Inverventure 77 Hudson LLC v Falcon Real Estate Inv. Co.

2016 NY Slip Op 30712(U)

April 13, 2016

Supreme Court, New York County

Docket Number: 653913/2013

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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INTERVENTURE 77 HUDSON LLC, et al.,

Plaintiffs,

-against-

FALCON REAL ESTATE INVESTMENT CO., et al.,

Defendants.

---X

DECISION AND ORDER

Index No. 653913/2013

HON. ANIL C. SINGH, J.:

Pinnacle Owner Corporation and Pinnacle Tenant LLC (collectively, "Pinnacle") moves pursuant to CPLR 1018 and 1021 to substitute Pinnacle for original plaintiffs 3150 Briarpark LP and 3010 Briarpark Tenant LP (collectively, "Briarpark") in this action, contending that Pinnacle is successor in interest based on an assignment of claims. Defendants oppose the motion.

Plaintiffs commenced the instant action against defendants alleging gross fraud in the management of real estate properties. Plaintiffs owned or held real estate interests in various commercial properties. Falcon Real Estate Investment Co., LP ("Falcon") provides advisory and management services for real estate. Defendants Howard Hallengren and Jack Miller are the principals, owners and officers of Falcon.

Commencing in September 1996, Falcon was engaged to manage Briarpark's commercial properties.

On February 10, 2012, plaintiffs commenced an arbitration before the American Arbitration Association alleging breach of contract claims against Falcon, as well as tort claims against the defendants also named in this action, including breach of fiduciary duty, fraud, negligent misrepresentation, tortious interference, conversion, and unjust enrichment. In their demand for arbitration, plaintiffs alleged that defendants misappropriated plaintiffs' funds, approved the payment of unauthorized and unearned compensation and fees, and engaged in a kickback scheme in connection with the hiring of third party vendors.

Plaintiffs commenced the instant action by filing a summons with notice on November 18, 2013.

On January 22, 2014, plaintiffs filed their original complaint, which arises from similar misconduct as is asserted in the demand in the arbitration.

Subsequently, defendants moved to dismiss Briarpark as a plaintiff pursuant to CPLR 3211(a)(3), contending that Briarpark lacked capacity to sue.

In a memorandum opinion dated October 10, 2014, this Court granted the motion to dismiss as to Briarpark, writing:

> CPLR 3211(a)(3) states that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the

party asserting the cause of action has no legal capacity to sue.

3150 Briarpark L.P. is "no longer in existence and good standing under the laws of the state of Delaware." *See* 3150 Briarpark L.P Delaware Certificate of Standing. On August 7, 2012, 3150 Briarpark L.P. filed a Certificate of Cancellation.

3010 Briarpark Tenant L.P. is "no longer in existence and good standing under the laws of the state of Delaware." *See* 3010 Briarpark Tenant L.P. Delaware Certificate of Standing. On October 16, 2012, 3010 Briarpark Tenant L.P. filed a Certificate of Cancellation.

A limited partnership voluntarily files a Certificate of Cancellation. By filing a certificate of cancellation, the company is stating that it has been dissolved and it is in the completion of winding up. (Del Code 17-203).

Under Del Code 17-803(b), a limited partnership can "prosecute and defend suits, whether civil, criminal or administrative" only "until the filing of a certificate of cancellation as provided in 17-203[.]"

Under Del Code 17-803, once they filed the certificates of cancellation, 3150 Briarpark L.P. and 3010 Briarpark Tenant L.P. were no longer able to prosecute or defend a suit.

3150 Briarpark LP filed this action over fifteen (15) months after filing its certificate of cancellation. 3010 Briarpark Tenant filed this action approximately thirteen (13) months after filing its certificate of cancellation. Neither 3150 Briarpark LP nor Briarpark Tenant LP was able to prosecute a suit at the time they filed this action.

Defendants' motion to dismiss all causes of action concerning 3150 Briarpark L.P. and 3010 Briarpark Tenant L.P. because of lack of capacity to sue is granted.

(NYSCEF Doc. No. 670, pp. 20-21).

Pinnacle's motion to substitute Pinnacle for Briarpark as a plaintiff in this

action is now pending before the Court. Pinnacle contends that the Briarpark entities assigned their rights in their claims against defendants to their affiliates – the Pinnacle entities – before Briarpark's corporate status was cancelled.

Discussion

"Choses in action, such as claims for breach of contract and breach of fiduciary duty, are freely assignable" (Najjar Group, LLC v. West 56th Hotel LLC, 106 A.D.3d 640, 641 [1st Dept., 2013]). "While, generally speaking, an assignee stands in the shoes of the assignor, the plain language of an assignment determines its breadth and scope" (id.) (internal quotation omitted).

