Index No. 06231-2002

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

DECISION AND ORDER

ROBERT C. FADE,

Plaintiffs

-against-

PATRICIA PUGLIANI/FADE and
THOMAS FADE and AILEEN FADE,

Defendants.

PAUL STEPHEN BEEBER
ATTORNEY FOR PLAINTIFF
130 Newbridge Road
Hicksville, New York 11801

DOROTHY A. COURTEN, ESQ.
ATTORNEY FOR DEFENDANTS
PATRICIA PUGLIANI/FADE & THOMAS FADE
33 Kings Highway
Hauppauge, New York 11788

HARVEY A. ARNOFF, ESQ.
ATTORNEY FOR DEFENDANT
AILEEN FADE
Roanoke Avenue
Riverhead, New York 11901

Background

This is an action brought by the Plaintiff, Robert C. Fade, against the defendants Patricia Pugliani (Plaintiff's former wife), Thomas Fade (Plaintiff's son) and Aileen Fade (wife of Plaintiff's son).

The case was heard before the court without a jury on March 13, 2006 and March 14, 2006.

The instant action was the subject of a Motion for Summary Judgment made by all defendants as against the former husband before Hon. Denise Molia, a Justice of this Court, who denied the application in its entirety in a decision and order dated June 13, 2003.

By way of a decision and order decided June 28, 2004 the Appellate Division Second Department affirmed the earlier order of Justice Molia *Fade v. Pugliani/Fade, 8 AD3d 612(2004)*.

In this decision and order the Appellate Division Second Department specifically held that "...the former husband raised a triable issue of fact as to whether a writing, executed by the former wife on October 1, 2001, acknowledged his [the former husband's] entitlement to one half of the sales proceeds [of the house at 47 Eckernkamp Drive, Smithtown, New York] and evinced her intent to pay it to him, thus restarting the statute of limitations".

Findings of Fact

Plaintiff (hereinafter referred to as "former husband") testified to the effect that he had executed a separation agreement with his wife Patricia Fade (now Pugliani, hereinafter referred to as "former wife") on June 25, 1986 (Plaintiff's Exhibit One).

Pursuant to that agreement the parties made particular provisions for the disposition of, among other things,

certain real property held by either or both of them during the course of the marriage.

In dispute is the disposition, ultimately made by former wife alone, of the following items of real property:

1. Residence at 47 Eckernkamp Drive, Smithtown, New York which had been the marital abode and was occupied by former wife, and, for a time, by former wife's parents as well.

2. A vacant parcel of residential land located next door to 47 Eckernkamp Drive, Smithtown, New York.

3. Property and dwelling house located at Scallop Road, South Jamesport, New York.

In addition there were two vacant residential building lots located at Lots #12 & #13 Block 250, Unit 2-1 Hendry County, Port La Belle, Florida. These Florida lots were lost for non-payment of real estate taxes and were never sold by any of the parties to this lawsuit. The action involves these lots only because former wife contends that, pursuant to the separation agreement aforesaid, it was former husband's obligation and duty to pay the real estate taxes on the lots and, in as much as he did not do so, the lots were lost for taxes through no fault of hers. Hence, it is the contention of the former wife that the Plaintiff owes her one half the value of the lots in Florida as of the date that they were lost due to non-payment of taxes to the Florida authorities.

The greater portion of this case can be resolved by resort to the testimony on trial of Plaintiff, former husband, which the court finds to have been credible.

It is undisputed from both the testimony of former husband and otherwise that, during most of the time relevant to the instant litigation, the former husband was in serious delinquency and default pursuant to his responsibilities under the separation agreement (Plaintiff's Exhibit #3).

In passing, the court notes that the separation agreement made very substantial provisions in favor of the former wife and, in light of former husband's undisputed testimony as to his poor financial condition at the time that the agreement was in effect, the defaults in question could not have been unexpected because, under the prevailing circumstances, they were in large part inevitable.

Because of difficulties that he was having with the I.R.S. and other creditors, former husband conveyed his interest in the three parcels above listed to the former wife, placing them in her individual name as opposed to tenancies by the entirety.

Former husband testified that these transfers took place in and around March 14, 1992, without consideration, and on the advice of an attorney who said that these steps would protect the properties from the liens of former husband's various creditors. Apparently, either the litigants, or the attorney, or all of them, were unaware of the relevant provisions of the Debtor & Creditor Law.

Both former wife and former husband knew that the disposition of any proceeds on the sale of any of the properties would be governed by the separation agreement. The deed conveying the marital home to the former wife's name alone so states. (Plaintiff's Exhibit #3).

In any event, the former wife did, in fact, initially sell the real property designated as items #2 and #3 above.

By way of a letter dated February 19, 1998 (Plaintiff's Exhibit #4) former wife accounted to former husband for the sales of items #2 and #3.

Former wife's own calculations show a balance due former husband of $3,287.27 as of February 19, 1998 out of total net proceeds of $251,708.00.

However, she concludes her missive with a statement that "other maintenance items from the letter dated April 25, 1997 totals more than the amount due you". No check was enclosed and former husband did not receive any money from a total of $116,037.00 ($251,708.00 total net proceeds) which former wife calculated to be due him before she made deductions regarding monies she claimed were due her from him (Plaintiff's Exhibit #4).

However, former husband testified on the trial of this action that he did not object to former wife's accounting in the above regards and was concerned only with the sale of the former marital premises known as 47 Eckernkamp Drive, Smithtown, New York.

The Former Marital Home at
47 Eckernkamp Drive, Smithtown, New York

The core of this case, in light of Plaintiff's testimony and the decision of the Appellate Division, Second Department, concerns the sale by the former wife of the marital residence to Plaintiff's son and daughter-in-law for the sum of $220,000.00 without a broker on August 20, 2001.

Firstly, former husband claims that the premises were worth much more, that the sale was not at arm's length and that his son and daughter-in-law were able to re-sell the premises for much more money ($426,000.00) just over a year later (August 23, 2002).

While it is true that former wife had a duty to sell the premises at a price that was within reasonable market value, she was not necessarily under a duty to obtain the last nickel of market value, particularly under these circumstances when the sale was to family members without a broker.

Moreover, former wife was not under any duty to attempt to subdivide the property, under the circumstances, as plaintiff's attorney has suggested. If subdivision was a wise and prudent thing to attempt then, former husband, as a contractor, would have been in the best position to attempt this if he was so inclined. At no time did the husband take any action to obtain a subdivision while either party held title to it. It is only now that he complains that former wife did not do this. Thus, the court rejects any claim that the former wife is liable to the former husband because she failed to subdivide the marital premises before selling them.

Although there was no persuasive expert testimony offered either way on the question of the fair market value of the former marital premises, I think plaintiff, former husband, resolved the issue for himself from the witness stand. Essentially, former husband admitted that, even if one were to use his (former husband's) own figures as to the value of the premises on the date of the sale to his son and daughter in law that the difference between his own estimate and the price the house was sold for, because it was without a broker, at best, could amount to a "swing" of $19,000.00 to his favor.

All this being so, there was no breach of duty, fiduciary or otherwise to the former husband by anyone in connection with the sale price of the former marital premises which were sold on August 20, 2001, at least in so far as the respective rights of these litigants, is concerned.

That having been said, there must follow an analysis of the wife's disposition of the actual proceeds of the sale of 47 Eckernkamp Drive, Smithtown, New York - another matter altogether.

The Letter of October 1, 2001

The Court finds as a matter of fact and law that the letter of October 1, 2001 signed "Pat" sent by the former wife to the former husband and received by him takes the obligation to pay the former husband the share due him on the sale of the house pursuant to the separation agreement out of the statute of limitations. General Obligations Law Section 17-101 provides as follows:

§ 17-101. Acknowledgment or new promise must be in writing

> "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest."

The case law has been consistent that the writing be signed, recognize existing debt and contain nothing inconsistent with intent on the debtor's part to pay it. *McKinneys 17-101, page 366, Sitkiewicz v. County of Sullivan 256 A.D.2nd 884, 681 N.Y.S.2d 677.* The writing in question meets all of the above criteria, both in form and content.

It is true that former wife did attach a summary to this letter much like she had done with regard to the two earlier closings, purportedly, showing why former husband should not receive any money from the sale of the premises due to an amalgamation of debits she posted as to his share.

Former wife also testified on the trial of this action as to other charges that she had made to former husband's account at closing of the 47 Eckernkamp Drive house and otherwise.

At no time did the former wife disavow the debt to former husband on this account.

This is not to say that she did not strive mightily to find offsets toward the end that former husband would have yet a third real estate closing where he walked away with nothing more than a list of charges and prospective charges from the former wife, while she retained every red cent of the net proceeds.

Analysis of monies due former husband
from the sale of 47 Eckernkamp Drive

The Court will rely on the attachments to former wife's letter of October 1, 2001 as its starting point.

Apparently, there was a time, during happier days of the marriage, when former wife's parents wished to move into the premises.

Toward this end, certain modifications were made to the house which required a certificate of occupancy when the house was sold to the defendant son and daughter-in-law.

After her parents were no longer living in the house, former wife claims to have lost rental income because of a lack of a certificate of occupancy for the parents former portion of the premises in the sum of $17,850.00 In addition she seeks to charge former husband not only for the putative lost rent as above but for the costs of obtaining a certificate of occupancy for the home prior to the sale.

This court categorically rejects these claims as outside the scope of the separation agreement and furthermore finds them to be some examples of gross overreaching on the part of the former wife, of which there are

many.

The court finds the following to be an accurate and fair accounting of the monies due former husband from former wife as a result of the closing of 47 Eckernkamp Drive, Smithtown, New York:

Half of Sale Price	$110,000.00
Half of Closing Costs	$ (1,347.51)
Half of Mortgage Balance	$ (7,795.67)
Half of Home Owners Insurance Bills (as testified to by former wife on trial)	$ (6,478.50)
Amount Due former husband as of August 20, 2001 from former wife on account of closing	$ 94,378.32

The Court specifically rejects as unproven and/or inapplicable all of the items contained in former wife's accounting attached to Plaintiff's Exhibit Five. These include but are not limited to items such as "squirrel extermination"in the sum of $495.25.

The separation agreement calls for the former wife to pay real estate taxes, so no credit is given for any sums spent by her on this account.

The separation agreement is silent on the topic of Homeowner's Insurance so that the Court has debited former husband with ½ of the cost of this item over the years as an expense to be shared to maintain the equity in the house. The figures the former wife testified to are slightly different than the amounts called for in the accounting (Plaintiff's Exhibit Five).

Any objection made to such testimony concerning the Homeowner's Insurance bills is overruled.

The Florida Lots

Former husband admitted on the witness stand that the lots in Florida above described were lost because he didn't pay the taxes as called for in the separation agreement.

Defendant's Exhibit B shows the two lots to be forth $11,000.00 each, a fact that was not seriously contested.

Accordingly, the Court will credit the former wife with the sum of $11,000.00 on that account.

The Court finds former husband's testimony to be credible. In fact, his testimony was, in large measure, against his interests. Former wife on the other hand, by her testimony, only served to confirm the suspicion that any reasonable person would have in reviewing her letters of February 19, 1998 and October 1, 2001. Specifically, that it was her intention to make sure that she and only she would ever get any money from the sale of any of the marital properties. In order to accomplish this objective, former wife elected not to disavow any obligation to her former husband in these regards but chose, instead, to rely on phantom expenses and overcharges, largely after the fact, so

as to leave former husband with not so much as a thank you after collecting, by her own figures, $495,000.00 in gross sales prices for the three former marital properties.

Conclusions of Law

Former wife owes former husband the sum of $94,378.32 with statutory interest from August 20, 2001 calculated as follows:

Opening Balance as per former Wife's letter (Plaintiff's Exhibit #4)	$ 3,287.27
Half of Sale Price	$ 110,000.00
Half of Closing Costs	-$ (1,347.51)
Half of Mortgage Balance	-$ (7,795.67)
Half of Home Owners Insurance Bill (as testified to by former wife on trial)	-$ (6,478.50)
Subtotal	$ 97,665.59
Less Half of Loss on Florida Lots	-$ (11,000.00)
TOTAL Amount Due former husband as of August 20, 2001	$ 86,665.59

The remaining balance of the proceeding including the counterclaim and all proceedings as against Thomas Fade and Aileen Fade are dismissed.

Any remaining open applications, if there be any are denied, if they are inconsistent with this decision.

Submit judgment on Notice.

Dated: April 4, 2006

Gary J. Weber, Acting J.S.C.