

Taylor v Casolo

2012 NY Slip Op 33907(U)

July 23, 2012

Supreme Court, Saratoga County

Docket Number: 2010-719

Judge: Robert J. Chauvin

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ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

DEBORAH J. TAYLOR, Individually, and as Trustee of the
DEBORAH J. TAYLOR REVOCABLE INTERVIVOS TRUST,
U/A/ 3/31/06, ANNA M. FINLEY f/k/a ANNA WEISS,
MARILYN C. DESIMONY, Individually and as Executrix of
the Estate of John DeSimony, DEBRA F. DESIMONY,
DOROTHY A. JOLY, PATRICIA A. BACHAN and
MARTA ZIONS,

Plaintiffs,

DECISION AND ORDER

-against-

**Index No: 2010-719
RJI No: 45-1-2010-0813**

MARK C. CASOLO, BRANDEN U. CASOLO a/k/a
BRANDEN L. CASOLO a/k/a BRANDON U. CASOLO,
FREDERICK W. JACKSON, JR., Individually and as
Trustee of The 1531 State Route 9 Trust, The 1531 State
Route 9 Trust, ESCALATION CAPITAL GROUP
LIMITED a/k/a Escalation Capital Group, Ltd., ADK
RE PARTNERS, LLC, BLACK OPAL RESORTS & SPAS,
LTD., WILDERNESS PARTNERS, LLC, WILDERNESS
CAPITAL GROUP, LTD. As Successor in name, interest
and title to WILDERNESS PARTNERS, LLC, WILDERNESS
CAPITAL GROUP, LTD., NCH PARTNERS, LLC, EAGLE
CAPITAL GROUP LLC and EAGLE CAPITAL GROUP LLC
as Successor in name, interest and title to WILDERNESS
CAPITAL GROUP, LTD., EMILIO LOCASCIO a/k/a EMIL
A. LOCASCIO, MANUFACTURERS & TRADERS TRUST
COMPANY a/k/a M&T BANK, M&T BANK, N.A., a New York
State Banking Institution a/k/a M&T INVESTMENT
GROUP, M&T BANK CORPORATION,

Defendants.

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BALLSTON SPA, NY

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Appearances:

For Plaintiff:

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Albany, NY 12204

For Defendant Mark C. Casolo, et al.

Mark C. Casolo, Pro-Se
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Voorheesville, NY 12186

For Defendant Branden U. Casolo, et al.

Branden U. Casolo, Pro-Se
4 Hickory Ridge
Voorheesville, NY 12186

For Defendant Frederick W. Jackson, et al.

Frederick W. Jackson, Pro-Se
50 Hill Street #506
Southampton, NY 11968

For Defendant M&T Bank:

Christian J. Soller, Esq.
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Albany, NY 12207

For Defendant Eagle Capital Group, et al.

Paul D. Jaffe, Esq.
202 Mamaroneck Avenue, 3rd Floor
White Plains, NY 10601

Before: Hon. Robert J. Chauvin, J.S.C.

By Notice of Motion dated June 7, 2011, plaintiffs seek an order of default judgment as against the defendants Mark C. Casolo, Branden U. Casolo, Frederick W. Jackson, Jr., Escalation Capital Group, Ltd., ADK RE Partners, LLC, Wilderness Partners, LLC, Wilderness Capital Group, Ltd. and NCH Partners, LLC, for failing to appear and/or answer the Summons with Notice and Complaint and/or Amended Complaint herein, pursuant to Section 3515 of the CPLR. In support of such motion the plaintiffs have submitted the affidavit of counsel dated June 7, 2011 along with annexed exhibits, the affidavit of Marilyn C. Desimony dated June 6, 2011 along with annexed exhibits, the affidavit of Deborah J. Taylor date June 4, 2011 along with annexed exhibits, the affidavit of Marta Zions dated June 6, 2011 along with annexed exhibits, the affidavit of Anna M. Finley dated June 4, 2011 along with annexed exhibits, the affidavit of Patricia A. Bachan dated June 6, 2011 along with annexed exhibits, the affidavit of Dorothy A. Joly dated June 7, 2011 along with annexed exhibits and the affidavit of Frederick W. Jackson, Jr., dated June 2, 2011 along with annexed exhibits.

