

**Bekas v Valiotis**

2013 NY Slip Op 33864(U)

March 4, 2013

Supreme Court, Queens County

Docket Number: 9318 2010

Judge: Marguerite A. Grays

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A GRAYS IA Part 4  
Justice

ORIGINAL

\_\_\_\_\_x  
DEMETRIOS BEKAS,

Plaintiff(s)

-against-

EFSTATHIOS VALIOTIS, TOP COVE  
ASSOCIATES INC., and RIVER CITY LLC.

Defendant(s)

\_\_\_\_\_x

Index  
Number 9318 2010

Motion  
Date October 26, 2012

Motion Cal No. 4

Motion Seq. No. 4

2013 MAR 15 AM 11:15

QUEENS COUNTY CLERK  
FILED

The following papers numbered 1 to 16 read on this motion by defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint; and this cross motion by plaintiff, appearing pro se, pursuant to CPLR 3025 for leave to amend the caption, naming him individually and derivatively on behalf of "Top Cove" as plaintiff, and Michael Papagiannopoulos and Stamatiki Valiotis as additional party defendants, and pursuant to CPLR 1003 for leave to serve and file a supplemental summons and the amended complaint, as proposed, upon the proposed additional defendants Michael Papagiannopoulos and Stamatiki Valiotis.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits .....	1-4
Notice of Cross Motion - Affidavits - Exhibits .....	5-12
Answering Affidavits - Exhibits .....	13-14
Reply Affidavits .....	15-16

Upon the foregoing papers it is ordered that the defendants motion is granted and the plaintiff's cross motion is denied.

Plaintiff commenced this action alleging that defendant Efstathios Valiotis was a long-time family friend, and business partner and advisor, and as a consequence, he confided in Valiotis that Valiotis's \$2 million investment in plaintiff's business known as Positive Newbel was at risk, due to potential liability owed by Positive Newbel to Commodore

Factors, and that he was contemplating separating from his wife, Vaia Bekas. Plaintiff alleged he believed defendant Efstathios Valiotis was acting in his best interest when Valiotis devised a plan for him to deal with the pressing debts, and personal problems. Plaintiff also alleged that the plan called for him to execute an affidavit for judgment by confession in favor of defendant Efstathios Valiotis and to transfer stock in Top Cove Associates, Inc. (Top Cove) to River City LLC (River City), an entity owned by defendant Efstathios Valiotis. Plaintiff further alleged that defendant Efstathios Valiotis exploited their fiduciary relationship, used undue influence over him, and made various misrepresentations to induce him to execute the affidavit for judgment by confession and transfer the Top Cove stock to Valiotis. Plaintiff additionally alleged that defendant Valiotis misrepresented that he would hold the Top Cove stock as plaintiff's "nominee," cause the real property owned by Top Cove (the Top Cove property) to be rezoned to increase its market value, and if necessary, recoup his investment in Positive Newbel from the added equity of the Top Cove property. In addition, plaintiff alleged that Valiotis made him offers of employment and business partnership, but nevertheless recorded the confession of judgment against him, which prevented him from soliciting new business and employment. Plaintiff also alleged that he suffered physical illness as a result of defendant Valiotis's tortious conduct. It is alleged in the complaint that the affidavit in confession of judgment, prepared by Michael Papagiannopoulos, as counsel for defendant Valiotis, contained erroneous statements.

Plaintiff asserted causes of action based upon the following: (1) breach of fiduciary duty;(2)breach of implied covenants of good faith and fair dealing; (3)undue influence; (4)intentional infliction of emotional distress, and (5) tortious interference with prospective business relations, the complaint also sought an award of compensatory and punitive damages, and to enjoin defendant Valiotis from foreclosing on "Vaia Bekas, [sic] property," and from "buying Bekas judgments."

Defendants served a combined answer, denying the material allegations of the complaint, and asserted various affirmative defenses, including ones based upon documentary evidence, judicial estoppel and estoppel.

Defendants move for summary judgment dismissing the complaint based upon res judicata and collateral estoppel, and on the ground that no material issue of fact exists. Plaintiff opposes the motion, asserting that genuine issues of fact exist and he has not had the opportunity to obtain needed discovery. Additionally plaintiff cross moves for leave to serve an amended complaint as proposed, naming Michael Papagiannopoulos and Stamatiki Valiotis as additional defendants, and asserting additional causes of action based upon unjust enrichment, rescission of the agreements with Valiotis regarding the confession of judgment and Top Cove stock sale, and a derivative claim against Top Cove. Plaintiff also proposes to add claims for the imposition of a constructive trust over the Top Cove shares of stock,

an accounting of Top Cove profit distributions, and a claim against Michael Papagiannopoulos for alleged aiding and abetting of Valiotis in the commission of fraud and breach of his fiduciary duties owed to plaintiff and a claim against Stamatiki Valiotis for imposition of a constructive trust over the real property known as 16-48 201st Street, Bayside, New York. Defendants oppose the cross motion.

Defendants argue that plaintiff should be barred from maintaining this action based upon the adverse judicial determination regarding the validity of the cross claims of Demetrios Bekas asserted against Efstathios Valiotis in the action entitled *Zelouf International Corp. v Rivercity LLC* (Queens County, Supreme Court, Index No. 18790/2010). According to defendants, the cross claims asserted by Bekas in the *Zelouf* action directly correspond with the claims made against them by plaintiff herein. Defendants also argue that the evidence demonstrates Valiotis and plaintiff had a business relationship, not a fiduciary relationship, with regards to the personal loans made by Valiotis to plaintiff and their respective companies, whereby the loans were required to be repaid in full. They assert that plaintiff admittedly borrowed in excess of \$2.5 million from Valiotis and Valiotis's companies, and plaintiff and plaintiff's companies did not repay these debts before May 27, 2004. They also assert that Valiotis's conduct was justified to obtain the required repayment of plaintiff's debts to Valiotis, and was not motivated solely by malice.

The doctrine of *res judicata* prohibits a party from relitigating any claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter (*see Sherwyn Toppin Marketing Consultants, Inc. v New York State Liquor Authority*, \_\_\_ AD3d \_\_\_ [2d Dept 2013], 2013 WL 440688, 2013 NY App Div LEXIS 731; *Matter of Josey v Goord*, 9 NY3d 386, 389 [2007]; *Matter of Hunter*, 4 NY3d 260, 269 [2005]; *see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]). The Appellate Division, Second Judicial Department, in *Matter of Allstate Ins. Co. v Williams* (29 AD3d 688, 690 [2006]), has written:

“Under New York’s transactional approach to *res judicata*, once a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or even if seeking a different remedy (*see O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

The doctrine of collateral estoppel precludes relitigation of an issue which has necessarily been decided in a prior action and is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling (*see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, [2008]; *Buechel v Bain*, 97 NY2d 295, 303–304 [2001], *cert denied* 535 US 1096 [2002];

*Mahler v Campagna*, 60 AD3d 1009, 1011 [2d Dept 2009]; *York v Landa*, 57 AD3d 980 [2d Dept 2008]). The party seeking the benefit of the doctrine of collateral estoppel must establish that the identical issue was necessarily decided in the prior action and is determinative in the present lawsuit (see *Buechel v Bain*, 97 NY2d at 304; *Capellupo v Nassau Health Care Corp.*, 97 AD3d 619 [2d Dept 2012]).

In the *Zelouf* action, Zelouf International Corp. (Zelouf) sued Efstathios Valiotis, River City, Top Cove, and Demetrios Bekas to set aside the sale of stock in Top Cove from Demetrios Bekas to Efstathios Valiotis as a fraudulent transfer. Demetrios Bekas asserted cross claims against Efstathios Valiotis for alleged fraud in the inducement, undue influence, duress, unconscionability and breach of fiduciary duty in connection with Bekas' execution of the affidavit of confession of judgment and transfer of Top Cove stock. By his cross claims, Bekas sought, among other things, to set aside the transfer of his stock in Top Cove stock to Valiotis. Zelouf moved for summary judgment against the defendants in its favor, and Valiotis, Top Cove and River City cross moved for summary judgment dismissing the complaint and the cross claims asserted against them by Demetrios Bekas. Demetrios Bekas cross moved for summary judgment in its favor as against Valiotis, Top Cove and River City on his cross claims.

By order dated July 3, 2012, the motion by Zelouf and the cross motion by Bekas were denied. The cross motion by Valiotis, Top Cove and River City was granted. The court determined, among other things, defendant Valiotis made a prima facie showing that Valiotis committed no fraud in inducing Bekas to execute the affidavit for judgment by confession and transfer the Top Cove stock, and that Bekas satisfied part of an antecedent debt owed to Valiotis by the transfer of 40 shares of Top Cove stock. The court also determined that the extinguishment of \$2,500,000.00 in antecedent debt constituted fair and adequate consideration for the transfer of such shares. The court also determined that Bekas failed to submit evidence sufficient to raise a genuine, triable issue of fact in rebuttal.

Bekas did not file a notice of appeal within 30 days of the service of a copy of the July 3, 2012 order with notice of entry upon him.<sup>1</sup> He moved for leave to reargue and renew the prior motion, which motion was denied by order dated January 4, 2013.<sup>2</sup>

---

1

According to the records on file in the County Clerk's office, Zelouf served a copy of the order with notice of entry on July 13, 2012 and filed a notice of appeal on August 10, 2012.

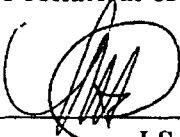
2

The court determined that to the extent Bekas sought leave to reargue, the motion was untimely, and to the extent he sought leave to renew, he failed to present a reasonable justification for his failure to present new and additional facts at the time the prior motion was made. On January 29, 2013, Bekas filed a notice of appeal from the January 4, 2013 order, denying him leave to reargue

Defendants have made a prima facie showing of entitlement to summary judgment dismissing the complaint by demonstrating that the continued maintenance of the instant litigation is barred by the doctrines of res judicata and collateral estoppel, and the affidavit for judgment by confession and transfer of Top Cove stock were not the product of fraud committed by defendants, or the result of defendant Valiotis's having breached any fiduciary duty owing to plaintiff. In opposition, plaintiff has failed to raise a triable issue of fact (*see Martin v Geico Direct Ins.*, 31 AD3d 505, 506 [2d Dept 2006]) or to establish the absence of a full and fair opportunity to litigate the issues related to his cross claims in the *Zelouf* case (*see Lobel v Allstate Ins. Co.*, 269 AD2d 502 [2d Dept 2000]; *see Ryan v New York Tel. Co.*, 62 NY2d 494, 501-502 [1984]). Plaintiff also has failed to demonstrate that outstanding, further discovery might reveal the existence of material facts that are currently in defendants' exclusive knowledge or possession which would require the denial of defendants' summary judgment with respect to his claims (*see Broich v McGann*, 92 AD3d 710 [2d Dept 2012]).

Under such circumstances, defendants are entitled to summary judgment dismissing the complaint and plaintiff is precluded from maintaining this action against defendants. The motion by defendants for summary judgment dismissing the complaint is granted, and the cross motion by plaintiff for leave to amend the complaint as proposed and to add Michael Papagiannopoulos and Stamatiki Valiotis as new party defendants is denied. The proposed additional claims against defendants Valiotis, River City and Top Cove arise out of the affidavit for judgment by confession and the transfer of Top Cove stock and thus, are barred under the doctrine of res judicata. In view of the dismissal of the complaint, the addition of new party defendants is unwarranted. The proposed claims against Papagiannopoulos, moreover, likewise relate to the affidavit for judgment by confession and the transfer of Top Cove stock and thus, are barred under the doctrine of collateral estoppel.

Dated: **MAR 04 2013**

  
 \_\_\_\_\_  
 J.S.C.

\_\_\_\_\_ or renew the July 3, 2012 order.

2013 MAR 15 AM 11:15  
 QUEENS COUNTY CLERK  
 FILED