

74 Eldert, LLC v Sharp
2014 NY Slip Op 30117(U)
January 17, 2014
Sup Ct, Kings County
Docket Number: 503266/2013
Judge: Ann T. Pfau
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At an IAS Term, Commercial Part 5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of January, 2014

P R E S E N T:

HON. ANN T. PFAU,

Justice.

-----X

74 ELDERT, LLC,

Plaintiff,

- against -

LINDA SHARP, CIE SHARP, MICHAEL SHARP,
SHARP REALTY LLC, and SHARP FAMILY
REALTY LLC,

Defendants.

-----X

LINDA SHARP, CIE SHARP, MICHAEL SHARP,

Third-Party Plaintiffs,

- against -

KALMAN SINAY, MORRELL I. BERKOWITZ, ESQ.,
MARK B. BRENNER, ESQ., GALLET DREYER &
BERKEY, LLP, MOSES BERKOWITZ, PROSPECT
MANAGEMENT INC., and JOHN DOES 1 - 25,

Third-Party Plaintiffs,

-----X

Index No. 503266/2013

DECISION AND ORDER

The following papers numbered were read on motion sequences 01 and 02:

All documents electronically filed in connection with these motions, documents numbered 55 - 126

This action is for breach of contract regarding the sale of real property located at 72-74 Eldert Avenue, Brooklyn, New York. Plaintiff 74 Eldert LLC and the third-party defendants move for a preliminary injunction, partial summary judgment pursuant to CPLR 3212 on the complaint, dismissal of counterclaims and third-party claims, an order striking affirmative defenses and directing the Clerk to vacate and cancel of record a notice of pendency dated August 9, 2013, and imposition of sanctions against defendants/third-party plaintiffs.

The individually named defendants Linda Sharp, Cie Sharp and Michael Sharp (Sharp defendants), appearing pro se, submitted an answer and a third-party complaint in response to the complaint. (Berkowitz Aff., Exh. 2). The corporate defendants, Sharp Realty LLC and Sharp Family Realty LLC did not file an answer to the complaint. In their answer and third-party complaint, the Sharp defendants, who are all members of the same family, deny all of the allegations in the complaint, assert affirmative defenses, and allege four third-party claims against the third-party defendants.

The third-party claims against third-party defendants are (1) that they violated the federal Real Estate Settlement Procedures Act (12 USC 2601-2617) in the purchase of the real property; (2) violated section 1983 of the United States Code and by their actions deprived third-party plaintiffs of due process; (3) violated the federal Racketeer Influenced and Corrupt Organization (RICO) Act by engaging in corruption to obtain the real property; and (4) discrimination on the basis of religion and disability, alleging that defendant Michael Sharp has severe learning disabilities that were exploited in obtaining the real property and that the defendants have been falsely accused of antisemitism (*id.*).

This action arises from the sale of real property located at 74 Eldert Street in Brooklyn. The relevant facts surrounding the sale are set forth in an order and declaratory judgment dated May 9, 2013 in a different proceeding, index number 502964/2012. The parties' familiarity with these facts is presumed. In short, plaintiff had a contract to purchase the property from defendant Sharp Realty LLC (Sharp Realty) for \$1.325 million; the parties to the contract had a dispute over the terms of the sale and a lawsuit resulted; they arrived at a settlement before another Justice of this Court, agreeing to transfer the property for \$1.4 million; and over the objections of Sharp Realty and the individual defendants herein, the agreement made in court was enforced. Plaintiff further complains that it incurred expenses, including unpaid real estate taxes, fees and a judgment lien upon the premises from a creditor of Sharp Realty, all of which has been addressed in the order confirming the referee's report in the other action.

Pursuant to the May 9 Order, the property was transferred to plaintiff from Sharp Realty by the Sheriff on July 8, 2013. Defendants Cie Sharp, Linda Sharp and Michael Sharp allegedly are principals in Sharp Realty, although they have made sometimes contradictory assertions of control and ownership in connection with the litigation in the earlier action. Plaintiff submits affidavits of service showing the summons and complaint was served upon all defendants, but only Cie Sharp, Linda Sharp and Michael Sharp (all appearing *pro se*) served an answer. Cie Sharp opposes the present motion and made the cross-motion on his behalf only. Although they are in default in answering the complaint, defendants Sharp Realty and Sharp Family Realty, LLC (SFR) submitted a joint opposition to the motion.

Plaintiff contends that it was compelled to pay outstanding real estate taxes and transfer taxes, which are Sharp Realty's obligation, when the property was transferred to it. It also contends that, as a result in defendants' actions delaying the sale, plaintiff has lost rental income in the amount of

approximately \$200,000. Plaintiff's managing agent alleges that Linda Sharp entered the building after the transfer and changed a lock in the basement (Affidavit of Moses Berkovics, ¶ 16). It alleges that Sharp Realty has not turned over leases or security deposits. It further claims that Sharp Realty leased out apartment B3 in November 2012 for a monthly rent of \$1,100, which is less than the proper rent on the apartment, and that also Sharp Realty offered "discounted" rents to tenants who pre-paid their rent to Sharp Realty, even after the property was transferred to plaintiff (*id.*, ¶¶ 7, 12-14, Ex. 6-8). Plaintiffs complain that Sharp Realty entered into the below-market rent stabilized lease in violation of injunctions issued by Justice Martin and Justice Schmidt of this court (Affirmation of Morrell Berkowitz, Esq., Ex. G). Plaintiffs have made a prima facie showing of entitlement to judgment on the latter claim. Sharp Realty is in default with respect to this claim, and plaintiff may seek damages arising from said default at the inquest directed below.

Plaintiff is not, however, entitled to attorneys fees. No specific contractual provision is referenced obligating defendants to pay plaintiff's attorneys fees, and such fees are generally not recoverable under the American Rule. Moreover, plaintiff commenced both of these lawsuits, and cannot be said to have been forced to engage in litigation against its will.

Plaintiff further complains that the individual defendants filed a notice of pendency against the property (Affirmation of Morrell Berkowitz, Esq., Ex. 5), although it appears from the submissions that the notice of pendency was filed only as an electronically filed document in this litigation (NYSCEF document number 49, marked "Returned For Correction" by the e-file clerk), and was not filed with the County Clerk and as such is not of record. The court takes judicial notice of the New York City Department of Finance, Office of the City Register on-line system known as ACRIS,

which, as of January 17, 2014, indicated that the purported notice of pendency was not of record with the County Clerk or the Office of the City Register.

The opposition by Sharp Realty and SFR is supported by the affirmation of an attorney with no personal knowledge of whether his clients, or the individual defendants, collected rent from tenants after the property transferred, changed locks, retained security deposits, or otherwise interfered with the owner's management of the property. No documentation that leases and security deposits were transferred to the new owner has been submitted. The attorney denies that his clients, or anyone authorized to act on their behalf,¹ executed a new lease with respect to the property after the transfer, or engaged in the other conduct complained of.

Cie Sharp's opposition and cross-motion are premised on the adage that the best defense is a good offense. He complains of the results in the other lawsuits involving the same property (*74 Eldert LLC v Sharp Realty LLC*, index number 502964/2012 and *74 Eldert Funding, Inc. v Sharp Realty LLC*, index number 503007/2012, in addition to a failed bankruptcy filing) and makes *ad hominem* attacks upon the Court and opposing counsel. His position is summed up in paragraph 68 of his affidavit, which states: "Finally, I state for the record that I continue to defend myself and attempt to hold the plaintiff, the third-party defendants, and other co-conspirators legally accountable is because [sic] my property, my sole source of income, was stolen without compensation of its owners. . . ." In taking this position, Cie Sharp fails to appreciate that he did not own the subject property, rather it was owned by a limited liability company of which he was one of the members, that Sharp Realty agreed to

¹ The attorney's affirmation does not specify who is authorized to act on behalf of the corporate defendants, but it states that Linda Sharp was not an authorized representative (Aff. Of Arthur V Graseck, Jr., Esq., paragraph 52), and neither admits nor denies allegations with respect to Linda Sharp's conduct.

sell the property for \$1.325 million, and after negotiation, the sale price was increased by \$75,000; and that the purchase price was paid in full. Although the Sharp defendants clearly have seller's remorse, the accusation that the property was taken with neither compensation nor due process is baseless.

Cie Sharp's cross motion seeks an order (1) recusing this judge; (2) voiding all orders and judgments from all judges in three matters (index numbers 502964/12, 503007/12, 503266/13) pertaining to these parties, rendering new decisions in the defendants' favor and directing entry of such judgments or alternatively directing a new trial; (3) reporting this judge pursuant to the rules of judicial conduct; (4) reporting this judge to the proper criminal and corruption authorities; (5) assigning a special prosecutor to this matter; (6) changing venue to a different county; (7) seeking a receivership on plaintiff, plaintiff's attorney, and Prospect Management, Inc.; (8) relieving plaintiff's attorney; (9) amending the third-party complaint to include the return of the real property at issue; (10) clarifying defendants' pleadings in this matter; and (11) for summary judgment.

The cross motion is denied in its entirety. While recognizing that pro se litigants are accorded greater lenience with respect to procedural requirements, they acquire no greater right than any other litigants and are subject to the same rules of substantive law as other parties (*see Walter v Jones, Sledzick Garneau & Nardone, LLP*, 67 AD3d 671, 672 [2nd Dept. 2009]). The orders sought in the cross motion have been sought, and denied, on multiple occasions throughout this contentious litigation. Moreover, the support for the motion, as the support for this defendant's prior motions, contain broad language with unsubstantiated allegations of a network of fraud and collusion among the attorneys, the plaintiff and the court in this matter and that the sale of the property was the result of such fraud and collusion and therefore should be vacated. Such generalized contentions of unsubstantiated wrong-doing

have no probative value and are insufficient as a matter of law to support the orders sought (*see Desantis v Ariens Co.*, 17 AD3d 311 [2nd Dept 2005]).

Turning to the merits of plaintiff's motion, the allegations that Sharp Realty did not transfer the leases and security deposits after the July 9, 2013 transfer of the premises is not refuted. Also unrefuted is the claim that Sharp Realty offered pre-payment discounts to tenants after it had agreed to sell the property to induce them to pay rent to Sharp Realty rather than to the plaintiff. Plaintiff has made a prima facie showing that Sharp Realty should be enjoined to turn over the rents and leases, which is not meaningfully opposed. Accordingly, this branch of the motion is granted in accordance with the in -court direction made at oral argument on January 16, 2014 and this order.

The next branch of plaintiff's motion seek to strike the affirmative defenses and dismiss the counterclaims interposed by the Sharp defendants on the ground that they lack merit. A motion to dismiss defenses may be made on the ground that the defense has no merit (CPLR 3211[b]). Here, the Sharp defendants interpose ten affirmative defenses, either repeating the allegations of corruption and fraud that they believe underlie the sale of the real property at issue or that the prior action involving this sale bars plaintiff from raising these issues (4th affirmative defense), that plaintiff has failed to mitigate or eliminate damages (5th affirmative defense), that plaintiff has failed to name plaintiff's principal as a party (6th affirmative defense), failure to pierce the corporate veil (7th affirmative defense), and that any damages to plaintiff are plaintiff's fault (8th affirmative defense).

A party may move for judgment dismissing one or more defenses on the ground that the defense has no merit (*see Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880 [2nd Dept. 2011]). Upon such motion, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law (*Greco v Christoffersen*, 70 AD3d 769 [2nd Dept 2010]). The court must

liberally construe the defenses in favor of the party asserting the defense and give that party every reasonable inference. Here, the affirmative defenses asserted by the individual Sharp defendants either do no more than repeat the unsubstantiated allegations of fraud and corruption that they have interposed throughout all of the related proceedings, or they merely plead conclusions of law that are unsupported by the facts. Because they are legally deficient, they must be dismissed (*see Plemmenon v Arvanitakis*, 39 AD3d 612 [2nd Dept 2007]; *1199 Housing Corp. v International Fidelity Ins. Co.*, 14 AD3d 383 [1st Dept 2005]).

Plaintiff also seeks dismissal of the Sharp defendants' third-party claims. Those claims include the violation of three federal statutes and discrimination based on disability and religion. On a motion to dismiss pursuant to CPLR 3211(a)(7), on the grounds that the pleading fails to state a cause of action, which will be assumed here, the court must determine whether, accepting the facts alleged in the complaint as true and according the third-party plaintiffs the benefit of every inference, the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]).

According the Sharp defendants every possible inference in this matter, it cannot be said that the facts as alleged in the third-party complaint fit within any cognizable legal theory. Simply put, the allegations do no more than restate the charges and allegations of fraud, corruption and unfairness that these parties have alleged throughout the life of the proceedings related to the sale of the real property and that have been found by the court on multiple occasions to be without merit. Such unsubstantiated and baseless charges, without more, cannot form the basis for a cognizable legal theory. Where, as here, the pleaders have no cause of action, the motion to dismiss must be granted (*see Schwaner v Collins*, 17 AD3d 1068 [4th Dept. 2005]).

Accordingly, that branch of plaintiff's motion to strike the affirmative defenses and dismiss the third-party claims is granted.

Cie Sharp also filed papers titled "Notice of Cross-Motion Void Sheriff's Deed Vacate All Judgments" [sic] (NYSCEF document number 130), which was rejected by the e-file clerk and marked "Returned For Correction". The court's records show it was not formally filed as a motion, and no fee was paid. However, the court addressed every issue raised by the purported cross-motion on the record on January 16, 2014, and every item of relief was, and hereby is, denied on the merits.

Finally, defendants Cie Sharp, Linda Sharp and Michael Sharp may not file any further motions without this court's express prior approval, and the Clerk of the Court is directed not to accept any such filings. Further motions seeking the same relief as has been denied in prior motions will be deemed frivolous and subject to sanctions and an award of attorney's fees to any opposing party (*see Wecher v Ambrosio*, 6 AD3d 452 [2nd Dept 2004]).

It hereby is

ORDERED that plaintiff's motion for default judgment as against defendants Sharp Realty LLC and Sharp Family Realty LLC is granted in all respects except for the claim for attorneys fees, which is dismissed, and said defendants hereby are in default in answering the complaint, and an inquest is directed against said defendants, which inquest is referred to a Special Referee; and it further is

ORDERED that plaintiff's motion for injunctive relief is granted in accordance with the decision put on the record at oral argument on January 16, 2014, and defendants shall turn over to plaintiff's attorney any rents received from tenants in the subject premises for any time period after July

9, 2013, and all security deposits received from the tenants fo the subject premises, and said turn over shall be completed by January 22, 2014; and it further is

ORDERED that plaintiff's motion to strike the counterclaims and affirmative defenses in the Verified Answer filed by defendants Cie Sharp, Linda Sharp and Michael Sharp is granted, and the Clerk shall enter judgment dismissing said counterclaims with costs and disbursements as taxed; and it further is

ORDERED that third-party defendants' motion to dismiss the third-party complaint filed by defendants/third party plaintiffs Cie Sharp, Linda Sharp and Michael Sharpt is granted, and the clerk shall enter judgment dismissing the third-party complaint, with costs and disbursements as taxed; and it further is

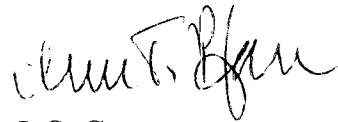
ORDERED that plaintiff's motion for summary judgment against defendants Cie Sharp, Linda Sharp and Michael Sharp is granted in accordance with the foregoing; and

ORDERED that the document titled "Notice of Pendency" electronically filed by the individual defendants with the NYSCEF system as document number 49 in this action is a nullity and hereby is stricken, and plaintiff's motion is otherwise denied with respect of this document, but plaintiffs are granted leave to renew the motion in the event that it can show that document 49 was or is in the future filed with the County Clerk, including that part of the motion seeking attorney's fees, costs and sanctions; and it further is

ORDERED that the cross-motion (motion sequence 02) and purported cross-motion referenced above are denied in their entirety; and it further is

ORDERED that the individual defendants are prohibited from filing any further motions or cross-motions in this proceeding without prior court approval, and the Clerk is directed not to accept motion papers from these defendants absent an explicit order to do so from this court.

ENTER,



J. S. C.

JOHANN T. PFAU