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| <b>55 Constr. Corp. v Giannakos</b>                                                                                                                                                                                            |
| 2018 NY Slip Op 31810(U)                                                                                                                                                                                                       |
| July 26, 2018                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 450935/2018                                                                                                                                                                                                     |
| Judge: Arthur F. Engoron                                                                                                                                                                                                       |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----X  
55 CONSTRUCTION CORP., a New York corporation  
created on July 3, 2007 with the New York Secretary of  
State that is the true owner of the real property that is  
the subject of this action; and ERAN ZARKA, the sole  
shareholder, officer and director of co-plaintiff 55  
Construction Corp.,

450935/2018  
Index Number: ~~22742/2018~~

Motion Seq. No.: 001

**DECISION AND ORDER**

Plaintiffs,

- against -

CONSTANTINE GIANNAKOS, a disbarred attorney as of  
August 21, 2012, who was illegally held out as an attorney  
for 15 Harper Ct, LLC, in connection with that entity's  
fraudulent acquisition and theft of Plaintiffs' real property;  
NISAN PLISHTYEF, the owner of the entity 15 Harper Ct,  
LLC, who used a disbarred attorney for his entity's  
fraudulent acquisition and theft of Plaintiffs' real property;  
15 HARPER CT, LLC, the entity in whose name title was  
placed by co-defendant Nisan Plishtyef for the fraudulent  
acquisition and theft of Plaintiffs' real property; JANUS  
ABSTRACT, INC., an agent and representative of various  
defendants that aided and abetted the fraudulent acquisition  
and theft of Plaintiffs' real property; and the fraudulently  
formed entity 55 CONSTRUCTION CORP (no period) that  
was fraudulently created on March 9, 2016 with the New  
York Secretary of State, with the same name and spelling  
as the true corporate owner of the real property but without  
a period (.) at the end thereof, to effectuate the fraudulent  
acquisition and theft of Plaintiffs' real property,

Defendants.

-----X  
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 and 2, were  
used on defendant 15 Harper Ct, LLC's motion, pursuant to CPLR 3211(a)(5), to dismiss the complaint  
upon the grounds of *res judicata* and collateral estoppel, and pursuant to CPLR 6514 and 6516, to vacate  
and cancel a Notice of Pendency and for an award of costs and expenses:

**Papers Numbered:**

|                                                                                   |   |
|-----------------------------------------------------------------------------------|---|
| Order to Show Cause– Affirmation – Affidavit – Exhibits (memorandum of law) ..... | 1 |
| Plaintiffs' Memorandum of Law in Opposition .....                                 | 2 |

Upon the foregoing papers, the motion is denied.

### Background

In this action, plaintiffs 55 Construction Corp. (“55 Const.”) and Eran Zarka, 55 Const.’s sole owner, seek a judgment quieting title in 55 Const. to a three-family dwelling located at 844 East 216<sup>th</sup> Street in the Bronx (“the Premises”), and for damages for defendants’ alleged tortious conduct in transferring title to the Premises from 55 Const., without any authority to do so. This is plaintiffs’ second action to recover title to the Premises; there is a prior, related action also pending before this Court entitled 55 Const. Corp. and Zarka v N’Dow, et al., Index No. 654725/2016 (“the First Action”). As is apparent from the title, with the exception of defendant 15 Harper Court LLC (“Harper”, which is common to both actions), the First Action names parties, other than those named herein, involved in the alleged “unauthorized” and “fraudulent” deed transfers and asserts slightly different legal theories.

Presently before this Court is Harper’s motion, pursuant to CPLR 3211(a)(5), to dismiss the instant complaint as against it upon the grounds of *res judicata* and/or collateral estoppel, and to cancel the Notice of Pendency filed by plaintiffs herein against the Premises. A brief word on the complaint in the First Action, and this Court’s dismissal, on default, of the first complaint as against Harper for pleading deficiency, is necessary and follows.

