Short Form Order

Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:
Hon. Emily Pines
Justice Supreme Court

BRUCE & IRIS, INC., GLOBAL TREASURES BY B&I, INC. and BRUCE SISSLER and IRIS SISSLER,

Plaintiffs,

-against-

LNM IMPORTS, INC., LEONARD VARIO and MARGARET VARIO,

Defendants.

Action #1 Index # 20533-2006
Motion Date: 05-02-2007
Submit Date: 05-04-2007
Motion No.: 001 MD
CASEDISP

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NYDIA GIOELI, LEONARD VARIO and LEONARD VARIO, JR., and infant by his father and natural Guardian,

Petitioners,

-against-

BRUCE & IRIS, INC., GLOBAL TREASURES BY B&I , INC., and BRUCE SISSLER and IRIS SISSLER,

Respondents.

Action #2 Index # 09735-2007
Motion Date: 04-07-2007
Submit Date: 04-30-2007
Motion No.: 001 MG
CASEDISP

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DECISION AND ORDER AFTER ORAL ARGUMENT

The Court is considering herein two separate motions in separate actions/proceedings which were consolidated for discovery purposes only by Order (PINES, J.) dated May 4, 2007. The gravamen of both motions is the vacatur of a certain Judgment of Confession entered May 5, 2007 and ancillary relief from restraining notices issued therewith. By Order to Show Cause (Kent, J.) granted April 2, 2007, Petitioners in the proceeding under Index No. 9735-2007 (action no. 2), Nydia Gioeli, Leonard Vario and Leonard Vario Jr., request that

certain bank accounts in Washington Mutual Bank be released from Restraining Notices issued by Respondents, Bruce & Iris, Inc., Global Treasures by B&I, Inc., and Bruce Sissler (collectively referred to as "Bruce and Iris"). These are specifically accounts in the name of Petitioner Nydia Gioeli who is the mother of Margaret Vario and Petitioner Leonard Vario Jr. who is the son of Margaret and Leonard Vario.

By further Order to Show Cause (PITTS, J.) granted April 13, 2007, defendants in the action under index no. 20533-2006 (Action No. 1), move for an Order, *inter alia*, restraining and enjoining Bruce & Iris and the Suffolk County Sheriff from taking any action to enforce the Judgment of Confession entered on March 5, 2007; directing that their individual bank accounts be released from the Restraining Notices; directing that the Judgment of Confession entered in this action on March 5, 2007 be vacated; and allowing the defendants to interpose an Answer to any Complaint which may have been filed; awarding Defendants the costs and reasonable attorney's fees; and for other further relief that the Court deem just and proper. Additionally, the Affidavit in support of the Order to Show Cause of Defendant Leonard Vario requests that the Court void the promissory notes and Bill of Sale resulting from the purchase of the assets of Once Again Home Decor.

Both motions were fully submitted by May 2, 2007. The Court heard oral argument regarding the matter of the bank accounts on May 4, 2007.

Action Number 1

On or about April 5, 2006 a plaintiff in the first action, Bruce & Iris, Inc., sold to Defendant, LNM Imports, Inc. ("LNM"), certain assets used in connection with a retail furniture business which was being liquidated. The assets included the name "Once Again Home Decor", its customer list, a website, goodwill, and equipment and fixtures including office machines, a used forklift and counters. The purchase price was $183,600.00 payable by a down payment of $10,000.00, cash at closing of $73,600.00 and the execution of a

promissory note in the amount of $100,000.00 payable in monthly installments for one year. This note contained a 9% interest clause and was personally guaranteed by the Defendants, Leonard Vario & Margaret Vario ("Vario Defendants"). The Purchase agreement contains warranties by the Plaintiffs/sellers that they had no creditors, that they were indebted to no other person, and were free from any litigation. The agreement contained an indemnification clause in the event that any action resulted with respect to the operation of the business prior to the closing. In connection with the sale, on or about April 5, 2006, the Defendants/purchasers executed a supply agreement wherein the Defendants agreed to purchase certain products from Plaintiff, Global Treasures by B&I, Inc. ("Global") and a consulting agreement wherein LNM agreed to employ Bruce Sissler and Iris Sissler, ("Sisslers"), as consultants for a period of one year at a rate of $2,000 per month. The consulting agreement was also personally guaranteed by the Vario Defendants.

