

100 Mile Fund, LLC v Rodriguez

2019 NY Slip Op 34630(U)

September 16, 2019

Supreme Court, Westchester County

Docket Number: Index No. 55458/2017

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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100 MILE FUND, LLC,

Plaintiff,

DECISION & ORDER
Index No.: 55458/2017
Sequence No. 4

-against-

**CIRILO RODRIGUEZ, BRUCE R. ALTER, ESQ.,
ALTER & BRESCIAS, LLP and GEORGE
ECHEVARRIA, ESQ.,**

Defendants.

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WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Document Numbers 185-245, were read in connection with the motion for partial summary judgment by plaintiff 100 Mile Fund, LLC, (“Lender” or “DIP Lender”), as to defendant Cirilo Rodriguez’s counterclaims.

Lender brought this action to recover upon a loan that Lender made to Rodriguez’s wholly owned entities (“Borrowers”) in bankruptcy, that was guaranteed by Rodriguez. Apart from Rodriguez, all defendants in this action have now settled and are no longer parties to this action. Lender asserts that even though a multi-million dollar deficiency remains for which Rodriguez is fully liable, Lender is willing to dismiss its claims against Rodriguez.

Notwithstanding Lenders willingness to “walk away”, Rodriguez has insisted on pursuing the counterclaims.

These counterclaims arise from the agreements made in Bankruptcy Court. Rodriguez’s First Counterclaim alleges that the Lender overcharged Rodriguez and Borrowers for legal

services. The Second Counterclaim for fraud states that Lender defrauded Rodriguez by deliberately underestimating the settlement costs to induce Borrowers to obtain a loan from it rather than a competing lender. The Third Counterclaim for “material representation” asserts that Lender defrauded Rodriguez because it induced Rodriguez and Borrowers to accept the Loan by promising to apply certain escrowed funds to the payment of future real estate taxes. The Fourth Counterclaim for fraud in the inducement asserts that Lender causes of action are barred because Lender allegedly fraudulently induced Borrowers to enter into the Loan.

Borrowers’ bankruptcies commenced between 2014 and 2015, when each of the Borrowers filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York. At that time, Rodriguez was the president and sole shareholder of certain Borrowers and the managing member and sole owner of others, and was an active participant in these bankruptcies. Borrowers sought a \$9.5 million debtor in possession loan from Lender to enable Borrowers to refinance prior obligations, and gain entry of an order from the Bankruptcy Court. On July 28, 2015, the Bankruptcy Court approved the Loan from the Lender (“the DIP Order”, NYSCEF Doc No. 208).

On or about August 7, 2015, the Loan approved by the Bankruptcy Court closed pursuant to Loan documents entered into by and between the Lender, Borrowers and Rodriguez (as guarantor). To secure their indebtedness to Lender, Borrowers also gave Lender a first mortgage lien against certain properties owned by one or more of the Borrowers.¹ Among other things, the Loan Agreement required Borrowers to deposit certain funds with Lender to be used to pay

¹The Properties are all located in Sleepy Hollow including: 85-87 Cortlandt Street, 173 Cortland street, 144 Cortland Street, 145 Cortlandt Street, 146-148 Cortlandt Street, 196 Cortlandt Street, 76 Beekman Avenue.

certain past due and future taxes. The Guaranty signed by Rodriguez provided that Rodriguez agreed to the provisions of the Loan Documents. The Guaranty, Section 3.3 provides that “[n]either [100 Mile]nor any other party has made any representation, warranty or statement to any Guarantor in order to induce such Guarantor to execute this Guaranty.”(NYSEF Doc No. 4)

Subsequently, Lender learned that there was in fact a money judgment against Rodriguez, and others for \$1,785,000, in favor of ATS One Holdings Corp. entered by the Westchester County Clerk on February 20, 2015 (“ATS Judgment”), which is in contravention to Borrowers’ representation made in the August 7, 2015 Loan Agreement that there is no action, suit, proceeding or investigation pending or, to [Borrowers’] knowledge, threatened against [Borrowers], [Rodriguez] or the [Properties]in any court which, if adversely determine, might have a material adverse effect was materially false and/or misleading when made. As a result, the Lender send a Notice of Default to Borrowers and Rodriguez. There were also additional Events of Default under the Loan Documents that came to Lender’s attention. Lender claims if it knew that Rodriguez had a \$1.4 million judgment against him and that the judgment creditor was actively pursuing collection, it never would have entered into the Loan.

