

Coke-Holmes v Holsey Holdings, LLC

2015 NY Slip Op 32743(U)

March 9, 2015

Supreme Court, Kings County

Docket Number: 9667/13

Judge: Larry D. Martin

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At an IAS Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of March, 2015

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

-----X

LORAIN COKE-HOLMES AND RICARDO COKE,

Plaintiffs,

- against -

Index No. 9667/13

HOLSEY HOLDINGS, LLC AND JULIET CAMPBELL,

Defendants.

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The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2, 5-6

Opposing Affidavits (Affirmations) _____

3

Reply Affidavits (Affirmations) _____

4

Upon the foregoing papers, defendant Juliet Campbell ("Campbell") moves for an order: (1) vacating the Court's September 3, 2013 decision and order (the "2013 order") granting plaintiffs Loraine Coke-Holmes ("Holmes") and Ricardo Coke's ("Coke"; collectively, "plaintiffs") motion for a preliminary injunction staying the holdover proceedings pending in the Civil Court of the City of New York, County of Kings, Housing Part, entitled *Holsey Holdings LLC v Coke Holmes* (Civ Ct, Kings County Index No. 63578/13) and *Holsey Holdings LLC v John Doe* (Civ Ct, Kings County Index No. 63579/13)

during the pendency of the instant action; (2) pursuant to CPLR 3211 (a)(8), dismissing the instant action on the grounds of lack of personal jurisdiction; (3) pursuant to CPLR 3211 (a)(5), dismissing the instant action on the grounds that the applicable limitations period has expired; (4) pursuant to CPLR 3211 (a)(5), dismissing the instant action on the grounds of statute of frauds; (5) pursuant to CPLR 3211 (a)(7), dismissing the instant action on the grounds of failure to state a cause of action; or, in the alternative, (6) granting her leave to interpose a late answer; and (7) vacating the lis pendens filed herein. By separate motion papers, defendant Holsey Holdings, LLC ("Holsey Holdings") moves for an order: (1) modifying the 2013 order so as to direct plaintiffs to file an appropriate undertaking by a date certain; and (2) deeming the preliminary injunction imposed by the 2013 order invalid if plaintiffs fail to file same by the date specified by the Court.

As an initial matter, based upon a review of the parties's submissions and the relevant law, the Court finds that Campbell is subject to its jurisdiction. The Court notes that Gregory Nanton, Esq. ("Mr. Nanton") appeared on more than one occasion, on Campbell's behalf, to orally argue in opposition to plaintiffs' underlying motion. Indeed, Mr. Nanton prepared a motion to dismiss the instant action as asserted against Campbell but it was unfiled and was rejected by plaintiffs (Affirmation in Opposition by Nicholas M. Moccia, ex. B). Notwithstanding the fact that Mr. Nanton failed to formally file a notice of appearance, there is no allegation by Campbell that Mr. Nanton lacked authority to act on her behalf or that he was not retained by her. In this regard, the Court finds that Mr. Nanton's

appearances on Campbell's behalf constituted an appearance thus bringing Campbell within the jurisdiction of this Court (*see USF&G v Maggiore*, 299 AD2d 341, 343 [2d Dept 2002]). Moreover, while Campbell fails to cite to the specific authority upon which she is relying to vacate the 2013 order, the Court notes that CPLR 5015(a) (4) allows for vacatur of a default once a movant demonstrates a lack of personal jurisdiction with no need to show a meritorious defense or a reasonable excuse (*see Velez v Forcelli*, —NYS2d —, 2015 WL 444741 [2d Dept 2015]). Here, Campbell failed to demonstrate a reasonable excuse for her default in formally opposing plaintiffs' underlying motion and, as such, it is unnecessary to determine whether she has a potentially meritorious defense (*see Capital Source v AKO Medical, P.C.*, 110 AD3d 1026, 1026 [2d Dept 2013]). In this regard, the branches of Campbell's motion to vacate the 2013 order and to dismiss the instant action as asserted against her for lack of personal jurisdiction are denied.

Additionally, the Court finds that Campbell's affirmative defenses with respect to the statute of limitations and the statute of frauds (CPLR 3211[a][5]) are deemed time-barred and waived (*see* CPLR 3211[e]).

