

Hollis Care Group Inc. v United States of America
2019 NY Slip Op 31524(U)
May 31, 2019
Supreme Court, New York County
Docket Number: 653506/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK **PART** **IAS MOTION 53EFM**

Justice

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HOLLIS CARE GROUP INC., MEDI-SYSTEM RENAL CARE
MANAGEMENT LLC, JACQUES ANTOINE M.D., GARAUDY
ANTOINE M.D. M.B.A.

Plaintiff,

- v -

UNITED STATES OF AMERICA, MICHAEL OGUS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for

DISMISSAL

Michael Ogus moves to dismiss the complaint against him pursuant to CPLR 3211(a)(3) (lack of standing), 3211(a)(5) (collateral estoppel/res judicata), and 3211(a)(7) (failure to state a claim), and, in the alternative, for a change of venue to Nassau County. The verified complaint (the **Complaint**) in this action is brought on behalf of Hollis Care Group, Inc. (**Hollis**), Medi-System Renal Care Management LLC (**Medi-System**), and Drs. Jacques Antoine and Graudy Antione (collectively, the **Plaintiffs**) against the United States of America, the Small Business Administration (**SBA**), Linda McMahan as the SBA Administrator, and Michael Ogus for claims sounding in fraud and/or gross negligence. For the reasons set forth below and stated on the record at oral argument (5/31/19), Mr. Ogus's motion is granted and the complaint is dismissed against him with prejudice.

FACTUAL BACKGROUND

The Complaint

The following facts are drawn from the Complaint and assumed as true for purposes of this motion to dismiss (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Complaint seeks redress from the SBA for its alleged failure to prevent the “fraudulent schemes” engaged in by Mr. Ogus, or in the alternative, for the SBA’s complicity in said schemes (Complaint, ¶ 16; NYSCEF Doc. No. 29). The Plaintiffs sought to obtain a small business loan (the **Loan**) to open an ambulatory urgent care renal dialysis in Hollis, New York (*id.*, ¶ 6). Mr. Ogus, as First Vice President of Community National Bank (**CNB**), participated in a federal program sponsored by the SBA called “Preferred Lender Participation” and, pursuant to that program, was authorized to originate loans to small businesses with limited capital (*id.*, ¶¶ 8-9). According to the Complaint, Mr. Ogus was an intermediary for obtaining an SBA loan. The Plaintiffs allege that, “[u]nder the guise of obtaining a loan for plaintiffs, defendants set about manipulating the program to acquire federal funds to which they were not entitled, and induced plaintiffs’ unwritten [sic] participation in a scheme to defraud plaintiffs” (*id.*, ¶ 11). Mr. Ogus was allegedly in charge of determining if a small business qualified for a loan and had the authority to originate any such loan and to “certify” to the SBA that the borrower and the guarantors were credit worthy (*id.*, ¶ 19). The Plaintiffs allege that Mr. Ogus:

- (a) Misrepresented and made materially false certifications to SBA that a company unrelated to plaintiffs applied for the loan; [See Exhibit A - Ogus's false 2/21/12 certification to SBA]
- (b) Intentionally manipulated the SBA loan application process on behalf of an entity unrelated to plaintiffs so as to make it appear that the borrower was qualified; [See Exhibit A - Ogus's false 2/21/12 certification to SBA]

