

Apostolidis v Coalition of Landlords Homeowners & Merchants, Inc.
2016 NY Slip Op 30690(U)
April 11, 2016
Supreme Court, Queens County
Docket Number: 4675/2012
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

PENE APOSTOLIDIS, et ano.,
Plaintiff(s),

Index
No. 4675 2012

- against -

Motion
Date March 22, 2016

THE COALITION OF LANDLORDS
HOMEOWNERS AND MERCHANTS, INC.,
Defendant(s).

Motion
Cal. No. 4

Motion
Seq. No. 4

The following papers numbered 1 to 16 read on this motion by defendant for an order granting it a preliminary injunction, pursuant to CPLR 6301, enjoining and restraining plaintiffs, their agents, representatives, employees, and servants, and anyone else acting on their behalf, during the pendency of this action, from executing upon a judgment entered on November 19, 2015 in plaintiffs' favor and against defendant in the principal amount of \$13,000.00; and on this cross motion by plaintiffs for an order imposing sanctions, together with costs and attorneys' fees.

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiffs commenced this breach of contract action on March 5, 2012. The matter was transferred to Court Attorney-Referee Elizabeth Yablon for trial. The parties reached a global settlement pursuant to a settlement agreement, placed on the record before Referee Yablon on September 23, 2014, in the amount of \$13,000.00, which defendant was to pay within 30 days. Thereafter, defendant moved to vacate the stipulation of settlement and dismiss the action. Same was denied on January 7, 2015 (CA-R Yablon) inasmuch as it was determined, *inter alia*, that plaintiffs did not procure the settlement through fraud as alleged by defendant.

The papers submitted on defendant's motion reveal that, thereafter, on January 29, 2015, defendant filed a Notice of Claim against the Estate of Konstantinos Apostolidis in the Suffolk County Surrogate's Court (where letters of administration were issued to plaintiff Pene Apostolidis herein), based upon a promissory note executed by the decedent in favor of defendant, whereby defendant claimed that the sum of \$81,500.00 plus interest was due to it. Defendant additionally brought a petition in Surrogate's Court to compel an accounting. The proceeding was converted to a proceeding to determine the validity of a claim (SCPA 202, 1809) by decision/order of Hon. John M. Czygier, Jr., Surrogate, dated December 4, 2015. In the meantime, on March 30, 2015, defendant commenced an action in this court for, *inter alia*, breach of contract based on the promissory note, including a cause of action to permit defendant to offset the \$13,000.00 debt against the \$81,500.00 it alleges the estate owes it. Issue was joined in that action and counterclaims were asserted; however, it does not appear from court records that a Request for Judicial Intervention was yet filed.

Now, defendant herein seeks a preliminary injunction preventing plaintiffs from enforcing the \$13,000.00 judgment entered against it on November 19, 2015¹ on two grounds: (1) the judgment is defective for plaintiffs' failure to comply with CPLR 5003-a (d); and (2) relying on *Banco Di Roma v Merchants Bank of N.Y.* (92 AD2d 42 [1983]), defendant is entitled to a stay of execution pending a determination of defendant's claims under the promissory note.

Defendant is not entitled to the relief requested. As a preliminary consideration, it should be noted that defendant does not, by this motion, seek vacatur of the judgment. Rather, defendant seeks a preliminary injunction "during the pendency of this action." However, the judgment entered in this matter is a final judgment and, thus, marks the ultimate disposition of this action (*see generally* CPLR 5011). As all claims by and between the parties have been settled, there are no more matters pending before this court, rendering the relief sought inappropriate (*see e.g. Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942

1. The judgment was entered pursuant to CPLR 5003-a (a).

[2009] [purpose of a preliminary injunction is to maintain status quo pending determination of the action]).²

Notwithstanding, defendant has not otherwise established its entitlement to the relief requested. First, CPLR 5003-a (d) is not applicable herein. CPLR 5003-a (a) provides, in relevant part, that “[w]hen an action to recover damages has been settled, any settling defendant . . . shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff.” For purposes of the statute, “tender” is defined as to either personally deliver or to mail, by registered or certified mail, return receipt requested (CPLR 5003-a [g]). CPLR 5003-a (d) states, in relevant part: “In an action which requires judicial approval of settlement . . . the plaintiff shall also tender a copy of the order approving such settlement with the duly executed release and stipulation discontinuing action executed on behalf of the plaintiff.”

In this action, the matter settled in open court (CPLR 2104; *see generally Bethea v Thousand*, 127 AD3d 798 [2015]; *Tavolacci v Tavolacci*, 114 AD3d 759 [2014]) and no order was required to approve same. Contrary to defendant’s contention, the fact that Referee Yablon “so ordered” the settlement does not trigger the applicability of CPLR 5003-a (d) since CPLR 5003-a (d), by its terms, refers to actions “which *require*[] judicial approval” (emphasis supplied), such as the settlement of a class action (CPLR 908) or claims by an infant or incompetent person (CPLR § 1207, 1208).

To the extent defendant, for the first time in reply, alleges that plaintiffs did not comply with CPLR 5003-a (a) since “[t]he attempted mailing was damaged before it got to the former office of Judith Berger, defendant’s former attorney and the envelope was empty,” same is insufficient to rebut plaintiffs’ showing that it tendered a release and stipulation of discontinuance on September 25, 2015. Plaintiffs’ counsel, per his affirmation, stated that same were tendered on that date, that they were delivered to opposing counsel on September 28, 2015, as evidenced by the USPS tracking information, that Ms. Berger signed for the delivery per the return receipt, that 21 days elapsed from the time of tender without payment, and that, accordingly plaintiffs filed for a judgment in accordance with CPLR 5003-a on November 19, 2015. Defense counsel’s claim of non-receipt whereby he annexes a letter sent from Ms. Berger to plaintiffs’ counsel, dated October 26, 2015 – nearly one month after the alleged damaged and empty envelope was received by her – is not authenticated by Ms. Berger. Current counsel for defendant has not demonstrated that he has any personal knowledge as to the receipt – or non-receipt – of the settlement documents. As such, he has

2. It is noted that the court will not convert this motion into a motion for vacatur due to any irregularity therewith as alleged by defendant.

not adequately demonstrated that plaintiff failed to comply with the prerequisites to entering judgment pursuant to CPLR 5003-a.

Second, neither has defendant established its entitlement to a preliminary injunction, aside from the fact – as noted above – that there is no longer an action pending. To establish entitlement to a preliminary injunction, a movant must establish, by clear and convincing evidence: (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Alayoff v Alayoff*, 112 AD3d 564 [2013]; *County of Suffolk v Givens*, 106 AD3d 943 [2013]). Defendant’s reliance on *Banco Di Roma* (92 AD2d 42), whereby the Appellate Division, First Department, reversed an order and judgment of the lower court and instead denied plaintiff’s motion for summary judgment in lieu of complaint based upon certain cashier’s checks issued by the defendant in favor of the plaintiff, and reinstated the defendant’s counterclaim to recover an amount larger than the plaintiff’s claim, is inapposite to the case at bar.³ Here, the parties entered into a binding agreement whereby defendant agreed to pay plaintiff a sum certain in “full settlement of all the claims in this case,” which included a withdrawal of defendant’s counterclaims and also certain claims made by defendant against the estate in Suffolk County Surrogate’s Court. The Court in *Banco Di Roma* was faced with competing claims within the context of one action; defendant herein cannot seek a stay of execution of a validly entered judgment based upon its claims under a promissory note.

Moreover, defendant has not established irreparable harm. Defendant has offered only conclusory statements that assets of the estate – with the exception of the \$13,000.00 judgment defendant has not yet paid to it – have been distributed.⁴ The fact that defendant has commenced two separate proceedings in two separate venues, one of which seeks money damages, renders defendant unable to show that it has no adequate remedy at law (*see Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738 [2010] [economic loss which is compensable by money damages does not constitute irreparable harm]). Further, a preliminary injunction is not appropriate to preserve a defendant’s assets so as to protect an

3. Defendant misinterprets the holding in that case. The Court did not grant a stay of execution of a judgment pending the determination of the defendant’s counterclaim; rather, as stated above, the Court vacated the plaintiff’s money judgment, denied its motion for summary judgment in lieu of complaint, and reinstated the defendant’s counterclaim. Even assuming the court stayed execution of the judgment, which it did not, it would have been pending a determination of the counterclaim brought within the context of that very action. Such is clearly not the case here.

4. Any concern about the dissipation of estate assets is within the purview of the Surrogate’s Court.

anticipated money judgment (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000]). Finally, and to that end, a claim which has not yet been adjudicated cannot satisfy or be set off against a final judgment (*see e.g. Piranesi Imports v Furniture Textiles & Wallcoverings*, 31 DA2d 742 [1969]; *D & B Enterprises No. 2 v Cablam Inc.*, 188 Misc 2d 522 [App Term, 2d Dept 2001]).

Turning to the cross motion for sanctions, 22 NYCRR 130-1.1 (a) permits sanctions for frivolous conduct (*see Glenn v Annunziata*, 53 AD3d 565 [2008]; *Breslaw v Breslaw*, 209 AD2d 662 [1994]), which is defined as conduct that is “completely without merit in law,” undertaken “primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another,” or which “asserts material factual statements that are false” (22 NYCRR 130-1.1 [c] [1], [2], [3]). In determining if conduct is frivolous “the court shall consider . . . whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (22 NYCRR 130-1.1 [c] [3]).

Though, *inter alia*, defense counsel’s interpretation of CPLR 5003-a (d) may have been incorrect, it cannot be said to rise to the level of frivolous as defined in 22 NYCRR 130-1.1 (c). As such, the cross motion is denied. To the extent defendant informally requests sanctions based on plaintiffs having made a cross motion for sanctions, same is also denied.

Accordingly, the respective motion and cross motion are denied. Any stay previously imposed by virtue of the order to show cause dated January 20, 2016 is hereby lifted.

Dated: April 11, 2016

J.S.C.