Riehm Corp. v Brennan
2019 NY Slip Op 34282(U)
September 30, 2019
Supreme Court, Bronx County
Docket Number: Index No. 21173/2017E
Judge: Robert T. Johnson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Riehm Corporation and Thomas Pepe,

Plaintiffs,

-against-

John Brennan,

Defendant.

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DECISION AND ORDER
Index No. 21173/2017E

The following papers, numbered 1, 2 were considered on the motion:

PAPERS	NUMBERED
Notice of Motion, Exhibits and Affidavits Annexed	1
Answering Affidavits and Exhibits Annexed	2
Replying Affidavits and Exhibits Annexed	3

Upon the foregoing papers, this motion is decided as follows:

Defendant John Brennan moves to dismiss plaintiffs' complaint pursuant to the following provisions: CPLR 3211(a)(1), defense founded in documentary evidence; (a)(4), another action on the same matter pending elsewhere between the same parties; (a)(5), collateral estoppel, res judicata, statute of frauds, and statute of limitations; and (a)(7), failure to state a claim on which relief can be granted. In the alternative, defendant seeks confirmation that he is not individually liable for alleged debt, attorneys' fees, or defense costs. Plaintiffs filed untimely opposition, after which the Court extended defendant's time to reply by interim order dated April 11, 2018.

In 2013, plaintiff Thomas Pepe ("Pepe") commenced an action (the "2013 action") in Bronx County Supreme Court (Index Number 300183/2013) against the instant individual defendant, John Brennan, and his business, Brennan Bros. Company, Inc. ("Brennan Bros."). Pepe's instant co-plaintiff, Riehm Corporation ("Riehm"), was not a party to the 2013 action. The 2013 action alleged that in 2011, Brennan Bros. experienced severe cash-flow problems, which prevented the company from meeting its payroll obligations to employees along with the union and other benefit payments it was contractually obligated to make. In or around August 2011, John Brennan allegedly had a telephone conversation with Pepe in which the former explained Brennan Bros.' financial difficulties. John Brennan purportedly asked Pepe to consider loaning the company money by temporarily taking over payroll obligations, including benefits, for six Brennan Bros.' employees. Plaintiff Pepe allegedly agreed to the terms of such a loan and placed the six Brennan Bros.

employees on Riehm's payroll, resulting in a total loan of $191,646.75. John Brennan and Brennan Bros. allegedly made partial payments totaling $45,013.14 between September 1, 2011 and October 25, 2011. Pepe, in the 2013 action, alleged that defendants had failed to repay the balance of $141,633.61 owed. On or about March 12, 2013, the 2013 action was resolved with a settlement agreement and accompanying stipulation discontinuing the entire matter against both defendants. The settlement document was signed by the parties themselves: plaintiff Pepe, defendant John Brennan first in his individual capacity, and then again as Vice President of defendant Brennan Bros. The stipulation of discontinuance was signed by all parties' attorneys and the matter was discontinued entirely.

The 2013 agreement provided that 2013 defendant Brennan Bros. was obligated to pay off the $141,633.61 balance in planned installments. It also released all parties from related future claims or liability. The action was discontinued (against both defendants) with the caveat, however, that if defendant Brennan Bros. defaulted on their prospective payment obligation, the action could be reinstated against defendant Brennan Bros., in spite of the agreement's release clause, to enter a confession of judgment against them.

Movant here, defendant John Brennan, contends that the current action must be dismissed because the central issues were previously litigated and resolved. John Brennan emphasizes that the settlement noted that only Brennan Bros. was liable for breach, not John Brennan personally, and that the terms released John Brennan from any future individual liability regarding unpaid debt. John Brennan additionally seeks attorney's fees for the instant matter, which he deems frivolous. Plaintiffs Pepe and Riehm argue in opposition that the entire settlement agreement, constituted an accord. They allege that John Brennan materially breached its terms, meaning that there was no satisfaction of the accord and plaintiffs are thus free to reinstate the underlying claims against him. Plaintiffs further assert that that despite raising fifteen other affirmative defenses in his answer, John Brennan failed to raise affirmative defenses of res judicata, collateral estoppel, or release and therefore waived them for the purposes of a CPLR 3211 motion to dismiss.

A settlement agreement creates an accord when settling of claims against a party is contingent upon some future performance by that party. The accord is not satisfied as to that party until such performance is executed. In the absence of legal "satisfaction," the non-breaching party may elect to sue on the underlying claims that gave rise to the settlement agreement. (*See* Gen Oblig. Law § 15-501(1) and (3); *Denburg v. Parker Chapin Flattau & Klimpl*, 82 NY2d 375 [1993]). However, accord terms requiring satisfaction must be carefully created and defined, and an

agreement cannot be deemed an accord without evidence that both parties intended to create one. (*Denburg*, 82 NY2d at 383-84). The terms must also clearly inform and identify parties to the accord and the consequences of settlement. (*E.g. Bardi v. Farmers Fire Ins. Co.*, 260 AD2d 783, 786 [3d Dept 1999], *lv denied* 93 NY2d 815). Furthermore, even if an accord has not been satisfied, the affected terms are severable—the remaining clauses remain enforceable even if the "accord" portion is unsatisfied. (*Denburg*, 82 NY2d at 384-85). Enforcement of the remaining terms requires only that "the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party" (Gen Oblig. Law § 15-501[2]).

The 2013 action named, and then settled with, two different defendants: Brennan Bros. and instant defendant John Brennan. Only the terms regarding the underlying claims against defendant Brennan Bros. required future performance to satisfy the agreement and bar the claims' reinstatement, the stipulation of discontinuance qualifying that if Brennan Bros. defaulted on their payment obligations, plaintiff could reinstate the action.[1] This clause made no mention of John Brennan or any payment responsibility he bore individually; indeed, no terms pertaining to John Brennan require any future action or satisfaction to execute the agreement. The 2013 Settlement, particularly given the severability and specificity required of accords, did not create an accord between plaintiff Pepe and John Brennan. In this action naming *only* John Brennan as defendant, therefore, plaintiffs' argument that the provision releasing John Brennan from liability is not binding without some future action is unavailing.

Plaintiffs also argue that defendant John Brennan waived several grounds invoked here for dismissal by failing to include the corresponding defenses in his responsive pleading. CPLR 3211 (a) (1) allows dismissal where documentary evidence refutes plaintiff's allegations to conclusively establish a defense; (a) (5) provides, in relevant part, that a motion to dismiss may be maintained on grounds of collateral estoppel, res judicata, release, statute of limitations, or statute of frauds. CPLR 3211 (e), however, qualifies that any of the grounds listed in (a) (1) and (5) are waived unless the movant raises them in their responsive pleading or by motion *before* filing the responsive pleading (motion to dismiss in lieu of answer). Failure to specifically assert these affirmative defenses cannot be overcome by including a boilerplate affirmative defense clause in the responsive pleading. (*See Scholastic Inc. v. Pace Plumbing Corp.*, 129 AD3d 75, 81 [1st Dept 2015]). This procedural standard is exacting, and not subject to a court's discretion even if the affirmative defense is

[1] A later clause further refers to the payment obligation as "Defendant Brennan Brothers Company, Inc.'s payment obligation."

adequately supported or asserted by post-answer motion to dismiss. (*Horst v. Brown*, 72 AD3d 434 [1st Dept 2010]; *Mayers v. D'Agostino*, 58 NY2d 696 [1982] [respectively]). Though defendant John Brennan's answer here includes fifteen affirmative defenses (including a boiler plate purporting to reserve unasserted defenses), it does not include refutation by documentary evidence, collateral estoppel, release, or res judicata; and, as this motion was not made prior to or in lieu of that responsive pleading, defendant's motion to dismiss on any of these grounds cannot be considered here. Two additional defenses under CPLR 3211 (a) (5) are asserted in defendant's answer, but defendant does not present any arguments in support of one, the statute of limitations defense, in their instant motion. Defendant John Brennan's alternative invocation of dismissal under CPLR 3211 (a) (4), for another action pending elsewhere between the same parties and for the same cause of action, is wholly without merit. Defendant's affirmation states, "the Current Litigation is based on the same facts… as the 2013 litigation, which *was* also before this very Court" (at 7; emphasis added); defendant frequently acknowledges, however, that the 2013 action was settled and discontinued. The 2013 action is therefore not currently pending.

Of the remaining, un-waived grounds— under CPLR 3211 (a) (5), statute of frauds, and CPLR 3211 (a) (7), failure to state a cause of action— the latter basis is the stronger and more applicable here. The Court therefore will not reach the statute of frauds analysis.[2] The CPLR 3211 (a) (7) inquiry permits dismissal not only where the claims made in a complaint are facially deficient, but also, as is relevant here, where submissions indicate with significant certainty that the plaintiff does not truly *have* a cause of action. (*Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). In the latter analysis under CPLR 3211 (a) (7), the court may assess evidence submitted by movant that refutes the existence of cognizable claim. In doing so, however, it must afford plaintiff "every possible inference [that] a cause of action exists." (*Id.* at 634). The causes of action against John Brennan herein, as asserted by plaintiff Pepe, are not cognizable claims. Instant plaintiff Pepe was also the sole plaintiff in the underlying action and signed a settlement agreement and accompanying stipulation of discontinuance in that capacity. A strong preference exists under New York law for enforcing agreements and stipulations of settlement when possible. (*Hallock v. State of New York*, 64 NY2d 224, 229-30 [1984]). In the agreement settling the first action, plaintiff Pepe "for himself and on behalf of Riehm" released and discharged John Brennan and Brennan

[2] Defendant's statute of frauds argument for dismissal because no such agreement was put in writing is technically accurate regarding the operative contracts here. However, it does not correspond with any of plaintiffs' arguments, which do not allege that an enforceable verbal agreement existed as the basis for this action.

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Bros from any liability arising from the settled 2013 claims or their circumstances. (2013 Settlement Agreement at 3, ¶ 4) As discussed above (and see footnote 1), the Settlement Agreement did not require further action from John Brennan to execute its terms. While former defendant Brennan Bros. bore a payment obligation on which Brennan Bros.' release was contingent, no qualification or contingency was placed on this release from liability as it applied to John Brennan individually. Plaintiff alternatively argues in opposition (at 12), that John Brennan was not a party to this agreement (and release therein). However, plaintiff does not offer evidence rebutting the fact that the agreement was signed by plaintiff Pepe's representative and by the attorney for defendants (plural), on behalf of both Brennan Corp. and John Brennan; or that the entire action against both defendants was thereby discontinued.

In short, the parties' settlement contained a release barring future liability that applied to John Brennan individually, and the qualification thereof did not. Plaintiff does not dispute the accuracy of the documents comprising the settlement agreement as provided here. Therefore, defendant has established with conclusive certainty that plaintiff Pepe does not have a cognizable claim against John Brennan, who is the sole defendant here. This is sufficient to merit dismissal of this action—only as it pertains to plaintiff Pepe's claims against John Brennan— under CPLR 3211 (a) (7). Instant plaintiff Riehm Corporation, however, was not Pepe's co-plaintiff in the 2013 action. Therefore Riehm Corp., though contemplated in the agreement's terms, was not a party to the action, settlement, or discontinuance. As such, there is no evidence sufficient to satisfy CPLR 3211 (a) (7) that establishes that plaintiff Riehm Corp does not have a cognizable claim against John Brennan. Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss the cause(s) of action made by plaintiff Thomas Pepe is granted, pursuant to CPLR 3211 (a) (7); and it is further

ORDERED, that plaintiff Pepe is severed from the above-captioned matter; and it is further,

ORDERED, that defendant's motion to dismiss the cause(s) of action made by plaintiff Riehm Corp. is denied.

Plaintiffs shall serve defendant with a copy of the decision and order with notice of entry within 30 days of the date of this decision.

This reflects the decision and order of this court.

Dated: September 30 2019

Robert T. Johnson, J.S.C.

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