

Biggio v Carman

2012 NY Slip Op 33277(U)

April 6, 2012

Supreme Court, Suffolk County

Docket Number: 11-13293

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 8-26-11 (#001)
MOTION DATE 9-7-11 (#002)
MOTION DATE 8-12-11 (#003)
MOTION DATE 9-21-11 (#004, #005, & #006)
ADJ. DATE 1-25-12
Mot. Seq. # 001 - MG # 004 - XMD
 # 002 - MG # 005 - XMD
 # 003 - MG # 006 - XMD

-----X
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Plaintiff,

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- against -

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GREGORY W. CARMAN, JR., CARMAN,
CALLAHAN & INGHAM, LLP, VESSA &
WILENSKY, P.C., MARK WASSERMAN,
MARIE HOLDINGS, INC. and THOMAS
GUBITOSI,

Defendants.
-----X

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(PR)

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Upon the following papers numbered 1 to 38 read on these motions to dismiss and to replead ; Notice of Motion/ Order to Show Cause (001) and supporting papers 1 - 5 ; Notice of Cross Motion (004) and supporting papers 6 - 8 ; Answering Affidavits and supporting papers 9 - 10 ; Notice of Motion/ Order to Show Cause (002) and supporting papers 11 - 17 ; Notice of Cross Motion (005) and supporting papers 18 - 20 ; Answering Affidavits and supporting papers 21 - 23 ; Notice of Motion/ Order to Show Cause (003) and supporting papers 24 - 28 ; Notice of Cross Motion (006) and supporting papers 29 - 31 ; Answering Affidavits and supporting papers 32 - 38 ; Replying Affidavits and supporting papers ____ ; Other ____ ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (001) of the defendants Gregory W. Carman, Jr. and Carman, Callahan & Ingham, LLP for an order dismissing plaintiff's complaint as against them, the motion (002) of the defendants Vessa & Wilensky, P.C. for an order dismissing plaintiff's complaint as against it, and the motion (003) of the defendants Marie Holdings, Inc. and Thomas Gubitosi for an order dismissing plaintiff's complaint as against them, are consolidated for the purposes of this determination and are decided together with the cross motions (004, 005, and 006) of the plaintiff for an order denying the relief sought by defendants and granting him leave to replead; and, it is further

ORDERED that the motion of the defendants Gregory W. Carman, Jr. and Carman, Callahan & Ingham, LLP for an order dismissing plaintiff's complaint as against them pursuant to CPLR 3211 (a) 1, 2, 5, and 7 is granted; and, it is further

ORDERED that the cross motion of the plaintiff for an order denying the relief sought by defendants Gregory W. Carman, Jr. and Carman, Callahan & Ingham, LLP and for an order pursuant to CPLR 3025 and 3211(e) granting him leave to replead is denied; and, it is further

ORDERED that the motion of the defendants Vessa & Wilensky, P.C. for an order dismissing plaintiff's complaint as against it pursuant to CPLR 3211 (a) 1, 2, 5, and 7 is granted; and, it is further

ORDERED that the cross motion of the plaintiff for an order denying the relief sought by defendant Vessa & Wilensky, P.C. and for an order pursuant to CPLR 3025 and 3211(e) granting him leave to replead is denied; and, it is further

ORDERED that the motion of the defendants Marie Holdings, Inc. and Thomas Gubitosi for an order dismissing plaintiff's complaint as against them pursuant to CPLR 3211 (a) 2, 4, and 7 is granted; and, it is further

ORDERED that the cross motion of the plaintiff for an order denying the relief sought by defendants Marie Holdings, Inc. and Thomas Gubitosi and for an order pursuant to CPLR 3025 and 3211(e) granting him leave to replead is denied.

Plaintiff commenced this action against the defendants in connection with matters that arise from plaintiff's underlying divorce action which was commenced some time in 2004 in the Supreme Court, Nassau County. On April 13, 2006 the Justice presiding over the divorce action issued an order holding plaintiff's ex-wife in contempt of court for violating its March 9, 2004 restraining order as a result of her obtaining a third mortgage on the marital premises from the defendants Marie Holdings, Inc. and

Thomas Gubitosi (“the mortgagees”) on or about May 20, 2005.¹ Thereafter, a foreclosure action was instituted against the plaintiff and his ex-wife by a prior lender and the premises was ultimately sold at auction on July 3, 2007 after a judgment of foreclosure and sale was granted. (A surplus money proceeding is currently pending in connection with surplus moneys being held from the said sale at the Nassau County Treasurer’s office.) Plaintiff was divorced from his ex-wife on July 20, 2007 and on April 13, 2011 a judgment concerning equitable distribution of their marital property was issued.

On or about May 19, 2011 plaintiff commenced this action against the defendants alleging three causes of action. His first cause of action for “violation of restraining order” was interposed against each of the moving defendants, Gregory W. Carman, Jr. and Carman, Callahan & Ingham, LLP (“the Carmans”), Vessa & Wilensky, P.C. (“V & W”), Marie Holdings, Inc., and Thomas Gubitosi (“the mortgagees”). Similarly, his second cause of action for “injury to property” was interposed against each of the moving defendants. However, his third cause of action “under Judiciary Law § 487” was interposed only against the Carmans.

The Carmans and V&W request that the court dismiss plaintiff’s action as against them on the grounds that the actions are time barred, that it is an impermissible attempt to bring a plenary action not properly before this court, that the request to punish for contempt is barred by the doctrines of res judicata and collateral estoppel, and that the plaintiff failed to plead properly the required elements of an injury to property claim. The mortgagees allege that the complaint should be dismissed because the Court lacks subject matter jurisdiction to adjudicate an issue of contempt based upon a Nassau County Supreme Court order and that the proper forum is the surplus money proceeding pending in Nassau County, and because the plaintiff failed to properly state a cause of action.

Plaintiff opposes the motions and asserts that his first cause of action entitled “violation of restraining order” is actually a “viable action” under Judiciary Law § 756. He argues that this cause of action, along with his third cause of action under Judiciary Law § 487 are governed by the six year statute of limitations pursuant to CPLR 213 (1). Although plaintiff’s attorney now claims that his “injury to property” claim falls under the General Construction Law § 25-b, the complaint makes no reference to same. He requests that the defendants’ motions be dismissed and that he be granted leave to replead, although he annexes no proposed amended complaint to any of his three motions.


CPLR 214 directs in section “4” that “an action to recover damages for an injury to property” and in section “2” that “an action to recover upon a liability, penalty or forfeiture created or imposed by statute” “must be commenced within three years.” It is clear that Judiciary Law § 487 is not a codification of common law, but is a statute with origins dating back to and deriving from the 13th century (*see Amalfitano v Rosenberg*, 12 NY3d 8, 874 NYS2d 868 [2009]) and the three year statute of limitations pursuant to CPLR 214 (2) is applicable (*see id, Merritt v Blumenthal*, 90 AD3d 514, 934 NYS2d 308 [1st Dept 2011]). Thus, plaintiff’s second and third causes of action are time-barred, the cause of action having accrued on May 20, 2005, the date plaintiff’s ex-wife violated the restraining

¹In a decision dated June 26, 2007 the Appellate Division upheld the contempt finding in *Biggio v Biggio*, 41 AD3d 753, 839 NYS2d 527 (2d Dept 2007).

order by taking the third mortgage on the marital premises. The Court finds plaintiff's first cause of action (for violation of a restraining order, which he claims is an action under Judiciary Law § 756), to be time-barred as well. It is an action to recover damages upon a statute and is thus governed by the three-year statute of limitations imposed by CPLR 214 (2). Additionally, for plaintiff to plead a cause of action under Judiciary Law § 756 his application must "contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both" with the requisite "warning" in large bold faced type. This was not done in plaintiff's motion. Accordingly, the defendants' motions are granted, plaintiff's complaint is dismissed as time barred and the Court need not address the other issues raised by defendants in support of their motions.

Finally, plaintiff has failed to include a proposed amended complaint with his request to replead or amend his pleading, nor has an affidavit of facts from a person with knowledge been offered setting forth additional transactions or occurrences in support of the motion. Although leave to amend a complaint should be freely granted pursuant to CPLR 3025 (b), it is necessary to show that the proposed amendment has merit and states a cause of action (*see Corman v LaFountain*, 38 AD3d 706, 835 NYS2d 201 [2d Dept 2007]; *Mohan v Hollander*, 303 AD2d 473, 756 NYS2d 615 [2d Dept 2003]). Here, plaintiff has not shown the court how he intends to amend or supplement his complaint, thus he cannot show that it has merit or states a cause of action. Accordingly, plaintiff's cross motions are denied in their entirety.

Dated: 6 April 2012


HON. JEFFREY ^{J.S.C.} ARLEN SPINNER

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