

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL, 8

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195 HAWTHORNE PARTNERS, LLC.,

Plaintiffs,

Decision and order

- against -

Index No. 506136/18

GEORGENE S. THOMPSON
a/k/a GEORGENE S. THOMPSON (BROWN)
AND HAWTHORNE PARTNERS, LLC.,

Defendants,

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October 30, 2018

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GEORGENE S. THOMPSON
AND HAWTHORNE PARTNERS, LLC.,

Third-Party Plaintiffs,

- against -

GEORGE RUSSO, ESQ., THE LAW FIRM OF
GEORGE RUSSO & ASSOCIATES, P.C.,
ATKINS & BRESKIN, LLC., JERRY ATKINS,
FIRST AMERICAN TITLE, UNITED AMERICAN
TITLE AGENCY, LLC., THOMAS V. CARABALLO,
THE BANK OF ASIA, USA, INDUSTRIAL AND COMMERCIAL
BANK OF CHINA, TITLEVEST AGENCY AND FIDELITY
NATIONAL TITLE INSURANCE COMPANY,

Third-Party Defendants.

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PRESENT: HON. LEON RUCHELSMAN

The defendants Atkins and Breskin LLC and Jerry Atkins have moved seeking to dismiss the third party complaint on the grounds it fails to state any cause of action. 195 Hawthorne Partners LLC has likewise moved seeking to dismiss the counterclaims filed in the original complaint on the grounds they too fail to state any claims. The defendant has opposed the motions. Papers were submitted by both parties and arguments held. After reviewing all the arguments this court now makes the following determination.

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The defendant Georgene Thompson acquired property located at 195 Hawthorne Street, Kings County in 1998. On March 28, 2007 Thompson transferred the property to defendant Hawthorne Partners LLC. Although Thompson contends that she is the sole shareholder of that entity, the Complaint filed in this case asserts that Thompson was "never a member or manager of Hawthorne" (see, Complaint, ¶ 3) and indeed, the Operating Agreement lists only one member, namely George Russo. Thompson and Russo, a real estate attorney advising Thompson, entered into an agreement on January 10, 2006 wherein the parties agreed to form a limited liability corporation (Hawthorne Partners LLC) to develop the property and build a multi-unit building selling condominiums. Hawthorne Partners LLC thereafter gave two mortgages on the property to the Bank of East Asia, one for \$650,000 and one for \$3,130,000. Unhappy with the progression of the development of the property Thompson deeded the property back to herself and such deed was recorded on September 7, 2011. Thereafter, on May 24, 2012 Russo and Hawthorne Partners LLC commenced an action against Thompson seeking to set aside the transfer of the deed to herself. The complaint asserted four causes of action including fraud and forgery and claims to set aside the deed transfer and to quiet title. The complaint alleged Thompson knew that Hawthorne Partners LLC was the rightful owner of the property and the deed transfer clouded title. Thompson answered the complaint

and asserted three affirmative defenses. First she asserted that any fraud or forgery she committed was only in response to such actions first committed by Russo and consequently her actions were permitted under the doctrine of anticipatory repudiation. Second, she alleged Russo breached his fiduciary duty and violated the Code of Professional Responsibility. Third, she alleged Russo misrepresented material facts about the development of the property. She then asserted two counterclaims. The first one alleged that Russo "commenced negotiations with a third party buyer" without her consent, in violation of the agreement. Second, she asserted that Russo "convinced Defendant (Thompson) to transfer ownership of the subject premises into the Plaintiff Corporation (Hawthorne Partners LLC) which Defendant was a co-owner in" (see, Verified Answer with Counterclaim, ¶¶ 29, 30, dated July 10 2012) and further obtained a mortgage on the property through "fraud" (id).

Thereafter, Russo defaulted on the mortgages which had since been consolidated and a judgement was entered against him. The judgement and consolidated mortgages were then assigned to the plaintiff 195 Hawthorne Partners LLC on September 18, 2014. The plaintiff entered into an agreement with Hawthorne Partners LLC and Russo on November 3, 2014 essentially conveying title to the property to 195 Hawthorne partners LLC. 195 Hawthorne Partners LLC then sought to intervene in the quiet title action and after

such intervention sought summary judgement. On July 1, 2015 Judge Bayne issued an order which stated that "195 Hawthorne Partners LLC's motion for summary judgement is granted to the extent that Defendant Georgene S. Thompson is directed to execute a deed for the Premises at issue 195 Hawthorne Street, Brooklyn, NY, within 30 days of the date of this order, to the prior owner Hawthorne Partners LLC..." (see, Order dated July 1, 2015). Thompson refused to comply with that order and on October 14, 2015 Judge Knipel ordered Russo to be appointed attorney in fact for Thompson to effectuate the earlier order directing Thompson to transfer the deed to Hawthorne Partners LLC. The deed was then transferred back to Hawthorne Partners LLC.

On December 9, 2015 195 Hawthorne Partners LLC instituted a foreclosure action against Hawthorne Partners LLC seeking to foreclose the mortgage and other liens on the property. On November 18, 2015 Judge Knipel issued an order granting 195 Hawthorne Partners LLC's motion seeking to compel the settlement agreement dated November 3, 2014 and ordered Hawthorne Partners LLC to record the deed. On October 1, 2015 the deed was recorded.

Thus, as of August 7, 2017 following a satisfaction of mortgage 195 Hawthorne Partners LLC was the owner of 195 Hawthorne Street in Kings County.

195 Hawthorne Partners LLC instituted the current action

seeking to quiet title to the property upon discovering, according to the complaint, that "Thompson or Hawthorne, or someone claiming to represent Hawthorne, have made at least two attempts to mortgage the Premises in exchange for loans in millions of dollars" (see, Verified Complaint, ¶ 38). Thompson filed a verified answer and asserted 195 Hawthorne Partners LLC's claims are barred by "waiver, laches, equitable estoppel, res judicata, collateral estoppel, and/or the entire controversy doctrine" (see, Verified Answer, ¶ 4) as well as other conclusory assertions. Moreover, Thompson instituted a third party action against Russo and Atkins and Breskin LLC and Jerry Atkins and others alleging six causes of action. Mr. Atkins is a member of 195 Hawthorne Partners LLC and a founding partner of Atkins and Breskin LLC. The first seeks a determination that Thompson is the rightful owner of the property. The second is for fraud against both Russo and 195 Hawthorne Partners LLC. The third is conspiracy to commit fraud. The fourth claim alleges malpractice against Russo. The fifth alleges a claim pursuant to § 487 of the Judiciary Law and the last claim alleges slander of title. In addition, Thompson asserted four counterclaims against 195 Hawthorne Partners, consisting of the same causes of action filed in the third party complaint except the two causes against Russo concerning his legal representation.

The defendants Atkins and Breskin LLC and Jerry Atkins have

now moved pursuant to CPLR §3211 seeking to dismiss the third party complaint on the grounds it fails to state any cause of action. 195 Hawthorne Partners LLC has moved seeking to dismiss the counterclaims filed in the original complaint.

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, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff 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]).

Concerning Atkins and Breskin LLC and Jerry Atkins, the Third Party Complaint does not contain any allegations directed toward either of them. The Third Party Complaint does note that defendant 195 Hawthorne Partners LLC's offices are located "c/o

Atkins and Breskin LLC" and that "it is a New York limited liability company" and that "Jerry Atkins, is a founding partner of Atkins & Breskin" (see, Third Party Complaint, ¶¶ 8,9,10). Further, in paragraph 70 of the Third Party Complaint it is alleged that "Defendants, Atkins & Breskin L.L.C. and Jerry Atkins took steps to purchase the defaulted loans" (id) and "in September 2012, Defendant Atkins took steps to form 195 Hawthorne Partners LLC (id at 71). However, other than these non-actionable and informational recitals, the Third Party Complaint does not allege any conduct committed by these defendants that could comprise the first two causes of action. The first cause of action seeks a determination that Thompson is the "lawful owner of said property and is vested with an absolute and unencumbered title in fee simple to the property" (id at 103). The basis for this claim is the assertion that Russo fraudulently encumbered the property by claiming to be the sole shareholder of Hawthorne Partners. That fraud, alleges the complaint, caused title to improperly vest with 195 Hawthorne Partners LLC. There is no mention of Jerry Atkins or Atkins and Breskin LLC. Thus, upon a motion to dismiss the court must examine the four corners of the complaint and discern whether the factual allegations establish any cognizable cause of action (see, Guggenheimer v. Ginzberg, 43 NY2d 268, 401 NYS2d 182 [1977]). It is clear that no such factual allegations even exist regarding Jerry Atkins and

Atkins and Breskin LLC. Consequently, the motion seeking to dismiss the first cause of action is granted.

The second cause of action of the Third Party Complaint alleges fraud. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328[2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014])). The complaint does not allege any conduct on the part of Atkins and Breskin LLC or Jerry Atkins that could comprise any fraud. The complaint states that "the Atkins Defendants, 195 Hawthorne Partners and Russo Defendants conspired to take the property from Third-Party Plaintiffs including a payment to Russo directly and discussions to pay Russo to assist in any litigation with Third-Party Plaintiffs" (see, Third Party Complaint, ¶ 105(h)). Even if these allegations are true they do not allege misrepresentations made to Thompson and thus are not fraud. Consequently, the second cause of action is hereby dismissed. The third cause of action, namely conspiracy to commit fraud is likewise dismissed. This cause of action stands and falls with

the underlying fraud claim and since the fraud claim has been dismissed the conspiracy claim is likewise dismissed (McSpedon v. Levine, 158 AD3d 618, 72 NYS3d 97 [2d Dept., 2018]). The next two causes of action concern malpractice and a claim pursuant to Judiciary Law §487. Those causes of action do not concern Atkins and Breskin LLC or Jerry Atkins at all and are consequently dismissed. The last cause of action, a claim for slander of title, states it is directed "against each and every third-party defendant" (see, Third Party Complaint, ¶ 130).

To succeed upon a claim of slander of title it must be demonstrated that the defendants issued a communication falsely casting doubt on the validity of the complainant's title, the communication was reasonably calculated to cause harm and that damages ensued (Brown v. Bethlehem Terrace Associates, 136 AD2d 222, 525 NYS2d 978 [3rd Dept., 1988]). However, the complaint does not allege any conduct committed by Atkins and Breskin LLC or Jerry Atkins at all. Moreover, there is no showing that any communications made were made with a reckless disregard for the truth (Weiss v. Konner, 137 AD3d 491, 26 NYS3d 460 [1st Dept., 2016]).

Therefore, based on the foregoing the motion of Atkins and Breskin LLC and Jerry Atkins seeking to dismiss the third party complaint is granted in total. All the causes of action of the third party complaint as to Atkins and Breskin LLC and Jerry

Atkins are dismissed with prejudice. The motion seeking to hold Thompson in contempt is denied at this time.

Turning to 195's motion seeking to dismiss the counterclaims, the verified answer reveals four counterclaims, namely a determination regarding ownership of the property pursuant to RPAPL Article 15, fraud, conspiracy to commit fraud and slander of title.

The doctrine of res judicata or claim preclusion prevents a party from relitigating an issue which has already been decided in a prior proceeding (Parker v. Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 690 NYS2d 478 [1999]). Thus, in the prior litigation in which Thompson participated a court order dated July 1, 2015 ordered Thompson to "execute a deed for the premises...to the prior owner Hawthorne Partners LLC" (supra). That determination, which Thompson had an opportunity to oppose, conclusively established that Thompson could not maintain possession of the deed. Thompson now argues that "the issue presented herein i.e. that Thompson was the sole shareholder of Hawthorne Partners LLC, the current deed holder of the subject property, has never been litigated and a decision issued on this point" (see, Defendant's Opposition, page 15). Thompson supports her claim she was a shareholder of Hawthorne Partners LLC because she was the grantor and the grantee, something only legally possible if she was a shareholder of the grantee. Further,

Thompson asserts the fact no transfer taxes were paid buttresses the argument she was a shareholder of Hawthorne Partners LLC. First, as noted, the only shareholder listed as a member of Hawthorne Partners LLC is George Russo. Thompson seeks to create an ownership interest in Hawthorne Partners LLC by virtue of the fact she signed certain documents on its behalf. However, even if true, the mere execution of any documents cannot create an ownership interest when the operating agreement of the LLC explicitly excludes her as an owner. The nature of her relationship with Russo can surely be explored by Thompson either through litigation or some other method, however, Thompson's argument that she "had to be an officer, shareholder, or held power of attorney for Hawthorne Partners LLC" (see, Defendant's Opposition, page 16) is not legally compelling.

Moreover, the entire line of inquiry pursued by this counterclaim is irrelevant. It is of no moment the court never ruled upon Thompson's claims of ownership of Hawthorne Partners LLC. Those ownership arguments were not raised in the 2012 lawsuit although they surely could have been raised at that time. In the defendant's Second Counterclaim, in that lawsuit, Thompson merely asserts that Russo, using undue influence, convinced her to transfer ownership of the subject premises into "the Plaintiff Corporation [Hawthorne Partners LLC] which Defendant was a co-owner in" (*supra* at ¶ 29). The thrust of that counterclaim was

an allegation of undue influence against Russo, not one of ownership and misappropriation by Russo. Indeed, regardless of any ownership disputes of Hawthorne Partners LLC, Judge Bayne ordered Thompson to execute a deed to Hawthorne Partners LLC on July 1, 2015. Thompson had a full and fair opportunity to oppose the motion that led to that decision and could have presented any defenses in opposition thereto. Thompson elides the conclusiveness of the prior order by noting that the fact she executed documents on behalf of Hawthorne Partners LLC demonstrates she was an owner and that this matter "was not at any time subject to judicial review" (see, Defendant's Opposition, page 16). However, the issue is not who rightfully owns Hawthorne Partners LLC but Thompson's repeated unwillingness to abide an order of the court. Her ownership claims cannot excuse her continued failure to transfer the deed to Hawthorne Partners LLC as ordered. In truth, this counterclaim is an improper vehicle in which to challenge the determination of J. Bayne. However, Thompson had an opportunity to challenge that order and failed to do so. Thus, the present action is surely barred by res judicata. It is well settled the doctrine bars recovery on a different theory where the issues arise from the same facts and transactions (Tsabbar v. Delena, 300 AD2d 196, 752 NYS2d 636 [1st Dept., 2002]). Therefore, based on the foregoing, the motion seeking to dismiss the first counterclaim is granted.


Again, concerning the fraud claim, the third party complaint does not allege any fraud committed by 195 Hawthorne Partners. In Paragraph 105 of the third party complaint it does allege that "Third-Party Defendants, and 195 Hawthorne Partners, with the intent to defraud Third Party Plaintiff, induced them in to enter into [sic] the subject 2007 transaction by making intentional misrepresentations" however, other than that introductory and conclusory assertion, there is no specific fraud alleged against 195 Hawthorne Partners. It is well settled that a fraud claim must be pled with specificity (Cheslowitz v. Board of Trustees of Knox School, 156 AD3d 753, 68 NYS3d 103 [2d Dept., 2017]). Therefore, the fraud claim and the conspiracy to commit fraud claim are both dismissed.

Lastly, concerning the counterclaim seeking slander of title, in light of the determination the quiet title counterclaim is dismissed there is no evidence at all any statements concerning the property, if made at all, were made with a reckless disregard for the truth (Weiss, supra). Consequently, all the counterclaims are herein dismissed. Therefore, 195 Hawthorne LLC's motion seeking to dismiss the counterclaims with prejudice is granted.

So ordered.

ENTER:

DATED: October 30, 2018
Brooklyn N.Y.


Hon. Leon Ruchelsman
JSC

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