

Cutler v Bianco

2004 NY Slip Op 30142(U)

November 19, 2004

Supreme Court, New York County

Docket Number: 0019205/1990

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sherry Klein Heitler
Justice

PART 30

0019205/1990

BAJE REALTY CORP.
vs
CUTLER, ARTHUR

INDEX NO. 019205K0
MOTION DATE _____
MOTION SEQ. NO. (009)
MOTION CAL. NO. _____

SEQ 9

PUNISH FOR CONTEMPT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated 11-19-04.

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Dated: 11-19-04

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

-----X
BAJE REALTY CORP.,

Plaintiff,

-against-

ALICE CUTLER, as Executrix of the Estate of ARTHUR
CUTLER, Deceased, and JEFFREY BAYNON,

Defendants/Third Party Plaintiffs,

-against-

ROBERT C. BIANCO, WALTER SAKOW, MARION
SAKOW, HERBERT BERKOWITZ, as Executor of
the Estate of ALICE BERKOWITZ, HERBERT
BERKOWITZ and SEYMOUR EISENGART,

Third Party Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

Motion sequence numbers 008, 009, 010 and 011 are consolidated for disposition herein.

In motion sequence number 008, defendants and third-party plaintiffs Alice Cutler, as Executrix of the Estate of Arthur Cutler ("Cutler") and Jeffrey Baynon ("Baynon") move for the imposition of sanctions against third-party defendant Walter Sakow.

In motion sequence number 009, Cutler and Baynon move for an order holding Walter Sakow in contempt of court.

In motion sequence number 010, Cutler and Baynon move for partial summary judgment against plaintiff Baje Realty Corp. ("Baje") and third-party defendants Walter Sakow, Marion Sakow and Robert C. Bianco ("Bianco"), determining that plaintiff and the third-party defendants are estopped and precluded from asserting any claim of ownership of Baje or the property and

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DECISION & ORDER

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building located at 180 West 81st Street, New York, New York (the “property”). By the same motion, Cutler and Baynon also seek to consolidate their partial summary judgment motion with their motion for the imposition of sanctions against Sakow and their motion to punish Sakow for contempt. Plaintiff Baje and third-party defendants Walter Sakow and Marion Sakow cross-move for partial summary judgment.

In motion sequence number 011, plaintiff Baje and third-party defendants Walter Sakow and Marion Sakow move for an order vacating the automatic stay of discovery resulting from the motions pending under sequence numbers 008, 009 and 010.

Defendants and third-party plaintiffs Cutler and Baynon contend that third-party defendants Walter Sakow, Marion Sakow and Robert Bianco should be judicially estopped from asserting any ownership interest in the property. The basis for their contention is that Walter Sakow has asserted, in sworn documents submitted in this action and dating back as far as 1990, that he and his wife, Marion, possessed no such ownership interest in the property, and Robert Bianco, who asserted that he was the sole shareholder of Baje, sold that interest to Cutler and Baynon in February 2004. In support of that contention, Cutler and Baynon have submitted to the court, *inter alia*, the following documents:

(1) an affidavit signed by Walter Sakow and dated October 3, 1990; in this affidavit,

Walter Sakow states:

Contrary to the assertions made in the answering affidavits of Cutler and Baynon, neither I or my wife, Marion Sakow, are not now, *nor have we ever been shareholders, legally or beneficially, of Baje Realty Corp. (“Baje”).* It is my understanding that Robert Bianco (“Bianco”) has always been the only shareholder of Baje.

(Emphasis supplied);

(2) an affidavit signed by Walter Sakow and dated December 30, 1998, in which he repeats the above-listed statement as to his and his wife's lack of legal or beneficial interest in the property;

(3) an affidavit signed by Walter Sakow and dated October 27, 1999, in which he again asserts that neither he nor his wife ever held any legal or beneficial interest in the property.

Contemporaneously with the submission of those affidavits, Robert Bianco submitted affidavits to the court indicating that, in fact, *he* was the true owner of the property and sole shareholder of Baje. See Affidavit of Robert C. Bianco, dated October 3, 1990; Affidavit of Robert C. Bianco, dated December 24, 1998; Affidavit of Robert C. Bianco, dated October 30, 1999.

Cutler and Baynon have also submitted an excerpt from the transcript of Walter Sakow's November 16, 1987 deposition in a case which predated the instant litigation, Accounting of Rose Sakow as Executrix of the Estate of Max Sakow, Deceased, File No. P. 1956. In that deposition, Walter Sakow stated that he and his wife had never been shareholders of Baje. When asked specific questions as to his involvement with the Baje property, Walter Sakow responded as follows:

Q. Were you ever involved in obtaining any financing for the purchase of that property?

A. No.

Q. Were you present at the closing when that property was purchased by Baje Realty?

A. I don't remember.

Q. Would you have any records by which you could refresh

your recollection?

A. I don't think so.

Q. Do you know whether or not Baje Realty is the present owner of that property?

A. I don't know.

Q. Do you have in your possession or control any books and records relating to that property?

A. No.

...

Q. Do you know whether or not any construction was done at that property?

A. When you say, "construction," what do you mean?

Q. I mean either rehabilitation, repairs or new construction.

A. There were repairs.

Q. When I said rehabilitation I meant renovation.

A. There were some repairs done.

Q. Who did those repairs?

A. Different contractors.

Q. Who were the contractors?

A. Plumbers, electricians and carpenters.

Q. Do you know who they were?

A. Offhand at this moment, no.

Q. Did you hire any of them?

- A. *I might have recommended some of them.*
- Q. Did you ever go to that property?
- A. Yes, I have been to the property.
- Q. *For what purpose were you at the property?*
- A. *In reference to my recommending people for repairs.*
- Q. Did you ever get paid anything for doing that?
- A. Me, personally? No.

Deposition of Walter Sakow, dated November 16, 1987, pp. 110-12, Accounting of Rose Sakow as Executrix of the Estate of Max Sakow, Deceased, File No. P. 1956 (emphasis supplied).

Walter Sakow's deposition testimony in the prior probate proceeding directly contradicts his later submissions to this court in this proceeding. In addition to denying any ownership interest in the Baje property in the above-mentioned affidavits he submitted to this court, Mr. Sakow asserted the following as to his involvement in construction work at the property, in his affidavit of October 3, 1990:

During the next several years, I supervised construction work to maintain the building. It was my understanding that I would receive a minority stock interest in Baje, the corporation that owned the building in the event it was vacated and successfully rehabilitated. . . . Since the rehabilitation of the Building was never completed I did not receive any interest in Baje.

Affidavit of Walter Sakow, dated October 3, 1990, at ¶ 4 (emphasis supplied). See also Affidavit of Walter Sakow, dated December 30, 1998, at ¶ 4; Affidavit of Walter Sakow, dated October 27, 1999, at ¶4. Plainly, Mr. Sakow gave contradictory accounts – at the prior probate proceeding and then in affidavits submitted to this court – of his own role in the construction

work performed at the property.

What is much more troubling, however, is that after repeatedly denying that he or his wife had any ownership interest at all in Baje, and after Cutler and Baynon had purchased Bianco's shares in Baje, in February 2004, Walter Sakow did an about-face on this issue and submitted to this court an affidavit asserting that he is "the sole shareholder and officer of the plaintiff [Baje] in this action." Affidavit of Walter Sakow, dated March 11, 2004, ¶ 1. In this affidavit, Mr. Sakow now claims that Bianco transferred his shares in Baje to Mr. Sakow by a written assignment dated February 16, 2000. According to Mr. Sakow, this transfer took place pursuant to an oral agreement he and Bianco had entered into in 1982, when Mr. Sakow acquired the building at 180 West 81st Street (the property which was later transferred to Baje Realty, Corp.). Mr. Sakow contends that the oral agreement between himself and Bianco required Bianco to act as the purported sole shareholder of Baje, "subject, however, to an agreement that Mr. Bianco, upon my demand, would transfer all of his shares of stock in that corporation to me." *Id.* At ¶ 14.

Bianco denies the existence of any such oral agreement, and Cutler and Baynon assert that the written assignment which allegedly transferred Bianco's shares in Baje to Mr. Sakow was forged. For purposes of determining Cutler and Baynon's motion for partial summary judgment, however, the court need not reach that question, because Walter Sakow's continued in-court assertions, *after* the date of this purported assignment – that Bianco was the sole shareholder of Baje and that he, Sakow, possessed no ownership interest in Baje – now mandate that Mr. Sakow be estopped from asserting otherwise in this proceeding.

Mr. Sakow claims that he was sole shareholder in Baje as of February 16, 2000, the date of the purported assignment of Bianco's shares in Baje to him. Yet, in August 2000, Mr. Sakow

denied, under oath, that he was “the real and beneficial owner of the Property, regardless of the corporate name and regardless of the name that appeared on the stock certificates of such corporation.” Verified Answer to Second Amended Third-Party Complaint, dated August 21, 2000, at ¶ 41. It was only when Cutler and Baynon and Bianco revealed that they had entered into a settlement agreement by which Bianco would sell his shares in Baje that Walter Sakow, for the first time in this litigation, asserted a proprietary interest in Baje.

Even assuming, *arguendo*, that the February 2000 written assignment of shares from Bianco to Mr. Sakow were genuine, Mr. Sakow’s continued assertion of a lack of proprietary interest in Baje, following that assignment, now bars him from making such an assertion at this juncture in the litigation. “Under the doctrine of judicial estoppel or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding.” Nestor v. Britt, 270 A.D.2d 192, 193 (quoting Maas v. Cornell University, 253 A.D.2d 1, 5 (3rd Dept. 1999), *aff’d.*, 94 N.Y.2d 87 [1999]). See also Evans v. Schneider, 2 Misc.3d 139A, 2004 N.Y. Misc. LEXIS 366, **1 (1st Dept. 2004).

Here, Walter Sakow countered Cutler and Baynon’s assertion of an ownership interest in Baje, as stemming from their alleged agreement with Sakow, by claiming that Bianco – and not Sakow – was the sole shareholder of Baje. Subsequent to Cutler and Baynon’s purchase of Baje shares from Bianco, Mr. Sakow asserted that he, in fact, was the sole shareholder of Baje – and, in essence, always had been. To permit Sakow to reverse positions at this juncture would unduly prejudice Cutler and Baynon, who relied upon the sworn assertions of both Sakow and Bianco to the contrary, and purchased Baje shares for \$180,000 and an agreement to settle the third-party

claims against Bianco in this case. “[W]here a party assumes a certain a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (internal citation omitted).

Cutler and Baynon point to previous rulings of this court and the Appellate Division which were based upon Walter Sakow’s denial, since 1990, of any ownership interest in Baje. While it is true that those decisions did, in fact, rely in part on Mr. Sakow’s denial of an ownership interest in Baje – a denial that Mr. Sakow now disavows – a hearing is required to determine the extent of the misrepresentation, the intent involved therein, and the resulting interference with the courts’ rulings. For this reason, and to determine whether the purported written assignment of Baje shares was fraudulent, a hearing as to Cutler’s and Baynon’s motions for Mr. Sakow to be sanctioned and punished for contempt is required.

Accordingly, it is

ORDERED that defendants’ and third-party plaintiffs’ motion for partial summary judgment against plaintiff Baje Realty Corp. and third-party defendants Walter Sakow, Marion Sakow and Robert C. Bianco (motion sequence number 010), determining that plaintiff and the third-party defendants are estopped and precluded from asserting any claim of ownership in or to Baje or the property and building located at 180 West 81st Street, New York, New York (the “property”), is hereby granted; and it is further

ORDERED that plaintiff Baje’s and third-party defendants’ Walter Sakow and Marion Sakow cross-motion for summary judgment is hereby denied; and it is further

ORDERED that defendants' and third-party plaintiffs' motion for the imposition of sanctions against third-party defendant Walter Sakow (motion sequence number 008) is hereby granted, to the extent of ordering a hearing on the matter; and it is further

ORDERED that defendants' and third-party plaintiffs' motion to punish third-party defendant Walter Sakow for contempt of court (motion sequence number 009) is hereby granted, to the extent of ordering a hearing on the matter, to be consolidated with the above-ordered hearing on defendants' and third-party plaintiffs' motion for the imposition of sanction against Walter Sakow; and it is further

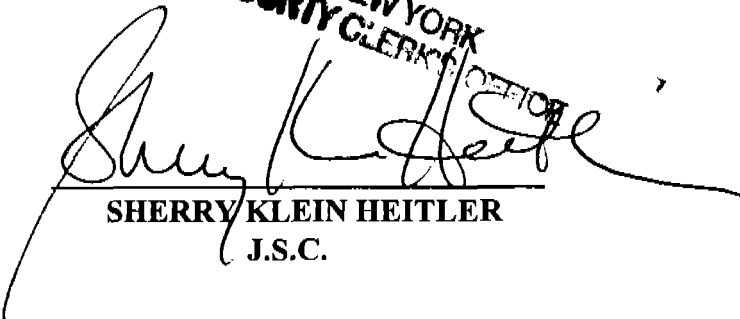
ORDERED that third-party defendant Walter Sakow's cross-motion for contribution and indemnification from third-party defendant Robert Bianco (motion sequence number 008) is hereby granted, to the extent of ordering a hearing on the matter, to be consolidated with the above-ordered hearing on defendants' and third-party plaintiffs' motions for the imposition of sanctions against, and punishment for contempt of, Walter Sakow; and it is further

ORDERED that motion sequence number 011 is denied as moot and discovery will proceed forthwith.

This shall constitute the decision and order of the court.

DATED: November 19, 2004

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SHERRY KLEIN HEITLER
J.S.C.