- (c) Certified the loan application i.e., loan eligibility, on behalf of the entity that was unrelated to plaintiffs;
- (d) Intentionally misled plaintiffs by stating orally and in writing to plaintiff and to the court that the loan application and 2/21/12 certification to SBA were submitted on behalf of plaintiffs when it was not; [See Exhibit B - OGUS's letter of conditional intent to lend]
- (e) Intentionally misled, induced and duped plaintiffs into guaranteeing a loan issued in favor of the entity unrelated to and unknown to plaintiffs; [See Exhibit A -OGUS's false 2/21/12 certification to SBA and Exhibit C - Conditional Commitment]
- (f) Funded the loan, under the guise that it was a construction loan issued to plaintiffs, and then, conditioned the loan on the basis that plaintiffs engage a certain construction company, known to OGUS and to OGUS's accomplices, to renovate plaintiffs' leased premises; [See Exhibits B - Ocus's letter of conditional intent to lend and C - Conditional Commitment]
- (g) Waived all surety bond protection for plaintiffs in case of a default by OGUS's designated contractor; [See Exhibit D - Waiver]
- (h) Caused, permitted, provoked, prompted, incited, induced and encouraged the contractor to default on the completion of plaintiffs' construction knowing there was no surety bond protection, OGUS and his accomplices causing a default in construction and a default on the loan;
- (i) Caused plaintiffs to be sued in the Supreme Court of the State of New York, Nassau County Index Number 602124/2014, by repeatedly, falsely asserting in sworn affidavits that plaintiffs were the borrowers they were not as OGUS personally submitted and certified the Preferred Lender Participation application on behalf of an entity unrelated to plaintiffs;
- (j) Repeatedly, falsely asserted in sworn affidavits that plaintiffs were the borrowers and the guarantors on the SBA when they were not; [See Exhibit E - OGUS's sworn affidavit]
- (k) Repeatedly, misled and misrepresented to the Court in sworn affidavits that plaintiffs defaulted on a SBA loan when they did not;

- (l) Submitted and made a false application to SBA under the "Preferred Lender Participation (PLP)" Program for default reimbursement in which OGUS falsely identified plaintiffs as the borrowers in express contradiction to the [sic] OGUS's sworn loan application certification; [See Exhibit F - Request to Honor SBA Loan Guaranty]
- (m) The Request to Honor SBA Loan Guaranty falsely certifies to SBA that the Loan Name is "Hollis Care Group, Inc.;" [See Exhibit F - Request to Honor SBA Loan Guaranty]
- (n) Swore in an Affidavit before the New York State Supreme Court that Loan Name is "Hollis Dialysis LLC," an entity unknown to plaintiffs; [See Exhibit G Fraudulent Note showing the name of the loan is "Hollis Dialysis LLC" and the borrower is Hollis Care Group, Inc. in express contradiction to the 2/21/12 OGUS certification to SBA showing the reverse]
- (o) By engaging in this scheme to defraud, OGUS and his accomplices derived benefits from participation in the SBA "Preferred Lender Participation (PLP)" Program such as fees payments and reimbursement; and
- (p) By engaging in this scheme to defraud, OGUS and his accomplices derived other benefits as compensation for originating the loan.

(Complaint, ¶ 20 [a]-[p]; NYSCEF Doc. No. 29).

As such, the Plaintiffs allege that Mr. Ogus: (1) made false certifications that he complied with his obligations; (2) manipulated the loan application and documents to make it appear that the Plaintiffs were qualified; (3) misrepresented and/or omitted material facts, and (4) concealed each of the "foregoing schemes" from the Plaintiffs (*id.*, ¶ 21[a]-[d]).

As compensation, the Plaintiffs seek unspecified losses incurred as a result of the alleged fraudulent schemes, compensation for "projected future income," and fees and costs in connection with the defense of any action "brought by defendants and their accomplices growing out of their fraud, misrepresentation, concealment of the facts and the truth."

The Prior Action

Previously, in 2014, CNB commenced an action in Nassau County against Hollis, Medi-System and Dr. Jacques Antoine, and non-party Juanito Caguiat, Jr. to enforce a certain United States Small Business Administration Promissory Note (the **Note**) dated July 13, 2012 and executed by Hollis as borrower in favor of CNB as lender, as well as United States Small Business Administration Unconditional Guarantees (the **Guarantees**) dated July 13, 2012 and executed by Medi-System, Dr. Jacques Antoine and Mr. Caguiat, Jr., and certain Security Agreements (the **Security Agreements**) dated July 13, 2012 and executed by Hollis and Medi-System (*Community National Bank v Hollis Care Group, Inc.*, Index No. 602124/2014; Palmieri Affirm., Ex. B, R. at 25-148, 37-82; NYSCEF Doc. No. 16;) (the **Prior Action**).

