Askilipios Med. Group, LLP v Greenblatt
2017 NY Slip Op 31252(U)
March 2, 2017
Supreme Court, Queens County
Docket Number: 7258/2016
Judge: Leonard Livote

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Justice

IA Part 33

x

Askilipios Medical Group, LLP, et al,
Plaintiffs,

- against -

David Greenblatt, et al,
Defendant

x

Index
Number 7258 2016

Motion
Date November 30, 2016

Motion
Cal. Seq. No. 1

The following papers numbered 1 to 3 read on this motion by the defendants for, inter alia, an order pursuant to CPLR 3211(a)(1),(5), and (7) dismissing the complaint against them

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	3
Memoranda of Law	

Upon the foregoing papers it is ordered that: The branch of the motion which is for an order pursuant to CPLR 3211(a)(5) dismissing the fifth cause of action on the ground of res judicata is granted. That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the seventh cause of action is granted. The remaining branches of the motion are denied.

I. The Complaint

The complaint alleges the following:

On or about June 9, 1998, defendant David Greenblatt, MD, defendant George Varsos, MD, and others organized Medical Real Estate Group, LLC (MREG or the company) for the purposes of owning and managing real property located at 23-22 30th Avenue, Astoria, New York. Plaintiff Asklipios Medical Group LLP, plaintiff Virgilio Cepellos MD, plaintiff Gustavo Depetris MD, and plaintiff Richard Desmond MD became members of MREG in or around late 1998. On or about August 25, 2009, MREG mortgaged the property to secure a loan from M&T Real Estate, Inc. The company used the loan to develop the property, and the plaintiffs eventually occupied parts of the building as tenants holding proprietary leases.

MREG did not have an operating agreement prior to August 1, 2013, although defendant Greenblatt, the holder of a 32% interest, and defendant Vargos, the holder of a 20% interest, acted as the managing members. After the adoption of an operating agreement, the defendant managing members sought to refinance the M&T loan, and in or about late August, 2013, the defendant managing members informed the plaintiffs that they had obtained a mortgage commitment from Astoria Federal in the principal amount of $2,200,000, a sum more than $1,300,000 greater than that needed to pay off the existing loan. When the plaintiffs balked at the size of the proposed Astoria loan, the defendant managing members promised that the additional $1,300,000 would be distributed to the members of MREG. Defendant David Berg, Esq., a partner at Berg and David PLLC. represented MREG in connection with the Astoria loan which closed on September 10, 2013. The Astoria loan, which matured in one year, was used to pay off the M&T loan.

On September 17, 2013, without the consent of the plaintiffs, defendant Greenblatt wrote a check to himself from the company's operating account in the amount of $1,113,394, over 99% of the net proceeds from the Astoria loan.

After defendant Greenblatt claimed that he drew the check in repayment for a loan that he had made to the company, other members of MREG began an action against him and Varsos in the New York State Supreme Court, County of Queens (*Asklipios Medical Group v. Greenblatt*, Index No. 705616/13). The complaint asserted causes of action for fraud, breach of fiduciary duty, conversion, and unjust enrichment. Despite the lawsuit, on December 13, 2013, Greenblatt and Varsos sold the property to a third party without notifying the plaintiffs or respecting their right of first refusal under section 12.3 of the

operating agreement. The plaintiffs served an amended complaint joining the purchaser of the property as a defendant and seeking a declaration that the sale was void.

On April 4, 2014, the plaintiffs discontinued the lawsuit by first entering into a settlement agreement with Varsos and Greenblatt whereby $1,650,000 from the company's bank accounts would be placed in escrow with Michael Resko, Esq., the attorney for the plaintiffs, and David Berg, Esq., the attorney for the defendants, equally divided between the attorneys. The settlement agreement further required the managing members to compile the financial books and records of the company and authorized the plaintiffs to hire an accountant to perform an accounting and auditing, and, if necessary to resolve disputes, to hire a review accountant. Section 3(h) of the settlement agreement permitted the escrow agents to release the funds upon the happening of certain events, one of which was the defendants' confirmation that they agreed with the accounting. On or about April 8, 2014, the defendants filed a stipulation discontinuing the action with prejudice.

Pursuant to the settlement agreement, the plaintiffs hired ARK LLP, an accounting firm, to conduct the accounting, and while the defendants provided the accountant with some documents, they failed to provide other requested documents. As a result of the defendants' failure to supply requested documents, on or about July 14, 2015, the plaintiffs brought an order to show cause seeking to vacate the stipulation of discontinuance, to void the settlement agreement, and to disqualify the defendants' attorneys. On March 31, 2016, the court denied the plaintiffs' motion.

By email dated May 9, 2016, defendant Abraham David, an attorney for the defendants, informed the plaintiffs that his law firm had released $434,557.59 to defendant Greenblatt and $272,040.11 to defendant Varsos from the escrow account. The defendants' attorneys allegedly released the funds in violation of the terms of the settlement agreement.

ARK eventually concluded that based on the records provided there was no basis for the $1,113,394 payment to defendant Greenblatt in September, 2013.

II. Discussion

A. CPLR 3211(a)(1)

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:1.a defense is founded on documentary evidence***." (*See, Galvan v. 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743.) In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all

the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see, Galvan v. 9519 Third Avenue Restaurant Corp, supra; Fontanetta v. Doe*, 73 AD3d 78; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.)

The first cause of action alleges that section 3(a) of the settlement agreement required defendant Greenblatt and defendant Varsos to compile and produce all of the financial and legal books and records of MREG from the formation of the company, but that they breached section 3(a) by failing to do so. The affirmation of the plaintiffs' attorney submitted in opposition to the instant motion amplifies the pleading by alleging that the defendants failed to produce (1) documentation substantiating the purported loan by Greenblatt of $1,113,394 to the company, (2) documentation relating to the closing of the property in 2013/20114, (3) financial or loan documents concerning the construction of the building and the refinancing of the property, and (4) company bank statements. The defendants assert that the settlement agreement only required them to produce those documents specified in section 4.1. of MREG's operating agreement which defines the company's books and records as including (a) a current list of members, (b)a copy of the certificate of formation, (c) tax returns and reports, (d) operating agreements, and (e) minutes and resolutions. The court finds that at best for the defendants section 3(a) is ambiguous concerning the documents that they were required to produce and that this ambiguity cannot be resolved solely by reference to section 4.1 of MREG's operating agreement.

The second cause of action is based upon section 4(b) of the settlement agreement which provides in relevant part: " Upon disbursement of the funds held in the Escrow Account pursuant to paragraph 3(g) hereinabove, and as a condition of the delivery and exchange of any such disbursement, each party to the Lawsuit and this Agreement shall execute and deliver to the Escrow Agent a General Release *** in favor of all other parties including without limitation [the] Escrow Agent." (Emphasis added.)The second cause of action alleges that "[d]efendants Greenblatt and Varsos breached the Settlement Agreement by failing to provide such General Releases prior the distribution of funds form the Berg Escrow Account." The defendants' attorney alleges that releases executed by the defendants are in existence, but even if so, they are not dispositive on the issue of when they were executed.

The third cause of action (unjust enrichment), the fourth cause of action (conversion), and the sixth cause of action (breach of fiduciary duty) are based on section 2(f) of the settlement agreement which provides that "[e]ach Escrow Agent shall release the Deposit if so directed: (i) Upon completion of the audit/accounting procedure as set forth in paragraph 3 of this Agreement; or (ii) in a subsequent writing executed by by all parties to

this Agreement; or (iii) by a final, non-appealable order or judgment of a court." Those causes of action are also based on section 3(h) of the settlement agreement which provides: " Within five (5) Business Days after the earlier of (i) the Majority Members' confirmation that it [sic] agrees with the Accounting, (ii) the expiration of the Majority Members 30 -day period to submit an Objection Notice without service of such Objection Notice, or (iii) the final resolution of any dispute by determination of the Review Accountant, Escrow Agent shall disburse the funds ***." The plaintiffs allege that the escrow agents disbursed escrow funds in violation of the terms of the settlement agreement. On the other hand, the defendants allege that they received the accounting report on or about August 21, 2014, did not object to it, and were entitled to receive the escrow funds pursuant to section 3(h)(ii). The court finds that there is an issue of fact concerning whether the accounting report received by the defendants was a final one (they allegedly had refused to supply complete financial information) and that this issue cannot be resolved on the basis of documentary evidence within the scope of CPLR 3211(a)(1).

The fifth cause of action alleges that defendant Berg and the defendant law firm breached a fiduciary duty owed to the plaintiffs by failing to provide them with written notice of the proposed sale of the property, thereby defeating their right of first refusal under the operating agreement. The defendants have produced an email sent by defendant Berg to the plaintiffs' then attorney notifying him of the proposed sale. The plaintiffs allege that the property was actually sold to a different buyer without notice to them. Although the defendants have submitted an affidavit attempting to show that the different buyer was just an assignee, "[a]ffidavits do not qualify as 'documentary evidence' for purposes of a motion to dismiss pursuant to CPLR 3211(a)(1)." (*Xia-Ping Wang v. Diamond Hill Realty, LLC*, 116 AD3d 767, 768.)

B. CPLR 3211(a)(7)

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference***." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83.) Nevertheless, "[w]hile typically the pleaded facts will be presumed to be true and accorded a favorable inference, 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence [will] not [be] entitled to such consideration' ***." (*Marraccini v. Bertelsmann Music Group Inc.*, 221 AD2d 95, 98, quoting *Roberts v.*

Pollack, 92 AD2d 440, 44; *see, Ullmann v. Norma Kamali, Inc.*, 207 AD2d 691; *Fisher v. Maxwell Communications Corp.*, 205 AD2d 356.) The seventh cause of action, which alleges that defendant Berg and his law firm tortiously interfered with contractual relations among the members of the company by inducing defendant Greenblatt and defendant Varsos to violate provisions of the operating agreement and settlement agreement requiring the production of documents, rests on little more than bare legal conclusions. The elements of a cause of action for tortious interference with contract include " the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom ***." (*Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 424.) The plaintiffs failed to allege sufficient facts showing that defendant Berg acted with the intent to procure a breach of contract. Insofar as the remaining causes of action are concerned, just as with CPLR 3211(a)(1), the documentary evidence in this case does not entitle the defendants to the dismissal of the remaining causes of action against them.

C. CPLR 3211(a) (5)

" The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same ***." (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 500; *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343; *Altegra Credit Co. v. Tin Chu,* 29 AD3d 718; *Sam v. Metro-North Commuter Railroad,* 287 AD2d 378.)

The prior action between the parties (*Asklipios Medical Group v. Greenblatt*, Index No. 705616/13) has no collateral estoppel effect on the first claim in the instant action since the issue of whether the defendants breached the settlement agreement by failing to produce documents was not previously raised by the pleadings, has no collateral estoppel effect on the second claim since the issue of whether the defendants breached the settlement agreement by failing to supply releases prior to the payment of escrow funds was not previously raised by the pleadings, has no collateral estoppel on the third, fourth, and sixth claims since the issue of whether the escrowed funds were paid in breach of sections 2(f) and 3(h) of the settlement agreement was not previously raised by the pleadings, has no collateral estoppel on the fifth claim since the issue of whether defendant Berg and his law firm failed to provide the plaintiffs with written notice of the sale of the property was not fully litigated with those defendants or others in privity, and has no collateral estoppel effect on the seventh cause of action since issues pertaining to whether defendant Berg and his law firm tortiously interfered with contractual relations among the members of the company was not previously

raised by the pleadings. In any event, "collateral estoppel is inapplicable if an issue has not been fully litigated, e.g., if there has been a stipulation ***," (*Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371; *Americorp Fin., L.L.C. v. Venkany, Inc.*, 102 AD3d 516 [stipulation of settlement].) Moreover, the decision and order (one paper) of the Honorable Timothy Dufficy dated March 31, 2016 denying the plaintiffs' motion to vacate the stipulation does not have a collateral estoppel effect on this case. Judge Dufficy only determined that: "the Stipulation of discontinuance with prejudice was unambiguous and the plaintiffs failed to demonstrate any grounds in the interest of justice for limiting or disregarding the language 'with prejudice' ***. The movants failed to demonstrate that the release and stipulation of discontinuance was the product of mutual mistake, duress, illegality or fraud." The issues pertaining to whether there were grounds for vacating the stipulation of discontinuance determined by Judge Dufficy differ from the issues pertaining to whether the settlement agreement was breached.

The fifth claim, which alleges that defendant Berg and his law firm breached a fiduciary duty owed to the plaintiffs by violating their right of first refusal in the sale of the property, is barred by the doctrine of res judicata. "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding ***." (*Sterngass v. Soffer*, 27 AD3d 549-550; *see, Barbieri v. Bridge Funding, Inc.*, 5 AD3d 414.) The first claim in the amended complaint served in the prior action sough to set aside the sale of the property on the ground, inter alia, that the plaintiffs' right of first refusal had been violated. Pursuant to a stipulation of discontinuance dated April 8, 2014, the plaintiffs agreed to discontinue the prior action against defendant Greenblatt and defendant Varsos with prejudice. Their lawyers representing them on the challenged transaction are in privity with them. " A stipulation of discontinuance with prejudice without reservation of right or limitation of the claims disposed of is entitled to preclusive effect under the doctrine of res judicata ***." (*Liberty Assocs. v. Etkin*, 69 AD3d 681, 682; *Trapani v. Squitieri*, 107 AD3d 696; *Town of Huntington v. Beechwood Carmen Bldg. Corp.*, 82 AD3d 1203.)

Dated: March 2, 2017

A. J. S.C.