

JS Equity Holdings 1 LLC v 527Myrtle LLC
2020 NY Slip Op 33847(U)
November 19, 2020
Supreme Court, Kings County
Docket Number: 513368/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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JS EQUITY HOLDINGS 1 LLC, Plaintiff, Amended Decision and order

- against - Index No. 513368/20

527MYRTLE LLC, 527MYRTLEVC LLC, JERICO BLUE LLC, KINAM HAN and "JOHN DOE #1 through JOHN DOE #99", such names being fictitious and unknown to Plaintiff, the person or parties intended being the persons or entities with whom the named defendants have conspired or transacted with as described in the Complaint, Defendants, November 19, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to dismiss counterclaims filed by the defendants. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On February 20, 2018 the plaintiff loaned an entity called Jerico Blue LLC one million dollars. The loan was guaranteed by Jason Lee the owner of Jerico Blue. Further, between January and March 2018 the plaintiff loaned Lee personally an additional \$545,000. Jerico Blue and Lee failed to repay any of the funds and an action was commenced in New York County. A settlement agreement was reached wherein Lee filed confessions of judgement in the amount of \$1,545,000 and agreed to repay the funds by May 20, 2019. Lee failed to repay the money and on July 8, 2019 the plaintiff filed the confession of judgement. The Complaint alleges that Lee transferred property he owned to his wife on

July 16, 2018 in efforts to avoid the consequences of the confession of judgement. A year later the wife transferred the property to another entity. Further, the Complaint alleges that on December 18, 2019 Lee and defendant Han purchased property located at 527 Myrtle Street through defendant entity 527Myrtle LLC. The Complaint contends that these entities are the alter egos of Lee and that pursuant to the confession of judgement the plaintiff should be declared the owner of these entities in place of Lee's interests. The defendant Lee answered and has asserted two counterclaims. First, Lee asserts that he is not the owner of 527Myrtle LLC and therefore does not own the property. Consequently, a Notice of Pendency filed on the property must be removed. In an amended answer Lee asserts that Han only acted as a general contractor at 527 Myrtle Avenue and has no ownership interest in the property either. Thus, the complaint should be dismissed as to Han.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint or in this case the counterclaims will

later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

First, the appearance of a name on a Department of Buildings application raises questions of fact whether that person is in fact the owner of the property despite other evidence to the contrary (27 Jefferson Avenue Inc., v. Emergi, 18 Misc3d 336, 846 NYS2d 848 [Supreme Court Kings County 2007]). In this case there has been evidence presented that both Lee and Han appear on various Department of Buildings application documents. This evidence surely raises questions whether in fact they are owners of the property or own entities that own the property. However, both Han and Lee have submitted affidavits asserting they have no ownership interests in 527Myrtle LLC. Therefore, there is no conclusive evidence that Lee and Han are owners of 527Myrtle LLC.

In any event, an examination of the counterclaims is now necessary. Pursuant to CPLR §3019 "a counterclaim may be any cause of action in favor of one or more defendants..." (id). In this case the counterclaims do not state any 'cause of action' at all. The first counterclaim merely states that Han does not maintain any financial interest in the property. This assertion enhances the defenses asserted of failing to state a cause of

action (first defense) and that the claims are barred by documentary evidence (fourth defense), however, it fails to present any specific cause of action. Indeed, the court cannot discern the relief the counterclaim seeks other than to dismiss the complaint against Han on the grounds Han has no ownership interest in the property. That is not a counterclaim, rather it is a basis upon which to seek to dismiss the complaint.

The second counterclaim alleges that plaintiff filed the Notice of Pendency without justification because Lee is not an owner of the entity that owns the property. Again, it is difficult to discern the precise cause of action being alleged. To the extent the counterclaim seeks to pursue a claim for slander of title based upon the filing of a notice of pendency, no such cause of action exists in New York (Seidman v. Industrial Recycling Properties Inc., 83 AD3d 1040, 922 NYS2d 451 [2d Dept., 2011])¹. This is so because the contents of the actual complaint are privileged and the notice of pendency is "an undeniably true statement" (Brown v. Bethlehem Terrace Associates, 136 AD2d 222, 525 NYS2d 978 [3rd Dept., 1988]). Thus, the counterclaim does not seek any relief other than to dismiss the notice of pendency. The defendant can seek that relief by way of motion to dismiss, however, a counterclaim is improper. This does not affect the

¹ In other states a party may pursue a slander of title claim based on the malicious filing of a Notice of Pendency. See, Carrozza v. Voccola, 90 A3d 142 [Supreme Court of Rhode Island 2014].


rights of the defendants in any way since they have adequately asserted defenses which encompass the essence of the counterclaims, namely that the lawsuit against Han and the notice of pendency should be dismissed.

Therefore, based on the foregoing, the motion seeking to dismiss the counterclaims is granted without prejudice.

So ordered.

ENTER:

DATED: November 19, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC