| **Sez Holdings LLC v Magic Quick Lube, Inc.** |
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| 2017 NY Slip Op 31617(U) |
| June 29, 2017 |
| Supreme Court, Bronx County |
| Docket Number: 26479/2015E |
| Judge: Ruben Franco |
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FILED: BRONX COUNTY CLERK 07/05/2017 10:47 AM INDEX NO. 26479/2015E
NYSCEF DOC. NO. 167 RECEIVED NYSCEF: 07/05/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Sez Holdings LLC and Dazzle L.P.,

Plaintiffs,

-against-

Magic Quick Lube, Inc., Bronx-1241, Inc., E & A Holdings, Inc., Jerome Avenue Car Wash and Lube, Inc., Paul Langiulli, and Law Offices of Steven Cohn, P.C.,

Defendants.

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DECISION AND ORDER
Present: Hon. Ruben Franco
Index No. 26479/2015E

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

**Papers (ALL MOTIONS)**
**NYSCEF DOCS. Nos. 4 – 32, 37 -- 160**

**Motion(s)**
**Motions Seq. No. 1**
**Motions Seq. No. 2**
**Motions Seq. No. 3**
**Motions Seq. No. 4**
**Motions Seq. No. 5**
**Motions Seq. No. 6**

Defendants Magic Quick Lube, Inc. (Magic), E & A Holdings, Inc. (E & A), and Bronx-1241, Inc. (Bronx-1241) are related entities which operated a car wash/automobile lube business on three adjacent parcels of real property in Bronx County. One parcel was, and continues to be, owned by Bronx-1241. The plaintiffs own the other two parcels.

In 2008, Magic, E & A, and Bronx-1241 sold the business to Jerome Avenue Car Wash and Lube, Inc. (Jerome Avenue), which executed a promissory note for payment of part of the purchase price. Individual defendant Langiulli, Jerome Avenue's president and sole shareholder, guaranteed the note. The purchase and sale agreement required the sellers to deliver assignments of the underlying commercial leases for the two parcels not owned by the sellers to Jerome Avenue. The plaintiffs allegedly agreed to extend the leases, for a fee, and consented to the assignment of the leases to Jerome Avenue. Further, in order to secure payment of the note, Jerome Avenue executed reassignments of the leases back to the sellers, and placed the leases in escrow with Law Offices of Steven Cohn, P.C., until the note was paid.

Jerome Avenue defaulted on the payments, and on February 2014, Magic, Bronx- 241, and E&A commenced an action in Supreme Court, Nassau County, alleging that Jerome Avenue and Langiulli defaulted on the leases and promissory note. On October 9, 2015, the court in the Nassau County action granted partial summary judgment directing that the escrowed documents be delivered to the sellers in view of Jerome Avenue's default under the leases and promissory note.

In April 2014, E & A served ten-day notices terminating the leases and, in May 2014, E & A commenced two holdover proceedings alleging that it was the "landlord/prime tenant" of the premises, that Jerome Avenue was the subtenant, and that Jerome Avenue was in default for failing to pay rent due. The Civil Court relied on the ruling of the Supreme Court, Nassau County, finding, in essence, that the re-assignment of the leasehold documents to E & A allowed E & A to recover possession. The Civil Court consequently awarded possession to E & A. (Orders, January 21, 2016, Miles, J.) The Appellate Term, on November 1, 2016, reversed, finding that "reassignments only took effect when the escrowed documents were released to petitioner pursuant to the October 2015 order of the Supreme Court, Nassau County, which was long after these proceedings were commenced." (*E & A Holdings, Inc. v. Jerome Ave. Car Wash & Lube, Inc.*, 53 Misc. 3d 145(A), 48 N.Y.S.3d 625 [App. Term, 1st Dept. 2016].)

In the present action, plaintiffs, the fee owners of two of the parcels, allege that they did not consent to the collateral reassignment of Jerome Avenue's leasehold back to E & A. They seek declaratory judgment that the collateral reassignments are void in the absence of the landlord's consent.

