

Valiotis v Bekas

2014 NY Slip Op 33687(U)

June 3, 2014

Supreme Court, Queens County

Docket Number: 23426 2010

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ORIGINAL

EFSTATHIOS VALIOTIS,
Plaintiff,

Index
No. 23426 2010

- against -

Motion
Date January 7, 2014

DEMETRIOS BEKAS, et al.,
Defendants.

Motion
Cal. Nos. 198-199

DEMETRIOS BEKAS, etc.,
Third-Party Plaintiffs,

Motion
Seq. Nos. 6-7

-against-

EFSTATHIOS VALIOTIS, et al.,
Third-Party Defendants.

2014 JUN -5 PM 2:45

QUEENS COUNTY CLERK
FILED

The following numbered papers read on this motion by third-party defendant Michael Papagianopoulos s/h/a Michael Papagiannopoulos pursuant to CPLR 3211 (a) (5) and (7) to dismiss the third-party complaint insofar as asserted against him, to award sanctions to him pursuant to 22 NYCRR 130-1.1; this motion by plaintiff Efstathios Valiotis, and third-party defendants Stamatiki Valiotis, Rivercity LLC (Rivercity) and Top Cove Associates, Inc. (Top Cove) pursuant to CPLR 3211 (a) (1), (3), (5) and (7) to dismiss the third-party complaint insofar as asserted against them, or in the alternative, pursuant to CPLR 603 to sever the third-party claims; and this cross motion by defendant/third-party plaintiff Demetrios Bekas, who is self represented, pursuant to CPLR 3104 for leave to appoint a referee to supervise discovery, including depositions, and to set dates for discovery, a compliance conference, the filing of the note of issue, and trial.

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Notice of Cross Motion - Affirmation - Exhibits.....	10-13
Answering Affirmation - Exhibits.....	14-18
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Upon the foregoing papers it is ordered that the motions with sequence nos. 6 and 7 on the motion calendar for January 7, 2014, and the cross motion by third-party plaintiff Bekas, are determined together as follows:

In the third-party complaint, third-party plaintiff Bekas asserts causes of action against third-party defendant Efstathios Valiotis¹ for fraud and breach of fiduciary duties, misappropriation of certain of Bekas' assets due by undue influence, promissory estoppel, and prima facie tort, and a derivative claim, causes of action against Efstathios and third-party defendant Rivercity for unjust enrichment, rescission, an accounting, impressment of a constructive trust and declaratory relief, a cause of action against third-party defendant Papagianopoulos for alleged aiding and abetting Efstathios in the commission of fraud and breach of fiduciary duties owed to Bekas, and a cause of action against third-party defendant Stamatiki Valiotis for a constructive trust and injunctive relief. Bekas alleges that Efstathios Valiotis exploited their fiduciary relationship, used undue influence over him, and made various misrepresentations to induce him to enter into a "master plan" devised by Efstathios purportedly to cope with Bekas' pressing debts. It is alleged that Efstathios Valiotis, in fact, intended to deceive Bekas and by means of the master plan, obtain Bekas' assets and foist Efstathios' own debts onto Bekas. Efstathios Valiotis allegedly fraudulently induced Bekas to execute an affidavit for judgment by confession and transfer stock in Top Cove to Efstathios or Rivercity (Efstathios' company), in accordance with the master plan. Third-party plaintiff Bekas also alleges that third-party defendant Papagianopoulos prepared an affidavit for judgment by confession for Bekas' signature, and recorded a fraudulent

1. To the extent defendant Bekas asserts claims against plaintiff Efstathios Valiotis, such claims are in the nature of counterclaims insofar as impleader under CPLR 1007 is limited to those situations where a person not a party to an action may be liable to the defendant for all or part of the plaintiff's claim against him or her (*see Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880 [2d Dept 2011]). For the purpose of these motions, the court shall deem the claims asserted by Bekas against Efstathios Valiotis in the third-party complaint to be counterclaims asserted by defendant Bekas, and will consider the motion by plaintiff Efstathios Valiotis to dismiss in relation to such counterclaims.

version of it with the County Clerk on June 8, 2004. Third-party plaintiff Bekas further alleges that defendant Papagianopoulos prepared an agreement for the sale of Top Cove stock, and knew, or should have known, Efstathios Valiotis made a material misrepresentation regarding Bekas' shares of stock in Top Cove as a means of exercising undue influence over him, and in breach of Efstathios' fiduciary duties to Bekas. Third-party plaintiff Bekas additionally alleges that third-party defendant Stamatiki Valiotis, the wife of Efstathios Valiotis, holds title to the real property known as 16-48 201st Street, Bayside, New York (the Bayside property), in trust for defendant Vaia Bekas (Demetrios Bekas' wife), and that Bekas and Vaia provided the funds for the down payment on the purchase price. Bekas also alleges that Efstathios Valiotis unlawfully misappropriated for his own benefit, a business opportunity involving "Steel Stud," which belonged to Top Cove.

In lieu of serving an answer to the third-party complaint, third-party defendant Papagianopoulos moves pursuant to CPLR 3211 (a) (5) and (7) to dismiss the third-party complaint insofar as asserted against him based upon the doctrine of collateral estoppel and failure to state a cause of action. Plaintiff Efstathios Valiotis,² and third-party defendants Stamatiki Valiotis, Rivercity and Top Cove also move pursuant to CPLR 3211 (a) (1), (3), (5) and (7) to dismiss the third-party complaint insofar as asserted against them based upon a defense founded upon documentary evidence, the doctrines of *res judicata*, collateral estoppel and unclean hands, lack of capacity to sue derivatively, lack of standing and failure to state a cause of action.

Third-party plaintiff Bekas asserts that the motion by third-party defendant Papagianopoulos to dismiss the third-party complaint is untimely, and therefore should not be entertained. Third-party plaintiff Bekas offers a copy of an affidavit of service of a licensed process server dated December 3, 2013, indicating service of a copy of the third-party summons and complaint upon one "Delialah Doe, Secretary/Administrative Assistant" at 31-10 37th Avenue, Long Island City, New York on November 22, 2013. The affidavit of service, however, does not indicate that a subsequent mailing of a copy of the summons was made (CPLR 308 [2]). To complete service upon third-party defendant Papagianopoulos, third-party plaintiff Bekas was required to effectuate the two-step procedure set forth in CPLR 308 (2), by delivering and mailing the copy of the summons within 20 days of each other (*see Zaretski v Tutunjian*, 133 AD2d 928 [3d Dept 1987]). Thus, third-party plaintiff Bekas has failed to demonstrate completion of service of process in relation to third-party defendant Papagianopoulos, triggering the running of the statutory time period for the making of a motion in relation to the third-party complaint (*see* CPLR 320). As a consequence, third-party plaintiff has failed to show the motion by third-party defendant Papagianopoulos is untimely made.

2. See n 1.

A motion to dismiss a complaint pursuant to CPLR 3211 (a)(1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Long v Allen AME Transp. Corp.*, 43 AD3d 1114 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005])” (*Delacruz v 236-1 Development Associates (Green), LP*, 48 AD3d 614 [2d Dept 2008]). A motion pursuant to CPLR 3211 (a) (5) may be appropriately granted if the cause of action against which a party moves “may not be maintained because of . . . collateral estoppel . . . [or] res judicata” (CPLR 3211 [a] [5]).

Pursuant to the doctrine of res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties, or those in privity, on the same cause of action (see *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; *Farren v Lisogorsky*, 87 AD3d 713 [2d Dept 2011]; *Matter of Field Home–Holy Comforter v De Buono*, 238 AD2d 589 [2d Dept 1997]).

It is well settled that the doctrine of collateral estoppel precludes a party from relitigating an issue which was previously decided against him or her in a proceeding in which he or she had a fair opportunity to fully litigate the issue (see *Kaufman v Lilly & Co.*, 65 NY2d 449 [1985]). The party seeking to invoke the doctrine must show that the identical issue was necessarily decided in the prior action and be decisive of the present action (see *Buechel v Bain*, 97 NY2d 295, 304 [2001], cert denied 535 US 1096 [2002]; *Capellupo v Nassau Health Care Corp.*, 97 AD3d 619 [2d Dept 2012]; *Laing v Cantor*, 1 AD3d 406 [2d Dept 2003]).

The first, second, third, fourth, fifth, and sixth causes of action asserted in the third-party complaint are predicated on the claim of third-party plaintiff Bekas that the confession of judgment dated May 27, 2004 and the sale of stock agreement dated July 29, 2004 are illegitimate, and the products of fraud or breach of fiduciary duty.

Plaintiff Efstathios Valiotis, and third-party defendants Rivercity, Top Cove and Papagianopoulos have demonstrated that the issue of whether the affidavit for judgment of confession and the transfer of Top Cove stock were the product of fraud committed by Efstathios or the result of Efstathios’ having breached any fiduciary duty owing to Bekas, was litigated in the prior actions entitled *Bekas v Valiotis*, (Supreme Court, Queens County, Index No. 9318/2010) and *Zelouf Intl. Corp. v Rivercity LLC* (Queens County, Supreme Court, Index No. 18790/2010).

In the *Bekas* action (Index No. 9318/2010), Bekas asserted claims against Efstathios Valiotis, Rivercity and Top Cove based upon breach of fiduciary duty, breach of implied

covenants of good faith and fair dealing, undue influence, intentional infliction of emotional distress, and tortious interference with prospective business relations. Bekas alleged that Efstathios Valiotis had exploited their fiduciary relationship, used undue influence over him, and made various misrepresentations to induce him to execute the affidavit for judgment by confession and transfer the Top Cove stock to Efstathios. Efstathios Valiotis, Rivercity and Top Cove moved for summary judgment, dismissing the complaint asserted against them, and Bekas cross moved to join Michael Papagianopoulos and Stamatiki Valiotis as new party defendants. By order of the Hon. Marguerite A. Grays, dated March 4, 2013, the motion by the defendants was granted and the cross motion by Bekas was denied. The court ruled that the issue of whether Efstathios Valiotis had committed fraud in inducing Bekas to execute the affidavit for judgment by confession and transfer the Top Cove stock had been previously litigated, in relation to cross claims asserted against Efstathios by Bekas for fraud in the inducement, undue influence, duress, unconscionability and breach of fiduciary duty in connection with Bekas's execution of the affidavit for confession of judgment and transfer of Top Cove stock in an action entitled *Zelouf Intl. Corp. v Rivercity LLC* (Queens County, Supreme Court, index No. 18790/2010), and had been determined against Bekas. The court determined, therefore, the defendants made a prima facie showing (by means of the doctrine of collateral estoppel) that the affidavit for judgment by confession and transfer of Top Cove stock were not the product of fraud committed by them, or the result of a breach of a fiduciary duty owed by Efstathios Valiotis to Bekas. The court also determined that Bekas, in opposition to the summary judgment motion, failed to raise a triable issue of fact, or establish a lack of a full and fair opportunity to litigate the issues related to his cross claims against Efstathios Valiotis in *Zelouf*.

In the *Zelouf* action (Index No. 18790/2010), the motion by Efstathios Valiotis, Rivercity and Top Cove for summary judgment dismissing the complaint and the cross claims asserted by Bekas against them was granted by order of Hon. Augustus C. Agate, dated July 3, 2012. The court determined Bekas was judicially estopped from claiming that he was fraudulently induced to sign the affidavit for judgment by confession and transfer Top Cove stock to Rivercity, having taken the position, in an earlier action, that Efstathios Valiotis paid fair consideration for the Top Cove stock. In addition, the court determined Efstathios Valiotis made a prima facie showing that he had committed no fraud in relation to the transfer of shares of Top Cove stock to him or Rivercity, and Bekas failed to submit evidence sufficient to raise a genuine triable issue of fact.

By virtue of the order of the Hon. Marguerite A. Grays dated March 4, 2013 in the *Bekas* action and the order of the Hon. Augustus C. Agate dated July 3, 2012 in the *Zelouf* action, the affidavit for judgment of confession and the transfer of Top Cove stock have been determined not to be the product of fraud or the result of breach of any fiduciary duty owing to Bekas. Third-party plaintiff Bekas has failed to show such determinations were gratuitous

or not material in the *Bekas* or *Zelouf* actions, or that he did not have a full and fair opportunity in such actions to litigate the issue of the validity of the affidavit for judgment of confession or the Top Cove stock transfer. Third-party plaintiff *Bekas* therefore is precluded from asserting herein that a fraud existed in relation to the affidavit for confession of judgment and the transfer of Top Cove stock, or that the affidavit and stock transfer were the result of an undue influence or breach of any fiduciary duty owed to him by Efstathios Valiotis.³

For a plaintiff to plead a cause of action for aiding and abetting fraud under New York law, a plaintiff must allege (1) the existence of a fraud; (2) the defendant's actual knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission (*see Lenczycki v Shearson Lehman Hutton, Inc.*, 238 AD2d 248 [1st Dept 1997]; *Franco v English*, 210 AD2d 630, 633 [3d Dept 1994]; *see also Lerner v Fleet Bank, N.A.*, 459 F3d 273 [2d Cir NY 2006]). Because third-party plaintiff *Bekas* may not assert the affidavit for confession of judgment and the transfer of Top Cove stock were products of fraud or undue influence, third-party plaintiff *Bekas* cannot state a viable cause of action for aiding and abetting fraud or breach of fiduciary duty against third-party defendant *Papagianopoulos*.

To the extent third-party plaintiff *Bekas* seeks damages pursuant to Business Corporation Law §§ 626 [b] and 720, the third-party complaint fails to set forth with particularity any efforts by *Bekas* to secure the initiation of an action for damages by the board of directors of third-party defendant Top Cove, or the reason for not making such an effort (*see Business Corporation Law* §§ 626 [c]; *Walsh v Wwebnet, Inc.*, 116 AD3d 845 [2d Dept 2014]). Moreover, because third-party plaintiff *Bekas* makes no allegation that he presently has an ownership interest in shares of stock in third-party defendant Top Cove, he cannot maintain any claims in a shareholder's derivative capacity (*see Business Corporation Law* §§ 626[b], 720; *see generally Independent Inv. Protective League v Time, Inc.*, 50 NY2d 259, 263 [1980]; *Pursnani v Stylish Move Sportswear, Inc.*, 92 AD3d 663, 664-665 [2d Dept 2012]).

The requisite elements of a cause of action sounding in prima facie tort are: "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]; *see Curiano v Suozzi*, 63 NY2d 113,

3. It is noted that the decision relied upon by *Bekas* (*Bekas v Valiotis*, 90 AD3d 687 [2011]) was a reversal of Hon. Grays' granting of defendants' motion to dismiss. The basis for collateral estoppel at this point is Hon. Grays' subsequent order which granted defendants' summary judgment dismissing the complaint.

117–118 [1984]). “To make out a claim sounding in prima facie tort, ‘the plaintiff [] [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]’ (*R.I. Is. House, LLC v North Town Phase MICICH Houses, Inc.*, 51 AD3d 890, 896 [2d Dept 2008])” (*Epifani v Johnson*, 65 AD3d 224, [2d Dept 2009]). Defendant Bekas has failed to allege that the actions of plaintiff Efstathios Valiotis were motivated solely by disinterested malevolence (*see id.*; *see also Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]). Nor has he alleged special damages (*see Freihof v Hearst Corp.*, 65 NY2d at 143).

To the extent third-party plaintiff Bekas asserts a cause of action to impress a constructive trust on Bayside property and for injunctive relief, the elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119 [1976]). Third-party plaintiff Bekas alleges that he and defendant Vaia Bekas provided the down payment towards the purchase price of the Bayside property, in reliance upon an alleged promise of third-party defendant Stamatiki Valiotis that Stamatiki would hold nominal title to the premises in trust for Vaia, and convey the property to Vaia upon Vaia’s request. Hence, by third-party plaintiff Bekas’s own allegations, it was never intended that the title to the Bayside property was to be held by third-party defendant Stamatiki Valiotis for the benefit of Demetrios Bekas, but rather for the benefit of defendant Vaia Bekas. Under such circumstances, third-party plaintiff Bekas has failed to state a cause of action against third-party defendant Stamatiki Valiotis for a constructive trust.

To the extent defendant Bekas cross moves for leave to the appoint a referee to supervise disclosure pursuant to CPLR 3104, the court lacks the authority to appoint a private attorney to serve as referee to oversee discovery and to be compensated by the parties without their consent (CPLR 3104[b]; *Csanko v County of Westchester*, 273 AD2d 434 [2d Dept 2000]), and thus can be accomplished only when the parties so stipulate. Defendant Bekas has failed to demonstrate the parties have consented to the appointment of a private attorney to serve as referee. To the extent defendant Bekas seeks the appointment of a Court Attorney Referee pursuant to CPLR 3104(a), he has failed to show he served discovery demands upon plaintiff Efstathios Valiotis *in this action*, or a sufficient basis for the appointment (*cf. e.g. National Dairy Prods. Corp. v Lawrence Am. Field Warehousing Corp.*, 23 AD2d 650 [1st Dept 1965]).

Accordingly, the motion by third-party defendant Michael Papagianopoulos is granted to the extent of dismissing the third-party complaint insofar as asserted against him. That branch of the motion for sanctions is denied. The motion by plaintiff Efstathios Valiotis and third-party defendants Stamatiki Valiotis, Rivercity and Top Cove to dismiss the causes of action asserted against them in the third-party complaint is granted.

The cross motion by defendant Demetrios Bekas for leave to appoint a referee is denied.

Dated: June 3, 2014



J.S.C.

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