

Pesa v Dayan

2011 NY Slip Op 32400(U)

August 30, 2011

Supreme Court, Nassau County

Docket Number: 000865-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**MARIO A. PESA, CHRISTOPER F. PESA,
FRANK PESA and CAMILLO JOHN PESA,**

Plaintiffs,

-against-

**MARK DAYAN, YOSSI TOLETANO,
SOUTHPOINT, INC. and DREW LONTOS,**

Defendants.

-----x

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 000865-11
Motion Seq. No: 1
Submission Date: 7/8/11**

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits.....x**
- Affirmation in Opposition.....x**
- Reply Affirmation and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Defendant Drew Lontos ("Lontos") on May 10, 2011, which was submitted on July 8, 2011. For the reasons set forth below, the Court grants the motion.

BACKGROUND

A. Relief Sought

Defendant Lontos moves for an Order, pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing the Complaint.

Plaintiffs Mario A. Pesa ("Mario"), Christopher R. Pesa ("Christopher"), Frank Pesa ("Frank") and Camillo John Pesa ("Camillo") (collectively "Plaintiffs") oppose the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Faley Aff. in Supp.) reflects that this dispute relates to Plaintiffs' purchase of three properties ("Properties") located in Far Rockaway, Queens County, New York from Yoma Development Group, Inc. ("Yoma"). Mark Dayan ("Dayan") and Yossi Toletano ("Toletano") were shareholders in Yoma, and Dayan, Toletano and Lontos were officers of Yoma. Lontos, who was also counsel to Yoma, drafted the contracts of sale ("Contracts") for the Properties. Plaintiffs allege that they were unable to proceed with their mortgage applications due to the cessation of construction ("Construction") being performed at the Properties as a result of a stop work order issued by the City of New York. Plaintiffs' counsel and Lontos agreed that the deadlines in the Contracts would be tolled until they were notified that Construction had resumed.

Plaintiffs allege that Lontos never advised them that Construction had resumed and Plaintiffs should proceed with their mortgage application, and wrongfully attempted to cancel the Contracts. Yoma transferred title to the Properties to Defendant Southpoint, Inc. ("Southpoint"), allegedly to defraud Plaintiffs and defeat their rights under the Contracts. Dayan and Toletano were the sole shareholders in Southpoint, and Dayan, Toletano and Lontos were officers of Southpoint. Lontos acted as counsel for Yoma and Southpoint in connection with the transfer ("Transfer") of the Properties to Southpoint. Lontos, allegedly to conceal the Transfer, continued to hold Plaintiffs' deposits in escrow without notifying Plaintiffs of the Transfer.

Defendants subsequently transferred the Properties to a third party, allegedly to defeat Plaintiffs' rights under the Contracts. On November 12, 2010, a judgment ("Judgment") was entered in favor of Plaintiffs in a prior action ("Prior Action") in the Supreme Court of New York, County of Queens against Yoma in the sum of \$836,309.13 as a result of Yoma's breach of the Contracts.

The Complaint contains fourteen (14) causes of action; 1) the Transfer violated New York State Debtor and Creditor Law ("DCL") § 273; 2) the transfer of the assets of Southpoint to Defendants Dayan and Toletano subsequent to June 20, 2007, which rendered Southpoint insolvent, violated DCL § 273; 3) the Transfer, which rendered Yoma insolvent, is void as in violation of DCL § 273; 4) Southpoint obtained proceeds from the sale of the Properties to a third party on June 20, 2007, which proceeds were wrongfully conveyed to Dayan and Toletano

in violation of DCL § 273; 5) the conveyances by Yoma to Defendants were void pursuant to the DCL; 6) the conveyances by Yoma to Southpoint were void; 7) the conveyances by Southpoint to Dayan and Toletano were void pursuant to the DCL; 8) the conveyances by Southpoint to Dayan and Toletano were void pursuant to the DCL; 9) Plaintiffs are entitled to attorney's fees pursuant to DCL § 276-a; 10) Defendants have failed to satisfy the Judgment in violation of DCL § 273-A; 11) by virtue of their participation in the fraudulent transfers, Lontos, Dayan and Toletano have defrauded Plaintiffs; 12) Defendants have violated DCL §§ 276 and 276-a entitling Plaintiffs to attorney's fees and damages; 13) the Court should pierce the corporate veil of Yoma and impose personal liability on Dayan, Toletano and Lontos; and 14) the Court should pierce the corporate veil of Southpoint and impose personal liability on Dayan, Toletano and Lontos.

