

Panos v Arvanitakis

2019 NY Slip Op 34919(U)

January 4, 2019

Supreme Court, Kings County

Docket Number: Index No. 500601/2018

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of January, 2019.

P R E S E N T:

HON. CARL J. LANDICINO, JSC

-----X
GEORGE PANOS,

Plaintiff,

Index No.: 500601/2018

- against -

DECISION AND ORDER

KATERINA ARVANITAKIS, JEANNE LISIKATOS
a/k/a JEAN M. LISIKATOS ALLEN a/k/a JEAN M.
LISIKATOS a/k/a JEAN M. ALLEN a/k/a JEAN
ALLEN a/k/a JEAN LISIKATOS a/k/a JEAN M.
LISIKATOS-ALLEN and TYCHE FORTUNE, LLC.

Motion Seq. #2 and #3

Defendant(s).

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2, 3/4
Opposing Affidavits (Affirmations).....	5
Memorandum of Law.....	6

After oral argument and a review of the papers, the Court finds as follows:

George Panos (hereinafter the "Plaintiff") moves (Motion Seq. #2) to dismiss the Counterclaim contained in the Answer of Jeanne Lisikatos (and various aliases as listed in the caption) (hereinafter "Defendant JL") and Tyche Fortune, LLC, (hereafter "Tyche" or "Defendant Tyche") (hereinafter collectively, the "Moving Defendants") pursuant to CPLR 3211(a)(1) and (7). The Moving Defendants cross-move (Motion Seq. #3) for an order "pursuant

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to CPLR §3212, granting Defendants summary judgment in their favor and dismissing the complaint upon defenses set forth in R 3211(1), (4) and pursuant to CPLR Rule 3212(a)...”¹

Concerning Plaintiff’s motion, Plaintiff contends that documentary evidence serves to support his contention that the Moving Defendants’ counterclaim should be dismissed. Plaintiff argues that a review of Defendants’ counterclaim and a pending action in Supreme Court, Suffolk County, George Panos v. Captain Hulbert House, LLC, Tyche Fortune, LLC and Jeanne Lisikatos, Index Number 621261/2017 (hereinafter the “Suffolk County Action”) serves to show that the Moving Defendants’ counterclaim has no merit. Plaintiff reasons that a review of the Counterclaim reflects that the Moving Defendants seek damages for Plaintiff having improperly commenced the instant action.

The Moving Defendants’ counterclaim at ¶15 states that “[p]laintiff has commenced a duplicative action in Suffolk County and the within action is simply intended to harass the answering Defendants.” (Plaintiff’s Motion, Exhibit C) Plaintiff, however, argues that the Suffolk County Action “...is an interpleader action seeking to distribute funds held by the Clerk of the Court of Suffolk County that were surplus proceeds from an auction at a foreclosure sale.” Plaintiff represents that “...this lawsuit [the instant proceeding] seeks damages resulting from the wrongdoing of the Defendants.”

The Moving Defendants contend in their cross-motion that 1) even assuming that there was a viable claim, the documentary evidence establishes that this Plaintiff has no standing to sue, 2) there is a pending prior action for the same relief in Supreme Court, Suffolk County and 3) the documentary evidence bars this suit on the doctrine of issue preclusion.

¹ Although the Moving Defendants state “R 3211(1), (4)” the Court will treat the motion as referring to CPLR Rule 3211(a)(1) and (4), due to clerical error.

Plaintiff's Motion to Dismiss the Moving Defendants' Counterclaim

The relief requested by the Plaintiff requires a review of both the instant Complaint and the Complaint in the Suffolk County Action. Plaintiff, in his Complaint, alleges that he is the sole owner and manager of non-party Blue Acre Holding, LLC ("Blue Arce"). The instant Complaint contains six causes of action: 1) Fraud Against All Defendants, 2) Aiding and Abetting Fraud Against Defendant Katerina Arvanitakis (hereinafter "Defendant KA" or "KA"), 3) Breach of Fiduciary Duty by Defendant KA, 4) Negligence by Defendant KA, 5) Negligent Misrepresentation by All Defendants and 6) Breach of Promissory Note against KA.

Generally, Plaintiff alleges in the instant Complaint that Defendant KA acted as his attorney for a period of "approximately October, 2014 to May 2015". Plaintiff contends that Defendant JL authorized KA to advise him that Defendant Tyche held three first position mortgages, on each of three properties, all located on Long Island, New York. Plaintiff alleges that KA told him that Defendant Tyche would assign its interest as mortgagee on the three properties to Plaintiff for the sum of \$300,000.00, together with \$150,000.00 in legal fees and costs associated with such assignments. Plaintiff avers that he agreed to the transaction and purportedly formed Blue Acre to act as assignee in relation to all three mortgages on the properties². Plaintiff alleges that he paid Defendant Tyche \$300,000.00 in April of 2015 and incurred legal fees and costs in the sum "...of approximately \$150,000[.00]". Plaintiff also alleges that out of the \$150,000.00 sum, KA accepted a legal fee of \$55,000.00, which Plaintiff was initially told was to be paid to a non-party attorney, Mr. Zweig.

Plaintiff contends that he was advised by Mr. Zweig that Defendant Tyche did not hold a first position mortgage interest on any of the properties. Plaintiff alleges damages of "approximately \$450,000[.00]" as a result of what he characterizes as misrepresentations made

² Plaintiff also alleges the Defendant Tyche has tendered two assignments, but refuses to tender a third.

by the Defendants. Plaintiff also alleges that Defendant KA and Mr. Zweig are subject to criminal penalties in federal courts of New York and California, respectively.

The Plaintiff's Complaint in relation to the Suffolk County Action is entitled an Interpleader Complaint. In that Complaint, Plaintiff alleges that there was an agreement whereby "...his entity Atlantic View Holdings, LLC ("AVH")..." was to "...purchase the mortgage owned by plaintiffs (mortgagees) in the matter entitled Berman, et. al., v. Captain Hulbert House, LLC, et. al., Index Number 21641/2013, New York State, Suffolk County..." (the "Berman Suit"). In addition, Plaintiff alleges that Plaintiff agreed to pay the assignors' outstanding legal fees in relation to the Berman Suit, and "...purchase the assignment of 3 valid mortgages from Tyche as valid mortgagee in the first mortgage position on 3 properties in Long Island." Plaintiff further alleged in the Suffolk County Action that the defendants therein agreed (1) not to assert any objection to AVH seeking foreclosure in the Berman Suit and (2) to allow AVH to "receive all proceeds from the auction of the foreclosure of the property." The Plaintiff also raises in the Suffolk County Action Complaint, the alleged criminal activity of KA and Zweig and seeks a portion of the surplus proceeds from the purported sale of the subject property, in relation to the Berman Suit, from the Suffolk County Clerk.

Although there appears to be some overlap in relation to both the instant and Suffolk County Actions, these actions are not "duplicative", as alleged by the Moving Defendants. The fact that some of the same alleged facts appear in both actions, that does not make the Suffolk County Action "...another action pending between the same parties for the same cause of action in a court of any state or the United States..." CPLR 3211(a)(4). The Suffolk County Action is an Interpleader action seeking surplus funds. It may relate and/or reference, in some manner, the parties and the purported assignments, but it does not seek a claim based on fraud. The parties are not wholly the same and the Suffolk County Action apparently relates to an ancillary foreclosure proceeding, the Berman Suit. Finally, the relief sought is different in both actions.

See *Matter of Spicer v. Spicer*, 162 A.D.3d 886, 80 N.Y.S.3d 328, 2018 N.Y.Slip Op. 04550 (2d Dept. 2018); *A.F. Rockland Plumbing Supply Corp. v. Hudson Shore Associated Ltd. Partnership*, 96 A.D.3d 885, 948 N.Y.S.2d 79, 2012 N.Y.Slip Op. 04957 (2d Dept. 2012).

The Plaintiff's motion to dismiss the Moving Defendants' counterclaim is solely based on his contention that the Suffolk County Action is not duplicative. As indicated above, the Moving Defendants' counterclaim is not solely based upon, what the Moving Defendants term as, "...a duplicative action in Suffolk County..." The Moving Defendants' counterclaim also contends that the instant proceeding is "...without basis in law or fact" and "...intended to harass the answering Defendants" and is frivolous. Additionally, the Moving Defendants also seek damages in the amount of \$10,000.00 and legal fees as damages. Although Plaintiff's claim in this action is not duplicative of the Suffolk County Action, that determination does not serve to bar the Moving Defendants' counterclaim. Accordingly, Plaintiff's motion to dismiss Defendants' counterclaim is denied.

Defendants' Motion Pursuant to CPLR §3211(a)(1) and (4)

As an initial matter, in light of the above finding, the motion to dismiss Plaintiff's Complaint on the basis of CPLR 3211(a)(4) is denied. The instant action is not duplicative of the Suffolk County Action. Defendants also move on the basis of CPLR 3211(a)(1) and 3212(a).

In relation to CPLR 3211(a)(1) the Moving Defendants contend that Plaintiff sues individually, although his Complaint indicates that the underlying Subject agreement related to "non-party [Blue Acre]". The Moving Defendants argue that Plaintiff cannot recover for claims that arguably belong to Blue Acre and that there is no indication that Plaintiff is an assignee of such alleged claims. The Moving Defendants also contend that even assuming that Plaintiff is a proper party, the related assignments are without recourse and therefore Plaintiff's claim is precluded as a matter of law. Plaintiff opposes the cross-motion and states generally that the

Moving Defendants rely upon a purported agreement (the “Agreement”) which has not been signed by the purported purchaser Blue Acre. (Moving Defendants Cross-Motion, Exhibit C). Plaintiff argues that he never agreed to the provisions contained therein and that he never saw the Agreement which he contends “...was obviously manufactured only recently...”. Moreover, the Plaintiff avers that since the Moving Defendants argument relates to two mortgage assignments and he alleges that three assignments were intended, that in and of itself creates an issue of fact. The Plaintiff also contends that the assignments do not disclose the existence of senior encumbrances.

The Moving Defendants’ cross-motion is denied. Although the assignments do show Blue Acre as assignee, the Plaintiff contends that misrepresentations were made to him as to the first position of the mortgages, the Agreement was not signed, and that the funds paid to Defendants were his funds. He contends that Blue Acre merely served as the entity that would ultimately act as the assignee. Notwithstanding Blue Acre’s role, the Plaintiff argues that the Defendants conspired to defraud him and fraudulently induced him to proceed with the transaction, which included the formation of Blue Acre. Moreover, Plaintiff contends that only two, albeit allegedly fraudulent, of the three mortgage assignments, were tendered. As such Plaintiff has standing to bring this action. See *Brach v. Levine*, 36 Misc. 3d 1213(A) (Sup. Ct. Kings County, 2012). Although in *Brach* the Court found that the individual Plaintiffs lacked standing, that finding was based upon those Plaintiffs claiming that the misrepresentations were not made to them individually. “Since Brach and Roth allege that they were acting on behalf of various limited liability companies, they each fail to allege any misrepresentation was made to them in their individual capacities, and that they sustained actual damages as a result of Defendants’ conduct.” *Brach v. Levine*, 36 Misc. 3d 1213(A) (Sup. Ct. Kings County, 2012). In the instant proceeding Plaintiff alleges that he was personally defrauded and damaged.

The Moving Defendants' reliance on the non-recourse language is insufficient as well. As stated, the Agreement, as annexed to the papers is not signed. Even assuming that the words "without recourse" limited Plaintiff's recovery, Plaintiff contends that three assignments were intended and only two were tendered. Documentary evidence needs to be clear conclusive.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 (2d Dept. 2005), citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2d Dept. 2004), citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 (2d Dept. 1989). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 (2d Dept, 2006); see *Menzel v. Plotnick*, 202 A.D.2d 558, 558-559, 610 N.Y.S.2d 50 (2d Dept. 1994). The Moving Defendants have not made that showing.

As to the CPLR 3212 application, it is clear that the parties present different versions of what allegedly occurred. As such, issues of fact exist, and further discovery is appropriate.

Accordingly, the Moving Defendants' CPLR 3212 application is denied as premature.

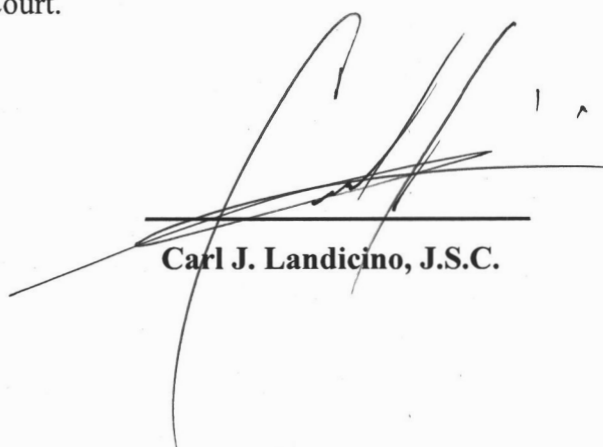
Accordingly, it is hereby Ordered as follows:

Plaintiff's motion (Motion Seq. #2) is denied.

Defendants' motion (Motion Seq. #3) is denied.

This constitutes the Decision and Order of this Court.

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Carl J. Landicino, J.S.C.

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