Pursuant to CPLR 1018, a court in its discretion may direct that an assignee be substituted as a party when a cause of action has been assigned (NationsCredit Home Equity Servs. v. Anderson, 16 A.D.3d 563 [2d Dept., 2005]). The purported assignee must prove the fact of the assignment (Citibank, N.A. v. Van Brunt Properties, LLC, 95 A.D.3d 1158 [2d Dept., 2012]). Substitution of a party is properly granted where the substitution would not result in surprise or prejudice to defendants (Mortgage Electronic Registration Systems, Inc. v. Holmes, 131 A.D.3d 680, 682 [2d Dept., 2015]); see also Melcher v. Greenberg Traurig LLP, 44 Misc.3d 1224(A) [Sup. 2014]). In the event of the assignment of a cause of action or interest in litigation, the court may, in its discretion, direct that the assignee be substituted as

a party (GRP Loan, LLC v. Taylor, 95 A.D.3d 1172, 1174 [2d Dept., 2012]).

Pinnacle exhibits the sworn affidavit of Teresa Tsai, who states that she is president of Briarpark and Pinnacle. She states that Briarpark held the real estate interests in the subject property pursuant to a deed and a master lease.

Ms. Tsai contends that in 2012, the legal ownership of the entities holding interests in the property was restructured and simplified in connection with a refinancing of the senior debt on the property.

Ms. Tsai states that on June 13, 2012, Pinnacle Tenant LLC assumed all rights of 3150 Briarpark Tenant LP under: 1) a certain assignment and assumption of the master lease; and 2) a general assignment and assumption agreement. She states further that on June 13, 2012, Pinnacle Owner Corp., assumed all rights of Briarpark Owner pursuant to: 1) a bill of sale; 2) a special warranty deed; and 3) a general assignment and assumption agreement. Pursuant to the master lease, she asserts that Pinnacle Owner Corp., is a nominee title owner of the property for Pinnacle Tenant LLC, just as Briarpark Owner was nominee title owner of the property for Briarpark Tenant.

Finally, Ms. Tsai states that, pursuant to the restructuring, plaintiffs 3150 Briarpark LP and 3010 Briarpark Tenant LP filed certificates of cancellation on August 7, 2012, and October 16, 2012, after their interests in the properties and all

other assets and liabilities – including their claims in the instant action – had been transferred.

Pinnacle exhibits an assignment and assumption of master lease, which states in pertinent part:

> 1. Assignment by Assignor. Assignor hereby assigns, transfers, and conveys to assignee all of assignor's right, title and interest in and to the lease.
>
> 2. Assumption. Assignee hereby assumes all liabilities and obligations of assignor under the lease and agrees to perform all obligations of assignor under the lease which are to be performed or which become due on or after the date hereof.
>
> . . .
>
> 5. Binding Effect. This assignment shall be binding upon and inure to the benefit of assignor, assignee and their respective successors and assigns.

(Tsai Aff., exhibit 2).

In addition, Pinnacle exhibits a general assignment and assumption agreement that states in pertinent part:

> Assignor for ten dollars ($10.00), and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby assigns to assignee all of assignors' rights, title and interest in, to and under ... (v) all other items of intangible personal property owned by the assignor and exclusively relating to the occupancy, use or operation of the real property....

(Tsai Affidavit, exhibit 3, p. 1)

Based upon the clear and unambiguous language of the general assignment

and assumption agreement, the Court finds that Pinnacle has shown that Briarpark validly assigned to Pinnacle all of the claims against defendants in the instant action. Such a finding is supported by the sworn affidavit of Ms. Tsai. Defendants have offered no evidence to rebut Pinnacle's prima facie showing.

Defendants have raised several arguments in opposition to substitution.

Defendants' first contention is that Pinnacle lacks standing to bring a motion for substitution because Pinnacle is not a party to this action nor is it a successor or representative of a party in this action.

"The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome as to present a court with a dispute that is capable of judicial resolution" (Security Pac. Natl. Bank v. Evans, 31 A.D.3d 278, 279 [1st Dept., 2006]). "The most critical requirement of standing ... is the presence of injury in fact – an actual legal stake in the matter being adjudicated" (id.)

Based on the assignment agreement, it is clear to the Court that Pinnacle has an actual legal stake in this matter. Because Pinnacle stands in the shoes of the aggrieved plaintiff, Pinnacle has standing to bring the motion to substitute.

In support of their contention, defendants cite Marte v. Graber, 58 A.D.3d 1 [1st Dept., 2008]). There, the First Department wrote in pertinent part:

> Because there simply is no precedent nor any support in New York's Civil Practice Law and Rules for a court obtaining jurisdiction over an action "commenced" three months after the death of the individual named as the sole defendant, we find that the order appealed from is a nullity. The complaint should have been dismissed by the motion court as a nullity when the putative plaintiff, having filed a summons and complaint, discovered that the named defendant had died *before* the filing.

(Marte, 58 A.D.3d 1-2 (emphasis in original)).

In their brief, defendants dub the certificates of cancellation that were filed by Briarcliff as "the corporate form of death." Defendants' reliance on Marte is misplaced. The case stands for the unremarkable proposition that one cannot commence a lawsuit against a deceased person. Jurisdiction is not at issue here.