In support of his motion, Lontos provides a copy of the complaint from the Prior Action ("Prior Complaint") (Ex. C to Faley Aff. in Supp.). The Prior Action was titled *Mario A. Pesa, Christopher F. Pesa, Frank Pesa and Camillo John Pesa v. Yoma Development Group, Inc. and Southpoint, Inc.*, Queens County Index Number 15986-07. Like the Complaint, the Prior Complaint contains allegations regarding the Properties, Contracts, Construction delays, Yoma's counsel's failure to advise Plaintiffs that Construction had resumed, the allegedly improper Transfer, and the negotiation by Yoma and its principals and representatives regarding a subsequent transfer of the Properties to a third party in contravention of Plaintiffs' rights under the Contracts.

By decision dated October 28, 2008 (Ex. D to Faley Aff. in Supp.) ("Prior Decision"), the Court in the Prior Action ("Prior Court"), *inter alia*, granted the branch of the cross-motion by Plaintiffs for partial summary judgment against Yoma on the issue of liability for breach of contract, which Order was affirmed on appeal.

The Prior Court also denied the branch of the cross-motion by Plaintiffs for leave to amend the supplement the Prior Complaint and add party defendants. Counsel for Lontos affirms that Plaintiffs, in the Prior Action, moved to amend the complaint to assert a fraud claim against Lontos (Faley Aff. in Supp. at ¶ 32), and that Plaintiffs did not appeal the denial of their application to add Lontos as a defendant and assert fraud claims. Lontos provides a copy of Plaintiffs' cross motion in the Prior Action ("Plaintiffs' Prior Motion") (Ex. E to Faley Aff. in

Supp.). In his affirmation in support of the Prior Motion, Plaintiffs' counsel affirmed that:

In this case, it is alleged that corporate defendant YOMA breached these real estate contracts when it transferred the properties to SOUTHPOINT on July 10, 2006 [emphasis in original]...It is further alleged that the same individual, namely [Dayan], as a principal and corporate officer of both YOMA and SOUTHPOINT, signed the deeds as both Grantor and Grantee in that transfer, and that [LONTOS] acted as both the attorney and a corporate officer of both corporations in that transfer. However, plaintiffs' complaint may fail to allege, with the required specificity, claims for compensatory damages and fraud. Nor does it specifically name the individuals, [DAYAN] and [LONTOS] as defendants.

As such, plaintiffs seek herein to amend and/or supplement the complaint to assert claims for compensatory damages and for fraud, and to add two (2) of the corporate principals/attorney as named defendants.

Ps' Prior Motion at ¶¶ 9 and 10.

The Prior Court, in ruling on Plaintiffs' motion to add a claim based on fraud and to add Dayan and Lontos as party defendants, held as follows:

To the extent plaintiffs seek to assert claims against Dayan and Lontos, the only parties to the contracts of sale were Plaintiffs and defendant Yoma. Plaintiffs make no claim that Dayan signed the contracts in his personal capacity, or that plaintiffs are shareholders, officers or directors of the corporations, and have failed to assert any facts supporting a claim of a breach of duty owing to them by either Dayan or Lontos. As a consequence, the branch of the cross motion by plaintiffs for leave to amend and supplement the complaint and add party defendants is denied.

Prior Dec. at pp. 15-16.

C. The Parties Positions

Lontos submits that Plaintiffs' claims against Lontos are barred by the doctrines of *res judicata* and collateral estoppel in light of the fact that 1) Plaintiffs had a full and fair opportunity to litigate their claims in the Prior Action; and 2) the Court in the Prior Action determined that Plaintiffs' fraud claims against Lontos lack merit. Lontos submits, further, that assuming *arguendo* that the instant action is not barred by the doctrines of *res judicata* and collateral estoppel, the Complaint does not contain factual allegations supporting a claim against Lontos for fraudulent conveyance, or supporting Plaintiffs' request that the Court pierce the corporate veil of Yoma and Southpoint and hold Lontos personally responsible for their obligations.

In opposition, Plaintiffs argue that the instant action is not precluded by the Prior Action because the Prior Decision decided the limited issue of whether Plaintiffs presented sufficient proof to warrant an amendment of the Prior Complaint. Plaintiffs note that the Prior Court did not have before it all of the allegations set forth in the Complaint, and that the Complaint contains 16 paragraphs specifically addressing the claims against Lontos, and four (4) separate causes of action against him. Plaintiffs submit that the Prior Court denied the Prior Motion to amend “because of an insufficiency of proof submitted in support of that cross motion, not because the claims against the moving defendant do not have merit” (Stock Aff. in Opp. at ¶ 7). Thus, Lontos has failed to establish that the claims against him were actually litigated and determined in the Prior Action, and the Court should deny his motion to dismiss.

In reply, Lontos submits that 1) the Prior Court did examine the merits of Plaintiffs’ proposed claim against Lontos; 2) Plaintiffs have not met their burden of demonstrating the absence of a full and fair opportunity to contest the prior determination; 3) even assuming *arguendo* that the instant action is not barred by the doctrines of *res judicata* and collateral estoppel, the Complaint fails to support a cause of action against Lontos for fraudulent conveyance, given that Lontos was not the transferee or beneficiary of the transaction, and is not alleged to have received proceeds of the allegedly fraudulent transfer; 4) the cause of action for fraud is duplicative of the fraudulent conveyance claims; and 5) given that Plaintiffs conducted the deposition of Lontos in the Prior Action, following the Prior Decision, and have still failed to provide allegations to support their claims, the Court should dismiss the Complaint against Lontos.

RULING OF THE COURT

A. Res Judicata and Collateral Estoppel

CPLR § 3211(a)(5) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the bases that the cause of action may not be maintained because of collateral estoppel or *res judicata*. The doctrine of *res judicata* operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding. *Luscher v. Arrua*, 21 A.D.3d 1005, 1006-07 (2d Dept. 2005), quoting *Koether v. Generalow*, 213 A.D.2d 379, 380 (2d Dept. 1995).

Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue. *Luscher*, 21 A.D.3d at 1007. The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a full and fair opportunity to litigate. *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2004).

B. Application of these Principles to the Instant Action

The Court grants Lontos' motion to dismiss the Complaint based on the Court's conclusion that the instant action against Lontos is precluded by the Prior Decision. The Court notes that the Prior Complaint and the Complaint make similar allegations regarding Defendants' participation in fraudulent transactions involving the Properties. In support of the Prior Motion, Plaintiffs specifically argued that Lontos acted as both the attorney and a corporate officer of both corporations in the transfer of the Properties to Southpoint, and Plaintiffs have made similar allegations about Lontos in the Complaint in the matter *sub judice*. The Prior Court concluded that these allegations were insufficient to support the amendment of the complaint to assert claims against Lontos. The Court concludes that Plaintiffs had a full and fair opportunity to litigate the issue of the sufficiency of their allegations against Lontos in the Prior Action, and that issue was decided against them. Accordingly, the Court grants Lontos' motion to dismiss.

All matters not decided herein are hereby denied.

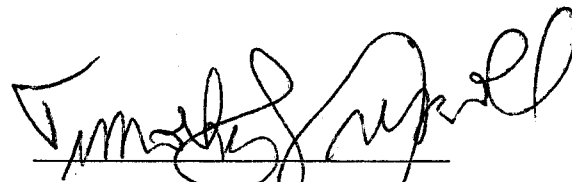
This constitutes the decision and order of the Court.

The Court directs counsel for Plaintiffs and the remaining Defendants to appear before the Court for a Preliminary Conference on October 5, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

August 30, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
SEP 07 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE