Pirraglia v Jofsen Inc.
2016 NY Slip Op 33001(U)
July 20, 2016
Supreme Court, Bronx County
Docket Number: 23247/2015E
Judge: Sharon A.M. Aarons
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

JOHN PIRRAGLIA,

Plaintiff,

-against-

JOFSEN INC., JORGENSON'S LANDING, INC., JOHN P. JORGENSON, CARL D. MADSEN,

Defendant(s).

Index No. 23247/2015E

DECISION AND ORDER

Hon. Sharon A.M. Aarons:

Defendants Jofsen Inc., (Jofsen), Jorgenson's Landing, Inc., (Jorgenson's Landing) John P. Jorgenson, (Mr. Jorgenson), and Carl D. Madsen (Mr. Madsen), move for an order compelling arbitration of all the causes of action asserted against them in the verified complaint of plaintiff John Pirraglia, or in the alternative, an order dismissing, with prejudice, all the causes of action asserted in plaintiff's verified complaint pursuant to CPLR 3211. Plaintiff submits written opposition. Defendants' motion is granted in part and denied in part.

On February 11, 1986, plaintiff's parents, Salvatore and Theresa Pirraglia, (plaintiff's parents), entered into a contract (hereinafter "the 1986 contract") with Jofsen, in which plaintiff's parents conveyed real property at 701 Minnieford Avenue, in Bronx County, New York, to Jofsen and granted Jofsen a ten foot easement, with access to a pier located across another property owned by plaintiff's parents at 703 Minnieford Avenue, in Bronx County, New York. The 1986 contract also granted a four foot easement to plaintiff's parents on the 701 Minnieford Avenue property, thereinafter owned by Jofsen. Furthermore, the 1986 contract includes a clause mandating that the arbitration of any controversy, dispute or question involving the interpretation of, performance of

terms within, or non performance of terms within the 1986 contract. However, the arbitration clause does not prohibit any of the parties from exercising their right to seek injunctive or equitable relief.

On November 30, 1991, plaintiff' parents conveyed to plaintiff, by deed, the 703 Minnieford Avenue property. Subsequently, on February 11, 2003, plaintiff entered a five-year lease agreement with Jorgenson's Landing and Mr. Jorgenson, for a ten foot easement on the 703 Minnieford Avenue, in addition to access to and use of a pier and dock located at the rear of the 703 Minnieford Avenue property.

This action was commenced by plaintiff's filing a summons and a verified complaint on June 12, 2015. In the verified complaint, plaintiff asserts six causes action based on the alleged breach of the 1986 contract and 2003 lease agreement. The first cause of action is based on the alleged breaches of the 2003 lease agreement entered by Jorgenson's Landing and Mr. Jorgenson. The second cause of action pertains to the alleged breach of the 1986 contract by Jofsen. The third cause of action seeks a declaratory judgment that Jorgenson's Landing and Mr. Jorgenson are in default under the 2003 lease agreement and are no longer entitled to exercise their rights under it as a result. The fourth cause of action seeks an injunction from the Court enjoining all the defendants from entering, docking on, or passing over the plaintiff's property. The fifth cause of action requests an injunction directing all defendants to conduct repairs to the sea wall located at 701 Minnieford Avenue. And, the sixth and last cause of action seeks injunctive relief directing Jofsen to subdivide the property at 701 Minnieford Avenue.

Defendants assert that the arbitration clause within the 1986 contract governs the causes of actions asserted in plaintiff's verified complaint, and, consequently, the issues in the complaint must be resolved in arbitration. Defendants alternatively move to dismiss the complaint under CPLR

3211.

DEFENDANTS' MOTION TO COMPEL

As an initial matter, the Court will address plaintiff's argument that defendants' motion to compel should be denied in its entirety because the underlying 1986 contract is unenforceable as it prohibits either party from exercising its right under the New York Constitution to seek declaratory relief from the Courts. This argument is unavailing because paragraph fourteen of the 1986 contract expressly states that the parties are not prohibited from exercising their right to seek injunctive or equitable relief.

Moving forward, the Court will address defendants' motion to compel arbitration. "Generally, under New York statutory and case law, a court may address three threshold questions on a motion to compel or to stay arbitration: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and, (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court" (*see Smith Barney, Harris Upham & Co., Inc. v Luckie*, 85 NY2d 193, 201-02 [1995]; CPLR 7502[b]; 7503). Where, as here, a defendant moves to compel arbitration, the burden of proof is on the defendant to establish that arbitration should be compelled (*see Bona Togs Limited v Goldstein and Leavy*, 31 Misc 2d 765 [1961]).

With respect to the applicability of the arbitration provision in the 1986 contract, Jorgenson's Landing and Mr. Jorgenson cannot rely on it in seeking to compel arbitration. The only named parties to the 1986 contract were plaintiff's parents and Jofsen. Because Jorgenson's Landing and Mr. Jorgenson were not parties to the 1986 contract, and there is no evidence that they are the assignees of the original parties to the 1986 contract, they cannot seek enforcement of the arbitration

clause (*see Willoughby Rehabilitation and Health Care Ctr., LLC v Webster*, 31 AD3d 537, 538 [2d Dept 2006]). In fact, according to the 2003 lease agreement, the only contract to which Jorgenson's Landing and Mr. Jorgenson are parties with plaintiff, any disputes are to be resolved in the Courts, and not arbitration. As a result, the motion to compel arbitration is denied to the extent sought by Jorgenson's Landing and Mr. Jorgenson.

To the extent that Jofsen seeks to enforce the arbitration clause in the 1986 contract against plaintiff, this requested relief is denied because plaintiff was not a party to that contract. Rather, the 1986 contract was entered into between plaintiff's parents and Jofsen. As such, Jofsen cannot enforce the arbitration clause against plaintiff because plaintiff is not a party to the 1986 contract (*see State ex rel. Grupp v DHL Exp. (USA), Inc.*, 19 NY3d 278, 285-86 [2012]). In light of the foregoing, the motion to compel arbitration is denied to the extent sought by Jofsen.

DISMISSAL OF THE PLAINTIFF'S CAUSES OF ACTION

Defendants also seek the dismissal of the six causes of action asserted by plaintiff in his verified complaint pursuant to CPLR 3211(a)(1), (3), and/or (7).

The first cause of action is based on the alleged breaches of the 2003 lease agreement by Jorgenson's Landing and Mr. Jorgenson. According to the complaint, plaintiff alleges that Jorgenson's Landing and Mr. Jorgenson failed to pay rent due and failed to obtain insurance for the benefit of plaintiff as required by the 2003 lease agreement and that they subleased the dock to Mr. Madsen in contravention of the 2003 lease agreement's terms. Viewing the allegations in a light favorable to plaintiff, the complaint adequately states a breach of contract claim against Jorgenson's Landing and Mr. Jorgenson. To the extent that the complaint alleges a breach of the 2003 lease agreement by Jofsen or Mr. Madsen, because they were not parties to the 2003 lease agreement, they

cannot be liable for any alleged breach (*see Blank v Noumair*, 239 AD2d 534 [2d Dept 1997]; *Aces Mech. Corp. v Cohen Bros. Realty & Const. Corp.*, 136 AD2d 503, 504 [1st Dept 1988], *mod,* 531 NYS2d 218 [1st Dept 1988]). Hence, the first cause of action is dismissed only as to Jofsen and Mr. Madsen.

With respect to the second cause of action which asserts that Jofsen allegedly breached the 1986 contract, it is dismissed pursuant to CPLR 3211(a)(3). As mentioned above, plaintiff was not a party to the 1986 agreement. Therefore, plaintiff cannot assert a breach of contract cause of action based on a contract to which he is not a party (*see Plaisir v Royal Home Sales,* 81 AD3d 799, 800 [2d Dept 2011]; *CDJ Builders Corp. v Hudson Group Const. Corp.,* 67 AD3d 720, 722 [2d Dept 2009]; *Jetro Holdings, LLC v Mastercard Intern., Inc.*, 51 Misc 3d 1217(A) [Sup Ct 2016]; *Turano v Turano,* 22 Misc 3d 1139(A) [Sup Ct 2009]). Thus, the second cause of action is dismissed under CPLR 3211(a)(3) because plaintiff lacks standing.

The third cause of action seeks a declaratory judgment that Jorgenson's Landing, Inc. and Mr. Jorgenson are in default under the 2003 lease agreement and are no longer entitled to exercise their rights under it. "A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]). Because plaintiff can seek relief in the form of a breach of contract claim, the third cause of action for declaratory relief is redundant and unnecessary. As a result, the third cause of action is dismissed.

For this same reason, the fourth, fifth, and sixth causes of action seeking injunctive relief are dismissed because "[i]njunctive relief is not appropriate in actions involving breach of contract where a plaintiff has an adequate remedy at law" (*O'Neill v Poitras*, 158 AD2d 928 [4th Dept 1990];

see also White Bay Enterprises, Ltd. v Newsday, Inc., 258 AD2d 520, 521 [2d Dept 1999]; *Amity Loans, Inc. v Sterling Nat. Bank & Trust Co. of New York*, 177 AD2d 277, 279 [1st Dept 1991]).

Accordingly, the branch of defendants' motion seeking to compel arbitration is denied. The branch of defendants' motion seeking dismissal pursuant to CPLR 3211 is granted to the extent of dismissing the second, third, fourth, fifth, and sixth causes of action asserted in the verified complaint of plaintiff John Pirraglia against all defendants, and dismissing the first cause of action to the extent that it is asserted against Jofsen and Mr. Madsen only, and is otherwise denied. It is hereby

ORDERED that the second, third, fourth, fifth, and sixth causes of action asserted in the verified complaint of plaintiff John Pirraglia are dismissed against all defendants; and it is further

ORDERED that the first cause of action is dismissed insofar as it is asserted against defendant Jofsen, Inc. and defendant Carl D. Madsen; and it is further

The foregoing shall constitute the Decision and Order of the Court.

Dated: July 20, 2016

Hon. Sharon A.M. Aarons