Subsequently, Borrowers each filed bankruptcy petitions in the Bankruptcy Court of the Southern District of New York, and on March 18, 2016, Rodriguez personally filed a bankruptcy petition in the Bankruptcy Court for the Southern District of New York. Ultimately, the personal bankruptcy was dismissed by way of a Consent Order entered on March 8, 2017, whereby the case was dismissed with prejudice, barring the filing of a bankruptcy petition by Rodriguez until September 6, 2018.

On April 1, 2016, the Bankruptcy Court entered an order directing the appointment of a

Chapter 11 Trustee. The Lender filed a proof of claim on June 1, 2016, asserting that Borrowers owed it \$9,819,056.96. Notably, neither Borrowers nor Rodriguez filed an objection to the Claim at any point during this 2016 Bankruptcy Proceedings.

The Trustee then entered into a purchase and sale agreement with the Lender, wherein Lender agreed to credit bid up to its claim to purchase the Properties. On March 9, 2017, the Bankruptcy Court entered an Order Pursuant to 11 USC 105(a) and 363 authorizing and approving the Trustee's sale of the debtors' real properties to Lender. Lender closed on the sale on or about March 31, 2017. As of that date, Lender was owed in excess of \$11.6 million under the Loan. At the time Lender closed on its purchase of Properties, it was obligated to pay certain closing costs, including all outstanding taxes in the combined amount of \$785,754.71.

Because neither Borrowers nor Rodriguez raise those issues asserted here in Borrowers' prior bankruptcies, Lender argues that the Counterclaims are barred by the doctrine of res judicata. In contravention, Rodriguez argues that he was not individually named in these bankruptcies and could not raise these issues. Lender also raises that the Merger Clause bars Rodriguez's Counterclaims, and on their merits, the Counterclaims should be dismissed.

Now, based upon the foregoing, the motion is decided as follows:

It is well settled that a proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v N.Y. Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Moreover, "failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has met this threshold burden, the opposing party must

raise a triable issue of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]). In deciding a motion for summary judgment “the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties” (Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]; Brown v Outback Steakhouse, 39 AD3d 450, 451 [2d Dept 2007]).

Under the doctrine of res judicata, a final judgment precludes reconsideration of all claims which could have or should have been litigated in the prior proceedings against the same party (Breslin Realty Dev. Corp. v Shaw, 72 AD3d 258, 263 [2d Dept 2010]). Under res judicata, or claim preclusion, a valid final judgment bars future actions between the parties on the same cause of action . . . [a]s a general rule, ‘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 upon different theories or if seeking a different remedy’ (Breslin Realty Dev. Corp. v Shaw, 72 A.D.3d at 263. The rules of res judicata apply to the decisions of a bankruptcy court (Winkler v Weiss, 294 AD2d 428, 429 [2d Dept 2002]).

Rodriguez’s counsel raises that the DIP Order is only applicable to the Borrowers, who are not parties to this action. That is not necessarily true, as the general doctrine of res judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, *and those in privity with them*, from subsequently relitigating any questions that were necessarily decided therein (Farren v Lisogorsky, 87 AD3d 713, 714 [2d Dept 2011]). To establish “privity” of the kind required for the application of res judicata, the party raising a res judicata defense must demonstrate a connection between the party to be precluded and a party to the prior action “such that the interests of the nonparty can be said to have been represented in

the prior proceeding” (Green v Santa Fe Indus., 70 NY2d 244, 253 [1987]).