In opposition thereto the defendant, Wilderness Capital Group, Ltd., submitted an Answering Affirmation dated July 5, 2011, along with annexed exhibits. In addition, the defendant, Mark Casolo submitted an unsigned, undated set of papers in opposition entitled a Motion opposing entry of default judgment. However such was marked as received on July 22, 2011.

Finally, the Court is also in receipt of correspondence of counsel for the plaintiffs dated July 14, July 18 and July 21, 2011, all rejecting a proposed Answer served by and on behalf of defendants Mark C. Casolo, Branden U. Casolo, the 1531 Route 9 Trust, Escalation Capital Group, Ltd, ADK RE Partners, LLC and Wilderness Partners, LLC. A copy of such proposed Answer was annexed to such correspondence.

Such motion was initially returnable July 13, 2011.

Thereafter by Notice of Motion dated January 31, 2012 the defendants Wilderness Capital Group, Ltd., Eagle Capital Group, Ltd. and Emilio Locascio seek an order canceling and/or vacating a Notice of Pendency filed in association with this action, as well as, an Order upon consent in a prior action in the United States Bankruptcy Court restraining the transfer of the same property. Such relief is sought pursuant to a dismissal of an action in bankruptcy and due to an alleged insufficient basis set forth in the Amended Verified Complaint to maintain such an encumbrance upon the subject property. In support of such motion the defendants submitted an affirmation of counsel dated January 31, 2012 along with annexed exhibits and a memorandum of law dated February 2, 2012.

In opposition to such motion the plaintiffs have submitted an undated proposed Order, the affidavit of Kenneth Wolosoff dated February 15, 2012, the affidavit of Frederick W. Jackson, Jr. dated February 10, 2012, the affidavit of Patricia A. Bachan, dated February 8, 2012, numerous exhibits annexed to such affidavits and a memorandum of law dated February 16, 2012.

The initial return date was February 22, 2012. However due to the adjournment of pending motions in an associated action naming the same defendants, in the interests of judicial economy, all of the motions herein, as well as in the associated action, were made returnable May 22, 2012.

It should also be noted that the matter herein was not before this Court when the initial motion was made but was reassigned to this court upon the filing of the further motion on January 31, 2012. In addition, based upon the motion to consolidate pending in the associated action, that matter was also reassigned to this Court.

UNDERLYING ACTION

The underlying action herein sets forth a variety of causes of action against numerous defendants all alleging the fraudulent and/or unauthorized transfer and/or theft of funds from

plaintiff's respective investment accounts by the defendant, Mark C. Casolo, who at the time was the investment broker managing the plaintiffs' respective accounts, and the later misappropriation of such funds to the other named defendants.

As specifically concerns the instant motions, it is clearly and unequivocally alleged in the Amended Verified Complaint that portions of the fraudulently obtained and/or stolen funds were utilized to purchase the premises located at 726 State Route 9, in the Town of Schroon, Essex County, New York, otherwise referred to in the pleadings as the Davis Motel property. Further it is clearly and unequivocally set forth that a form of relief sought is a determination of an interest in such real property, on behalf of the plaintiffs, based upon the use of their funds in the purchase of the property.

The initial action was commenced by the filing of a Summons with Notice on February 19, 2010. Thereafter a further Summons and a Verified Complaint were filed on May 14, 2010. Finally, a Supplemental Summons and Amended Verified Complaint were filed on March 25, 2011.

Between May 18, 2010 and May 24, 2010, service of the initial Summons and Verified Complaint was made upon the defendants Wilderness Partners, LLC, ADK RE Partners, Escalation Capital Group, Limited, NCH Partners, LLC, Mark C. Casolo and Branden U. Casolo. Such pleadings were served along with an application for a Temporary Restraining Order, upon which application the defendants Mark Casolo and Branden Casolo appeared.

Following the filing and service of the initial pleadings in this matter the plaintiffs filed a Notice of Pendency upon several properties which had been purchased and/or were owned by the defendants herein. One such property included the premises located at 726 State Route 9, in the Town of Schroon, Essex County, otherwise referred to as the Davis Motel property. Specifically in regard to this property, both the pleadings submitted and other documentation submitted upon the motions herein, indicate that such property was initially contracted to be purchased by defendant, Escalation Capital Group Limited. That some time thereafter the rights pursuant to such contract were assigned to the defendant, Wilderness Capital Group, Ltd., and that after the purchase of the property by Wilderness Capital Group, Ltd, that it was unilaterally transferred by defendant, Locascio, from Wilderness Capital Group, Ltd. to defendant, Eagle Capital Group, LLC.

The same premises was among several parcels of real estate which were subject to a prior Order stemming from an action previously pending in the United States Bankruptcy Court in and for the Northern District of New York, concerning the defendant, Mark Casolo, which has apparently been dismissed.

Thereafter, between March 25, 2011 and April 16, 2011, service of a further Supplemental Summons and Amended Verified Complaint was made upon defendants, Mark C. Casolo, Branden U. Casolo, Escalation Capital Group Limited, ADK RE Partners, Wilderness Partners, LLC and NCH Partners, LLC.

At no time, prior to the making of the motion herein, did any aforementioned defendants attempt to interpose any Answer or other defense. Following the making of the motion in July, 2011, the defendants did attempt to interpose an Answer, however same was rejected repeatedly by the plaintiffs. It should also be noted that such proposed Answer was not verified. In addition, although the defendants, Mark and Branden Casolo, Escalation Capital Group Limited, ADK RE Partners, Wilderness Partners, LLC and NCH Partners, LLC, submitted papers which oppose the motion for default judgment, such were apparently received by the Court after the return date of the motion, and such papers are not signed, notarized or otherwise supported by affidavit. Nor do such papers in any way address an excusable basis for the default herein.

In this regard, again, it appears as if both defendants, Mark and Branden Casolo, did in fact have notice of the initial pleadings, as they both appeared upon the application for the Temporary Restraining Order.

As concerns, the defendant, Wilderness Capital Group, Ltd., such defendant was served with the Supplemental Summons and Amended Verified Complaint on March 30, 2011. However, this defendant did serve a Notice of Appearance dated March 1, 2011, which demanded a copy of the Complaint, and did serve an Answer to the Amended Verified Complaint dated June 28, 2011.

Finally the defendant, Jackson, was served with the initial pleadings on May 24, 2010 and May 25, 2010. Although defendant, Jackson, has not interposed a formal Answer or written defense, he has "voluntarily" appeared in this action and, by way of affidavit, has indicated his lack of opposition to the relief sought by the plaintiffs as against him in this action.

MOTION FOR DEFAULT JUDGMENT

The plaintiffs seek a default judgment, pursuant to Section 3215 of the CPLR, as against defendants, Mark C. Casolo, Branden U. Casolo, Frederick W. Jackson, Jr., Escalation Capital Group Limited, ADK RE Partners, LLC, Wilderness Partners, LLC, Wilderness Capital Group Ltd. and NCH Partners, LLC.

It is undisputed that defendants, Mark C. Casolo, Branden U. Casolo, Escalation Capital Group Limited, ADK RE Partners, LLC, Wilderness Partners, LLC and NCH Partners, LLC were served with the initial pleadings in May, 2010, and failed to timely interpose any Answer or other defense thereto.

It is also undisputed that the same defendants were again served with the Supplemental Summons and Amended Verified Complaint in March and April, 2011, and again failed to timely interpose any Answer or other defense.

Further there is no question but that the defendants, Mark Casolo and Branden Casolo, had notice of the pending action, as they had both previously appeared upon the request for a Temporary Restraining Order. However the only attempt to interpose an Answer was after the instant motion was commenced, and such pleading was expressly rejected by the plaintiffs as untimely.

Indeed such Answer was and/or is completely untimely. In addition, the proposed Answer is not verified. Likewise there has been no excuse set forth by the defendants for their default in appearing and/or submitting a proper and timely Answer nor an affidavit establishing a meritorious defense in the matter, nor motion to relieve them from their default. As such, the Court finds said defendants in default, and no proper basis upon which to excuse or open such default. Jusienoski v Board of Education of New York, 15 A.D.3d (Second Dept., Feb., 2005). Thus the plaintiffs motion for a default judgment as concerns the above defendants is granted.

However, in regard to the defendant, Wilderness Capital Group, Ltd., it does appear as if they interposed an Answer which was not rejected, as untimely or otherwise, by the plaintiffs. As such, the plaintiffs' motion in regard to Wilderness Capital Group, Ltd., is denied.

In regard to defendant, Jackson, it is undisputed that he was served with the initial pleadings herein, and has not interposed any Answer or defense. Further it appears as if the defendant, Jackson, does not oppose the relief sought by the plaintiffs. However there has been

no proof submitted of service of the present Supplemental Summons and Amended Verified Complaint upon this defendant, and despite his apparent lack of objection to the plaintiffs limited relief, such is not appropriately subject to the instant motion for a default judgment. Thus plaintiffs motion as concerns defendant, Jackson, is denied.

MOTION TO CANCEL NOTICE OF PENDENCY

As set forth above, subsequent to the initial motion by plaintiffs, the defendants, Wilderness Capital Group, Ltd., Eagle Capital Group LLC and Emilio Locascio, have moved to cancel and/or vacate the Notice of Pendency which has been filed by the plaintiffs concerning the premises located at 726 State Route 9, in the Town of Schroon, Essex County. Such relief is requested both in regard to a Notice of Pendency which was filed upon the property pursuant to the actions commenced herein, as well as, some form of lien upon the property pursuant to a former action in the United States Bankruptcy Court, in and for the Northern District of New York.

First, although the Court may have authority pursuant to Article 65 of the CPLR to cancel a Notice of Pendency in an action brought in a Court of the United States, this Court has no authority or jurisdiction to affect or otherwise alter an Order of a Court of the United States. In this proceeding the lien upon the property stemming from the action in the United States Bankruptcy Court is not a Notice of Pendency pursuant to Article 65 of the CPLR but rather an Order upon consent by that Court. As such, this Court lacks any authority to vacate such Order, and the defendants' motion for such relief is denied.

As concerns the Notice of Pendency filed in the present action, Section 6501 of the CPLR sets forth that a Notice of Pendency may be filed upon any action, "...in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property..." Further in analyzing whether an action fits within the parameters of Section 6501 the Court is limited to a review of the pleadings. In this regard, specifically, an action to impress a trust upon real property has been held to be such an action. 5303 Realty Corp. v O&Y Equity Corp., 64 N.Y.2d 313 (Dec., 1984); citing Keating v Hammerstein, 196 A.D. 18 (First Dept., April, 1921); see also Nadeau v Tuley, 160 A.D.

In the present matter the defendants, Wilderness Capital Group, Ltd., Eagle Capital Group, LLC and Locascio, seek the vacating of the filed notice premised upon the contention that

the plaintiffs' Amended Verified Complaint does not meet the statutory requirements of Section 6501 of the CPLR and/or that the causes of action within the Amended Verified Complaint have no merit. In this regard the Court would note that the motion is not in any sense premised upon any alleged insufficiency of the contents of the notice, the timeliness of the filing of the motion and/or service of the pleadings, nor the sufficiency of the filed pleadings at the time of the filing of the notice. Indeed neither party has submitted a copy of the initial Complaint nor the Notice of Pendency involved herein. (Both parties submitted a copy of a Notice of Pendency in a related action).

As set forth above, the allegations contained within the Amended Verified Complaint clearly and unequivocally allege the fraudulent and/or unauthorized transfer and/or theft of funds from the plaintiff(s) investment accounts, by the defendant, Mark C. Casolo, who at the time was the investment broker managing the plaintiffs' respective accounts, and later misappropriation of such funds to the other named defendants.

Further, it is clearly and unequivocally alleged that portions of the fraudulently obtained and/or stolen funds were utilized to purchase the premises located at 726 State Route 9, in the Town of Schroon, Essex County, otherwise referred to in the pleadings as the Davis Motel property.

Most importantly, the Amended Verified Complaint clearly and unequivocally seeks relief by way of the establishment of an interest in such real property on behalf of the plaintiffs based upon the use of the misappropriated funds to purchase such property.


As such, the Court finds the instant action adequate to sustain the Notice of Pendency herein, and the defendants' motion is denied.

This Memorandum shall constitute the Decision and Order of the Court. The original Decision and Order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this Decision and Order and the delivery of this Decision and Order to the Saratoga County Clerk shall not constitute Notice of Entry under CPLR Section 2220, and the parties are not relieved from the applicable provisions of that Rule regarding service of Notice of Entry.

DATED: July 23, 2012
Ballston Spa, NY

ENTERED
Kathleen A. Marchione

Kathleen A. Marchione
Saratoga County Clerk


HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED