

Spitzer v Ferran

2007 NY Slip Op 31606(U)

June 5, 2007

Supreme Court, Queens County

Docket Number: 0011284/2005

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD
Justice

IA Part 5

ELLIOT SPITZER, Attorney General
of the State of New York,

Plaintiff-Claiming Authority,

x
Index
Number 11284 2005

Motion
Date April 24, 2007

- and

STATE OF NEW YORK,

Co-Plaintiff,

Motion
Cal. Number 34

Motion Seq. No. 3

- against-

OSMIN FERRAN, JR.,

Criminal Defendant

LEWIS BRESTIN, et al.,

Non-Criminal Defendants.

_____ x

The following papers numbered 1 to 8 read on this motion by non-criminal defendant Lewis R. Brestin, Lewis R. Brestin DDS, P.C., Richmond Hill Dental Associates, PC, and Alternative Medicine Care of Queens (Brestin defendants) for an order lifting the statutory stay that has been in place since July 25, 2005; directing plaintiff to return to the non-criminal defendants all property seized, or produced voluntarily or pursuant to a subpoena, but not limited to business computers, software, hardware, tax record, ledgers, business records, documents, including patient charts and records, dental equipment and products and the buses containing such property; permitting Lewis R. Brestin and his wife, Maddy LaBianca Brestin, to sell their interest in a certain cooperative apartment, with the proceeds being given directly to

the sellers; and to vacate any judgment entered against these defendants in this county and in the State of Florida, and to remove notices of pendency against certain properties.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavit - Affirmation	
- Exhibits (A-E)	1-4
Opposing Affirmation -Exhibits (A-J, 1-5)	5-6
Reply Affirmation	7-8
Memorandum of Law	

Upon the foregoing papers it is ordered that this motion is decided as follows:

This an action for a forfeiture claim pursuant to CPLR Article 13-A. In essence, plaintiff alleges that the non-criminal defendants Lewis Brestin and Marina Bonaparte are dentists who billed the state Medicaid program for unauthorized dental services provided by the criminal defendant Osmin Ferran, Jr. and companies he is alleged to have controlled, defendants Nations Management Group, Inc. and Globe Management Group, Inc., by and through Dental Wheels, LLP (Wheels) and Dental Wagon, LLC (Wagon). Wheels and Wagon are jointly owned by defendants Brestin and Bonaparte. It is alleged that the unauthorized Medicaid payments received by Wheels and Wagon were deposited into bank accounts held by numerous defendants, including accounts held by Bonaparte and Jamaica-Queens Dental Health Care, and that these defendants thus possessed an interest in the proceeds of a crime, in the amount of \$4,798,764.00. Osmin Ferran, Jr. was arrested on February 10, 2005 and was charged with the crime of Grand Larceny in the first degree (Penal Law § 155.42), a Class B Felony. Mr. Ferran was indicted on February 15, 2005, and entered a guilty plea on September 27, 2005 to the crime of Grand Larceny in the second degree, a Class C Felony. The court's records indicate that he is scheduled to be sentenced on August 31, 2007.

The Attorney General commenced this Article 13-A forfeiture action by order to show cause on May 19, 2005, at which time the court granted plaintiff's request for a temporary restraining order attaching the personal and real property of the criminal defendant Osmin Ferran, Jr. and the non-criminal defendants, and restrained all defendants and all persons and entities having knowledge of the order from removing from the State, transferring, assigning, disposing of, encumbering or secreting such property. Defendants

appeared by counsel and on May 25, 2005 the court approved a stipulation modifying the temporary restraining order, and permitted the release of funds from certain accounts held by the non-criminal defendants, including the release of approximately \$7,000.00 to Ms. Bonaparte, to be used for living, business and legal expenses. On July 15, 2005, the court approved a stipulation and order further modifying the temporary restraining order, and permitted the release of additional funds from certain accounts held by certain defendants, including \$23,187.37 to Wheels, Wagon and Jamaica-Queens Dental Health Care, PC., to be used for living, business and legal expenses.

On July 25, 2005 the Attorney General and non-criminal defendants Brestin individually and on behalf of his interests in Wheels, Wagon, Lewis R. Brestin DDS, P.C., Richmond Hill Dental Associates, PC, and Alternative Medicine Care of Queens and defendants Bonaparte individually and on behalf of her interests in Wheels, Wagon, Lewis R. Brestin DDS, P.C., Richmond Hill Dental Associates, PC, Alternative Medicine Care of Queens and Jamaica-Queens Dental Health Care, PC. (Brestin-Bonaparte defendants) entered into a Stipulated Preliminary Injunction. These defendants also executed an Affidavit of Confession of Judgment dated July 25, 2005 in favor of the State of New York to secure plaintiff's interest in real property owned by these defendants, and agreed to plaintiff's filing of judgments in the counties where they possess real property and the filing of notices of pendency against several of the real properties. The Affidavit of the Confession of Judgment and the Confession of Judgment were filed with the Queens County Clerk on August 3, 2005. Plaintiff, pursuant to the Stipulated Preliminary Injunction, agreed to vacate previous restraints upon the assets of the Brestin-Bonaparte defendants, including all bank accounts. In August 2005 the plaintiff filed copies of the Queens County judgment in all of the counties where the Brestin-Bonaparte defendants were known to possess an interest in real property and notices of pendency were filed against several properties. On October 20, 2005, all restraints on the bank accounts of the Brestin-Bonaparte defendants were removed, pursuant to the terms of the Stipulated Preliminary Injunction. Defendants were also permitted to draw upon existing home equity lines of credit.

That branch of the Brestin defendants' motion which seeks to lift the statutory stay that has been in place since July 25, 2005, is denied as moot. The court, in a so-ordered stipulation dated April 26, 2007, lifted the stay pursuant to CPLR 1311, effective May 16, 2007.

That branch of the Brestin defendants' motion which seeks to recover business property that was seized or produced voluntarily or pursuant to a subpoena is denied. It is noted that the parties have yet to conduct discovery in this forfeiture action, and that the enumerated business property was seized or produced in connection with the criminal action against Ferran. Thus, in order to recover this property, the non-criminal defendants are required to commence a replevin action pursuant to CPLR Article 71.

That branch of the Brestin defendants' motion which seeks to vacate the Confession of Judgment on the ground that it was signed under duress is denied. Repudiation of an agreement on the ground that it was procured under duress requires the showing of a wrongful threat and the preclusion of the exercise of free will (Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp., 14 AD3d 352, 352-353 [2005]; Matter of Guttenplan, 222 AD2d 255, 256-257 [1995], lv denied 88 NY2d 812 [1996]). The threatened exercise of a legal right is not evidence of duress (Wall St. Clearing Co. v Ainbinder, 212 AD2d 488 [1995]; see also Fred Ehrlich, P.C. v Tullo, 274 AD2d 303 [2000]). Furthermore, an agreement purportedly procured under duress must be promptly repudiated (Matter of Guttenplan, supra at 257; Kranitz v Strober Org., 181 AD2d 441 [1992]). Here, the Brestin defendants were represented by counsel at the time they entered into the Stipulated Preliminary Injunction and Judgment of Confession. They now claim that their former counsel wrongfully advised them to enter into the Judgment of Confession, that they were advised by their former counsel that the restraints on their property would only last a few months, and that they were then "under threat" of criminal prosecution. Defendants' assertion that the restraints would be in effect for no more than a few months is based on double hearsay. Furthermore, there is no evidence that Mr. Cudden ever made a representation to the defendants as to the length of time the restraints would be in effect, or represented that he had an ability to affect the pace of the criminal prosecution of Mr. Ferran, or that he made any threats or had the ability to criminally prosecute these defendants. In addition, defendants did not promptly seek to repudiate the Judgment of Confession. The within order to show cause is dated March 8, 2007, which was more than a year and seven months after the Confession of Judgment was entered, and more than a year and five months after all restraints on their bank accounts were lifted. Defendants thus have failed to establish that the Confession of Judgment was the product of duress.

