually operated the homeless shelter, pursuant to the Services Agreement. Moreover, although the trial court held that the Salvation Army was acting in a “purely representative capacity,” the trial court’s decision was reversed.

Although the First Department’s reversal of that decision does not specifically address the issue of whether the Salvation Army was merely a representative for the City, the trial court decision cannot now be relied on. Because the Salvation Army has failed to establish that it is in privity with the City as a matter of law, its motion to dismiss plaintiff’s claims on the grounds of res judicata is denied.

However, the Salvation Army is entitled to dismissal of JFK’s claim for breach of contract by failing to return the Premises in pre-Lease condition and failing to meet certain financial obligations because JFK fails to state a claim. The Salvation Army’s liability is specifically limited by the Lease to any amounts paid to it from the City. The Lease provides that

Tenant [the Salvation Army] shall only be liable for Base Rent, Maintenance Payments, Tax Payments, Insurance Payments, the Termination Fee, Additional Rent or other payments under this Lease, including without limitation, indemnification payments, damages for breaches of any covenant under this Lease, and any late charges or default interest, solely to the extent of the amounts paid to Tenant from time to time under the Services Agreement or otherwise in connection with the use of the Leased Premises and expressly excluding any other assets of Tenant... (emphasis added).

This provision explicitly limits the damages available to JFK from the Salvation Army for any breach of the Lease to payments made by the City to the Salvation Army. The City has not made any payments to enable the Salvation Army to restore the premises to pre-Lease condition or to enable the Salvation Army to meet any other financial obligations remaining under the Lease. Moreover, the City will not be making any such payments to the Salvation Army pursuant to the Lease or the Services Agreement as this action is being dismissed against the City. Because no damages are available under the Lease for “breaches of any covenant under this Lease” except for what is paid by the City, JFK cannot recover any damages from the Salvation Army for breaches

of any covenant under this Lease.

The Salvation Army is also entitled to dismissal of the remaining contract claim which alleges it failed to use “commercially reasonable efforts” to enforce its rights against the City upon termination of the Lease. The Lease provides that “In the event the Department [DHS] fails to pay any such amounts [Base Rent, Maintenance Payments, Tax Payments, Insurance Payments, the Termination Fee, Additional Rent or other payments under this Lease] to Tenant, Tenant shall use commercially reasonable efforts to enforce its rights against the Department under the Services Agreement or otherwise...” Because the Lease provides that the Salvation Army’s liability is limited to any amounts paid to it from the City for breach “of any covenant under this Lease,” this claim must also be dismissed. The provision in the Lease requiring the Salvation Army to use commercially reasonable efforts is a covenant under the Lease. Therefore, the provision limiting liability applies to this covenant as well.

Finally, JFK’s cause of action asserting a breach of the implied covenant of good faith and fair dealing is dismissed as duplicative of its claim for breach of the explicit covenant to use “commercially reasonable efforts” to obtain compensation from the City. When claims are duplicative of each other, one must be dismissed. *See Logan Advisors, LLC v Patriarch Partners, LLC*, 63 A.D.3d 440, 443 (1st Dept 2009) (dismissing claim for breach of implied covenant of good faith and fair dealing as duplicative of claim for breach of contract because both “arise from the same facts”). In the instant case, JFK’s claim for breach of the implied covenant of good faith and fair dealing and its claim for breach of the obligation in the Lease to use “commercially reasonable efforts” are based on the same allegation - that the Salvation Army failed to seek to enforce its rights against the City.

Accordingly, the City's motion to dismiss is granted and the plaintiff's complaint against it is dismissed in its entirety. The Salvation Army's motion to dismiss is also granted and the plaintiff's complaint against it is also dismissed in its entirety. This constitutes the decision, order and judgment of the court.

Dated:

10/12/10

Enter:

CSK

J.S.C.

CYNTHIA S. KERN
J.S.C.

UNFILED JUDGMENT

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