

Bekas v Valiotis

2010 NY Slip Op 33980(U)

September 22, 2010

Supreme Court, Queens County

Docket Number: 9318 2010

Judge: Marguerite A. Grays

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

05

_____ x
DEMETRIOS BEKAS,

Plaintiff,

-against-

EFSTATHIOS VALIOTIS, TOP COVE
ASSOCIATES, INC., and RIVER CITY, LLC,

Defendants.
_____ x

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Motion
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Motion
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Motion Seq. No. 2

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FILED

The following papers numbered 1 to 3 read on this motion by the defendants for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint against them asserted by pro se plaintiff Demetrios Bekas.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	3

Upon the foregoing papers it is ordered that: Those branches of the motion which are for an order dismissing the complaint against the defendants pursuant to CPLR 3211(a)(1) and (7) are granted. That branch of the motion which is for an order dismissing the complaint against the defendants pursuant to CPLR 3211(a)(5) is denied as moot.

Plaintiff Demetrios Bekas signed an affidavit dated May 27, 2004 confessing judgment in favor of defendant Efstathios Valiotis for the sum of \$3,243,445. The affidavit states that the confession of judgment "is for a debt justly due to the plaintiff" and that the

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debt arises from, inter alia, specified loans made by Valiotis to Bekas. The Clerk of Queens County signed a judgment by confession dated June 8, 2004.

Plaintiff Bekas subsequently signed a sale of stock agreement dated July 29, 2004 pursuant to which he transferred his 40% interest in defendant Top Cove Associates, Inc. to defendant River City, LLC, which is owned by defendant Valiotis. In the agreement Bekas acknowledged owing a debt to River City in the sum of \$3,243,445. As payment for his 40% interest, Bekas received a credit in the amount of \$2,500,000 against the amount owed to Valiotis pursuant to the confession of judgment, thereby reducing the amount owed under it to \$743,445. Nicholas G. Petras, Esq., who represented Bekas, drafted the agreement.

On or about January 20, 2005, Evangelos Gatzonis, another shareholder in Top Cove, began an action in the New York State Supreme Court, County of Queens, against Bekas and Valiotis, among others, for the purpose of obtaining an injunction prohibiting Bekas from transferring his stock in the corporation (*Gatzonis v Top Cove Associates, Inc.*, Index No. 1493/05). Gatzonis, who claimed to have the right of first refusal, alleged, inter alia, that Bekas had not received genuine consideration for the transfer of his shares. Gatzonis moved for a preliminary injunction, and Bekas cross-moved for an order pursuant to CPLR 3211 dismissing the action against him on the ground of a prior action pending in the New York State Supreme Court, County of Queens (*Gatzonis v Bekas*, Index No. 7502/04). In opposition to the motion and in support of the cross motion, Bekas submitted an affidavit in which he stated: "I have reviewed in detail the affirmation of Hal R. Ginsburg [his attorney] dated February 16, 2005. I hereby reaffirm and reallege all of the factual statements contained therein with respect to my dispute with the plaintiff." Ginsburg stated in his affirmation:

"Gatzonis has argued before Justice O'Donoghue that the Stipulation of Settlement should be vacated on the ground that the purchase by Valiotis did not involve the actual transfer of monies but nearly [sic: merely] reduced Bekas' indebtedness to Valiotis which Gatzonis suspects (without any evidence) was not a true indebtedness but was created to avoid Bekas' obligations to Gatzonis under the shareholders agreement. Beyond the fact that *there is not a shred of evidence to support this allegation*, any issue regarding the Stipulation of Settlement is clearly one for determination by Justice O'Donoghue ***. *** These documents show that Mr. Bekas had significant debts to Mr. Valiotis and that those debts resulted in a Confession of Judgment *which Mr. Valiotis was entitled to* and was in the process of executing upon. *** All parties had independent counsel and the reduction of Mr. Bekas debt by \$2.5 million dollars *was significant and actual consideration*. Therefore, Mr. Bekas' statements to the court that he had a

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purchaser for his shares for \$2.5 million *was accurate* and the stock was sold to that very purchaser.” (Italics added.)

By decision and order dated April 13, 2005 (one paper), this court (1) denied the motion for a preliminary injunction because a similar request had been denied in the prior action and (2) denied the cross motion to dismiss “due to the lack of pleadings and the failure of the parties to address the specific claims in each action.”

On or about April 15, 2010, Bekas, acting pro se, began the instant action for the purpose of, inter alia, vacating the confession of judgment and rescinding the stock sale agreement. Bekas alleges that Valiotis induced him to sign the confession of judgment by fraudulent misrepresentations and coerced him into signing the stock sale agreement. According to the complaint, “Most transactions mentioned in that confession, Valiotis unilaterally, deliberately inflated and created bogus amounts ***. One particular entry *** Valiotis knew was a repeat debt which was satisfied.” The plaintiff asserts six causes of action: the first, for “fraudulent inducement,” the second for breach of fiduciary duty, the third for “breach of implied covenant of good faith and fair dealings,” the fourth for “tort of outrage against Valiotis,” the fifth for “tortious interference with prospective business,” and the sixth for “availability of tort damage to creditors.”

CPLR 3211 provides in relevant part: “(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 on documentary evidence ***.” (See, *Galvan v 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743.) In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted “must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff’s claim ***.” (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; see, *Galvan v 9519 Third Avenue Restaurant Corp.*, *supra*; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248.) In the case at bar, the defendants successfully carried their burden. The affidavit Bekas submitted in *Gatzonis v Top Cove Associates, Inc.*, the prior action pending in this court, in successful opposition to a motion establishes that he executed a confession of judgment for valid debts. The court notes that pursuant to the doctrine of judicial estoppel, a party that successfully took a certain position in a prior action cannot assume a contrary position in another action simply because his or her interests have changed. (See, *Tedesco v Tedesco*, 64 AD3d 583; *City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33; *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435.)

CPLR 3211 also provides in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him

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on the ground that: *** 7. the pleading fails to state a cause of action ***.” (See, *Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d 1168.) In the case at bar, the plaintiff failed to adequately plead facts supporting the elements of the causes of action asserted in his complaint. (See, e.g., *Howell v New York Post Co., Inc.*, 81 NY2d 115; *Daly v Kochanowicz*, 67 AD3d 78.) In regard to fraud in the inducement, the elements of a cause of action or defense alleging fraud in the inducement are representation of a material existing fact, falsity, scienter, reliance, and injury. (See, *Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135; *Chopp v Welbourne & Purdy Agency, Inc.*, 135 AD2d 958.) An alleged promise by Valiotis to rezone property, allegedly the means by which he induced Bekas to sign the confession of judgment, is not a misrepresentation of a material existing fact. Moreover, “[w]hile typically the pleaded facts will be presumed to be true and accorded a favorable inference, ‘allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence [will] not [be] entitled to such consideration’ ***.” (*Marraccini v Bertelsmann Music Group Inc.*, 221 AD2d 95, 98, quoting *Roberts v Pollack*, 92 AD2d 440, 44; see, *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691; *Fisher v Maxwell Communications Corp.*, 205 AD2d 356.) In the case at bar, the allegations of the complaint are contradicted by documentary evidence submitted by the defendants.

Dated: **SEP 22 2010**



J.S.C.

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