The pertinent factual allegations in the complaint in the First Action are: on September 21, 2007 defendant Baboucarr N’Dow (“N’Dow”) sold the Premises to Zarka; on November 28, 2008 Zarka transferred the Premises to 55 Const.; Zarka owns 100% of 55 Const.; on February 18, 2016, N’Dow, as purported president of 55 Const., transferred the Premises to defendant Levanta Global Inc. (“Levanta”) for \$262,600; N’Dow did not have any authorization to transfer the Premises on behalf of 55 Const.; defendant Malick Diop (“Diop”) represented N’Dow in the February 18, 2016 transfer; on March 21, 2016, Levanta transferred the Premises to Harper for \$380,000. Upon those facts, the complaint asserts the following causes of action: breach of contract against N’Dow; fraud against N’Dow; aiding and abetting fraud against Levanta, Diop, and Harper; and seeks to quiet title in 55 Const. pursuant to RPAPL Article 15 against Harper. Plaintiffs also filed a Notice of Pendency simultaneously with the filing of the complaint.

Harper moved, pursuant to CPLR 3211(a)(1) and (7), CPLR 3016, and RPL 266, to dismiss the complaint in the First Action. By Order dated September 22, 2017, this Court granted the motion, on default, explaining:

..... 15 Harper Court argues, successfully, that the complaint fails to state a cause of action against it: (1) for “aiding and abetting” fraud because the complaint does not allege that 15 Harper had “actual knowledge” of N’Dow’s alleged fraud, or that Harper rendered “substantial assistance” towards said alleged fraud, and the complaint otherwise fails to meet the pleading requirements for fraud under CPLR 3016; and (2) because 15 Harper is a good faith purchaser for value of the premises within the meaning of RPL 266. Plaintiffs failed to oppose the motion. Accordingly, 15 Harper’s motion to dismiss is granted on default and on the merits.

By Order dated February 28, 2018, this Court “granted, on consent,” Harper’s motion to vacate and cancel the first Notice of Pendency. As far as this Court can tell, no further proceedings have taken place in the First Action.

On March 9, 2018, plaintiffs commenced this action in Supreme Court, Bronx County. The instant complaint contains the same factual allegations as contained in the first complaint, but names new

parties, alleges facts as to those parties, and provides more details as to the alleged unauthorized, fraudulent deed transfers. In the main, the instant complaint alleges that: defendant Constantine Giannakos, a disbarred attorney, who represented Harper in Levanta's March 21, 2016 transfer of the Premises to Harper; Nisan Plishtyef is the sole owner of Harper; Harper "knew or should have known" based upon "publicly available records," including documents filed with the New York State Secretary of State that N'Dow lacked any authority to transfer the Premises to Levanta; Janus Abstract Inc. was the title company involved in the unauthorized deed transfers from N'Dow to Levanta, and Levanta to Harper; and 55 Construction Corp (no period) was "fraudulently formed" in March 2016 in furtherance of the alleged fraudulent deed transfers. As against Harper, the instant complaint seeks: an order declaring that the transfer of the Premises from Levanta to Harper "is void from its inception" and that 55 Const. is "the true legal owner" of the Premises (first cause of action); equitable disgorgement of rents and income earned by Harper from the Premises, to be paid to plaintiffs (second cause of action); and an order declaring that Harper is not a bona fide purchaser for value and directing Harper to pay plaintiffs "all damages proximately caused by [its] tortious conduct" (third cause of action; although it sounds more like a prayer for relief than a cause of action). Simultaneously with the filing of the instant complaint, plaintiffs filed a second Notice of Pendency.

By Order to Show Cause dated April 4, 2018, Harper moved to transfer the case to this Court; to dismiss the complaint with prejudice on *res judicata* and/or collateral estoppel grounds; and to vacate/cancel the second Notice of Pendency, with an award for costs and expenses. Plaintiffs opposed the motion. By Order dated April 23, 2018, Justice Mary Ann Brigantti granted Harper's request to change venue and transferred the case to this Court for all purposes. This Court now decides that part of Harper's motion that was to dismiss the complaint and to vacate and cancel the second Notice of Pendency, with an award of costs and expenses.

### Discussion

Plaintiffs' claims against Harper herein are not barred by the doctrines of *res judicata* or collateral estoppel, for two reasons. First, this Court dismissed plaintiffs' causes of action in the First Action solely upon pleading deficiencies which have been obviated (i.e. there is no "aiding and abetting fraud" claim against Harper herein) or cured (i.e., new facts are alleged about Harper's notice of publicly available records that allegedly show that N'Dow lacked authority to transfer the Premises). See 175 E. 74th Corp. v Hartford Acc. & Indem. Co., 51 NY2d 585, 590 fn. 1 (1980) (dismissal on 3211 motion "has preclusive effect only as to a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint"); Adelaide Prods., Inc. v BKN Int'l AG, 15 AD3d 316 (2005) (complaint not barred by *res judicata* as it "sufficiently alleges new facts concerning defendants' purportedly fraudulent intentions").

Second, the dismissal was on plaintiffs' default in opposing the motion; this Court did not examine the merits of plaintiffs' claims. See Chin Tsun Yang v Sneh Prabha Shukla, 138 AD3d 668, 669 (2d Dept 2016) (dismissal on default "would not constitute a determination on the merits that would provide a basis to invoke the doctrine of *res judicata*."). Indeed, this Court has not made a determination on the merits, after the parties have had a full and fair opportunity to litigate their claims and defenses, that plaintiffs have no claim against Harper under any legal theory on the facts alleged. Contrary to Harper's apparent argument, this Court did not find, as a matter of law, that Harper is a bona fide purchaser for value under RPL 266. Nor could the Court make such a finding on the merits because that argument was based solely upon: (1) the March 21, 2016 deed from Levanta to Harper and related transfer forms; and (2) the statement of Harper's attorney, who has no personal knowledge, that Harper is a bona fide purchaser for value. Neither the transfer documents nor counsel's conclusory statement, either standing alone or considered together, unequivocally establish that Harper performed its due diligence in respect to the transaction and had no notice that the underlying deed transfers were unauthorized. See generally Fleet Bank v Consola, Riccitelli, Squadere Post No. 17 Inc., 268 AD2d 627, 630 (3<sup>rd</sup> Dept

2000) (“corporate resolutions upon which plaintiff relied--executed only by Mastan as president and one of which was also certified by him as defendant’s secretary--did not provide a reasonable basis for plaintiff to conclude that Mastan was cloaked with actual or apparent authority to enter into the loan transactions or mortgages.”); Zuckerman v. City of New York, 49 NY2d 557, 563 (1980) (“affirmation by counsel is without evidentiary value and thus unavailing”).

In any event, even assuming, arguendo, that this Court’s September 22, 2017 Order could be construed to contain a finding on the merits that Harper is a bona fide purchaser for value – which construction is erroneous – such a finding does not bar plaintiffs’ claim herein to quiet title to the Premises, whether asserted under RPAPL Article 15 or GOL 5-703, because an innocent purchaser for value obtains no title to property purchased from a thief. See Solomon R. Guggenheim Found. v Lubell, 77 NY2d 311, 317 (1991) (“New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value.”).

Thus, there is no bar, under the doctrines or *res judicata* or collateral estoppel, to plaintiff’s complaint herein. Accordingly, Harper’s motion to dismiss is denied. Plaintiffs, of course, will be put to their proof in this litigation on the issues of Harper’s status as a bona fide purchaser for value, and whether the deed transfers are void ab initio, or voidable.

As service of the summons upon Harper has been completed, and the instant action against Harper has not been discontinued, there is no basis for “mandatory cancellation” of the second Notice of Pendency under CPLR 6514(a). In addition, as this Court finds that plaintiffs commenced the instant action in good faith, there is no basis for “discretionary cancellation” of the second Notice of Pendency under CPLR 6514(b). Finally, the plain meaning of the language in CPLR 6516 – to wit: a “notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective” – prohibits only the filing of successive notices of pendency in the same action, and not the filing of a “second notice of pendency in a different action.” Deutsch v Grunwald, 63 AD3d 872, 873 (2d Dept 2009). Accordingly, Harper’s motion to vacate and cancel the second Notice of Pendency is denied.

#### Conclusion

Defendant 15 Harper Ct, LLC’s motion to dismiss and to vacate and cancel the Notice of Pendency is denied. This matter, and the related action entitled 55 Construction Corp. v N’Dow, et al, Index No. 654725/2016, are scheduled for a **Preliminary Conference on September 18, 2018 at 10:00 a.m.**, before Part 37, 60 Centre Street, Room 418, New York, New York.

Dated: July 26, 2018



Arthur F. Engoron, J.S.C.