

Doukas v Hauptman

2007 NY Slip Op 33331(U)

October 11, 2007

Supreme Court, Suffolk County

Docket Number: 0027763/2005

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI**Justice**

Fed Doukas,

Plaintiff(s)

-against-

Mary Hauptman (a/k/a Mary Doukas),
Horsepath Realty, LLC, Hermes Realty, Corp. and
Melville Realty, LLC,

Defendant(s)

Motion date: 6/27/07Submitted: 9/26/07Motion Sequence No.: 005 MD

006 Mot D

007 Mot D

008 MG

Index No.: 27763-05Attorney for Plaintiff:

Robert J. DelCol, Esq.

34 Dewey Street

Huntington, NY 11743

Attorney for Defendant:

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100 Garden City Plaza, Suite 408

Garden City, NY 11530

Upon the following papers numbering 1 to 20 read upon these motions:

Order to Show Cause and supporting papers 1 - 4, 5 - 8;

Notice of Cross Motions and supporting papers 9 - 10, 13 - 16;

Affidavit in Opposition and supporting papers 17 - 18;

Reply Affidavits and supporting papers 19 - 20;

it is

ORDERED that this motion (005) by defendants Mary Hauptman, Horsepath Realty, LLC, Hermes Realty Corp. and Melville Realty Corp. for an order modifying the preliminary injunction granted by the Hon. Donald Blydenburgh by order dated June 29, 2006 to permit plaintiff to mortgage and encumber one or more properties and for a further order cancelling the Notices of Pendency filed by defendant against the properties is denied; and it is further

ORDERED that the cross motion by plaintiff, Ted Doukas (006) for an order inter alia denying defendant's motion, granting plaintiff counsel fees in connection with the application, permitting plaintiff to file an amended complaint and for an order permitting plaintiff to inspect the books and records and accounts of defendant is granted to the extent that defendant's motion is denied and plaintiff is permitted to file an amended complaint, and is otherwise denied; and it is

further

ORDERED that this motion (007) by defendants brought by order to show cause (8/15/07) for an order pursuant to CPLR 2221 granting leave to renew and reargue plaintiff's prior summary judgment motion is granted. Upon reargument the court adheres to its original decision except to the extent set forth below; and it is further

ORDERED that the cross motion by plaintiff, Ted Doukas (008) for an order impressing an equitable mortgage on the subject properties is granted.

As set forth in this court's July 2, 2007 order, the parties were married on July 2, 1982. Together they accumulated a fairly significant marital estate consisting mostly of real estate. After encountering marital discord, the parties apparently agreed to separate as evidenced by a separation agreement signed by the parties and notarized by John Stravato on September 7, 2005 ("agreement"). As pertinent to the motions pending before the court, the agreement provides that the individual defendant herein, Mary Hauptman (a/k/a Mary Doukas) ("Hauptman") was to receive the following real property: the marital residence located at 13 Winchester Drive, Muttontown, a commercial parcel located at 535 Broadhollow Road, Melville and another commercial parcel located at 1500 Old Northern Boulevard, Roslyn. On the other hand plaintiff, Ted Doukas ("Doukas") was to receive residential properties located at 2 Lisa Court, Woodbury and 70 Split Rock Road, Syosset. In addition, Hauptman was to execute two separate mortgages in the combined amounts of \$5,000,000.00 to encumber the Melville and Roslyn properties.

Hauptman, who has not executed the mortgages contemplated by the agreement, commenced an action for a divorce in Nassau County on September 6, 2005 just one day after the agreement was signed, alleging constructive abandonment. Thereafter, Doukas commenced the instant action to recover damages for breach of contract and for specific performance of the separation agreement. By order dated September 26, 2006, the Hon. Angela Ianucci, the justice assigned to the matrimonial action, granted Doukas' motion for summary judgment, dismissed Hauptman's complaint and denied Hauptman's cross motion to set aside the parties' separation agreement (Doukas v. Doukas [202469-05], 9/26/06, N.O.R.). In rendering her decision, Justice Ianucci specifically considered Hauptman's allegations that the separation agreement should be set aside based upon fraud, duress or overreaching or that the agreement is unconscionable and found the same to be insufficient.

In this court's July 2, 2007 order, the court granted plaintiff summary judgment on his first and second cause of action for breach of contract and specific performance because it found that defendant was barred by res judicata from re-litigating the validity of the agreement in this forum. More specifically, the court recognized that the validity of the subject separation agreement was previously upheld by the Hon. Angela Ianucci and that the issue of the agreement's validity was fully litigated by both parties. Defendant had a full opportunity to present her case to Justice Ianucci, who rejected her arguments and found her proffered evidence insufficient to defeat Doukas' summary judgment motion. While Hauptman did not raise the issue before Justice Ianucci that certain terms of the agreement are too ambiguous to be enforced or that enforcement of the agreement would result in an unconscionable result, this court found that she could have and should have raised such issue before Justice Ianucci. The court therefore granted plaintiff's motion for summary judgment on his First and Second Causes of Action and found that defendant

breached the agreement in that she has failed to pay to Doukas the sum of \$20,833.00 per month as required by the agreement and he is entitled to judgment in the amount \$312,495.00 for past due amounts from October 2005 through December 2006. The court further directed defendant to execute the mortgages as prepared by Doukas within 10 days of service of a copy of this order. To date defendant has not executed a mortgage, despite having agreed to do so and despite being directed to by the court. The court further granted plaintiff's motion for an order appointing a receiver, but only if defendant failed to execute the mortgages.

In motion sequence 005, which was made prior to this court's July 2, 2007 order but submitted thereafter, defendants seek to modify a preliminary injunction imposed by Justice Blydenburgh in order to permit defendants to mortgage the property, specifically the Melville property. In particular, defendant claims that the mortgage on the Melville property matures on November 1, 2007 at which time a balloon payment of \$2.4 million dollars becomes due. She further claims that she does not have the means to make the payment and will lose this \$9 million dollar property within months. She further seeks to cancel the Notice of Pendency claiming the same is improper since she argues the lawsuit does not concern title to or use and enjoyment of real property.

Defendant appeals to the court to allow her to save the property. However, it is Hauptman's actions that has resulted in the instant emergency. Pursuant to an agreement executed over two years ago, plaintiff relinquished his interest in: the marital residence located at 13 Winchester Drive, Muttontown, a commercial parcel located at 535 Broadhollow Road, Melville; and another property located at 1500 Old Northern Boulevard, Roslyn. In exchange defendant agreed to execute two separate mortgages in the combined amounts of \$5,000,000.00 to encumber the Melville and Roslyn properties. Defendant has had the full benefit of this agreement and readily admits that she has managed the properties, collected the rental income and paid the bills. What she has not done in the last two years is execute the mortgages she agreed to execute, or to pay to plaintiff the amount of \$20,833.00 contemplated by the agreement to be the monthly mortgage payment. Instead, Hauptman has chosen a path of litigation wherein, all the while accepting the benefits of the agreement, she has avoided all responsibilities attendant therewith. Two courts have now ruled against Hauptman in her claim to set aside the agreement and still she has not executed the mortgages. Accordingly, defendant's motion to modify the preliminary injunction to allow her to mortgage the subject properties imposed by Justice Blydenburgh is denied.

That part of the motion to vacate the Notice of Pendency is denied. "A notice of pendency is authorized to be filed in an action seeking 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, 486 NYS2d 877 [other citations omitted]). An action seeking to impose a constructive trust over real property qualifies as one in which the filing of a notice of pendency is allowed (Natasi v. Natashi, 26 AD3d 32, 805 NYS2d 585 [2d Dept. 2005]). In plaintiff's Third Cause of Action, he seeks to impose a constructive trust. While this court declined to grant summary judgment on this cause of action, it did not dismiss the same. In any event, plaintiff has moved to amend his complaint with respect to this cause of action, which defendant has not opposed. Accordingly, defendant's motion to vacate the Notice of Pendency is denied and plaintiff's cross motion to serve an amended complaint is granted. The amended complaint in the form annexed to the motion shall be deemed served upon service of a copy of this order.

Defendants' motion for an order granting leave to reargue plaintiff's previous motion for summary judgment and for the appointment of a receiver is granted. Upon reargument, the court adheres to its original decision that plaintiff is entitled to summary judgment on his first and second causes of action. However, the court modifies its original order which directed defendant Hauptman to execute the mortgages as prepared by Doukas and now, upon the cross motion of plaintiff; imposes an equitable mortgage upon the properties located at 535 Broadhollow Road, Melville and 1500 Old Northern Boulevard, Roslyn.

"While 'a court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation' (Allen v. Union Fed. Mtge. Corp., 204 F.Supp.2d 543, 546, appeal dismissed 71 Fed.Appx. 82), 'it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances. Strict proof of such intention is required' (Pennsylvania Oil Prods. Ref. Co. v. Willrock Producing Co., 267 N.Y. 427, 434-435, 196 N.E. 385" (Tornatore v. Bruno, 12 AD3d 1115, 785 NYS2d 820 [4th Dept. 2004]). "Further, '[a]n equitable mortgage has been defined as a transaction that has the intent but not the form of a mortgage and that a court will enforce in equity to the same extent as a mortgage' 77 N.Y. Jur. 2d, Mortgages and Deeds of Trust § 20, at 444-446" (Moon v. Moon, 6 AD3d 796, 776 NYS2d 324 [3d Dept. 2004] [other citations omitted]).

The threshold issue in any claim for equitable relief, including the instant action seeking imposition of an equitable mortgage, is whether relief in equity is warranted or, put another way, whether plaintiff has an adequate remedy at law (see, e.g., Boyle v. Kelley, 42 N.Y.2d 88, 91, 396 N.Y.S.2d 834, 365 N.E.2d 866). A legal remedy is deemed to be adequate if it is "plain and adequate and as certain, prompt, complete, and efficient to attain the ends of justice and its prompt administration as the remedy in equity" (55 NY Jur 2d, Equity, § 25, at 455; see also, Daily v. City of New York, 170 App.Div. 267, 276, 156 N.Y.S. 124, mod. on other grounds 157 N.Y.S. 1121, affd. 218 N.Y. 665, 113 N.E. 1053)" * * * "The basis for any equitable mortgage is "the cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done"' (Sprague v. Cochran, 144 N.Y. 104, 114, 38 N.E. 1000). Its availability is not dependent upon the nature or size of the error, but rather upon the existence of a "clear intent between the parties that [certain] property be held, given or transferred as security for an obligation" (Datlof v. Turetsky, 111 A.D.2d 364, 365, 489 N.Y.S.2d 353; see Mailloux v. Spuck, 87 A.D.2d 736, 449 N.Y.S.2d 69, lv. denied, 56 N.Y.2d 507, 453 N.Y.S.2d 1025, 438 N.E.2d 1147; see generally, Bowmar, Mortgage Liens in New York §§ 7.1-7.6, at 163-197). (New York TRW Title Ins. v. Wade's Canadian Inn and Cocktail Lounge, 199 AD2d 661, 605 NYS2d 139 [3d Dept. 1993]).

In the case at bar, there is clear intent to encumber the subject property with mortgages as

evidenced in the written agreement. Moreover, defendant Hauptman admits that she does not have the funds to satisfy the existing first mortgage on one of the properties, therefore, it is clear that a money judgment is inadequate. Since Hauptman agreed to execute a mortgage and since plaintiff waived his interest on three separate parcels of real property in exchange for her promise to execute such mortgage, and since Hauptman has not, to date, executed such mortgage, the court finds that equity requires the imposition of an equitable mortgage in the amount of a \$3,000,000.00 (three million dollars) on the property located at 535 Broadhollow Road, Melville and an equitable mortgage in the amount of \$2,000,000.00 (two million dollars) on the property located at 1500 Old Northern Boulevard, Roslyn with a mortgage balance of \$2.4 million dollars.

In providing plaintiff with this equitable relief, the court rejects defendants' claims that plaintiff's unclean hands preclude the granting of equitable relief. The marital agreement provides that plaintiff is to pay the amount of \$2,500.00 per month in child support. Plaintiff did tender an amount of \$30,000.00 in October 2006 which tender was rejected by Hauptman since plaintiff enclosed a letter stating that acceptance of the funds would be considered a ratification of the terms set forth in the agreement. Since Hauptman desired to continue litigating the agreement she chose not to accept the check. However, while Hauptman continues to challenge the agreement, she has accepted the benefits of various terms and is seeking to enforce those terms that are beneficial to her. Under these circumstances, the court finds that unclean hands do not preclude plaintiff from specific performance on the agreement, nor does it preclude the court from granting the equitable mortgages. However, the amount due and owing plaintiff from Hauptman shall be reduced by the amount of child support due and owing Hauptman.

The court rejects defendants' arguments that the court erred in finding that plaintiff's specific performance claims were barred by res judicata. Justice Ianucci has twice upheld the validity of the entire agreement. Defendants complain that it is "completely illogical" to contend that plaintiff is not precluded from bringing a separate claim for specific performance in Suffolk County but that defendant is precluded from defending against those claims in the same action. However, the court did not rule that plaintiff was not precluded from bringing this action as that issue was not before the court. In fact, such an argument would be non-sensical. Rather than precluding plaintiff from commencing this action, the order of Justice Ianucci supports plaintiff's claims for specific performance as she has ruled that the agreement which he seeks to enforce is valid. Had Justice Ianucci ruled that the agreement was invalid, then plaintiff would have been barred from seeking specific performance in this court.

Upon reargument of the prior motion for appointment of a receiver, the court adheres to its prior determination. "It is well settled that the appointment of a receiver in a matrimonial action is an extreme remedy which should not be granted lightly" (Serdaroglu v. Serdaroglu, 209 AD2d 606, 622 NYS2d 51 [2d Dept. 1994]). In order to prevail on a motion to appoint a receiver in a matrimonial action, movant must establish by clear and convincing evidence that there is danger of irreparable loss or material injury..." to the property (Id citing CPLR 6401[a]). Here, Hauptman has for over two years failed to pay under a obligation to which she agreed, opting instead to avoid payment and to litigate resulting in the imposition of the injunction. By Hauptman's own admission, she is in danger of losing the property when the mortgage matures in less than one month. Hauptman has not made a good faith tender of payment and she even argues that because she has not executed a mortgage that no interest payments are due.

Moreover, while Hauptman refers to a document she prepared that she is willing to sign, the court rejects the same as wholly deficient to constitute a mortgage. Under the circumstances here, the court finds there is danger of irreparable loss or injury. Accordingly, the drastic remedy of appointment of a receiver is appropriate. In its previous order the court allowed Hauptman to avoid such remedy by signing the mortgage presented by plaintiff. However, she chose not to sign the mortgage in favor of continued fruitless litigation. Accordingly, it is

ORDERED that Louis C. England, Esq. of 2556 Middle Country Road, Centereach, New York 11720 (631-588-0250), known to this court as being capable to fulfill and undertake this assignment and who possesses the appropriate ethical character and is on the approved list to be appointed a receiver pursuant to the Rules of the Chief Judge, Part 36, be and is hereby appointed Receiver, effective immediately of the rents, issues and profits of 535 Broadhollow Road, Melville and the property located at 1500 Old Northern Boulevard, Roslyn. While the court notes that these properties are owned by the corporate defendants, both these corporations are solely owned by Hauptman and she had previously agreed to encumber these properties to secure her indebtedness to plaintiff; and it is further

ORDERED that said receiver shall have the usual powers and duties according to the laws of this State; and it is further

ORDERED that the Receiver shall execute a bond, as surety, in the amount of \$50,000.00 in the form prescribed by law to the People of the State of New York, with a fidelity or surety company, authorized by the laws of the State of New York to transact business in the State of New York and file same with the Office of the County Clerk of the County of Suffolk and such bond shall be conditioned upon the Receiver's faithful performance of his duties and he shall not assume his responsibilities as Receiver until the bond is obtained and filed with the Office of the Suffolk County Clerk as indicated; and it is further

ORDERED that upon obtaining the surety bond, the Receiver shall submit to the court the original bond for approval; and it is further

ORDERED that the cost of the bond shall be initially paid by the Receiver, who shall be entitled to reimbursement from the rents received of the aforementioned property; and it is further

ORDERED that the Receiver, before entering upon his duties, and in order to qualify therefor, shall execute and file an oath that he will faithfully and fairly discharge the trust committed to him; and it is further

ORDERED the Receiver shall keep written accounts, itemized receipts and authorized expenditures, describing the property and naming the depository of funds; and it is further

ORDERED that the Receiver shall deposit any and all monies received by him in his own name, as receiver, in an interest bearing account, showing the name of the case, in the Bank of Smithtown located in Centereach and that no funds shall be withdrawn without court order; and it is further

ORDERED that the depository shall furnish monthly statements to the Receiver; and it is further

ORDERED that the Receiver shall not retain additional counsel in this matter, as the appointed receiver is a lawyer, licensed in the State of New York and is directed to perform all necessary legal services associated with his appointment as Receiver, unless the Receiver receives prior Court approval for the appointment of counsel, after application on notice with a submission of an affirmation stating the reasons necessary for the appointment of such counsel; and it is further


ORDERED the Receiver may at any time apply to this court for an order or other instructions or powers necessary to enable the Receiver properly to fulfill his duties; and it is further

ORDERED that the Receiver's fee shall be determined in accordance with CPLR 8004(a), commensurate with services rendered by him, subject to the determination and approval of this Court, plus costs and disbursements incurred by him.

The court adheres to its determination that plaintiff is entitled to judgment for the interest due and owing to him under the agreement. The parties agreed on September 7, 2006 that Hauptmans would pay interest only on the \$5,000,000.00 (five million dollars) obligations for ten years at the rate of 5 % for a total interest per year for a total of \$250,00000. Defendant has not signed the mortgage and has not tendered the monthly interest payments of \$20,833.00 per month. Accordingly the court finds that plaintiff is entitled to judgement against Mary Hauptman in the amount of \$500,000.00 up and through October 7, 2007 less \$2,500.00 per month for 24 months for a total of \$440,00.00. This provision replaces the previous order which granted plaintiff a judgment against all defendants in the amount of \$312,495.00 for arrears through December 2006.

Settle judgment.

Dated: October 11, 2007


HON. WILLIAM B. REBOLINI, J.S.C.