

Pyros v Dengel

2007 NY Slip Op 32932(U)

September 17, 2007

Supreme Court, Suffolk County

Docket Number: 0024517/2000

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 24517/2000

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 CLORINDA PYROS,

Plaintiff,

-against-

CHARLES DENGEL,

Defendant.

 CHARLES R. CAPOBIANCO and JENNIFER
 CAPOBIANCO,

Plaintiffs,

-against-

CHARLES ENGEL, CLORINDA PYROS and
 ELIZABETH PYROS,

Defendants.

ORIG. RETURN DATE: MAY 9, 2007
 FINAL SUBMISSION DATE: MAY 31, 2007
 MTN. SEQ. #: 009
 MOTION: MOT D

ORIG. RETURN DATE: MAY 9, 2007
 FINAL SUBMISSION DATE: MAY 31, 2007
 MTN. SEQ. #: 010
 CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 9 read on this motion TO
PUNISH FOR CONTEMPT AND CROSS-MOTION FOR SANCTIONS

Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Replying Affidavits and supporting papers 7, 8; Replying Affidavits and supporting
 papers 9; it is,

ORDERED that this motion by plaintiff, CLORINDA PYROS (“plaintiff”), for an Order, pursuant to CPLR 5104 and/or Judiciary Law § 753(A)(3), punishing defendant CHARLES DENGEL (“defendant”) for civil contempt of court for his failure to comply with the provisions of the Judgment granted on July 7, 2005 (Werner, J.), and, pursuant to Judiciary Law § 773, granting an award of costs and reasonable attorneys’ fees, is hereby determined as provided herein; and it is further

ORDERED that this cross-motion by defendant for an Order setting this matter down for a hearing, and pursuant to 22 NYCRR § 130-1.1, imposing sanctions upon plaintiff and/or her attorney, is hereby **DENIED**.

By way of background, in 1998, plaintiff transferred the real property known as 41 Harbor Circle, Centerport, New York to defendant through two conveyances. In or about June of 2000, defendant entered into a contract of sale to sell the property to the CAPOBIANCOS, the plaintiffs in Action No. 2. Plaintiff then commenced Action No. 1, in or about September 2000, to impose a constructive trust upon the real property. Thereafter, the CAPOBIANCOS commenced Action No. 2 seeking specific performance of the contract of sale. A trial of this matter was conducted in April and May of 2005, and on May 3, 2005, the Court (Werner, J.) rendered a decision on the record directing the specific performance of a contract of sale between defendant and plaintiffs CAPOBIANOS for the agreed upon price of \$765,000.00; imposing a constructive trust on the proceeds from that sale; and directing that one-third (1/3) of the proceeds be distributed to plaintiff and two-thirds to defendant, after all expenses were deducted. A Judgment was granted on July 7, 2005 (Werner, J.) which incorporated the Court’s oral decision on May 3, 2005. Plaintiff had appealed the Judgment, which was affirmed by decision and Order of the Appellate Division, Second Department dated December 5, 2006 (*Pyros v Dengel*, 35 AD3d 424 [2006]).

Plaintiff has now filed this post-judgment contempt application, seeking to hold defendant in contempt of court for his alleged failure to comply with the provisions of the Judgment granted on July 7, 2005 (Werner, J.). Specifically, plaintiff alleges that defendant has failed to comply with the portion of the judgment that requires defendant to pay to plaintiff one-third (1/3) of the net proceeds from the sale of the property.

Defendant had ultimately sold the property to the CAPOBIANCOS, although the date of the closing is in dispute. Plaintiff alleges that the closing occurred on February 26, 2007, while defendant alleges that the closing occurred on March 27, 2007. During and after the time of closing, counsel for plaintiff and defendant exchanged numerous correspondence relative to the costs and expenses incurred in connection with the sale. Counsel for defendant submitted that after all costs and expenses were deducted, plaintiff's one-third (1/3) share of the proceeds equaled \$73,044.97. In a letter sent on or about March 8, 2007, two letters sent on or about March 26, 2007, and another letter sent on or about March 29, 2007, counsel for plaintiff sought to have plaintiff's \$73,044.97 wire transferred into counsel's IOLA account. Counsel for defendant refused to release the funds unless plaintiff first provided defendant with a satisfaction of judgment. Plaintiff refused to do so, arguing that the satisfaction of judgment was not a condition precedent to the release of plaintiff's money.

In opposition, defendant has filed a cross-motion seeking an imposition of sanctions upon plaintiff and/or her counsel for the filing of the instant motion for contempt, arguing that the motion is frivolous. Defendant alleges that plaintiff contests defendant's accounting of the costs and expenses associated with the sale which resulted in plaintiff's net share of \$73,044.97, and seeks a hearing to determine the precise amount due plaintiff.

CPLR 5104 provides, in pertinent part, that "[a]ny interlocutory or final judgment or order not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court" (CPLR 5104). The statute requires that a certified copy of the order must be served on the party thereby required to obey it (CPLR 5104). Notwithstanding the notice requirement of CPLR 5104, a person who has actual knowledge of the mandate of a court may be punished for contempt even though not personally served with a certified copy of the order allegedly disobeyed (*Village of Westhampton Beach v Suffolk Asphalt Supply*, 253 AD2d 425 [1998]; *Campanella v Campanella*, 152 AD2d 190 [1989]; *Puro v Puro*, 39 AD2d 873 [1972]).

In the instant application, despite the fact that defendant has not been served with a certified copy of the judgment, the Court finds that defendant has actual knowledge of the mandates contained therein, given the lengthy

history between the parties since the entry of the judgment. In addition, defendant does not contest that he had actual knowledge of the judgment, and had served his own certified copy of the judgment upon plaintiff on or about August 18, 2005.

In the instant matter, the Court finds that an unequivocal mandate was in effect of which defendant had notice, to wit: the provision set forth in the Judgment of July 7, 2005 which imposed a constructive trust on the proceeds of the sale and divided the proceeds such that defendant was to pay plaintiff one-third (1/3) of the net proceeds. Despite defendant's characterization, plaintiff has not filed the instant application to contest the amount due her pursuant to the Judgment. Instead, she has filed the application to hold defendant in contempt, and seeks the release of \$73,044.97 to her without condition (see Pltf.'s Exhs. I, K, L, M). The Court has reviewed the Judgment of July 7, 2005 and finds that no conditions were imposed relative to the payment of plaintiff's one-third (1/3) share of the net proceeds.

In view of the foregoing, plaintiff's application is granted to the extent that defendant is directed to release to plaintiff, via wire transfer to plaintiff's counsel's IOLA account, the sum of \$73,044.97, within thirty (30) days of service of the within decision and Order with notice of entry. That branch of plaintiff's application seeking an award of costs and reasonable attorneys' fees is denied.

Defendant's cross-motion for a hearing to determine the precise amount due plaintiff is denied, given the Court's ruling on plaintiff's motion-in-chief. Further, that branch of defendant's motion seeking the imposition of sanctions pursuant to 22 NYCRR § 130-1.1 is also denied. The Court finds that plaintiff's motion was not frivolous within the meaning of section 130-1.1(c).

The foregoing constitutes the decision and Order of the Court.

Dated: September 17, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court