

**C and J Brothers, Inc. v Hunts Point Terminal
Produce Coop. Assoc., Inc.**

2016 NY Slip Op 30669(U)

March 16, 2016

Supreme Court, Bronx County

Docket Number: 302074/12

Judge: Ruben Franco

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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C AND J BROTHERS, INC.,

Index No: 302074/12

Plaintiff,

- against -

DECISION AND ORDER

HUNTS POINT TERMINAL PRODUCE COOPERATIVE
ASSOCIATION, INC.,

Defendant.

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In this action for, *inter alia*, breach of fiduciary duty, defendant moves for dismissal pursuant to¹ (1) CPLR § 3211(a)(5), alleging that an order previously issued by the United States Bankruptcy Court conclusively resolved the issues raised here, thereby barring the action under the doctrines of collateral estoppel and res judicata; (2) CPLR § 3211(a)(2), claiming that the issues raised fall within the exclusive jurisdiction of the Bankruptcy Court, such that this Court lacks subject matter jurisdiction; and, (3) CPLR § 3211(a)(7), asserting that the business judgment rule causes the Complaint to fail to state a cause of action.

In opposition, plaintiff avers that the Bankruptcy Court expressly declined to address the issues raised here, advising the parties to seek redress in State court, and that this court has the

¹ Defendant initially also sought dismissal pursuant to CPLR § 3211(a)(10), claiming that plaintiff failed to join a necessary party. However, in light of plaintiff's withdrawal of its causes of action for declaratory and injunctive relief (paragraphs 1-3 of its wherefore clause), defendant withdrew this portion of its motion. Therefore, the Court shall not rule on that branch of defendant's motion.

requisite subject matter jurisdiction to hear this action, and neither collateral estoppel nor res judicata serve to bar it. Plaintiff also contends that inasmuch as it pleads bad faith, self-dealing, and collusion by defendant, it raises legally cognizable exceptions to the business judgment rule, thus, the Complaint states a cause of action.

For the reasons that follow, defendant's motion is denied in its entirety.

Plaintiff's Complaint states the following: Plaintiff is a wholesale produce dealer who conducts business in defendant's market. Defendant, a cooperative association, leases the real property in which the market is located, and issues stock and proprietary leases to members like plaintiff. The leases and stock represent ownership of units, and office space in the market, which are used by members like plaintiff to operate wholesale produce businesses. Plaintiff has been a member of defendant's cooperative since 2002 and is the owner of four units.

On May 11, 2011, non-party Hunts Point Tropical (Tropical), a member of defendant's cooperative and owner of four units, filed for bankruptcy, and on August 29, 2011, pursuant to order of the Bankruptcy Court, an auction was conducted in which plaintiff submitted a \$1 million bid. Plaintiff was deemed the sole qualified bidder and submitted, as required, an application for approval of the purchase to defendant's Board of Directors (the Board). On September 13, 2011, the Board denied plaintiff's application, which application included, *inter alia*, evidence that plaintiff had approximately \$2.6 million in available cash. Plaintiff's request for reconsideration was also denied. On December 16, 2011, pursuant to order of the Bankruptcy Court, another auction was conducted and plaintiff was again declared the highest bidder, with a \$1 million bid. Non-party A&J Produce Corp. (A&J), a twenty-year member of the Board and owner of 25 units at defendant's market, was deemed the backup bidder with a bid of \$750,000. On January 4, 2012, plaintiff again submitted an

application to the Board, as required, and the application was again denied. On that same date the Board approved A&J's application, despite A&J's lower bid and the fact that A&J only had \$750,000 in cash.

On January 23, 2012, non-party John Georgallas Banana Distributors of New York, Inc. (Banana), one of Tropical's creditors, filed an objection to the sale of Tropical's units to A&J. In objecting to the sale, Banana contended that defendant's denial of the sale to plaintiff was made in bad faith and was the result of self-dealing and collusion. On February 3, 2012, the Bankruptcy Court issued an order approving the sale to A&J and denying Banana's objections. The Court opined that it lacked authority to grant the relief requested by Banana, and that Banana had, and could pursue, a remedy in State court.

Plaintiff alleges that defendant's denial of its application to purchase Tropical's assets, while approving A&J's application, was the result of self-dealing, bad faith and collusion. Specifically, plaintiff claims that in approving bids to purchase units in the market, defendant ostensibly reviews the amount of the bid, and the prospective buyer's financial health. Plaintiff alleges that because A&J's bid was substantially lower than plaintiff's, and that A&J had significantly less working capital, the decision to approve A&J's bid was motivated by defendant's desire to steer Tropical's units to A&J, because A&J was a member of defendant's Board. Additionally, inasmuch as defendant is obligated to act in the best interest of the members of the cooperative, approving A&J's bid was tantamount to placing the interest of one of its members above the collective interests of all of the members, constituting a breach of its fiduciary duty. Plaintiff alleges that defendant's actions deprived it of the opportunity to expand and grow its business, as well as to sustain damages.

Defendant's Motion for Dismissal Pursuant to CPLR § 3211(a)(5)

The branch of Defendant's motion seeking to dismiss on the ground that the causes of action were adjudicated by the Bankruptcy Court and are barred by the doctrines of collateral estoppel and res judicata, is denied. A review of the order of the Bankruptcy Court, as well as the transcript of those proceedings, establishes that the Court did not pass upon the issues presented here. In fact, the Court expressly stated that it lacked the authority to adjudicate those matters, stating that the issues comprising plaintiff's action should be addressed by this court. Accordingly, defendant fails to establish identity of issues, an essential element of both collateral estoppel and res judicata.

The doctrine of res judicata holds that

as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action

(*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979]); *Luscher v Arrua*, 21 AD3d 1005, 1006-1007 [2d Dept 2005]; *Koether v Generalow*, 213 AD2d 379, 380 [2d Dept 1995]; *New York Site Development Corporation v New York State Department of Environmental Conservation*, 217 AD2d 699, 700 [2d Dept 1995]). The party seeking to avail itself of the doctrine must demonstrate that the issue sought to be litigated was critical and was decided in a prior action, and that the party against whom the doctrine is being asserted, had a full and fair opportunity to contest the issue (*Luscher* at 1007; *New York Site Development Corporation* at 700).

The res judicata doctrine is only applicable when the prior action was resolved on the merits (*Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d 614, 615 [1985]; *Djoganopoulos v Polkes*, 67 AD3d 726, 727 [2d Dept 2009]).

The doctrine of collateral estoppel, a narrower species of the doctrine of res judicata, prevents

a party from re-litigating an issue which was previously litigated and decided against the party, or those with which it is in privity (*Ryan v New York Telephone Company*, 62 NY2d 494, 500 [1984]; *see also, Buechel v Bain*, 97 NY2d 295, 303-304 [2001]; *David v Biondo*, 92 NY2d 318, 322 [1998]; *Lumbermens Mutual Casualty Company v 606 Restaurant, Inc.*, 31 AD3d 334, 334 [1st Dept 2006]). In order to invoke the preclusive effects of collateral estoppel, it must be demonstrated that the issue being raised is identical to an issue previously litigated and decided; that the issue is decisive in the present action, and was decisive and resolved in the prior action; and, that the party against whom the doctrine is being asserted had a full and fair opportunity to contest and litigate the issue in the prior action, or that his privies had such an opportunity (*Buechel* at 303-304; *David* at 322; *Ryan* at 500; *Gramartan Home Investors Corp.* at 485; *Color by Pergament, Inc. v O'Henry's Film Works, Inc.*, 278 AD2d 92, 93 [1st Dept 2000]).

The proponent seeking preclusion on grounds of collateral estoppel has the burden of demonstrating (1) identity and saliency of issues in the present and prior action; and, (2) identity of parties against whom the issue has been decided, or privity between the party sought to be precluded and the party against whom the prior issue was resolved (*Buechel* at 304; *Kaufman v Eli Lilly & Company*, 65 NY2d 449, 546 [1985]; *Lumbermens Mutual Casualty Company* at 334). Once this is established, the burden shifts to the party opposing the applicability of collateral estoppel to show the absence of a full and fair opportunity to litigate the issue in the prior action (*Buechel* at 304; *Kaufman* at 546; *Lumbermens Mutual Casualty Company* at 334)

Here, a review of the Bankruptcy Court's order dated February 3, 2012, shows that the court granted Tropical's motion seeking, *inter alia*, authorization to enter into a purchase agreement with A&J for the sale by Tropical of its units at defendant's market, and allowing Tropical to assign the

related leases to A&J. One of the reasons that Banana sought to preclude the sale of Tropical's assets to A&J was because defendant's refusal to approve plaintiff's application to purchase Tropical's assets was "unconscionable and the direct result of self dealing, collusion and bad faith." Significantly, the Court's order indicated that it fully considered the objection to the sale filed by Banana, noting that it "lack[ed] the authority to grant the relief requested" by Banana. The court also held that Banana had an "adequate remedy which [could] be pursued in State Court and adequate time to pursue such remedy."

The court finds that, contrary to defendant's assertion, neither *res judicata* nor collateral estoppel preclude this action. It is exceedingly clear that the issues raised by plaintiff in its cause of action for, *inter alia*, breach of fiduciary duty, were never decided by the Bankruptcy Court. In fact, the Bankruptcy Court's order indicates that while those issues were previously raised by Banana, the court declined to resolve them because it lacked authority to adjudicate them.

Defendants Motion Seeking Dismissal Pursuant to CPLR § 3211(a)(2)

Defendant's motion seeking dismissal on the ground that the claims are preempted by federal law, is treated as one for dismissal pursuant to CPLR § 3211(a)(2), for want of subject matter jurisdiction. The record indicates that this court not only has subject matter jurisdiction as to all claims made, but that these claims do not fall within the Bankruptcy Court's jurisdiction.

28 USCA § 1334, grants the Bankruptcy Court exclusive jurisdiction over all of the debtor's property in an action pursuant to Chapter 11 (28 USCA § 1324[e][1]). Specifically,

[o]rdinarily when a petition in bankruptcy has been filed the Bankruptcy Court has exclusive jurisdiction over a controversy concerning the assets in bankruptcy and questions concerning priorities, preferences, and the like and no action may be entertained by a State court without the consent of the trustee in bankruptcy, appropriately authorized by Bankruptcy

Court

(*Ryan Stone Co. v Central School Dist. No. 3 of Town of Irondequoit*, 23 AD2d 625, 626 [4th Dept 1965]; see *Aetna Casualty & Surety Co. v Tramley, Inc.*, 260 NY 280, 286 [1932]; *Rice v Chapman*, 234 AD 279, 286 [1st Dept 1932]).

Here, as noted above, the Bankruptcy Court expressly declined to consider the issues raised by plaintiff's causes of action. Moreover, the issues do not relate to whether Tropical's units were properly conveyed under the procedures prescribed by federal bankruptcy law, but whether the defendant here acted tortiously in refusing plaintiff's bid and conveying the units to A&J. The former is, of course, squarely within the purview of the Bankruptcy Court's jurisdiction, while the latter falls under this court's jurisdiction. This is manifestly so insofar as the Bankruptcy Court's main concern is that the debtor's assets are properly sold to satisfy debts, and not whether in the conveyance of such assets, a third-party was harmed in tort (*Ryan Stone Co.* at 626; *Aetna Casualty & Surety Co.* at 286; *Rice* at 286). The plaintiff here has withdrawn all claims for declaratory and injunctive relief, and is seeking only money damages, thus, the outcome of this case has no potential to effect the bankruptcy estate, or any prior orders issued by the Bankruptcy Court.

Motion to Dismiss Pursuant to 3211(a)(7)

Defendant's motion seeking dismissal of this action pursuant to CPLR § 3211(a)(7), on grounds that the Complaint fails to state a cause of action, is denied. Deeming all allegations in the Complaint as true, plaintiff pleads causes of action for breach of fiduciary duty, self dealing, collusion and bad faith. These are claims which are not precluded by the business judgment rule.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), all allegations in the Complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414

[2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the Complaint, and the allegations stated, shall be resolved in favor of the plaintiff (*Cron* at 366). In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the Complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*) The court's role when analyzing the Complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Generally, the business judgment rule prevents judicial review of decisions undertaken by a corporation. As the court in *Levandusku v One Fifth Ave. Apt. Corp.* (75 NY2d 530, 537-538 [1990]), noted

Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient

(*id.* 537-538 [internal citations and quotation marks omitted]). Thus, the business judgment rule is, at best, a qualified privilege, inapplicable when it is alleged that the corporation breached the fiduciary duty owed to its members (*id.*), acted in "bad faith and deliberately singled plaintiff out for disparate treatment" (*Smukler v 12 Lofts Realty, Inc.*, 178 AD2d 125, 125 [1st Dept 1991]), engaged

in self-dealing (*Simpson v Berkley Owner's Corp.*, 213 AD3d 207, 207 [1st Dept 1995]), or acted fraudulently or unconscionably (*Schoninger v Yardarm Beach Homeowners' Assn.*, 134 AD2d 1, 9 [2d Dept 1987]).

In light of the allegations in plaintiff's Complaint alleging that, in denying plaintiff the right to purchase Tropical's units, defendant acted in bad faith, breached the fiduciary duty owed to its members, engaged in self dealing, and otherwise acted unconscionably, there is no merit that the business judgment rule bars this action. Significantly, the instant motion is directed at the pleadings and, as such, the court must deem all allegations in the Complaint as true (*Sokoloff* at 414; *Cron* at 366). When claims such as those alleged here are made, the business judgment rule will not bar judicial inquiry into a decision made by a corporation, thus, the Complaint states a cause action (*Levandusku* at 537-538; *Smukler* at 125; *Simpson* at 207; *Schoninger* at 9).

Accordingly, it is hereby

ORDERED that defendant's motion is denied in its entirety, and it is further

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's Decision and Order.

Dated : March 16, 2016
Bronx, New York



RUBEN FRANCO, J.S.C.
HON. RUBÉN FRANCO