

Goldoff v Peck Slip Assoc. Group, LLC
2013 NY Slip Op 31689(U)
July 23, 2013
Sup Ct, New York County
Docket Number: 150188/13
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 150188/2013
GOLDOFF, ROBERT
vs
PECK SLIP ASSOCIATES GROUP
Sequence Number : 002
DISMISS DEFENSE

INDEX NO. 150188/13
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to 15, were read on this motion to/for Dismiss/amend

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1-9
Answering Affidavits — Exhibits No(s) 10-13
Replying Affidavits No(s) 14-15

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: 7/23/13

JOAN M. KENNEY J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X

Donna O. Goldoff, Individually and
as Executrix of the Estate of Robert
Goldoff,

Plaintiffs,

-against-

DECISION AND ORDER
Index Number: 150188/13
Motion Seq. No.: 002

Peck Slip Associates Group, LLC
and Barry Goldoff,

Defendants.

-----X

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	Numbered
Notice of Motion, Affirmations, and Exhibits	1-9
Opposition Affirmation and Exhibits	10-13
Reply Affirmation and Exhibits	14-15

In this action, plaintiffs move for an Order, pursuant to CPLR 3211(a)(5), dismissing the counterclaims against them, and for an Order, pursuant to CPLR 3025(b), for leave to file an amended complaint.

Factual Background

This action involves claims arising from the operation and management of Peck Slip Associates Group, LLC (Peck) by Barry Goldoff (Barry). Barry and Robert Goldoff (Robert) were brothers, with each owning a 50% interest in Peck.

Peck owns three real estate properties, consisting of: a commercial property in Garland, Texas (leased to Walgreen's); a commercial property in South Carolina (leased to BiLo Supermarket [Bilo]); and a residential "cottage" property located in Awendaw, South Carolina (the cottage).

Plaintiffs allege that Barry has been residing at the cottage on a full-time basis during the winter months, for the past 6 years, without paying anything to Peck for his use and occupancy.

The distribution of rent from the 3 properties had been the source of dispute between the brothers, and were resolved by two separate agreements. With respect to rent generated from the 3 properties, Barry and Robert entered into an agreement in July of 2008 (the 2008 agreement). In January of 2010, the brothers entered into a second agreement with respect to the income received from the properties (the 2010 agreement). Pursuant to the 2010 agreement, the income from the properties would be collected and disbursed by Peck's accountant on an equal basis each month between Barry and Robert after payment of certain expenses.

One of the deductions was a payment to plaintiff Donna Goldoff (Donna) in connection with a loan that she had previously made to Peck in connection with the purchase of the cottage.

Plaintiffs allege that Barry refused to remit any payment of the November or December 2012 BiLo rental payments (as executrix of Robert's estate), which led to the commencement of the within action before this court. Plaintiffs assert the following causes of action against defendants: breach of fiduciary duty by Barry Goldoff; breach of operating agreement; accounting; conversion; appointment of a receiver; and unjust enrichment.

On or about January 8, 2013, Barry subsequently sent Donna checks totaling \$16,784.00 in payment of the January 2013 BiLo rent, which contained an unauthorized deduction of \$1,413.50. These checks reference the deduction being related to a "court stip," wherein money was owed and past due on a "Walgreen's loan."

The "stip" referenced by Barry is in regard to a prior legal action, *Robert Goldoff v Barry Goldoff*, Supreme Court of New York County, 107848/09 (the 2009 action). That action was

settled by a stipulation in open court dated December 19, 2011, before Justice Joan Madden.

Pursuant to the terms of that stipulation, the following was resolved:

- (i) The expenses of Ann Goldoff [the mother of the Goldoff brothers] paid by Robert Goldoff would be determined by accountant Thomas Stears and Barry Goldoff will split those expenses. (Court transcript, Exhibit F, Pg. 17 Ln. 3);
- (ii) Regarding Peck Slip Texas [Walgreen's], Robert Goldoff agreed to pay Barry Goldoff the amount Stears determines is due and owing. (*Id.* at Pg. 17 Ln. 13);
- (iii) Barry Goldoff will negotiate with the landlord (Furio) the amount owed by Ann Goldoff for rent and/or use and occupancy. Barry Goldoff and Robert Goldoff will each pay one half of that amount. That amount is separate and distinct from any amount Robert Goldoff may owe for his own apartment. (*Id.* at Pg. 18 Ln. 8);
- (iv) Regarding Donna Goldoff's loan of \$560,000.00, Barry Goldoff and Robert Goldoff will pay the interest due, as calculated by Stears. (*Id.* at Pg. 19 Ln. 15).

Defendants filed an answer to the within complaint on February 19, 2013, containing two counterclaims. The first counterclaim alleges that Donna, individually, breached the July 2008 agreement regarding the Walgreen's property, when she failed to pay Barry a preferred return of 7% each month from the Walgreen's property. Defendants' second counterclaim alleges that plaintiff (who has stepped into the shoes of her now deceased husband) breached the 2011 stipulation by failing to make payments in support of Ann Goldoff, mother of the Goldoff brothers.

Arguments

Plaintiffs move to dismiss the counterclaims, based on the theories of *res judicata* and collateral estoppel, asserting that the counterclaims are based on matters previously litigated before Justice Madden in the 2009 action and resolved by stipulation dated December 19, 2011. Plaintiffs also argue that they should be allowed to amend their complaint, to include the failure

of Barry to pay Peck for the use and occupancy of the cottage, as it relates to the breach of fiduciary duty already asserted, and thus not unduly prejudicial.

Defendants claim that their counterclaims are not barred by *res judicata* and/or collateral estoppel because the conduct complained of now did not occur until after the 2009 action had settled.

Discussion

Pursuant to CPLR 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of...collateral estoppel...[or] *res judicata*. The doctrine of *res judicata*, “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 [1981]). 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, whether or not the tribunals or causes of action are the same. (*BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556 [1st Dept. 2010]).

Current claims arising from acts or omissions that occur after a decision has been rendered could not have been the basis for actions settled in a prior action. (*IDT Corp. v Tyco Group, S.A.R.L.*, 104 AD3d 170 [1st Dept. 2012]).

Here, defendants claim a breach of two parts of the December 19, 2011 settlement agreement. In other words, movants are seeking to enforce the terms of the stipulation that resolved the 2009 dispute before Justice Madden. The application to dismiss the counterclaims

on a *res judicata* theory, must therefore be denied because the enforcement of said stipulation was never before Justice Madden.

Under CPLR 3025(b), a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading. A “leave to amend pleading shall be freely given in absence of prejudice or surprise, in order to conserve judicial resources, examination of underlying merit of proposed amendment is mandated.” (*Thompson v Cooper*, 24 AD3d 203 [1st Dept. 2005]).

Here, defendants would not be “surprised” or “prejudiced” by amending the fiduciary duty section of the complaint to include the fact that Barry has lived at the cottage rent free for 6 years. Barry is a 50% owner of Peck, and as such, his free usage takes away from potential rent money generated by the cottage for Peck. Further, defendants do not even rebut the fact that Barry has lived rent free for 6 years at the cottage, so “surprise” or “prejudice” are not valid arguments. Accordingly, it is hereby

ORDERED, that plaintiffs’ motion to dismiss the counterclaims against them, is denied; and it is further

ORDERED, that the plaintiffs’ motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

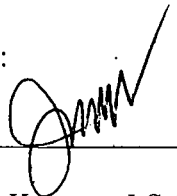
ORDERED that defendant shall serve an answer to the amended complaint or otherwise

respond thereto within 20 days of said service; and it is further

ORDERED, that the parties appear for a compliance conference on October 24, 2013 at 10 am in Room 304, at 71 Thomas St., NYC 10013.

Dated: 7/23/13

ENTER:



Joan M. Kenney, J.S.C.