

Tomassetti v Falco

2015 NY Slip Op 30947(U)

April 28, 2015

Supreme Court, Kings County

Docket Number: 508599/14

Judge: Martin M. Solomon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Commercial Part 10**

-----X
LORIN TOMASSETTI, et al.

Plaintiff(s) Index no. 508599/14

-against-

DECISION/ORDER

MADELINE B. FALCO, et al.

Defendant(s)

-----X

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to dismiss the action pursuant to CPLR 3211(a)(1), (5) and (7) and CPLR 3024(a)

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Memorandum of Law	4, 5 & 6

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This action is brought by Lorin Tomassetti as a minority owner of four limited liability corporations alleging, inter alia, mismanagement of the LLCs by her aunt, Madeline B. Falco. The four LLCs are identified in the complaint as: 2250 East 69th Street, LLC, (2250) the owner of 2250 E. 69th Street, Brooklyn, NY; 2300 East 69th Street, LLC, (2230) the owner of 2300 E. 69th Street, Brooklyn, NY; Wielka, LLC, the owner of 2350 E. 69th Street, Brooklyn, NY; and Point Development, LLC, (Point) the owner of 2401-2423 E. 69th Street, Brooklyn, NY.

The complaint alleges that plaintiff has a 16% interest (though possible less during some relevant periods) in both 2235 and 2300 and a 25% interest in both Wielka and Point, and that Madeline Falco has approximately a 69% interest in 2235 and 2300, a 75% interest in Wielka and a 25% interest in Point. The remaining 50% interest in Point is held equally by Madeline's sons, Joseph and Salvatore.

The complaint alleges that the property allegedly owned by 2250 and 2300 are used by Falco Supply & Equipment Corp. and Falco Construction Corp. to store equipment and material and that Madeline Falco is the sole or majority owner of both Falco Supply & Equipment Corp. and Falco Construction Corp. (the Falco defendants). The gist of the complaint in regard to these two LLCs is that Madeline Falco as managing member of 2250 and 2300 sets the rent for these properties below fair market rent and has failed to render an account for the LLCs.

The allegations regarding the Wielka property are that it is under the control of Madeline Falco. That the property is under a triple net lease to Mill Basin Health & Racquet Club and that the LLC has failed to make appropriate distributions of the proceeds it receives for rent or provide plaintiff with access to the records of the LLC.

The allegations regarding the Point properties are that they were used to park construction equipment by Falco Supply & Equipment Corp. and Falco Construction Corp. and that leakage from this equipment contaminated the property. A prospective sale of the property in 2014 was cancelled as a result of the contamination and decontamination will result in substantial costs. The allegations in regard to Point are directed to Joseph Falco, as the managing partner of Point, and Madeline, as alleged de facto manager.

It is worth noting that the motion of the accountant defendants to dismiss the seventeenth, eighteenth and nineteenth causes of action was granted by short form order dated March 26, 2015.

Turning to the causes of action that remain, as an initial matter, the first cause of action is for a declaratory judgment declaring void ab initio amendments to the operating agreements of 2250 and 2300, both dated September 8, 2011. These amendments, if they are enforced, substantially circumscribe, if not entirely preclude plaintiff proceeding on the second, third, sixth, seventh, tenth, eleventh, fourteenth and fifteenth causes of action. These amendments expressly provide:

“4.6.3 Each Member understands and acknowledges that the conduct of the Company’s business may involve business dealings and undertakings with Members and their Affiliates. In any of those cases, those dealings and undertakings shall be at arm’s length and on commercially reasonable terms, except however for any agreements, leases and/or rental arrangements entered into, whether formally or informally, and whether in writing or orally, with Falco Construction Corp. or Falco Supply & Equipment Corp., a/k/a Falco Supply Corp., which are owned exclusively, as of the date hereof, by Susan Falco in her capacity as the current Trustee of the Susan Falco Revocable Trust u/a dated June 16, 2009, as amended, and Madeline B. Falco”

On September 11, 2011, Susan Falco (plaintiff’s grandmother and Madeline’s mother) passed away and ownership of all, or substantially all, of Falco Construction Corp. and Falco Supply & Equipment Corp. passed to Madeline B. Falco. Plaintiff asserts that she was coerced into signing the amendments by threats by Madeline B. Falco “to use her power of attorney to disinherit plaintiff from her grandmother’s will”.

In sum, the first cause of action seeks a declaratory judgment voiding the amendments that permit non-arms length transactions between 2250 and 2300 and the Falco defendants. The second, third, sixth, seventh, tenth, eleventh, fourteenth and fifteenth causes of action assert mismanagement by Madeline B. Falco in connection with non-arms length transactions entered into by 2250 and 2300 with the Falco defendants and/or for an accounting. The fourth, fifth,

eighth, ninth, twelfth, thirteenth and twentieth cause of action all concern the alleged pollution of the Point properties and the failure of Madeline and Joseph to prevent it, or, in regard to the twentieth cause of action, the Falco defendants for causing it. The sixteenth cause of action is for an accounting in connection with the Wielka property (the rented property).

The remaining defendants move to dismiss the action asserting that the stipulation discontinuing with prejudice in a prior action (4267/10) brought by plaintiff's mother should be given *res judicata* effect as to the instant action and that the first cause of action fails to state a cause of action to void the amendments in regard to 2250 and 2300.

At the outset of this court's analysis is important to note that neither Wielka or Point were parties to the prior action. Contamination of the properties owned by Point are not among the allegations raised in the prior action. Inadequate distributions from Wielka are not among the allegations raised in the prior action. Thus, to the extent the resolution of the prior action may have resolved issues concerning the management of the LLCs, it could only apply to 2250 and 2300, which morphed out of Stasna LLC/Maly LLC and Dobry LLC/Nadzieja LLC, respectively, the later LLCs having been parties to the prior action and their management an issue in that case.

"Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation... [U]nder New York's transactional analysis approach to *res judicata*, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158 [1981], citing *Matter of Reilly v. Reid*, 45 N.Y.2d 24, 29–30, 407 N.Y.S.2d 645, 379 N.E.2d 172 [1978]". (In re *Hunter*, 4 N.Y.3d 260, 827 N.E.2d 269, 794 N.Y.S.2d 286, 2005 N.Y. Slip Op. 02361 [2005]).

"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." (*Douglas Elliman, LLC v. Bergere*, 98 A.D.3d 642, 642–643, 949 N.Y.S.2d 766, quoting *Abraham v. Hermitage Ins. Co.*, 47 A.D.3d 855, 855, 851 N.Y.S.2d 608). (*Pedote v. STP Associates, LLC*, 124 A.D.3d 856, 998 N.Y.S.2d 894, 2015 N.Y. Slip Op. 00738 [2d Dept. 2015]).

"Generally, to establish privity the interests of the nonparty must have been represented by a party in the prior proceeding (see *Green v. Santa Fe Indus.*, 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 514 N.E.2d 105). The Court of Appeals has observed that privity is an "amorphous concept," not easily applied (*Buechel v. Bain*, 97 N.Y.2d 295, 304, 740 N.Y.S.2d 252, 766 N.E.2d 914, cert. denied 535 U.S. 1096, 122 S.Ct. 2293, 152 L.Ed.2d 1051 [internal quotation marks omitted]),

but persons in privity include those whose interests are represented by a party to the previous action and those "[whose] own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation" (*D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24, 564 N.E.2d 634).” (*Bayer v. City of New York*, 115 A.D.3d 897, 983 N.Y.S.2d 61, 2014 N.Y. Slip Op. 02005 [2 Dept., 2014]).

The plaintiff in this action was not a party to the prior action. There is nothing in the record showing that plaintiff had notice of the prior action. The submissions on this motion and the record in the prior action fail to establish that the interests of Ms. Tomasseti in 2250 and 2300 are derived exclusively through her mother. To the extent a portion of her interests are derived through her mother, that portion may be bound by the prior resolution. Conversely, to the extent her interests are not derived through her mother, the prior resolution may not be binding on her. It is worth noting that the stipulation of discontinuance in the prior action makes reference to a Memorandum of Understanding that has not been submitted in connection with the motion and is not on file as part of the prior action, so this court can not determine the full outlines of the settlement in the prior action. For the foregoing reasons, the motion to dismiss the action pursuant to CPLR 3211 based on the res judicata effect of the discontinuance with prejudice of the prior action must be denied.

Turning to the motion to dismiss the first cause of action for failure to state a cause of action, this cause of action seeks a declaratory judgment that the amendments to the operating agreement for 2250 and 2300 are void ab initio as the product of coercion.

"On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 996, 913 N.Y.S.2d 668; see *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see *Rodolico v. Rubin & Licatesi, P.C.*, 114 A.D.3d 923, 924–925, 981 N.Y.S.2d 144). (*Attias v. Costiera*, --- N.Y.S.2d ----, 2014 WL 4627774, 2014 N.Y. Slip Op. 06163 [2d Dept., 2014]).

"In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should...determine only whether the facts as alleged fit within any cognizable legal theory" (*Simos v. Vic-Armen Realty, LLC*, 92 A.D.3d 760, 761, 938 N.Y.S.2d 609, quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see *Sinensky v. Rokowsky*, 22 A.D.3d 563, 564, 802 N.Y.S.2d 491). (*Black v. New York City Housing Authority*, 120 A.D.3d 731, 991 N.Y.S.2d 337, 2014 N.Y. Slip Op. 05936 [2d Dept. 2014]). “In opposition to a

motion to dismiss pursuant to CPLR 3211(a)(7), the plaintiff may submit an affidavit to remedy any defects in the complaint (see *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635–636, 389 N.Y.S.2d 314, 357 N.E.2d 970).” (*Igneri v. Igneri*, 125 A.D.3d 813, 4 N.Y.S.3d 272, 2015 N.Y. Slip Op. 01419 [2d Dept., 2015]).

Thus, the court considers the sufficiency of the first cause of action as it is alleged in the complaint and amplified by the allegations contained in Ms. Tomassetti’s affidavit concerning the signing of the amendments of the operating agreements of 2250 and 2300. There is only limited case law on what constitutes duress or coercion, and by and large it focuses on what does not constitute duress.

“In order to maintain a claim of duress, “the aggrieved party must demonstrate that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain from performing” (*Polito v. Polito*, 121 A.D.2d 614, 614–615, 503 N.Y.S.2d 867; see also, *Gerstein v. Broad Hollow Rd. Co.*, 75 A.D.2d 292, 297, 429 N.Y.S.2d 195). A threat to do that which one has the legal right to do does not constitute duress (see, *Franklin Nursing Home v. Local 144 Hotel Hosp. and Allied Servs. Union, SEIU, AFL–CIO*, 122 A.D.2d 22, 23, 503 N.Y.S.2d 908; *Appel v. Ford Motor Co.*, 111 A.D.2d 731, 732–733, 490 N.Y.S.2d 228).” (*Matter of Garvin*, 210 A.D.2d 332, 620 N.Y.S.2d 400[2d Dept., 1994]).

“The threatened exercise of a legal right is not economic duress (citations omitted).” (*Fred Ehrlich, P.C. v. Camerota Tullo*, 274 A.D.2d 303, 710 N.Y.S.2d 572, 2000 N.Y. Slip Op. 06620 [1st Dept., 2000]). “It is well established that where the alleged menace was, as here, to stop performance under a contract or to exercise a legal right, there is no actionable duress (see, e.g., *Matter of Garvin*, 210 A.D.2d 332, 333, 620 N.Y.S.2d 400; *Franklin Nursing Home v. Local 144 Hotel Hosp. & Allied Servs. Union*, 122 A.D.2d 22, 23, 503 N.Y.S.2d 908; *Appel v. Ford Motor Co.*, 111 A.D.2d 731, 732–733, 490 N.Y.S.2d 228). Moreover, financial pressures, even when coupled with inequality in bargaining position, do not, without more, constitute duress (see, e.g., *Edison Stone Corp. v. 42nd St. Dev. Corp.*, 145 A.D.2d 249, 538 N.Y.S.2d 249; *Matter of Bruno v. City of Poughkeepsie*, 121 A.D.2d 629, 503 N.Y.S.2d 655).” (*Gubitz v. Security Mut. Life Ins. Co. of New York*, 262 A.D.2d 451, 692 N.Y.S.2d 139, 1999 N.Y. Slip Op. 05659 [2d Dept., 1999]).

In the instant action, plaintiff alleges that Madeline B. Falco threatened to use a power of attorney from plaintiff’s grandmother to disinherit her from her grandmother’s estate and have her evicted. Ms. Falco does not address this in her reply and the alleged power of attorney is not among the submissions.

Under the circumstances and affording plaintiff every favorable inference, the allegations contained in the first cause of action in the complaint, as amplified by the affidavit of Ms. Tomassetti, are sufficient to plead a cause of action to void the amendments to the operating


agreements to 2250 and 2300.

In conclusion, the motion to dismiss based on res judicata is denied for failure to establish that all of plaintiff's interests in the LLCs were derived from her mother and were bound by the prior action and the motion to dismiss the first cause of action for failure to state a cause of action is denied.

The action is set down for a preliminary conference for Thursday, June 4, 2015 at 2:00 P.M.

Motion denied.

Dated: April 28, 2015



Hon. Martin M. Solomon
J.S.C.

FILED
KINGS COUNTY CLERK
2015 MAY 27 AM 8:00
