

Minor v Combo Stores Co., P&S Realty Co.
2011 NY Slip Op 31026(U)
April 11, 2011
Supreme Court, Nassau County
Docket Number: 16437/09
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

LISA MINOR and LISA MINOR AS THE TRUSTEE OF THE TRUST UWO SHIRLEY COOPERMAN, DECEASED, FBO ELLEN ABRAMS,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 16437/09

MOTION DATE: Feb. 18, 2011
Motion Sequence#005,006

Plaintiffs,

-against-

COMBO STORES COMPANY, P&S REALTY COMPANY, SONS REALTY COMPANY, INITIAL REALTY COMPANY, FLATLANDS MANAGEMENT COMPANY, QUEENS SYNDICATE COMPANY, CAMBRIDGE V, LLC, QUINCY V, LLC, VICTOR VITLIN, JANICE SHEINBERG, ROBERT FEINERMAN and SHELLY HERMAN, AS EXECUTRIX OF THE ESTATE OF STEPHEN COOPERMAN,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation/Affidavit in Opposition..... XX
- Affirmation in Support..... X
- Affidavit in Further Support..... X
- Reply Affirmation..... X
- Memorandum of Law..... XXX
- Reply Memorandum of Law..... X

Motion by defendants Combo Stores Company, P & S Realty Company, Sons Realty Company, Initial Realty Company, Flatlands Management Company, Queens Syndicate

Company, Cambridge V, LLC, Quincy V, LLC, Victor Vitlin, Janice Sheinberg, and Robert Feinerman for partial summary judgment on their counterclaim and dismissing plaintiffs' third cause of action is **granted** to the extent indicated below. Cross-motion by plaintiffs for partial summary judgment is **denied**. Cross-motion by plaintiffs for a temporary receiver is **denied**.

This is an action for an accounting. Plaintiff Lisa Minor is the trustee of a testamentary trust created by Shirley Cooperman, Lisa's mother, who died on September 20, 2000. At the time of her death, Shirley Cooperman was a partner in defendants Combo Stores Company and Queens Syndicate Company, which own commercial property located in Queens. Shirley Cooperman was also a partner in defendants P & S Realty Company and Flatlands Management Company, which own commercial property located in Brooklyn. Additionally, Shirley Cooperman was a partner in defendants Initial Realty Company and Sons Realty Company, which own commercial property located in Nassau. In addition to her position as trustee, plaintiff is a member of the various partnerships in her own right.

Defendant Cambridge V, LLC is the general partner of Combo Stores. Defendant Quincy V, LLC is a partner in Queens Syndicate. Defendants Victor Vitlin, Janice Sheinberg, and Robert Feinerman are members of the management committees of Combo Stores and Queens Syndicate. Prior to his demise, Stephen Cooperman, Lisa's brother, was a general partner and involved in the management of all six of the partnerships.

Shirley Cooperman's will provides that plaintiff and Stephen Cooperman would each receive a 1/3 share of the residuary estate. The remaining 1/3 of the residuary estate was to be placed in trust for the benefit of Ellen Abrams. On December 13, 2000, letters testamentary and of trusteeship were issued to Stephen Cooperman by the Nassau County Surrogate's Court. On September 7, 2005, Stephen Cooperman executed a "Receipt, Release, and Refunding Agreement," whereby Stephen received his share of Shirley Cooperman's estate and agreed to indemnify the estate against any liability which would have been chargeable against the property distributed to him.

Stephen Cooperman died on February 18, 2008. Defendant Shelly Herman is the executrix of Stephen Cooperman's estate, having received letters testamentary from a Massachusetts probate court. On April 3, 2008, letters of trusteeship with respect to the Ellen Abrams Trust were issued to plaintiff by the Nassau County Surrogate's Court. Letters testamentary with respect to Shirley Cooperman's estate were granted to plaintiff on April 9, 2008.

On May 14, 2008, Combo Stores and Queens Syndicate commenced an action against Stephen Cooperman's estate in the U.S. District Court for the District of Massachusetts based upon Cooperman's management of the Queens properties prior to his demise (3:08-CV-30095). On May 22, 2008, Cambridge and Quincy commenced a proceeding against Minor, as executrix of Shirley Cooperman's estate, in the Nassau County Surrogate's court for unjust enrichment. Cambridge and Quincy's unjust enrichment claim was based upon certain distributions which Shirley Cooperman received with respect to the Combo Stores, Queens Syndicate, and Initial properties. Shirley Cooperman received these distributions pursuant to an assignment which she received in 1981 from Hyman Kamen.

On November 11, 2008, Shelly Herman, on behalf of Stephen Cooperman's estate, commenced an action against plaintiff in Massachusetts Superior Court, Berkshire County. On December 17, 2008, P & S, Flatlands, Initial, and Sons commenced an action against Stephen Cooperman's estate in the U. S. District Court for the District of Massachusetts based upon Cooperman's management of the Brooklyn and Nassau properties (3:08-CV-30235).

On February 27, 2009, the parties involved in the Massachusetts federal lawsuits entered into a mediation settlement agreement which purports to "settle any and all claims among and between the parties." The settlement agreement provides that Stephen Cooperman's estate retains the house which he owned in Great Barrington, Massachusetts. The agreement provides that tangible personal property, other than household goods, shall be auctioned and distributed 70% to the partnerships and 30% to Stephen's estate. The agreement provides that Lisa Minor shall transfer certain funds which were held in a Massachusetts bank to the partnerships. The agreement provides that Stephen Cooperman's estate shall transfer its interests in the partnerships to the partnerships. The agreement provides that Stephen's estate shall transfer the estate bank accounts to the partnerships. The agreement provides that any interest of Stephen's estate in the so-called "Kamen Agreement" shall be null and void.

The agreement provides that the partnerships shall retain the partnership distributions "sequestered" from Stephen Cooperman's estate. However, the agreement provides that Lisa Minor and the Ellen Abrams Trust shall be paid "all distributions and other payments from the partnerships presently being sequestered by the partnerships." In the agreement, Lisa Minor, individually and as trustee of the Ellen Abrams Trust, agrees to cooperate fully with the partnerships to convert the partnerships to limited liability companies.

The agreement provides that general releases shall be executed by all parties, except that the “Kamen lawsuit” pending in the Nassau Surrogate’s Court was not covered by the releases. In the agreement, the partnerships acknowledge that Lisa Minor and Stephen Cooperman’s estate entered into a separate settlement in the Berkshire County action. The settlement agreement is signed by all parties, including plaintiff. By order dated June 12, 2009, the United States District Court for the District of Massachusetts granted Queens Syndicate’s motion to enforce the mediation settlement agreement.

This action for an accounting was commenced on August 14, 2009. In the first cause of action, plaintiff seeks an accounting with respect to the affairs of Combo Stores. In the second cause of action, plaintiff seeks an accounting with respect to the affairs of Queens Syndicate. In the third cause of action, plaintiff seeks a declaratory judgment that the mediation settlement agreement does not cover her claims for an accounting. In their answer, defendants Combo Stores, P & S Realty, Sons Realty, Initial Realty, Flatlands Management, Queens Syndicate, Cambridge V, Quincy V, Vitlin, Sheinberg, and Feinerman (“the partnership defendants”) counterclaim for specific performance of the mediation settlement agreement.

By order dated March 9, 2010, the United States District Court denied plaintiff’s motion to vacate the order to enforce and granted defendant’s motion to enforce the medication settlement agreement to the extent of ordering plaintiff to execute the mutual release provided for in the agreement. The federal court determined that plaintiff was subject to the court’s jurisdiction and was a party to the federal actions as a matter of law by virtue of being a member of the partnerships. The federal court retained jurisdiction to enforce the settlement agreement “by whatever mechanisms may be available to the court.” By order dated March 24, 2010, the federal court denied plaintiff’s motion to dismiss for lack of personal jurisdiction. In its order, the court stated, “the parties entered into settlement negotiations in New York City aimed at resolving all (or virtually all) the disputes among them...[A]fter extensive negotiations, the painful disputes that gave birth to this litigation were settled. It may be time now for the parties to move on” (Defendants’ Ex. 4).

By order dated May 14, 2010, this court denied the partnership defendants’ motion to dismiss the complaint on the ground of the pendency of the Massachusetts federal action brought by Queens Syndicate and Combo Stores. The court determined that defendants had not established that the claims in the Massachusetts federal action were sufficiently similar to those in the present case.

The partnership defendants move for summary judgment on their counterclaim for specific enforcement of the mediation settlement agreement and for dismissal of plaintiffs' declaratory judgment cause of action on the grounds of res judicata and collateral estoppel. Defendants argue that plaintiffs are precluded from relitigating the issue of the validity and binding effect of the mediation settlement agreement by the Massachusetts federal court's order.

Plaintiffs argue that they are not bound by the Massachusetts federal court order because they were not subject to personal jurisdiction and the federal court granted defendant's motion to enforce the agreement only in part. Plaintiffs cross move for partial summary judgment in favor of plaintiff Lisa Minor against defendants Combo, Vitlin, Scheinberg and Feinerman in the amount of \$72,063.63, representing profit distributions due plaintiff for the period July 2008 through July 2010, together with interest and such additional sum as may be revealed upon an accounting. Plaintiffs cross move for similar relief on behalf of the Shirley Cooperman Trust. Plaintiffs cross-move for similar relief as against defendants Queens Syndicate, Vitlin, Sheinberg, and Feinerman.

The doctrine of res judicata, or claim preclusion, is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication (*Ins Co. v HSBC Bank*, 10 NY3d 32, 38 [2008]). In federal court, subsequent litigation is prohibited if a prior court ruling was 1) a final judgment on the merits, 2) by a court of competent jurisdiction, 3) in a case involving the same parties or their privies, and 4) involving the same cause of action (Id). It appears that a New York court will apply the rules of res judicata followed in the jurisdiction that rendered the earlier court decision (*Breslin Realty v Shaw*, 72 AD3d 258, 264 [2d Dept 2010]).

Defendants have established that plaintiffs' claims for an accounting with respect to the partnerships were encompassed within the mediation settlement agreement and the federal court would consider its judgment preclusive with respect to those claims. The partnership defendants' motion for summary judgment is **granted** to the extent of declaring that the mediation settlement agreement resolves plaintiffs' claims for an accounting with respect to Combo Stores and Queens Syndicate.

In opposition to plaintiffs' cross-motion for partial summary judgment, defendants assert that the partnership distributions to which plaintiffs were entitled have been paid (Aff. of defendant Victor Vitlin at ¶ 50). Plaintiffs argue that they cannot determine whether the

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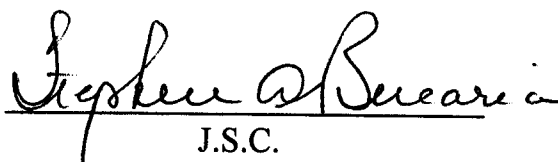
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distributions were "complete" without an accounting. However, plaintiff Lisa Minor was presumably aware of the amount of the sequestered funds at the time she signed the settlement agreement. Accordingly, plaintiffs' motion for partial summary judgment is **denied**.

In opposition to plaintiffs' cross-motion for a receiver, defendant Vitlin asserts that Queens Syndicate and Combo Stores are presently managed by Midboro Management, Inc. and Initial, P&S, Sons, and Flatlands are managed by Prime Realty Properties & Management, Inc. Both of the management companies are independent and professional real estate companies. Plaintiffs have not established that there is any danger that the properties will be materially injured or destroyed (CPLR § 6401). Accordingly, plaintiffs' motion for a temporary receiver is **denied**.

So ordered.

Dated APR 11 2011


J.S.C.

ENTERED
APR 12 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE