

Katan Group, LLC v CPC Resources, Inc.

2014 NY Slip Op 30120(U)

January 16, 2014

Sup Ct, New York County

Docket Number: 652900/2012

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____
Justice

PART 3

Index Number : 652900/2012
KATAN GROUP LLC,
vs
CPC RESOURCES, INC.
Sequence Number : 003
DISMISS ACTION

INDEX NO. 652900/2012
MOTION DATE 8/21/2013
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1

Answering Affidavits — Exhibits No(s) 2

Replying Affidavits No(s) 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-16-14

Eileen Brandt, 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: IAS PART THREE

-----X

KATAN GROUP, LLC,
individually and derivatively as a member
of Refinery Management LLC,

Plaintiff,

Index No. 652900/2012
Motion Date: 8/21/2013
Motion Seq. No. 003, 004

-against-

CPC RESOURCES, INC., CPCR OPPORTUNITY
FUND II, LLC, THE REFINERY LLC,
RAFAEL CESTERO, SUSAN POLLACK,
MICHAEL LAPPIN, NEW DS ACQUISITIONS LLC,
TWO TREES MANAGEMENT CO. LLC,
REFINERY MANAGEMENT LLC,
DOMINO MEZZ HOLDINGS LLC,
PCCP, LLC and JOHN DOES 1-20 inclusive,

Defendants.

-----X

BRANSTEN, J.:

The Court consolidates motion sequence numbers 003 and 004 for decision.

In motion sequence number 003, defendants CPC Resources, Inc. (“CPCR”),
CPCR Opportunity Fund II, LLC (“Fund II”), The Refinery LLC (the “Refinery”), Rafael
Cestero, Susan Pollock, Michael Lappin (“Individual defendants”) and Refinery
Management LLC (collectively, the “CPCR defendants”) move to dismiss the sixteen
causes of action alleged against them in the verified amended complaint pursuant to
CPLR 3211(a)(1), (5), and (7).

In motion sequence number 004, defendants Domino Mezz Holdings, LLC (“Domino Mezz”) and PCCP, LLC (collectively, “the Lenders”) likewise move to dismiss the ninth and tenth claims of the verified amended complaint pursuant to CPLR 3211(a)(1), (3) and (7).

Plaintiff opposes both motions.

I. Background

This action is the fourth in a series of litigations brought by plaintiff over a period of thirteen months concerning real property commonly known as the Domino Sugar Refinery in Brooklyn, New York (Block 2413 Lot 1 and Block 2428 Lot 1, Kings County) (the “Property”).

The Property is owned in fee by Refinery, an entity wholly-owned by defendant Refinery Management LLC (“Management”). (Am. Compl. ¶ 26.) Plaintiff Katan and defendant CPR were each fifty percent owners of Management. *Id.* ¶ 43. Defendant CPR also served as the managing member of Management, and is alleged to control CPR. *Id.* The Individual defendants are members of CPR.

On June 20, 2012, Management entered into an agreement to sell its primary asset – the Property – to defendant New DS Acquisitions LLC (“New DS”) for \$180 million

(the “Two Trees Transaction”). *Id.* ¶ 152; Affirmation of Mark Walfish ¶ 2.¹ Katan then brought suit against CPR, alleging that CPR’s agreement to this sale transaction violated Katan’s rights under the Second Amended and Restated Operating Agreement of Refinery Management LLC between plaintiff, CPR and Fund II (the “Second Operating Agreement”). The sale of the Property closed on October 12, 2012.

The facts of the Prior Actions have been previously discussed at length by this Court and familiarity with these facts is assumed. However, for the purpose of this decision, some digression into these facts is warranted before discussion of the background of the instant litigation.

A. The Prior Actions

1. *The First Action*²

Plaintiff filed its First Action in New York County on March 16, 2012. Plaintiff alleged, *inter alia*, breach of fiduciary duty and contract and sought to enjoin CPR from

¹ The Court notes that both counsel for Katan and CPR defendants failed to include fact sections in their briefing, instead, directing the Court to review their respective attorney affirmations for a discussion of the facts. Counsel cannot circumvent the page limitations provided in the Court rules by relegating their lengthy and often argumentative fact sections to their attorney affirmations. In any future submissions to this Court, counsel are directed to include their factual recitations in their briefing.

² *Katan Group, LLC v. CPC Resources, Inc. et al.* (Sup. Ct. N.Y. Cnty) (Bransten, J.), Index No. 650664/2012.

transferring an approximate 84% interest in the Property to Domino Mezz, in exchange for forgiveness of Domino Mezz's mortgage loan on the Property (the "Lender Transaction").

On April 30, 2012, this Court denied plaintiff's application for injunctive relief to halt the transaction.³ The Court held that pursuant to the Second Amended and Restated Operating Agreement of Refinery Management LLC between plaintiff, CPR and Fund II (the "Second Operating Agreement"), CPR was entitled to effect the proposed transaction.

On May 4, 2012, the CPR defendants moved to dismiss. Plaintiff failed to submit any opposition papers before the return date, and the Court extended plaintiff's time to respond until August 8, 2012. Plaintiff requested a further extension of time to August 13, 2012, from the CPR defendants, who acceded to the request. In lieu of submitting opposition papers on August 13, 2012, plaintiff filed an amended complaint that withdrew all of its prior claims regarding the Lender Transaction, and instead asserted allegations concerning the Two Trees Transaction, the subject of the instant action.

³ The next day, May 1, 2012, plaintiff commenced the Second Action.

At an August 17, 2012 appearance, the Court dismissed the original complaint on default, due to plaintiff's repeated failures to oppose the motion to dismiss.⁴ The Court deemed the amended complaint improper and invalid, and did not examine it on the merits. The Court memorialized this ruling in its September 26, 2012 order. On November 9, 2012, the Court clarified the September 26th order, dismissing the claims regarding the Lender Transaction in the original complaint with prejudice, but without prejudice to the claims in the improperly amended complaint, which were filed as the instant action.

2. *The Second Action*⁵

On May 1, 2012, plaintiff filed its Second Action in this Court. As in the First Action, plaintiff sought to enjoin the Lender Transaction. This time, plaintiff advanced the theory that the CPC defendants breached Section 8(d) of the Second Operating Agreement, which purportedly provided plaintiff with a right of first refusal in the event CPC sought to sell the Property to a third party. Plaintiff contended that it had duly

⁴ Later, that same day, plaintiff commenced the litigation at issue on this motion, the Fourth Action.

⁵ *Katan Grp., LLC v. CPC Resources, Inc., et al.* (Sup. Ct. N.Y. Cnty.) (Bransten, J.), Index no. 651450/2012.

exercised its right of first refusal to purchase the Property and that CPC had failed to honor it.

On May 17, 2012, the CPC defendants moved to dismiss, arguing that plaintiff had no such right of first refusal. In its June 26, 2012 decision, this Court found the CPC defendants' argument persuasive and held that plaintiff did not have a right of first refusal on the Property. Accordingly, the Court dismissed plaintiff's complaint in its entirety, as all the causes of action emanated from the nonexistent right of first refusal. The First Department affirmed this decision. *Katan Grp., LLC v. CPC Resources, Inc.*, 110 A.D.3d 462, 463 (1st Dep't 2013) ("Supreme Court properly granted defendants' motion to dismiss the second action, since the Operating Agreement between the parties does not provide plaintiff a right of first refusal with regard to a sale of the subject property.").

3. *The Third Action*⁶

Plaintiff commenced its Third Action in Kings County Supreme Court on June 25, 2012, four days after Management and New DS executed the Two Trees Transaction. Unlike the prior actions, seeking to prevent consummation of the Lender Transaction (which was ultimately abandoned), the Third Action was directed at the Two Trees

⁶ *Katan Grp. LLC v. CPC Resources, Inc., et al.* (Sup. Ct. Kings Cnty.), Index No. 13071/2012.

Transaction. In the Third Action, plaintiff sought to file a notice of pendency against the property, advancing the same theory as in the Second Action – that the CPC defendants entered into a transaction violating Katan’s purported contractual right of first refusal.

On July 5, 2012, the CPC defendants moved to consolidate the Third Action with either or both of the prior actions, and to dismiss the Third Action on the ground that the Third Action’s claims were barred by collateral estoppel. In its September 20, 2012 decision, this Court consolidated the Third Action into the Second Action, and dismissed the Third Action on the ground that plaintiff was collaterally estopped from relitigating the issue of the their purported right of first refusal. This decision was affirmed by the First Department. *Katan Grp., LLC v. CPC Resources, Inc.*, 110 A.D.3d 462, 463-64 (1st Dep’t 2013).

B. The Fourth Action

The instant action was commenced on August 17, 2012, the same day the First Action was dismissed on default. The complaint was nearly identical to the improperly amended complaint in the First Action, which alleged that the Two Trees Transaction constituted a breach of CPC defendant’s contractual, statutory, and fiduciary duties. On August 21, 2012, plaintiff moved by order to show cause for a preliminary injunction to enjoin the closing of the Two Trees Transaction. At oral argument, the Court declined to

sign the order, holding that equitable relief was not proper; the declination was memorialized in the Court's August 30, 2012 order.

On January 21, 2013, three months after the Two Trees Transaction closed, plaintiff filed a verified amended complaint, which sought monetary damages. The crux of the allegations against the CPCR defendants is that they breached their duties owed to plaintiff by accepting the lowest offer for the Property. Plaintiff alleges that the statutory duty of care required of a managing member was breached, and that the Second Operating Agreement was breached by the CPCR defendants' failure to maximize profit and to consult with plaintiff on a major decision. It is also alleged that for CPCR defendants mismanaged the Property, engaging in self-dealing and waste.

The amended complaint also contained new allegations of aiding and abetting breach of fiduciary against the Lenders and New DS as purchaser of the Property and Two Trees Management, Co. LLC ("Two Trees") as owner of New DS. The gravamen of these allegations is that the Lenders colluded with the CPCR defendants to enter into the Lender Transaction, and to charge plaintiff both an exorbitant default interest rate, as well as a \$1.2 million exit fee upon maturation of the mortgage.

Specifically, the verified amended complaint purports to state twenty causes of action: (1-2) breach of contract; (3-4) declaratory judgment finding a breach of fiduciary duty; (5-6) corporate waste and mismanagement; (7-8) breach of fiduciary duty; (9-14)

aiding and abetting breach of fiduciary duty; (15) accounting; (16-17) declaratory judgment finding gross negligence; (18-19) violation of New York Limited Liability Law § 409; and, (20) access to book and records.

Presently before the Court are the motions to dismiss filed by the CPCRC defendants and the Lenders. Defendants New DS and Two Trees have answered the verified amended complaint, and have not joined in either of the motions to dismiss.

II. Analysis

A. CPCRC Defendants Motion to Dismiss (Mot. Seq No. 003)

The CPCRC defendants argue that all of the claims asserted against them are barred by res judicata. Specifically, they argue that this Court's September 20, 2012 order, which dismissed the Third Action, precludes the instant action because that action also arose from the Two Trees Transaction.

Plaintiff argues that the September 20th order does not bar the instant action because it never addressed the Two Trees Transaction on the merits, and that the instant claims were dismissed without prejudice from the First Action. They also argue that the CPCRC defendants are prevented from asserting res judicata by the doctrine of laches, and that this Court specifically permitted the litigation of the instant action.

“New York law analyzes res judicata questions using a transactional approach. ‘[O]nce 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 upon different theories or if seeking a different remedy.’” *Schwartzreich v. E.P.C. Carting Co.*, 246 A.D.2d 439, 440-441 (1st Dep’t 1998) (quoting *O’Brien v City of Syracuse*, 54 N.Y.2d 353, 357 (1981)). Not only does res judicata preclude relitigation of matters that were actually litigated in a prior action, it also bars revisiting any causes of action that *could* have been litigated in the prior action. *See Lot 1555 Corp. v. Nahzi*, 79 A.D.3d 580, 580 (1st Dep’t 2010); *see also Marinelli Assoc. v. Helmsley-Noyes Co.*, 265 A.D.2d 1, 5 (1st Dep’t 2000).

Four days after execution of the contract with Two Trees, plaintiff commenced the Third Action, which sought to enjoin the sale from closing, and was ultimately dismissed. Plaintiff may not now prosecute yet another action on the same transaction, even if it now pursues different theories of liability and prays for different relief. All the causes of action in the instant complaint were extant and available to plaintiff as of the execution of the agreement with Two Trees. The CPCRC defendants are being subjected to a litany of successive suits due to plaintiff’s failure to plead causes of action it could have, but chose not to plead in the earlier action.

Likewise, plaintiff’s argument that the Two Trees Transaction was never addressed on the merits in the Third Action, and thus res judicata does not bar the instant

suit, is unpersuasive. Plaintiff commenced the Third Action one day before the Second Action was dismissed on the merits; despite this, plaintiff did not amend its complaint, and continued to pursue the theory that Second Operating Agreement conferred a right of first refusal. When the CPR defendants moved to consolidate and dismiss the Third Action pursuant to collateral estoppel, plaintiff's opposition was premised on the argument that because the subject of the Second Action was the Lender Transaction, it could have no preclusive effect on the Third Action. They continued to advance the right of first refusal theory.

This Court ruled for the CPR defendants, and dismissed the Third Action, holding that plaintiff was collaterally estopped from relitigating the issue of the right of first refusal, citing *Ventur Group, LLC v Finnerty*, 80 A.D.3d 474, 475 (1st Dep't 2011):

Collateral estoppel, or issue preclusion, 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 [citation omitted]. . . The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.

The Court's decision on the fully submitted and argued motion to dismiss the Third Action was on the merits and bars the instant action.

Plaintiff also argues that the dismissal of the First Action without prejudice to the claims found in their improperly amended complaint (which was then filed as the instant

action). However, the dismissal was without prejudice because the improperly amended complaint was never examined on the merits in the First Action. Despite plaintiff's contentions, this in no way vitiates the preclusive effect of the subsequent dismissal on the merits of the Third Action, nor does it defeat the instant motion.

Nor were the Court's statements on the record at the August 17, 2012 appearance in the First Action an "affirmative determination" of plaintiff's right to litigate the instant action. The Court simply stated that it was powerless to prevent plaintiff from commencing another action, and that if that action had merit, plaintiff would be entitled to damages. Plaintiff has contorted this to mean that the Court "permitted" the filing of this action, and then conferred it protection from dismissal. Plaintiff's interpretation of the Court's statements on the record is erroneous.

Finally, plaintiff's contention that the equitable theory of laches bars the CPC defendants from raising res judicata in the fourth suit is without a scintilla of merit.

Accordingly, the Court dismisses the first through eighth, eleventh and twelfth, and fifteenth through twentieth causes of action, and grants reasonable attorneys' fees as provided in Section 13(k) of the Second Operating Agreement. *See Katan Grp., LLC v. CPC Resources, Inc.*, 110 A.D.3d 462, 464 (1st Dep't 2013) (affirming award of attorneys' fees under operating agreement).

B. The Lenders' Motion to Dismiss (Mot. Seq No. 004)

The Lenders argue that the allegations of aiding and abetting breach of fiduciary duty against them be dismissed, since plaintiff has failed to plead the elements necessary to sustain that cause of action. Further, the Lenders maintain that the Mortgage Loan Agreements themselves are documentary evidence, which dispose of the claims.

Plaintiff argues that it has properly alleged the elements of aiding and abetting breach of fiduciary duty and that dismissal should be denied pursuant to CPLR 3211d) because defendants are in sole possession of facts unavailable to them.

In September 2007, the Lenders and Management entered into a \$120.2 million mortgage loan, which plaintiff signed as a guarantor. Plaintiff alleges that in October 2009, the loan was amended to include onerous terms, including a \$1.2 million "exit fee" to be paid upon maturation of the mortgage loan, and a \$1.5 million a month default interest rate. According to plaintiff, the CPCR defendants mismanaged the Property and its finances, causing the mortgage loan to go into default.

After the default, plaintiff alleges that the CPCR defendants and the Lenders colluded to enter into the aforementioned Lender Transaction, which would have transferred an 84% interest in the Property to the Lenders at a below market value price. According to plaintiff, this would have been profitable to the CPCR defendants, as they would continue to collect management fees after Lenders took possession of their interest

in the property. Further, plaintiff contends that the Lenders aided and abetted breach of fiduciary duty by unreasonably refusing Plaintiff's attempts to "cure" the defaulted mortgage loan. As a result of the Lenders unreasonable refusal to accept their offer to pay off the mortgage, Plaintiff asserts that they were damaged by being forced to pay the default interest rate, as well as the exit fee when the Two Trees Transaction closed.

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). In order to satisfy the first element, plaintiff must first allege that the CPCR defendants breached their fiduciary duty to plaintiff, and that the Lenders had knowledge of, and participated in the breach, resulting in damages to plaintiff.

The Court need not reach a determination on the sufficiency of the breach of fiduciary duty claims against the CPCR defendants, as plaintiff has failed to allege that the Lenders engaged in conduct amounting to participation in the breach. A party "knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." *Kaufman*, 307 A.D.2d at 126. The only allegations in the amended complaint that could be construed as participation in a breach of fiduciary duty would be those alleged in paragraphs 242, 245-248, and 321, which

allege that the Lenders refused plaintiff's attempts to "pay off" the defaulted mortgage loan.

What plaintiff offered the Lenders was not a pay off of the amount due, but a purchase and assignment of the mortgage loan. Article 10, Section 10.24.1 of the Mortgage Loan Agreement confers sole decision making authority regarding assignment of the mortgage on the Lenders. There is no language in the agreement that could be interpreted as a requirement that the Lenders accept an unsolicited assignment offer from a borrower or guarantor. Exercising a contractual right conferred by a contract signed by plaintiff cannot be construed as "substantial assistance" to a breach of fiduciary duty.

Plaintiff's argument that the Lenders motion should be denied pursuant to CPLR 3211(d) is devoid of merit, as the allegations set forth in plaintiff's amended complaint plainly fail to state a cause of action and do not require further discovery.

Accordingly, the Court dismisses the ninth and tenth causes of action as alleged against the Lenders.

III. Conclusion

For the foregoing reasons, the CPCR defendants' motion to dismiss is granted, and the Court dismisses counts one, two, three, four, five, six, seven, eight, eleven, twelve, fifteen, sixteen, seventeen, eighteen, nineteen, and twenty. Likewise, the Lenders' motion

to dismiss counts nine and ten is granted. Causes of action thirteen and fourteen remain against New DS and Two Trees.

Accordingly, it is,

ORDERED that the motion (003) of defendants CPC Resources, Inc., CPCR Opportunity Fund II LLC, The Refinery LLC, Rafeal Cestero, Susan Pollack and Michael Lappin to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion (004) of defendants Domino Mezz Holdings, LLC and PCCP, LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is continued as against the remaining defendants, New DS Acquisitions LLC and Two Trees Management LLC and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158), and the Clerk of the E-file Support Office (Room 119), who are directed to mark the Court's records to reflect the change in the caption herein; and it is further

ORDERED that the issue of the total amount of reasonable attorneys' fees incurred by CPC Resources, Inc., its affiliates and officers in defending against Katan Group LLC in this action is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures") shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for the parties seeking the reference shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a

Katan Group v. CPCR

Index No. 652900/2012

Page 18 of 18

completed Information Sheet, upon the Special Referee Clerk in the Motion Support
Office in Rm. 119 at 60 Centre Street.

Dated: New York, New York
January 16, 2014

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.