

Suleiman v Suleiman
2019 NY Slip Op 34885(U)
September 30, 2019
Supreme Court, Richmond County
Docket Number: Index No. 153583/2018
Judge: Wayne M. Ozzi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

SAMI D. SULEIMAN and
YORKER NY REALTY, LLC

DCM PART 23

Present:

HON. WAYNE M. OZZI

DECISION AND ORDER

Index No.: 153583/2018

Motion No. 001
002

Plaintiffs,

-against-

MOHAMED SULEIMAN, SYLVESTER SICHENZE,
ESQ., CRAIG FINE and BENTLEY ABSTRACT, INC.

Defendants.

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The following numbered 1 through 11 were marked submitted on July 11, 2019 .

Papers
Numbered

Notice of Defendants Craig Fine and Bentley Abstract, Inc.'s Motion to Dismiss, dated April 12, 2019 (Motion No. 001).....1

Affirmation in Support of Defendants Craig Fine and Bentley Abstract, Inc.'s Motion to Dismiss, with Exhibits, dated April 12, 2019 (Motion No. 001).....2

Memorandum of Law in Support of Defendants Craig Fine and Bentley Abstract, Inc.'s Pre-Answer Motion to Dismiss (Motion No. 001).....3

Notice of Defendant Sylvester Sichenze, Esq.'s Motion to Dismiss, dated May 3, 2019 (Motion No. 002).....4

Affirmation of Robert J. Bergson in Support of Sylvester Sichenze, Esq.'s Motion to Dismiss, with Exhibits, dated May 3, 2019 (Motion No. 002).....5

Defendant Sylvester Sichenze, Esq.'s Memorandum of Law in Support of Motion to Dismiss the Amended Verified Complaint, dated May 3, 2019 (Motion No. 002).....6

Memorandum of Law in Support of Plaintiffs' Affirmation in Opposition (Motion No. 001).....7

Affirmation of Jeremy landolo, Esq., in Opposition to Defendants Craig Fine and Bentley Abstract, Inc.'s Motion to Dismiss, with Exhibits (Motion No. 001).....8

Memorandum of Law in Support of Plaintiffs' Affirmation in Opposition to Defendant Sylvester Sichenze's Motion to Dismiss, with Exhibits, dated June 7, 2019 (Motion No. 001).....9

Defendant Sylvester Sichenze, Esq.'s Reply Memorandum of Law in Further Support of Motion to Dismiss the Verified Complaint, dated July 8, 2019 (Motion No. 002).....10

Reply Memorandum of Law in Further Support of Defendants Craig Fine and Bentley Abstract, Inc.'s Motion to Dismiss, dated July 8, 2019 (Motion No. 001).....11

Defendants Craig Fine ("Fine") and Bentley Abstract, Inc. ("Bentley") moved under CPLR §§3211(a)(1), (a)(3), (a)(5) and (a)(7) for an Order dismissing Plaintiffs' Amended Verified Complaint ("Amended Complaint") against them on the grounds that (a) such causes of action are barred under the doctrines of collateral estoppel and/or res judicata and (b) Plaintiffs have failed to state a cause of action. Defendant Sylvester Sichenze, Esq. ("Sichenze") similarly moved under CPLR §§3211(a)(5) and (a)(7) for an Order dismissing the Amended Verified Complaint as against him. The Court grants the Motion made by Defendants Fine and Bentley in its entirety. The Court also grants Defendant Sichenze's Motion in part, dismissing all causes of action against him by Plaintiff Yorker NY Realty LLC ("Yorker"), but denies his Motion to Dismiss the causes of action brought against him by Plaintiff Sami Suleiman ("Sami").

FACTS

Plaintiffs commenced this Action by filing a Summons and Complaint alleging fraud, intentional/negligent misrepresentation, negligence, conversion and unjust enrichment. Defendants allegedly engaged in a course of conduct in which they perpetrated a fraud by facilitating a "fraudulent" loan that was made to Defendant Mohamed Sulieman ("Mohamed"), in the form of a promissory note for the amount of \$200,000.00 (the "Loan"). In the Amended

Complaint, it states that Plaintiff Sami is the sole member of Yorker and has owned the premises located at 489 Maine Avenue, Staten Island NY 10314 (the "Property") since July 16, 2010. Sami is also the father of Mohamed. Bentley was the title company in connection with the Loan and Fine was the attorney for James Martella and Toni Epstein, the private money lenders that issued the Loan (the "Lender"). The Note lists Yorker as the Borrower and Mohamed as the Guarantor, who signed the document as "Mgr. Member" of Yorker. (Fine and Bentley's Affirmation in Support of Motion, Exhibit D).

Based on Yorker's failure to make payments on the Loan, the Lender commenced a mortgage foreclosure action on May 5, 2017, *James Martella and Toni Epstein v. Yorker NY Realty, Mohamed Suleiman et al.*, Supreme Court, Richmond County (Index No. 135298/2017) ("Foreclosure Action"). In its answer, Yorker interposed counterclaims alleging that Mohamed was not a member of Yorker and lacked authority to enter into the Loan. After granting summary judgment in favor of the Lender on April 24, 2018, this Court later denied Yorker's Motion to reargue and Sami's Motion to intervene in the Foreclosure Action, holding that (1) as a member of Yorker, Sami did not have any right to or property interest in the Property and (2) Yorker's rights and interests were already represented and litigated. The Court declined to consolidate the two actions due to a lack of sufficient common questions of law and fact. On June 5, 2019, this Court denied Sami and Yorker's application for a stay of the proceedings and vacatur of the Judgment of Foreclosure and Sale. The Court found that (1) the moving papers failed to establish by any preponderance of the evidence that Sami is the undisputed owner of Yorker and (2) that Mohamed had apparent authority to bind Yorker to the Loan.

In the instant Action, Sami and Yorker allege that Defendant Mohamed had no ownership interest in Yorker and lacked the authority to bind it. In an affidavit, Mohamed states he

approached Sichenze and “concocted a story” whereby Sichenze drafted a document stating that Mohamed was Yorker’s owner. (Amended Complaint, Exhibit A). Plaintiffs allege that in an opinion letter, Sichenze falsely represented that Mohamed was Yorker’s sole manager and member and authorized to sign the Loan and encumber the Property (“Opinion Letter”). Plaintiffs maintain that Fine and Bentley should have questioned the Opinion Letter based on apparent discrepancies between it and “the facts presented.” Fine allegedly perpetrated the fraud when he drafted and notarized a corporate resolution in which Mohamed certified he was the owner of Yorker (“Corporate Resolution”). Plaintiffs maintain that Bentley should have known a question of fact existed regarding Yorker’s ownership based on the documents presented to it, including an SS-4 form from the IRS listing Sami as Yorker’s sole member, and the fact that Yorker’s articles of incorporation were never provided. On or about May 16, 2016, Mohamed, Sichenze, Fine and Bentley are accused of closing on the Loan without Plaintiff Sami’s knowledge or consent. “Upon information and belief”, individuals from Fine’s office then “pulled strings” at the bank to allow Mohamed to open an account after he was unable to produce documents showing his authority to act on Yorker’s behalf.

Plaintiffs bring causes of action against Sichenze, Bentley and Craig and Mohamed for intentional/negligent misrepresentation of fact and fraud. Due to the Amended Complaint’s poor drafting, it is impossible for the Court to decipher Plaintiffs’ specific allegation against each Defendant and the Court refuses to guess which Defendant(s) the Plaintiffs are referring to.¹ In support of their negligence cause of action, Plaintiffs claim that Sami would not have been

¹ For example, Plaintiffs state “. . . Defendant knew or should have known that Mohamed’s misrepresentations were false, and that they would cause the true owner damage”; “Defendant knew or should have known that Mohamed was not the true owner”; “Defendant’s knew or should have reasonably known that the accuracy of the representations made and implied were false, because Mohamed never proffered Plaintiff with any dispositive documentation evidencing ownership of the Premise.” (Amended Complaint, Page 10).

damaged in the amount of \$200,000 but for (1) Sichenze’s failure to review his files and contact Sami to determine whether Mohamed had authority to bind Yorker to the Loan, (2) Fine’s failure to act reasonably and review pertinent documents prior to facilitating a closing and (3) Bentley’s failure to diligently review the documents and question any discrepancies. Plaintiffs also bring causes of action for injunctive relief, seeking to have the Court direct the Richmond County Clerk to strike the fraudulent mortgage and cloud on Plaintiff’s title, and for a declaratory judgment declaring that the Mortgage dated May 27, 2016 be stricken, clearing the title of all liens and encumbrances.

Defendants’ Motions to Dismiss

Fine and Bentley move to dismiss Plaintiffs’ Amended Complaint against them pursuant to CPLR §3211(a)(7) for failure to state a cause of action, CPLR §3211(a)(1) based on documentary evidence and CPLR §3211(a)(5) under collateral estoppel and res judicata. Fine and Bentley argue that Plaintiffs’ allegations, which are based on Mohamed’s authority, are barred under the doctrine of collateral estoppel and disproved by documentary evidence. Sichenze similarly seeks dismissal pursuant to CPLR §3211(a)(5), arguing that Sami is bound by this Court’s rulings in the Foreclosure Action. Sichenze also moves to dismiss Plaintiffs’ causes of action for fraud pursuant to CPLR §3211(a)(7) and §3016(b) and negligent misrepresentation and negligence pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

The Court Grants Defendants’ Fine and Bentley’s Motion to Dismiss Based on Collateral Estoppel

Regarding the doctrine of collateral estoppel, which bars the relitigation of an issue, the Second Department has held

The party seeking the protection of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior action and is decisive of the present. The party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination. Generally, a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation. *River View at Patchogue, LLC v. Hudson Ins. Co.*, 122 AD3d 824, 825-826 (2d Dept., 2014) (internal citations omitted).

When determining if privity exists, courts must analyze whether the party seeking to be bound and the party against whom the litigated issue was decided have a relationship justifying preclusion, and whether preclusion would be fair under the circumstances. *See Chambers v. City of New York*, 309 AD2d 81, 86 (2d Dept. 2003).²

The issue of Mohamed's authority was necessarily decided in a prior action and is determinative of the issues disputed in the present one. There was also a full and fair opportunity to contest the decision, as this Court ruled upon multiple applications made by Yorker and Sami to invalidate the Loan based on Mohamed's alleged lack of authority. The Court finds that privity exists between Sami and Yorker sufficient to apply collateral estoppel to his causes of action against Fine and Bentley. Sami's membership status in Yorker justifies preclusion in this instance and it is fair to apply collateral estoppel under these circumstances.

Plaintiffs are therefore estopped from bringing causes of action against Fine and Bentley for fraud, negligent misrepresentation and negligence. To maintain their cause of action for fraud, Plaintiffs must allege (1) a material misrepresentation of fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages. *See Greene v. Rachlin*, 154 AD3d 814, 817 (2d Dept. 2017). Plaintiffs are unable to allege that Fine and Bentley made a

² See also *Baten v. Northfork Bancorporation, Inc.*, 85 AD.3d 697, 698 (2d Dept. 2011).

material misrepresentation that they knew was false, since Mohamed had apparent authority to bind Yorker to the Loan. Plaintiffs are also estopped from bringing a cause of action for negligent misrepresentation, which requires a plaintiff to allege (1) a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, (2) the information was incorrect and (3) reasonable reliance on the information. *See International Shoppes, Inc. v. At the Airport, LLC*, 131 AD3d 926, 937 (2d Dept. 2015). As Mohamed had apparent authority to bind Yorker, Plaintiffs cannot allege that the information regarding Mohamed's authority was incorrect. This Court's prior determination also bars Plaintiffs from bringing a negligence claim against Fine and Bentley, which is premised on Mohamed's purported lack of authority.

The Court Grants Defendants Fine and Bentleys' Motion to Dismiss Based on Res Judicata

The litigation of a claim or defense may be barred under CPLR §3211(a)(5) "if, in former litigation between the parties, or those in privity with them, in which there was a final conclusion, the subject matter and the causes of action are identical or substantially identical." *Williams v City of Yonkers*, 160 AD3d 1017, 1018 (2d Dept. 2018). Once a claim is brought to a final conclusion, all other claims that arise out of the same transaction or series of transaction are barred, even if they are based on different theories or a different remedy is sought. *See Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 100 (2005). Under the Second Department's "pragmatic approach", events are part of the same transaction or series of transaction when their "foundational facts" are related in space, time, origin or motivation, they form a "convenient trial unit" and treatment of such facts as a unit confirms to the parties' expectations. *See Manko v. Gabay*, 2019 N.Y. App. Div. LEXIS 6110, *4-5, 2019 NY Slip Op 06077, 2 (2d Dept. 2019).

Plaintiffs' causes of action against Fine and Bentley for fraud, negligent misrepresentation and negligence are also barred by the doctrine of res judicata. Fine, Bentley and Sami were each in privity to a named party in the Foreclosure Action and the issue of Mohamed's authority was brought to a final conclusion. Using the Second Department's "pragmatic approach", all other claims arising out of the same series of transactions are barred.

Fine and Bentley's Motion to Dismiss Plaintiffs' Cause of Action for Declaratory Judgment

Pursuant to CPLR §3211(a)(5), Plaintiffs' cause of action seeking a declaratory judgment is hereby dismissed. Plaintiffs are estopped from bringing this cause of action, as Yorker's interests in the Property were represented in the Foreclosure Action, Mohamed had authority to bind Yorker to the Loan and Sami has no individual right to or property interest in the Property. Res judicata also applies, as a former litigation between the parties, and those in privity with them, had a final conclusion, and the subject matter and causes of action are identical.

The Court Grants Fine and Bentley's Motion Pursuant to CPLR §3016 and §3211(a)(7) to Dismiss Plaintiffs' Cause of Action for Fraud, Negligent Misrepresentation

"On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Goel v. Ramachandran*, 111 AD3d 783, 789 (2d Dept. 2013) (internal citations omitted). Even if Plaintiffs were not estopped from bringing a cause of action for fraud, such is hereby dismissed pursuant to CPLR §3016 and §3211(a)(7). For allegations of fraud, "each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR §3016(b)." *Stortini v. Pollis*, 138 AD3d 977, 978 (2d Dept. 2016).

Any alleged misrepresentations were made by Mohamed and Sichenze, not Fine or Bentley, and Plaintiffs' allegation that Fine and Bentley "pulled strings" at the bank, without more specificity, is a bald, conclusory allegation that is insufficient to survive Defendants' Motion. *See Stein v. Doukas*, 98 AD3d 1024, 1025 (2d Dept., 2012).³ Plaintiffs have further failed to sufficiently plead that Fine or Bentley made any alleged misrepresentations that they knew were false.

Plaintiffs' cause of action for negligence misrepresentation is also dismissed under CPLR §3211(a)(7). An ordinary arm's length business transaction between two parties does not give rise to a special relationship and an arm's length borrower-lender relationship is not of a confidential or fiduciary nature. *See High Tides, LLC v. DeMichele*, 88 AD3d 954, 960 (2d Dept. 2011). Therefore, Plaintiffs have not alleged a special or privity-like relationship with Fine or Bentley that imposed a duty on them to impart correct information. Additionally, the information imparted by Fine and Bentley was not incorrect, as Mohamed had apparent authority, and Plaintiffs didn't sufficiently plead that they reasonably relied on such information.

Pursuant to CPLR §3211(a)(7), the Court dismisses Plaintiffs' cause of action for negligence, the elements of which are (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty and (3) that the breach of that duty was a proximate cause of the injury. *See Ortega v. Liberty Holdings, LLC*, 111 AD3d 904, 906 (2d Dept. 2013). Plaintiffs have not sufficiently pleaded that Fine or Bentley owed a duty of care or that Fine and Bentley breached such a duty, especially since Mohamed had apparent authority to enter into the Loan. Plaintiffs have further failed to sufficiently plead how Fine and Bentley breached a duty owed to them by failing to question the Opinion Letter or review documents relevant to Mohamed's authority.

³ Plaintiffs' reliance on Mohamed's affidavit dated April 30, 2019 is also unavailing.

The Court Grants Fine and Bentley’s Motion to Dismiss Pursuant to CPLR §3211(a)(1)

To grant a motion to dismiss under CPLR §3211(a)(1), the documentary evidence must utterly refute the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law. *See Matter of Elberg*, 164 AD3d 497, 498 (2d Dept. 2018). Documentary evidence includes judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts and any other papers, “the contents of which are essentially undeniable”, but does not include emails, affidavits or letters. *Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 (2d Dept. 2017). This Court’s prior rulings are documentary evidence that Mohamed had apparent authority and utterly refute Plaintiffs’ factual allegations, thereby conclusively establishing a defense as a matter of law. Plaintiffs’ causes of action against Fine and Bentley are therefore dismissed pursuant to CPLR §3211(a)(1).

Sichenze’s Motion to Dismiss Yorkers’ Causes of Action Is Granted

Pursuant to CPLR §3211(a)(5), Yorker is estopped from bringing a cause of action for fraud, negligent misrepresentation of fact and negligence against Sichenze, who was in privity with Yorker and who has shown that the identical issue of Mohamed’s authority was necessarily decided in the prior Action and is decisive of the present. Yorker has also failed to show that it was denied a full and fair opportunity to contest that prior determination. The Court declines to address Sichenze’s other grounds for dismissal of Yorker’s causes of action against him pursuant to CPLR §3211(a)(7) and §3016(b).

Sichenze’s Motion to Dismiss Sami’s Causes of Action Is Denied

Sichenze has failed to demonstrate that the identical issue underlying Sami’s claims was “necessarily decided” in the prior action. Furthermore, Sami has shown that he did not have a

full and fair opportunity to contest the prior determination, as he was barred from intervening in the Foreclosure Action and consolidating the two actions. Sami's allegations against Sichenze include issues different from those decided in the Foreclosure Action, including Mohamed's procurement of the Santander bank account and Sichenze's drafting of the Opinion Letter. It is therefore premature to dismiss such causes of action based on collateral estoppel or res judicata.

The Court denies Sichenze's Motion to Dismiss pursuant to CPLR §3211(a)(7) and CPLR §3016(b). Sami pled his fraud cause of action with the required specificity, stating that Sichenze knowingly made misrepresentations concerning Mohamed's status in Yorker with the intent to induce reliance that was justifiable and resulted in damages. Sami also stated a cause of action for negligent misrepresentation, since Sichenze may have had a duty to impart correct information to Sami based on his role as the Sulieman family attorney. Finally, Defendant Sichenze has not sufficiently shown that Sami has failed to state a cause of action for negligence.

Accordingly, it is hereby:

ORDERED that Defendants Fine and Bentley's Motion to Dismiss Plaintiffs' Amended Complaint against them is granted in its entirety and the Amended Complaint is dismissed against them; it is further

ORDERED that Defendant Sichenze's Motion to Dismiss Yorker's Causes of Action against him is granted; and it is further

ORDERED that Defendant Sichenze's Motion to Dismiss Sami's Causes of Action against him is denied in its entirety; and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly; and it is further

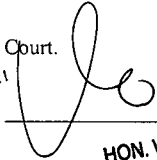
ORDERED that the remaining parties are directed to appear for a conference before this

Court on 11/4/19 at 10 AM at 26 Central Avenue, S.I., New York, 10301,

Room 410

This constitutes the final Decision and Order of this Court.

ENTER



J.S.C.

HON. WAYNE M. OZZI
J.S.C.

Dated:
September 30, 2019