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| Fade v Pugliani/Fade |
| 2003 NY Slip Op 30065(U) |
| June 13, 2003 |
| Supreme Court, Suffolk County |
| Docket Number: 0006231/6231 |
| Judge: Denise F. Molia |
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Index No.: 06231-02

**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA,**
Justice

ROBERT C. FADE,

Plaintiff,

- against -

PATRICIA PUGLIANI/FADE and THOMAS FADE,

Defendants.

MOTION R/D: **09/04/02**

SUBMISSION DATE: **03/28/03**

MOTION SEQUENCE NO.: 001; **002; 003; 004**
MG; MD; MD; XMD

ATTORNEY FOR PLAINTIFF

Paul Stephen Beeber, Esq.

130 Newbridge Road
Hicksville, New York 11801

ATTORNEY FOR DEFENDANTS

Dorothy A. Courten, Esq.

33 Kings Highway
Hauppauge, New York 11788

Upon the following papers filed and considered relative to this matter:

Order to Show Cause dated August 20,2002 (001); Affidavit in Support dated August 19, 2002; Affirmation in Support dated August 19,2002; Exhibits 1 through 8 annexed thereto; Affirmation in Opposition dated September 3,2002; Exhibits A and B annexed thereto; Reply Affirmation dated September 18,2002; Notice of Motion dated October 23,2002 (002); Affirmation in Support dated October 23,2002; Exhibits 1 through 4 annexed thereto; Notice of Motion dated November 7,2002 (003); Affidavit in Support dated November 8,2002; Affirmation in Support dated November 7,2002; Exhibits A through D annexed thereto; Affidavit in Opposition dated December 17,2002; Affirmation dated December 16,2002; Exhibits 1 through 5 annexed thereto; Reply Affirmation dated January 9,2003; Exhibits annexed thereto; Notice of Cross Motion dated November 22,2002 (004); Affirmation in

Support dated November 20,2002; Affidavit in Opposition dated December 18,2002; Affirmation in Support dated December 18,2002; Exhibits 1 through 5 annexed thereto; Reply Affirmation dated January 9,2003; and upon due deliberation; it is

ORDERED, that the motion by plaintiff, brought by Order to Show Cause (001), for an Order directing that the defendant, Thomas Fade, be restrained from selling or transferring any portion of the property located at 47 Eckernkamp Drive, Smithtown, New York to anyone, and, in the event of a sale, that the proceeds be held and not distributed until further determination of this Court, is granted solely to the extent that the defendant, Thomas Fade, is restrained and enjoined from distributing the proceeds of the sale of the property located at 47 Eckernkamp Drive, Smithtown, New York pending further Order of this Court; and it is further

ORDERED, that the motion by plaintiff, pursuant to Judiciary Law, Article 19(002), for an Order adjudging the defendant, Thomas Fade, to be in contempt, is denied; and it is further

ORDERED, that the motion by defendants, pursuant to CPLR 3212 (003), directing the entry of summary judgment in favor of defendants and dismissing the complaint, is denied; and it is further

ORDERED, that the cross motion by defendants (004), for the imposition of sanctions as against plaintiff for frivolous motion practice, is denied.

The plaintiff, Robert Fade, and the defendant, Patricia Pugliani/Fade, were married on October 5, 1968, and during the course of the marriage became the parents of three children, one of whom, Thomas Fade, is a defendant in the instant action. The youngest of the three children is Sara, who was born on September 1, 1975. Robert and Patricia entered into a separation agreement on June 23, 1986. A judgment of absolute divorce was granted to the plaintiff and entered in the Supreme Court, Suffolk County, on December 10, 1987. The aforementioned separation agreement survived and was not merged into the judgment of divorce.

Page 5 of the separation agreement identified four parcels of real property, including the marital residence located at **47** Eckernkamp Drive, Smithtown, New York, as part of the marital property. That same paragraph provided, in pertinent part, that

the marital residence and any and all other items listed of real property must be sold on or before the 19* birthday of the issue **SARA** with the proceeds from said sales less any mortgages or other costs of sale to be divided equally among the parties.

Inasmuch ~~as~~ Sara was born on September 1, 1975, the “must sell” date of the marital residence ~~was~~ September 1, 1993.

The section entitled ~~Support and Maintenance For The Children and Wife~~, at page 3 of the aforesaid agreement established that the maintenance and support to be provided by the plaintiff, was to include the maintenance on the Eckernkamp Drive property (hereinafter “subject property”). Among the five conditions which would terminate plaintiff's obligation to provide maintenance to defendant (and thereby the Smithtown marital residence), was the twenty first birthday of Sara, which would occur on September 1, 1996.

By letter dated October 1, 2001, Patricia notified the plaintiff that the marital property had been sold to the defendant, Thomas, and his wife Aileen, who is not a party to the instant action, for the sum of \$220,000.00. After deducting maintenance “expenses and other costs of the sale” amounting to \$122,782.95, and adding back the amount of \$3,287.27, that Patricia owed to plaintiff from a prior transaction, Patricia advised the plaintiff that he owed her an amount of \$10,843.19. Plaintiff maintains that he had expected to receive the sum of \$110,000.00, constituting one half of the sale price. Patricia did not provide the plaintiff with the dates of occurrence, or names of tradesmen or vendors who performed the services which were included in the schedule of “costs” and “expenses.” Neither did Patricia provide supporting documentation, such as bills or invoices.

The plaintiff claims that an independent appraiser had set the fair market value of the subject property at \$350,000.00; that he owed no maintenance to Patricia after September 1, 1996; that any costs and expenses incurred by Patricia were part of the normal maintenance of the marital property; and that the conveyance to Thomas was undervalued, not an arms length transaction, and meant to defraud the plaintiff.

The original contract of sale between Patricia and Thomas dated October 11, 2001, set the purchase price at \$229,000.00. A Rider to the same contract set the purchase price at \$223,000.00, which Patricia maintains acknowledges a seller's concession. The HUD-1 Settlement Statement executed by all parties at the closing of title, set the purchase price at \$275,000.00 .

Upon learning that Thomas had contracted to sell the premises and was scheduled to close title on the sale during the week of August 19, 2002, the plaintiff initiated the instant proceeding to prevent such sale pending a resolution of the financial issues surrounding the transfer from Patricia to Thomas.

By Order to Show Cause dated August 20, 2002 (J. Costello), the plaintiff obtained a temporary restraining order, prohibiting the sale or transfer of the subject property. On August 21, 2002, the Order to Show Cause was served upon Dorothy A. Courten, **Esq.**, an attorney who had been retained to represent Thomas in an unrelated matrimonial action, but had not been retained to represent Thomas in the pending real estate transaction. As a courtesy, Ms. Courten faxed a copy of the temporary restraining order to both Thomas's real estate attorney and Aileen's matrimonial attorney on August 22, 2002. Despite this notification, the closing of title took place on August 23, 2002, and title passed to Ralph S. Vinci and Carmela Vinci. A notice of pendency had been filed in this matter on August 20, 2002.

Based upon the unresolved factual issues that exist in this matter, the **Court** finds that a fair and practical solution requires that any funds received from the August 23, 2002 sale, which have not already been distributed, continue to be held in escrow in accordance with the terms of this Order. The preservation of the status **quo** in this manner should help to facilitate the resolution of this dispute.

At this time, the **Court** does not find a sufficient basis upon which to find that defendant, Thomas Fade, is in contempt of the prior Order of this **Court**. While a portion of the August 20, 2002 temporary restraining order prohibited the sale or transfer of the subject premises, a provision was included that, in the event the property was transferred, directed that the proceeds of the sale be held in escrow. The Order did not direct who was to act as the escrow agent. While there is no dispute that the property was transferred, plaintiff has failed to submit evidence to demonstrate that the sale proceeds have been dissipated in violation of the restraining order. The facts in evidence do not establish that the actions of Thomas Fade have risen to the level of willfulness or contumaciousness, necessary to support the sanction of contempt.

The **Court** also finds several outstanding issues of fact yet to be determined, which preclude the granting of summary judgment at this juncture. Issues involving the fair market value of the property, the alleged fraudulent activities of the parties, and the question of joinder of all parties necessary to the action, remain matters that require additional disclosure and development.

With regard to the defendant's application for counsel fees, due to plaintiff's alleged frivolous motion practice, the Court finds that there is insufficient evidence to sustain the relief requested. The **Court** is unable to conclude that the motions brought by the plaintiff were made in bad faith or lacked merit.

The foregoing constitutes the Order of this **Court**.

Dated: June 13, 2003

DENISE F. MOLIA

HON. DENISE F. MOLIA

J.S.C.