Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE LEONARD LIVOTE IA Part 33
Justice CD Part A

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x Index
70-35 113TH STREET HOLDINGS, LLC, Number 701293/2021

Plaintiff,

-against- Motion
Date March 23, 2021

AUBERGE GRAND CENTRAL LLC Motion Seq. No. 1

Defendants

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The following papers EF numbered below read on this motion by defendant Auberge Grand Central LLC for, inter alia, an order pursuant to CPLR 3211(a)(5) dismissing the complaint against it on the grounds of collateral estoppel and res judicata.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	4-35
Answering Affidavits - Exhibits	
Reply Affidavits	
Memoranda of Law	5, 38

Upon the foregoing papers it is ordered that the branch of the motion which is for an order pursuant to CPLR 3211(a)(5) dismissing the complaint on the grounds of collateral estoppel and res judicata is granted. The

remaining branches of the motion which seek an order dismissing the complaint are denied as moot. The branch of the motion which is for an order cancelling the notice of pendency is denied as premature. The remaining branches of the motion are denied.

I. The Facts

This case concerns real property located at 70-35 113th Street, Forest Hills, New York (the subject property) formerly occupied by Parkway Hospital. Medical Hospital Holdings held a mortgage on the subject property, which Auberge Grand Central LLC (Auberge) purchased after the former had begun a foreclosure action in the New York State Supreme Court, County of Queens. (*Auberge Grand Central, LLC [assignee of Medical Provider] v Parkway Acquisition I, LLC*, Index No. 489/2011). Pursuant to a judgment rendered in that action, the subject property was foreclosed upon and was to be sold at auction.

The auction notice of sale stated that the outstanding judgment against the property amounted to approximately $14,862,239.38 plus costs and interest. On January 10, 2014, referee Joseph Risi held a foreclosure auction. Pytor Yadgarov, then a co-owner and manager of Auberge, had invited Samuel Sprei, the manager of 70-35 113th Street Holdings (Holdings), to the foreclosure sale. Sprei had contacted Chaim Babad (Babad) and Chaim Miller (Miller), the owners of Holdings, and Sprei had also contacted Wing Fung Chau ("Chau") for the purpose of getting him to contribute funds needed for the down payment on the property.

On January 10, 2014, Sprei and Chau went to the foreclosure auction and, on behalf of Holdings, successfully bid $22 million to acquire the property. Auberge and Holdings executed a memorandum of sale and Holdings made a down payment of $2.2 million. (Chau subsequently received a check, reimbursing him for his contribution toward the down payment). Pursuant to the Terms of Sale, the closing was to take place on or before February 10, 2014, at 10:00 AM. Holdings requested repeated adjournments of the closing, and Auberge agreed to several postponements,

including to a final postponement to May 29, 2014. On the the day before that date, Susan McWalters, Esq. , the closing attorney for Auberge, emailed Holding's attorney, Yisroel Schwartz, and the referee to confirm that the closing was to take place on May 29, 2014, at 10:00 AM , at the referee's office. The email stated that Auberge would not consent to any further adjournments in the event that Holdings could not close the next day. Schwartz did not respond to the confirmation email sent by McWalters.

On May 29, 2014, McWalters and Richard Sorrentino, a title closer on behalf of Atlantis National Services, appeared at the referee's office, but no one appeared on behalf of Holdings. Schwartz had sent an email to the referee informing him that Holdings had almost finished its negotiations with its lender and would appear the next day, but the email did not arrive before 10:00 AM because of an email outage. The referee sent a notice to Schwartz, before receiving the latter's email, with an attached memorandum signed by McWalters and Richard Sorrentino memorializing the default by Holdings. On June 6, 2014, after an exchange of emails between McWalters and Schwartz concerning a vacatur of the default, the former informed the latter that Auberge would re-auction the property.

On August 8, 2014, Auberge successfully bid on the property for $1,000,000 at a second foreclosure auction. Auberge retained the down payment made by Holdings.

On December 30, 2015, Chau, notwithstanding the fact that his down payment had been refunded, began an action in the New York State Supreme Court, County of Queens, against Auberge and other parties, alleging, inter alia, that Holdings had appeared at the closing scheduled for May 29, 2014 ready,willing, and able to close (*Wing Fung Chau v. Parkway Hospital Associates, and Auberge Grand CentraL LLC* , Index No. 713438/15). Plaintiff Chau, suing individually and derivatively, subsequently alleged that he had made the winning bid at the foreclosure auction and had made a deposit of $2,200,000. Chau further alleged that Auberge, which had been substituted as the plaintiff in the foreclosure action, had wrongfully refused to close and as a result he lost his bid deposit.

On December 20, 2016, plaintiff Chau submitted a motion for a default judgment against defendant Parkway Hospital Associates, and Auberge submitted a cross motion for, inter alia, summary judgment dismissing the complaint against it. By decision and order dated July 21, 2017, the Honorable Leslie J. Purification denied Chau's motion and granted the branch of the cross motion by Auberge which was for summary judgment dismissing the complaint against it. The court stated: "The defendant Auberge, however, through the affirmation of its counsel and the attached exhibits has established that the plaintiff in this action defaulted in closing on its bid in the foreclosure action. By virtue of being defaulted by the referee in the foreclosure action, the plaintiff lost its bid deposit and, therefore, does not have a cause of action to recover this deposit and is not entitled to any of the relief sought in the complaint.."

On July 16, 2015, Holdings brought an action in the New York State Supreme Court, County of Queens, against Auberge and Parkway Hospital Associates LLC (*70-35 113th Street Holdings v. Auberge Grand, Central, LLC and Parkway Hospital Associates LLC.,* Index No. 707503-15), alleging, inter alia: "On May 29, 2014, plaintiff even appeared for the closing with the funds for purchase, and a title company, and informed defendants that plaintiff was ready, willing, and able to tender the balance of the purchase price and close the transaction." Holdings brought the action for the purpose of obtaining specific performance or money damages for breach of contract. Defendant Auberge counterclaimed for an order vacating a notice of pendency and for money damages for the alleged malicious filing of a notice of pendency.

This court held a trial of *70-35 113th Street Holdings v. Auberge Grand, Central, LLC and Parkway Hospital Associates LLC.* Index No. 707503-15 (the tried action) from February 20, 2020 through March 11, 2020. In a decision and order of this court dated December 1, 2020, this court found, inter alia: "As a threshold matter, the evidence establishes that the plaintiff breached the contract when it did not appear on the May 29, 2014, time-of-the-essence closing date. ***[T]his is not a case where one party

unilaterally made time-of-the essence a requirement and, accordingly, notice of an intention to declare a default was unnecessary. *** Auberge did not act as if the contract was in full force and effect [and so was not estopped from declaring a default] *** [A]t no point during the post-default negotiations did plaintiff ever demonstrate that is was ready, willing, and able to close the transaction." This court, finding that Holdings had failed to prove its causes of action for breach of contract and specific performance, dismissed the complaint.

On January 19,2021, Holdings began the instant action against Auberge by the filing of a summons and a complaint which asserts four causes of action. The first cause of action is for reformation of the contract between the parties. The complaint alleges, inter alia: "66. The parties disregarded the "time of the essence" provision in the Terms of Sale. 67. The parties conducted themselves as if the Terms of Sale did not contain a "time of the essence" provision. 68. The parties disregarded the provision in the Terms of Sale which prohibited an adjournment of the closing for more than ten (10) days beyond February 10, 2014. 69. The parties conducted themselves as if the Terms of Sale did not contain a prohibition against adjournments of more than ten (10) days beyond February 10, 2014. 70. The parties disregarded the fact that the Terms of Sale called for an all cash transaction, with no finance contingencies. 71. The parties conducted themselves as it the Terms of Sale provided for partial financing to be provided by Auberge. ***73. Under the law of reformation of contract, where the words used in a contract do not reflect the parties' actual intent thereunder, as manifested by their conduct, the Court may change the language of the contract to reflect the parties' actual intent." The second cause of action is for the foreclosure of a vendee's lien and rests on the allegations, inter alia, that Holdings paid a total of $4,500,000 in deposits and extension fees between January 10, 2014 and May 29,2014 and that Auberge has retained that sum. The third cause of action is for the return of the $4,500,000 as "alternative relief." The fourth cause of action is for the return of the $4,500,000 on the theory of money had and received.

II. Discussion

regarding the first cause of action, CPLR 3002, " Actions and relief not barred for inconsistency," provides in relevant part: "(d) Action on contract and to reform. A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed."

There is authority for the proposition that CPLR 3002(d) does not render the doctrine of collateral estoppel inapplicable:

"If plaintiff P sues on a contract and fails in the action, P is not precluded from later bringing suit to reform the contract and then attempting to enforce it as reformed. That is what CPLR 3002(d) provides; the subdivision is identical to its predecessor in section 112-d of the old Civil Practice Act. But any issue decided between the parties in the first suit for breach of the written contract may, of course, be entitled to collateral estoppel in the reformation action if it should prove relevant there. The assumption of the statute is that the question of reformation was not before the court in the first action, so that it is unlikely that any issue decided there will bind the parties when the later suit goes into the question of whether or not the contract should be reformed." (Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C3002:23.)

"The statute assumes that no issue relevant to the question of reformation was or could have been decided in the prior action on the contract, and if that is not the case, the principle of res judicata may prevent the relitigation of any such issue." (1 NYJur2d," Actions," § 22.)

In *Falkowski v. Metro. Life Ins. Co.* (175 Misc. 878, 882, [Sup. Ct. 1941]), relied upon by Auberge, the court held that where facts of the plaintiff's present complaint in an action to reform a policy of life insurance were litigated and disposed of on the merits in a prior action to recover the proceeds of the policy, the reformation action was barred by the doctrine of res judicata. The court stated: "The intention [of section 112-d of the old Civil Practice Act, the predecessor of CPLR 3002(d)] was to prevent, in a proper case, the operation of a technicality in a manner to work injustice. The

facts of plaintiff's complaint in the case at bar were litigated and disposed of on the merits. The same issues as now presented were or 'might have been so litigated' in his first lawsuit. They are now res judicata." (*Falkowski v. Metro. Life Ins. Co.*, *supra*, 882.) Plaintiff Falkowski appealed and moved to appeal as a poor person, but the Appellate Division, Fourth Department, denied the motion and conditionally dismissed the appeal, stating: "Motion for leave to appeal as a poor person denied on the ground that plaintiff, suing as administrator, makes no showing of the financial condition of the estate which he represents ***and no showing that the appeal has any merit." (*Falkowski v. Metro. Life Ins Co*, 28 NYS2d 17, 18 (4th Dept. 1941].)

This court does not find that the intention of CPLR 3002(d) was only to prevent a dismissal of a reformation action where a dismissal of a prior contract action occurred because of a "technicality." The statute cannot be read so narrowly. Moreover, the current understanding of the doctrine of collateral estoppel, at least to the extent that issues might have been litigated, is not in harmony with the understanding of the *Falkowski* court. (*See, CitiMortgage, Inc. v. Ramirez*, 192 AD3d 70, 72 [3rd Dept 2020] ["(2) the issue in the prior proceeding was actually litigated and decided,"].) However, *Falkowski* does have precedential value for its willingness to apply the doctrine of collateral estoppel in a case brought pursuant to CPLR 3002(d).

Scheer v. Nething (282 App Div [2nd Dept 1953]), relied upon by Holdings, actually does not support an argument that CPLR 3002(d) precludes an application of the doctrine of collateral estoppel. In *Scheer*, the appellate court held that a bankruptcy court's refusal to exercise jurisdiction to reform a release was not a bar to a state court action for reformation. The bankruptcy court did not determine issues pertaining to reformation on the merits.

Holdings also relies on *Weissman v. Friend* (29 AD2d 599, 599, [3rd Dept 1967]) where the defendants argued that a present action for reformation of shareholders' agreements and other corporate documents was barred by the doctrine of res judicata. The appellate court, citing CPLR 3002(d), rejected the argument, stating that the present case concerned a

"different cause of action from that previously asserted in which respondent sought to assert certain rights pursuant to such documents as then constituted." However, *Weissman* has little value for Holdings because the appellate court does not state that the doctrine of collateral estoppel has no application to issues determined in the prior action.

From its review of the authorities, this court concludes that although CPLR 3002(d) does permits a plaintiff to bring suit to reform a contract after previously suing unsuccessfully for breach of contract, the statute also permits the application of the doctrine of collateral estoppel. (*See, e.g.*, Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C3002:23.)

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same ***." (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 500 [1984]; *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343 [1999]; *Altegra Credit Co. v. Tin Chu*, 29 AD3d 718 [29 AD3d 718 [2nd Dept., 2006].) "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action ***." (*Parker v. Blauvelt Volunteer Fire Co., Inc., supra*, 349; *Simmons v. Trans Express Inc.*, -NY3d -, 2021 WL 2228828, [2021]; *Sam v. Metro-North Commuter Railroad*, 287 AD2d 378 [1st Dept 2001].)

" It is well established that in order to reform a written agreement, it must be demonstrated that the parties came to an understanding but, in reducing it to writing, through mutual mistake or through mistake on one side and fraud on the other, omitted some provision agreed upon or inserted one not agreed upon ***" (*Slutzky v. Gallati*, 97 AD2d 561, 561, [3rd Dept 1983]; *Chimart Assocs. v. Paul*, 66 NY2d 570 [1986].) "It is equally well established that reformation may not be granted upon probability or

even upon a mere preponderance of evidence, but only upon a certainty of error ***." (*Slutzky v. Gallati*, 97 AD2d 561, 561, [3rd Dept 1983].)

Holdings has attempted to obtain reformation on the ground of mutual mistake. The complaint alleges: "66. The parties disregarded the "time of the essence" provision in the Terms of Sale. 67. The parties conducted themselves as if the Terms of Sale did not contain a "time of the essence" provision ***." The court notes initially that these allegations of disregard do not suffice to establish a mutual mistake– the omission of some provision agreed upon or the insertion of one not agreed upon. These allegations amount to the assertion of a waiver. "A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved ***." (*Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York*, 61 NY2d 442, 446[1984].) "It occurs where a person dispenses with the performance of something that they have a right to exact or could have demanded or insisted upon if they chose to do so" (57 NY Jur. 2d, Estoppel, Etc.," § 81).

In any event, collateral estoppel effect is given to findings of fact (*see,e.g.*, *In re Intini*, 123 AD3d 1347 [3rd Dept 2014]; *New York State Dep't of Lab. (Unemployment Ins. Appeal Bd.) v. New York State Div. of Hum. Rts.*, 71 AD3d 1234 [3rd Dept 2010]); *Gemstar-TV Guide Int'l, Inc. v. Yuen,* 61 AD3d 478 [1st Dept 2009]), and the doctrine of collateral estoppel precludes Holdings from relitigating findings of fact made in this court's decision and order of December 1, 2020. The court found that in return for agreeing to extend the closing dates, Auberge received consideration such as the release of the initial deposit of $2,200,000 to Auberge, an additional deposit of $500,000 made to the referee, and the payment of a $300,000 extension fee. These findings of the court concerning consideration amount to a finding that the contract did not simply include a time of the essence clause as a matter of mutual mistake. The time of the essence clause had value to Auberge, and Holdings had to pay dearly for Auberge's forbearance.

The complaint in the instant action also alleges that there was mutual mistake arising from the omission to include Auberge's obligation to

provide financing. The complaint reads in relevant part: "70. The parties disregarded the fact that the Terms of Sale called for an all cash transaction, with no finance contingencies. 71. The parties conducted themselves as it the Terms of Sale provided for partial financing to be provided by Auberge. "

Holdings introduced evidence concerning the alleged promise by defendant Auberge to provide financing at the trial of the earlier action. The defendants' memorandum of law (pp17-18) states: "Similarly herein, Plaintiff was given full leeway over the course of ten (10) days of trial to prove the causes of action now set forth in the complaint filed in the Third Proceeding, and the substance of the relief being sought by Plaintiff remains the same, to wit, either specific performance or an award of money damages in the amount of the deposit monies and extension fees paid in relation in the underlying transaction. During the trial in the First Proceeding, Plaintiff's representatives Sam Sprei and Chaim Babad testified at considerable length about the underlying Terms of Sale and Stipulations regarding the contemplated sale of the Premises, and went to collectively testify for several days that Defendant had promised financing, that the time of the essence law dates were ignored, vacated or inapplicable, and that, in general, the parties had essentially entered into an understanding that ran contrary to the clear and unequivocal Terms of Sale and Stipulations, which warranted a finding that Defendant breached the subject agreements and that Plaintiff was allegedly entitled to specific performance or a money judgment in the amount of the deposit monies and extension fees it paid. This is precisely what Plaintiff is now trying to rehash and get a second bite at the proverbial apple by bringing the instant claim for reformation. "

This court found in the earlier action that Holdings had failed to prove its cause of action for breach of contract, and the court thereby implicitly found that Auberge had not breached a promise to provide financing – a matter upon which evidence was received at the trial of the earlier action. The plaintiff cannot relitigate the issue of whether Auberge agreed to provide financing in this action.

Holdings attempted to prove at the trial of the earlier action that the parties had modified the original contract by their course of conduct. "[E]ven where a contract specifically contains a nonwaiver clause and a provision stating that it cannot be modified except by a writing, it can, nevertheless, be effectively modified by actual performance and the parties' course of conduct ***." (*Aiello v. Burns Int'l Sec. Servs. Corp.*, 110 AD3d 234, 245 [1st Dept 2013].) Holdings is again attempting to prove modification through course of conduct under the guise of reformation. As the complaint in the instant action states, for example: "The parties conducted themselves as if the Terms of Sale provided for partial financing to be provided by Auberge. "The case at bar is not truly one for reformation, and it is outside of the scope and intent of CPLR 3002(d).

The court notes that Auberge did not move for a dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The court further notes that whether the plaintiff's case can withstand a motion for summary judgment is a matter not taken into consideration here (*see. Victory State Bank v. EMBA Hylan, LLC*, 169 AD3d 963 [2nd Dept 2019]; *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 38 AD3d 34 [2nd Dept 2006]) even though the burden of proving a cause of action for reformation is very heavy.

The complaint asserts a cause of action (the second) for the foreclosure of a vendee's lien. "[T]he execution of a contract for the purchase of real estate and the making of a part payment gives a contract vendee equitable title to the property and an equitable lien in the amount of the payment ***." (*Polish Nat. All. of Brooklyn, U.S.A. v. White Eagle Hall Co.*, 98 AD2d 400, 405 [2nd Dept 1983.) "[W]here the sale contract fails, absent fault of the purchaser, courts in New York will enforce in favor of the purchaser (vendee) a lien on the subject property to the extent of monies paid so that the purchaser may assert his rights in a court of equity to get out of the land what he paid on it" (*In re 85-02 Queens Blvd. Assocs.*, 212 B.R. 451, 456 [Bankr. E.D.N.Y. 1997] [internal quotation marks and citations omitted]). The complaint also asserts causes of action for return of the deposit (the third) apparently on the theory of unjust enrichment (*see,*

Nakamura v. Fujii, 253 AD2d 387[1st Dept 1998]) and monies had and received (the fourth). (*See, Matter of Est. of Witbeck*, 245 AD2d 848 [3rd Dept 1997].) "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding ***." (*Sterngass v. Soffer*, 27 AD3d 549, 549-550 [2nd Dept 2006]; *Sandhu v. Mercy Med. Ctr.*, 54 AD3d 928 [2nd Dept. 2008].) Holding's second, third, and fourth causes of action are barred by the doctrine of res judicata.

Auberge also seeks an order vacating the notice of pendency. Auberge's motion in this regard is premature if brought pursuant to CPLR 6514(a) since the time to appeal from this order has not expired or is without merit if brought pursuant to CPLR 6514(b) because in view of CPLR 3002(d), a problematic statute, this court does not find that the action was brought in bad faith. Moreover, while CPLR 6514(a) requires cancellation "if service of a summons has not been completed within the time limited by section 6512," Holdings' attorney asserts that Auberge's attorney agreed to accept apparently timely electronic service. The court notes that it has received a communication stating that Auberge has apparently sold the property despite the notice of pendency.

The remaining branches of the motion, which seek an order, inter alia, awarding attorney's fees, imposing sanctions, and requiring Holdings to obtain court approval before filing another notice of pendency, are denied. Accordingly, the motion is granted to the extent that it is,

ORDERED, that the complaint is dismissed.

This constitutes the Order of the Court.

Dated: October 20, 2021

J.S.C.

FILED
10/28/2021
COUNTY CLERK
QUEENS COUNTY

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