Defendants' second contention is that the Pinnacle entities cannot be substituted for the Briarpark entities who were not the real parties in interest at the time of the initial filing of this action.

New York courts take a practical approach to determine the real party in interest. As Professor Siegel noted in New York Practice:

> Under section 210 of the old Civil Practice Act every action was required to be prosecuted "in the name of the real party in interest," except in enumerated circumstances. The successor provision, CPLR 1004, omits that statement as obvious on the one hand (who else would bring the action?), misleading on the other (does it require in a trust case, for example, that the beneficiaries rather than the trustee bring suit?), and "an inept statement of ... substantive law" in any event. Low praise, indeed.

> We thus have an acknowledgment that the questions of who may bring suit and against whom it may be brought are really questions of substantive rather than procedural law and must be answered as such. Who owns the cause of action? Whose right has been interfered with? Who interfered with it?

(Siegel, NY Prac section 137 at 243 [5th ed 2011]).

Here, it is crucial to note that the relief Pinnacle seeks is identical to the relief sought by Briarpark (see HSBC Guyerzeller Bank AG v. Chascona N.V., 42 A.D.3d 381 [1st Dept., 2007] (stating that "since the relief Montagu seeks is the same as that sought by plaintiff, the substitution motion was properly granted in the exercise of the court's discretion")).

Defendants cite Matter of C&M Plastics (Collins), 168 A.D.2d 160 [3rd Dept., 1991]) for the proposition that "[s]ubstitution ... is not available for replacing a party petitioner who had no right to sue with one who has such a right."

Defendants' contention implies that at no time did Briarpark have any legal rights or legal obligations based on its business relationship with the defendants. It is clear, however, that Briarpark did, in fact, have such rights and obligations.

The Falcon defendants' third contention is that there are no current plaintiffs for whom Pinnacle can be substituted.

We disagree. For the reasons stated above, we reiterate that Pinnacle may be substituted for Briarpark.

Defendants' final contention is that substitution would be futile because any claims by Pinnacle are time-barred; the relation-back doctrine does not apply; and CPLR 204(b) does not toll the statute of limitations.

The Court of Appeals summarized the raison d'etre of the statute of limitations in Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427 (1969). The Court wrote:

> At common law there was no fixed time for the bringing of an action. Personal actions were merely confined to the joint lifetimes of the parties. The Statute of Limitations was enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action. The statutes embody an important policy of giving repose to human affairs.

(Flanagan, 24 N.Y.2d at 429).

Here, it is hard to discern how the purpose of the statue of limitations would be served if the court were to find that Pinnacle's claims were time-barred based on the hypertechnical legal arguments of the defendants. It is important to note that defendants will suffer no legal prejudice or surprise if Pinnacle is substituted as a plaintiff, for no new cause of action is being asserted. Under such circumstances, defendants' arguments miss the mark.

Accordingly, it is

ORDERED the motion is granted; and it is further

ORDERED that the caption is amended as follows:

--X
INTERVENTURE 77 HUDSON LLC, HIGHLAND
OWNER LLC, HIGHLAND TENANT LLC,
RESTON OWNER CORP., RESTON TENANT CORP.,
1300 PARKWOOD OWNER CORP., 1300
PARKWOOD TENANT CORP., PINNACLE
OWNER CORP., PINNACLE TENANT LLC,
MIAC OWNER CORP., MIAC TENANT
LLC, WESTLAKE FOUR OWNER CORP.,
WESTLAKE FOUR TENANT LLC, WESTLAKE
THREE OWNER CORP., WESTLAKE THREE
TENANT LLC, WOODBRIDGE OWNER CORP.,
WOODBRIDGE TENANT LLC, CLEVELAND
OWNER CORP., CLEVELAND TENANT LLC,
BURBANK OWNER CORP., BURBANK PLAZA
TENANT LLC, DISTRIBUTION I PATENT
OWNER LLC, DISTRIBUTION I PATENT TENANT
LLC, DISTRIBUTION I TL OWNER LLC,
DISTRIBUTION I TL TENANT LLC, 7025
OWNER CORP., 7025 TENANT LLC, and
CRYSTAL CONDOMINIUMS, LLC,

Plaintiffs,

-against-

FALCON REAL ESTATE INVESTMENT CO., LP
N/D/B/A FALCON REAL ESTATE INVESTMENT
MANAGEMENT, LTD., HOWARD E.
HALLENGREN, JACK D. MILLER, DAVID A.
HILL, INTERNATIONAL REAL ESTATE
SERVICES, INC., WHITNEY INVESTMENT
ADVISORS, and WELSH REAL ESTATE SERVICES,

Defendants.

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And it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158) and on the County Clerk (Room 141B).

The foregoing constitutes the decision and order of the court.

Date: April 13, 2016
New York, New York

Anil C. Singh