Saleh v Ali
2015 NY Slip Op 31418(U)
July 28, 2015
Supreme Court, New York County
Docket Number: 150613/2015
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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FATEH SALEH and MONSOUR AL-KABYALEE,

Plaintiffs,

- against -

HAMAD ALI, SELIM ZHERKA, SILAS METRO HOLDINGS CORP., JAMES G. DIBBINI and JAMES G. DIBBINI & ASSOCIATES, P.C.,

Defendants.

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Index Number: 150613/2015

Motion Sequence No.: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on defendant Hamad Ali's motion, pursuant to CPLR 3211(a)(10), to dismiss the complaint, and plaintiffs' cross-motion for sanctions:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Notice of Cross-Motion - Affirmation - Exhibits 2
"Sur-Reply in Opposition to Cross-Motion and Further Support of Motion" 3

Upon the foregoing papers, the motion and cross-motion are denied.

Background

This action is the latest in what is now a series of lawsuits seeking damages for the alleged fraudulent conveyance and conversion of three parcels of land located in the Bronx and Manhattan (the "Properties"), and to quiet title to such properties. A history of the parties, claims and lawsuits follows to explain the Court's determination on the instant motion, and, one can only hope, to encourage the parties to cease and desist unnecessary motion practice, which has wasted judicial, and other, resources.

Plaintiffs Fateh Saleh ("Saleh") and Monsour Al-Kabyalee ("Al-Kabyalee") were once apparently united in interest with defendant Hamad Ali ("Ali"), first as business partners, co-owners of the three corporations which owned the Properties (the "corporate entities"), and then as plaintiffs suing together for damages and to recover title to the Properties. In June of 2011, non-party Fares Ali ("Fares"), defendant Ali's son, with the alleged help of defendant James G. Dibbini and his law firm, James G. Dibbini & Associates, P.C. (collectively "Dibbini"), purported to transfer Fares' claimed 100% interest in the corporate entities to defendant Selim Zherka. Zherka then purported to transfer title to the Properties to his company Silas Metro Holdings Corp. ("Silas") and obtained a $4.9 mortgage on the Properties from Signature Bank. In fact, Fares had no interest in the corporate entities or Properties at any time.

Ali and the corporate entities, as named plaintiffs, sued Fares, Zherka, Silas, and Dibbini, as well as Signature and the title company involved in the transfer, in Supreme Court, Bronx County – Hamad Ali, et al v Fares Ali, et al, Index No. 381035/2011 (the "Bronx Action") – for fraud, conversion, malpractice, return of title to the Properties to the corporate entities, and voiding the defendants' claims thereto. Justice Brigantti-Hughes entered a default judgment against Fares, only, and subsequently dismissed, with prejudice, Ali and the corporate entities' proposed amended complaint against Zherka, Silas, Dibbini, Signature and the title company. Thereafter, Ali, Saleh, and Al-Kabyalee (also known as Al-Kabualer) commenced another action, this time in New York County, against Zherka, Silas and Dibbini – which is presently pending before this Court, entitled Ali, et al v Zherka, et al, Index No. 153074/2013 ("Action 1") – for fraud, conversion, unjust enrichment and constructive trust. By Decision and Order dated October 31, 2013, this Court dismissed the fraud claims in Action 1.

During discovery proceedings in Action 1, Saleh and Al-Kabyalee, claiming to be in possession of new information allegedly establishing that Ali was the "mastermind" behind the fraudulent transfer of the Properties, obtained their own separate counsel and moved to amend the complaint to assert: (1) cross-claims against Ali for fraud, breach of fiduciary duty, breach of contract, negligent supervision of Fares, and unjust enrichment, (2) several new causes of action against Zherka and Silas, including one under RPAPL Articles 6 and 15, and against Dibbini, including one for negligence and breach of fiduciary duty. By Decision and Order dated January 2, 2015, this Court denied the motion to amend but invited Saleh and Al-Kabyalee to commence: "a separate action against Ali in which they may assert any claims as to which they deem themselves so advised"; "a separate action against Zherka and Silas, asserting claims under Articles 6 and 15 of the RPAPL"; and "a separate derivative action on behalf of the corporate entities against the Dibbini defendants for negligence and breach of fiduciary duty."

That is exactly what Saleh and Al-Kabyalee have done – the instant action is plaintiffs' "separate action," asserting the same claims against Ali, Zherka, Silas and Dibbini that they asserted in their proposed amended complaint in Action 1. In fact, the instant complaint herein is virtually identical, line-for-line, with the proposed amended complaint. Plaintiffs allege, as they did in Action 1, that Ali: misrepresented that the corporate entities would be profitable; mismanaged the corporate entities; improperly paid corporate profits only to himself; schemed to defraud plaintiffs; hired and instructed Fares to sell the Properties; and was the "mastermind" behind the fraudulent conveyance of the Properties. Based upon those allegations, each plaintiff asserts, on his own behalf, five separate causes of action against Ali: fraud (1st and 6th causes of action); breach of fiduciary duty (2nd and 7th causes of action); breach of contract (3rd and 8th causes of action); negligent supervision (4th and 9th causes of action); and unjust enrichment (5th and 10th causes of action). Plaintiffs also assert causes of action for: fraud against Zherka, Silas and Dibbini (11th cause of action); conversion against all defendants (12th cause of action); relief under RPAPL 15 against Zherka and Silas (13th and 14th causes of action); and negligence and breach of fiduciary duty against Dibbini (15th cause of action).

Ali now moves, pursuant to CPLR 3211(a)(10), to dismiss the complaint upon the ground that plaintiffs have failed to name an indispensable party, Fares Ali, the alleged "main culprit" in the fraudulent transfers. Plaintiffs oppose the motion, arguing that it should be dismissed as "materially defective" under CPLR 2214 because the notice of motion states that the relief sought

is to amend the complaint, not for dismissal under CPLR 3211(a)(10). Plaintiffs also argue that dismissal is not warranted as they are able to obtain complete relief on the instant complaint because it does not assert any claims against Fares, which claims are allegedly "precluded" by res judicata. Plaintiffs also cross-move for sanctions under 22 NYCRR § 130-1.1, upon the ground that the instant motion is frivolous and meant to delay resolution of this action.

On June 1, 2015, while the motion and cross-motion were pending, plaintiffs filed a stipulation discontinuing the instant action against the Dibbini defendants *only*.

Discussion

Dismissal of the complaint pursuant to CPLR 3211(a)(10) is not warranted because Fares Ali is not an indispensable party within the meaning of CPLR 1001(a). Fares' presence in this action is not necessary to accord "complete relief" between plaintiffs and defendants. The factual basis of the instant complaint is *Ali's* alleged separate and independent negligence, misconduct and fraud in the management and control of the corporate entities from the outset, as well as *Ali's* participation in the June 2011 fraudulent transfer of the Properties, and, to some lesser extent, Zherka and Silas' alleged fraudulent conduct, for which plaintiffs seek relief as against Ali and a declaration voiding the deeds naming Silas as owner of the Properties. This Court does not need Fares to make a determination as to Ali's own independent liability. And Ali has failed to show that Fares participated, or was complicit, in Ali's mis-management of the Properties, other than the fraudulent transfer thereof, for which plaintiffs now seek damages herein. Moreover, Fares' liability to the corporate entities for the fraudulent transfer of the Properties has already been determined by way of default judgment entered in their favor and against him in the Bronx Action. Therefore, plaintiffs, the co-owners of the corporate entities, need not assert claims against Fares in this action. Indeed, if added as a defendant, Fares would be barred, under the doctrine of res judicata, from raising defenses to claims that he fraudulently transferred the Properties, even though his liability is based upon a default and was not litigated on the merits. See generally Schuykill Fuel Corp. v B. & C. Nieberg Realty Corp., 250 NY 304, 307 (1929) ("A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first."); Ionescu v Brancoveanu, 246 AD2d 414, 416-417 (1st Dep't 1998) ("The fact that Ionescu's fraud and misrepresentation claims were never litigated on the merits in the New Jersey action does not alter the outcome."). Nor does the Court need Fares to determine whether Silas' deeds to the Properties are void or voidable.

Additionally, Fares is not an indispensable party because he will not be "inequitably affected by a judgment" in this action. Fares Ali has, and had, no interest in the corporate entities or the Properties. See CPLR 1001(a).

While Ali's motion to dismiss for failure to join a necessary party lacks merit, plaintiffs have not established entitlement to the drastic relief of sanctions for frivolous motion practice. However, the Court strongly admonishes all of the parties to be mindful before making additional motions to ensure that their legal arguments are adequately supported by the facts and law, to double-check that their papers accurately reflect the relief being sought, and to proof-read for grammatical and typographical errors.

Finally, this Court *sua sponte* dismisses: (1) the 11th cause of action, for fraud, as against Zherka and Silas, as such claim is duplicative of the fraud claim in Action 1, which this Court previously dismissed; and (2) the 12th cause of action, for conversion, as against Zherka and Silas, as such claim is duplicative of the conversion claim in Action 1.

Conclusion

Motion and cross-motion denied. The Court sua sponte dismisses the 11th and 12th causes of action as against defendants Selim Zherka and Silas Metro Holdings Corp., *only*, and the Clerk is hereby directed to enter judgment dismissing those causes of action as to said defendants, *only*.

Date: July 28, 2015

Arthur F. Engoron, J.S.C.