

Weadick v Herlihy

2007 NY Slip Op 34352(U)

January 2, 2007

Supreme Court, New York County

Docket Number: 0600127/2003

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK

PART 12

Justice

Pamela Weasick

INDEX NO.

600127/03

MOTION DATE

MOTION SEQ. NO.

004

MOTION CAL. NO.

- v -

Carol A. Helwig

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

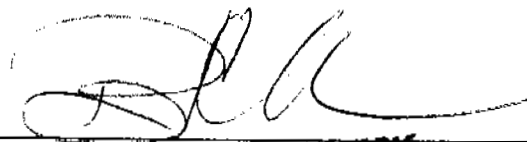
**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

JAN 04 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/2/07



BARBARA R. KAPNICK J.S.C.
J.A.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
PAMELA WEADICK and DAVID TULLOCK,

Plaintiffs,

-against-

CAROL ANNE HERLIHY,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 600127/03
Motion Seq. No. 004

In this action for a constructive trust, defendant Carol Anne Herlihy moves by Order to Show Cause (i) pursuant to CPLR §§ 2221(e) and 5015(a)(2) and (3) for an order renewing her motion for summary judgment dismissing plaintiffs' complaint; (ii) upon renewal, dismissing plaintiffs' action based upon the newly discovered evidence of plaintiffs' fraud, misrepresentation or other misconduct; and (iii) pursuant to 22 NYCRR 130-1.1(a) and (c)(3) awarding defendant her costs and attorneys' fees and imposing financial sanctions against plaintiffs arising from plaintiffs' assertion of false material factual statements in a civil action.

Specifically, defendant relies upon the following evidence which was discovered after the prior decision by this Court dated

September 23, 2004 which denied defendant's motion to dismiss as to plaintiffs' second and third causes of action:¹

(a) tape-recordings of telephone conversations which defendant argues reveal that prior to April 30, 2002, plaintiffs secretly procured George Olsen, Esq. and his wife to replace her in the venture to buy the building at 79 Warren Street, thus contradicting the basis for their constructive trust action; namely, plaintiffs' claim that defendant abandoned them, without justification, on April 30, 2002;²

(b) a statement by plaintiff Weadick to the Loft Board in September 2002 in which she admits that Herlihy gave them the information from the seller that plaintiffs later claimed she had concealed from them;

(c) plaintiffs' recent admission that defendant did not obtain a title report in her name alone on April 3, 2002 while she was still working with the plaintiffs as a member of their purported joint venture, but rather obtained the report in May 2002 after defendant had ended her relationship with plaintiffs; and

¹ This Court dismissed plaintiffs' first cause of action, and that decision was modified on other grounds at 16 A.D.3d 223 (1st Dep't 2005); lv. to app. den. 5 N.Y.3d 707 (2005).

² The Appellate Division specifically found that "[h]ere, questions exist, including whether the attorney diverted the opportunity to herself and was unjustly enriched as a result." 16 A.D.3d at 224.

(d) the deposition testimony of the sellers' attorney, Eric Goidel, Esq., on May 11, 2005 and his timesheets which defendant argues refute plaintiffs' claim that she "controlled" the negotiation of the contract of sale with him.

Defendant argues that this new evidence reveals that it was plaintiffs who tried to divert the opportunity to themselves and unjustly enrich themselves, rather than the other way around. This became apparent, defendant contends, when, on September 21, 2005, plaintiff Tullock's former employer, JPMorgan Chase, produced three cassette tapes of recordings of some phone calls made to and from his office phone in April and May 2002.

While Tullock stated in his Affidavit In Support of Cross-Motion for Partial Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment, sworn to on May 22, 2003, that "I categorically deny ever having a conversation with Louise Longa [the owner] in which I said I thought it [the venture with Carol Anne Herlihy] wasn't working," the tapes reveal 1) a conversation between the plaintiffs held on April 26, 2002 in which Tullock says he tried to get in touch with George Olsen and reached his voice mail but wanted to talk to him in person; 2) a conversation between Tullock and George Olsen held on April 29, 2002 at 10:57 a.m. in which Olsen tells Tullock that he and his

wife are "very interested" and Tullock replies that they "should meet with the owner, one of the owners that wants to sell it, sell his interest and establish some sort of rapport with him right now...Maybe what I could do is call him up today. And then we can meet with him"; and 3) a conversation between the plaintiffs held on April 30, 2002 in which Tullock informs Weadick that

I tried to call Longa and actually got in touch with Louise and I just sort of filled her in on the situation and, you know, I let them know that I'm not sure what Carol Anne is up to, she's not returning our calls and this sort of thing and we thought we had the deal worked out and, you know, things haven't been proceeding, so...In any case, she said she's very concerned. I also told her that, you know, she - that we have someone else who's interested in the building. But she said we'll just have to see how things are going, so...

Defendant contends that Louise Longa then called her at 1:16 p.m. on April 30, 2002 and she returned her call later in the afternoon, during which Ms. Longa informed her that David Tullock told her that the deal between them (Tullock and Herlihy) was not working and that she should from then on deal with Tullock and not Herlihy.

It was only after that, on April 30, 2002 that defendant called Tullock and told him that they should "say goodbye". Herlihy specifically told Tullock that "I know Louise called me today and said she had spoken to you and told her you thought it wasn't working...So maybe at this point I think - well, I do think we

should say, let each one do what they can do on their own and release each other from any obligations." They both indicated they planned to pursue the purchase of the building, with Tullock confirming that "[w]e've got people who are interested actually."

Plaintiffs also previously argued that defendant diverted the contract of sale to herself by failing to turn over to plaintiffs a last draft of the contract defendant obtained from sellers' attorney on April 16, 2002, and by failing to share with plaintiffs the sellers' attorney's inquiry if they were ready to sign the contract. However, defendant claims that she just discovered in preparing the record on appeal in a related Article 78 proceeding³ that Ms. Weadick submitted a Statement to the Loft Board on September 25, 2002 in which she stated that "[o]n April 16, 2002 Carol Anne sent me a copy of the draft contract of sale from the Mongelli Estate⁴ that she was given by Eric Goidel, the attorney for the Mongelli estate."

Ms. Weadick also attached to her Loft Board submission Mr. Goidel's cover sheet to defendant dated April 16, 2002 with the contract asking her if she was ready to execute it.

³ Herlihy and Horowitz v. NYC Loft Board, et al., Index No. 110438/04

⁴ Tom and Louise Longa were the executors of the Mongelli Estate which owned a one-half interest in the building.

[*7]
Therefore, defendant contends plaintiffs were being disingenuous in representing otherwise to this Court.

Furthermore, plaintiffs now admit that defendant did not obtain a title report in her name alone on April 3, 2002, a point which they argued both to this Court in opposition to the original motion for summary judgment, and to the Appellate Division on the appeal. However, after an EBT of a principal of the title company, plaintiffs apparently retracted this allegation and did not make reference to this issue in their motion for leave to appeal to the Court of Appeals.

Finally, defendant asserts that she deposed Mr. Goidel, the sellers' attorney, on May 11, 2005, at which time he testified that he had no part in the negotiations of the sale of the Longas' interest in the property to defendant, but just prepared the sales contract for Mr. Longa. He further testified that Ms. Herlihy had no input into the original draft of the sales contract which was simply his standard form. Ms. Herlihy ultimately paid \$425,000 all-cash for the Longa interest in the building at a closing held on May 9, 2002.

Based on all this new evidence, defendant contends that plaintiffs' cause of action for a constructive trust can no longer stand. Defendant further argues that renewal of the motion should

be permitted even where the former denial of summary judgment was affirmed by the Appellate Division upon a showing of new evidence and especially a showing that the initial result was obtained by the plaintiffs' misconduct. See, Cohoes Realty Associates v. Lexington Insurance Co., 292 A.D.2d 51 (1st Dep't 2002).

Plaintiffs oppose the motion, arguing that (a) defendant has made no showing that the so-called 'newly discovered' evidence could not with due diligence have been presented to the Court in connection with the original motion; and (b) the alleged false statements are not material to the core elements of plaintiffs' claim that the defendant attorney used a confidence or secret obtained from the plaintiffs to her advantage in order to divert a business opportunity to herself to the detriment of her clients.

Specifically, plaintiffs argue that the tapes reveal that they did not actually replace Herlihy or offer to buy the building without her until after she advised Tullock that she wished to go it alone.

Tullock alleges in his Affidavit in Opposition that his comment "we have someone else interested in buying" was in response to Longa's statement that she had received a recent or better offer. He further contends that Longa had told them at the beginning of their negotiations that she wanted a contract by May

1, 2002 and that by mentioning that there were others interested, he was simply trying to keep all of his options open.

Tullock claims that by mid-April 2002, Herlihy had somehow "changed direction" as to her negotiations - and as to the division of the proceeds of the sale - and he and Weadick were concerned because Herlihy was not addressing the final comments to the Contract of Sale. He states that his phone records from JPMorgan indicate that he tried to call Herlihy four times on Friday, April 26, 2002, by which time he and Weadick had become sufficiently concerned as to try and think of an alternative safety net.⁵

Tullock said that is when he called George Olsen with whom he had spoken once in 2001 about developing the building as an investment property.

He also received an e-mail from defendant Herlihy that evening at 7:57 p.m. in which she stated:

Honestly the latest proposals and numbers have made Stu⁶ and me very concerned. We want to take some time for us to talk between ourselves before we meet again.

⁵ Herlihy argues that she did, in fact, respond by e-mail once in response to his early morning call and again later in response to his later calls.

⁶ Stuart Horowitz lives in the unit with Ms. Herlihy.

We'll be in touch over the weekend once we've talked it out. I haven't received the contract back from Goidel so we have a breather at this moment although of course we could get pressured any day now.

I do want to urge you again to confer with your attorney if you haven't already ...

On April 28, 2002, defendant sent an e-mail to plaintiffs stating that "[t]he recent proposals have been making the partnership deal less and less attractive to us." Tullock then met with George Olsen on the 27th or 28th of April 2002. However, they signed no papers nor made any agreements between themselves or anyone else that day.

Plaintiffs further argue that Weadick's statement to the Loft Board was not a part of the record before this Court or the Appellate Division, so it was not relied upon, nor was it material. Tullock further claims that the allegation that defendant had failed to forward the April 16, 2002 draft of the sellers' contract along with a cover letter was an error made by prior counsel, rather than by plaintiffs themselves.

In any event, plaintiffs continue to argue that Herlihy never conveyed to them an urgency to close and Tullock believed that a final contract had not yet been sent by Goidel.

He claims that the confusion surrounding the title report bearing the April 2, 2002 date but which was actually not obtained until May 2002 merely eliminates one fact in contention, but does not compel a modification of this Court's prior order.

Finally, he argues that Mr. Goidel, at his deposition, never retracted one word of his Affidavit dated May 21, 2003 upon which this Court and the Appellate Division relied in making their decisions.

It is thus still plaintiffs' contention that Herlihy was able to make a bid for the property without plaintiffs' involvement and to close on an all-cash deal within seven business days after withdrawing from their venture because she knew the terms of the proposed contract of sale and had obtained information while allegedly working on behalf of the plaintiffs and the venture.

In reply, defendant again argues that the true reason plaintiffs did not purchase the Longa interest after they split up had nothing to do with any diversion of opportunity because plaintiffs had the cash available together with Olsen. She claims plaintiffs made a strategic decision not to offer the cash to the Longas, but instead to buy the other half of the building in cash and to try to get the Longas to accept financing, which plan was ultimately not successful.

Defendant further argues that plaintiffs have still never identified what information or knowledge or advantage was supposedly given to her but denied to them, even after they cross-examined Mr. Goidel at his deposition. She claims that plaintiffs' allegation that she was secretly raising cash before April 30, 2002 to buy the property herself is nothing but unfounded speculation.

Moreover, defendant continues to argue that she did not have an attorney-client relationship with the plaintiffs in regard to this venture and even if it could be so construed, she did not breach any fiduciary obligation to them.⁷

While it is true that courts will apply more rigorous scrutiny to a transaction when an attorney participates as a party, an attorney may nevertheless contract with his or her clients over nonlegal matters as long as the attorney does not betray the fiduciary relationship and take advantage of his or her superior knowledge and position (see, *Greene v. Greene*, 56 N.Y.2d 86, 92, ...).

Clifton Country Road Associates v. Vinciguerra, 195 A.D.2d 895, 896 (3rd Dep't 1993); lv. to app. denied, 82 N.Y.2d 664 (1994). See also, Schlanger v. Flynn, 218 A.D.2d 597 (1st Dep't 1995).

⁷ Defendant admittedly did some small legal favors for her neighbors since she was an attorney, but claims that the last one was at least one year earlier and did not relate to this real estate transaction or make her plaintiffs' general counsel.

Defendant claims that plaintiffs are attempting to portray her as their attorney in order to avoid calling her their co-venturer, in which case they would each owe the other a fiduciary duty.

Finally, defendant contends that she was not dilatory in bringing this motion since the depositions she relies on were not held until April and May 2005, promptly after the March 2005 decision of the Appellate Division, and that is also when she began seeking the tapes from JPMorgan Chase which she only learned of in Tullock's Affidavit in support of his cross-motion for summary judgment. The motion practice and the appeal stayed discovery proceedings during that time period.

"Multiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence...(citations omitted)." Dillon v. Dean, 170 A.D.2d 574, (2nd Dep't 1991). Here, however, there is an adequate showing of newly discovered relevant evidence. See, Pough v. Aegis Property Services Corp., 186 A.D.2d 52 (1st Dep't 1992).

Based on the papers submitted and the oral argument of the parties held on the record on February 1, 2006, this Court grants defendant's motion for renewal, and upon renewal, finds that questions no longer exist as to whether the attorney diverted the opportunity to purchase the one-half interest in the building from

the Longas to herself and was then unjustly enriched as a result. At the end of April of 2002 it became clear that the plaintiffs and defendant Herlihy were getting farther and farther away from reaching an agreement on the deal. Plaintiffs now admit that they had a copy of the April 16, 2002 draft of the contract of sale from Mr. Goidel and thus knew the amount and the terms of the contract at the same time Herlihy did. Plaintiffs fail to identify what other information or knowledge or advantage defendant had at this time which they did not have.

Once the venture fell apart, either side could have reached a deal with the Longas to purchase the property - the evidence now shows that the plaintiffs and Mr. Olsen had the cash but chose not to make an all-cash offer to the Longas. Therefore, the sellers were free to, and did accept Herlihy's offer.

Accordingly, this Court now dismisses plaintiffs' second and third causes of action.

The Court further finds, based on the misrepresentations made by plaintiffs in this action, that defendant is entitled to her costs as well as to sanctions to be determined at a hearing to be held before a Special Referee.⁸

⁸ However, defendant is not entitled to attorney's fees, since she represented herself throughout this proceeding.

Accordingly, the issues of the amount of defendant's costs and the appropriate sanctions to be assessed against the plaintiffs are referred to a Special Referee to hear and report with recommendations.

Defendant is directed to serve a copy of this order with notice of entry upon the Special Referee Clerk, who shall place this matter on the Part 50R Calendar for referral to a Special Referee.

This constitutes the decision and order of this Court.

Date: January 2, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
JAN 04 2007
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