Defendants allege that subsequent to the closing, they were contacted by several previous customers of Once Again with complaints regarding incomplete furniture delivery, damaged goods, and other problems which allegedly existed prior to the closing. The Defendants contend that these complaints and the allegation that Plaintiffs failed to disclose these issues give rise to an action for fraud and deceit by the Plaintiffs sufficient to vacate the purchase agreement and promissory note. The record is void of any indication that the Vario Defendants attempted to enforce the indemnification provision. Defendants further allege that as a result of these complaints, along with a slow furniture market, they were unable to perform their obligations under both the promissory note and the consulting agreement. Additionally, the Varios were unable to pay for the inventory they purchased from the Plaintiffs pursuant to the supply agreement and fell behind in payments under the note. The Plaintiffs herein thus accelerated the note and demanded payment of all money due in the amount of $207,225.60. The attorney for the Plaintiffs contacted Mr. Feil, the attorney for the Defendants at that time, in an attempt to resolve this matter. The parties, through their attorneys, reached a settlement in which the Defendants obligation on

the original note was refinanced and a new promissory note was executed. The agreed on amount of the new note was $155,844.98 payable over three years in monthly installments. This note was also personally guaranteed by the Vario Defendants.

The terms of the stipulation of settlement indicate that LNM Imports is the owner of the name, website and customer list of Once Again Home Decor, that the agreements by and between the parties dated April 5, 2006 are no longer in effect insofar as they provide for obligations and duties to be performed by the Plaintiffs and that the Defendants were required to execute a Confession of Judgement. This stipulation of settlement along with a separate Confession of Judgment were signed by the defendants in September 2006. Subsequent to the settlement, the defendants failed to make the required payments on the new note and the plaintiffs through their attorneys, sent a letter to the Office of the Clerk of the County of Suffolk along with the confession of judgment. Judgment was entered on March 5, 2007 and in executing such judgment and the issuance of Restraining Notices, certain bank accounts were frozen including those of the Plaintiffs in the second action index # 07-09735.

It is well established that stipulations of settlement are favored by the Courts and will not lightly be cast aside. **Quality Ceramic Tile & Marble Co., v. Cherry Valley Limited Partnership, 259 A.D.2d 607, 686 N.Y.S.2d 797 (2d Dept. 1999); Daniel D. Cole & Co., Inc., v. 630 Corp., 150 A.D.2d 358, 540 N.Y.S.2d 857 (2d Dept. 1989).** A stipulation of settlement is a contract, enforceable according to its terms. **McKenzie v. Vintage Hallmark, PLC., 302 A.D.2d 503, 755 N.Y.S.2d 288 (2d Dept. 2003).** A stipulation of settlement which is fair on its face will not be set aside absent evidence of fraud, collusion, mistake or accident. **Linder v. Linder, 297 A.D.2d 711, 748 N.Y.S.2d 599 (2d Dept. 2002); Bailey v. New York City Transit Authority, 196 A.D.2d 854, 602 N.Y.S.2d 177 (2d Dept. 1993).**

In the case at bar, the record shows that the Defendants were represented by counsel in all stages of these transactions from the original purchase through the execution of the stipulation of

settlement. Defendants now claim that their attorney, Mr. Feil did not adequately represent them in that he failed to run a judgment or lien search against the Plaintiffs prior to closing the sale, failed to comply with the Bulk Sale Notice requirement and that he failed to make inquiry to consumer affairs regarding any complaints against the Plaintiffs. However, whether or not Mr. Feil acting in the best interest of his client is not the subject of this action. Since both parties were represented by counsel, and the record does not support a claim of fraud or coercion on the part of the Plaintiffs, the Court cannot undue the sale nor the provisions of the Stipulation of Settlement, agreed on by both parties. A settlement agreement is a contract between the parties. This contract clearly sets forth the duties of the parties herein, explains the payment terms, and clearly refers to the Confession of Judgment. The Varios indicate that their attorney did not adequately explain this settlement to them and that he defrauded and coerced them into entering into the Confession of Judgment. They further allege that Mr. Feil secured investors in the Varios business which were members of his family and claim that this was unethical. However, as set forth above, this is not an action against Mr. Feil for legal malpractice and Mr. Feil is not a party to this action.

Pursuant to the above, Defendants' applications to vacate the Confession of Judgment and void the promissory notes and the Bill of Sale are denied.

Action Number 2

The second motion was argued before the Court on May 4, 2007. On that date, the Court issued an Order which directed that the restraining notices served on March 14, 2007, by the law firm of Bracken & Margolin, upon Washington Mutual Bank, restraining the accounts of LNM Imports, Inc., Leonard Vario and Margaret Vario, would remain in effect but that such restraining notices would be lifted with regard to the following five accounts:

Leonard J. Vario Jr.: 3586669564, 3123330601, & 9376450139
Nydia Gioeli: 3586668920 & 3123328367

The Order further enjoined and restrained Leonard Vario, Sr. and Margaret Vario from taking any action whatsoever with regards to the five accounts specified, until further Order of the Court. The injunction prohibits any transfers of funds into or out of the above five accounts.

The Defendants in the second action, Bruce and Iris Inc., et al, argue that the funds in these accounts should be restrained because the judgment debtors are named on the accounts. **New York Banking Law §675** provides that the opening of a joint bank account creates a rebuttable presumption that a joint tenancy was created. However, a party seeking to rebut this presumption can provide direct proof that no joint tenancy was intended and/or proof that the joint account had been opened for convenience only. **(See Wacikowski v. Wacikowski, 93 A.D.2d 885, 461 N.Y.S.2d 888 [2d Dept. 1983]; see also, Sherman v. Georgopoulos, 84 A.D.2d 811, 444 N.Y.S.2d 136 [2d Dept. 1981]).**

In determining the ownership of the accounts held by Nydia Gioeli and Margaret Vario, the Court finds that Petitioners have satisfied their burden of proof. Nydia Gioeli has submitted an affidavit along with a paper trail detailing that the money in the above accounts came from funds which she held with her deceased husband. Her affidavit further explains that Margaret Vario, her daughter, was added to the account as a co-signer for convenience only, so that she could assist her with her finances and payment of her bills if she was ever unable to do so herself. Based upon the foregoing, the Court finds that the money in the accounts of Nydia Gioeli belong solely to her and are not subject to the Judgment entered against Defendant Margaret Vario.

Similarly, the ownership of the accounts of Leonard Vario Jr. vest in Leonard Vario Jr. The Petitioners have shown that the accounts for Leonard Jr. were set up as custodial accounts when he was an infant. Petitioners assert that the money in these accounts has always belonged exclusively to Leonard Jr. and has not been co-mingled with Leonard Sr.'s accounts. Pursuant to **Banking Law §239** any deposit made by or in the name of any minor shall be held for the exclusive

right and benefit of such minor. Additionally, Courts have held that funds in custodial accounts created on behalf of the children of a judgment debtor may not be seized in order to satisfy a judgment against said debtor. **(See, Friedman v. Mayerhoff, 156 Misc. 2d 295, 592 N.Y.S.2d 909 [Civil Ct. Kings Co. 1992]). See also, EPTL 7-4.2 (a), 7-4.3 (a) and 7-4.4 (b)).**

Accordingly, this motion Index number 07-09735 (action number 2), is granted in its entirety and the Restraining Notices imposed upon the aforementioned accounts are vacated and of no further force and effect.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: May 15, 2007
Riverhead, New York

EMILY PINES
J. S. C.