

Sharon v Ausch

2015 NY Slip Op 32906(U)

April 27, 2015

Supreme Court, Rockland County

Docket Number: 30708/2014

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.
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To commence the statutory
time period 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.

YEHOASHA SHARON and MOSHE BERNAT,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 30708/2014

JOSEPH AUSCH, HAYA AUSCH and JOEL
ABRAMOWITZ,

Defendants.
-----x

Motion Sequences #1 and #2

The following papers, numbered 1 to 11, were read in connection with the motions of Defendants Joseph Ausch and Haya Ausch (hereinafter collectively "the Ausches") seeking dismissal of Plaintiffs' complaint pursuant to CPLR §3211(a)(1), (5), and (7) and of Defendant Joel Abramowitz seeking dismissal of Plaintiffs' complaint pursuant to CPLR §3211(a)(1), (2), and (7):

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Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

This action arises from business transactions between and amongst the parties regarding a contemplated partnership and joint business venture regarding real property situated in Miami, Florida. According to Plaintiffs, they wired \$315,000 to Joseph Ausch's attorney in 2008 in

¹ The Court, in its discretion and pursuant to CPLR §2001, excuses the omission of acknowledgments from Plaintiff's affirmations in opposition. Future submissions that are not properly verified/acknowledged will not be read or considered by the Court.

furtherance of a partnership to purchase and operate a commercial center in Miami, Florida. This sale was never consummated and Plaintiffs demanded the return of this \$315,000. Notwithstanding these demands and his acknowledgment of this indebtedness, Joseph Ausch did not return these funds.

On October 13, 2010, the Ausches executed a promissory note in the sum of \$340,000 payable to Plaintiffs, without interest, on or before April 20, 2011. This note was secured by a mortgage on real property owned by the Ausches in Jerusalem, Israel and designated as Block 30063, Parcel 124/13 (hereinafter "the apartment").

Plaintiffs, through Israeli counsel, commenced a proceeding before the District Court in Jerusalem seeking permission to encumber this property. By verdict dated October 27, 2011, Judge Yoseh Shapira of that court authorized the registration of the October 13, 2010 mortgage given in favor of Plaintiffs, which was a second mortgage on the property. In February of 2012, Plaintiffs foreclosed upon this second mortgage, which prompted an appraisal of the apartment. This appraisal revealed that the apartment had not been build in conformity with applicable zoning laws and therefore was not legal. As such, the apartment was worth only \$458,981.35 rather than \$868,000 if it had been in compliance with these zoning provisions.

According to Plaintiffs, they agreed to forego suing Joseph Ausch based upon numerous false representations he made to them, including the apartment being worth \$1,000,000 and having sufficient equity to sustain the \$430,000 second mortgage given to them in connection with the promissory note.

Plaintiffs' complaint contains causes of action sounding in breach of contract, account stated, breach of fiduciary duty, conversion, unjust enrichment against Joseph Ausch and declaratory relief against Abramowitz.² Defendants' motions seek dismissal of these five causes of action and related declaratory relief.

CPLR §3211(a)(1) and CPLR §3211(a)(5) Grounds

The Defendants seek dismissal of Plaintiff's complaint on these grounds and contend that the determinations made by the District Court in Jerusalem in its October 27, 2011 verdict constitute documentary evidence that invokes the legal doctrine of res judicata. Abramowitz offers this verdict

² By stipulation dated October 30, 2014, the parties agreed that Plaintiffs' cause of action sounding in fraud would be withdrawn with prejudice.

and the contents of Plaintiffs' complaint itself as documentary evidence warranting dismissal.

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law". *Leon v Martinez*, 84 NY2d 83, 88 [1994].

"Under the doctrine of res judicata, a final adjudication of a claim on the merits precludes relitigation of that claim and all claims arising out of the same transaction or series of transactions by a party or those in privity with a party". *Djoganopoulos v Polkes*, 67 AD3d 726, 727 [2d Dept 2009].

In his affirmation, Rotem Levy, Plaintiff's Israeli counsel, states that the Plaintiffs could not register the second mortgage because a power of attorney lacked an apostille certification. Furthermore, he explains that the hearings held before Judge Shapira were limited to the registration of the second mortgage and no issues pertaining to the first mortgage were presented or addressed.

Given the statements as to the scope of the hearing before the Israeli tribunal, the Court finds that the proceedings did not clearly address the issues presented herein or make any substantive determinations as to their merits. As such, the doctrine of res judicata is wholly inapplicable to the issues and claims raised in the instant action. The Ausches' allegations that Plaintiff's claims are barred by an alleged accord and satisfaction and application for dismissal upon the grounds of comity or Full Faith and Credit are equally unavailing.

Similarly, the Israeli verdict does not constitute documentary evidence that conclusively establishes a defense to Plaintiffs' claims. Accordingly, dismissal under these grounds is unwarranted.

CPLR §3211(a)(2) Grounds

Abramowitz's application seeking dismissal based upon this Court's alleged lack of subject matter jurisdiction is denied as moot in light of the parties' stipulation dated October 30, 2014 withdrawing Plaintiffs' cause of action sounding in fraud with prejudice.

CPLR §3211(a)(7) Grounds

"In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit

within any cognizable legal theory”. *Integrated Const. Services, Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162 [2d Dept 2011][internal citations omitted]; *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]. “In assessing a motion under CPLR 3211(a)(7),...a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one’” *Leon v Martinez*, 84 NY2d 83, 88 [1994][internal citations omitted]; see CPLR §3026.

In applying these sound legal principles to this action, the Court finds that Plaintiff’s pleadings and papers submitted in connection with these applications assert cognizable causes of action sounding in breach of contract, breach of fiduciary duty, conversion, and unjust enrichment. The Court further finds that Plaintiffs have plead a cause of action for breach of fiduciary duty with the requisite level of specificity pursuant to CPLR §3016. Given this, Defendants’ motions pursuant to CPLR §3211(a)(7) are granted to the extent that Plaintiff’s’ cause of action sounding in account stated is hereby dismissed.

The parties are advised that a preliminary conference in this matter will be held at **9:30 a.m.** on **June 2, 2015**.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
April 27, 2015

E N T E R


HON. ROBERT M. BERLINER, J.S.C.

To:

Katlowitz & Associates
The Law Office of Jeremy Rosenberg
Schloss & Schloss