

Abdulayev v Yadgarov
2015 NY Slip Op 30033(U)
January 15, 2015
Supreme Court, Queens County
Docket Number: 8242/13
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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ABDULATIF ABDULAYEV,
Plaintiff(s),

Index No.:8242/13
Motion Date:9/11/14
Motion Cal. No.:3
Motion Seq. No: 8

- against -

MARK YADGAROV, PYOTR YADGAROV, NATHAN
PINKHASOV, AVANT GARDE REALTY, INC., TONI
ANN ZITO, AMERICAN CAPITAL HOLDINGS CORP.
and JP MORGAN CHASE BANK, NA,
Defendant(s).

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The following papers numbered 1 - 9 read on this motion by the defendants Mark Yadgarov, Pyotr Yadgarov, Nathan Pinkhasov, Toni Ann Zito and American Capital Holdings Corp. for an order granting summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Service.....	8 - 9

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

Plaintiff in this action seeks to compel the determination of claims to certain real property known as 105-48 63rd Avenue, Forest Hills, New York (the subject property). The complaint contains four causes of action: pursuant to Article 15 of the New York Real Property Law to compel the determination of claims to the subject property; pursuant to Real Property Law §265-a to void the contract and seeking recovery of compensatory and punitive damages; for attorney negligence against defendant Nathan Pinkhasov; and seeking recovery of compensatory and punitive damages and for negligence and misconduct against Toni Ann Zito and American Capital Holdings Corp.

This is the second lawsuit instituted by plaintiff concerning the property which he voluntarily sold through a short sale to Mark and Pyotr Yadgarov ("the Yadgarovs"), which plaintiff undertook to avoid a judicial auction after a judgment of foreclosure. The first

action which plaintiff commenced wherein he sued just the Yadgarovs based upon identical allegations in this action, to wit; that he was duped into selling his property and only signed all the documents at the closing because he thought he was signing a loan modification agreement, was dismissed pursuant to CPLR §3211(a)(1) and (a)(7) by the court on November 1, 2011 (Gavrin, J.). On appeal, the Appellate Division, Second Department ("Appellate Division") affirmed the court's order finding that the dismissal was proper pursuant to CPLR §3211(a)(7) because "contrary to plaintiff's contention, the allegations in the complaint were insufficient to state a cause of action to void the subject contract on the ground that plaintiff lacked a full understanding of the English language, inasmuch as the complaint failed to adequately plead the 'reasonable effort[s]' he undertook to understand the documents he executed" (see *Abdulayev v Yadgarov, et al.*, 105 AD3d 877 [2013]).

In an order dated November 21, 2013, this court granted plaintiff's request for a preliminary injunction enjoining and restraining defendants the Yadgarovs from enforcing a judgment of possession obtained from Queens Civil Court or from otherwise attempting to displace, evict or remove the plaintiff from the subject property. In another order dated, November 21, 2013, this court denied plaintiff's motion seeking a default judgment against defendants the Yadgarovs, Toni Ann Zito and American Capital Holdings Corp. In that same order, this court granted defendants Yadgarovs', Toni Ann Zito's and American Capital Holdings Corp.'s cross-motion for an order extending their time to answer their complaint *nunc pro tunc*, vacating any default of the defendants in answering the complaint, compelling the plaintiff to accept the defendants' answer and denied that portion of the cross-motion dismissing plaintiff's complaint. On May 8, 2014, this court issued an order denying defendants the Yadgarovs, Toni Ann Zito and American Capital Holdings Corp. motion to renew and/or reargue the court's November 21, 2013 order.

Defendants Yadgarov, Toni Ann Zito and American Capital Holdings Corp. now move, pursuant to CPLR §3212, for summary judgment and dismissal of the complaint against them. On a motion for summary judgment, parties must lay bare their proofs in non-hearsay form, and the movant must establish their *prima facie* entitlement to judgment as a matter of law (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). The court's function, when presented with a summary judgment motion, is not to determine credibility or engage in issue determination, but rather to determine whether there are material issues of fact for the court to determine (see, *Quinn v. Krumland*, 179 A.D.2d 448 [1st Dept. 1992]). Failure to make such a showing requires denial of the motion.

The moving defendants assert that summary judgment is warranted on the grounds that this action is barred on the ground of *res judicata*. Specifically, the movants asserts that, as plaintiff's causes of action stemming from the same transaction were dismissed by Justice Gavrin, and this dismissal was affirmed by the Appellate Division, plaintiff is now barred from bringing the instant action.

"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 [2008]; see *Pondview Corp. v Blatt*, 95 AD3d 980, 980 [2012]; *Matter of ADC Contr. & Constr., Inc. v Town of Southampton*, 50 AD3d 1025, 1026 [2008]; see also *Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Union St. Tower, LLC v Richmond*, 84 AD3d 784, 785 [2011]). *Res judicata*, thus, "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 at 785, quoting *Luscher v Arrua*, 21 AD3d 1005, 1006-1007 [2005][internal quotation marks omitted]).

However, New York courts have ruled that, where a complaint is dismissed for a plaintiff's failure to state a cause of action, *res judicata* does not apply (see, *Rechais v. McGivens*, 119 AD3d 666 [2d Dept. 2014]; *Pereira v. St. Joseph's Cemetery*, 78 AD3d 1141 [2d Dept. 2010]). A review of the orders, of Justice Gavrin and of the Appellate Division, in the previous action reveals that plaintiff's complaint was dismissed, pursuant to CPLR §3211(a)(7), based on plaintiff's failure to state a cause of action. Thus, the doctrine of *res judicata* does not bar plaintiff from maintaining this action. Accordingly, that portion of the instant motion which seeks summary judgment and dismissal of the complaint due to *res judicata* is denied.

The moving defendants also assert that summary judgment is warranted, pursuant to CPLR §§3212, 3211(a)(7) due to plaintiff's failure to state a cause of action. It is well-settled that a motion to dismiss made pursuant to CPLR §3211(a)(7), can only be granted if, from the pleadings' four corners, factual allegations are not discerned which manifest any cause of action cognizable at law. In furtherance of this task, the court liberally construes the complaint, accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accords the plaintiff the benefit of every possible favorable inference (See, *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]). As it is noted that plaintiff's third cause

of action does not make any allegations against the moving defendants, this court will now consider the instant motion regarding dismissal of plaintiff's first, second and fourth causes of action.

First Cause of Action

In plaintiff's first cause of action, he asserts that he is entitled to a declaratory judgment against the defendants Yadgarov based on their fraudulent misrepresentations. Plaintiff asserts that, because he does not speak or read English, he relied on these defendants to tell him the true nature of the transaction.

In order to prevail on a claim for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendants, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 646 N.Y.S.2d 76 [1996;]).

A review of the instant complaint reveals that plaintiff has failed to allege any facts which would have made his reliance on the representations of the defendants Yadgarov reasonable. It is undisputed that plaintiff was represented by counsel during this transaction, that his attorney spoke to him in his native language, Russian, and that he signed the documents required to transfer the subject property to the defendants Yadgarov. New York courts have ruled that a party is obliged to read a contract before signing it and the failure to do so will not permit avoidance of the obligations contained therein on the grounds that the signor was unaware of the contractual terms (*see, Gillman v. Chase Manhattan Bank, N.A.*, 73 NY2d 1 [1988]; *Augustine v. Bank United FSB*, 75 AD3d 596 [2d Dept. 2010]; *Martino v. Kashak*, 208 Ad2d 698 [2d Dept. 1994];). Thus, the fact that plaintiff asserts that he signed the documents without reading or understanding them did not make it reasonable for plaintiff to rely on the alleged oral representations of the defendants Yadgarov (*see, Urstadt Biddle Properties, Inc., supra*). Accordingly, that portion of the instant motion which seeks summary judgment and dismissal of plaintiff's first cause of action is granted.

Second Cause of Action

Plaintiff's second cause of action asserts that the subject contract should be voided due to the defendants Yadgarov's violation of Real Property Law §265-a. Real Property Law §265-a, otherwise known as the "Home Equity Theft Prevention Act" (the "Act"), was enacted to protect homeowners that are in default of

their mortgage from being robbed of their equity in their property. Passed in 2009, it recognized that "the recent rapid escalation of home values throughout urban and rural areas has resulted in significant increase in home equity, which constitutes the greatest financial asset held by many homeowners of this state". The Act was specifically directed to protect what it described as "vulnerable" homeowners from "aggressive equity purchasers who induce homeowners to sell their homes for a small fraction of their fair market value" during "the time period between the default on the mortgage and the scheduled foreclosures sale date" (see RPL §265-a at §1(a)).

However, the remedies of deed rescision and the cancellation of a related mortgage under RPL §265-a are subject to the rights of *bona fide* purchasers or encumbrances for value and are available only to qualifying claimants who sue within two years of the transaction (see RPL §265-a [2][e], [8]; *Washington Mut. Bank v Sholomov*, 20 Misc.3d 773, *supra*). Here, the transaction complained of admittedly occurred on December 20, 2010, and plaintiff filed the instant complaint on April 29, 2013, which is more than two years after the transaction. Accordingly, plaintiff's claim to "void" the contract or for rescission is barred by the statute of limitations, and, thus, that portion of the instant motion which seeks summary judgment and dismissal of plaintiff's second cause of action is granted.

Fourth Cause of Action

In his fourth cause of action, plaintiff alleges that he is entitled to punitive damages against defendants Toni Ann Zito and American Capital Holdings, Corp. for their conspiracy with the defendants Yadgarov to commit fraud on the plaintiff. To establish a claim of civil conspiracy, the plaintiff must "demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Abacus Fed. Sav. Bank v. Lim*, 75 A.D. 3d 472, 474, 905 N.Y.S.2d 585 [1st Dept 2010]).

A review of the instant complaint reveals that plaintiff has not alleged that an agreement existed between defendants Toni Ann Zito and American Capital Holdings, Corp. and the defendants Yadgarov nor has plaintiff asserted any overt act taken in furtherance of this agreement. Thus, plaintiff has failed to state a cause of action against defendants Toni Ann Zito and American Capital Holdings, Corp. Consequently, that portion of the instant motion which seeks summary judgment and dismissal of the complaint against these defendants is granted.

Preliminary Injunction

As previously stated, by order dated November 21, 2013, this court issued a preliminary injunction enjoining and restraining the defendants Yadgarov from enforcing a judgment of possession obtained from Queens Civil Court or from otherwise attempting to displace, evict or remove the plaintiff from the subject property. As the complaint has now been dismissed as against the moving defendants, that portion of the instant motion which seeks vacatur of the preliminary injunction is granted.

Use and Occupancy

The moving defendants also seek an order directing plaintiff to pay use and occupancy at a rate of \$2,500.00 per month from December 20, 2010 to June 30, 2014. By order dated May 6, 2013, Judge Terrence C. O'Connor granted Mark Yadgarov's request that plaintiff in this action pay use and occupancy at a rate of \$2,500.00. Thus, there has already been a ruling on the subject of use and occupancy, this court will not issue a separate order for the same relief. Consequently, that portion of the instant motion which seeks an order granting use and occupancy is denied with leave to renew upon the assigned judge of the New York City Civil Court, Queens County. Accordingly, it is,

ORDERED, that plaintiff's first, second and fourth causes of action are hereby dismissed as against the moving defendants. It is further,

ORDERED, that the preliminary injunction issued on November 21, 2013 is hereby vacated. Finally, it is,

ORDERED, that, as this court has now dismissed plaintiff's complaint as against the defendants Yadgarov, the owners of the subject property, the notice of pendency filed on April 29, 2013 is cancelled. The moving defendants are directed to file a copy of this order with the Queens County Clerk who shall cancel the notice of pendency filed in this action.

Dated: January 15, 2015

JANICE A. TAYLOR, J.S.C.