

Rozen v Russ & Russ, P.C.

2009 NY Slip Op 30509(U)

February 17, 2009

Supreme Court, Suffolk County

Docket Number: 08-23620

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-16-08 (001)
MOTION DATE 7-18-08 (002)
ADJ. DATE 11-12-08
MNEMONIC: # 001 - MotD
002 - MotD

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MAREK ROZEN, CHRISTINE ROZEN and
GABRIELLE ROZEN,

Plaintiffs,

- against -

RUSS & RUSS, P.C., JAY EDMOND RUSS,
LINDA EILEEN RUSS, DANIEL P.
ROSENTHAL, KENNETH J. LAURI, IRA
LEVINE, PORTABELLA ASSOCIATES, LLC,
JONNAT MANAGEMENT CORP.,
MOHAMED SH. OMAR and SALLY OMAR,
Defendants. :

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Upon the following papers numbered 1 to 53 read on this motion and cross-motion to dismiss the complaint; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 16 ; Notice of Cross-Motion and supporting papers (002) 17- 41 ; Answering Affidavits and supporting papers 42 - 45; 46 - 47 ; Replying Affidavits and supporting papers 48 - 50; 51 - 52 ; Other Russ Mem/Law 53 : (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, Russ & Russ, P.C. Jay Edmond Russ, Linda Eileen Russ, Daniel P. Rosenthal, Kenneth Lauri and Ira Levine, (hereinafter Russ & Russ) for an order pursuant to CPLR §507 transferring this action to the Supreme Court of the State of New York in and for the County of Suffolk (hereinafter Suffolk County) where the real property is located has been rendered academic and is denied as moot; granting consolidation of this action pursuant to CPLR §602(a) granting consolidation with the action pending in Suffolk County entitled **Sally Omar and Mohamed Omar v Marek Rozen and Christine Rozen**, Index No. 06-04685 (hereinafter **Omar v. Rozen**) is granted to the extent that the actions are consolidated for joint discovery and trial, but the actions shall maintain their separate captions and index numbers; pursuant to CPLR §3211 (a) (7) dismissing each of the causes of action in the complaint for failure to state a cause of action; pursuant to CPLR §3211(a)(1) dismissing each of the causes of action in the complaint based upon documentary evidence, and pursuant to CPLR §3016(b) dismissing the first, second, fourth, fifth, sixth and eighth causes of action based upon the failure to plead fraud therein with particularity, are decided as follows; and it is further

ORDERED that this cross-motion (002) by the defendant, Portabella Associates, LLC (hereinafter Portabella) and Jonnat Management Corp. (hereinafter Jonnat) pursuant to CPLR §3211 (a)(1) and (7) dismissing each of the causes of action in the complaint asserted against them for failure to state a cause of action and based upon documentary evidence; or alternatively, pursuant to CPLR §602(a) granting consolidation of this action with the action pending in Suffolk County entitled **Omar v Rozen** (Index No. 06-04685) is granted to the extent that the actions are consolidated for joint discovery and trial, but the actions shall maintain their separate captions and index numbers; and it is further

ORDERED that all parties shall appear for a preliminary conference on Wednesday, April 1, 2008, Supreme Court, courtroom #6, 1 Court Street, Riverhead, New York at 10 o'clock in the a.m. and it is further

ORDERED that plaintiffs, Marek Rozen, Christine Rozen (hereinafter Rozens) and Gabrielle Rozen, shall serve a copy of this Order with Notice of Entry on all parties in both actions and a copy of the Order upon the Suffolk County Clerk and the Clerk of the Calendar Department, Supreme Court, Riverhead, New York, within thirty days of the date of this Order, and said Calendar Clerk is directed to make the appropriate changes in the Court's computer and files consolidating both actions for discovery and for trial.

In 1989, Sally Omar and Mohamed Omar (hereinafter Omars) acquired title to certain undeveloped property located in Mattituck, Town of Southold, County of Suffolk, State of New York, known as District 1000, Section 106.00, Block 08.00, Lot 050.005, (hereinafter Mattituck property), and the deed by which the Omars acquired said property was recorded in the office of the Suffolk County Clerk on November 20, 1989. On or about November 9, 1999, the Omars executed a bond (note) in the principal sum of \$200,000.00 and a mortgage affecting the property in favor of the Rozens, which mortgage was recorded in the office of the Suffolk County Clerk on November 22, 1999. The Omars defaulted on that note and mortgage by failing to make payments as agreed.

On March 9, 2001, the Omars executed an agreement wherein they consented to convey the title and interest in the Mattituck property to the Rozens by quitclaim deed in lieu of a foreclosure action. The agreement afforded Sally Omar the right of first refusal to buy the Mattituck property at the price offered by a prospective buyer. If the right of first refusal was not exercised, then Sally Omar was entitled to share the net profits from the sale of the Mattituck property pursuant to calculations set forth in the agreement. In the event Sally Omar decided to erect a house within five years of the agreement and prior to the sale of the property, the agreement afforded her the option to purchase that property at the then fair market value (purchase option), said purchase to be financed by a mortgage and loan from the Rozens to Sally Omar for 95% of the purchase price. By letter, dated February 23, 2006, Sally Omar notified the defendants that she was exercising the purchase option pursuant to the terms of the agreement. On March 13, 2006, counsel for the Rozens rejected the notice as defective and untimely and wanted additional information from Sally Omar.

Other Related Actions

In *Omar v Rozen*, (Suffolk County Index No. 06-04685), commenced February 14, 2006, the Omars claimed they exercised their option pursuant to the March 9, 2001 agreement but the Rozens repudiated and breached the agreement, and thus the Omars seek, inter alia, specific performance directing the Rozens to reconvey the property pursuant to the terms of the agreement. As stated in this Court's order in that action, dated June 26, 2007, the agreement was determined to be valid under the common-law rule prohibiting unreasonable restrictions on the alienation of property.

The Rozens had also made several loans to the Omars from 2001 to 2004 for the Omars' taxi and livery business. The Omars signed promissory notes for repayment of the loans. In 2005, the Rozens commenced two separate actions in the Supreme Court of the State of New York in and for the County of Nassau (hereinafter Nassau County) against the Omars and two businesses owned by the Omars, Nite Riders Group, Inc. (hereinafter Nite Riders) and Cairo Business Enterprises, Ltd. (hereinafter Cairo) based upon the Omars' nonpayment of those promissory notes *Rozen v The Nite Riders Group, Inc. et al*, (Index No. 05-01148 hereinafter *Rozen v. The Nite Riders*). The two Nassau County actions against the Omars, Jonnat and Nite Riders were jointly tried on August 10, 2007 with a verdict in the Rozen's favor and a judgment was entered against the defendants in the sum of \$800,000.00 plus interest.

On or about January 2006, the Omars, by written retainer agreement, retained Russ & Russ to represent them, the Nite Riders and Cairo, in the Nassau County actions. They paid a retainer of \$10,000.00 (billing was at \$530/\$385 per hour), and the parties made a security interest in the Mattituck property and rights under the March 9, 2001 agreement, contingent upon the legal expenses exceeding the Omars' ability to pay. On May 12, 2006, by written agreement, Russ & Russ and the Omars amended their retainer agreements pursuant to which Russ & Russ reduced its fee by \$10,000 from \$24,000 to \$14,000. The fee for the services of Russ & Russ would also be 40% of Sally Omar's interest in the Mattituck property which would be transferred to Portabella, and a promise to pay 40% of the net recovery in the Suffolk County action.

Further, the Omars agreed that Portabella would provide the financing for the purchase and development of the Mattituck property. Sally Omar further agreed to receive a cash payment equal to 20% of the recovery from the Suffolk County action.

Portabella is a New York limited liability company wholly owned by Jonnat, which is wholly owned by Jay Edmond Russ. The remaining defendants in this action, Daniel P. Rosenthal, Kenneth J. Lauri and Ira Levine are of counsel to Russ & Russ law firm and are not shareholders or officers of Russ & Russ.

In *Omar v Jay Russ, Russ & Russ, PC, and Ira Levine*, (Nassau County, Index No. 08-01462 hereinafter *Omar V. Russ & Russ*), by Order of my distinguished colleague Mr. Justice Joseph P. Spinola, dated August 13, 2008, the Court found that the complaint stated a cause of action for legal malpractice, but dismissed the cause of action based upon violation of Judiciary Law §487 concerning the claim that the attorneys failed to disclose to the Court that they lacked standing to maintain the Suffolk County action.

MOTIONS (001) and (002)

CHANGE OF VENUE

This case has already been transferred on August 1, 2008 from Nassau County to Suffolk County by my distinguished colleague, Mr. Justice Ira Warshawsky in a decision in *Rozen v. the Nite Riders* (Nassau Index #05-01148).

Accordingly, those parts of motions (001) and (002) which seek a change of venue to the Suffolk County have been rendered academic and are denied as moot.

CONSOLIDATION

In the Suffolk County action entitled *Omar v Rozen*, (Index No. 06-04685), in their first cause of action, the Omars claim that the Rozens failed and refused to offer the Mattituck property for sale to them, thus breaching the March 9, 2001 agreement; in their second cause of action they seek specific performance; in their third cause of action they claim that the Rozens acquired title to the Mattituck property and hold it as trustees and fiduciaries for and on behalf of the Omars and the defendants, and that the Rozens have breached their duties as trustees and fiduciaries to the Omars' detriment and damage; and in their fourth cause of action sounding in unjust enrichment, the Omars allege that the Rozens would be unjustly enriched if they were permitted to retain any of the benefits of the March 9, 2001 agreement, and thus they seek an order directing the Suffolk County Clerk to extinguish, discharge and mark as satisfied the mortgage recorded on November 22, 1999.

In the Suffolk County action entitled *Portabella Associates, LLC v Marek Rozen and Christine Rozen*, (Index No. 08-07951 hereinafter *Portabella v. Rozen*), Portabella as plaintiff and as assignee and contract-vendee, asserts that it is entitled to specific performance of the

March 9, 2001 agreement; that the Rozens should be directed and compelled to convey the Mattituck property to it, that it is ready, willing and able to comply with the terms of the March 9, 2001 agreement; and that it lacks an adequate remedy at law. Portabella has asserted a first cause of action wherein it seeks a declaratory judgment stating that Portabella and the Rozens are bound by the rights and obligations as indicated in the March 9, 2001 agreement, specifically, that Portabella has the right to purchase, and the Rozens have an obligation to convey the property at fair market value as defined in the March 9, 2001 agreement and that the Rozens have an obligation to finance 95% of the purchase price of the Mattituck property pursuant to that agreement; a second cause of action for specific performance requiring the Rozens to transfer all right, title and interest to and in the Mattituck property pursuant to the March 9, 2001 agreement; and a third cause of action for breach of the March 9, 2001 agreement.

Based upon the foregoing, the Court finds that in these actions the parties' claims arise from their alleged interests in the Mattituck property, the March 9, 2001 agreement between the Rozens and Sally Omar, and Sally Omar's subsequent assignment of her rights under that agreement to Portabella. Therefore, these actions involve common witnesses and common issues of law and fact arising from the March 9, 2001 agreement involving the rights and responsibilities of the parties in both actions (*Mattia v. Food Emporium*, 259 A.D.2d 527, 686 N.Y.S.2d 473).

Accordingly, this action is consolidated for the purpose of joint discovery and joint trial with *Omar v Rosen* (Index No. 06-04685), which has already been consolidated for the purpose of discovery and trial with the action entitled *Portabella v Rozen* (Index No. 08-07951). Each action shall maintain its separate caption and index number.

CPLR §3211(a)(1) and (7)

Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Leon v. Martinez*, 84 NY2d 83, 87, 614 NYS2d 972). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. State Educ. Dept.*, 116 AD2d 939, 498 NYS2d 516). Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 645-636, 389 NYS.2d 314). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v. Martinez*, 84 NY2d 83, 87, 614 NYS2d 972; *Thomas McGee v. City of Rensselaer*, 663 NYS2d 949, 174 Misc2d 491).

Dismissal under CPLR §3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Logatto v City of New York*, 51 AD3d 984, 859 NYS2d 469 [2nd Dept 2008]).

As stated by my distinguished colleague Mr. Justice Warshawsky, in **Rozen v The Nite Riders**, *supra*, dated August 1, 2008, “[s]oon after the jury portion of the trial ended, it came to light that Sally Omar had given, and Russ & Russ, or it’s (sic) agents or assigns had accepted, the assignment of an 80% interest in Sally Omar’s option created in the Agreement. The news provoked an intense reaction by the Rozens as being an ethical and statutory violation, caused the Omars to terminate Russ & Russ as their attorney, resulted in the commencement of an action by the Omars for legal malpractice, (**Omar v Russ & Russ**, Index No. 01462/2008), and the commencement of a second action by the Rozens for a violation of Judiciary Law §476, (**Rozen v Russ & Russ**, Index No. 19442/2007).” The **Rozen v Russ & Russ** action which has been transferred to is before this Court and in this case gives rise to the within motion and cross-motion in which the defendants seek, inter alia, to dismiss the complaint pursuant to CPLR §§3211(a)(1) and (7), and 3016.

First Cause of Action and Second Cause of Action

In the first and second causes of action, the plaintiffs assert that Russ & Russ committed violations of the Judiciary Law §487 and committed violations of contract law because the terms of the Omars’ retainer agreement with it were not disclosed to their adversaries in unsuccessful settlement discussions. The Rozens assert that from January 27, 2006 through the present time they were compelled to and did expend not less than \$300,000 in legal fees to prosecute the Nite Riders and Cairo actions and to defend the Mattituck action and seek recovery of their legal fees and expenses arising from the prosecution of this action. They further seek treble damages.

“... Judiciary Law §487 states: Misconduct by attorneys. An attorney or counselor who: 1. is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, 2. willfully delays his client’s suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action. Judiciary Law §487 must be carefully reserved for the extreme pattern of legal delinquency, which falls within the restrictive contemplation of that (**Wiggin v Gordon**, 115 Misc2d 1071, 455 NYS2d 205 [Civil Court of the City of New York, Queens County 1982]). However, the alleged deceit forming the basis of such a cause of action, if it is not directed at a court, must occur during the course of a ‘pending judicial proceeding’” (**Costalas v Amalfitano et al**, 305 AD2d 202, 760 NYS2d 422 [1st Dept 2003]; **Hansen v Caffry**, 280 AD2d 704, 720 NYS2d 258 [3rd Dept 2001]).

“Section 487 (1) refers to deceit and collusion practiced by an attorney in a suit actually pending in court, with the intent to deceive the court or the party, and not to the giving of incorrect advice which results in injury and expense to the client. The words used relate to a case where an attorney intends to deceive the court or his client by collusion with his opponent, or by some improper practice. They do not include a transaction antecedent to the commencement of the action, as the court could have no connection to any such proceeding” (**Gelmin et al v Quicke et al**, 224 AD2d 481, 638 NYS2d 132 [2nd Dept 1996]).

The Court finds that the action, *Rozen v Nite Riders, supra*, arose out of the Rozens' claim that the Omars failed to pay on certain promissory notes, for which, after a jury trial in Nassau County, the Rozens received a judgment in the amount of \$800,000. There is no claim that the Mattituck property was part of that action or a basis upon which disclosure based upon the retainer agreement was required, or constituted proximate cause of the plaintiffs' loss. The pre-emptive rights, such as Sally Omar's right of first refusal provided for in the agreement of March 9, 2001, was conditioned upon the Rozens' receiving payment equal to a third-party's offer, as well as purchase options determined by fair market value of the Mattituck property. The agreement stated that in the event that Sally Omar decided to erect a house on the premises any time within the next 5 years and prior to the sale of said premises, the Rozens agreed to reconvey the premises to Sally Omar subject to certain conditions, which provided, *inter alia*, for Sally Omar to pay the then fair market value which was to be determined by the average of two appraisals, of which 95% of such purchase price was to be secured by a purchase money mortgage from the Rozens to Sally Omar for 15 years at the prevailing interest rate on a variable residential mortgage.

Although the Rozens allege attorney's fees as damages and seek recovery of the same plus treble damages, the proximate cause of those fees is not attributable to the disputed assignment of the March 9, 2001 agreement which the plaintiffs assert Russ & Russ should have disclosed.

In Mr. Justice Warshawsky's decision, dated August 1, 2008, the Court previously determined in the motion and cross-motions for sanctions that were pending before it that, "[l]ooking over the history of the case, in its totality, it is the conclusion of the court that Russ & Russ upheld its duty to use the court as a means for resolving a legal dispute and not as a means to inevitably delay an accounting of the monies loaned to the defendants....". The moving parties alleged conduct by Russ & Russ that undermined the judicial process, increased the legal fees of the Rozens, and that it was the intention of Russ & Russ to take the option to the Mattituck property from the Omars and then cause the Rozens to incur extensive delays and expense so that they would relinquish their rights to the Mattituck property without the knowledge that Russ & Russ sought to develop and profiteer from the property, that Russ & Russ instructed the Omars not to divulge any financial or personal information and not to produce any bank records, nor tax returns, neither corporate or personal, or corporate books or records, and that such refusal was "part of a deliberate and designed pattern of conduct to prolong this litigation, cause the plaintiffs to incur costs and legal fees, and frustrate the plaintiffs' prosecution of this matter."

The Court then further stated in its opinion that "[t]he duty of an IAS or trial justice is, *inter alia*, to allow the litigants to reach a final resolution of their dispute. The justice is required to "stamp out" conduct designed to 'delay' or 'prolong' but is not to stop zealous representation and not curtail the exercise of a lawyer's individual judgment." The Court also stated that "[t]o demonstrate by way of example the low level of intellect to which this case has sunk the case is summarized, as gleaned from the papers submitted by the parties, that the Judge was biased in the opinion of the defendants, plaintiffs' attorney was incompetent and disorganized, and, of course, defense counsel is guilty of a misdemeanor-and stealing beyond stalling the case for his own personal gain." The Court found that the actions of Russ & Russ did not rise to the level of frivolous conduct.

Based upon the foregoing, the submissions in support of this application, and Mr. Justice Warshawsky's previous decision in *Rozen v Nite Riders, supra*, that the conduct of Russ & Russ did not rise to the level of frivolous conduct the Court finds that the plaintiffs have failed to state a first and second cause of action for the alleged violation of Judiciary Law §487.

Accordingly, in motion (001), the first and second causes of action are dismissed with prejudice as against Russ & Russ, P.C, Jay Edmond Russ, Linda Eileen Russ, Daniel P. Rosenthal, Kenneth J. Lauri, and Ira Levine.

Third Cause of Action - Champerty

In the third cause of action, it is premised upon the alleged violation of Judiciary Law §§488 and 489-Champerty based upon the defendants obtaining an interest in and an unconditional assignment of the March 9, 2001 agreement giving Russ & Russ control of the disposition of Omars' interest in the Mattituck property. The plaintiffs' claim that the conduct of Russ & Russ by virtue of the May 12, 2006 retainer agreement, permitted Russ & Russ the right to control the action pending in Suffolk County. The plaintiffs therefore seek a judgment declaring that the May 12, 2006 assignment of Sally Omar's interest in the March 9, 2001 agreement is illegal, invalid and void pursuant to Judiciary Law §§488 and 499 and common law rules against champerty.

"Common law Champerty has been codified in New York under Judiciary Law, mainly sections 488 and 489. Champerty prohibits any attorney, person, co-partnership or corporation from directly or indirectly taking assignment of a chose in action 'with the intent and for the purpose of bringing an action or proceeding thereon'" (*Echeverria v The Estate of Marvin L. Lindner et al*, 7 Misc3d 1019A, 801 NYS2d 233 [Supreme Court of New York, Nassau County 2005]).

Judiciary Law §§488 and 489 prohibit the direct or indirect buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon (*Lost lots Associates, Ltd. et al v Augustus H. Bruyn*, 95 Misc2d 99, 406 NYS2d 415 [Supreme Court of New York, Special Term, Ulster County 1978]).

"... Judiciary Law §489 is a criminal statute. Its purpose is to prevent the resulting strife, discord and harassment which could result from permitting corporations to purchase claims for the purpose of bringing actions thereon. A plaintiff who acquires a claim in violation of this provision may not recover on the claim, for assignments made in violation of §489 are void. A mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose" (*Elliott Associates, L.P. v The Republic of Peru*, 12 FSupp2d 328, 1998 US Dist. Lexis 12253 [United States District Court for the Southern District of New York 1998]). "In order to constitute champerty in New York law, the primary purpose of the purchase must be to bring suit or proceed with an action upon the claim they received" (*Echeverria v The Estate of Marvin L. Lindner et al*, supra).

By written retainer agreement, dated January 27, 2006, the Omars retained Russ & Russ to represent them in the two cases that were already pending in Nassau County, brought against them by the Rozens for non-payment on promissory notes. The retainer agreement provided that in the event the Omars were unable to pay the attorney's fee, Russ & Russ would have a security interest in the Mattituck property and the rights under the agreement. A retainer of \$10,000 was paid. A letter, dated May 4, 2006, supplemented the retainer agreement with Russ & Russ and was signed by the Omars, individually, and on behalf of Nite Riders and Cairo. That letter provided for, *inter alia*, 40% ownership of the real property in the Mattituck case and recovery of any kind, and 40% ownership for the two cases in Nassau County of the Mattituck property and any recovery of any kind in the Mattituck case. The summons and complaint commencing the Suffolk County action **Omar v. Rozen** (Index No. 06-04685) were filed February 14, 2006. Therefore, the documentary evidence establishes that the action was commenced prior to Russ & Russ entering into the supplemental retainer agreement with the Omars.

Accordingly, those parts of motions (001) and (002) which seek dismissal of the third cause of action alleging violation of Judiciary Law §§488 and 489 are granted and the third cause of action is dismissed with prejudice as to the moving defendants.

Fourth Cause of Action - Fifth Cause of Action - Fraudulent Transfer

In the fourth cause of action the plaintiffs claim a fraudulent transfer occurred under Debtor and Creditor Law §273 when Russ & Russ took action in transferring the interest of the Omars in the March 9, 2001 agreement without fair consideration in violation of Debtor and Creditor Law §272, and that the plaintiffs seek to set aside the transfer of these interests and the value of the alleged fraudulent transfer as violating Debtor & Creditor Law §§273, 273-a, and 275.

In the fifth cause of action, the plaintiffs claim a fraudulent transfer occurred under Debtor and Creditor Law §§276 and 276-a when Russ & Russ, acting in conspiracy to defraud creditors, transferred the Omars interests in the March 9, 2001 agreement with the intent to delay or defraud creditors and the plaintiffs seek to set aside the transfer of these interests and the value of the alleged fraudulent transfer.

The Debtor & Creditor Law §273 provides that every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration. It further provides in Debtor & Creditor Law §276 provides that every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors (***Gruenebaum v Meno Lissauer et al***, 185 Misc 718, 57 NYS2D 137 [Supreme Court of New York, Special Term, New York County 1945]).

"... Debt(or) & Cred(itor) Law §§273, 273-a, 274, 275, prohibit conveyances made without fair consideration by a person or entity who is or will be thereby rendered insolvent, ... §273: who is a defendant in an action for money damages, ... §273-a; who is engaged or about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an

unreasonably small capital, ... §274; or who intends or believes that he will incur debts beyond his ability to pay as they mature, ... §275... . A transfer is not rendered illegal by the fact that the transferor was insolvent or that the transferee has knowledge of such insolvency. Nor is a transfer subject to attack by reason of knowledge on the part of the transferee that the transferor is preferring him to other creditors, even by virtue of a secret agreement to that effect. The fact that a confidential relation exists between the grantor and the grantee does not affect the validity of the transfer" (***Atlanta Shipping Corporation, Inc. v Chemical Bank***, 631 F Supp 335, 1986 US Dist. Lexis 27740 [1986]).

In order to state a claim under Debtor & Creditor Law §276, a creditor need only establish an actual intent to hinder and delay. An actual intent to defraud is unnecessary. The requisite intent under §276 need not be proven by direct evidence but may be inferred (a) where the transferor has knowledge of the creditor's claim and knows that he is unable to pay it; (b) where the conveyance is made without fair consideration; or (c) where the transfer is made to a related party. Under Debtor & Creditor Law §276-a, a plaintiff who can establish that a fraudulent conveyance was made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud creditors can recover attorney's fees (***Atlanta Shipping Corporation, Inc. v Chemical Bank***, 631 F Supp 335, 1986 US Dist. Lexis 27740 [1986]). (***Atlanta Shipping Corporation, Inc. v Chemical Bank***, supra).

"Fair consideration is given for property, or obligation (1) in exchange for such property, or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied, or (2) when such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained, ... §272" (***In re Flutie New York Corp. d/b/a Company Management et al v Flutie New York Corp. , Albert Flutie et al***, 310 B.R. 31, 2004 Bankr. Lexis 722 (United States Bankruptcy Court for the Southern District of New York 2004).

"For a conveyance to constitute a fraud as a matter of fact, it must be made with actual intent to hinder, delay or defraud present or future creditors. There can be no fraudulent conveyance as a matter of fact where there is not resultant diminution of value of the assets or estate of the debtor which remains available to creditors. The test of a fraudulent conveyance is whether, as a result of the debtor's operations the creditor loses by reason of finding less to seize and apply to his claim. An intent in this instance is shown where the proof indicates that at the time of making the transfer the officer or director of the corporation knew it would result in other creditors not being paid their fair pro-rata share of the assets" (***Newfield, as Trustee in Bankruptcy of Max Ettlinger Co., Inc. Bankrupt v Paul Ettlinger et al***, 22 Misc 2d 769, 194 NYS2d 67C [Supreme Court of New York, Special and Trial Term, New York County 1959]).

In the instant action, the documentary evidence does not resolve such factual issues concerning the intent of Russ & Russ in taking an assignment of the option from the Omars or the value of the property at the time the retainer agreement was signed, and the value of the property thereafter. The Court finds that the plaintiffs have sufficiently pleaded causes of action for a fraudulent transfer under Debtor and Creditor Law §§§§273, 273-a, and 275, 276 and 276-a.

Accordingly, those parts of motions (001) and (002) which seek dismissal of the fourth and fifth causes of action pursuant to CPLR §3211(a)(1) and (7) are denied.

Sixth Cause of Action

In the sixth cause of action, the plaintiffs seek to rescind the assignment by Sally Omar to Russ & Russ and the Portabella and Jonnat defendants on the basis that her interest was unassignable as the March 9, 2001 agreement is personal to Sally Omar and cannot be assigned to a third-party.

