[*1]

Jackson v Brinkman
2006 NY Slip Op 50015(U)
Decided on January 6, 2006
Supreme Court, Kings County
Schack, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 6, 2006

Supreme Court, Kings County

JASON JACKSON, Plaintiff,

against

SIMONA BRINKMAN and MARINA BRINKMAN, Defendants.

10217/05

Plaintiff:

Jacqueline Cherveny Brown, Esq.

Pomona, NY

Defendant:

Arnold Davis, Esq.

NY NY

Arthur M. Schack, J.

Plaintiff, Jason Jackson, former husband of defendant Simona Brinkman, moves, by order to show cause, to enjoin defendants, Simona Brinkman and her mother, Marina Brinkman, from "liquidating, encumbering, transferring, selling, mortgaging, hypothecating, or in any other manner disposing of, diminishing or diluting . . . realty located at 8 Bartlette [sic - actually [*2]"Bartlett"] Place, Brooklyn, New York, a one-family house in Gerritsen Beach.

Defendants cross-move, pursuant to CPLR 3211 (a) (5) and (7), to have plaintiff's action dismissed on the grounds of *res judicata* and failure to state a cause of action.

Jason and Simona signed a pre-nuptial agreement [exhibit B of order to show cause] on April 7, 2000. It states in paragraph 6 of the pre-nuptial agreement, "Simona represents that her net worth is presently in excess of $175,000.00 as a result of a loan from Jason, in the sum of $175,000.00 . . ." The agreement has no other references to the $175,000.00 loan and doesn't contain any terms with respect to repayment of the debt. Several days after they executed the pre-nuptial agreement Jason and Simona married.

Jason states, in paragraph 4 of his affidavit in support of the order to show cause, that he and Simona resided together at 8 Bartlett Place until they separated in January 2001. He also alleges, in paragraph 2, that title to 8 Bartlett Place was in Simona's name, and that Simona, during the pendency of their divorce action, Brinkman v Jackson, Kings County Supreme Court Index Number 3203/03, transferred title to the property, in July 2004, to her mother, Marina "to avoid payment of money that she knew she owed me pursuant to a pre-nuptial agreement that she and I entered into on

April 7, 2000." In paragraph 7 he alleges that "[i]t was a gratuitous transfer whereby Marina Brinkman colluded with Simona Brinkman to conceal Simona Brinkman's one and only asset, this realty, to avoid the payment of the debt that she owed and still owes me pursuant to the aforementioned pre-nuptial agreement." In paragraph 8 Jason alleges that Marina put the house up for sale in February 2005. Then, he concludes in paragraph 10:

> [t]o preserve my only hope of ever receiving the loan proceeds due to me pursuant to the pre-nuptial agreement, which was a $175,000.00 loan owed to me by Simona Brinkman, as well as $5,000.00 owed to me as my interest in the former marital abode pursuant to the Judgment of Divorce [a misreading of the divorce judgment as detailed below], it is respectfully requested that this court grant me a temporary restraining order on the subject premises so that my remedy at law may be preserved.

In Marina's opposing affidavit, attached to defendants' affirmation in opposition, she claims that she paid the entire purchase price and all closing costs for the premises. The December 29, 1998 deed [exhibit A of Marina's affidavit] shows that mother and daughter owned the premises as joint tenants with rights of survivorship. Marina states that her daughter's name was on the deed in the event that she predeceased her daughter. Further, Marina claimed that she made all the mortgage payments. She claims, in paragraph 4, that Jason threatened her during the divorce proceedings that he would take the property from her, and "I did not want to become embroiled in the dispute between my daughter and her husband and I requested that Simona deed the property back to me." On January 14, 2004, Simona and Marina deeded the property to Marina [exhibit B of Marina's affidavit]. In paragraph 6 of her affidavit, Marina states, "I submit that this action is a sham and that it was brought as a device to harass me and my daughter."

Hon. Virginia Yancey conducted Jason and Simona's divorce trial on September 7, 2004. Subsequent to that proceeding, Hon. Eric I. Prus ordered and adjudged in his March 2, 2005 judgment of divorce [exhibit C of order to show cause], *inter alia,* "that all issues of equitable distribution are determined," in that Simona was ordered to pay Jason $5,000.00 as compensation for one-half of a former joint bank account [not as asserted by Jason, in his affidavit in support of [*3]the order to show cause, for an interest in the former marital abode]. Further, it was ordered and adjudged by Justice Prus "that all issues concerning the former marital abode have been equitably distributed between the parties hereto, and that all other personal property have likewise been distributed between the parties hereto except that stated in a pre-nuptial agreement which must be brought under a separate action; . . ."

Simona subsequently moved to resettle the findings of fact, conclusions of law and judgment in the matrimonial action. At page 5 of the June 8, 2005 matrimonial action minutes, in oral argument by opposing counsel on Simona's resettlement motion, before Justice Prus, Jason's attorney claims that she attempted to have Justice Yancey try the pre-nuptial agreement claim during the divorce trial, but that Justice Yancey refused to do so and then went off the record. Jason's counsel admitted that she never raised the issue of the pre-nuptial agreement claims on the record nor did she take an exception on the record to Justice Yancey's refusal to try the pre-nuptial agreement issue during the divorce trial. Justice Prus, at page 6, granted Simona's motion to resettle the judgment. The June 22, 2005 resettled findings of fact, conclusions of law and judgment of divorce [exhibit A of Simona's reply affirmation], by Justice Prus, are unequivocal. The court made an equitable distribution of Jason's and Simona's personal and marital property. All references to the parties' pre-nuptial agreement were deleted in the resettled order. Justice Prus ordered and adjudged that "all issues of equitable distribution are determined," with Simona ordered to pay Jason $5,000 as his interest in a former joint bank account within 60 days of service of a copy of the divorce judgment with notice of entry. Further "that all issues concerning the former marital abode have been equitably distributed between the parties hereto, and that all other personal property has likewise been equitably distributed between the

parties hereto; . . ."

For the reasons to follow, defendants' cross-motion, to have Jason's action dismissed on the grounds of *res judicata* and failure to state a cause of action, is granted. Plaintiff's order to show cause, to enjoin defendants from selling and/or entering into any other real estate transactions with respect to 8 Bartlett Place, Brooklyn, New York, is denied. The instant action is dismissed.

Discussion

A judgment in a matrimonial action embraces all matters presented or that should have been presented by the parties, with respect to the parties' real and personal property. Domestic Relations Law 234 grants the Court in a matrimonial action the power to "determine any questions as to the title to property arising between the parties." In the instant action, plaintiff incorrectly pleads that as part of the equitable distribution in the matrimonial action the Court considered the pre-nuptial agreement and the $175,000 loan. Justice Prus' resettled findings of fact, conclusions of law and judgment of divorce clearly demonstrated that he made no findings or adjudged that a $175,000 debt, or any lesser amount, was owed by Simona to Jason as part of a pre-nuptial agreement. As conceded in the June 8, 2005 minutes of the matrimonial action, Jason's counsel made Justice Yancey aware of the claimed indebtedness underlying the instant action, but then failed to press the claim of indebtedness pursuant to the pre-nuptial agreement. The September 7, 2004 divorce trial transcript [exhibit A of cross-motion] confirms this. The resettled judgment preserved none of plaintiff's pre-nuptial agreement claims.

Thus, *res judicata* or "claim preclusion" bars plaintiff from going to this Court, or any [*4]other Court, with his alleged $175,000 pre-nuptial agreement debt claim. The doctrine of *res judicata,* as public policy, prevents courts from wasting limited resources with the continued relitigation of previously adjudicated claims. Professor David Siegel, in NY Prac §442, at 747 [4th ed], makes it clear that:

> The doctrine of res judicata is designed to put an end to a matter once duly decided. It forbids relitigation of the matter as an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties. Its main predicate is that the party against whom it is being invoked has already had a day in court, and, if it was not satisfactory, the proper course was to appeal the unsatisfactory result rather than ignore it and attempt its relitigation in a separate action.

Further, Professor Siegel, in § 447, at 754, observes that, "Res judicata in its strictest sense operates to bar not only matters that were actually put in issue in the prior action, *but also those that might have been* [*emphasis added*]." Judge Cardozo, for a unanimous Court of of Appeals, in Schuylkill Fuel Corp. v B & C Nieberg Realty Corp., 250 NY 304, 306-307 (1929), instructed that:

> [a] *judgment in one action is conclusive in a later one* not only as to any matters actually litigated therein, *but also as to any that might have been so litigated*, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first . . . [*emphasis added*]

In O'Brien v City of Syracuse, 54 NY2d 353, 357 (1981), Chief Judge Cooke, also for a unanimous Court of Appeals, noted that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy . . ." *See* Yerg v Board of Educ. of Nyack Union Free School District, 141 AD2d 537 (2d

Dept 1988); Coliseum Towers Associates v County of Nassau, 217 AD2d 387 (2d Dept 1996).

The resolution of plaintiff's claims with respect to the marital residence and the pre-nuptial agreement in the divorce proceedings are clearly *res judicata* in the instant action. In Luscher ex rel. Luscher v Arrua, 21 AD3d 1005, 1006-1007 (2d Dept 2005), the Court explained that:

> [u]nder the doctrine of res judicata, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action involving the parties to a litigation and those in privity with them (*see* Gramatan Home Investors Corp. v Lopez, 46 NY2d 481, 485) . . .
>
> The party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in the instant action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue (*see* Matter of [*5] New York Site Dev. Corp. v New York State Dept. of Envtl. Conservation, 217 AD2d 699, 700 [1995]).

Defendants have met the two-prong Luscher ex rel. Luscher test in invoking *res judicata* by demonstrating that the issue of the pre-nuptial agreement and possession of 8 Bartlett Place was decided in the divorce judgment with Jason having had a full and fair opportunity to contest these issues. In Boronow v Boronow, 71 NY2d 284 (1988) the Court affirmed the Appellate Division, Second Department, which had held that

the question of title to a marital residence that could have been litigated, but not raised in a prior divorce action, is barred in a subsequent action by *res judicata,* pursuant to Domestic Relations Law 234. The Court held, at 286, "that a party to a concluded matrimonial action, who had a full and fair opportunity to contest title to the former marital home, is barred by res judicata principles from subsequently and separately reopening that issue." Then, at 290, the Court observed that issues of title to marital property are so intertwined with the central issue of the continuation of the marriage, that they should be resolved fairly and efficiently with the issue of the marriage relationship. At 291, the Court held that:

> jurisprudential policy reasons support the result we reach today; that is, a
>
> continuation of the relationship and of the conflict among parties to a
>
> matrimonial litigation would be particularly perverse and the inevitable
>
> cloud on titles should also not be allowed to hang over the alienability of
>
> the property.

The Appellate Division, First Department, in Merrill Lynch, Pierce, Fenner & Smith, Inc.

v Benjamin, 1 AD3d 39, 40 (2003), citing Boronow, instructed that, "[p]arties to an action for dissolution of a marriage are entitled to anticipate the final resolution of all issues relating to the marriage relationship without fragmentation and are obligated to litigate all issues affecting the marriage in that action." *See* O'Connell v Corcoran, 1 NY3d 179 (2003); Silvers v Silvers, 267 AD2d 298 (2d Dept 1999); Siegel v Siegel, 197 AD2d 569 (2d Dept 1993).

With respect to Jason's claim of a fraudulent conveyance by Simona to her mother of the marital residence, Jason could have easily moved to add his mother-in-law as a party defendant to the divorce action. Solomon v Solomon, 136 AD2d 697 (1988). Jason now has to live with his choice not to have pursued in the underlying matrimonial action his claims against Simona and Marina with respect to

the transfer of title to 8 Bartlett Place.

In his verified complaint [exhibit A of plaintiff's order to show cause] Jason asks for specific performance of the sale of 8 Bartlett Place, to pay the alleged $175,000 debt from Simona to Jason in the pre-nuptial agreement. As noted above, the pre-nuptial agreement fails to indicate any repayment date, as well as failing to state the date when the loan was made. Even if the pre-nuptial agreement was addressed in the divorce judgment, the fact that plaintiff has a remedy at law for his claim precludes plaintiff from the use of an equitable provisional remedy for specific performance. Creston Apartments Corp. v Philip Gertler Elec. Contracting Co., 229 AD 450, 451 (1st Dept 1930). [*6]

In essence, plaintiff's order to show cause demands a preliminary injunction, pursuant to CPLR Article 63. Putting aside that this Court found for defendants in their motion for dismissal on *res judicata* grounds, this or any other Court cannot issue a preliminary injunction to a plaintiff seeking to prevent defendants from transferring assets during the pendency of a money action. An unsecured creditor suing to collect a debt is not entitled to a preliminary injunction to prevent a debtor from disposing of his property if the true object of the action is to collect a money judgment. Campbell v Ernest, 64 Hun 188, 19 NYS 123 (Ct App 1892); Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541 (2000); Siegel, NY Prac §327, at 522 [4th ed].The Appellate Division, Second Department, in Digestive Liver Disease, P.C. v Patel, 18 AD3d 423 (2005) enunciated three requirements for the granting of a preliminary injunction, holding that, "[a] preliminary injunction will not be granted unless the moving party first establishes (1) a likelihood of ultimate success on the merits, (2) that irreparable injury will occur absent a preliminary injunction, and (3) a balancing of the equities favors the movant (*see* CPLR 6301; W.T. Grant Co. v Srogi, 52 NY2d 496 [1981])." In the instant action, plaintiff has failed to meet the first requirement. He cannot show any likelihood of success on the merits because of *res judicata*. Further, a contractual money action is an improper subject matter for the use of the equitable provisional remedy of a preliminary injunction.

Conclusion

Accordingly, it is,

ORDERED, that plaintiff's order to show cause to enjoin defendants, Simona Brinkman and Marina Brinkman, from liquidating, encumbering, transferring, selling, mortgaging, hypothecating, or in any other manner disposing of, diminishing or diluting realty located at 8 Bartlett Place, Brooklyn, New York, is denied; and it is further

ORDERED, that defendant's motion for dismissal of plaintiff's complaint, pursuant to CPLR 3211 (a) (5) and (7) upon the grounds of *res judicata* and plaintiff's failure to state a cause of action is granted; and it is further

ORDERED, that the instant action is dismissed.

This constitutes the Decision and Order of the Court.

____

HON. ARTHUR M. SCHACK

J. S. C.

Appearances:

Return to Decision List