

Baranek v Balthasar

2013 NY Slip Op 31541(U)

July 3, 2013

Sup Ct, Suffolk County

Docket Number: 14342/07

Judge: Joseph C. Pastoressa

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY**

COPY

PRESENT:

HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot Seq: #001-Mot-d
#002-MG

_____ x

MARK BARANEK,

Plaintiff(s),

-against-

OSKAR BALTHASAR, ANNELORE
BALTHASAR AND KARIN BARANEK,

Defendant(s),

_____ x

ATTY FOR PLAINTIFF(S):

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Pages Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 2
Opposing Affidavits (Affirmations) 3
Reply Affidavits (Affirmations) 4, 5
Affidavit (Affirmation) _____
Other Papers _____

Upon the foregoing papers, the plaintiff moves for an order pursuant to CPLR 3126 striking the answer of the defendants Oskar Balthasar and Annelore Balthasar for their alleged failure to be deposed and the answer of co-defendant Karin Baranek for her alleged failure to respond plaintiff's demand for a verified bill of particulars and demand for documents; or in the alternative, for an order pursuant to CPLR 3124 compelling said relief; and the defendants Balthasar cross-move for an order amending their answer; granting summary judgment in favor of the movants dismissing the plaintiff's complaint; and vacating a Notice of Pendency.¹

The plaintiff and the defendant Karin Baranek (hereinafter "KB") were married on April 1, 1981 and subsequently divorced on or about September 19, 2005. The defendants Balthasar are the parents of defendant KB. The plaintiff and the defendant KB acquired real property located at 24 Kennedy Avenue, North Babylon, New York (hereinafter "subject premises") on or about February 4, 1987. The plaintiff commenced a matrimonial action against the defendant KB, which was settled via oral stipulation (hereinafter "stipulation") on October 7, 2004 before Justice Whelan, Supreme

¹ This matter was stayed pending the bankruptcy filing of the defendant KB which has been lifted.

Court, index number 2003-27691. The stipulation, inter alia, provided that plaintiff/husband shall “upon presentation to him, duly execute and tender a bargain and sale deed with covenants and all ancillary documents required for transferring title to the marital residence (“subject premises”) to the wife in full satisfaction of all claims of equitable distribution.” The plaintiff/husband transferred his interest in the marital residence via deed on or about December 7, 2004 to the defendant KB. The defendant KB sold and transferred the subject premises to the defendants Balthasar for \$225,000 via deed on or about December 29, 2004.

The plaintiff commenced a plenary action against the defendant KB on or about September 11, 2006 seeking to vacate the stipulation dated October 7, 2004 alleging, inter alia, that the stipulation was procured under duress and that the stipulation did not comply with the Child Support Standards Act. The plaintiff moved for summary judgment on the first cause of action alleged in the complaint that the stipulation between the parties did not comply with the Child Support Standards Act. The trial court in the plenary action by order (Weber, J.) dated December 13, 2007 denied the plaintiff’s motion for summary judgment and sua sponte granted the defendant summary judgment dismissing the plenary action in toto, which alleged four causes of action. The plaintiff appealed the December 13, 2007 decision and order, whereby the Appellate Division, Second Department, by decision and order dated September 16, 2008 modified the trial court’s order and set aside only the portion of the stipulation pertaining to the child support and unreimbursed medical expenses for the children and held that the basic child support provision was not intertwined with the remaining provisions of the stipulation, which included custody and visitation, equitable distribution of property, and a waiver of maintenance based upon equitable distribution of property. The Appellate Division, Second Department, by order dated January 21, 2009 denied a motion for leave to reargue.

The plaintiff in this action alleges two causes of action. The first cause of action avers that the defendant KB was prohibited from transferring the subject premises by court order and as a result of said transfer he sustained damages. The plaintiff avers in his complaint that his transfer of the subject premises was done under duress with the expectation that said transfer would have no effect until the matrimonial proceedings were resolved. The second cause of action avers that the defendants conspired to defraud the plaintiff from the use, occupancy, economic benefit, and enjoyment of the subject premises, and as a result he sustained damages.

