

State of N.Y. ex rel. Romanoff v Shah
2020 NY Slip Op 31103(U)
May 1, 2020
Supreme Court, New York County
Docket Number: 101432/2014
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 055

THE STATE OF NEW YORK ex rel.
ROBERT ROMANOFF,

Plaintiff,

- against -

MICHAEL SHAH,
SHERYL ROMANOFF, as executor of the
estate of Gerald Romanoff, deceased,
GHC NY CORP.,
DELSHAH GROUP LLC and its owned
or controlled subsidiaries and alter egos,
GRIFFON GANSEVOORT HOLDINGS LLC,
and RISHI PANDE,

Defendants.

Index No. 101432/2014

Motion Seq. Nos. 003 & 004

Hon. James E. d'Auguste, J.S.C.

Motions Sequence Numbers 003 and 004 are hereby consolidated for disposition.

In Motion Sequence Number 003, defendants Michael Shah, Delshah Group LLC (“Delshah”), Griffon Gansevoort Holdings LLC (“Griffon”), and Rishi Pande (“Pande”) (collectively, the “Delshah Defendants”) move, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the Amended Complaint, and for the imposition of sanctions against plaintiff, the State of New York ex rel. Robert Romanoff (“Relator”), pursuant to 22 NYCRR 130-1.1.

Relator cross-moves (1) to further amend the Complaint to add the City of New York as a party, if necessary, and for time to file a New York City *qui tam* action, pursuant to the New York City False Claim Act, Administrative Code §§7-801 through 7-810, holding this action in abeyance pending the amendment and filing; and (2) to correct the Order, dated January 24, 2018 (NYSCEF Doc No. 002), to include defendant GHC NY Corp. (“GHC”) in the caption.

In Motion Sequence Number 004, defendants Sheryl Romanoff, as executor of the estate of Gerald Romanoff, deceased, and GHC (collectively, the “Estate Defendants”) move, pursuant to CPLR 3211(a)(1), (2), (5), and (7), to dismiss the Amended Complaint, and for attorney’s fees and expenses.

BACKGROUND

This *qui tam* action is the latest in a series of lawsuits filed by Robert Romanoff regarding the sale of the five-story commercial property located at 53-61 Ganesvoort Street, New York, New York (the “Gansevoort Property”) to Griffon. To date, Robert Romanoff has filed suit against his parents and their attorneys, the buyers and mortgagors of the Gansevoort Property, and his co-trustees and their attorneys.

Unless indicated otherwise, the following facts are taken from the Amended Complaint, filed on April 4, 2018 (NYSCEF Doc. No. 10), and the Order, filed February 6, 2013, in a related action, *55 Gans Judgment LLC as successor in interest to Union Ctr. Natl. Bank v Romanoff* (Sup Ct, NY County [Mendez, J], Index No. 106008/11) (the “Fraudulent Conveyance Action”) (Order, NYSCEF Doc. No. 14). The facts are accepted as true for purposes of these motions (*see Alden Global Value Rec. Master Fund, L.P. v KeyBank, N.A.*, 159 AD3d 618, 621 [1st Dept 2018]).

Robert Romanoff is the son of Sheryl Romanoff, and Gerald Romanoff, who died on April 4, 2015. On October 2, 2015, Nassau County Surrogate’s Court appointed Sheryl Romanoff as the executor of the estate of Gerald Romanoff. (*see* Administrative Order, NYSCEF Doc. No. 38).

Michael Shah is the principal of Griffon, and Delshah, a real estate investment company. (Savino Affid, NYSCEF Doc.No. 6). Pande is also affiliated with Delshah.

GHC, a New York corporation, owned the Gansevoort Property, and another property in Brooklyn, New York.

Before his death, Gerald Romanoff operated several businesses. From 2006 to 2011, he was a shareholder and president of nonparties Nebraska Distribution, LLC and Nebraska Meat Corporation (collectively, “Nebraska”). Nonparty New Roads Realty Corp. (“New Roads”), formerly known as Romanoff Equities, Inc., was the sole shareholder of GHC. Gerald Romanoff directly controlled the management of New Roads and GHC.

Gerald Romanoff and Sheryl Romanoff owned 99 percent of the shares of New Roads, each owning 49.5 percent of the shares. Nicholas Romanoff, their grandson and Robert Romanoff’s son, owns the remaining one percent of New Road’s shares.

On August 30, 2007, North Fork Bank loaned GHC \$9,000,000.00. The loan was secured by a first mortgage on the Gansevoort Property.

On October 11, 2007, GHC and Gerald Romanoff executed guarantees for a \$6,000,000.00 loan that North Fork provided to Nebraska. The loan was secured by a second mortgage on the Gansevoort Property. In May 2008, Gerald Romanoff personally guaranteed Nebraska’s obligation to Union Center National Bank.

GHC and Nebraska defaulted under the loans. Gerald Romanoff and GHC failed to satisfy the guarantees.

Thereafter, Gerald Romanoff transferred his shares of New Roads to Sheryl Romanoff for no consideration, while remaining the sole officer and director of New Roads and GHC. On November 25, 2009, Sheryl Romanoff created two trusts, the Sheryl Romanoff Irrevocable Grantor Trust (“IGT”) and the Sheryl Romanoff Grantor Retained Trust (“GRAT”). She transferred 49.5 percent of the shares of the New Roads stock to the IGT, and the remaining 49.5 percent of the shares of the New Roads stock to the GRAT.

Robert Romanoff was the sole beneficiary and one of two co-trustees of the trusts. He had also been a tenant of the Gansevoort Property pursuant to a lease, but had declined to pay any rent during the term of the lease.

On January 20, 2011, Robert Romanoff commenced an action, *Romanoff v Romanoff*, Sup Ct, NY County (Singh, J.), index No. 650152/2011 (NYSCEF Doc No. 13), as beneficiary and co-trustee of the GRAT and IGT, against Gerald Romanoff and his co-trustee for, among other things, breach of fiduciary duties to the trusts. The Court eventually dismissed the action as to Gerald Romanoff and the co-trustee (*id.*).

On February 4, 2011, following a mortgage foreclosure action, *Capital One, N.A. v Nebraska Distribution Ctr.*, in Superior Court, Essex County, New Jersey (the “New Jersey Foreclosure Action”), Capital One obtained a foreclosure judgment against Nebraska, New Roads, GHC, and Gerald Romanoff, in the amount of \$15,564,551.12.

By order dated July 5, 2011, this Court (Kornreich, J.), recognized the New Jersey Judgment, granting Capital One summary judgment in lieu of complaint and ordering that judgment be entered against the defendants (*Capital One, N.A. v Nebraska Meat Corp.*, Sup Ct, NY County, index No. 651018/2011) (NYSCEF Doc. No. 90). On September 14, 2011, the Clerk entered judgment (the “Capital One Judgment”) in the amount of \$16,361,663.42.

In a separate foreclosure action regarding the Gansevoort Property, *Capital One, N.A. v GHC NY Corp.*, Supreme Court, NY County (Sherwood, J.), Index No. 850024/2011 (the “New York Foreclosure Action”), the Court granted summary judgment to Capital One. Thereafter, 55 Gans Lender LLC purchased the mortgage from Capital One and was substituted as plaintiff in the New York Foreclosure Action (*see 55 Gans Lender LLC, as successor to Capital One, National*

Association [as successor by merger to North Fork Bank] v GHC NY Corp., Sup Ct, NY County [Sherwood, J], index No. 850024/2011).

Also, by Judgment entered April 4, 2013, the Court ordered Robert Romanoff to pay \$381,849.93 for use and occupancy of the Gansevoort Property from September 9, 2009, plus interest, costs, and disbursements (Judgment, NYSCEF Doc. No. 22). The judgment was satisfied from the proceeds of the sale of real estate owned by Robert Romanoff during a bankruptcy proceeding, *In re Romanoff*, U.S Bankruptcy Ct, SD NY, index No. 13-40002 (REG) (the “Robert Romanoff Bankruptcy Action”).

On May 5, 2011, Union Center National Bank obtained a judgment against Gerald Romanoff in Superior Court, Essex County, New York, in the amount of \$1,000,728.00, based on his personal guaranty of Nebraska’s obligations.

By Agreement dated June 25, 2012, Gerald Romanoff, Sheryl Romanoff, GHC, New Roads, 55 Gans Lender, LLC, 55 Judgment LLC, and Griffon, consented to transfer title to the Gansevoort Property to Griffon in light of the foreclosure action against GHC (Settlement, NYSCEF Doc. No. 19). Gerald Romanoff, as president and sole director of GHC, conveyed the Gansevoort Property to Griffon by deed recorded on August 14, 2012 (Deed, NYSCEF Doc. No. 20).

Thereafter, Robert Romanoff commenced multiple actions alleging improprieties in the conveyance of the Gansevoort Property to Griffon. In August 2012, Robert Romanoff individually, as co-trustee of the IGT, and on behalf of his son, Nicholas Romanoff, individually and as shareholder of New Roads, commenced an action, *Romanoff v Griffon Gansevoort Holding LLC*, Sup Ct, NY County (Sherwood, J.), index No. 652705/2012 (“Nicholas I”). By order entered

April 15, 2013, the Court dismissed Nicholas I, finding that Robert Romanoff lacked standing to sue on behalf of the IGT (Order, NYSCEF Doc No. 26).

In September 2012, GHC filed a federal Chapter 11 bankruptcy action, *In the Matter of GHC NY Corp.*, U.S Bankruptcy Ct, SD NY (Gerber, J.), index No. 12-14031 (REG) (the “GHC Bankruptcy Action”). The Court dismissed the GHC Bankruptcy Action by order entered December 11, 2012 (Order, NYSCEF Doc. No. 25).

By order entered February 6, 2013, the Court (Mendez, J.) in the Fraudulent Conveyance Action, among other things, voided the transfer of New Road shares from Gerald Romanoff to Sheryl Romanoff as fraudulent, finding that the transfer was made without consideration and rendered Gerald Romanoff insolvent (NYSCEF Doc No. 14). The Court also denied Robert Romanoff’s motion to intervene (Order, NYSCEF Doc. No. 16). Robert Romanoff’s appeals from these orders were dismissed by the Appellate Division, First Department (123 AD3d 452 [1st Dept 2014]; NYSCEF Doc. No. 17) and the Court of Appeals (26 NY3d 1073 [2015]; NYSCEF Doc. No. 18).

In February 2014, Robert Romanoff commenced a derivative action, *Romanoff v Romanoff*, Sup Ct, NY County (Singh, J.), Index No. 151160/2014 (“Nicholas II”), pursuant to Business Corporation Law 626, essentially alleging that Gerald Romanoff breached fiduciary duties to New Roads and GHC by conveying the Gansevoort Property to Griffon in exchange for the release of personal liabilities. By order entered October 31, 2017, this Court (d’Auguste, J.), dismissed the action based on Robert Romanoff’s failure to post security, pursuant to Business Corporation Law 627 (Order, NYSCEF Doc No. 34).

In August 2014, Robert Romanoff and Nicholas Romanoff filed another action, *Romanoff v The Trustees of the Sheryl Romanoff Irrevocable Grant Trust*, (Sup Ct, NY County [Singh, J.]),

Index No. 157641/2014) (Nicholas III), alleging, among other things, mismanagement of the IGT (*see* NYSCEF Doc. No. 35). By order dated January 22, 2015, this Court (Singh J.) cancelled the notice of pendency (Order, NYSCEF Doc. No. 36).

On July 3, 2015, the State of New York sent Griffon a Notice of Demand for additional real estate transfer taxes, interest, and penalties in the sum of \$108,540.15. Similarly, the City of New York issued a Notice of Determination for additional real estate transfer taxes and interest in the sum of \$582,048.58. After conciliation conferences, the State of New York determined that only \$8,749.97 was owed (Conciliation Determination, NYSCEF Doc. No. 53), and the City of New York determined that no additional payment was owed (Conciliation Determination, NYSCEF Doc. No. 55). Griffon sent a check in the amount of \$8,749.97 to the New York State Commissioner (NYSCEF Doc. No. 54).

In May 2016, Nicholas Romanoff commenced an action, Romanoff v Romanoff, Chancery Ct, State of Delaware (Slights, J), C.A. No. 12375-VCS, individually and on behalf of the IGT and GRAT, seeking a declaration that the trusts, previously voided, are the rightful owners of the New Road stocks (Complaint, NYSCEF Doc. No. 39). That action was dismissed and has been marked closed (*see* NYSCEF Doc. No. 41).

In this action, Relator seeks to recover treble damages and civil penalties from defendants for the alleged violation of the New York False Claims Act (“NYFCA”), New York State Finance Law §§187-194. Relator claims, in essence, that defendants conspired to file false tax return documents in connection with the sale of the Gansevoort Property. As stated, it is Relator’s position that the deed and associated tax documents understate the consideration paid for the property, and that the parties to the conveyance underpaid New York State and New York City real estate transfer taxes.

The original Complaint was filed under seal on December 4, 2014 (*see* Order, NYSCEF Doc. No. 8). On December 27, 2017, the State of New York declined to intervene or supersede, and plaintiff elected to proceed with the action. The State remains the real party under the NYFCA, and offers submissions in opposition to the motion to dismiss. By Order entered January 25, 2018, this Court (d'Auguste, J.), among other things, ordered the action unsealed and granted plaintiff leave to file an Amended Complaint (*see* Order, NYSCEF Doc. Nos. 2, 9).

On April 4, 2018, Relator filed the Amended Complaint. The sole cause of action seeks damages relating to the underpayment of New York State real estate transfer taxes.

Defendants seek to dismiss the Amended Complaint and to impose sanctions on Relator for excessive motion practice. Relator seeks to further amend the Complaint, and to correct the caption in a prior order in this action.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011)). Under CPLR 3211(a)(1), dismissal is warranted where “a defense is founded on documentary evidence.” The documentary evidence must utterly refute plaintiff’s factual allegations and conclusively establish a defense to the allegations as a matter of law (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 57 [1st Dept 2015]). CPLR 3211(a)(2) permits dismissal when the court does not have jurisdiction over the subject matter of the cause of action. CPLR 3211(a)(5) allows for dismissal on the ground that “the cause of action cannot be maintained because of ... *res judicata*.” “Under *res judicata* or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). “[A]ll other claims arising out of the same transaction are barred, even if based upon different theories or if

seeking a different remedy” (*Corto v Lefrak*, 203 AD2d 94 [1st Dept 1994]). Finally, under CPLR 3211(a)(7), dismissal is warranted where “the pleading fails to state a cause of action.” On a motion pursuant to CPLR 3211(a)(7), “the court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in a light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated” (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]).

As stated, the Amended Complaint in this *qui tam* action seeks damages under the NYFCA relating to the underpayment of New York State real estate transfer taxes. The NYFCA was enacted as part of a federal incentive to limit Medicaid fraud (*State of New York ex rel. Seiden v Utica First Ins. Co.*, 96 AD3d 67, 71 [1st Dept 2012]). It is not restricted to Medicaid fraud, however, but applies to any sort of looting of the public purse (*id.*). The typical false claim involves the State paying out money because of a false claim (*id.*). A “reverse false claim” occurs when someone “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or local government” (NYFCA §189[1][g]; *id.*).

To allege a reverse false claim, a plaintiff must state facts tending to show:

“(1) that the defendant made, used, or caused to be made or used a record or statement to conceal, avoid, or decrease an obligation to [the government]; (2) that the statement or record was false; (3) that the defendant knew that the statement or record was false; and (4) that [the state] suffered damages as a result”

(*State of New York ex rel. Seiden, supra*, at 71-72, quoting *United States v Raymond & Whitcomb Co.*, 53 F Supp 2d 436, 444-445 [SD NY 1999]). Furthermore, the plaintiff must provide particular details of the scheme (*see State of New York ex rel. Seidel, supra*, at 72).

Here, Relator claims that defendants conspired to file false tax return documents in connection with the sale of the Gansevoort Property. Relator also asserts that the deed and associated tax documents understate the consideration, and that the parties to the conveyance underpaid New York State and New York City real estate transfer taxes. Relator further asserts that the real property transfer tax reported the consideration for the sale of the Gansevoort Property as \$15,599,089.65, whereas the actual consideration, including debt forgiveness, totaled approximately \$30,000,000.00.

However, as stated, after initial demands for additional real estate transfer taxes and conciliation conferences, the State of New York determined that Griffon owed \$8,749.97, and the City of New York determined that Griffon did not owe any additional payment.

Section (9) of the NY State Finance Law bars *qui tam* actions “based on allegations or transactions which are the subject of a pending civil action or an administrative claim in which the state or a local government is already a party” (NY State Finance Law §190[9][a][i]), or where the Relator is not an original source of the information, if the same allegations or transactions as alleged in the action were publicly disclosed:

“(i) in a state or local government criminal, civil, or administrative hearing in which the state or a local government or its agent is a party; (ii) in a federal, New York state or New York local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public; provided that such information shall not be deemed “publicly disclosed” in a report or investigation because it was disclosed or provided pursuant to article six of the public officers law, or under any other federal, state or local law, rule or program enabling the public to request, receive, or view documents or information in the possession of public officials or public agencies; (iii) in the news media, provided that such allegations or transactions are not “publicly disclosed” in the “news media” merely because information of allegations or transactions have been posted on the internet or on a computer network”

(NY State Finance Law §190[9][b]).

Here, the Court lacks subject matter jurisdiction over this action because Relator's allegations that defendants wrongfully underpaid taxes are derived from and substantially similar to allegations that were already in the public domain (*see* NY State Finance Law §190[9][b]; *State of New York ex rel. Rasmusen v Citigroup, Inc.*, 162 AD3d 607 [1st Dept 2018]). The amount of consideration for the sale of the Gansevoort Property was the subject of Conciliation Determinations issued by the State of New York and the City of New York. The Conciliation Determinations are binding since Griffon did not file an appeal with the State Division of Tax Appeals (*see Taft Partners Dev. Group v Drizin*, 283 AD2D 218 [1st Dept 2001]).

Furthermore, the deed, the consideration for the sale, and the debts encumbering the Gansevoort Property, were publicly reported on the Automated City Register Information Systems ("ACRIS"), the GHC Bankruptcy Action and State Court actions, and in press release dating back to 2012. In addition, Relator acknowledges that he "complained to GHC, Gerald [Romanoff], and their attorneys for years, since the transaction first took place in 2012, that the tax was underpaid, including in an affidavit in the [Fraudulent Conveyance Action] back in 2011" (Romanoff Affid, pp. 4-5). As such, the Court need not reach the issue of whether the complaint states a cause of action (*State of New York ex rel. Rasmusen v Citigroup, Inc., supra*).

In the exercise of discretion, the Court denies the request for sanctions (22 NYCRR 130-1.1).

In light of the foregoing, Relator's cross motion to amend the pleading and the caption on a prior order is unnecessary.

Furthermore, Relator notes that the City of New York is not a necessary party, but nevertheless seeks to further amend the pleading to bring the City into this action to satisfy the threshold for damages under the NYFCA. While leave to amend pleadings should be "freely

given” (CPLR 3025[b]), the decision to allow or disallow the amendment is committed to the court’s discretion (*see Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]).

Here, although the proposed amendment is timely under §192 of the NYFCA, which provides a ten-year statute of limitations for *qui tam* actions, the amendment would unduly prejudice defendants by exposing them to a “change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add” (*Barbour v Hospital for Spec. Surgery*, 169 AD2d 385, 386 [1st Dept 1991]). Thus, the Court denies the proposed amendment. Furthermore, the branch of the cross motion that seeks to correct the caption in the January 24, 2018 order is denied as moot.

Accordingly, the motions are granted to the extent of dismissing the action, and otherwise denied. The cross-motion is denied.

The Clerk is directed to enter judgment dismissing the Amended Complaint.

This constitutes the decision and order of this Court.

Dated: May 1, 2020



Hon. James E. d’Auguste, J.S.C.