

Feldman v Toscani

2007 NY Slip Op 31561(U)

June 8, 2007

Supreme Court, Ulster County

Docket Number: 0043710/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

EDDIE R. FELDMAN,

Plaintiff,

-against-

Index No.: 04-3710

RJI No.: 55-05-00519

ERNEST TOSCANI, GEORGINA TUFANO,
DINA TOSCANI, TOSCANI & SONS, THE
WORKS, INC., RENAISSANCE, 127 MAIN
STREET, LLC, DIGI, LLC, TNT, LLC,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

ALLEN J. GOODMAN, ESQ.

Attorney for Plaintiff

47 Route 17K

Newburgh, New York 12550

JACOBOWITZ AND GUBITS

Attorneys for Defendants Tufano and Related Companies

(Amanda B. Brady, Esq. of Counsel)

P.O. Box 367

Walden, New York 12586

DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking to foreclose a mechanic's lien for the agreed upon price for labor rendered as a carpenter. During the course of the litigation defendants were ordered on several occasions to comply with plaintiff's discovery demands. Upon defendants' repeated defaults, their answers were stricken. A

judgment for \$37,500 together with interest, costs and unspecified attorneys fees was granted by order of Hon. Mary M. Work, dated December 14, 2006. Plaintiff has moved for an order directing the Ulster County Clerk to execute and enter the statement for judgment submitted by plaintiff and to release the sum of \$37,500 on deposit as an undertaking to discharge the mechanic's lien. Defendant Tufano has cross-moved for an order staying the release of the \$37,500 undertaking, staying entry of the statement for judgment and granting leave to assert a cross-claim against Ernest Toscani.

The statement for judgment submitted by plaintiff includes an award of \$1,500 as and for attorneys fees notwithstanding the fact that there has been no Court determination of the amount of such award. Moreover, plaintiff's attorney has failed to submit a statement of services rendered and the submissions do not provide a sufficient basis for the Court to determine if such amount is appropriate. It further appears that the statement for judgment includes costs of \$8,000 pursuant to CPLR § 8302 even though such statute authorizes only a percentage of the first \$8,000 of the value of the real property involved, totaling \$150. Moreover, by its terms, CPLR § 8302 is only applicable in actions to foreclose a mortgage, for partition of real property or to compel the determination of a claim to real property. The statute does not include an action to foreclose a mechanic's lien. It is therefore determined that the proposed statement for judgment is grossly deficient. As such, the motion to compel the County Clerk to execute and enter the proposed statement for judgment shall be denied.

It further appears that a stay of the release of the undertaking is warranted. The enforcement of the judgment sought to be stayed is not provided for in CPLR § 5519 (a) or (b). CPLR § 5519 (c) authorizes the Court to order a stay under such circumstances. While not directly applicable, CPLR § 5519 (a) provides for an automatic stay of enforcement of a judgment upon posting an undertaking. The requirement of an undertaking has already been met herein, supporting a discretionary stay.

It further appears that the stay would maintain the status quo, especially since plaintiff is a non-resident and it is likely that defendant Tufano would experience significant difficulty in recovering the funds from plaintiff in the event it is determined that plaintiff was not entitled to the funds. Under such circumstances, the Court finds that a stay should be granted. Plaintiff's motion to compel the immediate release of such funds shall be denied.

As noted above, the proposed statement for judgment contains gross errors. Defendant Tufano has, however, offered no basis to stay the entry of a proper judgment. As such, a stay is not warranted. There is also no basis for asserting a cross claim against a co-defendant after the action has been terminated by a final judgment. Therefore, leave to serve a cross-claim shall be denied without prejudice to renew in the event the judgment is vacated on appeal.

Accordingly it is

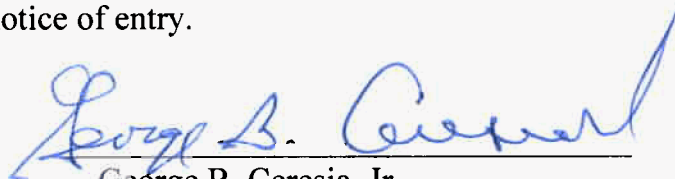
ORDERED that plaintiff's motion for an order directing the Ulster County Clerk

to execute and enter the statement for judgment submitted by plaintiff and to release the sum of \$37,500 on deposit as an undertaking to discharge the mechanic's lien is hereby denied, and it is further

ORDERED that defendant Tufano's cross-motion is hereby granted to the extent that release of the \$37,500 undertaking shall be stayed pending appeal. The cross-motion is otherwise denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendant Tufano, who are directed to enter this Decision/Order without notice and to serve plaintiff's counsel and the Toscani defendants pro se with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
June 8, 2007



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated January 25, 2007; Affirmation of Allen J. Goodman, Esq. dated January 25, 2007 with Exhibits A-C annexed;

Notice of Cross-Motion dated February 21, 2007; Affirmation of Amanda B. Brady, Esq. dated February 21, 2007 with Exhibits A-H annexed; Affidavit of Georgina Tufano sworn to February 21, 2007;

Unsigned Reply "Affirmation" of Allen J. Goodman, Esq. dated February 27, 2007 with Exhibit A annexed;

Reply Affirmation of Amanda B. Brady, Esq. dated March 5, 2007.