

Ben-Yosef v Hillel

2011 NY Slip Op 30218(U)

January 26, 2011

Sup Ct, New York County

Docket Number: 602681/2007

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 602681/2007

BEN-YOSEF, EYAL

vs

HILLEL, YORAM

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 602681/07

MOTION DATE _____

MOTION SEQ. NO. 004

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 A

Replying Affidavits - Exhibits A+B

PAPERS NUMBERED

1, 2
3, 4, 5
6, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED

JAN 28 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: January 26, 2011

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
EYAL BEN-YOSEF and YORAM MOUSSAIEFF,

Plaintiffs,

Index No. 602681/2007

-against-

YORAM HILLEL, OREN HILLEL, ITAMAR HILLEL
a/k/a TOMER HILLEL, Y&Y REALTY LAND
CORP., QTY REALTY CORP., ET AL.,

FILED

JAN 28 2011

Defendants.

-----X
Shulman, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In motion sequence number 004, all defendants except QTY Realty Corp. ("defendants") move pursuant to CPLR 3025 (b) for leave to amend their answer to assert a defense of lack of standing, and upon granting leave to amend, to dismiss the complaint pursuant to CPLR 3211 (a) (2) and (3) and/or CPLR 3212. Defendants also move pursuant to CPLR 3211 (a) (10) to dismiss plaintiffs' complaint for lack of a necessary party.

Background

The facts will be briefly summarized here, as they were set forth in detail in this court's decision dated November 23, 2009. In 2003-2004, plaintiffs Eyal Ben-Yosef and Yoram Moussaieff began a business relationship with defendant Yoram Hillel. Plaintiffs agreed to provide capital towards the purchase of real estate (the "Investment Money") and Hillel would rehabilitate the existing real estate or construct new homes on the real estate purchased. Once the real estate was purchased, developed and sold to a third party, Hillel would use the net proceeds of the sale to reimburse plaintiffs the Investment Money and then divide the profit evenly between the parties. Hillel formed

various companies, all of which are named defendants in this action, to carry out the real estate transactions.

In their complaint, plaintiffs accuse Hillel and his sons, Oren and Itamar Hillel, as well as the various defendant companies, of fraud, breach of fiduciary duty, misappropriation of funds, failure to account, unjust enrichment and fraudulent conveyance. Defendants move to amend their answer to assert a defense of lack of standing, arguing that plaintiffs themselves did not supply the Investment Money. If their application to amend is granted, defendants also move to dismiss the complaint based on lack of standing and/or to dismiss for lack of a necessary party.

Analysis

"It is well settled that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (CPLR 3025 [b])." *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 (1st Dept 2006). Here, plaintiffs do not make a showing, or even mention, any prejudice or surprise resulting from defendants' delay in seeking leave to amend their answer. Plaintiffs instead argue that this court already heard defendants' arguments in regard to this issue and ruled against them. The court does not agree.

In November 2009, this court issued a decision and order in response to defendants' order to show cause seeking, *inter alia*, to strike the complaint for alleged discovery defaults. Specifically, in seeking to strike the complaint, defendants asserted that plaintiffs failed to explain and document the source of the Investment Money, as defendants believed plaintiffs engaged in a money laundering scheme.

At that stage of the litigation, this court determined that it would be a fishing expedition to seek the sources of the Investment Money to shed light on an alleged money laundering scheme, especially where there was no counterclaim seeking monies lost as a result of the alleged scheme. Despite plaintiffs' current assertion, this court's ruling was limited to what plaintiffs had to produce in response to defendants' interrogatories in regard to the money laundering allegations. It was not a determination that defendants could not later raise an affirmative defense of lack of standing if discovery supported such a defense.

After this court's ruling, defendants had the opportunity to depose plaintiffs. During their testimony, plaintiffs indicated that they did not supply the Investment Money and did not receive any money in return for those investments. This raised a valid issue as to whether plaintiffs have standing to bring this action. Thus, defendants' motion to amend their answer to assert the affirmative defense of lack of standing is granted.

Defendants also move to dismiss the complaint on the grounds of this newly amended defense. This motion is denied. In their depositions, plaintiffs describe the source of the Investment Money, although their description is, at points, unclear. Plaintiffs admit that the Investment Money came from a non-party company, Eitan Investments, which they have no interest in, and that Eitan Investments received the returns of the Investment Money. However, plaintiffs also claim that they borrowed money from Eitan Investments to fund the investments with Hillel, and that they directed that returns of Investment Money be sent to Eitan to repay their loans. Thus, plaintiffs claim that the Investment Money actually belonged to them. As it is not clear at this

point who the true investors are, this court cannot dismiss the complaint for lack of standing.


While plaintiffs argue that the source of the Investment Money is irrelevant, this court cannot ignore the fact that plaintiffs may not be the proper parties to seek relief against defendants. Plaintiffs' depositions raise many questions of fact in regard to who actually funded the Investment Money, and thus, who has standing to bring this suit. Accordingly, it is

ORDERED that the branch of defendants' motion for leave to amend their answer is granted and defendants' proposed amended answer in the form attached to the moving papers at Exhibit 3 is deemed served; and it is further

ORDERED that the branch of defendants' motion to dismiss the complaint pursuant to CPLR 3211 and CPLR 3212 is denied.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: January 26, 2011



Martin Shulman, J.S.C.

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JAN 28 2011

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