

Ner Mordechai Inc. v Ohel Harav Yenoshua Boruch Found.

2022 NY Slip Op 32361(U)

July 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 520013/2020

Judge: Ingrid Joseph

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At an I.A.S. Term, Part 83 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 7th day of July, 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
NER MORDECHAI INC. and SEPHARDIC
TORAH AND RETURN CENTER, INC.,

Index No.: 520013/2020

Plaintiff,
-against-

OHEL HARAV YENOSHUA BORUCH
FOUNDATION and JOSEPH "BEN"
LANDA,

Defendants.
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In this matter, defendants, Ohel Harav Yehoshua Boruch Foundation ("the Foundation") and Joseph "Ben" Landa ("Landa") move (Motion Seq. 2) by notice of motion for leave to reargue and renew their pre-Answer motion to dismiss the Complaint, and, upon reargument and renewal, an order granting their underlying motion to dismiss. Plaintiffs, Ner Mordechai Inc. ("Ner Mordechai") and Sephardic Torah and Return Center, Inc. ("Sephardic Torah Center") (collectively "plaintiffs"), cross move (Motion Seq. 3)

In the Complaint, plaintiffs, Ner Mordechai Inc. ("Ner Mordechai") and Sephardic Torah and Return Center, Inc. ("Sephardic Torah Center") (collectively "plaintiffs") assert that Goldie Hager and Helen Schvimmer created Trusts in or about 2007. Plaintiff alleges that the purposes of both Trust was to hold Hager and Schvimmer's respective life

insurance policies and, upon their death, provide the pay out from such policies as charitable contributions to Ner Mordechai. Plaintiffs allege that Hager and Schwimmer designated Ner Mordechai as the sole and irrevocable beneficiary of their individual Trusts. John Hancock issued both life insurance policies, and plaintiffs allege that the Sephardic Torah Center made “a number of premium payments” under both policies. Specifically, plaintiff asserts that the Sephardic Torah Center made premium payments totaling \$849,240.48 and \$518,495.26 on the Hager and Schwimmer policies, respectively. Plaintiffs claim that the payments were made with the understanding that both policies would continue to be owned by the Trusts and Ner Mordechai would continue to be the beneficiary. However, plaintiff’s claim that defendant Landa submitted documents to John Hancock that transferred the ownership and beneficiary information on both policies from Ner Mordechai to the Foundation. Plaintiffs claim that defendant Landa was not authorized by either Trust to submit transfer documents to John Hancock, or to change the ownership or beneficiary of either life insurance policy.

In the First Cause of Action, plaintiffs seek a declaratory judgment that defendant Landa was not authorized to submit documents to John Hancock that changed the owner or beneficiary for either policy and a further declaration that such policies are owned by the original Trust. Additionally, plaintiffs seek an injunction requiring defendant Landa and the Foundation to prepare the documents required to revert the policies to the prior ownership/beneficiary state. In the Third Cause of Action, plaintiffs seek the recovery of approximately \$1.3 million dollars on unjust enrichment grounds.

The defendants filed a pre-Answer motion to dismiss plaintiffs' complaint pursuant to CPLR § 3211 (a)(1), (7) and (5), based upon documentary evidence, failure to state a cause of action, and on the ground that the issues raised by plaintiffs were previously submitted to arbitration before a Beth Din that resulted in an award. The defendants also requested costs and sanctions against plaintiffs, based upon their attorney's contention that he previously advised plaintiffs' counsel via email that the instant lawsuit was frivolous.

Plaintiffs opposed the motion on the ground that the defendants' exhibits, including Landa's affidavit, were insufficient to bar plaintiffs' claims on res judicata or collateral estoppel grounds. Plaintiffs argued that the proceeding before the Beth Din did not result in an "award" or "judgment" but rather, it resulted in a voluntary agreement that was either an "award" or a "judgment," which is necessary in order for res judicata or the doctrine of collateral estoppel to bar their claims. Plaintiff further argued that the purported agreement lacks consideration and that only Rabbi Muscat waived his right to pursue monetary claims. Lastly, plaintiffs argued that the defendants' request for sanctions should be rejected, because the underlying complaint is not frivolous.

The court, upon consideration, rendered a decision on September 27, 2021 that denied the defendants' application to dismiss. In the decision, the court found that the defendants had the burden of establishing that the issues presented in the instant matter were identical to those previously litigated. Ultimately, the court determined that the defendants failed to establish that an arbitration before a Beth Din occurred and that such arbitration resulted in an arbitration award. The court, upon review of the Agreement

annexed to the defendants' motion, found that the defendants failed to established that it resolved all factual issues and conclusively disposed of the plaintiffs' claims herein.

