

Eljamal v Weil

2014 NY Slip Op 32194(U)

August 12, 2014

Supreme Court, New York County

Docket Number: 651144/14

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SAMMY ELJAMAL, Individually and as a Member of
AMSTERDAM 181 REALTY LLC,

Index No. 651144/14

Motion Seq. Nos. 002 and
003

Plaintiffs,

-against-

JAMES A. WEIL, Individually and as a Member of
AMSTERDAM 181 REALTY LLC, LEON SILVERMAN,
Individually and as a Member of AMSTERDAM 181
REALTY LLC, AMSTERDAM 181 REALTY LLC,
JMM FUELCO LLC, SRG FUELCO LLC, ABG
FUELCO LLC, THE WEIL FAMILY LLC, and STEVEN
CASPI,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, fraud and for the imposition of a constructive trust on the proceeds of a mortgage, defendants move (under motion sequence no. 002) pursuant to CPLR 510 and 511 to change the venue of this action from New York County to Westchester County.

Under motion sequence no. 003, defendants move pursuant to CPLR 3211 and 3016 for dismissal of the complaint for failure to state a cause of action.¹

Factual Background

Plaintiff Sammy El Jamal (“plaintiff”), a one-third owner of Amsterdam 181 Realty, LLC (“Amsterdam”) alleges that he was improperly excluded from Amsterdam’s management and has not received revenues and profits due to him from his ownership thereof. Plaintiff alleges that the individual defendants sold the Parcels at a multi-million-dollar profit to non-party YWA-

¹ The motions are consolidated for the purpose of joint disposition herein.

Amsterdam LLC (“YWA”), which took out a mortgage from Amsterdam in connection with the transfer.

Plaintiff asserts ten causes of action: six for monetary damages; one for an accounting; one for specific performance requiring defendants to provide plaintiff with income/expense records and to make payments to him; one for a declaratory judgment as to plaintiff’s rights as a member; and one (tenth cause of action) for a constructive trust on all proceeds arising from plaintiff’s ownership interest in Amsterdam, and on the proceeds of any mortgage granted to a third-party in connection with any sale or transfer of two parcels of property located at 2420 Amsterdam Avenue and 2430 Amsterdam Avenue in Manhattan formerly owned by Amsterdam (the “Parcels”).

On May 8, 2014, defendants served a demand to change venue to Westchester County on the grounds that no party resides in New York County, and that all but one of the parties resides in Westchester County. Plaintiff served a response affidavit pursuant to CPLR 511(b) by which he averred that venue in New York County is proper pursuant to CPLR 507 because the real property that is the subject of this action (the Parcels) is situated in New York County.

Arguments

Defendants contend that the action neither affects, nor involves, title to real property, which is required to sustain a venue selection under CPLR 507. Plaintiff seeks money damages and related relief for the individual defendants’ purported wrongdoings. The complaint does not allege anything regarding to title of the Parcels. Venue is proper in Westchester County under CPLR 503, as plaintiff and all but one defendant reside in Westchester County (the remaining defendant is located in Suffolk County). Moreover, there are several pending actions between

these parties in Supreme Court, Westchester County.

Case law and other authority (including the predecessor to CPLR 507 and case law interpreting that statute) provide that CPLR 507 is inapplicable when, as here, money damages are sought, and when the title possession or use of a property would not be affected by the court's judgment. CPLR 507 requires more than the mere "involvement" of property; the judgment must affect the subject property's title itself. As such, CPLR 503 provides the correct basis for venue.

In opposition, plaintiff contends that venue is proper in the county where the subject property is located since the plaintiff seeks to impose a constructive trust on a mortgage of the property. Although defendants characterize the complaint as one that concerns plaintiff's business relationship with defendants, that relationship has led plaintiff to seek a constructive trust for "all revenues, profits, benefits and entitlements related to plaintiff's one-third interest in [Amsterdam], the ownership of and mortgage on, the [Parcels]." The constructive trust would also apply to any mortgage granted to a third-party in connection with a sale or transfer of the Parcels. Plaintiff argues that a constructive trust action concerns use and enjoyment of real property and thus provides a basis for venue under CPLR 507.

Plaintiff argues that venue should not be based on CPLR 503, as Amsterdam received a \$16 million mortgage from YWA, the entity that purchased the Parcels, without plaintiff's knowledge, consent and approval. Plaintiff, as a one-third partner and owner of Amsterdam, asserts a proprietary interest in that mortgage, rendering venue in New York County proper.

Further, defendants' citation to CPLR 507's predecessor and related case law is improper, as CPLR 507 is not limited to cases directly affecting title. Rather, the section encompasses many types of actions relating to real property, including those for the imposition a constructive

trust on real property. And, the Second Department has held that CPLR 507 governs venue in an action for monetary damages based on fraud and breach of fiduciary duty which revolve around a parcel of real property. Thus, defendants' case citations concern factually distinguishable matters and/or are based on a repealed statute.

In reply, defendants' argue that venue in New York County is improper because the transactions from which this case arise are already the subject of a litigation commenced in 2011 between the parties that is venued in Westchester. Defendants are simultaneously making a motion to dismiss based in part on the fact that this other action is a "prior action pending."

In any event, plaintiff's legal reasoning is flawed, because even assuming that plaintiff could prevail on his claim to impose a constructive trust on the proceeds of the subject mortgage, and assuming that his claims for fraud and breach of fiduciary duty revolve around the Parcels, such claims do not affect the title to, or the possession, use or enjoyment of, real property in New York County as required by CPLR 507.

Despite plaintiff's contentions, a mortgage is generally considered to be personal property that does not "affect the underlying real property." Thus, imposing a constructive trust on mortgage *proceeds* (or on the assignment of a mortgage) does not "affect" real property, and the mortgage itself (and thus title) would not be affected. On this note, plaintiff's case law is inapposite, as the constructive trust would not affect the use and/or enjoyment of the Parcels. In fact, YWA is not even named as a party to the action, which further undercuts plaintiff's argument that this action "affects" title to real property.

And, the action does not "revolve" around a parcel of real property, but around the allegedly wrongful acts of defendants in depriving plaintiff of his share of the revenues and

profits generated by Amsterdam, and his right to participate in management of the enterprise. Title, possession, and the use/enjoyment of the Parcels are not implicated. Nor does the Complaint seek to set aside the Parcels' sale, nor does it seek to modify any mortgage given in connection therewith

And, defendants' citation to CPLR 507's predecessor and related case law is relevant, because the statute's drafters indicated they intended no change in meaning. Thus, while CPLR 507 used language broad enough to include all of the actions listed in its predecessor, it did not expand to include "many types of actions, including those for a constructive trust," as plaintiff contends. As to the actions not on the prior statutory list, courts have sought to distinguish between those that affect title, use, possession, or enjoyment of land, and those that only incidentally involve land. Since this action neither affects nor involves title, venue in New York County is improper.

Also, defendants argue that plaintiff commenced this action in New York County as a blatant act of forum shopping. Plaintiff, already a party to numerous litigations pending in Westchester, has not been successful in such actions, and has engaged in improper gamesmanship to forestall the ultimate resolution of many claims against him. For example, he has repeatedly changed counsel, and has requested judges to recuse themselves after they have ruled against him. Five judges in the 2011 action have recused themselves, either in response to plaintiff's motion, or because there was some reason they did not wish to preside in a case involving plaintiff. Now that these methods are no longer productive (for example, two judgments totaling nearly \$10 million have been awarded against plaintiff in recent days), he is trying new approaches.

Plaintiff's most recent strategy to commence cases in New York County was rejected by the Southern District of New York in a federal action involving plaintiff, related parties and defendants. When counsel for the parties appeared before the court for an initial conference, the court asked plaintiff's counsel why the case was not brought in Westchester. Counsel responded that the case was brought in Manhattan because the judges in Westchester County were not sufficiently familiar with the relevant law, and that the defendants are believed to have political affiliations with a number of Westchester judges. The court rejected counsel's contentions, and, before transferring the case to White Plains, accused counsel of manipulating the system by bringing a case in Manhattan that should have been brought in Westchester.

Discussion

CPLR 510(1) permits the court, upon motion, to change venue where the county designated for that purpose is "not a proper county." The movant bears the initial burden of establishing that the venue selected by the plaintiff was improper (*see Book v. Horizon Asset Mgmt.*, 105 A.D.3d 661, 966 N.Y.S.2d 368 [1st Dept 2013]).

Defendants established that a change venue to Westchester County based on all but one of the parties' residences is warranted pursuant to CPLR 503 (which provides that "the place of trial shall be in the county in which one of the parties resided when it was commenced").²

As relevant herein, according to the complaint, plaintiff seeks the imposition of a constructive trust on the "revenues, profits, benefits and entitlements arising from or associated with plaintiff's one-third (1/3) interest in Amsterdam and the ownership of [the Parcels] and on

² It is uncontested that Westchester County is the county of the residence of the plaintiff and all but one of the defendants.

the proceeds of any mortgage granted to a third-party in connection with sale or transfer of [the Parcels].”

CPLR 507, upon which plaintiff relies, provides that “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.”

CPLR 507 does not extend to cases where the plaintiff seeks a money judgment that does not affect the use of, or title to, the property (*see Leidel v. Annicelli*, 2011 WL 2533030 [Sup Ct New York Cty 2011], *citing McNamara Realty, Inc. v. Hutchinson*, 54 Misc.2d 810, 283 N.Y.S.2d 422 [Sup Ct Schenectady Cty 1967]; *see also State v. Slezak Petroleum Products, Inc.*, 78 A.D.3d 1288, 1289, 910 N.Y.S.2d 268 [3d Dept 2010] (“while this action clearly ‘involves’ defendant's property, it does not involve a change in the title thereto or otherwise directly ‘affect’ such property—an important distinction . . . Accordingly, Supreme Court properly determined that a change of venue was not required by CPLR 507”). And, when title is not affected, the action is deemed transitory; thus, venue in such cases is properly based on residence rather than on the location of the subject real property (*see Lucas v. Kensington Abstract LLC*, 2009 WL 3713153 [Sup Ct Nassau Cty 2009]). Here, there are no allegations regarding the execution of a new mortgage or foreclosure of an existing mortgage.

Furthermore, contrary to plaintiff's contentions, the request for imposition of a constructive trust on the assignment of a mortgage does not constitute a ground for venue under CPLR 507 based on the location of the underlying real property (*see Singh v. Becher*, 249 A.D.2d 154, 672 N.Y.S.2d 60 [1st Dept 1998]; *Chambers v. Weinstein*, 2014 WL 917034 [Sup Ct New York Cty 2014]). A mortgage is generally considered to be personal property, and the

assignment of an existing mortgage, rather than execution of a new mortgage or foreclosure of an existing mortgage, does not affect underlying real property (*i.e.*, the title to, or the possession, use or enjoyment of, such property) for purposes of venue (*see Singh, supra, citing* 77 N.Y.Jur.2d, Mortgages, § 3, at 375; *Chambers supra*).

Plaintiff seeks, with respect to his constructive trust claim (for purposes of this discussion), are the *proceeds* of any mortgage granted to a third-party regarding the sale of the Parcels. Here, plaintiff alleges that the Parcels were sold to YWA, and that Amsterdam received a \$16 million dollar mortgage from YWA in connection with same. Therefore, although a constructive trust action may support venue in the county in which the related property was located (*see Maurer v. Maurer*, 96 A.D.3d 417, 944 N.Y.S.2d 880 [1st Dept 2012] (holding, “because the constructive trust action concerns use and enjoyment of real property in Suffolk County, venue for that action must lie in Suffolk County”); *Don v. Singer*, 73 A.D.3d 583, 900 N.Y.S.2d 733 [1st Dept 2010] (complaint “sought the placement of the subject properties in a constructive trust in order to protect plaintiffs' alleged ownership interest therein”), plaintiff’s complaint does not allege facts affecting the title, use and enjoyment of the subject property so as to trigger the applicability of CPLR 507. Thus, plaintiff’s reliance on CPLR 507 is improper

Likewise, plaintiff’s claim in opposition that he has “asserted a proprietary interest in the mortgage on the [Parcels] and has sought a constructive trust on the proceeds of that mortgage as well” and that such constructive trust “would apply to any mortgage granted to a third-party in connection with a sale or transfer of [the Parcels]” fail to justify venue in New York County, is unavailing. *Craig v. Clifton Springs Country Club, Inc.* (26 A.D.2d 903, 274 N.Y.S.2d 455 [2d Dept 1966]), cited by plaintiff, is inopposite, as the complaint therein sought an order directing

the defendant to execute and deliver to plaintiff a mortgage upon certain real property. Thus, the Second Department in *Craig* noted that if plaintiff were to succeed in the action, title of the subject property would be affected (*id.*). Here, however, even if plaintiff prevailed and the court imposed a constructive trust on the proceeds of the mortgage, the mortgage itself (and the title of the Parcels) would not be affected. As noted above, the alleged mortgagor YWA is not a named party to the action, and plaintiff only seeks the *proceeds* of the mortgage, and not the execution of a new mortgage or foreclosure of an existing mortgage.

Similarly, *Antonacci v. Antonacci* (273 A.D.2d 185, 709 N.Y.S.2d 432 [2d Dept 2000]), on which plaintiff relies, is likewise unavailing. In *Antonacci* plaintiff pursued, “*inter alia*” money damages for fraud and breach of fiduciary duty, and the Court held that “since the action centered around a certain parcel of real property located in Suffolk County, the court properly transferred the action to that county.” Notably, no mention of the other claims is made, and no other factual details are provided in the Court’s decision. Moreover, plaintiff’s action herein is one for money damages, and a constructive trust sought over *proceeds*. Therefore, aside from the fact that the Second Department is not controlling, and that the instant action does not “affect the title to, or the possession, use or enjoyment of” the subject property, *Antonacci* does not warrant a different result.

Plaintiff’s remaining contentions based on *Maurer* and *Antonacci* cases discussed above lack merit. The complaint’s allegations, by which plaintiff seeks the “revenues, profits, benefits, and entitlements” arising from his ownership interest in Amsterdam, makes clear that he seeks money damages and, even if plaintiff prevailed, the Parcels’ title would not be affected. Accordingly, CPLR 507 fails to provide a basis for venue, and defendants’ application to change

venue based on the parties' residence in Westchester County is granted.

Lastly, it is well-settled that, as a matter of policy, once a court determines to grant a party's motion for a change of venue, it is preferable to defer ruling upon any other issues presented by the parties and leave their resolution to the justice to whom the case is to be assigned in the county to which venue has been changed (*see* CPLR 511(d); *Diamond v. Papreka*, 7 Misc. 3d 1006(A), 801 N.Y.S.2d 232 [Sup Ct Kings County 2005], *citing Taylor v. New York City Transit Authority*, 131 A.D.2d 460, 462, 516 N.Y.S.2d 237 [1987]; *see also Rosenblatt v. Sait*, 34 A.D.2d 238, 239, 310 N.Y.S.2d 790 [1970]). Accordingly, in light of the above, defendants' motion to dismiss (under motion sequence 003) is denied without prejudice, with leave to re-file upon transfer of this matter to Westchester County.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion (under motion sequence no. 002) to change venue of this action to Supreme Court, Westchester County is granted; it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, Westchester County, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Westchester, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

ORDERED that the proceedings in this matter are stayed until the Clerk of the Supreme Court, County of Westchester receives the papers on file in this action; and it is further

ORDERED that defendants' motion (under motion sequence no. 003) for dismissal of the complaint is denied without prejudice with leave to re-file upon transfer of this matter to

Westchester County.

This constitutes the decision and order of the Court.

Dated: August 12, 2014

A handwritten signature in black ink, appearing to read 'Carol R. Edmead', written over a horizontal line.

Hon. Carol R. Edmead