

Ferris v Yoon

2015 NY Slip Op 31869(U)

October 6, 2015

Supreme Court, Westchester County

Docket Number: 59627/2015

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
HENRY FERRIS, SHINE ON CORP., and HORSESHOE HILL
ROAD CORP.,

Plaintiffs,

-against-

JOHN YOON, ELIZABETH YOON, SHINE ON CAR WASH
CORP., and 8603 ROCKAWAY HOLDINGS, INC.,

Defendants.

-----X
CONNOLLY, J.

DECISION and ORDER
Sequence Nos. 1 & 2
Index No. 59627/2015

The following papers were read in connection with the plaintiffs' motion by order to show cause to consolidate, and the defendants' cross motion to dismiss:

Order to show cause, affidavit, affirmation, exhibits	1-11
Notice of cross motion, affirmation, memo of law, exhibits	12-25
Reply affirmation and in opposition to cross motion	26
Reply affirmation in further support of cross motion	27

The plaintiffs commenced this action for rescission of a contract of sale executed by the plaintiff Shine On Corp. and the defendant Shine On Car Wash Corp. on October 7, 2014. The plaintiffs simultaneously move by order to show cause to consolidate the instant action with an action pending in Kings County Supreme Court entitled *Shine On Car Wash Corp. v Horseshoe Hill Road Corp.* (Kings County Index No. 504553/2015) (hereinafter the Kings County action) based upon the nonpayment of a promissory note. The defendants oppose the motion, and cross-move to dismiss the action pursuant to CPLR 3211 (a) (1) and (7) or, in the alternative, to transfer and consolidate this action with the Kings County action. The plaintiffs oppose the cross motion.

By way of background, Shine On Corp. and the plaintiff Henry Ferris, Shine On Corp.'s president, purchased a car wash located in Queens County, New York from the defendants Shine On Car Wash Corp., John Yoon, and Elizabeth Yoon. The parties memorialized the terms of the purchase in a "Contract of Sale of Business" (hereinafter contract of sale) dated October 7, 2014. The contract of sale contains a clause indicating that all proceedings "shall be brought in the Supreme Court of the State of New York, County of Westchester, unless otherwise required by law" (Contract

of Sale ¶ 23 [b]).

Paragraph 2 (c) of the contract of sale calls for Shine On Corp. to execute and deliver a promissory note to Shine On Car Wash Corp. in the amount of \$350,000.00. This promissory note was executed by the plaintiff Horseshoe Hill Corp. (of which Henry Ferris is also president) and delivered to Shine On Car Wash Corp. on October 7, 2014. The promissory note contains a clause stating that any “action, suit or proceeding [arising from or relating to the promissory note] may be brought in any State or Federal Court of competent jurisdiction sitting in Kings County, New York” (Promissory Note § 7). When Horseshoe Hill Road Corp. defaulted under the terms of the promissory note, Shine On Car Wash Corp. commenced the above-referenced Kings County action by summary judgment in lieu of complaint pursuant to CPLR 3213 on April 17, 2015. The plaintiffs then commenced the instant action on May 29, 2015 with the filing of a summons and complaint.

In support of their motion, the plaintiffs submit the affidavit of Henry Ferris, in which he avers that John Yoon, Elizabeth Yoon, and Shine On Car Wash Corp. fraudulently induced him to execute the contract of sale and note by misrepresenting the car wash’s cash income. Because Horseshoe Hill Road Corp. ceased making payment under the promissory note due to the discovery of the alleged fraudulent misrepresentations, Ferris avers that common questions of law and fact exist in the instant action and the Kings County action. Ferris further avers that consolidation would not prejudice the defendants from asserting their rights, claims, and defenses before this Court.

In opposition to the motion, the defendants contend that the plaintiffs’ motion must be dismissed because substantial prejudice will result to Shine On Car Wash Corp. in the Kings County action and, further, any issues of law and fact in the two actions are not sufficiently similar. In the alternative, the defendants contend that if the Court were to grant the plaintiff’s motion, it should consolidate the actions in Kings County, as the Kings County action was commenced prior to the instant action.

DISCUSSION/ANALYSIS

The branch of the plaintiffs’ motion which seeks consolidation is granted. “When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay” (CPLR 602 [a]). “A motion to consolidate two or more actions rests within the sound discretion of the trial court” (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622 [2d Dep’t 2012]). “Where common questions of law or fact exist, consolidation is warranted unless the opposing party demonstrates prejudice to a substantial right” (*id.*).

