

Fabtastic Abode, LLC v Arcella
2014 NY Slip Op 31611(U)
June 24, 2014
Supreme Court, Kings County
Docket Number: 500166/2012
Judge: Mark I. Partnow
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At an IAS Term, Part 43 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 June, 2014.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.
-----X

FABTASTIC ABODE, LLC,

Plaintiff,

- against -

Index No. 500166/12
(Action No. 1)

CONSTANTINE ARCELLA, AS EXECUTOR OF THE
ESTATE OF JOHN F. ARCELLA,

Defendant.
-----X

CONSTANTINE ARCELLA, EXECUTOR OF THE
ESTATE OF JOHN ARCELLA,

Plaintiff,

- against -

Index No. 505405/13
(Action No. 2)

FABTASTIC ABODE, LLC,

Defendant.
-----X

The following papers numbered 1 to 11 read herein:

Papers Numbered

	<u>2012 action</u>	<u>2013 action</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2	9-10
Opposing Affidavits (Affirmations) _____	3-4	11
Reply Affidavits (Affirmations) _____	5-6	
Other papers <u>Supplemental Affirmation; Reply Affirmation</u>	7; 8	

Upon the foregoing papers in the first commenced action (2012 Action), defendant, Constantine Arcella, Executor of the Estate of John Arcella (Constantine Arcella), moves, pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7) and (a) (10), for an order dismissing the complaint of plaintiff, Fabtastic Abode, LLC (Fabtastic). In the second commenced action (2013 Action), defendant Fabtastic moves, pursuant to CPLR 3211 (a) (4), for an order dismissing Constantine Arcella's complaint because a prior action is pending before the court.

While the 2012 and 2013 Actions are separate and have different index numbers, the issues raised in these Actions are inextricably intertwined. Therefore, the court, in the interest of judicial economy, joins the 2012 and 2013 Actions together only to address and determine the present motions.

Background

The 2012 Action

Fabtastic commenced the 2012 Action against John Arcella on or about January 31, 2012.¹ That action primarily seeks to cancel John Arcella's \$70,000 purchase money first mortgage (Mortgage) on the six-unit, residential apartment building at 315 Menahan Street

¹John Arcella died January 23, 2013. Testamentary letters were issued March 4, 2013 to Constantine Arcella as estate executor. The court, by February 11, 2014 short-form order, so ordered the parties' stipulation to amend the 2012 caption to now read, as appears above, *Fabtastic Abode, LLC v Constantine Arcella, as Executory of the Estate of John F. Arcella*.

in Brooklyn (Property). Fabtastic also seeks a ruling declaring it the fee owner of the Property.

Fabtastic allegedly obtained its fee interest in the Property through a January 2012 sale from Juan Gallardo, Fabtastic's principal, managing member and predecessor in interest (Fabtastic Complaint ¶ 4). Gallardo, in turn, had allegedly derived his interest in the Property through a 1991 testamentary bequest from Merrill Van Slyke (Van Slyke), who had purchased the Property from John Arcella in 1985 (Fabtastic Complaint ¶ 6).

A. *The Mortgage*

Van Slyke financed the 1985 purchase of the Property with a \$70,000 purchase money Mortgage from John Arcella (Fabtastic Complaint ¶ 7). The Mortgage allegedly "bore interest at six percent per annum and was payable in installments of \$501.51 . . . each month until November 14, 2005, at which time the entire unpaid balance would become due and payable" (Fabtastic Complaint ¶ 8). Paragraph 13 of the Mortgage granted John Arcella "the right to enter upon and take possession of the [Property] and to apply the rents and profits from such activity to the indebtedness due under the Mortgage" (Fabtastic Complaint ¶ 9).

B. *The 1989 Foreclosure*

John Arcella commenced a 1989 Kings County foreclosure action against Van Slyke entitled *John F. Arcella v Merril N. Van Slyke*, bearing index No. 21217/89 (1989 Foreclosure). That action alleged that \$63,858.86 was due and owing under the Mortgage (Fabtastic Complaint ¶ 10). After appointment and discharge of a receiver, a

December 4, 1998 order (1998 Order) granted John Arcella the right to “enter and manage the [Property],” including the collection of rental income (Fabtastic Complaint ¶ 13).

Fabtastic alleges “upon information and belief” that the 1989 Foreclosure was dismissed in 2001 “due to [John] Arcella’s repeated failure to prosecute the case, and in particular his failure to cause the Estate of Merrill Van Slyke to be substituted as a party defendant after Van Slyke’s death in 1991” (Fabtastic Complaint ¶ 15).

C. John Arcella’s Collection Of Rent

John Arcella continued to manage the Property and collect rental income after the 1989 Foreclosure was dismissed in 2001 (Fabtastic Complaint ¶ 16). Fabtastic’s “entire theory” in the 2012 Action is that “. . . [John] Arcella, in the nearly twenty-five years since Van Slyke purportedly defaulted on his mortgage . . . has managed the [Property] and extracted enough value thereby to repay the principal . . .” (Plaintiff Fabtastic’s Supplemental Memorandum of Law, p 3). Thus, Fabtastic alleges:

“On information and belief, [John] Arcella has extracted well in excess of \$63,858.86, the amount he claimed was due and owing on the Mortgage upon commencement of the Foreclosure Action [in 1989], from the Property during the twenty-one years since the [1991] death of Van Slyke, plus interest. Despite this fact, [John] Arcella continues to manage the Property and collect rents from tenants despite having no legal right to do so under the Mortgage or otherwise” (Fabtastic Complaint ¶ 17).

The rental records filed with the New York State Division of Housing and Community Renewal’s Office of Rent Administration reflect that the Property produced rental income

of \$56,022.48 in 2011 (Fabtastic Complaint ¶ 5). Fabtastic allegedly demanded a satisfaction of the Mortgage from John Arcella to no avail (Fabtastic Complaint ¶ 18).

Fabtastic, in the 2012 Action, asserted four causes of action against John Arcella seeking: (1) a judgment: (i) “determining [Fabtastic] to be the sole owner of the Property”; (ii) “declaring the Mortgage to be paid in full”; (iii) “entering an injunction requiring [John] Arcella to provide [Fabtastic] with a recordable satisfaction of the Mortgage”; and (iv) “entering an injunction preventing [John] Arcella from receiving further rents or taking any other steps inconsistent with [Fabtastic’s] status as sole owner of the Property and directing [John] Arcella to turn over the keys to the Property and all documents relating to the Property . . .” (Fabtastic Complaint ¶¶ 19-26); (2) a judgment imposing a constructive trust and directing an accounting of the rents that John Arcella collected (Fabtastic Complaint ¶¶ 27-32); (3) a judgment for damages in excess of \$100,000 for unjust enrichment (Fabtastic Complaint ¶¶ 33-37); and (4) a judgment for damages in excess of \$100,000 for conversion based on the allegations that “[John] Arcella has exercised wrongful dominion and control over [Fabtastic’s] property and has converted such property to his own use” (Fabtastic Complaint ¶¶ 38-44).

The 2013 Action

On September 13, 2013 – while the 2012 Action was pending – Constantine Arcella commenced the 2013 Action against Fabtastic by filing a summons and complaint, which contains many of the same factual allegations as Fabtastic’s complaint in the 2012 Action.

Constantine Arcella, for example, alleges that Fabtastic “is the title owner of the [Property] . . . by deed recorded on January 30, 2012, from Gallardo” (Constantine Arcella Complaint ¶ 6) and that “Gallardo’s predecessor in interest was the Estate of Merrill Van Slyke [who] acquired the Property from John Arcella on or about November 14, 1985” (Constantine Arcella Complaint ¶ 7). Constantine Arcella’s complaint, like Fabtastic’s pleading in the 2012 Action, describes the payment terms and paragraph 13 of the Mortgage, which allegedly provides for an assignment of rents “as further security for the payment of said indebtedness . . .” (Constantine Arcella Complaint ¶¶ 8-10). Constantine Arcella further alleges that Van Slyke defaulted under the Mortgage in January 1989 “on which date the outstanding principal loan balance was \$63,858.86, plus interest accrued and accruing thereon” (Constantine Arcella Complaint ¶ 11).

Constantine Arcella’s complaint in the 2013 action similarly describes the 1989 Foreclosure, the appointment and discharge of a receiver and the 1998 Order “authorizing J. Arcella to enter upon, take possession of, and manage the Premises in accordance with the terms of the Mortgage” (Constantine Arcella Complaint ¶¶ 12-13). Constantine Arcella’s allegation regarding dismissal of the 1989 Foreclosure “due to the failure of appointment of an executor or administrator” (Constantine Arcella Complaint ¶ 18) is nearly identical to Fabtastic’s allegation in the 2012 Action. Finally, John and Constantine Arcella have admittedly been collecting rental income at the Property from December 1, 1998 to

January 31, 2012, the commencement date of the 2012 Action (Constantine Arcella Complaint ¶ 19).

Constantine Arcella has asserted two causes of action in the 2013 Action. The first cause of action has sought a judgment declaring that Fabtastic's "time to redeem the Property from the Mortgage with or without an account of rents and profits against [Constantine Arcella] . . . is and was on January 31, 2012 time-barred by virtue of [John and Constantine Arcella] having continually been possessed of the Property for ten years after the breach of the Mortgage" (Constantine Arcella Complaint ¶ 24). The second cause of action has sought a judgment declaring Fabtastic's "right to equitable relief is barred by the applicable six year limitations period and by the doctrine of laches" (Constantine Arcella Complaint ¶ 30).

Fabtastic's Motion To Dismiss The 2013 Action

Fabtastic now moves to dismiss the 2013 Action on the ground that an earlier action (the 2012 Action) involving the same parties and relief is pending. According to Fabtastic, "[t]he two actions arise from the same subject matter, involve the same parties and seek relief that is substantially the same" (Defendant Fabtastic's Memorandum Of Law In Support Of [Its] Motion To Dismiss, p 5).

Constantine Arcella, in opposition, contends that Fabtastic's characterization of the 2012 Action as a prior pending action within the meaning of CPLR 3211 (a) (4) is "baseless" because "there is no 'common cause of action'":

"Although both the [2013 Action] and the [2012 Action] arise from the same series of transactions and relate to the same parties, there is no 'common cause

of action.’ In the [2012 Action], [Fabtastic] is in title of the subject property and seeks possession based exclusively on equitable remedies. . . . In the [2013 Action], Constantine Arcella, as Executor, is in possession of the subject property and seeks title grounded on the time-barred statutory limitation period for Fabtastic to have sought possession by redeeming the subject property from the mortgage” (Peter F. Edelman, Esq.’s January 29, 2014 Affirmation In Opposition, p 2).

Essentially, Arcella admits that he commenced the 2013 Action as a vehicle to assert the statute of limitations as a defense to the 2012 Action.

Fabtastic, in reply, contends that dismissal under CPLR 3211 (a) (4) is warranted because the 2012 and 2013 Actions are “substantially similar” and that Arcella seeks in both actions “an order transferring title to the Property from Fabtastic . . . which cannot be obtained in either action without the formalities of foreclosing on the purported mortgage” (Defendant Fabtastic’s Reply Memorandum Of Law, p 1).

Constantine Arcella’s Motion To Dismiss The 2012 Action

Constantine Arcella moves, pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7) and (a) (10), to dismiss the 2012 Action on the grounds that: (1) his “continued entitlement to an assignment of rents, issues and profits and possession of the [Property]” is derived from documentary evidence, including the Mortgage, the 1998 Order and accountings by the receiver and Arcella; (2) “Gallardo is precluded from seeking equitable remedies by the doctrine of laches and unclean hands”; (3) Fabtastic “fail[ed] . . . to plead entitlement to a discharge under applicable provisions of RPAPL”; and (4) Gallardo is a necessary party “in

whose absence the Court ought not proceed” (Peter F. Edelman, Esq.’s March 22, 2012 Affirmation In Support, pp 10, 11 and 13).

The Arcella counsel contends that “the Mortgage has not been satisfied, the outstanding principal loan balance remains at \$63,858.86, and the interest accrued and accruing at 6% per annum net of the [operating expenses] aggregates \$71,628.08 through January 31, 2012, the commencement date of this proceeding.” Arcella further argues that “[u]nder the terms of the Mortgage and the [1998 Order], Arcella’s status as mortgagee in possession remains the law of the case until the Mortgage is satisfied” (*id.* at 8).

Fabstastic, in opposition, submitted the April 10, 2012 affirmation of David J. Kaplan, Esq., an associate of its counsel, Guzov, LLC, to establish (through paragraph 3, therein) that the 1989 Foreclosure was “marked off the calendar” in January 2001 and was “finally disposed” based on information that he obtained from the court clerk. Additionally, Fabstastic submitted the April 10, 2012 affidavit of its principal, Juan Gallardo, who confirmed (in paragraphs 7, 8 and 9) that John Arcella, through his counsel, refused to provide access to financial records for the Property.

Fabstastic reiterates (in its Memorandum Of Law In Opposition To Defendant John Arcella’s Motion To Dismiss, p 1) that its “entire theory of this litigation” is that Arcella has “extracted enough value” from the rental income of the Property to satisfy the Mortgage. Fabstastic invokes CPLR 3211 (d) to argue that “[i]n order to prove this theory, [Fabstastic] will need access to books and records concerning the management and operation of the

building which are solely in the possession of [John, and now Constantine, Arcella] – and which defendant refused to turn over to [Fabtastic] prior to the commencement of this action” (*id.*).

Fabtastic also argues that defendant’s motion “which cites not a single solitary case” (*id.*) fails to establish a basis for dismissal under the referenced subdivisions of CPLR 3211. Specifically, Fabtastic contends that the Mortgage, the 1998 Order and John Arcella’s one-page accounting do not warrant dismissal of the 2012 Action, pursuant to CPLR 3211 (a) (1), because those documents do not irrefutably establish a defense to Fabtastic’s allegations and are “either irrelevant . . . or they raise more questions than they resolve” (*id.*).

Fabtastic notes that defendant “barely develops his argument” under CPLR 3211 (a) (7) (*id.* at 2) and that defendant’s laches and unclean hands defenses, raised pursuant to CPLR 3211 (a) (5), “are either flatly wrong or raise factual issues which cannot be decided without a trial” (*id.*). Finally, Fabtastic addresses defendant’s “opaque” argument that dismissal is warranted, pursuant to CPLR 3211 (a) (10), because Gallardo (the predecessor owner of the Property) is not a party to the 2012 Action. As Fabtastic points out, “nothing prevents defendant from naming Gallardo as a third-party defendant at the appropriate time if he can ethically do so” (*id.* at 11). Fabtastic further contends that “Gallardo’s absence as a plaintiff does not affect [its] standing to bring this action, or its right to the relief it seeks as owner of record of the Property” (*id.*).

Discussion

(1)

The 2013 Action

CPLR 3211 (a) (4) permits dismissal of an action where “there is another action pending between the same parties for the same cause of action in a court of any state or the United States.” A court has broad discretion as to the disposition of an action when another action is pending (*Montalvo v Air Dock Sys.*, 37 AD3d 567, 567 [2007]).

Here, a comparison of the pleadings in the 2012 and 2013 Actions reflect that they contain nearly identical factual allegations. Constantine Arcella’s complaint in the 2013 Action repeats, almost verbatim, Fabtastic’s factual allegations in the 2012 Action concerning the Property’s chain of ownership, the Mortgage, John Arcella’s collection of rent and the controversy at hand. Essentially, Fabtastic in the 2012 Action seeks an accounting of the rental income that John, and now Constantine, Arcella have admittedly collected for 25 years to prove that the Mortgage has been satisfied. Constantine Arcella, in contrast, seeks additional rental income under the 1998 Order and the Mortgage. Thus, the dominant issue for the parties concerns whether or not the Mortgage has been satisfied. Constantine Arcella contends, by the 2013 Action, that Fabtastic’s claims asserted in the 2012 Action are time-barred, which should have been asserted as an affirmative defense in the 2012 Action. Dismissal of the 2013 Action, pursuant to CPLR 3211 (a) (4), is plainly warranted under the circumstances and in the interest of judicial economy.

(2)

The 2012 Action

The court, according to CPLR 3211 (d), may deny a motion made under CPLR 3211 (a) if the opposing party demonstrated that “facts essential to justify opposition may exist but cannot then be stated . . .” The Appellate Division, Second Department has held “[w]hen knowledge of facts is necessary for a party to properly oppose a motion to dismiss, and those facts are within the sole knowledge or possession of the movant, discovery is sanctioned if it has been demonstrated that such facts may exist” (*Cantor v Levine*, 115 AD2d 453, 454 [1985] [holding that court has broad discretion to grant plaintiff leave to conduct discovery respecting facts necessary to oppose defendant’s motion to dismiss]; *see also* CPLR 3211[d]).

Denial of Constantine Arcella’s dismissal motion, pursuant to CPLR 3211 (d), is appropriate to develop a record to resolve material factual questions that the parties have raised. More specifically, the parties’ conflicting contentions regarding satisfaction of the Mortgage cannot be conclusively determined at this time and must await development of a proper record. Accordingly, it is

ORDERED that Fabtastic’s dismissal motion, pursuant to CPLR 3211 (a) (4), to dismiss the 2013 Action (Action No. 2) is granted; and it is further

ORDERED that Arcella’s dismissal motion, pursuant to CPLR 3211 (a) (1), (a) (5),

(a) (7) and (a) (10), to dismiss the 2012 Action (Action No. 1) is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE



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