Lefkowitz v Lee Odell Real Estate Inc.
2008 NY Slip Op 31319(U)
May 5, 2008
Supreme Court, New York County
Docket Number: 0111072/2006
Judge: Herman Cahn
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[* 1] SCANNED ON 5/8/2008

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

PRESENT: Hon. Herman Cahn, Justice — PART 49

LEFKOWITZ, JACK

INDEX NO. 111072/06

MOTION DATE ______

- v -

MOTION SEQ. NO. 4

LEE ODELL REAL ESTATE INC

MOTION CAL. NO. ______

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

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

FILED
MAY 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 5 2008

J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ J.S.C.
DATED: ______

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-- X

JACK LEFKOWITZ,

Plaintiff,

-against-

Index No. 111072/06

LEE ODELL REAL ESTATE, INC.,

Defendant.

-- X

FILED
MAY 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

CAHN, J.:

This is an action to declare a money judgment obtained by defendant herein against plaintiff herein, satisfied or otherwise unenforceable.

Defendant Lee Odell Real Estate, Inc. ("Odell") moves to confirm the report of Special Referee Lancelot B. Hewitt dated September 28, 2007 (the "Report"), CPLR § 4403. The Special Referee reported that plaintiff Jack Lefkowitz failed to prove that the judgment was discharged by prior agreement. Lefkowitz cross-moves to reject the Report, to deny the prior motion to dismiss the complaint and to disqualify attorneys Lionel A. Barasch, Esq. and William J. Candee, IV, Esq. from representing Odell.

Background

Odell obtained a judgment against Lefkowitz in the amount of $670,966.04 in a separate action in 2002 (see, Lee Odell Real Estate v Jack Lefkowitz and Barclay Dwyer Co., Inc., NY Co Sup Ct Index No. 602317/98) (the "Prior Action"). Lefkowitz commenced the instant action in 2006, seeking a declaration that the said Judgment had been discharged pursuant to an agreement between the parties arrived at in November 2002. Specifically, the complaint contends that Lefkowitz executed a November 4, 2002 agreement (the "Agreement") -- in which he agreed to withdraw his appeal of the Judgment and commence an indemnification action to recover the

Judgment amount from third parties -- with the understanding that the Judgment would be deemed fully satisfied and discharged. Pursuant to the Agreement, Lefkowitz received a November 4, 2002 letter from Odell (the "Letter"), confirming "that we have reached a satisfactory arrangement regarding the above [the Prior Action] and we look forward to working with you in the future."

By letter agreement dated February 7, 2003 (the "Amendment") the parties amended the Agreement to the extent of requiring Lefkowitz to assign his indemnity rights, to Odell in lieu of commencing an indemnity action, with the condition that Lefkowitz's approval would be required for any settlement less than $250,000.

Odell then moved to dismiss the action on the ground that the Agreement and related documents failed to support Lefkowitz's discharge theory. In a ruling from the bench on February 22, 2007 (the "Prior Order"), this court held the motion to dismiss in abeyance. Specifically, the Prior Order stated:

> The Court cannot decide that issue [the discharge of the Judgment] on these papers alone. The issue of whether or not it was the intention of the parties that upon the doing of certain things and the happening of certain events, the judgment would be discharged or whether that was not their intention, is respectfully referred to a special referee to hear and report . . . .
>
> * * *
>
> As a preliminary to the hearing, the Court will permit either side to arrange for the deposition of Edward Rubin, Esq., the attorney who apparently prepared the November 4, 2002 letter and indeed who signed it.
>
> If either side decides to depose Mr. Rubin, such deposition shall be held at the courthouse and shall be held on notice to the adversary who may also take part in the deposition.
>
> The special referee should also consider a [second] letter dated November 4, 2002 from the Odell Real Estate, Inc. to Mr. Jack Lefkowitz which is annexed to the moving papers.

Prior Order at 4-5.

The deposition of Edward Rubin, Esq. ("Rubin"), Lefkowitz's transactional attorney, was taken on April 11, 2007. The hearing before the Referee was held on June 4, 2007.

At the hearing, both Lefkowitz and Odell testified. Rubin failed to appear, but defendant read selected portions of his deposition testimony into the record. At the conclusion of the hearing, the Referee granted plaintiff one week to identify the testimony from Rubin's deposition, if any, that he wished placed in the record.

In his September 28, 2007 Report, the Referee concluded that "Lefkowitz has failed to demonstrate that the parties intended to discharge him of the judgment entered against him in the written agreements they executed on November 4, 2002 and February 7, 2003, upon the occurrence of certain events or the performance of certain acts." In support of this conclusion, the Referee made the following findings:

> Lee Odell . . . president of Odell, testified credibl[y] that in conversations with Lefkowitz regarding the judgment, Lefkowitz advised him that he could not pay off the judgment, but that he would assist [Lee] Odell [in] collect[ing] the judgment by assisting him sue his (Lefkowitz's) partners.
>
> [Lee] Odell testified credibly that Odell and Lefkowitz executed two written agreements dated November 4, 2002, and one written agreement dated February 7, 2003, which pertained to Odell's efforts to enforce the judgment against Lefkowitz. I find that such written agreements are complete, clear and unambiguous on their faces, and that the language contained in such documents does not express any intention or agreement by the parties to discharge the judgment entered against Lefkowitz . . . .
>
> [T]he language "reached a satisfactory arrangement with respect to this matter" set forth in the letter agreement dated November 4, 2002, as well as the language "satisfactory arrangement" set forth in the letter also dated November 4, 2002, cannot be reasonably interpreted to indicate that Odell was discharging Lefkowitz from the judgment entered against him.
>
> Additionally . . . [Lee] Odell testified credibly that he never at any time told Lefkowitz that Odell forgo collecting on the judgment entered against him, that Odell was in anyway discharging Lefkowitz of such judgment. Moreover . . . Lefkowitz did not offer any credible testimony on this issue.

Report at 6-7.

The instant motions followed.

Discussion

The Report of the Referee is confirmed, and upon confirmation, the motion to dismiss is granted. The report of a referee will be confirmed whenever the findings contained therein are substantially supported by the record (see, Sichel v Polak, 6 AD3d 416 [1st Dept 2007]) and the referee has clearly defined the issues and resolved matters of credibility (see, Poster v Poster, 4 AD3d 145, 145 [1st Dept 2003]; Einy v Robert Elevator Co., 209 AD2d 248 [1st Dept 1994]; Namer v 152-54-56 West 15th Street Realty Corp., 108 AD2d 705 [1st Dept 1985]). "The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor" (Poster, 4 AD3d at 145).

After reviewing the relevant documents, considering witness testimony and making credibility determinations, the Referee concluded that there was no evidence of an intent to discharge the Judgment. The record overwhelmingly supports this conclusion. In fact, the hearing established beyond all doubt that all of the parties, including plaintiff Lefkowitz, understood that the right to pursue the Judgment against him was being specifically preserved and that enforcement of it was merely being forestalled pending the attempts to pursue payment of the underlying debt from others.

In opposing confirmation, plaintiff contends that the Referee erred by: (1) imposing the burden of proof upon him; (2) finding that the written agreements were clear, complete and unambiguous despite the court's earlier refusal to rule on the papers alone; (3) failing to draw an adverse inference against defendant by reason of its failure to call its attorney, Lionel A. Barasch, Esq., as a witness; (4) failing to consider the testimony of Rubin; and (5) failing to adequately explain why Odell's testimony was being credited over the testimony of Lefkowitz. None of

these arguments has any merit.

First, the Referee properly invoked the preponderance of the evidence standard in evaluating plaintiff's proof. CPLR 3211(c) provides for an immediate trial of any fact issue whose resolution might expeditiously resolve the entire case (see, Brown v Micheletti, 97 AD2d 529 [2d Dept 1983]). Accordingly, plaintiff was required to meet his ultimate burden of proof at trial, rather than merely the liberal standard applicable to a motion to dismiss. In any event, the record would require dismissal of plaintiff's claim regardless of what burden was imposed.

Second, the Referee's conclusion that the agreements were unambiguous did not conflict with the court's reference to determine the issue of intent. Although resort to extrinsic evidence is generally not permitted where the relevant contracts are clear and unambiguous (see, W.W.W. Assocs. v Giancontieri, 77 NY2d 157 [1990]), "in deciding whether an agreement is ambiguous courts should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed" (Kass v Kass, 91 NY2d 554, 566 [1998]). Despite granting plaintiff the leeway to explore the circumstances surrounding the execution of the Agreement, the court made no ruling regarding its ambiguity, but held the CPLR 3211(a)(1) motion in abeyance. Upon consideration of the fully developed record, the court concurs that there is nothing in the Agreement, the Letter or the Amendment which, when viewed in light of the surrounding circumstances, would be ambiguous or would support a conclusion that the parties intended to release or discharge the Judgment.

Third, the Referee's decision to disregard plaintiff's post-hearing request for a missing witness charge with respect to Mr. Barasch was not error. Plaintiff's request was untimely because it was not made before the close of evidence (see, 3134 East Tremont Corp. v 3100 Tremont Assocs., 37 AD3d 340 [1st Dept 2007]; Thomas v Triborough Bridge, 270 AD2d 336 [2d Dept 2000]). Rather, plaintiff sent an unsolicited memorandum requesting the charge a week after the hearing, even though the Rubin deposition excerpts were the only submissions

previously requested and approved by the Referee. Furthermore, the record establishes that Mr. Barasch's testimony would be, if not irrelevant, at best cumulative of Mr. Odell's and unfavorable to plaintiff (see, Matter of Ismael S., 213 AD2d 169 [1st Dept 1995]).

Finally, plaintiff's remaining objections to the Referee's evaluation of the testimony of Lefkowitz, Odell and Rubin merely raise issues regarding the weight and credibility of evidence well within the discretion of the trier of fact. However, it is worth noting here that Lefkowitz's testimony, even if fully credited, amounted to nothing more than an assertion that he gained some sort of subjective feeling that the Judgment would not be pursued against him after Mr. Odell said "I promise I am not here to go after you." The statement is as consistent with forbearance as with discharge and was made, if at all, at a time when Lefkowitz was admittedly aware that only the former option was anticipated by the settlement documents. Rubin's testimony was not to the contrary and, in fact, only confirms that his counsel made Lefkowitz fully aware that the judgment creditor had no intention of agreeing to a release.

Accordingly, it is

ORDERED, that the motion to confirm the Referee's Report dated September 28, 2007 is granted and the Referee's Report is confirmed, and the cross-motion to reject the Report is denied, and it is further

ORDERED, that the cross-motion to disqualify counsel is denied as moot, and it is further

ORDERED, that the motion to dismiss is granted, and the complaint is dismissed in its entirety, and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: May 5, 2008

ENTER:

J.S.C.

FILED
MAY 08 2008
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