

2005-2011 Realty LLC v Brailovskiy

2022 NY Slip Op 30179(U)

January 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 502216/2016

Judge: Wayne P. Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of January 2022.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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2005-2011 REALTY LLC,

Plaintiff

Index No. 502216/2016

-against-

MS #5

ALEKSANDR BRAILOVSKIY, YULIYA
BRAILOVSKAYA, YELENA SAVITSKAYA
and DMITRIY BRAILOVSKIY,

Defendants.

Decision and Order

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ALEKSANDR BRAILOVSKIY, YULIYA
BRAILOVSKAYA, YELENA SAVITSKAYA
and DMITRIY BRAILOVSKIY,

Third-Party Plaintiffs,

-against-

BORIS KURBATSKY and FELIX NEMIROVSKY,

Third-Party Defendant.

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Third Party Defendants BORIS KURBATSKY and FELIX NEMIROVSKY move this Court for an order to (a) limit the factual Record to the traversable allegations set forth in the Third-Party Complaint; (b) limit the damages recoverable against Third-Party Defendants at inquest; and (c) dismiss the Third-Party Complaint.

That portion of the motion that seeks to limit the factual record and damages recoverable at inquest is moot as the inquest has already been held, the referee has already issued her decision, and a judgment has already been entered on October 26, 2021.

That portion of Third-Party Defendants motion to dismiss the Third-Party Complaint should also be denied as the motion to grant Third-Party Plaintiffs summary judgment was granted on default and the motion to vacate that default was denied for failure to demonstrate a meritorious defense.

Third-Party Plaintiffs commenced their action against Third-Party Defendants based on breach of contract.

In a decision dated January 18, 2017, Justice Wooten granted Third-Party Plaintiff's summary judgment against Third-Party Defendants BORIS KURBATSKY and FELIX NEMIROVSKY on default and ordered an inquest to determine damages and enter judgment.

On November 15, 2017, Justice Wooten denied the Third-Party Defendants motion to vacate their default, holding that "the third-party defendants failed to meet the two-prong test to vacate a default judgment in that they failed to establish a meritorious defense".

In a decision dated November 26, 2018, Justice Wooten denied Third-Party Defendants' motion to reargue and review his decision which denied their motion to vacate the default judgment entered against them.

In a decision dated August 26, 2020, the Appellate Division Second Department upheld the denial of the motion to renew and reargue.

In their motion to reargue the denial of the motion to vacate their default, Third-Party Defendants specifically argued that the court did not have jurisdiction over the matter, which was rejected by Justice Wooten.

Although Third-Party Defendants assert that the Court lacked subject matter jurisdiction over the matter, they have not shown that the Court lacked jurisdiction to hear the case.

The Third-Party Complaint alleged damages based on breach of the corporate operating agreement, for the alleged failure to make payments due under a corporate lease, and to pay their alleged share of certain build out costs. Third-Party Defendants argue that they were not individually liable for the payments under both the operating agreement and under the Limited Liability Corporation Law.

These arguments do not go to the jurisdiction of the Court to hear the matter, but are substantive defenses to Third-Party Plaintiffs' claims. These defenses were foreclosed by Justice Wooten's grant of summary judgment and denial of the motion to vacate their default.

Third-Party Defendants also argue that the Court lacked subject matter jurisdiction because Third-Party Plaintiffs, as corporate shareholders, lacked standing to seek damages from the Third-Party Defendants. However, lack of standing does not affect the subject matter jurisdiction of the Court.

Third-Party Defendants' reliance on the decision in *Stark v. Goldberg*, 297 AD2d 203 [1st Dept 2002], is misplaced. The Second Department rejected the holding in *Stark* in its decision in *Wells Fargo Bank v. Mastropaolo*, 42 A.D.3d 239 [2nd Dept 2007].

The Appellate Division in *Mastropaolo* stated that the decision in *Stark* was inconsistent with the Court of Appeals authority that standing is a waivable affirmative defense. The Appellate Division explained that the decision confuses

“a plaintiff's right to recovery with the court's power to hear the case. A court lacks subject matter jurisdiction when it lacks the competence to adjudicate a particular kind of controversy in the first place. As the Court of Appeals has observed, “[t]he question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it” Whether the action is being pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it.” (*Mastropaolo*, at 243).

Moreover, Third-Party Defendants did not raise standing in their answer, and thus waived it. It is well established that a defense of lack of standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived (*Matter of Fossella v. Dinkins*, 66 NY2d 162, 167-168 [1985]; *Dougherty v. City of Rye*, 63 NY2d 989, 991-992 [1984]; *US Bank NA v. Nelson*, 169 AD3d 110 [2d Dept 2019]; *Wells Fargo Bank v. Halberstam*, 166 AD3d 710 [2d Dept 2018]; *HSBC Bank USA, N.A. v. Roldan*, 155 AD3d 942 [2d Dept 2017]; *One W. Bank, FSB v. Vanderhorst*, 131 AD3d 1028 [2d Dept 2015]).

WHEREFORE, it is hereby ORDERED that Third-Party Defendants' motion is denied; and it is further,

ORDERED that the oral continuation of the stay of enforcement of the judgement pending determination of this motion is vacated.

This constitutes the Decision and Order of this Court.

ENTER:



JSC