

S&M Home Heating Corp. v Macaluso

2014 NY Slip Op 32720(U)

October 15, 2014

Supreme Court, Suffolk County

Docket Number: 9264-08

Judge: Elizabeth H. Emerson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-19-14
SUBMITTED: 7-17-14
MOTION NO.: 014-MOT D

_____ X
S&M HOME HEATING CORP., THE BIG
SEVEN HOLDING CORP., THE BIG SEVEN
REALTY CORP., BEST OIL BURNER,
PLUMBING, HEATING & POOL SUPPLY,
INC., & ANTHONY MACALUSO, SR.,

Plaintiffs,

MAYER, ROSS & HAGAN, P.C.
Attorneys for Plaintiffs
178 East Main Street
Patchogue, New York 11772

-against-

ANTHONY P. GALLO, P.C.
Attorneys for Defendant Joseph Macaluso, as
Executor of the Estate of Santo Macaluso, Jr.
6080 Jericho Turnpike, Suite 216
Commack, New York 11725

JOSEPH MACALUSO, AS EXECUTOR OF
THE ESTATE OF SANTO MACALUSO, JR.,
FTF TRANSPORT CORP., NEXT
GENERATION F/O INDUSTRIES INC., d/b/a
COUNT ON FUEL, COUNT ON FUEL, INC.,
and COUNT ON BURNER SERVICE, INC.,

Defendants.

ANTHONY DECAROLIS, ESQ.
Court-Appointed Receiver
210 Townsend Square
Oyster Bay, New York 11771

_____ X

Upon the following papers numbered 1-32 read on this motion to dismiss; Notice of Motion and supporting papers 1-12; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 13-16; 17-27; Replying Affidavits and supporting papers 28-32; it is,

ORDERED that the motion by the defendant Joseph Macaluso, as Executor of the Estate of Santo F. Macaluso, Jr., for an order pursuant to CPLR 3211 (a) (5) and CPLR 3016 (b) dismissing the complaint insofar as it is asserted against him is granted as to the first, second, third, fourth, and fifth causes of action; and it is further

ORDERED that the motion is otherwise denied.

The plaintiff Anthony Macaluso (“Anthony”) and the defendant Santo Macaluso (“Santo”), now deceased, were brothers. Each owned 50% of the shares of the plaintiffs S&M Heating Corp. (“S&M”), Big Seven Holding Corp., Big Seven Realty Corp., and Best Oil Burner, Plumbing, Heating & Pool Supply, Inc. (the “corporate plaintiffs”). On or about June 30, 2006, Anthony commenced a derivative action in this court against Santo on behalf of S&M (the “2006

action”). That action was settled pursuant to a stipulation of settlement that was placed on the record in open court on or about July 6, 2007. The settlement provided, *inter alia*, that Anthony would purchase Santo’s interests in the corporate plaintiffs for \$2.1 million. The settlement was not contingent upon the financial condition of the corporate plaintiffs, Anthony’s ability to obtain financing, or Anthony’s ability to perform due diligence. Anthony subsequently moved to set aside the stipulation of settlement arguing, *inter alia*, mutual mistake and fraud in the inducement. Anthony argued that both parties were under the mistaken belief that the corporate plaintiffs were worth over \$2 million, but that they were appraised at only \$1.4 million, which was insufficient to support bank financing of the settlement. Anthony also argued that he was unaware of the poor financial condition of the corporate plaintiffs, which Santo had kept from him, and relied on Santo’s representations that they were in good condition. By an order of this court dated February 5, 2008, Anthony’s motion to set aside the stipulation of settlement was denied. That order was affirmed by the Appellate Division, Second Department, on May 26, 2009 (**Macaluso v Macaluso**, 62 AD3d 963). Anthony then moved for leave to renew his motion to set aside the stipulation of settlement, raising the same arguments that he had made in support of his prior motion, *i.e.*, that the settlement was contingent upon his obtaining financing, that he was unaware of the poor financial condition of the corporate plaintiffs, that he relied on Santo’s misrepresentations that they were in good financial condition, and that both parties were under the mistaken belief that they were worth more than \$2 million. Anthony’s motion to renew was denied by an order of this court dated June 18, 2010, on the ground that the new evidence submitted was merely cumulative and, in some cases, could have been discovered earlier with due diligence. A judgment was entered in the 2006 action on or about October 20, 2010. However, pursuant to the June 18, 2010, order, enforcement of the judgment was stayed pending the resolution of this action.

On or about March 12, 2008, approximately one month after this court denied Anthony’s motion to set aside the stipulation of settlement, Anthony and the corporate plaintiffs commenced this action against Santo and FTF Transport Corp. (“FTF”); Next Generation F/O Industries, Inc. (“Next Generation”); Count on Fuel Oil, Inc.; and Count on Burner Service, Inc. (the “corporate defendants”). Santo subsequently passed away. By an order of this court dated January 28, 2010, the executor of Santo’s estate, Joseph Macaluso (“Joseph”), was substituted as a party defendant in place of Santo. The plaintiffs then moved to amend the complaint. FTF and Next Generation cross moved for an order dismissing the first, third, and fourth causes of action insofar as asserted against them. By an order of this court dated December 13, 2012, the motion to amend the complaint was granted in part, and the cross motion was granted. The plaintiffs served and filed their amended complaint on or about January 25, 2013. Joseph answered the amended complaint on or about March 12, 2013. He now moves for an order dismissing the complaint pursuant to CPLR 3211 (a) (5) on *res-judicata* and *collateral-estoppel* grounds and pursuant to CPLR 3016 (b) on *lack-of-particularity* grounds.

A motion to dismiss based on a ground listed in CPLR 3211 (a) (5) must be made before answering (*see*, CPLR 3211 [e]; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (**Id.**). Summary judgment is, therefore, a post-answer device (**Id.**). Any of the grounds on which a CPLR 3211 motion could have been made

before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (*see*, CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:20). Joseph answered the complaint and raised collateral estoppel and res judicata as affirmative defenses. Thus, the branch of the motion which is to dismiss pursuant to CPLR 3211(a) (5) is, in effect, a motion for summary judgment on those grounds.

CPLR 3211(c) empowers the court to treat a motion to dismiss as a motion for summary judgment after adequate notice to the parties when the proof submitted to the court is as complete as it usually is on a motion for summary judgment pursuant to CPLR 3212 (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:44). Notice is not required if the parties have revealed their proof and clearly charted a summary judgment course (*see*, **Matter of Weiss v North Shore Towers Apartments Inc.**, 300 AD2d 596; *see also*, **Kavoukian v Kaletta**, 294 AD2d 646, 647). The court finds that the parties have charted a summary judgment course. Accordingly, the court will treat the branch of the motion which is to dismiss pursuant to CPLR 3211 (a) (5) as a motion for summary judgment without any further notice to the parties.

The court will treat the branch of the motion which is to dismiss pursuant to CPLR 3016 (b) as a motion to dismiss for failure to state a cause of action (*see*, CPLR 3211 (a) (7); **New York Fruit Auction Corp. v City of New York**, 81 AD2d 159, 161-162 *aff'd* 56 NY2d 1015; **Neiman v Felicie, Inc.**, 55 AD2d 521), which may be made at any time notwithstanding the service of an answer and even though the objection was not included in the answer as a defense (*see*, CPLR 3211 [e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:53).

The amended complaint contains seven causes of action to recover damages in the amount of \$2.1 million. The first cause of action for fraud alleges that Santo, in preparing to sell his interest in the plaintiff corporations, entered into an intricate relationship with the corporate defendants in which the parties colluded to devalue the corporate plaintiffs and transfer their assets to themselves. The first cause of action further alleges that, prior to entering into the stipulation of settlement in the 2006 action, Santo fraudulently misrepresented to Anthony that the corporate plaintiffs were worth more than \$4 million and that financing would be readily available. The second cause of action alleges that Santo fraudulently concealed the true value of the corporate plaintiffs from Anthony in order to induce him to enter into the stipulation of settlement in the 2006 action. The third cause of action for fraudulent conveyance alleges that Santo transferred, without consideration, assets of the corporate plaintiffs, such as client lists and work products, in excess of \$2.1 million to FTF and Next Generation, which caused the corporate plaintiffs to become devalued and border on insolvency. The fourth cause of action for conversion alleges that Santo rendered the corporate plaintiffs insolvent and unable to obtain financing by transferring to the corporate defendants assets in the amount of \$2.1 million including, but not limited to, customer lists, cash holdings, and credit lines. The fifth cause of action for non-specific intentional tort alleges that Santo's actions were intentional and tortious in nature and carried out with the intent to injure the plaintiffs. The sixth cause of action alleges that

Santo's actions constitute a breach of his fiduciary duty to the corporate plaintiffs. The seventh cause of action is for breach of contract against FTF.

The First and Second Causes of Action

The doctrines of res judicata and collateral estoppel are designed to put an end to a matter once it is duly decided (**Eagle Surgical Supply, Inc. v AIG Indemnity Ins. Co.**, 40 Misc 3d 139(A) at *1). Res judicata, or claim preclusion, is invoked when a party, or those in privity with that party, seek to relitigate a disposition on the merits of claims or causes of action arising out of the same transaction or series of transactions that were raised, or could have been raised, in a prior litigation (**Id.** [and cases cited therein]). The doctrine of collateral estoppel, a narrower species of res judicata, 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, or those in privity therewith (**Ryan v New York Tel. Co.**, 62 NY2d 494, 500). For collateral estoppel to apply, the identical issue must have been decided in the prior action and must be decisive of the present action, and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*see*, **Kaufman v Lilly & Co.**, 65 NY2d 449, 455).

Applying these principles, the court finds that the plaintiffs are barred from relitigating the fraud and fraudulent concealment issues raised in the first and second causes of action. Those causes of action raise the same issues that Anthony raised on behalf of S&M in support of his motion to set aside the stipulation of settlement in the 2006 action and again in support of his motion to renew the denial of that motion, which was also denied. Thus, the first and second causes of action are Anthony and S&M's third attempt to get those issues before the court and decided in their favor. Although the other corporate plaintiffs were not parties to that action, they are in privity with Anthony. Moreover, the first and second causes of action contain no allegations that they were defrauded. Accordingly, the motion is granted as to the first and second causes of action.

The Third and Fourth Causes of Action

In response to Anthony's motion to amend the complaint in this action, FTF and Next Generation cross moved for an order dismissing, inter alia, the third and fourth causes of action on the ground that they were not pleaded with particularity. The court granted the cross motion in its prior order dated December 13, 2012. The court found that the allegations of the third cause of action for fraudulent conveyance were not sufficiently particular to withstand dismissal pursuant to CPLR 3016 (b) because such a cause of action must identify the alleged transfers at issue and cannot simply allude generally to alleged transfers that may have taken place (*see*, **Felshman v Yamali**, 2011 NY Slip Op 33110[U], *affd as mod* 106 AD3d 948) and the plaintiffs had not identified any particular transaction that they sought to void (**Syllman v Calleo Dev. Corp.**, 290 AD2d 209, 210). The court also found that the fourth cause of action for conversion was duplicative of the third cause of action and that, like the third cause of action, the plaintiffs' conclusory allegations were not sufficiently particular to withstand dismissal pursuant to CPLR 3016 (b).

The court's prior order dated December 13, 2012, is the law of the case. The law-of-the-case doctrine in a kind of intra-action *res judicata* (**Cherry v Koch**, 129 Misc 2d 346, 347, *affd as mod* 126 AD2d 346). It seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding (**Brownrigg v New York City Housing Auth.**, 29 AD3d 721, 722). It applies to legal determinations that were necessarily resolved on the merits in a prior decision (**Id.**) and may be ignored in extraordinary circumstances, such as a change in the law or a showing of new evidence (**Id.**). The plaintiffs still have not identified any particular transactions that they seek to void. Moreover, they rely on the same evidence on which they relied in opposition to FTF and Next Generation's motion to dismiss, and they do not contend that there has been a change in the law since then. Accordingly, the court declines to ignore its prior order, and the motion is granted as to the third and fourth causes of action

The Fifth Cause of Action

The opposition fails to address the fifth cause of action for non-specific intentional tort. Moreover, the court is unaware of any such cause of action. Accordingly, the motion is granted as to the fifth cause of action.

The Sixth Cause of Action

The sixth cause of action is for breach of fiduciary duty. The law provides that officers and directors of a corporation stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty thereto (**Howard v Carr**, 222 AD2d 843, 845). They are prohibited from profiting personally at the expense of the corporation and from promoting personal interests that are incompatible with the superior interests of the corporation (**Adirondack Capital Mgt., Inc. v Ruberti Girvin and Ferlazzo, P.C.**, 43 AD3d 1211, 1215).

A court may properly look beyond the allegations in the complaint and deny summary judgment when a party's papers in opposition to the motion raise triable issues of fact (**Gold Connection Discount Jewelers v American Dist. Tel. Co.**, 212 AD2d 577, 578). Likewise, on a motion to dismiss, the plaintiff may submit affidavits in opposition to the motion to remedy any defects in the complaint (*see*, **Cron v Hargro Fabrics**, 91 NY2d 362, 366).

The reports of the forensic accountant submitted in opposition to the motion¹ contain allegations that Santo, who was the president of S&M, outsourced oil deliveries to FTF and that he failed to monitor FTF, which did not have adequate controls to account for and record the oil deliveries conducted on behalf of S&M and misrepresented the number of gallons delivered. The reports concluded that S&M experienced a decrease in customer accounts and sales directly related to Santo's deviation from existing practices and inability to establish monitoring controls over FTF during the calendar years 2006 through 2009. The reports also

¹Both the plaintiffs and the receiver rely on the reports of the forensic accountant in opposition to the motion. Although the reports themselves are not in affidavit form, the reports submitted by the receiver are annexed to the forensic accountant's affidavit.

concluded that the decrease in customer accounts had a direct impact on S&M's sales and that Santo, as the president of S&M, did not attempt to mitigate the losses by obtaining new clients or maintaining existing clients. The court finds that these allegations, together with the allegations in the amended complaint that Santo was trying to devalue S&M, raise questions of fact as to whether Santo breached his fiduciary duty to S&M. The court also finds that the allegations are sufficiently particular to withstand a motion to dismiss pursuant to CPLR 3016 (b). Moreover, insofar as the misconduct is alleged to have occurred, in part, after the 2006 action was settled, it is not barred by the doctrines of res judicata or collateral estoppel.² Accordingly, the motion is denied as to the sixth cause of action.

Conclusion

The motion is granted as to the first, second, third, fourth, and fifth causes of action and denied as to the sixth cause of action. The plaintiffs' request for leave to replead the dismissed causes of action is denied since they are barred by the doctrines of res judicata, collateral estoppel, and law of the case. Finally, the plaintiffs' request for sanctions is denied in the absence of a notice of cross motion or any other notice to the moving defendant that he was required to respond to a motion for sanctions (*see*, CPLR 2215; **Myung Chun v N. Am. Mtge. Co.**, 285 AD2d 42, 45).

Dated: October 15, 2014

HON. ELIZABETH HAZLITT EMERSON

J.S.C.

²The 2006 action contained a cause of action against Santo for breach of his fiduciary duty to S&M.