Hollis, Medi-System, Dr. Jacques Antoine and Mr. Caguiat, Jr. (the **Hollis Defendants**) filed an answer in the Prior Action that contained seven affirmative defenses and four counterclaims against CNB. The counterclaims sought damages in excess of \$73,000,000 against CNB based on allegations of substantially similar conduct as forms the basis of the claims against Mr. Ogus in the instant action. CNB filed a motion for summary judgment in the Prior Action on or about July 31, 2014. Pursuant to a Short Form Order of the Court dated December 16, 2014 (the **Trial Court Decision**), the court (Parga, J.) granted CNB's motion for summary judgment, struck the affirmative defenses and dismissed all of the counterclaims (Palmieri Affirm., Ex. B, R. 3-4; NYSCEF Doc. No. 16). The Hollis Defendants appealed and, in a decision dated November 1, 2017, the Appellate Division, Second Department, affirmed the trial court decision (the **Appellate**

Decision) (Palmieri Affirm., Ex. D [NYSCEF Doc. No. 18]). The Hollis Defendants moved to reargue the Appellate Decision and for leave to appeal to the Court of Appeals (*id.* Ex. E). The Second Department denied this motion in its entirety (*id.*, Ex. F). The Hollis Defendants did not seek leave to appeal directly to the Court of Appeals.

DISCUSSION

Standing

As an initial matter, to the extent that the Complaint asserts claims that Mr. Ogus defrauded the SBA, Mr. Ogus correctly argues that the Plaintiffs lack standing to assert any claims on behalf of the SBA or for any harm done to the SBA (*Society of Plastics Industry, Inc. v County of Suffolk*, 77 NY2d 761, 773 [1991]). Here, the Plaintiffs are alleging claims that Ogus “sought to acquire federal funds [from the SBA] to which [the Plaintiffs] were not entitled” (Complaint, ¶ 11). Plaintiffs simply do not have standing to assert such a claim on behalf of the SBA.

Res Judicata/Collateral Estoppel

The doctrine of res judicata “applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation” (*Matter of Hunter*, 4 NY3d 260, 629 [2005]). “[U]nder New York’s transactional analysis approach to res judicata, ‘once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy’” (*id.*, citing *O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Collateral estoppel is “a narrower species of res judicata,” and “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 causes of action are the same” (*Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]).

In her affirmation in opposition, counsel for the Plaintiffs argues that:

16. Hollis Dialysis *LLC* is unrelated to Plaintiffs and is unknown to Plaintiffs but the “name” of the Plaintiffs’ purported Loan is *Hollis Dialysis LLC* forming the basis for what defense counsel describes as a prior “judicial determination” which resulted in a judgement.

(Felton Affirm., ¶ 16; NYSCEF Doc. No. 27).

This argument is misleading and, in any event, unavailing. The argument ignores the fact that the borrower on the Note is listed as “Hollis Care Group, Inc.” (Palmieri Reply Affirm., Ex. A). The fact that the Note states that the “SBA Loan Name” is “Hollis Dialysis LLC” does not alter Hollis’s liability on the Note as the borrower. The Note is signed by Jacques Antoine *as president for Hollis Care Group, Inc.* (*id.*). The loan documents are clear on this point: Hollis Care Group, Inc. is “the borrower” on the Note.

In any event, as explained by the Plaintiff’s closing attorney Michael M. Cohen in his letter dated July 13, 2012 to CNB:

2. Medi-System Renal Care Management Services LLC is a limited liability company duly organized and existing in good standing under the laws of the State of New York and transacts [sic] business *under the name Hollis Dialysis* (emphasis added).

Thus, to suggest that the entity is “unknown” to the Plaintiffs or their counsel is false.

Moreover, the Plaintiffs' theory that somehow a different entity was the "real" borrower of the SBA loan was raised and rejected by the court in the Prior Action. To wit, in their motion papers on the reargument motion in the Second Department, the Hollis Defendants argued, among other things:

5. Hollis Dialysis LLC was the SBA Loan applicant. The Loan is "named" Hollis Dialysis LLC. [R38, 44, 54] Based upon a mistake of fact, appellants guarantee [sic] and Drs. Antoine and Cagiut, Jr. personally guaranteed the loan for the Hollis Dialysis LLC as we believed that CNB obtained the SBA Loan for and on behalf of our company, appellant Hollis Care Group, Inc., formed at the specific direction of CNB for the purpose of processing the loan.

* * *

15. ... Hollis Dialysis LLC was excluded from the [prior] action, when on the face of respondent's proof contained in the Record on Appeal; [sic] Hollis Dialysis should have been a necessary party.

* * *

21. The vital point to consider is that respondent never explains why Hollis Dialysis LLC was granted the commitment and why it is such an integral part of the SBA Loan, but nevertheless was excluded from the action...
22. The Loan documents show "the name of the SBA Loan" as Hollis Dialysis LLC while the "borrower," Hollis Care Group, Inc is a C corporation.

(Garaudy Antoine Aff. in Supp. of Motion for Reargument or in the Alternative for Leave to the Court of Appeals, ¶¶ 5, 15, 21-22; NYSCEF Doc. 19). In other words, and most significantly, the issues raised by the Plaintiffs were litigated in the Prior Action.

In addition, the court notes that although generally, a defense of res judicata is available only to parties to the prior action or their privies,

[i]n cases involving the relationship of principal and agent, master and servant, or indemnitor and indemnitee, the liability of more than one party

turns on, or is dependent upon, identical issues. In such situations when the complaining party has been given a full opportunity to litigate those issues against one of the parties, and has been defeated on grounds other than a personal defense, he is not permitted to relitigate those same issue in a new action against the other. The unilateral character of the estoppel in such cases is warranted by the policy of the doctrine of res judicata that the be an end to litigation”

(*Israel v Wood Dolson Co.*, 1 NY2d 116, 119 [1956]).

Here, the requisite privity relationship between CNB and Mr. Ogus exists as Mr. Ogus was CNB’s First Vice President, and the liability of Mr. Ogus turns on the same issues that were raised, or could have been raised, in the Prior Action. It is “fundamental that a final determination in a prior action is subsequently binding not only as to the parties to that lawsuit, but also those in privity with them” (*Prospect Owners Corp. v Tudor Realty Servs. Corp.*, 260 AD2d 299 [1st Dept 1999]; *Lau v Capital One Bank*, 63 AD3d 641 [1st Dept 2009] [“Plaintiff is also barred by the doctrine of collateral estoppel from relitigating the issues decided in the Civil Court action against newly named parties, who were in privity with defendants in the prior Civil Court action”]).

In any event, “collateral estoppel is available to protect those defendants who were not parties to earlier proceedings from having to litigate those issues previously raised and rejected, where, as here, the plaintiff[s] fully participate in the prior proceedings” (*Corto v Lefrak*, 203 AD2d 94, 95 [1st Dept 1994]).

Finally, to the extent that counsel for the Plaintiffs' argued at oral argument that Garaudy Antoine's notarized signature on the Note was somehow a forgery, this argument is unsupported by the record. Antoine Garaudy does not allege any such fact in his affidavit, and, in any event, the appropriate time to raise that argument would have been in the Prior Action (*see* A. Graudy Aff.; NYSCEF Doc. No. 28). The Note, which counsel now claims was fraudulently obtained, *was the basis* upon which CNB sued the Hollis Defendants in the Prior Action.

Accordingly, it is

ORDERED that the motion of Michael D. Ogus to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against Michael D. Ogus, with costs and disbursements to him as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption:

Hollis Care Group, Inc., Medi-System Renal Care Management LLC, Jacques Antoine, M.D., and Garaudy Antoine, M.D.,
Plaintiffs,

v.

United States of America, the Small Business Administration, Linda McMahon, solely as the Administrator of the Small Business Administration

Defendants.

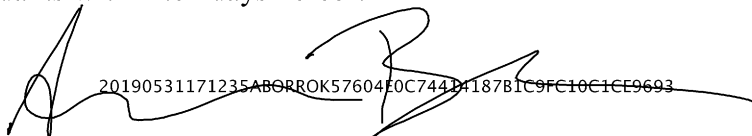
and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it further

ORDERED that the counsel for the Plaintiffs and the remaining defendants are directed to appear at a preliminary conference in this matter on **June 26, 2019 at 11:30 A.M.** in Part 53, 60 Centre Street, Rm. 238, New York, NY 10007, and it is further

ORDERED that counsel for the Plaintiffs is directed to serve a copy of this decision and order on counsel for the remaining defendants within ten days hereof.



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5/31/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER

OTHER

APPLICATION:

CHECK IF APPROPRIATE: INCLUDES
TRANSFERR/REASSIGN FIDUCIARY APPOINTMENT REFERENCE