In support of the instant motion, the defendants contend that the court failed to address whether the instant matter is subject to dismissal for lack of standing and on statute of limitations grounds. Defendants contend that the court misapprehended the facts of the case when it determined that the defendants "failed to establish that the alleged agreement resolves all factual issues as a matter of law and conclusively disposes of plaintiffs' claims" and further, when the court held there was no showing that an arbitration actually occurred and resulted in an "arbitration award" from the rabbinical court. In further support of that argument, the defendants posit that the documentary evidence annexed to its motion, namely, the Agreement, is a "written contract" and that such contract "evidences the parties' intent in plain language, and that [such agreement] was acted upon by both parties for eleven (11) years before [p]laintiffs commenced [the instant] action (defendants memorandum, p. 4 - 5). The defendants also highlight that part of the Agreement where it is indicated that the plaintiffs "will cooperate with transferring the Hager & Schwimmer life insurance policies" and another section in the Agreement where non-party, Chaim Muscat, on behalf of himself and the authorized representative of the plaintiffs, waived all monetary claims against the defendants, and anyone else, concerning the subject life insurance policies.

Additionally, the defendants, through their attorney, contend that the court failed to identify what factual issues the court believed were left unresolved by the Agreement. The defendants go on to outline the factual allegations in plaintiffs' complaint and argues

that each factual assertion is irrelevant, moot or without merit. To that end, defendants argue that the plaintiffs' intent is unambiguously indicated by the plain language of the agreement, as well as the parties' subsequent performance pursuant to the Agreement. The defendants argue that the Agreement is analogous to a consent award and provides case law to support its contention that the Agreement/consent award is binding upon plaintiffs under collateral estoppel and res judicata principles. Defendants contend that the plaintiffs' lack of consideration argument is belied by plain language in the Agreement, which provides that the Agreement was reached "in consideration of certain mutual commitments."

Further, the defendants argue that the court misapplied the standard of review applicable to motions to dismiss by failing to properly account for the shifting of the burden upon a defendants' presentation of evidentiary material that flatly contradicts the factual allegations in the complaint. Lastly, the defendants argue that leave to renew is appropriate in this case, because defendants received documentary evidence from the insurer, John Hancock, after submission of its underlying motion to dismiss. Specifically, defendants argue that the documents provided reveal that plaintiffs were never the owners or intended beneficiaries of the subject life insurance policies and therefore, plaintiffs lack standing to bring this action.

"A motion for leave to reargue is addressed to the sound discretion of the motion court" (*Fein v. Fein*, 192 AD3d 1083, 1085 [2d Dept 2021]; see *Brett v. AJ Assoc., LLC*, 189 AD3d 1153, 1154 [2d Dept 2020]). "Such a motion must be 'based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior

motion, but shall not include any matters of fact not offered on the prior motion' ” (Fein v. Fein, 192 AD3d at 1085[2d Dept 2021] quoting CPLR § 2221[d][2]). However, “a motion for leave to reargue ‘is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented’ ” (*Jaspar Holdings, LLC v. Gotham Trading Partners # 1, LLC*, 186 AD3d 582, 584 [2d Dept 2020]; see *Degraw Constr. Group, Inc. v. McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019]; *Williams v. Abiomed, Inc.*, 173 AD3d 1115, 1116 [2d Dept 2019]).

In this case, the defendants underlying motion to dismiss consisted of four documents, to wit: the affidavit of Benjamin Landa, the affirmation of defendants’ counsel, Keith J. Singer, Esq., a translated version of the subject “Agreement” (with corresponding Certificate of Accuracy), and copies of email correspondence between the parties’ attorneys. The Notice of Motion referenced Sections 3211 (a)(1), (5), and (7) as grounds for dismissal. However, Landa’s affidavit, and the defendants’ attorney’s affirmation in support, presented arguments that pertain solely to dismissal pursuant to CPLR § 3211 (a)(5) (because of arbitration and award), res judicata, and collateral estoppel.

A motion to reargue is not designed to provide an unsuccessful party, in this case, the defendants, with successive opportunities to present arguments different from those originally, or improperly presented in the original motion. The issue of whether plaintiffs’ complaint is subject to dismissal on lack of standing or statute of limitations grounds, based upon documentary evidence, or for failure to state a cause of action, were

either not presented on defendants' original motion, improperly raised for the first time on reply, or raised for the first time on reargument. Thus, this court, in its discretion, hereby grants the defendants' request for leave to reargue solely to the extent that reargument is limited to the defendants' contention that the court overlooked or misapprehended matters of fact or law when it determined the defendants failed to demonstrate dismissal was warranted because of arbitration and award, or on res judicata and collateral estoppel grounds.

Under CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action on the ground that the cause of action may not be maintained because of arbitration and award (CPLR § 3211(a)(5)). The foundation for the defendants' defense in this regard is the Agreement that the parties purportedly reached voluntarily after the dispute was submitted for arbitration before a rabbinical court. The Agreement provides that the parties entered into the Agreement, "in consideration of certain mutual commitments." It further provides that the signatories to the agreement accepted, obligated and committed themselves to certain terms as follows:

1. Rabbi Chaim Muscat, Sephardic Torah Center & Ner Mordechai will cooperate with transferring the Hager & Schwimmer life insurance policies (#93181832 & #93414449) to Ohel Harav Yehoshua Baruch Foundation.
2. Rabbi Muscat further waives absolutely all monetary claims he has to date against Mr. Ben Landa, Ohel Harav Yehoshua Baruch Foundation, R' Menachem Markowitz, and/or Congregation Be'er Menachem.
3. Rabbi Muskat further waives absolutely all other monetary claims he has to

date related to the abovementioned policies against anyone else, including without limitation, Menachem Peretz, Mordechai Schonbrun, Eli Rubenstien.”

The Agreement directly references both policies on which the plaintiffs’ causes of action are based. The Agreement specifically references the plaintiffs and provides that they will “cooperate with transferring the Hager & Schwimmer life insurance policies to [the Foundation].” The defendants, through their attorney, allege that such transfers already took place; however, documentary proof of the chain of ownership of the subject policies was not included with the defendants’ motion to dismiss. Moreover, it is unclear what “mutual commitments” are contemplated in the Agreement. The language is ambiguous, at best. The conclusory arguments of defendants’ counsel is not evidence, and the statements made by Mr. Landa do not establish a basis for dismissal on arbitration and award grounds.

Further, the facts and circumstances of the arbitration are too obscure. The original demand for arbitration and/or the initiatory documents that were utilized to engage the rabbinical court were omitted from the defendants original motion. An accounting of the individuals and/or entities that participated in the arbitration was not provided, nor was there evidence of the precise issues submitted for arbitration. The defendants’ original motion was also devoid of the resulting record, including proof of the rabbinical court’s final disposition, or consent award. Moreover, it is unclear whether the Agreement is a fully executed contract, since it appears to have the illegible signature of only one party.

It is understood that the Agreement concerns the same life insurance policies that are the gravamen of the instant action. However, the defendants failed to submit evidence of the identity of the parties in both matters, or show that there is identity and decisiveness of the issues and questions of law at hand. The Agreement does not aid in this regard, since there exists ambiguities that make it impossible to ascertain whether plaintiffs' claims for declaratory judgments, injunctive relief, and damages have been contemplated by all parties and resolved. Thus, upon reargument, the court stands by its decision that the defendants' original motion to dismiss, with corroborating documents were insufficient to warrant dismissal of plaintiffs' claims.

To the extent that the defendants have failed to establish that the plaintiffs' claims are subject to dismissal, neither have the defendants demonstrated that the imposition of sanctions and recovery of costs and fees is appropriate under 22 NYCRR 130-1.1. At this stage of the litigation, it is not yet established that plaintiffs' claims are completely without merit in law, or that such claims have been asserted for the purpose of harassing or maliciously injuring the defendants, or that the plaintiffs have asserted false statements in the complaint. The opinion of defendants' counsel and chain of email correspondence between the attorneys is not dispositive on the issue. Thus, that branch of the defendants' motions for sanctions and costs against the plaintiffs is denied without prejudice.

Further, it is well understood that "[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Lardo v. Rivlab Transp. Corp.*, 46 AD3d 759 [2d Dept 2007]);

Matter of Leyberman v. Leyberman, [2d Dept 2007]; *Elder v. Elder*, 21 AD3d 1055 [2d Dept 2005]).

Finally, upon consideration of the parties' respective arguments concerning plaintiffs' cross motion to dismiss the defendants' counterclaims, the court finds that the defendants Third Cause of Action for sanctions and cost is subject to dismissal. Plaintiffs correctly point out that New York does not recognize an independent cause of action for the imposition of sanctions relating to frivolous actions (*Zuniga v BAC Home Loans Servicing, L.P.*, 147 AD3d 882 [2d Dept 2017] citing *Lewis, Brisbois, Bisgaard & Smith LLP v Law Firm of Howard Mann*, 141 AD3d 574 [2d Dept 2016]). The defendants counterclaim for a declaratory judgment is likewise subject to dismissal. The court finds that such counterclaim is merely an iteration of the defendants' affirmative defenses and "patently seeking a declaration of their sufficiency" [*Sport-Craft v Garment Center Capitol*, 167 Misc 425 [New York County 1938)]. The defendants have asserted multiple affirmative defenses against the plaintiffs claims, including failure to state a cause of action, statute of frauds, and arbitration and award. Plaintiffs request for a declaration that transfer of the subject life insurances was authorized and that the defendants are the rightful owners of the policies is, in effect, a declarations that merely establishes their defenses. Contrary to the plaintiffs contention, the court finds that the defendants properly pled their counterclaim for unjust enrichment.

Accordingly, it is hereby

ORDERED, that the defendants motion for leave to reargue (Motion Seq. 2) is granted and upon reargument the court adheres to the September 27, 2021 decision and order that denied plaintiff's motion to dismiss the instant cause of action, and it is further

ORDERED, that the branch of the defendant motion for leave to renew is denied in its entirety, and it is further

ORDERED, that plaintiffs' cross motion (Motion Seq. 3) is granted to the extent that the defendants First Counterclaim for a declaratory judgment and Third Counterclaim for costs, fees and the imposition of sanctions are dismissed.

This constitutes the decision and order of the court.

ENTER,



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice