

Gutierrez v Bernard

2007 NY Slip Op 33666(U)

November 9, 2007

Supreme Court, New York County

Docket Number: 0107111/2005

Judge: Leland G. DeGrasse

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LELAND DeGRASSE
Justice

PART 25

Gutierrez, R

INDEX NO. 107111/05

- v -

MOTION DATE _____

Bernard, L

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

NOV 09 2007

Dated: _____

415

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
RAFAEL DIAZ GUTIERREZ and AURORA
BOREALIS REALTY, INC.,

Plaintiffs,

-against-

Index No. 107111/05

L. RAUL BERNARD a/k/a LUIS R. BERNARD, a/k/a
LUIS RAUL BERNARD GUZMAN, DOLORES
VERA a/k/a DELORES VERA, MICHAEL
SCHNEIDER, SANDRA BERNARD SCHNEIDER,
230 WEST 105TH STREET REALTY, INC. and
CENDANT MORTGAGE CORPORATION,

Defendants.

-----X

DeGrasse, J.:

Plaintiffs move and defendants Michael Schneider (M. Schneider), Sandra Bernard Schneider (S.B. Schneider) and Cendent Mortgage Corporation n/k/a PIH Mortgage Corporation (Cendent) cross-move for summary judgment. On July 14, 1998, plaintiff Rafael Diaz Gutierrez was awarded judgment against defendant L. Raul Bernard in the sum of \$970. 914. 29 (Gutierrez v Bernard, Index No. 600695/97). According to the complaint, Gutierrez assigned that judgment to plaintiff Aurora Borealis Realty, Inc. on or about February 26, 2004. In another action, (Gutierrez v Bernard, Index No. 605955/98) Gutierrez was awarded judgment against defendant Dolores Vera in the sum of \$666, 847. 40 on or about August 16, 2005. Plaintiff alleges that both judgments remain unsatisfied.

Bernard was a rent controlled tenant in building which had been converted to cooperative ownership. Defendant 230 West 105th Street Realty, Inc. (Realty) is the cooperative corporation.

The shares allocable to the apartment were owned by Speiser Regent, the cooperative's sponsor. On or about November 8, 1995, Vera, Bernard's sister-in-law, contracted to purchase the shares for the sum of \$17, 500. Realty's Board of Directors declined to approve the transaction, citing a lack of evidence that Vera was financially responsible. Vera sued Speiser and Realty for specific performance and declaratory relief (*Vera v Speiser Regent*, Index No. 600151/99). That action was settled by stipulation dated March 18, 2002. Under the terms of the stipulation, Vera assigned to the contract to M. Schneider, her son-in-law, by instrument also dated March 18, 2002. M. Schneider purchased the shares from Speiser for \$29, 500. It is alleged in the complaint that the assignment of the contract to Schneider were fraudulent conveyances within the meaning of Debtor and Creditor Law §§ 273, 273-a and 276.

Debtor and Creditor Law § 273-a provides that:

“Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.”

At their depositions, Vera and M. Schneider admitted that no consideration was paid for the assignment. Schneider also admitted that the fair market value of the apartment was several hundred thousand dollars at the time of the assignment. It is undisputed that at paragraphs 14 and 30 of the *Vera v Speiser Regent* complaint, filed by an attorney, Vera admitted that the fair market value of the shares and lease allocable to the apartment was at least \$500, 000. An admission in a pleading in one action is admissible against the pleader in another suit, provided it can be shown that the facts were alleged with the knowledge or under the direction of the pleader (*Hirsch, Inc. v Town of N. Hempstead*, 177 AD2d 683 [1991]). It is presumed that the Speiser

Regent complaint was filed with Vera's authority (*see e. g. Matter of Locke*, 21 AD2d 248 [1964] *lv denied* 15 NY2d 482 [1964]). The attorney's authority is not disputed by an affidavit by Vera. Defendants' assertion that the apartment was unmarketable because it was occupied by rent controlled tenants lacks probative value because constitutes opinion and is set forth in an attorney's statement.¹ M. Schneider's claim that he did not purchase the apartment with the intent to shield Bernard's or Vera's assets is unavailing. As set forth above, intent is irrelevant under Debtor and Creditor Law § 273-a. Therefore, the Vera - M. Schneider assignment was made without fair consideration. Undeniably Vera was a defendant in Gutierrez's action for money damages at the time of the assignment. It is further undisputed that Gutierrez's judgment against Vera remains unsatisfied. Based upon the foregoing, Vera's assignment of the contract to M. Schneider is fraudulent as to Gutierrez under Debtor and Creditor Law § 273-a.

Vera has submitted no affidavit to refute plaintiffs' assertions that the assignment to M. Schneider is fraudulent under Debtor and Creditor Law § 273 because it rendered her insolvent. Vera also does not challenge plaintiffs' that she made the assignment with fraudulent intent under Debtor and Creditor Law § 276. For the foregoing reasons, plaintiffs' motion for summary judgment is granted. As prayed for in plaintiffs' supporting affirmation and the amended complaint, the assignment of the contract by Vera to M. Schneider is vacated. Defendants are directed to assign the shares and proprietary lease allocable to Apartment 9A at 230 West 105th Street, New York, NY to Gutierrez. Any undertaking given on the preliminary injunction shall

¹Also, the papers submitted by the attorney representing Bernard and Vera are a nullity because the attorney's office is not located within the State. Judiciary Law § 470 requires attorneys who practice in this State to maintain an office for the transaction of law business within the State (*see Lichtenstein v Emerson*, 251 AD2d 64 [1998]).

be discharged upon entry of the judgment and order to be settled. The cross motion by M. Schneider, S. B. Schneider and Cendent is denied. Settle judgment and order.



Dated: November 9, 2007

J. S. C.

HON. LELAND DOGRASSE