

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 01-21-2009, 02-05-2009 & 04-08-2009
Motion Submit Date: 04-08-2009
Motion Sequence No's.: 004 MOTD
005 MOTD
006 MG

WILLIAM WATKINS a/k/a CHIP
WATKINS, individually and as a shareholder
on behalf of J C LAND DEVELOPMENT,
LTD.,

Plaintiff,

-against-

J C LAND DEVELOPMENT LTD, JOHN
CENCI and CHRISTOPHER BRADSHAW,

Defendants.
_____ X

Attorney for Plaintiffs
Thaler & Gertler, LLP
By: Marc Wasserman, Esq.
90 Merrick Avenue, Suite 400
East Meadow, Ne York 11554

Attorney for Defendants J C Land and Cenci
Matthew J. Barnes, Esq.
Barnes & Barnes, PC
1461 Franklin Avenue
Garden City, New York 11530

Attorney for Defendant Bradshaw
Farrell Fritz, PC
Bruce N. Roberts, Esq.
1320 RexCorp Plaza
Uniondale, New York 11556

The Plaintiff in this Shareholder's Derivative action, seeks redress against his alleged co-shareholder in JC Land Development Ltd ("JC Land") as well as the corporation's alleged agent, co-defendant Christopher Bradshaw ("Bradshaw"), resulting from an asserted diversion of corporate assets to the individual Defendants. Watkins asserts that he and John Cenci formed JC Land on March 25, 1999 as co-shareholders of the subject corporation, for the purpose of purchasing and developing real properties. Watkins states that he made substantial capital contributions to JC Land so that the entity could purchase and develop the properties. In abrogation of his rights and in derogation of Cenci's duties to the corporation, Watkins claims that Cenci, with the aid of Bradshaw, an alleged agent of the corporation, placed title ownership to several of the properties purchased in the name of Bradshaw as well as Cenci and Cenci's wife for "no adequate consideration". Plaintiff seeks to have the allegedly improper transfers set aside and have the title to such real properties transferred to the corporation. Cenci answers the complaint, alleging that he alone is the sole shareholder of JC Land and counterclaims on behalf of himself and JC Land against Watkins for \$600,000 allegedly due and owing on the sale of

a property developed by JC Land and sold to Watkins.

The Court is now faced with three motions. Christopher Bradshaw moves, by Notice of Motion (motion sequence number 004) for an Order, pursuant to **CPLR § 3211 (a)(7)** dismissing the Complaint against Bradshaw and pursuant to **CPLR § 6514 (b)** cancelling the Notice of Pendency filed by Watkins. Bradshaw argues that the Complaint merely states that title to certain property in Melville, New York was transferred to him for inadequate consideration. Although the Complaint terms Bradshaw an “agent” to JC Land, Bradshaw asserts that the Complaint is devoid of any facts to support this assertion or any of the other bald claims made. Assuming the Complaint is dismissed, Bradshaw also asks this Court to cancel the Notice of Pendency filed by Plaintiff, as to the Melville property. In answer to the motion, Watkins annexes a copy of a taped conversation between Watkins and Bradshaw in which Bradshaw admits substantial involvement with Cenci and Watkins in the business of JC Land. In any case, based upon liberal pleading rules and the fact that Plaintiff alleges a direct connection between the Melville property and Bradshaw’s wrongdoing, Watkins argues that the Complaint sets forth adequate allegations to support the filing by Plaintiff of a Notice of Pendency concerning that property. Defendants JC Land and John Cenci move, by Notice of Motion (motion sequence number 005) for an Order pursuant to **CPLR § 6514(b)** canceling the Notice of Pendency filed by Plaintiff on the real property titled to Cenci and his wife in Brookhaven, New York, on the ground that Plaintiff is really seeking to recover monies allegedly diverted from JC Land to Cenci based on Watkins’ assertion that he is a 50% shareholder of JC Land and that he invested substantial funds in the corporation. As this is merely a shareholder’s derivative action to recover funds allegedly belonging to a corporation, the filing of a lis pendens is inappropriate. Watkins opposes such motion because he claims he has met the legal test that he is making a claim of right in the lands of the Defendants , which might be lost in the event of a transfer to a purchaser for value, citing **Braunston v Anchorage Woods, Inc.** 10 NY 2d 302 (1961). Citing the test set forth by the Court of Appeals as well as arguing that on such motion, the Court must accept as true, the allegations in the complaint, Watkins asserts that the motion to cancel the Notice of Pendency must be denied.

In a third motion, Defendants JC Land LTD and John Cenci move, by Notice of Motion (Motion sequence number 006), for Summary Judgment, pursuant to **CPLR § 3212**, dismissing the Plaintiff’s complaint and severing the Defendants’ counterclaims interposed against Watkins on the ground of judicial estoppel. The basis for the motion lies in the purported contradictions between the allegations that form the basis for the Plaintiff’s complaint before this Court and statements he made to the Probation Department which, when included in a Presentence Report submitted to Judge Jed S. Rakoff of the Southern District of New York, were relied upon by that Judge in his treatment and sentencing of William Watkins in connection with a prosecution and guilty plea for conspiracy to violate the federal

narcotics laws under **21 USC § 841 (b)(1)(B)**. In affidavits before the New York State Court, in this shareholder's derivative action, Watkins has alleged that he is a 50% owner of JC land, which he and Cenci formed on March 25, 1999, and that Plaintiff provided such corporation \$600,000, including start up cash of \$130,000. At the date of Watkins' guilty plea before the Federal Court on March 5, 1999, Judge Rakoff stated as follows: "(n)o fine will be imposed because the Court made a finding that, in his present circumstances and in the foreseeable future, (Watkins) will not be able to pay any material fine". As a result of the obvious discrepancy between the statements in State and Federal Court, Cenci moved before Judge Rakoff, for disclosure of Watkins' previously sealed Presentence Report. Watkins opposed the motion, and Judge Rakoff issued his decision ordering partial disclosure of the Report in a Memorandum Order, dated June 9, 2009.

While Cenci argues that this case is subject to the doctrine of judicial estoppel based on the statements by Watkins and relied upon by Judge Rakoff at sentencing, and those made by Watkins in this proceeding, Watkins argues that there is no evidence of any on the record statement by Watkins regarding his financial situation and that there were many reasons for the sentencing, including Watkins' personal family situation at the time of sentencing.

The Federal Court's Memorandum Order is instructive. It states that "(t)hroughout all proceedings before this Court, respondent was represented by court-appointed counsel, based on his representations to the Court that he was financially unable to employ counsel himself". In determining that Cenci met the compelling need for disclosure of the Presentence Report to "meet the ends of justice", Judge Rakoff wrote: "(i)n the New York action and dissolution proceeding, however, (Watkins) alleges that on or about March 25, 1999, i.e., twenty days after (Watkins) pleaded guilty before this Court, he and (Cenci) formed a real estate development company, and that, beginning less than a month after being incarcerated, respondent invested approximately \$600,000 in that corporation". He states further "(a)fter pleading guilty, (Watkins) provided certain information to the probation department concerning his finances for use in his PSR. At (Watkins') sentencing hearing, the Court adopted the factual findings of the PSR, . . . , and, as noted, declined to impose any fine based on its determination concerning (Watkins') inability to pay".

In released portions of Watkins' PSR, on which the Federal Judge relied in sentencing Watkins, there is no evidence presented, as of June 25, 1999, that Watkins' had invested in JC Land Ltd., the investment he allegedly made in March 1999 in his statements before the State Court, and, which form the basis for his Shareholder's derivative suit.

As recognized by Judge Rakoff in his Order, the release of portions of Watkins' PSR and

probation records were necessary "(t)o protect the judicial system". The well recognized doctrine of judicial estoppel is designed to protect the integrity of the court system as a whole by prohibiting deliberate alteration of a stated position before the same or different courts in order to obtain favorable treatment. **New Hampshire v Maine**, 532 U S 742 (2001); **Festinger v Edrich**, 32 AD 3d 412, 820 NYS 2d 302 (2d Dep't 2006). The doctrine prohibits a party who, having obtained a favorable ruling based upon an asserted position, seeks to alter the position simply because the litigant's interests have changed. **Jones Lang Wooten USA v Leboeuf, Lamb, Greene & MacRae**, 243 AD 2d 168, 674 NYS 2d 2890 (1st Dep't 1998), leave to appeal dismissed, 92 NY 2d 962, 683 NYS 2d 172, 705 NE 2d 1213 (1998).

Judge Rakoff's Order makes clear that he relied on Watkins' statements concerning his finances made to the Probation Department and included for use in his PSR. As stated by Judge Rakoff, "At respondent's sentencing hearing, the Court adopted the factual findings of the PSR, . . . and, as noted, declined to impose any fine based on its determination concerning . . .(Watkins') inability to pay". The Sentencing Guidelines provide that the Court must impose a fine in all cases except where the defendant is able to establish both his inability to pay and the unlikelihood that such inability will continue. **USSG § 5E1.2(a)**

To obtain Summary Judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberger v Brick & Ballerstein**, 217 AD 2d 682, 629 NYS 2d 813 (2d Dep't 1995). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. **Zayas v Half Hollow Hills Cent School Dist**, 226 AD 2d 713, 641 NYS 2d 701 (2d Dep't 1996).

Defendants have demonstrated their prima facie entitlement to Judgment as a matter of law. Applying the doctrine set forth above, and Judge Rakoff's statements in his Order and the released portions of the PSR, the Court cannot imagine a more apt scenario for application of the doctrine of judicial estoppel. The Federal Court specifically relied on Watkins' assertions of penury in declining to impose an otherwise mandatory fine in connection with Watkins' plea of guilty to the crime of conspiracy to violate the federal narcotics laws. Thus, Watkins obtained a judgment in his favor based upon his statements, including those declaring the lack of assets. The same litigant will not be permitted to utilize the State Court system to litigate his claims to real property or accountings based on funds he now states he began transferring at the precise time of his contradictory statements to probation, relied upon by a federal judge. Plaintiff has not raised any issue fact, and indeed cannot do so, when faced with

the statements of the sentencing judge, and the admissions contained in the PSR.

In granting the Defendants Cenci and JC Land's motion for Summary Judgment, the Court dismisses the entire case. Accordingly, Bradshaw's motion to dismiss the complaint pursuant to CPLR § 3211 (a) (7) is now moot. The Court directs that the Notices of Pendency filed by Watkins in connection with this lawsuit shall be canceled. The counterclaims asserted by Cenci and JC Land are hereby severed and continued.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: June 19, 2009
Riverhead, New York



EMILY PINES
J. S. C.

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