Here, there are common questions of law and fact between the Kings County action to recover under the note and this action to rescind the contract of sale (*see Lorber v Morovati*, 83 AD3d 799, 800 [2d Dept 2011] [“the defendants’ action to recover damages for breach of contract and fraud relating to the purchase agreement is sufficiently intertwined with the plaintiffs’ action to

recover on the promissory note” such that summary judgment should have been denied and the separate motion for consolidation should have been granted]; *see also* *Scotto v Kodsi*, 102 AD3d 947, 948 [2d Dept 2013] [borrower’s action to rescind mortgage properly consolidated with lender’s action to foreclose on the same mortgage]).

The next issue for this Court to determine is whether the actions should be heard together in Westchester County or Kings County. The contract of sale in this case provides that any action relating thereto shall be brought in Westchester County and the note provides that any action relating thereto shall be brought in Kings County. The plaintiffs contend that, despite these conflicting forum selection clauses, the consolidated action should be tried in Westchester County, as that forum is more convenient for them. The defendants argue, in the alternative to dismissal, that the actions should be consolidated in Kings County, where the first action was commenced.

While the parties’ conflicting forum selection clauses do not simply cancel each other out (*see e.g. Lazare Kaplan Int’l Inc. v KBC Bank N.V.*, 528 Fed Appx 33, 35 [2d Cir 2013]), a Court may, in its discretion, decline to enforce a forum selection clause where to do so would be, among other things, unreasonable (*see LSPA Enter., Inc. v Jani-King of N.Y., Inc.*, 31 AD3d 394, 395 [2d Dept 2006] [“A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be *unreasonable*, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court” (emphasis added)]).

Here, given the common issues of fact between the two actions necessitating consolidation, it would be wholly impracticable and, therefore, unreasonable to enforce both clauses. In determining which forum these actions should be tried, the Court gives great weight to the fact that the defendants were the first party to assert their rights by commencing the Kings County action 42 days prior to the commencement of this action (*see Manshul Constr. Corp. v Sawyers Glass Corp.*, 242 AD2d 262 [2d Dept 1997] [“the general rule for determining the venue of actions which have been joined for trial, where the actions have been commenced in different counties, is that absent special circumstances, venue should be placed in the county where the first action was commenced”]; *see also Wager v Pelham Union Free Sch. Dist.*, 108 AD3d 84, 89 [2d Dept 2013] [“a consolidated action is typically litigated in the county where the first action was commenced”]). Moreover, although the plaintiffs’ attorney speculates that the Kings County venue provision could have resulted from careless drafting (*see* Plaintiffs Reply Affirmation ¶ 28), the plaintiffs do not dispute that they agreed to that venue provision and, thus, the Court is equally bound to respect the parties’ selection of Kings County as the forum for actions arising under the note.

Under these circumstances, and considering that the defendants were the first to invoke their rights under the contractual forum selection clause by commencing the action under the note in Kings County, the Court declines to enforce the conflicting Westchester County forum selection clause. Accordingly, this action is removed to Kings County for consolidation with the action on the note (*see* CPLR 602 [b] [“Where an action is pending in the supreme court it may, upon motion,

remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court”]).

Accordingly, the remaining branches of the defendants’ cross motion which are to dismiss the action are denied without prejudice to bringing a new motion for the same relief in the consolidated action.

Based upon the foregoing, it is hereby

ORDERED that the branch of the plaintiff’s motion which is for consolidation is granted; and it is further

ORDERED that the instant action is transferred to the Kings County Supreme Court and consolidated with the action entitled *Shine On Car Wash Corp. v Horseshoe Hill Road Corp.* under Kings County index number 504553/2015 for joint discovery and trial; and it is further

ORDERED that, within 10 days, the plaintiffs shall serve a copy of this order on the Clerk of the Westchester County Supreme Court, who shall transfer the papers filed under Westchester County index no. 59627/2015 to the Clerk of the Kings County Supreme Court; and it is further

ORDERED that, within 10 days, the plaintiffs shall serve a copy of this order on all parties to the consolidated action; and it is further

ORDERED that the defendant is granted leave to make a new motion to dismiss in the consolidated action for the same relief sought herein within 20 days of service upon them of this order with notice of entry; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the court.

Dated: White Plains, New York
October 6, 2015



HON. FRANCESCA E. CONNOLLY, J.S.C.

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