Spitzer v Bhat
2014 NY Slip Op 32754(U)
August 15, 2014
Sup Ct, Kings County
Docket Number: 506751/2013
Judge: David I. Schmidt

At an IAS Term, Part 47 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 15th day of August, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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JACOB SPITZER,

Plaintiff,

- against -

Index No. 506751/13

JODUMUTT G. BHAT, et ano.,

Defendants.

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The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Jacob Spitzer moves for an order, pursuant to CPLR 3212, granting partial summary judgment on his first cause of action against defendant Jodumutt G. Bhat in amount of $71,425.00 and on his second cause of action against defendant Nirmal K. Mattoo in the amount of $71,425.00.

Plaintiff commenced this action to recover under two personal guaranties signed by Bhat and Mattoo as security for repayment of a loan by plaintiff to Ambulatory Vascular

Management, LLC (AVM) in the amount of $500,000.00. Plaintiff, Bhat and Mattoo, along with four other individuals, were members of AVM with each holding a 14.285% interest. The loan agreement, dated October 4, 2009, provided that plaintiff would make one or more advances to AVM for working capital and other cash needs, up to $500,000.00, with the outstanding principal balance and accrued interest becoming due and payable in full four years from the date of the agreement or upon a specified event of default. A revolving promissory note was also executed by AVM on October 4, 2009 which set the interest rate of the loan at seven percent (7%) per annum.

In addition to the October 4, 2009 loan, plaintiff made two additional loans to AVM on August 24, 2010, in the amount of $300,000.00 with an annual interest rate of 10%, and on May 9, 2011, in the amount of $200,000.00 with an annual interest rate of 10%. According to plaintiff, he made several advances to AVM from October 14, 2009 through August 25, 2010, for the maximum amount of $500,000.00 pursuant to the October 4, 2009 loan agreement.

On November 9, 2012, plaintiff commenced an action against AVM in Supreme Court, New York County, seeking more than $1,000,000.00 in principal and interest which he claimed was due and unpaid under the three loans. By order dated July 25, 2013, the Supreme Court, New York County (Hon. Barbara R. Kapnick) granted plaintiff's motion for summary judgment in the amount of $1,018,722.84 on default. On October 31, 2013, plaintiff commenced the instant action seeking to recover under the guaranties executed by

Bhat and Mattoo. Pursuant to the terms of the guaranties, Bhat and Mattoo were each obligated to repay a percentage of the indebtedness equal to their percentage interests in AVM (14.285%). In the instant motion, plaintiff seeks partial summary judgment against Bhat and Mattoo, each in the amount of $71,425.00 or 14.285% of the $500,000.00 principal.

While defendants do not dispute that they executed the guaranties and are liable thereunder, defendants produce in their opposing papers a check from AVM to plaintiff, dated December 22, 2010, in the amount of $300,000.00 The check contains a notation stating "interim loan proceeds." Defendants argue that these proceeds should be applied toward repayment of the October 4, 2009 loan, thereby reducing the balance of the loan to $228,460.27 and defendants' obligations to $32,635.55 each (14.285% of $228,460.27). Plaintiff, on the other hand, asserts that the $300,000.00 check was intended as a repayment of the separate $300,000.00 loan made on August 24, 2010 and that the $500,000.00 principal of the October 4, 2009 loan remains due and owing in full. Further, plaintiff refers to the New York County judgment finding, in essence, that the full amount is owed under the October 4, 2009 loan as well as the two subsequent loans ($1,000,000 in sum, plus interest) and argues that the judgment precludes defendants, under the doctrines of collateral estoppel and res judicata, from claiming that an amount of principal less than $500,000.00 is due and owing under the October 4, 2009 loan.

"The doctrine of collateral estoppel precludes a party from relitigating 'an issue which has previously been decided against him in a proceeding in which he had a fair opportunity

to fully litigate the point'" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985] quoting *Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]). Because the New York County judgment was granted on default, the issue of the amount due under the October 4, 2009 loan was not "actually litigated" and, accordingly, defendants are not precluded from arguing this issue under the doctrine of collateral estoppel (*see Kaufman*, 65 NY2d at 456-457).

"Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Abraham v Hermitage Ins. Co.*, 47 AD3d 855, 855 [2d Dept 2008]).* As defendants were not parties to the New York County action, plaintiff must demonstrate that they were "in privity" with AVM before res judicata may be applied. The Court of Appeals has observed that privity is an "amorphous concept," not easily applied (*Buechel v Bain*, 97 NY2d 295, 304 [2001], *cert denied* 535 US 1096 [2002] [internal quotation marks omitted]). "It has been said that the term privity does not have a technical and well-defined meaning. It denominates a rule, however, to the effect that under the circumstances, and for the purposes of the case at hand, a person may be bound by a prior judgment to which he was not a party of record. It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose

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* A judgment by default which has not been vacated is conclusive for res judicata purposes (*Richter v Sportsmans Props., Inc.*, 82 AD3d 733, 734 [2d Dept 2011]; *Lazides v P&G Enters.*, 58 AD3d 607, 609 [2d Dept 2009]). ,

interests are represented by a party to the action, and possibly coparties to a prior action" (*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970] [citations omitted]). "[T]o establish 'privity' of the kind required for the application of res judicata, the party raising [res judicata] must demonstrate a connection between the party to be precluded and a party to the prior action 'such that the interests of the nonparty can be said to have been represented in the prior proceeding'" (*Farren v Lisogorsky*, 87 AD3d 713, 714 [2d Dept 2011], quoting *Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]). For example, the sole owner of a corporation who executes a guaranty on the corporation's debt may be deemed in privity with the corporation and therefore be bound by a judgment on the debt (*see Shire Realty Corp. v Schorr*, 55 AD2d 356 [2d Dept 1977]; *Provident Bank v Tropp*, 43 Misc 3d 1204[A], 2014 NY Slip Op 50488[U] [Sup Ct, Kings County 2014]).

In this matter, there is no allegation that defendants, who each own a one-seventh interest and who identify themselves as "passive investors" in AVM, had any managerial powers in AVM or were in any way involved, much less in control of, the New York County litigation. Moreover, because the summary judgment motion was granted on default, it cannot be argued that defendants' interests as guarantors of the subject October 4, 2009 loan were represented in the prior proceeding. Under the circumstances, the court does not find that defendants were "in privity" with AVM for purposes of applying res judicata effect to the New York County judgment and precluding defendants from contesting whether the full balance of the October 4, 2009 loan is due and owing.

Turning to the December 22, 2010 check for $300,000.00 presented by defendants, plaintiff claims that this check from AVM represented repayment of the August 24, 2010 loan in the amount of $300,000.00 rather than a partial payment of the October 4, 2009 loan as argued by defendants.** However, the court finds that an issue of fact exists as to the purpose of the December 22, 2010 check (which bears the equivocal notation "interim loan proceeds"), and how the proceeds were to be applied to AVM's indebtedness. It is not clear who drafted the check, although defendants have identified Richard Harris as the chief executive officer and managing member of AVM, who was vested with the authority to establish the overall business policy of AVM and was responsible for its day-to-day management. At the very least, defendants should be able to conduct discovery to determine the identity of the drafter of the check and whether the drafter intended the proceeds to be applied fully or partially toward repayment of the October 4, 2009 loan or toward some other obligation.

Plaintiff states that on August 25, 2010, he issued a $300,000.00 check to AVM which represented both the final advance of $100,000.00 under the October 4, 2009 loan and a $200,000.00 advance under the August 24, 2010 loan. Plaintiff further asserts that the December 22, 2010 check represented repayment of the August 24, 2010 loan. However,

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** In his reply memorandum, plaintiff argues that defendants waived any defense based on payment by failing to raise it in their answer. However, defenses waived under CPLR 3211 (e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025 (b) (*see Deutsche Bank Trust Co. Americas v Cox*, 110 AD3d 760, 762 [2d Dept 2013]).

according to the payment history submitted with plaintiff's reply papers, when the December 22, 2010 check was negotiated, plaintiff had only advanced the amount of $200,000.00 under the August 24, 2010 loan. Thus, accepting plaintiff's argument that the December 22, 2010 check was intended to repay the August 24, 2010 loan, there is a question presented as to why AVM overpaid plaintiff in the amount of $100,000.00. This discrepancy alone raises an issue of fact as to whether the December 22, 2010 check was intended as a partial payment under the October 4, 2009 loan.

As a result, plaintiff's motion for partial summary judgment is denied without prejudice.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT