

Hardoon v Seward Park Hous. Corp.

2004 NY Slip Op 30403(U)

February 18, 2004

Supreme Court, New York County

Docket Number: 113632/04

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

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Ezra Hardoon and Francine Hardoon,

Plaintiff,

-against-

Seward Park Housing Corp.,
Kerry Gotlib, Esq., Citi Habitats, Inc.,
and Isaac Hardoon,

Defendant.

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DECISION/ORDER

Index No.: 113632/04

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pl's OSC w/E.H. aff., A.Y.C. affirm., exhs.	1
Def. I.H.'a Aff. In Op. w/exhs.	2
Def. I.H.'s Amended Aff. In Op. w/exhs.	3
Def. Seward Park Housing Corp. Aff. of S.F w/exhs.	4
Def. Seward Park Housing Corp. Affirm. of S.S.A. w/exhs.	5
Def. Citi Habitats Affirm. of H.S.M. w/exhs.	6
Def. K.G. Affirm. w/exhs.	7
Pl's Reply Aff. w/exhs.	8

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Gische, J.:

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiffs move for a preliminary injunction, pending the determination of the underlying action, to prevent the sale of a cooperative apartment located at 208 East Broadway in Manhattan, Apartment J-503 ("coop").

Plaintiffs are the parents of defendant, Isaac Hardoon. Isaac Hardoon is a 43 year old man who has been living in Israel for at least the last year. He is the titled owner of the coop. Recently (in August 2004) he entered into a contract to sell the

coop to a third party for a purchase price of \$380,000. Defendant Seward Park Housing Corporation is the cooperative corporation that owns the building in which the coop is located. Defendant Kerry Gotlib is the attorney Isaac Hardoon hired to represent him in connection with the sale. Defendant Citi Habitats, Inc. is the real estate broker that brought about the contract of sale.

Plaintiffs commenced this action which, in part, seeks to impose a constructive trust on the coop. They seek an injunction against the sale of the coop while this action is pending. They claim that if defendant is permitted to sell the apartment before their claim is adjudicated, then any victory on the underlying claim would be a pyrrhic one. The motion is separately opposed by all defendants.

The granting of a preliminary injunction is a drastic remedy which should be granted only upon a proper showing. Marietta Corp. V. Fairhurst, 301 AD2d 734 (3rd dept. 2003). In order to obtain a preliminary injunction the movant must show: [1] a likelihood of success on the underlying merits; [2] irreparable injury and [3] a tipping of the equities in his or her favor. Olympic Tower Condominium v. Coccoziello, 306 AD2d 734 (3rd dept. 2003). The movants have failed to satisfy the necessary requirements and their motion must, therefore, be denied.

The underpinning for this motion is plaintiffs' cause of action to impose a constructive trust on the coop. The doctrine of constructive trust evolved as an equitable remedy which is intended to, under certain circumstances, have the titled owner of real property convey it to someone who is otherwise entitled to ownership. The elements of a constructive trust are: [1] the existence of a confidential relationship; [2] a promise, either express or implied; [3] a transfer in reliance on the promise, and [4] unjust enrichment to the transferee. Sharp v. Kosmalski. 40 NY2d 119 (1979); Heness

v. Hunt, 272 AD2d 756 (3rd dept. 2000); Matter of Wieczorek, 186 AD2d 204 (2nd dept. 1992). Even where the factors are proven, the remedy, being equitable in nature, is still only available at the court's discretion. Levy v. Moran, 270 AD2d 314 (2nd dept. 2000).

Plaintiffs allege a confidential and fiduciary relationship with their son. Plaintiffs claim that they gave their son \$15,000 in 1999 toward the purchase of the coop for Isaac Hardoon to live in. They claim that as a consequence of the payment of this money, as well in consideration of plaintiffs financially supporting their son while he lived with them, Isaac Hardoon orally promised that if he ever moved out of the coop, he would transfer title of the coop to plaintiffs. Plaintiffs allege that after the coop was purchased in Isaac's name, they continued to pay expenses toward its maintenance.

While the complaint alleges a confidential relationship between plaintiffs and Isaac Hardoon, Isaac Hardoon denies such fact. There is nothing inherent in the relationship between parents and adult children that makes it confidential *per se*. Gala v. Magaorinos, 245 AD2d 336 (2nd dept. 1997). Although Isaac does not deny receipt of the \$15,000, he claims that it was a gift from his father made only after the purchase of the coop. The bank documents lend support to Isaac Hardoon's claim. Isaac Hardoon claims that he paid for the purchase of the coop from his own personal funds. He denies that he ever promised to give the coop to his parents if he ever moved out. He denies that they contributed any monies toward the maintenance of the coop after its purchase.

Because there are sharply disputed factual issues, the motion for a preliminary injunction should be denied. Pearlgreen Corp. v. Yau Chi Chu, 8 AD3rd 460 (2nd dept. 2004); Koultukis v. Phillips, 285 AD2d 433 (1st dept. 2001). Plaintiffs have not sustained their burden of showing a likelihood of success on the merits.

Equally significant is the fact that the Cooperative Housing by-laws prohibit plaintiffs from obtaining title to the coop for a period exceeding 120 days. It is undisputed that plaintiffs occupy and own the shares of the Seward Park Housing Corporation appurtenant to another, non-contiguous, apartment in the same building as the subject coop. The by-laws prevent ownership of two non-contiguous apartments which are part of the Seward Park Housing Corporation for more than 120 days.. Seward Park Housing Corporation, in its opposition, presents the applicable by-law provisions. In their complaint plaintiffs acknowledge the rule as the reason why they did not take title of the coop in their own names when it was first purchased in 1999. Thus, even if plaintiffs were able to establish the elements of a constructive trust, they would be compelled to sell the apartment in any event. Legal title is just not an option¹. Plaintiffs admit that they have no need or no intention to actually occupy the coop.

There is no claim that the contract of sale with a third party is anything but an arms length transaction; nor is there any claim that the apartment is being sold for less than fair market value. If plaintiffs ultimately show themselves to be aggrieved, monetary damages would make them whole. This is another separate basis to deny the preliminary injunction. Neos v. Lacey, 291 AD2d 434 (2nd dept. 2002); Sirius Satellite Radio, Inc. v. Chinatown Apartments, Inc., 303 AD2d 261 (1st dept. 2003). On the other hand, if Isaac Hardoon does not proceed to close on the contract that he duly executed, he may be liable to the purchaser.

Plaintiffs make no secret of the fact that their real motivation in this case is not to

¹ In this regard plaintiffs claim that having physical possession (but certainly not title) of the stock attributable to the coop is of no moment. It gives them no greater standing to contest the sale and their veiled threats to interfere with the sale by physically withholding the stock will potentially expose them to great liability.

obtain title or occupancy of the coop, but rather to avoid the sale and "save" the apartment for Isaac Hardoon, should he ever return to live in the United States. They claim that Isaac Hardoon is being forced to sell the coop by his wife, who is exerting undue influence on him. They claim that Isaac is incompetent to make such a contract and they fear that after the apartment is sold, Isaac Hardoon's wife will take all of the money and leave him. They explain that Isaac Hardoon has a low IQ and life long mental and other learning disabilities, that make him unable to enter into a contract or appreciate the significance of his own actions.

Isaac Hardoon emphatically denies these allegations. Instead he portrays himself as a quiet and somewhat timid person, who has had the burden of living with overbearing and meddlesome parents. After he married, his wife did not get along with his parents, who continually interfered in their lives. Mrs. Isaac Hurdoon left the United States, with the parties' son, to live in Israel, her country of origin. Isaac Hardoon states that he is now voluntarily living in Israel in order to be with his family and outside the influence of his parents.

The evidence presented in this motion on both sides of this dispute are scant. Regardless, the issue really has no bearing on the plaintiffs' cause of action for constructive trust. Isaac Hardoon's competency to make the contract of sale is not an element of the cause of action and it is not an issue to be adjudicated herein. More importantly, this proceeding cannot be used as a substitute to adjudicate serious issues of competency in a court of appropriate jurisdiction in accordance with all the attendant due process protections. See generally: Mental Hygiene Law Article 81. Plaintiffs' ultimate goal here is to deprive Isaac Hardoon of his liberties, including his right to freely enter into a contract. They seek to substitute their judgment for his in order to do


what is best for him. Plaintiffs cannot accomplish this goal without bringing an action that would allow them to act in Isaac Hardoon's place and stead based upon appropriate proof that he cannot do so himself. While any adjudication of Isaac Hardoon's competency is certainly complicated by the fact that he does not live in this country, the issue of Isaac Hardoon's competency simply has no bearing on the plaintiff's entitlement to constructive trust.

Co-defendant's Citi Habitats advocates that the sale go forward and alternatively suggests that the net proceeds of the sale be put into escrow. This alternative request is rejected because it has not been requested by the plaintiffs. It is further rejected because it appears that there are funds in the United States and assets available should plaintiffs ultimately succeed in whole or in part on their claims.

In accordance herewith the motion for a preliminary injunction is denied in its entirety. This constitutes the decision and order of the court.

Dated: New York, New York
February 18, 2004

So Ordered:



J.J.G. J.S.C.

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