Prior to the transfer of this action to Suffolk County, the instant motions were filed by Russ & Russ, and Portabella and Jonnat. The Court determined that part of the application for change of venue and the Court transferred this action to Suffolk County. In an order of my distinguished colleague Mr. Justice Daniel Martin, dated June 18, 2008, the Court stated that the outcome of the instant action necessarily affected title to the Mattituck property located in Suffolk County. The Court further stated that in the event the Omars succeeded in the Suffolk County action and Sally Omar was held to have title in the Mattituck property, the fee arrangements and transfers to Portabella would be triggered, and Portabella would acquire a percentage in the Mattituck property. The Court also stated that where a plaintiff seeks to rescind a conveyance of a party's interest in real property, such affects title and therefore the Court rejected the Rozens' assertion that Sally Omar's rights under the March 9, 2001 option were personal to her.

Generally, such purchase options are freely assignable absent express language to the contrary or terms which indicate that the seller is relying upon the credit of the optionee or other forms of personal performance (*Toroy Realty Corp. v Ronka Realty Corp.* 113 AD2d 882, 493 NYS2d 8000 [2nd Dept 1985]). Here, the Rozens did not demonstrate in the purchase option that it was not assignable, and the only reasonable interpretation of the agreement is that the Omars would have the right to assign the option. "The assignability of a contract must depend upon the nature of the contract and the character of the obligations assumed rather than the supposed intent of the parties, except as that intent is expressed in the agreement. Parties may, in terms, prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it or be bound by its obligations. But when this has not been declared expressly or by implication, contracts other than such as are personal in their character, as promises to marry or engagements for personal services requiring skill, science or particular qualifications, may be assigned and by them the personal representatives will be bound" (*Farone v Hall and Another*, 128 Misc 794, 220 NYS 1 [Supreme Court of New York, Saratoga County 1927]).

"The principal purpose of a first option to purchase is to protect the lessee's interest in continued possession of the premises by assuring him of an opportunity to purchase the premises before they are sold to anyone else.... An option to purchase is a covenant running with the land and the benefit of the covenant passes to an assignee of the lease without specific mention." (*Gilbert v Van Kleeck*, 284 AD2d 611, 132 NYS2d 580 [3rd Dept 1954]). In an action

on a promissory note, the demand for judgment affects the title to real property so as to render the proper venue of the action where the mortgaged property is located (CPLR §507; **Sterling Commercial Corp. v Minnie Bradford et al**, 32 AD2d 952, 303 NYS2d 757 [2nd Dept 1969]).

Based upon the foregoing, as it affects title to real property, the Court finds that the purchase option in the March 9, 2001 agreement is not personal in nature. The Court finds that the documentary evidence does not prohibit assignment of the March 9, 2001 option.

Accordingly, those parts of motion (001) and cross-motion (002) which seek dismissal of the sixth cause of action are granted and the sixth cause of action is dismissed with prejudice as to the moving defendants.

Seventh Cause of Action - Rescission of Assignment

In the seventh cause of action the plaintiffs seek rescission of the assignment by Sally Omar due to lack of consideration. The plaintiffs allege that the subject property was transferred unconditionally pursuant to the May 12, 2006 retainer agreement with Russ & Russ, and that Jay Edmond Russ, Portabella and Jonnat paid no consideration to the Omars for this unconditional transfer and, therefore, they, as plaintiffs, are entitled to rescission of the transfer of the Omars' interest in the property.

This Court in **Omar v. Rosen** (*supra*) in an order, dated June 26, 2007, found that the purpose for entering the March 9, 2001 agreement containing the preemptive right and a purchase option was reasonable as the agreement had been negotiated in lieu of a foreclosure action and by businesspeople represented by counsel. Consequently, given the reasonableness of the price, duration and purpose of Sally Omar's right of first refusal and purchase option, this Court found the agreement to be valid under the common law rule prohibiting unreasonable restrictions on the alienation of property. This Court also found that a right of first refusal "effectively ripens into an option upon the happening of a contingency: the decision of the obligated party to accept a third-party's offer for the property" (**Morrison v Piper**, 77 NY2d 165, 568 NYS2d 753 [1992]).

In this case, the supplemental retainer agreement with Russ & Russ relieved Sally Omar of any obligation to pay the down payment for the property or for the reacquisition of title to the Mattituck property and provided for Portabella to obtain financing for that purpose. Russ & Russ reduced the Omars' outstanding legal fees from \$24,000 to \$14,000, accepted 40% of Sally Omar's interest in the Mattituck property and put it into Portabella, agreed to accept 40% of the net recovery in the Suffolk County action, and accepted 40% of Sally Omar's interest in the Mattituck property for its work on the Nite Riders and Cairo action, and agreed to pay Sally Omar for her remaining 20% interest in the Mattituck property. Therefore, consideration has been demonstrated by documentary evidence submitted and the cause of action asserting lack of consideration must fail.

Accordingly, those parts of motions (001) and (002) which seek dismissal of the seventh cause of action are granted and the seventh cause of action is dismissed with prejudice as to the moving defendants.

Eighth Cause of Action - Injunction

In the eighth cause of action, the plaintiffs seek an injunction enjoining and restraining the defendants from exercising the assignment, from intervening and substituting Portabella as a plaintiff in the Mattituck property (Omars') action and to preclude any further transfer or assignment of the interest in the March 9, 2001 agreement as to the Mattituck property, and/or Mattituck action which is the subject of a May 12, 2006 assignment.

In November 2007, the Rozens brought two orders to show cause, one in the instant action which was then pending in Nassau County, and an order to show cause in the Suffolk County action **Omar v Rozen**, supra, seeking, inter alia, a temporary restraining order prohibiting the assignment of Sally Omar's interest in the March 9, 2001 agreement; restraining Portabella from intervening and substituting as the plaintiff in the Suffolk County action; restraining from taking any action to enforce Portabella's rights with regard to Sally Omar's transfer of rights to that entity; and restraining any further transfers of the interests inscribed in the March 9, 2001 agreement. Such applications were denied. In the Suffolk County action, the Rozens also seek an order disqualifying Russ & Russ from representing the Omars.

To prevail on a motion for a preliminary injunction, the plaintiffs have the burden of demonstrating (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors the plaintiff's position (**Shannon Stables Holding Company, Ltd. v Bacon**, 135 AD2d 804, 522 NYS2d 908 [2nd Dept 1987]).

The pre-emptive rights, such as Sally Omar's right of first refusal provided for in the March 9, 2001 agreement, are conditioned upon the Rozens' receiving payment equal to a third-party's offer, as well as purchase options determined by fair market value of the property. The March 9, 2001 agreement stated that in the event that Sally Omar decided to erect a house on the Mattituck property at any time within the next 5 years and prior to the sale of said premises, the Rozens agreed to reconvey the premises to Sally Omar subject to certain terms and conditions which provided, inter alia, for Sally Omar to pay the then fair market value which would be determined by the average of two appraisals, of which 95% of such purchase price would be secured by a purchase money mortgage from the Rozens to Sally Omar for 15 years at the prevailing interest rate on a variable residential mortgage.

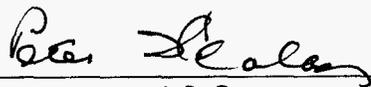
The plaintiffs have failed to allege damages attributable to a transfer of the purchase option pursuant to the agreement. When the option is exercised, by whomever, the plaintiffs will be duly compensated pursuant to the formula to which they agreed and which is set forth in the March 9, 2001 agreement.

Additionally, the moving defendants have demonstrated that the Omars timely exercised their option to purchase the Mattituck property pursuant to the agreement, thus converting the option to a contract and an enforceable agreement. When the optionee accepts the offer for sale of the property, for the first time there exists a contract for the sale of the property, and the optionee can require the owner to specifically perform (*see, Lewis v Bollinger*, 115 Misc 221, 187 NYS563 [Supreme Court of New York, Special Term, Kings County 1921]). The Omars are seeking specific performance of the March 9, 2001 agreement in ***Omar v Rozen*** (Suffolk County Index No. 03-04685).

Based upon the foregoing, the plaintiffs have not sufficiently pleaded damages attributable to the assignment of the option by the Omars; nor have they pleaded the likelihood of success on the merits. The plaintiffs assert in the complaint that the basis for the injunction is the illegal assignment to the moving defendants of Sally Omar's interest in the March 9, 2001 agreement concerning the purchase option involving the Mattituck property. There is a sharp dispute concerning whether the Rozens breached their own obligations under the March 9, 2001 agreement by not consenting to the sale when the Omars exercised their option to purchase. A party is not entitled to a temporary injunction unless the right is plain from the undisputed facts (***Shannon Stables Holding Company, Ltd. v Robin Bacon***, *supra*). The undisputed facts do not demonstrate a plain right of the plaintiffs to such injunction, nor has the same been pleaded.

Accordingly, the eighth cause of action for an injunction enjoining the defendants from enforcing the wrongful and unlawful and improper assignment of Sally Omar's interest in the March 9, 2001 agreement is dismissed with prejudice as to the moving defendants in motions (001) and (002).

Dated: February 17, 2009



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION