

Jamal v Weil

2015 NY Slip Op 30269(U)

February 25, 2015

Supreme Court, New York County

Docket Number: 652792/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SAMMY EL JAMAL, Individually and as a member of
AMSTERDAM 181 REALTY, LLC,

Plaintiff,

Index No.652792/2014

-against-

DECISION/ORDER

JAMES A. WEIL, Individually and as a member of
AMSTERDAM 181 REALTY, LLC, ET AL.,
Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1,2,3</u>
Answering Affidavits.....	<u>4,5,6</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>7,8,9</u>

Defendants HSBC Bank USA, National Association, (“HSBC”) and YWA-Amsterdam LLC (“YWA”) have brought the present motion to dismiss the complaint with prejudice against them and for costs and sanctions. The remaining defendants have also brought a motion to transfer the venue of this action to Westchester County and a separate motion to dismiss this action against them. As will be explained more fully below, this action is dismissed as against HSBC and YWA and the venue of this action is transferred to Westchester County.

YWA is the owner of two adjoining parcels of real estate known as 2420 and 2430 Amsterdam Avenue in New York (the “Property”). YWA acquired the Property in May of 2013 from the owner at the time, Amsterdam 181 Realty LLC (“Amsterdam”), for \$18,000,000.

HSBC currently holds, and has held as of June 30, 2014, a consolidated mortgage on the Property in the principal amount of \$14,000,000. The only claim asserted in the complaint against HSBC and YWA is the eleventh cause of action in which plaintiff seeks to rescind the May 2013 conveyance of the Property from Amsterdam to YWA.

Plaintiff brought a previous action in New York County in April 2014, which was before Justice Edmead. In that action, he claimed that he had a one-third membership interest in Amsterdam and that he was entitled to money damages consisting of one-third share of the funds received by Amsterdam from the sale of the Property to YWA. Plaintiff did not seek rescission of the conveyance to YWA in the 2014 action. Justice Edmead granted defendants' motion in that action to transfer venue of the action to Westchester County.

The court finds that plaintiff's rescission claim against YWA is barred as a matter of law by the doctrine of election of remedies as he failed to seek rescission of the transaction in the prior April 2014 New York action that he brought against Amsterdam and the individual defendants. Instead, he only sought money damages in that action, including his share of the proceeds received by Amsterdam from the sale of the Property to YWA. Indeed, it was because of plaintiff's failure to seek any claim for rescission in the 2014 action that led the court to hold, in its August 12, 2014 decision and order, that New York County was not a proper venue of such action, and to thereby transfer the action to Westchester County.

The law is clear that a "defrauded party to a contract may elect to either disaffirm the contract by a prompt rescission or stand on the contract and thereafter maintain an action at law for damages attributable to the fraud." *Big Apple Car v. City of New York*, 204 A.D.2d 109, 110-111 (1st Dept 1994). *See also Assured Guar. Mun. Corp. v. DB Structured Prods., Inc.*, 44

Misc.3d 1206(A) (Sup. Ct. N.Y. Co 2014) (“it is well settled that a party may not simultaneously seek performance and rescission of a contract”). In the present case, plaintiff has elected to bring the 2014 action to recover monetary damages based on Amsterdam’s sale of the Property to YWA. As a result, he has elected his remedy and cannot now bring a separate action for rescission. Moreover, it is not relevant whether plaintiff knew of the HSBC mortgage when he commenced the 2014 action as he knew that the Property had been sold and did not take any action to rescind the sale.

The court also finds that plaintiff’s rescission claim is barred because he has an adequate money damages remedy. The “equitable remedy of rescission ‘is to be invoked only when there is lacking complete and adequate remedy at law and where the *status quo* may be substantially restored.’” *Sokolow, Dunaud, Mercadier & Carreras v. Lacher*, 299 A.D.2d 64, 71 (1st Dept 2002). In the present case, plaintiff already acknowledged he had an adequate remedy at law by electing to bring an action for money damages to recover one third of the amount generated from the sale of the Property to YWA. Moreover, the status quo can no longer be substantially restored in this case as the Property has been sold to YWA, who is a bona fide purchaser, and encumbered by HSBC, who is a bona fide encumbrancer. Moreover, it is not disputed that YWA has made substantial investments in and contractual commitments regarding the Property. Although YWA and HSBC present many other valid arguments as to why the rescission claim must be dismissed with prejudice, the court need not reach these arguments based on the foregoing analysis.

Moreover, there is no basis for plaintiff’s claim that the 2014 action no longer exists as that action was transferred to Westchester County, where it is currently pending. Plaintiff’s

attempt to voluntarily discontinue the 2014 action, without a stipulation or leave of court, before it was transferred was ineffective for two reasons. Initially, it was ineffective as the action was stayed by Justice Edmead at the time that plaintiff attempted to serve a notice discontinuing the action. Second, plaintiff was required to have leave of court to discontinue, which it did not have. Pursuant to CPLR § 3217 (a) (1), a party may discontinue an action without leave of court or a stipulation at any time before a responsive pleading is served. However, a plaintiff's right to discontinue by notice is terminated once a defendant makes a motion to dismiss the complaint. See D. Siegel, Practice Commentaries, C3217:8 (Mckinneys 2005).

This court also finds that the venue of this action should be transferred to Westchester County pursuant to CPLR §§ 510 and 511 on the ground that New York county is not a proper county. As previously discussed, plaintiff previously brought an action against Amsterdam 181 Realty, LLC, James Weil and Leon Silverman (the "Amsterdam defendants") in 2014 challenging the same transaction that he is challenging in the present action-the sale by Amsterdam of the property to YWA. The primary difference between the 2014 action and the present action is plaintiff's addition of YWA and HSBC as defendants and the addition of a cause of action for rescission of the sale of the Property to YWA and plaintiff dropping some of the defendants who were named in the 2014 action. On August 12, 2014, Justice Edmead granted defendants' motion to change venue of plaintiff's prior action from New York County to Westchester County, after analyzing the 10 causes of action plaintiff asserted in that action. The first 10 causes of action in plaintiff's 2014 complaint are identical to the first 10 causes of action in the present complaint. The court found venue for those 10 causes of action was properly in Westchester County based on the residence of all but one of the parties. Based on this court's

dismissal of the eleventh cause of action for rescission with prejudice, the venue of this action must be transferred to Westchester County for the same reasons articulated by Justice Edmead in her eleven page decision, which is annexed to the moving papers of the Amsterdam defendants, including the fact that all of the remaining parties reside in Westchester County and that this action does not affect title to property pursuant to CPLR § 507.

Based on this court's finding that this action must be transferred to Westchester County, the court will not address the motion by the Amsterdam defendants to dismiss the complaint. The request by all defendants for sanctions is denied.

Based on the foregoing, the eleventh cause of action for rescission is dismissed with prejudice, the complaint is dismissed with prejudice as against HSBC and YWA and the motion by the Amsterdam defendants to change venue of this action to Westchester County is granted.

It is further ordered that the venue of this action is changed from this court to the Supreme Court, Westchester County, and the clerk of this court is directed to transfer the papers on file in this action to the clerk of the Supreme Court, County of Westchester, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

Ordered that the proceedings in this matter are stayed until the clerk of the Supreme Court, County of Westchester receives the papers on file in this action.

This constitutes the decision and order of this court.

Dated: 2/25/15

Enter: _____

CGK
J.S.C.

CYNTHIA S. KERN
J.S.C.