

Cortazar v Tomasino
2014 NY Slip Op 34069(U)
September 30, 2014
Supreme Court, Queens County
Docket Number: Index No. 701692/14
Judge: Leonard Livote
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE _LEONARD LIVOTE, ASCJ IA Part _33_

James Cortazar individually and
derivatively on behalf of Jackson
Bounty, LLC, and Cojam Realty, Inc.
Plaintiff,

-- against --

Vincent Tomasino, Jr., George Leckler,
Brian Scalcione, Vincent Cortazar,
Dongsung Lim, Jackson Bounty LLC,
Cojam Realty Inc., 27-51 Jackson Ave
Corp., 27-51 Jackson Avenue Holding,
Inc., Goo Young Inc., A-Plus Construction
Corporation; and Manhasset Properties, Inc.
Defendants.

Index No: 701692/14

Motion Date: 05/02/14

Seq. No: 2

FILED

OCT -9 2014

COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion by plaintiff for a preliminary injunction and a cross motion by defendants Vincent Tomasino, Jr. and Jackson Bounty, LLC (Jackson Bounty) to reinstate the cross motion made returnable on April 24, 2014, and upon reinstatement, to dismiss the causes of action insofar as asserted against them by plaintiff pursuant to CPLR 3211(a)(1)(5) and (7) on the ground they are barred by the doctrines of collateral estoppel and res judicata, a defense exists founded on documentary evidence, and failure to state a cause of action, and for an award of sanctions pursuant to 22 NYCRR 130-1.1, or in the alternative, to transfer the matter to the Hon. David Elliot, J.S.C. pursuant to CPLR 2217 and 2221; this cross motion by defendants George Leckler and Brian Scalcione to transfer this matter to the Hon. David Elliot, J.S.C. pursuant to CPLR 2217 and 2221, to dismiss the causes of action insofar as asserted against them by plaintiff pursuant to CPLR 3211(a)(1), (5) and (7), and to impose sanctions pursuant to 22 NYCRR 130-1.1.

Papers

Numbered

Order to Show Cause - Affidavits - ExhibitsEF Doc. Nos. 151-185
Notices of Cross Motion - Affidavits - ExhibitsEF Doc. Nos. 14-17,
34-109, 132-34, 186-196
Answering Affidavits - ExhibitsEF Doc. Nos. 198-199,
202-203
Reply AffidavitsEF Doc. Nos. 206-207

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

At the outset, the court notes that the original motion (Motion Sequence No. 1) by plaintiff for a preliminary injunction and the cross motions to dismiss the complaint by defendants Tomasino Jr. and Jackson Bounty and by defendants Leckler and Scalcione were marked off the Centralized Motion Part's calendar when plaintiff's counsel failed to appear. Plaintiff thereafter obtained an order to show cause dated April 24, 2014 (Motion Sequence No. 2) seeking a preliminary injunction, and defendants Tomasino, Jr. and Jackson Bounty, cross moved to reinstate their prior cross motion to dismiss and for dismissal, and defendants Leckler and Scalcione cross moved to dismiss the complaint. The motion by plaintiff for a preliminary injunction was previously decided pursuant to an order dated May 20, 2014, and the court will now proceed to determine the respective cross motions. The court further notes that under these unique circumstances, and solely for the purpose of determining these cross motions, it shall consider the e-filed documents filed with respect to the cross motions, notwithstanding complete working copies of them have not been provided to the court.

Plaintiff commenced the action in his individual capacity and derivatively on behalf of Jackson Bounty and Cojam Realty Inc. (Cojam), alleging that he is a member of Jackson Bounty, and he and defendant Vincent Cortazar are the sole shareholders of Cojam. Cojam is the former owner of the premises located at 27-49 Jackson Avenue, Long Island City, New York (Parcel 1). Plaintiff, in his individual capacity, entered into a written agreement dated October 1, 2009 (the Agreement) with various other persons and entities, which resulted in the formation of the limited liability company, Jackson Bounty.¹ The Agreement provided that defendant Vincent Tomasino Jr. was to be the managing member of Jackson Bounty, with a 60% membership interest, and the "Cortazar Group," identified in the Agreement as plaintiff and defendants Leckler, Scalcione and Vincent Cortazar, would receive a 40% membership interest in the names of the individual group members as agreed to by the Cortazar Group in a separate agreement.² Pursuant to the Agreement, Cojam transferred Parcel 1 to Jackson Bounty. Jackson Bounty also took title to an adjoining property located at 27-51 Jackson Avenue, Long Island City, New York (Parcel 2).

The purpose of Jackson Bounty was to demolish existing structures and develop a condominium with 44 units on the site. The Agreement contemplated that defendant Jackson Bounty would obtain financing and hire architects, etc. and make necessary governmental

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It is unclear if the parties executed an operating agreement for Jackson Bounty.

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The separate agreement was not provided to the court.

filings, and that defendant Tomasino Jr. would pay the fees to obtain the necessary plans and permits to secure requisite construction financing and building permits for the project. The Agreement provided that in the event that permits or financing were not obtained within 24 months, the Cortazar Group and Tomasino Jr. could extend the time in which to obtain the requisite financing, or that the properties would be placed for sale with a sale price in an amount of no less than \$6 million, with the net sale proceeds to be divided as set forth in the Agreement. The Agreement also provided the sale option would be the default option in the event the Cortazar Group and Tomasino Jr. did not mutually agree to extend the period. Defendant Tomasino Jr. executed a contract of sale dated March 7, 2014 as managing member of Jackson Bounty to sell both parcels to 27-51 Jackson Ave LLC, as purchaser.

In the complaint, plaintiff asserts the first, second, and fifth causes of action against defendant Tomasino Jr., seeking rescission of the Agreement and the deed to Parcel 1 into Jackson Bounty, based upon alleged breach of contract, unjust enrichment and breach of the implied covenants of good faith and fair dealing. Plaintiff alleges that defendant Tomasino Jr. breached the Agreement by failing to take any commercially reasonable steps to develop the site, including failing to seek financing, and terminating without justification, the services of an architect. Plaintiff further alleges that defendant Tomasino Jr. did so to frustrate the development and thus, force a sale of the parcels under the terms of the Agreement. According to plaintiff, defendant Tomasino Jr. intended by the forced sale to reap a substantial return on his investment, and for plaintiff to lose a large portion of plaintiff's investment, thereby unjustly enriching defendant Tomasino Jr. at the expense of plaintiff. Plaintiff also asserts a third cause of action for injunctive relief against defendants Tomasino Jr. and Jackson Bounty to enjoin those defendants from transferring or hypothecating the properties. Plaintiff additionally asserts a fourth cause of action against defendant Tomasino Jr. seeking compensatory and punitive damages for breach of fiduciary duty owed to him as a member of Jackson Bounty, alleging that Tomasino Jr. committed corporate waste and mismanagement and engaged in self dealing, by failing to seek financing for the project, and terminating and suing the architect.

The sixth, seventh, eighth, ninth, tenth and eleventh causes of action, for imposition of a constructive trust, conversion, equitable and promissory estoppel, unjust enrichment, restitution, an accounting and monies had and received, are asserted against defendant Vincent Cortazar.³ In the complaint, plaintiff specifically alleges that there are no direct

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Plaintiff alleges that he and defendant Vincent Cortazar, plaintiff's brother, had a fiduciary relationship, whereby plaintiff provided the funds to purchase properties for Cojam, and was the beneficial owner of such properties. Plaintiff also alleges that Vincent Cortazar was included on the deeds for the Cojam properties as a matter of convenience, and Vincent promised not to assert any

claims asserted against Leckler, Scalcione, Dongsung Lim, 27-51 Jackson Ave LLC, 27-51 Jackson Avenue Holdings Inc., Hypothecator Realty Corp., Goo Young, Inc., A-Plus Construction Corp., and Manhasset Properties Inc. but rather alleges those parties are named as defendants to afford him complete relief.

In considering a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]). The criterion is whether the proponent of the pleading has a cause of action, not whether it has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

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]).

"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]). "The doctrine of res judicata operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding" (*Union St. Tower, LLC v Richmond*, 84 AD3d 784, 785" (*Valenti v Clocktower Plaza Properties, Ltd.*, 118 AD3d 776 [2d Dept 2014]).

ownership claim to Parcel 1, Cojam or Jackson Bounty, but rather to hold title to them for the benefit of the wife and children of James Cortazar. Plaintiff further alleges that at various times, defendant Vincent Cortazar has asserted ownership claims to Cojam and Jackson Bounty. Plaintiff seeks to impose a constructive trust with respect to the shares of stock of Cojam held by defendant Vincent Tomasino Jr. and the 10% membership interest held by Vincent in Jackson Bounty.

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]).

With respect to that branch of the cross motion by defendants Tomasino Jr. and Jackson Bounty to dismiss the complaint insofar as asserted against them on the ground that the causes of action asserted against them are barred by the doctrines of collateral estoppel and res judicata, plaintiff previously commenced an action entitled *Cortazar v Tomasino* (Supreme Court, Queens County, Index No. 700375/2013) on February 4, 2013 in his individual capacity and derivatively on behalf of Jackson Bounty and Cojam against Tomasino Jr. asserting causes of action for breach of the Agreement, breach of fiduciary duties related to a mortgage on Parcel 2, and the collection of rents from Parcel 1, judicial dissolution of Jackson Bounty, and seeking damages for breach of contract and breach of fiduciary duties, access to the books and records of Jackson Bounty, an accounting, injunctive relief, and rescission of the Agreement and “return of title” to Parcel 1 to Cojam. Plaintiff alleged therein, among other things, that defendant Tomasino Jr. had diverted without authority, or misappropriated, rents from Parcel 1 for his own personal benefit and in violation of the Agreement, and usurped plaintiff’s right to collect rents and maintain Parcel 1, thereby breaching the Agreement. By order dated November 8, 2013 of the Hon. David Elliot, the complaint was dismissed. The court determined, among other things, that plaintiff failed to join Vincent Cortazar, George Leckler and Brian Scalcione as necessary party defendants and could not seek relief on behalf of the “Cortazar Group,” and James Cortazar did not have the right under the Agreement to collect rents and maintain Parcel 1. The court also determined that plaintiff had improperly intermingled his individual and derivative claims relative to the cause of action for breach of fiduciary duty, and failed to state a cause of action for breach of fiduciary duty owed by Tomasino Jr. either to James Cortazar or Jackson Bounty. The court further determined the cause of action by plaintiff derivatively on behalf of Cojam for rescission of the Agreement and to recover possession of Parcel 1 based upon the alleged lack of authority to transfer the property and lack of consideration was refuted by documentary evidence.

A defendant seeking dismissal of claims asserted against him or her based upon the doctrine of res judicata has the burden of demonstrating an identity of issues in the present and prior proceedings warranting application of the doctrine of res judicata (*see Agudist*

Council of Greater New York v Imperial Sales Co., 158 AD2d 683 [2d Dept 1990]; *Seabrook v City of New York*, 306 AD2d 68 [1st Dept 2003]).

A dismissal of a claim on the ground of a defense based upon documentary evidence is a determination on the merits for res judicata purposes (*see Law Offices of D'Amico & Associates, PLLC v D'Elia*, 44 Misc 3d 137[A] [NY Sup App Term 2014]). To the extent that plaintiff seeks rescission herein based upon defendant Tomasino Jr.'s alleged failure to pursue financing for the project, plaintiff asserted in the prior action (Index No. 700375/2013) that Tomasino Jr. had "intentionally or negligently failed to execute the agreed upon business purpose of Jackson Bounty LLC as part of a scheme to unjustly profit from the sale of Parcel I and Parcel II," and "[a]s a result of the aforesaid [Tomasino Jr.] breached his fiduciary duties to both the Members and [Jackson Bounty]" (Complaint in Index No. 700375/2013 at ¶ 52[e]). Plaintiff's present claims that defendant Tomasino Jr. failed to use commercially reasonable efforts to obtain financing for development of the parcels, terminated the services of the architect and failed to deal fairly or in good faith with plaintiff, are encompassed within such prior allegation. Plaintiff was aware of the firing of the architect prior to the dismissal of the complaint in the prior action (Index No. 700375/2013), and of the impact that firing had on the progress of the development of the site, including the ability of Jackson Bounty to obtain financing. Thus, the dismissal of the rescission claim in the prior action serves to preclude plaintiff from asserting the first, second and fourth causes of action for rescission herein against defendant Tomasino Jr.

A dismissal of a claim on the ground of failure to state a cause of action is not a determination on the merits for res judicata purposes (*see Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1005 [2d Dept 2012]). Consequently, the doctrine of res judicata does not bar the current cause of action asserted by plaintiff against defendant Tomasino Jr. for breach of fiduciary duty. Nevertheless, plaintiff's allegations are insufficient to state a cause of action for breach of fiduciary duty against defendant Tomasino Jr. The fourth cause of action for breach of fiduciary duty contains allegations that improperly confuse individual claims on behalf of James Cortazar with derivative claims brought on behalf of Jackson Bounty (*see Mizrahi v Cohen*, 104 AD3d 917, 919 [2d Dept 2013]). In addition, plaintiff individually seeks an award of damages and no award for Jackson Bounty.

The third cause of action for a permanent injunction enjoining defendants Tomasino Jr. and Jackson Bounty is predicated upon the same allegations which form the basis for the rescission claims, which claims are barred by the doctrine of res judicata. The claim fails to state a cause of action because the Agreement allows for the sale of the property by Jackson Bounty as a default option in the event the parties cannot not reach an agreement concerning an extension of the time to obtain financing for the development of the parcels.

That branch of the cross motion by defendants Tomasino, Jr. and Jackson Bounty to reinstate the cross motion made returnable on April 24, 2014 is granted, and upon reinstatement, to dismiss the causes of action insofar as asserted against them is granted to the extent of granting the cross motion by defendants Tomasino Jr. and Jackson Bounty to dismiss the complaint insofar as asserted against them. That branch of the cross motion for an award of sanctions pursuant to 22 NYCRR 130-1.1 to the extent of directing plaintiff to pay actual expenses incurred, including reasonable attorneys' fees is denied.

Because the claims asserted in the complaint against defendants Tomasino Jr. and Jackson Bounty have been dismissed herein, the only claims left are those against defendant Vincent Cortazar. To the degree plaintiff seeks money damages with respect to the seventh, eighth, ninth, tenth and eleventh causes of action against defendant Vincent Cortazar, he has failed to state any claim for such damages against defendants Leckler and Scalcione. Insofar as plaintiff seeks to impose a constructive trust upon the membership interest of Vincent Cortazar in Jackson Bounty, and restitution and an accounting from Vincent Cortazar, plaintiff seeks no concomitant equitable relief against defendants Leckler and Scalcione. Plaintiff therefore has failed to state a cause of action against defendants Leckler and Scalcione to impose a constructive trust, or for restitution or an accounting.

That branch of the cross motion by defendants Leckler and Scalcione to dismiss the complaint insofar as asserted against them is granted. That branch of the cross motion for an award of sanctions pursuant to 22 NYCRR 130-1.1 to the extent of directing plaintiff to pay actual expenses incurred, including reasonable attorneys' fees is denied.

Dated: 9/30/2014



J.S.C.