Ali v Zherka
2013 NY Slip Op 32788(U)
October 31, 2013
Sup Ct, New York County
Docket Number: 153074/2013
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron Justice PART 37

Index Number : 153074/2013
ALI, HAMAD
vs
ZHERKA, SELIM
Sequence Number : 002
CHANGE VENUE

INDEX NO. _____
MOTION DATE 9/18/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 10/31/13

HON. ARTHUR F. ENGORON J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
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: PART 37

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HAMAD ALI, MONSOUR AL-KABUALER and FATH SALEH,

Plaintiffs,

- against -

SELIM ZHERKA, SILAS METRO HOLDINGS CORP., JAMES G. DIBBINI & ASSOCIATES, P.C. and JAMES G. DIBBINI,

Defendants.

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Index Number: 153074/2013

Sequence Numbers: 001, 002 & 003

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 9, were used on these motions to dismiss this action or to change the venue of it to Bronx County:

	Papers Numbered:
Moving Papers (Dibbini)	1
Opposition Papers (Ali)	2
Reply (memo only)	none
Moving Papers (Silas)	3
Opposition Papers (Ali)	4
Reply Papers (Silas)	5
Moving Papers (Zherka)	6
Opposition Papers (Ali)	7
Reply Papers (Zherka)	8
Opposition Papers (Saleh)	9

Upon the foregoing papers, the motions are denied except to the extent of deeming plaintiffs' fraud claims dismissed, pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

Background

In this action plaintiffs essentially claim that defendants sold land right out from under them.

For present purposes, defendants do not dispute that plaintiffs, through various corporate entities, owned and/or controlled three parcels of Bronx real estate and one parcel of Manhattan real estate. Plaintiff Hamad Ali claims that his son, non-party Fares Ali (who helped manage the

properties), without authority or authorization, transferred the parcels, or, perhaps more exactly, the entities that owned them, to defendant Zherka, who further transferred them to defendant Silas, all with the connivance of the Dibbini defendants (collectively, "Dibbini"). The summons states that the nature of the action "is to set aside the fraudulent transfer[s] and/or to recover $12 million in damages for fraud, conversion, and unjust enrichment." Venue in New York County is predicated on the location here of one of the parcels.

According to the complaint, in allegations that are not contested or must be accepted as true for present purposes, plaintiff Ali resides in New Jersey; he was "the majority or controlling shareholder and/or managing member of the corporations and limited liability companies" that owned all four parcels; plaintiff Saleh resides in New York County; he owned a majority of the shares of the corporation that owned one of the parcels; defendant Zherka resides in Westchester County; defendant Silas is a Connecticut Corporation with a place of business in Westchester; defendant Zherka owns 100% of defendant Silas; defendant James Dibbini practices law through his corporation, in Westchester; James Dibbini purported to represent the sellers; and Fares Ali and the other defendants conspired to transfer the property and/or the owning/controlling entities to Zherka (and thence to Silas) for "substantially less than fair market value" ($100,000 as opposed to $10,000,000).

The dispute before this Court has a problematic procedural history. In or about August of 2011 the original property owners sued Fares Ali; the instant defendants; Signature Bank; and Custom Title Services, Inc. Custom allegedly knew that the title was being conveyed fraudulently; and Signature allegedly knew something was fishy when it refinanced the properties and placed a "spreader" mortgage on all of them. Fares was sued for fraud and conversion and apparently defaulted in the Bronx action; an inquest was ordered. Dibbini was sued for fraud and malpractice. Custom was sued for fraud. Zherka, Silas and Signature were sued for the return of the real property, or for the quashing of any claims that they may be making on them. The exact details of each claim against each defendant are not, for present purposes, controlling.

Signature moved to dismiss for failure to plead fraud, or, for that matter, anything, with particularity (see CPLR 3016(b)). In a decision dated April 3, 2012, Bronx Supreme Court Justice Mary Ann Brigantti-Hughes granted the motion "only to the extent of permitting plaintiff[s] 60 days . . . to amend [the] complaint so that the statements therein are sufficiently particular to give the Court and the parties notice of the occurrences intended to be proved and the material elements of each cause of action."

What happened next may be unique in the annals of the law. Plaintiffs served an "Amended Complaint as to Signature Bank." that purported to amend the complaint "as follows: "SUMMARY OF COMPLAINT"; New Paragraphs starting from Complaint # 146; As and for the FRAUDULENT SCHEME aided and abetted by SIGNATURE BANK" that picked up where the original complaint left off, i.e., commencing with Paragraph 147. The following several pages purport to show that Signature failed to follow proper banking practices in issuing a mortgage covering the properties, proving that Signature "was part of the scheme of fraudulent

conveyances and transactions." This set off a wave of motion practice. As here relevant, essentially, Signature, Dibbini, Silas and Custom moved to dismiss on CPLR 3016(b) and 3211(a)(7) grounds; and plaintiffs moved and cross-moved to compel disclosure and to amend the complaint by "melding" the original and amended complaints "into a single complaint, 'word for word.'"