Here, the record reflects that Rodriguez was intimately involved in the bankruptcy proceeding. It is undisputed that Rodriguez signed all pertinent paperwork in the 2014 and 2016 bankruptcy petitions, including for debtor, Biombo, Inc (as president) NYSCEF Doc Nos. 227 and 236). In his position as president or other capacities for the Borrowers, Rodriguez clearly possessed controlling status over the bankruptcy proceeding, and was afforded ample opportunity to litigate the counterclaims.

Additionally, the court finds that Rodriguez’s Counterclaims arose out of the same series of transactions as in the bankruptcy proceeding for the purpose of res judicata. Rodriguez’s alleged issues of fact are conclusory, include, but are not limited to: whether the Lender had knowledge of the ATS Judgement, and still proceeded with the closing because of the substantial fees that it was receiving in that Loan transaction, and an intention was to retain the Properties; and whether taxes were properly escrowed.

The Counterclaims raised by Rodriguez relate to the validity and amount of the Loan Documents that were supervised by the Bankruptcy Court, reviewed by the Bankruptcy Court, and approved by the Bankruptcy Court. Rodriguez who was in privity with the Borrowers had ample opportunity in the 2014 and 2016 Bankruptcy proceedings to raise the Counterclaims, and even though at the closing of the Loan, Rodriguez had concerns, he closed anyway. His failure to object to the Bankruptcy orders is fatal to his Counterclaims.

Additionally, and quite the opposite of defendant’s assertions, the Bankruptcy Court found that the debtors [Borrowers] were unable to obtain the required funds on terms more favorable than those embodied in the DIP Documents. Also the DIP order stated that the DIP

Financing is solely on the terms set forth in the DIP Documents and the DIP Order; the terms of the DIP financing are fair, just and reasonable under the circumstances; .. are supported by reasonably equivalent value and fair consideration; the terms of the DIP financing have been negotiated in good fath and at arm's length by and between the Debtors and the DIP Lender. The DIP documents were approved; all fees paid and payable and costs and expenses reimbursed or reimbursable by the Debtors to the DIP Lender under the DIP Documents were approved. "The Debtors shall promptly pay all such fees, costs, and expenses payable under the DIP Documents in accordance with the DIP Documents, including professional fees, without the necessity of any notice or further application with the Court for approval or payment of such fees, costs, or expenses". In addition in the Release section it reads:

"Subject to the closing of the DIP Financing, in consideration of (I) the DIP Lender's agreement to the making of the DIP Loan, the Debtors, on behalf of themselves.. Shall forever release discharge and acquit the DIP Lender..... of and from any and all claims, demands, liabilities, responsibilities, disputes, remedies, causes of action indebtedness and obligations of ever kind" (NYSCEF Doc No. 208 at p13)

Since the Lender established its prima facie entitlement to judgment as a matter of law dismissing the Counterclaims on the ground of res judicata, and defendant Rodriguez failed to raise a triable issue of fact in opposition, Lender's motion is granted for partial summary judgment dismissing the Counterclaims as barred by the doctrine of res judicata (Sweet Constructors, LLC v Wallkill Med. Dev., LLC, 106 AD3d 810 [2d Dept 2013]). In light of the foregoing, Lender's other contentions are now academic, and shall not be addressed.

Accordingly, it is hereby

ORDERED, that plaintiff Lender's motion for partial summary judgment is **granted**,


insofar as Rodriguez's Counterclaims are **dismissed**; and it is further

ORDERED, that the remaining parties are directed to appear in the Trial Ready Part, Courtroom 1200 on September 19, 2019 at 9:30 AM at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The arguments by the parties not explicitly addressed herein have been reviewed and deemed to be devoid of merit. This constitutes the Decision and Order of the Court.

The Clerk shall mark his records accordingly.

Dated: September 16, 2019
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF