

Brusco v Koff

2012 NY Slip Op 31009(U)

April 16, 2012

Sup Ct, Richmond County

Docket Number: 103606/11

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
ANTHONY BRUSCO,

Plaintiff,

-against-

MITCHELL KOFF and RONALD KOFF,

Defendants.
-----X

DCM PART 6

Present:

HON. PHILIP G. MINARDO

DECISION and ORDER

Index No. 103606/11

Motion No. 4310-002

The following papers numbered 1 through 2 were fully submitted on the 12th day of January, 2012.

	Papers Numbered
Notice of Motion to Dismiss of Defendants MITCHELL KOFF and RONALD KOFF, with Supporting Papers, Exhibits (dated November 29, 2011) _____	1
Affirmation in Opposition by Plaintiff, with Exhibits (dated January 5, 2012) _____	2

Upon the foregoing papers, defendants' motion to dismiss the complaint is decided as follows:

Plaintiff ANTHONY BRUSCO (hereinafter "BRUSCO") commenced this action to recover monies allegedly owed to him under a consulting agreement which he executed in January 2006 with defendants MITCHELL and RONALD KOFF (hereinafter the "KOFFs") on behalf of their company Astoria Graphics, Inc. (hereinafter "Astoria Graphics"). The multi-year agreement provided for total payments in the amount of

\$594,000 in return for consulting services to be provided by BRUSCO. The complaint alleges that in addition to signing in their corporate capacities, the KOFFs agreed individually, jointly, severally and unconditionally to guarantee both the payment and performance obligations of Astoria Graphics.

On or about March 2010, the KOFFs apparently entered into a contract to sell the business of Astoria Graphics to Content Critical, LLC (hereinafter "Content Critical"), including all of its rights and obligations under the consulting services agreement with BRUSCO which were assigned to Content Critical as part of the transaction. BRUSCO allegedly continued to receive payments under the aforementioned agreement through February 2011.

In support of dismissal, the KOFFs allege that barely one month later, *i.e.*, on April 20, 2010, the creditors of Astoria Graphics filed a Chapter 7 involuntary bankruptcy petition against it and, pursuant to same, an interim trustee was appointed by a Bankruptcy Judge in New Jersey. This trustee demanded that BRUSCO return all of the payments he had received from Content Critical under the assigned contract, and in a subsequent proceeding commenced against BRUSCO and Content Critical. In the Bankruptcy Court, it was alleged, *inter alia*, that the payments made to the former by the latter constituted the wrongful misuse of assets that were entitled to be held by the bankruptcy trustee for the benefit of the creditors of Astoria Graphics. In addition, the retention of certain other funds presently held by Content Critical were drawn into question, as was the possibility of fraud in its assumption of Astoria Graphic's contract with BRUSCO. Thus, the bankruptcy

trustee, in essence, was seeking to compel BRUSCO to turn over any payments that he may have received from Content Critical under the assigned contract. BRUSCO's answer in the bankruptcy proceeding apparently admitted the facts of the underlying transactions, but denied any wrongdoing or liability to the trustee.¹ Thereafter, BRUSCO commenced this action against the KOFFs individually in the Supreme Court of Richmond County based on the latters' alleged personal guarantee of payment under the original consulting agreement with Astoria Graphics.

The motion to dismiss BRUSCO's complaint in the Supreme Court is predicated on CPLR 3211(a)(4), *i.e.*, the pendency of another action between the same parties in Bankruptcy Court. According to the KOFFs, (1) both actions arise out of the same transaction with Astoria Graphics; (2) the nature of the two actions is essentially similar in that both the bankruptcy trustee and BRUSCO have asserted claims to the funds received from Content Critical under the assigned contract; and (3) the only material difference between the current action and the bankruptcy proceeding is that BRUSCO has not asserted any claims against Content Critical in the Supreme Court notwithstanding its alleged status as the primary obligor under the assigned contract. According to the KOFFs, all of the issues concerning the validity of the assignment and the right to payment under the terms of the "Astoria Graphics" contract should be resolved in the first action commenced, *i.e.*, the bankruptcy proceeding pending in New Jersey.

