

Walker v Steinberg

2014 NY Slip Op 32612(U)

October 3, 2014

Sup Ct, New York County

Docket Number: 154169/13

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

DAVID WALKER,

Plaintiff,

-against-

INDEX NO. 154169/13

MOTION SEQ. NO. 002

CHANA STEINBERG, ISRAEL TAUB, and 675 OWNERSHIP LLC,

Defendants.

The following papers were read on this motion by defendant to dismiss the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Motion sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, defendants Chana Steinberg, Israel Taub, and 675 Ownership LLC move, pursuant to CPLR 3013, 3014, 3016, 3024, and 3211 (a) (7), to dismiss the complaint. In motion sequence number 003, defendants move to disqualify plaintiff David Walker's counsel, Denise Morten Kranz, Esq. (Ms. Kranz) and Elizabeth Eilender, Esq. (Ms. Eilender), for conflicts of interest pursuant to the Rules of Professional Conduct (22 NYCRR 1200.00) rules 1.9, 1.10, and 3.7(a) and (b).

BACKGROUND

The following factual allegations are set forth in the amended verified complaint, and for the purposes of this motion are accepted as true.

Nonparty Sam Steinberg (Mr. Steinberg) is the husband of defendant Chana Steinberg (Mrs. Steinberg) and the son-in-law of defendant Israel Taub (Taub). It is also alleged that Mr.

Steinberg is active in and received a salary and/or distributions from Taub's business, defendant 675 Ownership LLC.

On February 24, 2010, Mr. Steinberg borrowed \$70,000 from plaintiff David Walker (plaintiff). He deposited plaintiff's \$70,000 check into HSBC bank account number ending in 9888, a joint account maintained by the Steinbergs (the Joint HSBC Account). When Mr. Steinberg failed to repay plaintiff, plaintiff commenced an action in this court, entitled *Walker v Steinberg*, index No. 104365/2011 (the Sam Steinberg Action). On September 18, 2012, this court granted plaintiff's motion for summary judgment on default against Mr. Steinberg in the Sam Steinberg Action, and on December 3, 2012, a judgment was entered by the Clerk of the Court against Mr. Steinberg in the amount of \$81,425.55.

Plaintiff then sent restraining notices to Mrs. Steinberg and Taub. Mrs. Steinberg responded with a "Questionnaire Rider," in which she swore that the only bank account of Mr. Steinberg's that she was aware of was one at Citibank. Taub also responded with a "Questionnaire Rider," in which he swore that he had no records of Mr. Steinberg's employment. Taub did state that he made monetary advances to Mr. Steinberg, but that he could not recall if they were loans or gifts and whether some of the advances were paid back. Plaintiff alleges that the information contained in both "Questionnaire Riders" was misleading and false.

Plaintiff also served a restraining order on HSBC Bank, which it responded to on April 24, 2013, stating that the Joint HSBC Account was closed on December 26, 2012. Plaintiff contends that Mr. Steinberg, Mrs. Steinberg, and Taub are concealing money to avoid Mr. Steinberg's creditors.

On May 6, 2013, plaintiff commenced this action for violations of the New York Debtor and Creditor Law §§ 273, 273-a, 275, 276, 276-a, and 278. On July 10, 2013, defendants made this motion to dismiss the complaint (002). The motion to dismiss was returnable on

August 8, 2013, but it was extended by agreement. On September 11, 2013, plaintiff filed an amended verified complaint. On February 28, 2014, defendants brought the current motion to disqualify plaintiff's attorneys by order to show cause (003).

Defendants originally moved to dismiss pursuant to CPLR 3013, 3014, 3016, 3024, and 3211(a)(7). However, in light of the amended verified complaint, defendants now seek dismissal under CPLR 3016 and 3211(a)(7) only.

STANDARDS OF LAW

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (see *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleadings states no legally cognizable cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). A court must ensure that the plaintiff's statements can *sustain* a cause of action, not whether the plaintiff has "artfully drafted the complaint" (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; see *Guggenheimer*, 43 NY2d at 275 ["the criterion is whether the

proponent of the pleading has a cause of action, not whether he has stated one”). “However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege whatever can be implied from its statements by fair and reasonable intendment” (*Foley*, 21 AD2d at 65 [internal quotations omitted]).

CPLR 3016(b) states:

Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

“A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)” (*FNF Touring LLC v Transform Am. Corp.*, 111 AD3d 401, 402 [1st Dept 2013], citing *Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486 [2008]).

DISCUSSION

Motion to Dismiss

Causes of Action Against Mrs. Steinberg

This is the classic situation where a judgment creditor has been frustrated in his attempt to collect a judgment. Here, the issue in regard to the causes of action alleged against Mrs. Steinberg boils down to whether plaintiff has sufficiently pled such causes of action, including those based on actual fraud, which must be pled with specificity under CPLR 3016(b). Mrs. Steinberg argues that plaintiff has not met this burden, as he does not allege the dates of any transfers or conveyances allegedly made to her by her husband in violation of the Debtor and Creditor Laws.

The amended verified complaint alleges that Mr. Steinberg and Mrs. Steinberg sold an apartment on Central Park West for \$6 million in 2005, and that these monies were conveyed to and concealed by Mrs. Steinberg to evade Mr. Steinberg’s creditors. It also alleges that Mr. Steinberg conveyed monies from a \$2 million investment in a company called Legal Funding to his wife. This \$2 million investment was allegedly returned to Mr. Steinberg with interest in

2009 and deposited into either the Joint HSBC Account or a Citibank account jointly held with Mrs. Steinberg.

Mrs. Steinberg is correct that the complaint fails to identify dates. However, if these monies were conveyed to Mrs. Steinberg when Mr. Steinberg was a defendant in the Sam Steinberg Action, or after the judgment was obtained, those facts are solely within the knowledge of Mrs. Steinberg, and not the plaintiff, and, thus it would be impossible for plaintiff to allege specific dates and details about the conveyances.

“[W]here the facts [are] ‘peculiarly within the knowledge of the party against whom the fraud is being asserted,’” it would be impossible for a plaintiff to state the circumstances in more detail (*Loreley Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 142, [1st Dept 2014], citing *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]). Further, the court notes that, thus far, Mrs. Steinberg has not appeared to be very forthcoming about her knowledge involving these monies and her joint bank accounts with Mr. Steinberg and there are conflicting accounts as to whether these monies were used to invest in Romanian real estate as Mrs. Steinberg attests. Under the circumstances, the Court regards plaintiff’s allegations against Mrs. Steinberg as sufficient to state causes of action under New York Debtor and Creditor Law §§ 273, 273-a, 275, 276, 276-a, and 278. Plaintiff should be given the opportunity to conduct full discovery.

Causes of Action Against Taub and 675 Ownership LLC

The causes of action against defendant Taub and 675 Ownership are dismissed. New York Debtor and Creditor Law § 276 provides that

“[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

In order to state a claim under this section, the conveyance must be made by the debtor

(*Ruskin, Schlissel, Moscou, Evans, & Faltischek, P.C. v Beal*, 1994 NY Misc LEXIS 726, *4

[Sup Ct, Nassau County Sept 2, 1994], citing *Hoyt v Godfrey*, 88 NY 669 [1882]; see also *In re Flutie New York Corp.*, 310 BR 31, 56 [SD NY 2004]).

The complaint alleges that Taub is directing payments meant for Mr. Steinberg to Mrs. Steinberg. However, any conveyances must be made by the debtor, and Taub and 675 Ownership LLC are not the debtors. Therefore, the fifth cause of action against Taub and 675 Ownership LLC is dismissed. Further, the causes of action brought pursuant to New York Debtor and Creditor Law §§ 276-a and 278 are also dismissed against Taub and 675 Ownership LLC, as any claims under these sections would rest upon a claim under New York Debtor and Creditor Law § 276.

Motion to Disqualify

Defendants also move to disqualify plaintiff's counsel on the ground that there is a conflict of interest. Plaintiff's attorney of record is Ms. Kranz, who brought in litigation counsel, Ms. Eilender, to assist in plaintiff's representation. Defendants argue that Ms. Eilender is "of counsel" to the firm of Jaroslawicz & Jaros (Jaroslawicz Firm), and that she represented Mr. Steinberg when she was of counsel to the Jaroslawicz Firm. Defendants also assert that David Jaroslawicz (Mr. Jaroslawicz) continues to represent Mr. Steinberg on a real estate venture in Romania, and that Mr. Jaroslawicz is a witness for plaintiff in this action.

"[A] party seeking to disqualify an opponent's attorney must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Sharifi-Nistanak v Coccia*, 119 AD3d 765, 765 [2d Dept 2014] [internal quotes and citation omitted]).

Although there was no attorney-client relationship between Ms. Steinberg, herself, and Ms. Kranz and Ms. Eilender, this Court holds that, for the purposes of disqualification, the interests of Mr. Steinberg and Mrs. Steinberg are one and the same (*Sirianni v Tomlinson*, 133 AD2d 391, 392 [2d Dept 1987]).

There is no dispute that Ms. Eilender and Mr. Jaroslawicz were professionally

associated with one another; although, it is not clear if Ms. Eilender is still of counsel to Mr. Jaroslawicz' firm. There is also no dispute that Ms. Eilender and Mr. Jaroslawicz represented Mr. Steinberg in two actions, one brought in 2000 for breach of a contract to sell certain goods involving one of Mr. Steinberg's businesses, and the other brought in 2002 for a personal injury claim. However, there is a clear factual dispute as to whether Ms. Eilender and Mr. Jaroslawicz continued to represent Mr. Steinberg in other matters, including a Romanian investment that relates to this case. These factual issues must be resolved in order to determine whether Ms. Kranz and Ms. Eilender should be disqualified under Rules of Professional Conduct (22 NYCRR 1200.00) rules 1.9 and 3.7. "Where material factual issues remain respecting an attorney's conduct or the propriety of disqualification, an evidentiary hearing is in order" (*Matter of Beiny*, 132 AD2d 190, 215 [1st Dept 1987]).

Thus, this motion is held in abeyance. The Court will refer the issues of whether (1) Ms. Eilender is still of counsel to Mr. Jaroslawicz' firm and (2) whether Ms. Eilender and Mr. Jaroslawicz continued to represent Mr. Steinberg in other matters, including a Romanian investment that relates to this case, to a referee to hear and report with recommendations.

CONCLUSION

Accordingly, it is

ORDERED that defendants Chana Steinberg, Israel Taub, and 675 Ownership LLC's motion to dismiss the complaint is granted, in part, in so far as the complaint is dismissed in its entirety as against defendants Israel Taub and 675 Ownership LLC, with costs and disbursements to defendants Israel Taub and 675 Ownership LLC as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the action continues as against defendant Chana Steinberg; and it is further

ORDERED that the issues of whether (1) Ms. Eilender is still of counsel to Mr.

Jaroslawicz' firm and (2) whether Ms. Eilender and Mr. Jaroslawicz continued to represent Mr. Steinberg in other matters, including a Romanian investment that relates to this case, are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

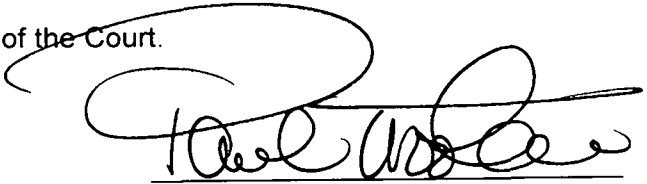
ORDERED that the motion for disqualification is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4402 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this order with notice of entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly in favor of Israel Taub and 675 Ownership LLC.

This constitutes the Decision and Order of the Court.

Dated: 10-3-14



PAUL WOOTEN J.S.C.

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