“Leave to amend a pleading should be freely granted unless the proposed amendment is palpably improper as a matter of law or prejudices or surprises the opposing party” (Nassau County v Incorporated Vil. Of Roslyn, 182 AD2d 678, 679; see also, CPLR 3025[b]). Moreover, “defenses waived under CPLR 3211 (e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025 (b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay” (Endicott Johnson Corp. v Konik Indus., 249 AD2d 744, 744). Here, the plaintiff failed to demonstrate any prejudice or surprise resulting from the delay between the service of the answer and the instant motion for leave to serve an amended answer (CPLR 3025; Ricchezza v Metropolitan Transp. Auth., 79 AD3d 998; Complete Mgt., Inc. v Rubenstein, 74 AD3d 722) and the evidence submitted in support indicated that the proposed amendment was neither palpably insufficient nor patently devoid of merit in light of the Appellate Division Second Department’s decision and order dated December 13, 2007 in the matter of Mark Baranek v Karin Baranek, index number 25377-2006 (see, Bajanov v Grossman, 36 AD3d 572, 573; Nunez v Mousouras, 21 AD3d 355). Accordingly, defendants Balthasar’s portion of the cross-motion seeking to amend its answer to include the affirmative defenses of res judicata and collateral estoppel is granted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and

triable issue of fact is presented (see, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v N.Y.U. Medical Center, 64 NY2d 851). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v Liberty Bus Co., 79 AD2d 1014). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (see, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065).

The defendants Balthasar’s cross-motion for summary judgment dismissing the complaint against them is granted. The plaintiff’s action is barred by the doctrines of res judicata and collateral estoppel. “Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy” (O’Brien v City of Syracuse, 54 NY2d 353, 357). “The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. Collateral estoppel effect will be given only to matters actually litigated and determined in a prior proceeding. It must be shown that the identical issue was decided in the prior action or proceeding, is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest it” (Headley v New York Transit Authority, 100 AD3d 700, 700). Here, in the instant action, the plaintiff in the plenary action challenged the stipulation alleging, inter alia, it was procured by duress and the Supreme Court by order (Weber, J) dated December 13, 2007 dismissed the action and the Appellate Division by order and decision dated September 16, 2008 modified the order dated December 13, 2007 setting aside the child support and healthcare provisions of the stipulation. Accordingly, the plaintiff is barred from maintaining the first cause of action seeking to rescind the deed transfer and the second cause of action alleging a conspiracy to defraud the plaintiff, which is based on issues and claims that were litigated or could have been litigated in prior proceedings (see, Fitzgerald v Hudson National Golf Club, 35 AD3d 533; Bindit Corp. v Inflight Adv., 285 AD2d 309; Joshua A. Becker & Assoc. v State of New York, 79 AD2d 599; Headley v New York City Transit Auth., *supra*).²

In any event, the defendants Balthasar established their entitlement to judgment as a matter of law dismissing the plaintiff’s second cause of action against them by submitting an affidavit and documentary evidence that no misrepresentations were made to the plaintiff and that their actions were not fraudulent (see, Watson v Pascal, 27 AD3d 459). The plaintiff avers that the defendants Balthasar and the defendant KB aided and abetted one another to commit a fraud against him, however, in order to establish that the defendants Balthasar and defendant KB aided and abetted the other in committing the fraud, the plaintiff must establish, inter alia, that a fraud in fact was

² To the extent that it could be argued that the appeal did not address the remaining portions of the order and decision (Weber, J.) dated December 13, 2007 it remains the law of the case and this court being a court of concurrent jurisdiction is bound by the decision and order dated December 13, 2007 dismissing the action.

committed (see, Cash v Titan Financial Services, Inc., 58 AD3d 785). “In order to establish a prima facie case of fraud, the plaintiff must establish (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant’s representations, and (4) that the plaintiff was injured as a result of the defendant’s representations (Cash v Titan Financial Services, Inc., 58 AD3d at 788). Here, the record demonstrates that the plaintiff entered into a stipulation of settlement on October 7, 2004 in connection with his divorce requiring him, inter alia, to convey his interest in the subject premises to the defendant KB and that he did in fact execute a deed on December 4, 2004 pursuant to the stipulation conveying his interest to the defendant KB. The defendant Balthasar established that they entered into a contract to purchase the subject premises from the defendant KB for \$225,000, which was subsequently conveyed to them via deed dated December 29, 2004. The defendant Balthasar aver that they purchased the property from their daughter because it was in foreclosure at the time and wanted to ensure that their daughter and three grandchildren could reside at the subject premises. Furthermore, the record demonstrates that the plaintiff was represented by counsel at the time of the signing of the deed conveying his interest in the subject premises to the defendant KB. In opposition, the plaintiff made only conclusory and unsubstantiated allegations that he was somehow forced into signing the deed of the subject premises to the defendant KB, which on this record is insufficient to raise a triable issue of fact (see, Whitehead v Town House Equities, Ltd., 8 AD3d 367; Resnik v Norrell Corp., 269 AD2d 438; Bosio v Seiig, 165 AD2d 822).

In addition, the defendant Balthasar established their entitlement to judgment as a matter of law dismissing the plaintiff’s first cause of action against them (assuming that the first cause of action is asserted against them) by submitting an affidavit and documentary evidence that they were not aware of any stay preventing the sale of the subject premises to them. The defendant Balthasar demonstrated that the transfer of the subject premises was done prior to the two orders to show cause referred to in the plaintiff’s complaint containing temporary restraining orders, which are dated July 26, 2005 and October 28, 2005 respectively. In any event, it is uncontroverted that the defendant Balthasar were not parties to the divorce action and therefore were not bound by any alleged temporary restraining orders issued in the divorce action preventing them from purchasing the subject premises. In opposition, the plaintiff made only conclusory and unsubstantiated allegations regarding purported stays that were in effect, which on this record is insufficient to raise a triable issue of fact. Furthermore, contrary to the plaintiff’s contention, the motion was not premature, as he failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the knowledge and control of the defendant (see, Kimyagarov v Nixon Taxi Corp., 45 AD3d 736, 737; Lopez v WS Distrib., 34 AD3d 759; Pina v Merolla, 34 AD3d 663). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion” (Kimyagarov v Nixon Taxi Corp., 45 AD3d at 737; see also, Arbizu v REM Transp., Inc., 20 AD3d at 376; Kershis v. City of New York, 303 AD2d 643, 746; Associates Commercial Corp. v Nationwide Mut. Ins. Co., 298 AD2d 537, 539). Accordingly, the defendant Balthasar’s cross-motion for summary judgment dismissing the complaint against them is granted.

The portion of the defendant Balthasar cross-motion to cancel the notice of pendency filed May 7, 2007 is granted in light of the plaintiff’s failure to extend prior to May 7, 2010 by court order the expiration of the lis pendens. Accordingly, the County Clerk of Suffolk County is directed to cancel the notice of pendency filed against the subject premises.

Turning to the plaintiff’s motion. “Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR §3126 is a matter

of discretion with the court . . . The moving party must ‘clearly demonstrate’ that the failure to comply was willful and contumacious” (see, Pascarelli v City of New York, 16 AD3d 472). Here, the plaintiff failed to “clearly demonstrate” that the defendant KB’s alleged failure to comply with discovery demands was willful or contumacious conduct in light of the fact that the defendant KB provided to the plaintiff a bill of particulars in opposition to the instant motion (see, Mangiapane v Brookhaven Beach Health Related Facility, 305 AD2d 642; Patterson v New York City Health & Hosps. Corp., 284 AD2d 516; Centerport Ins. Agency v Atlantic Fabricators of Rhode Is., 277 AD2d 414). Accordingly, the plaintiff’s portion of the motion seeking to strike the defendant KB’s answer is denied. Nonetheless, the defendant KB is directed to provide a response to any of the plaintiff’s outstanding discovery demands and submit to a deposition within thirty (30) days from service of a copy of this order with notice of entry.

This shall constitute the decision and order of the court.

DATED: July 3, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION ____ NON-FINAL DISPOSITION X