

**Sharaf v Sotnychuk**

2011 NY Slip Op 31314(U)

May 16, 2011

Supreme Court, New York County

Docket Number: 113049/2010

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lobis

PART 6

Index Number : 113049/2010

**SHARAF, WAHID**

vs.

**SOTNYCHUK, RAYMOND**

SEQUENCE NUMBER : 001

DISM ACTION/INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_

MOTION DATE 3/15/11

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**PAPERS NUMBERED**

1-11

12-31

32-39

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 18 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/10/11

[Signature] J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
**WAHID SHARAF AND ISABEL FRASER-  
SEWELL, as Administrators of the Estate of  
Siyad Sharaf,**

**Plaintiffs,**

**Index No. 113049/10**

**-against-**

**Decision and Order**

**RAYMOND SOTNYCHUK and HUMBERTO  
ABENOZA,**

**Defendants.**

-----X  
**JOAN B. LOBIS, J.S.C.:**

Defendant Raymond Sotnychuk brings this pre-answer motion for an order dismissing the complaint as against him pursuant to various provisions of C.P.L.R. Rule 3211. He seeks dismissal on the basis that documentary evidence defeats plaintiffs' claims; that the causes of action are barred by the principles of collateral estoppel and res judicata; and that the complaint fails to state a cause of action. Mr. Sotnychuk also seeks an order striking the complaint as against him, or alternatively directing correction of the complaint, for failing to plead the claims with adequate specificity (see C.P.L.R. Rules 3016 and 3024[a]) and/or for containing unnecessary scandalous and prejudicial material (see C.P.L.R. Rule 3024[b]). In the alternative, Mr. Sotnychuk requests that the court consider the motion as one for summary judgment and dismiss the complaint as against him because the causes of action are untimely.

This is the third court case arising out of the right to own and occupy a condominium unit located at 184 East 2nd Street, Apartment 5E (the "Apartment"). The Apartment was originally owned by Siyad Sharaf, who died on May 16, 1997. Sometime after May 1997, Humberto Abenoza

began to occupy the Apartment. Mr. Abenoza claimed that he and plaintiff Wahid Sharaf, Siyad Sharaf's brother and an administrator of Siyad Sharaf's estate (the "Estate"), had entered into an oral agreement whereby Mr. Abenoza agreed to pay outstanding common charges, stop a foreclosure proceeding against the Apartment, and pay Wahid Sharaf \$20,000 in exchange for the right to own the Apartment. Plaintiffs denied that such an agreement existed and sought to evict Mr. Abenoza in a Housing Court action in 2004 (the "Housing Court Action"). In September 2004, Mr. Abenoza brought an action to enforce the alleged oral agreement. See Abenoza v. Sharaf, New York County Supreme Court, Index No. 113631/2004 (the "Abenoza Action"). The co-administrators of the Estate counterclaimed for fraud, conversion, unjust enrichment, and ejectment in the Abenoza Action. The Housing Court Action was stayed pending the resolution of the Abenoza Action.

The Abenoza Action proceeded to trial, over which I presided. Mr. Sotnychuk, who was president of the condominium board for the Apartment's building at the time of Siyad Sharaf's death and a personal friend of Mr. Abenoza, testified on Mr. Abenoza's behalf. In May 2009, I issued a decision and judgment dismissing the Abenoza Action and granting ejectment. The remainder of the counterclaims were denied on the merits. The stay in the Housing Court Action was lifted and Mr. Abenoza was evicted on February 25, 2010.

In this action, plaintiffs seek damages in the amount of \$70,000 plus legal fees resulting from the cost of restoring the Apartment "to the condition in which it was before the occupation by Abenoza and Sotnychuk" (the "First Cause of Action"); legal fees related to the costs of removing Mr. Abenoza from the Apartment (the "Second Cause of Action"); damages in the

amount of \$273,000 plus legal fees for being "compelled to take a lower than usual price for [the Apartment] in order to sell it[,]" which plaintiffs attribute to the damage caused by defendants (the "Third Cause of Action"); and damages resulting from a "conspiracy to steal" the Apartment from the Estate (the "Fourth Cause of Action").

In his motion, Mr. Sotnychuk argues that none of the causes of action make out legally cognizable claims; several of the allegations in the complaint are vague; and some allegations are unnecessarily scandalous. Mr. Sotnychuk argues that the Second Cause of Action, as well as aspects of the other causes of action, must be dismissed because there is no right to collect legal fees absent a statute or agreement. With regard to the Fourth Cause of Action, Mr. Sotnychuk asserts that New York state does not recognize a cause of action for civil conspiracy. With respect to his defense predicated on documentary evidence, Mr. Sotnychuk offers a release given to the condominium by plaintiff Isabel Fraser-Sewell and argues that he cannot be liable to plaintiffs. Mr. Sotnychuk also argues that the claims for damage to the Apartment are barred by the statute of limitations. As to the damage to the Apartment, Mr. Sotnychuk admits that the Apartment was damaged from a water leak, but asserts that he is not responsible for a condition that he did not create and that repairing damage as a result of a water leak is an owner's responsibility. Mr. Sotnychuk seeks to strike as scandalous and prejudicial all allegations that he forged a power of attorney or gave false testimony in the Abenoza Action.

In an affidavit in opposition to the motion, Wahid Sharaf sets forth further factual allegations to elucidate plaintiffs' claims. Mr. Sharaf asserts that both defendants used legal and

illegal means to retain possession of the Apartment. He claims that defendants broke into the Apartment and changed the locks; this claim is based on a portion of Mr. Sotnychuk's trial testimony in the Abenzoza Action wherein Mr. Sotnychuk acknowledged that Mr. Abenzoza never received permission from Mr. Sharaf to occupy the Apartment.<sup>1</sup> Mr. Sharaf further asserts that both defendants were occupying the Apartment and were working in concert to steal it from the Estate. He further alleges that the "plan to steal" the Apartment was initiated by Mr. Sotnychuk because Mr. Abenzoza is not fluent in English. Mr. Sharaf maintains that there is nothing in the complaint that is scandalous.

In support of the Third Cause of Action, Mr. Sharaf states that a unit similar to the Apartment sold for \$900,000 in 2007, while the Apartment sold for only \$627,000 several years later. Mr. Sharaf argues that he would have sold the Apartment in 2007 but he was hampered by Mr. Abenzoza's occupancy and claims of legal right to the Apartment. Mr. Sharaf also claims that after Mr. Abenzoza's eviction, he discovered that the Apartment was in an "uninhabitable condition," which negatively affected its value. As to the offered release, it is plaintiffs' position that the release was given to members of the condominium board for work performed in their official capacity and does not cover a board member acting in his or her personal capacity.

When considering a pre-answer motion to dismiss, the court must "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition

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<sup>1</sup> Mr. Sotnychuk testified that the condominium board allowed Mr. Abenzoza to occupy the Apartment so that maintenance could be collected. He did not testify as to any agreement or lack thereof between Mr. Abenzoza and Wahid Sharaf.

to the dismissal motion.” 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002) (internal citations omitted); see also EBC I. Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005). The court does not make credibility determinations nor assess the weight of the evidence. See, e.g., Skillgames, LLC v. Brody, 1 A.D.3d 247, 250 (1st Dep’t 2003). Even under this liberal standard, however, the court must dismiss the Second and Fourth Causes of Action. There is no right to sue to recover for legal fees “from the losing party except where authorized by statute, agreement or court rule.” U.S. Underwriters Ins. Co. v. City Club Hotel, LLC, 3 N.Y.3d 592, 597 (2004) (citations omitted). Plaintiffs have not alleged that any such agreement exists nor that any statute or court rule applies that would entitle them to sue to recover their attorneys’ fees. The Second Cause of Action is therefore dismissed. The Fourth Cause of Action fails because there is no substantive tort of civil conspiracy. Legion Lighting Co., Inc. v. Switzer Group, Inc., 171 A.D.2d 472, 473 (1st Dep’t 1991). Although “[a]llegations of conspiracy are permitted . . . to show that the tortious acts flowed from a common scheme or plan and to connect each defendant with an actionable injury” (Danahy v. Meese, 84 A.D.2d 670, 672 [4th Dep’t 1981] [citations omitted]; see also Cunningham v. Hagedorn, 72 A.D.2d 702, 704 [1st Dep’t 1979]), there must be an underlying, viable tort claim. After trial in the Abenzoza Action, the court dismissed all of the civil wrongs that flowed from the alleged conspiracy. As such, plaintiffs are barred by the principles of collateral estoppel from litigating the Fourth Cause of Action. See Ventur Group, LLC v. Finnerty, 80 A.D.3d 474, 475-76 (1st Dep’t 2011).

As to the First and Third Causes of Action, both seek compensation for damages to the Apartment that resulted in renovation costs and a reduced sales price. These causes of action

are pled sufficiently to enable defendants to frame a response, are not clearly contradicted by documentary evidence, and are not clearly time barred. Although a claim for property damage must be commenced three years from the date of the damage regardless of the date of discovery (see C.P.L.R. § 214[4]), it cannot be ascertained from the papers when the damage occurred. Furthermore, without knowing the particulars of the claim for damage, the effect of the release cannot be determined. Finally, there is nothing that was inserted into the complaint that is not necessary and relevant to plaintiffs' claims. Therefore, there is no basis to strike portions of the complaint under C.P.L.R. Rule 3024(b). Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted to the extent of dismissing and plaintiffs' second and fourth causes of action; and it is further

ORDERED that the parties shall appear for a preliminary conference on Tuesday, June 27, 2011, at 9:30 a.m., in Part 6, Courtroom 345, at 60 Centre Street, New York, New York.

Dated: May 16, 2011

  
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 JOAN B. LOBIS, J.S.C.

**FILED**  
 MAY 18 2011  
 NEW YORK  
 COUNTY CLERK'S OFFICE