There are presently six motions pending in this action. Each of the motions is decided as set forth below.

*Analysis*

Motion Seq. No. 1

In this motion, brought by Order to Show Cause, plaintiffs seek, *inter alia*, to consolidate and remove to the Supreme Court the two companion Civil Court actions entitled *E & A Holdings, Inc. v. Jerome Avenue Car Wash and Lube, et al.*, Index Nos. 900827/2014 and 900828/2014. The motion was brought in December 2015. Since that time, as noted above, the Appellate Term has dismissed the petitions. Assuming, without deciding, that this court has the authority to remove

these two summary proceedings to itself, inasmuch as the cases have been litigated, appealed, and dismissed by the appellate court, no valid basis to do so exists at this juncture.

Accordingly, this motion is denied in its entirety, and all interim stays and restraints are vacated.

Motion Seq. No. 2

Here, defendant Jerome Avenue moves, by Order to Show Cause dated March 9, 2016, to compel co-defendants Magic Quick Lube, Bronx-1241, and Law Offices of Steven Cohn, to re-deposit the reassignment documents in escrow.

Jerome Avenue argues that Justice Feinman granted partial summary judgment for release of the escrow documents "pursuant to the subject Agreement." (Order, Nassau Co., Feinman, J., Ind. No. 1813/2014, October 9, 2015.) Jerome Avenue argues that the documents should not have been released from escrow until, as the agreement provides, "a judgment …become[s] final after the expiration of all time within which to appeal…."

Defendants Magic Quick Lube, Bronx-1241, and E & A Holdings argue, correctly, that the relief defendant Jerome Avenue now seeks is nothing more than an untimely clarification or reargument of Justice Feinman's October 9, 2015 Order. Jerome Avenue had ample opportunity to raise this argument before Justice Feinman, in a motion for reargument or re-settlement of the judge's Order, or in connection with a stay on appeal from that Order. Having failed to do so, the argument is waived. Moreover, the argument is barred by collateral estoppel. The court of Appeals has stated that, "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, 467 N.E.2d 487, 478 N.Y.S.2d 823 [1984].)

Moreover, Jerome Avenue has ostensibly abandoned the appeal, and thus, at this juncture, the escrowed documents would no longer be subject to the escrow agreement.

Accordingly, the motion is denied.

Motion Seq. No. 3

By Order to Show Cause dated March 9, 2016, plaintiffs seek to remove and consolidate a pending Nassau County action, *E &A Holdings, Inc. v. Sez Holdings LLC*, Ind. No. 600238/2016), with this action.

This is the second Nassau County action arising out of the present dispute between the parties. As noted above, the prior Nassau County action (Ind. No. 1813/2014), commenced in 2014, resulted in Justice Feinman's October 9, 2015 Order releasing the escrowed documents. The second Nassau County action, for which removal and consolidation is sought, names the plaintiffs herein and other parties as defendants, and seeks damages for tortious interference with business relations, tortious interference with contract, and other business torts, arising out of the present dispute.

Defendants Magic Quick Lube, Bronx-1241, and E & A Holdings argue in opposition that the actions do not involve common questions of law or fact within the meaning of CPLR 602(a), because the Nassau County action is a tort action. Further, they argue that even if the plaintiffs prevail in this action, the allegations being litigated in the Nassau County matter, would not be resolved.

Defendants concede that with respect to the instant action, "the underpinning of Plaintiff's claims involves the alleged failure of E & A to procure consent to the reassignments . . .." (Opposition, par. 28.) The Verified Complaint in the Nassau County action alleges that, "Defendants have without legal basis wrongfully and maliciously induced Purchaser and Langiulli to [sic] their legal and financial obligations to Plaintiffs because Defendants never formally consented to the Reassignments." (Complaint at par. 27.) Thus, consent to the reassignments is a central issue in both actions.

The determination of a motion seeking a joint trial pursuant to CPLR 602(a) "rests within the sound discretion of the trial court." (*Glussi v Fortune Brands*, 276 A.D.2d 586, 587, 714 N.Y.S.2d 516 [2d Dept. 2000]). "When there are common questions of law or fact, a joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right." (*Pierre-Louis v DeLonghi Am., Inc.*, 66 A.D.3d 855, 856, 887 N.Y.S.2d 632 [2d Dept. 2009]). Considering that consent to the reassignments is at issue in both proceedings, the two actions are sufficiently related to warrant a joint trial.

Accordingly, Motion Sequence No. 3 is granted to the extent of ordering a joint trial pursuant to CPLR § 602(a), and the instant action shall be jointly tried with *E&A Holdings, Inc. v. Sez Holdings LLC*, Index No. 600238/16, pending in Supreme Court Nassau County.

Motion Seq. No. 4

In this motion, plaintiffs seek to change venue of the pending Nassau County action (*E &A Holdings, Inc. v. Sez Holdings LLC*, Ind. No. 600238/2016) to Bronx County. The motion is denied as academic in view of the determination under Motion Sequence No. 3, that a joint trial is warranted.

Motion Seq. No. 5

Defendants Magic Quick Lube, Bronx-1241, E & A, and the Law Office of Steven Cohn, P.C., seek an order dismissing the cross-claims against them interposed by defendants Jerome Avenue and Langiulli. The cross-claims allege that the escrowed documents should not have been released pursuant to the Order of Nassau County Supreme Court until, according to the escrow agreement, "becoming final after the expiration of all time within which to appeal."

Defendants Jerome Avenue and Langiulli argue that the language of the agreement meant that the documents should not have been released until the appeal was dismissed. They contend that the Order was issued October 9, 2015, an appeal was taken October 26, 2015, and that the documents were released "prematurely" in November 2015.

The language of the Order of Supreme Court, Nassau County, that the documents may be released "pursuant to the Agreement of the parties," appears to authorize immediate release of the escrow documents. The phrase "pursuant to the Agreement of the parties" seems to relate to the E & A defendants' right to the release of the agreements, and not to the timing or manner of the release.

Further, the language of the escrow agreement – "becoming final after the expiration of all time within which to appeal" – does not state, as the cross-claiming defendants argue, that all appeals must be exhausted (i.e., determined or dismissed), before the documents are released. In the court's view, the agreement merely states that the time to appeal must have expired. Although the

agreement states that the order of the court releasing escrowed documents must be "final," it defines finality by referring to "time within which to appeal," which clearly refers to the time period for the taking of an appeal. The escrow agreement does not require that an appeal be determined before the documents may be released.

Moreover, defendants Jerome Avenue and Langiulli had ample opportunity to object to the release of the escrowed documents, and to seek clarification of the Order of Nassau County Supreme Court or of the meaning of the escrow agreement, but failed to do so.

Accordingly, the motion is granted, and the cross-claims interposed by defendants Jerome Avenue and Langiulli, are dismissed.

Motion Seq. No. 6

Lastly, the plaintiffs move for partial summary judgment declaring that the reassignment of the leases to defendant E & A is null and void, as the prior written consent of the plaintiffs was not obtained. Defendants Magic, E & A, and Bronx-1241 contend that plaintiffs were paid $55,000 to extend the leases, and to consent to the assignment of the leases to Jerome Avenue. The defendants maintain that plaintiffs were aware of the transaction, including the collateral reassignment of the leases, and thus no further consent by the plaintiffs was required. In support, defendants cite *Fotiadis v. 313 W. 57th Assoc.* (176 A.D.2d 565, 567, 574 N.Y.S.2d 739 [1st Dept. 1991]), in which the court stated, that where "defendant had knowledge of the assignment for security purposes and specifically consented thereto," the plaintiff would be permitted to re-enter the premises, as not permitting re-entry would render the agreement meaningless.

However, in *Fotiadis*, the landlord specifically consented to the collateral assignment. In the present case, the key consideration is whether the plaintiffs, as landlords, had knowledge of the entire agreement of the parties, including the reassignment of the leases as collateral security, such that the landlord could have been deemed, in consenting to the original assignment of the lease, to have consented to the reassignment.

Here, Yemini, the principal of E & A and its related companies, states that the principals of the plaintiffs were aware of the entire transaction, which includes the assignment and reassignment. Other than making this conclusory statement, he provides no facts to support this contention. He

does not provide any information regarding the method by which the plaintiffs were informed of the collateral assignment, when they were informed, nor does he identify the person who informed the plaintiffs.

Assuming, *arguendo*, that the defendants have raised an issue of fact as to plaintiffs' knowledge of the collateral assignment, there is no evidence that plaintiffs consented to the transaction, or that they waived consent to the collateral reassignment by their conduct. The defendants' argument rests on the assumption that knowledge of the transaction, and consent to the initial assignment of the leases, was tantamount to consent to the collateral reassignment. However, having consented to the initial assignment of the leases to Jerome Avenue cannot be interpreted as a consent to any future assignment of the leases. Unlike *Fotiadis v. 313 W. 57th Assoc.*, supra, there is no evidence that the plaintiffs "specifically consented" to the assignment of the lease for security purposes.

Defendants Magic, E & A, and Bronx-1241, argue that the plaintiffs could not unreasonably refuse to permit the collateral assignment. This may be so, but that does not relieve the defendants of their obligation to seek plaintiffs' consent to the reassignment (*Riesenburger Props., LLLP v. Pi Assoc., L.L.C.*, 47 Misc. 3d 1224(A), 18 N.Y.S.3d 581 [Sup. Ct., Queens Co., 2015]). While the Court is not aware of any factors precluding a request for consent to the assignment, even at this late juncture, the fact remains that consent was neither sought nor obtained.

The collateral assignment was effectuated without the plaintiffs' consent. The plaintiffs are therefore entitled to a declaration that the assignments were made in contravention of the terms of the leases, and thus, are inoperative.

Conclusion

In view of the foregoing, it is

ORDERED that Motion Seq. No. 1 seeking consolidation and removal and other relief, is denied in its entirety, and all interim stays and restraints are vacated, and it is further

ORDERED that Motion Seq. No. 2, seeking to compel defendants Magic Quick Lube, Inc., Bronx-1241, Inc., and Law Offices of Steven Cohn, P.C., to re-deposit certain documents into escrow, is denied in its entirety, and it is further

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ORDERED that Motion Sequence No. 3 seeking a joint trial is granted, and the movants are directed to settle a further order of this Court providing for removal to this Court of pending Nassau County action *E &A Holdings, Inc. v. Sez Holdings LLC*, Ind. No. 600238/2016, for a joint trial herewith, and it is further

ORDERED that Motion Sequence No. 4 is denied as academic, and it is further

ORDERED that Motion Sequence No. 5 is granted, and the cross-claims interposed by defendants Jerome Avenue Car Wash and Lube, Inc., and Paul Langiulli are dismissed, and it is further

ORDERED that Motion Sequence No. 6 is granted, and it is further

DECLARED AND ADJUDGED that the reassignments of the 1245 Lease and the 1251 Lease to defendant E & A Holdings, Inc., was contrary to the requirement under the leases between E & A Holdings, Inc., and the plaintiffs herein, that plaintiffs give prior consent, and it is further

DECLARED AND ADJUDGED that E & A Holdings, Inc., has no present possessory interest in the leases to 1245 and 1251 Jerome Avenue, Bronx, New York, by virtue of the purported collateral reassignments for which consent of the plaintiffs was not obtained.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2017

Ruben Franco, J.S.C.