Alternatively, the KOFFS request the entry of an order staying the within action

¹ The position of Content Critical in the bankruptcy proceedings is unreported.

pursuant to CPLR 2201 pending the outcome of the bankruptcy proceeding. According to the KOFFs, a court has broad discretion to stay an action in the Supreme Court where there is another action pending between the same parties in another court, and that such a stay is justifiable here in order to avoid the possibility of inconsistent verdicts and the allied waste of judicial resources, as well as to safeguard the orderly functioning of the judicial system.

In opposition, BRUSCO argues that the automatic stay in bankruptcy does not bar him from proceeding against the KOFFs personally in state court on their written guarantee, as neither KOFF is a party in the bankruptcy proceedings and while they may have made a bad business decision when they decided to sell their business to Content Critical, they cannot now disclaim their liability under the guarantee in the original consulting agreement. In addition, BRUSCO notes that neither the validity of the original “consulting agreement”, nor that of the KOFF’s unconditional guarantee of payment has been challenged in Bankruptcy Court. According to BRUSCO, the very intention of the KOFFs’ guarantee was to assure his payment notwithstanding the success or failure of their business venture, over which BRUSCO had no control. Thus, plaintiff argues that defendants’ motion to dismiss is simply a frivolous attempt by the KOFFs to avoid liability on their guarantee.

It is well settled that dismissal is authorized under CPLR 3211(a)(4) whenever there is another action pending between the same parties for the same cause of action in a court of any state or of the United States (see Cherico, Cherico & Assoc v. Midollo, 67 AD3d

622). Moreover, the statute clearly affords a court broad discretion in determining whether an action should be dismissed on this ground or such other order be entered as justice may require (see Whitney v. Whitney, 57 NY2d 731, 732). As was held, *e.g.*, in Cherico, Cherico & Associates v. Midollo (67 AD3d at 622), a dismissal is permitted whenever there is a substantial identity of the parties and the causes of action. The precise legal theories to be litigated in each need not be the same, as long as both lawsuits arise out of the same subject matter or series of alleged wrongs as to render the respective actions duplicative of one another (*id.*; see Montalvo v. Air Dock Sys, 37 AD3d 567; see also White Light Prods v. On the Scene Prods, 231 AD2d 90).

Here, it is the opinion of this Court that the within action should be stayed pending the resolution of the New Jersey bankruptcy action. While both actions arise generally out the same subject matter, *i.e.*, the execution and later assignment of Astoria Graphics contract with BRUSCO, neither the identity of the parties in the two actions nor the causes of action themselves are sufficiently the same to warrant dismissal.

The KOFFs are not parties in the bankruptcy proceeding and, therefore, would not be individually bound by any judgment rendered therein. Moreover, while the series of alleged transactions are inter-related (see Kent Dev. Co. v. Liccione, 37 NY2d 899, 901), the gravamen of the action in Bankruptcy Court involves the possibility that BRUSCO and/or Content Critical were parties to a fraud against the general creditors of Astoria Graphics, while the gravamen of this action relates solely to the personal liability of the KOFFs (if any) under the terms of their individual guarantees. While the outcome of the

former may affect the extent of defendants' liability in this action, any resolution reached by the Bankruptcy Court will neither bind the KOFFs nor settle the question of their personal liability to BRUSCO.

Accordingly, it is

ORDERED that defendants' motion, *inter alia*, to dismiss the complaint pursuant to CPLR 3211(a)(4) is denied; and it is further

ORDERED that the proceedings in this action be stayed pending the determination of the proceedings now pending before the Bankruptcy Court in Newark, New Jersey under Case No. 10-21948.

E N T E R,

/s/ Philip G. Minardo
J.S.C.

Dated: April 16, 2012