That branch of the Brestin defendants' motion which seeks to

vacate the Confession of Judgment, and the notices of pendency filed against real properties in this state and in Florida, is denied, as Mr. Brestin's claims of financial hardship are not supported by any documentary evidence. Defendants' claim that permitting plaintiff to restrain these assets would be unjust and inequitable, as the value of the properties far exceed the \$4,795,764.00 set forth in the Confession of Judgment, is also rejected. Mr. Brestin has not submitted any evidence of the 2005 and present appraised value of the properties in question. Therefore, his claims regarding the value of these properties, are purely speculative.

Defendant Lewis R. Brestin now seeks the court's permission to sell his and his wife, Maddy LaBianca Brestin's, interest in the shares to a cooperative apartment located at 269-19 Grand Central Parkway, Floral Park, New York (North Shore Towers), and to directly receive the proceeds of the sale. Plaintiff does not oppose the sale of the cooperative apartment, but seeks to have the entire proceeds placed in escrow. Defendants have submitted a copy of the stock certificate issued by North Shore Towers, Inc., dated December 20, 1995, which states that 3518 shares of stock were issued to Lewis R. Brestin and "Maddy M. Brestin" as tenants in common. Since "each tenant in common holds his title and interest independently of the other tenants in common, he may encumber or dispose of his interest * * * without seeking their consent or joinder to the [conveyance]" (24 NY Jur 2d, Cotenancy and Partition, § 84, at 342-343; see Cary v Fisher, 149 AD2d 890, 892 [1989]). Therefore, Mr. Brestin could only grant an interest in his undivided share in the shares of stock in the cooperative, and could not grant any interest in his wife's undivided share. The court notes that where the security pledged are shares constituting ownership of a cooperative apartment and its proprietary lease, the procedure for enforcement of a security interest in personalty (UCC Article 9) governs and not for summary recovery of real property (RPAPL Article 7) (Fundex Capital Corp. v Reichard, 172 AD2d 420 [1991]; Saada v Master Apts., Inc., 152 Misc 2d 861, 863-864 [1991]; 5-52 Warren's Weed, New York Real Property § 52.49).

Maddy LaBianca Brestin is not a defendant in this action and has not submitted an affidavit stating her desire to sell her undivided share in the shares in the cooperative. Therefore, Mr. Brestin's request for permission to sell his, and his wife's shares in the cooperative apartment and to retain the proceeds of sale, is denied. However, the notice of pendency filed against the cooperative apartment must be vacated. Shares constituting

ownership of a cooperative apartment and a proprietary lease are chattel real or personalty, not realty (Matter of State Tax Commn. v Shor, 43 NY2d 151 [1977]; see also Savasta v Duffy, 257 AD2d 435 [1999]). A notice of pendency is authorized to be filed only in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (see CPLR 6501; 5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313, 320 [1984]; Nastasi v Nastasi, 26 AD3d 32 [2005]; Sansol Indus. v 345 E. 56th St. Owners, 159 Misc 2d 822 [1993]). Therefore, the notice of pendency filed against the cooperative apartment located at 269-19 Grand Central Parkway, Floral Park, New York, is hereby cancelled.

To the extent that Mrs. Brestin and other individuals are co-owners of real properties that are the subject of the stipulated preliminary injunction, Judgment of Confession and notices of pendency, these individuals have the right to bring a special proceeding against the Attorney General to determine the rights of adverse claimants to the property or debt, prior to the application of the property or debt to the satisfaction of a judgment(CPLR 1327).

In view of the foregoing, that branch of the Brestin defendants' motion which seeks to lift the statutory stay is denied as moot, and the remainder of the defendants' motion is denied. The notice of pendency filed against the cooperative apartment located at 269-19 Grand Central Parkway, Floral Park, New York is vacated.

Dated: June 5, 2007