In an omnibus Decision and Order dated February 19, 2013, Justice Brigantti-Hughes wrote as follows:

> [The amended complaint] only contains paragraphs numbered 147 though [sic] 159. The Amended Complaint does not contain any of the allegations previously contained in the original complaint, including an identification of the various parties, a description of the purported ownership of the Properties, any allegations describing the purported fraudulent scheme, and any causes of action, including the material elements thereto. The Amended Complaint does not include an *ad damnum* clause identifying the relief sought against any of the defendants, including Signature.

Justice Brigantti-Hughes seems not to have considered, or to have rejected, incorporation by reference, although CPLR 3014 explicitly provides for this, at least within a single pleading:

> Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters. * * * A copy of any writing which is attached to a pleading is a part thereof for all purposes.

She also seems not to have considered, or to have rejected, application of CPLR 2001:

> At any stage of an action, including the filing of a . . . complaint . . . , the court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded . . . .

In her view, because an amended complaint "supercede[s] the original pleading, rendering it a nullity," there was nothing to which to attach or add paragraphs 147 to 159. She also found that these latter paragraphs still failed properly to allege fraud or breach of fiduciary duty claims. For good measure, she denied the motion to amend ("to meld," as it were), because the motion was not supported by an affidavit of merit by someone with personal knowledge.

Bloodied but unbowed, plaintiffs have commenced the instant action. The complaint purports to set forth causes of action for fraud, conversion, unjust enrichment, and for imposition of a constructive trust over the properties in favor of plaintiffs. The three instant motions essentially

seek to dismiss on the grounds of failure to state a cause of action (CPLR 3211(a)(7)) and/or res judicata (CPLR 3211(a)(5)), or to transfer venue to Bronx County.

Discussion

The basic ground of the motion to change venue is that plaintiffs are "manipulating" the rules of venue for the purpose of impermissible "forum shopping." However, the cases defendants cite are characterized by a party relying on a bogus residence. Here, venue is proper in New York County pursuant to CPLR 507: "The place of trial of an action in which the judgment demanded would affect the title to, or the possession , use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." No amount of "manipulation" would make 2591 Eighth Avenue be somewhere other than New York County, and this action clearly demands a change in the title, possession, use or enjoyment thereof.

Defendants also argue that the complaint served in the instant action is "virtually identical" to the complaint in the Bronx action. Defendants cannot have it both ways: dismissal of the amended complaint in the Bronx because it was not melded with the original complaint; and a claim here, that the instant complaint is identical to the complaint that was dismissed in the Bronx. In any event, Justice Brigantti-Hughes was very specific as to what she was dismissing, and it was not "virtually identical" to the complaint here. The Bronx dismissal was not on the merits and, thus, is not res judicata as to this action. Furthermore, Justice Brigantti-Hughes did not indicate in her decision that plaintiffs were not allowed to plead again; she did not indicate that she felt "enough is enough."

Defendants argue at some length that the instant complaint fails to allege the facts necessary to state the four causes of action to which it aspires. This Court agrees with defendants that plaintiffs have failed to state a cause of action for fraud, also known as "misrepresentation." Of course, in layperson's terms, plaintiffs claim that defendants defrauded them. However, that is not the same as making out a cause of action for common law fraud/misrepresentation. Such a cause of action requires a statement known to be false on the part of defendant, and reasonable reliance and damages on the part of plaintiff. Here, to the contrary, defendants did not tell plaintiffs what they were doing; and plaintiffs did not rely on anything defendants told them.

This Court disagrees with defendants' argument that plaintiffs have not stated a claim for conversion on the ground that real property cannot be converted. The fly in the ointment of that argument is that plaintiffs allege that defendants stole the corporations that, in turn, owned the real property.

The unjust enrichment cause of action is right out of the equitable causes of action playbook. As stated by the Court of Appeals:

> The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and

> depends upon broad considerations of equity and justice. Generally, courts will look to see if a benefit has been conferred on the defendant under a mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent.

Paramount Film Distrib. Corp v State of New York, 30 NY2d 415, 421 (1972) (citations omitted) (Brietel, J.), cert denied, 414 US 829 (1973). In a later case, by then-Chief Judge Brietel added the following: "whether there is unjust enrichment . . . must be a realistic determination based on a broad view of the human setting involved." McGrath v Hilding, 41 NY2d 625, 629 (1977). As summarized in 22A NY Jur 2d, Contracts § 513, at 230 (1996): "Whenever one person possesses money that in equity and good conscience he ought not to retain and that belongs to another, has money in his possession which he cannot conscientiously retain from another, or whenever money has been received which belongs to another, such other party may recover it." Bingo!

Although the constructive trust allegations are not particularly strong, plaintiffs' claims that their blood relative and lawyers conspired to transfer plaintiffs' real estate holding companies for minimal value to third parties would seem to fit within the ambit of the harms against which the constructive trust doctrine is intended to be a corrective.

Finally, as defendants point out, there are significant, and troubling, discrepancies between the parties named as plaintiffs in the summons and the parties named as plaintiffs in the complaint. However, Hamad Ali, who appears to be the driving force behind this litigation, is named in both. Furthermore, such discrepancies are not, in this Court's view, grounds for pre-answer dismissal; rather, they can be addressed in motion practice and disclosure.

Conclusion

Thus all three motions are denied except to the extent of deeming plaintiffs' fraud claims dismissed, pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

Dated: October 31, 2013

Arthur F. Engoron, J.S.C.