The branches of Campbell's motion to dismiss the first, second and third causes of action of the complaint for a declaratory judgment and constructive trust are denied. On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court must accept the facts alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as

alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Based on the foregoing, the Court finds that plaintiffs have adequately plead causes of action for a declaratory judgment and for the imposition of a constructive trust (*see Cerabono v Price*, 7 AD3d 479, 480 [2d Dept 2004]).

With respect to the fifth, sixth and eighth causes of action of the complaint, the Court finds that plaintiffs have failed to state a cause of action for fraudulent inducement (*see Fromowitz v W. Park Associates, Inc.* 106 AD3d 950, 951 [2d Dept 2013], breach of a joint venture (*see Dee v Rakower*, 112 AD3d 204, 207 [2d Dept 2013]) and conversion (*see Channel Marine Sales, Inc. v City of New York*, 7 AD3d 600, 601 [2d Dept 2010]). As such, the fifth, sixth and eighth causes of action of the complaint are hereby dismissed and severed.

Moreover, plaintiffs' request for provisional relief in the fourth and seventh causes of action of the complaint are not proper causes of action. In any event, such relief was already granted in the 2013 order. As such, the fourth and seventh causes of action of the complaint are likewise dismissed and severed.

Turning to Holsey Holdings' motion to modify the 2013 order, the Court notes that plaintiff has not submitted any opposition to the motion. Notably, a preliminary injunction must be accompanied by an undertaking in an amount set by the Court (CPLR 6312 [b]; *Dupigny v St. Louis*, 115 AD3d 638, 641 [2d Dept 2014]). "...[I]f it is finally determined that [plaintiffs were] not entitled to an injunction, [the plaintiffs] will pay to the defendant all damages and costs which may be sustained by reason of the injunction ..." (*2339 Empire*

Management, LLC v 2329 Nostrand Realty, LLC, 71 AD3d 998, 999 [2d Dept 2010]). The 2013 order did not direct plaintiffs to post an undertaking. As such, in the exercise of this Court's discretion, within 30 days of the date of this decision and order, plaintiffs are directed to post an undertaking in the amount of \$75,000. Said amount is rationally related to the amount of potential damages Holsey Holdings established it might sustain as a result of the preliminary injunction granted in plaintiffs' favor (*see S.P.Q.R. Co., Inc. v Untied Rockland Stairs, Inc.*, 57 AD3d 642, 643 [2d Dept 2008]). In the event that plaintiffs fail to post the undertaking within the time-frame specified herein, the preliminary injunction issued by the 2013 order will be vacated and the Kings County Civil Court actions under Index No. 63578/13 and Index No. 63579/13 will proceed.

Accordingly, it is hereby

ORDERED that the branch of Campbell's motion to vacate the 2013 order is denied; and it is further

ORDERED that the branch of Campbell's motion to dismiss the instant action as asserted against her on the grounds of lack of personal jurisdiction is denied; and it is further

ORDERED that the branch of Campbell's motion to dismiss the instant action on the grounds that the applicable limitations period has expired is denied; and it is further

ORDERED that the branch of Campbell's motion to dismiss the instant action on the grounds of statute of frauds is denied; and it is further

ORDERED that the branch of Campbell's motion to dismiss the complaint herein for failure to state a cause of action is granted to the extent of dismissing the fourth, fifth, sixth, seventh and eighth causes of action of the complaint only. The afore-mentioned causes of action are hereby severed from the complaint; and it is further

ORDERED that the branch of Campbell's motion granting leave to extend the time to interpose an answer is hereby granted. Campbell is directed to interpose an answer within 20 days of service of this decision and order with notice of entry; and it is further

ORDERED that the branch of Campbell's motion to vacate the lis pendens is denied; and it is further

ORDERED that Holsey Holding's motion to modify the 2013 order to direct plaintiffs to file an undertaking is hereby granted. Within 30 days of service of this decision and order with notice of entry, plaintiffs are directed to file an undertaking in the amount of \$75,000 for the preliminary injunctive relief granted in the 2013 order. In the event that plaintiff fails to do same within the specified time-frame, the injunction imposed by the 2013 order will be vacated upon notice of same to the Court.

The foregoing constitutes the decision, order and judgment of the Court.

ENTER,

J. S. C.

MAR 09 2015

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT