SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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S & J REALTY CORP.,

Plaintiff,

-against- Index No.: 21438/1999

THOMAS V. McLAUGHLIN, JOSEPH GALL, CARO & GRAIFMAN, P.C., ... NATIONAL COUNCIL ON COMPENSATION INSURANCE, et al.,

Defendants.

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HON. GEORGE D. SALERNO:

Nature of this Action

This was an action to foreclose a certain mortgage held by Plaintiff, S & J REALTY, on real property that was partially owned by Defendant JOSEPH GALL. [1] This action was settled, pursuant to the parties' Stipulation, dated July 15, 2004, (which was later modified, but not in any relevant manner, by the parties' Stipulation, dated January 22, 2007). [2] The Stipulations were So-Ordered by the Court, pursuant to the parties' request, although this Court was not part of any settlement negotiations.

The parties' aforesaid So-Ordered Stipulations, in this foreclosure action, provided for the sale of GALL's subject property, (referred to as the Trinity

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[1] Movant Defendant NCCI's papers are fatally deficient, since they do not even include a copy of the pleadings in this foreclosure action, which was commenced 9 years ago. (See Krasner v. Transcontinental Equities, 64 A.D.2d 551 [1st Dept. 1978]; See Welton v. Drobnicki, 298 A.D.2d 757 [3d Dept. 2002]).

[2] (See Stipulations, dated July 15, 2004 and January 22, 2007, at Movant Defendant NCCI's Exhibits "E" and "F").

Apartments), and for the distribution and escrow of the proceeds of the sale.

--Parties

Movant is NATIONAL COUNCIL ON COMPENSATION INSURANCE (NCCI), who was named as a Defendant in this foreclosure action based upon its judgment lien against Defendant GALL, in the alleged principal amount of $5,147,254.00, pursuant to the "Order of Restitution", made in the U.S. District Court, District of Connecticut, by the Hon. Alan Nevas, dated July 30, 1997, and filed November 6, 1997, (the NCCI lien). [3]

Cross Movant is CARO & GRAIFMAN, P.C., a law firm, who was named as a Defendant in this foreclosure action based upon its mortgage, dated April 24, 1997, filed on May 14, 1997, against Defendant GALL's interest in the subject property.[4] The Mortgage, made to secure GALL's payment of his debt for legal services provided by the law firm, was in the principal amount of $800,000.00; and Defendant CARO & GRAIFMAN alleges that it was entitled to compounded interest [5] thereon at the rate of 10% per annum. [6] Nonparty Chase Caro, sole shareholder of the law firm, calculated that the law firm's lien totaled

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[3] (See Movant Defendant NCCI 's Exhibit "C" and "D").

[4] (See Mortgage and Note, at Movant NCCI's Exhibits "A" and "B").

[5] "Compound interest ... is recoverable where there is an express agreement between the parties". Gutman v. Savas, 17 A.D.3d 278, 279 (1st Dept. 2005).

[6] (See the "Mortgage Modification Agreement" between GALL and CARO & GRAIFMAN, annexed to Affidavit of Caro, dated April 30, 2007, Exhibit "A").

$1,908,000.00, (the CARO & GRAIFMAN's lien).[7]

The Closing & Escrow Agreement

The Closing of the sale of the subject Trinity Apartments took place on March 22, 2007, (just prior to the Defendant NCCI engaging in this unnecessary motion practice). At the Closing, the moving and cross moving parties (Defendant NCCI and Defendant CARO & GRAIFMAN), and the nonparty Escrow Agent (Counsel Narango), entered into an "Escrow Agreement", which provided that certain proceeds of the Closing of the sale of GALL's property would be held in escrow in an interest-bearing account. (See "Escrow Agreement", at Movant Defendant NCCI's Exhibit "J").

Motion and Cross Motion

Movant Defendant NCCI, seeks an order punishing Defendant, CARO & GRAIFMAN, and Nonparty Chase Caro, for contempt of court for their alleged noncompliance with the parties So-Ordered Stipulation dated July 15, 2004; and for an order compelling compliance therewith by directing the release of proceeds of the Closing of the sale of GALL's property in the amount of $1,248,789.42[8], plus accrued interest, to Defendant NCCI.

Cross Movants Defendant, CARO & GRAIFMAN, and Nonparty Chase

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[7] See Affidavit of Caro, dated April 30, 2007. (See Counsel Leimbruber's letter, dated March 15, 2007, and Counsel Gutwirth's letter, dated March 14, 2007, annexed to Affidavit of Caro, dated April 30, 2007, as Exhibits "B" and "C").

[8] Defendant NCCI's Counsel later modifies this to allege that the actual amount in Ms. Naranjo's escrow account was $1,394,883.87, plus any interest accrued. (See Supp Aff of NCCI's Counsel Tils, dated May 1, 2007).

Caro, seek an order staying distribution of the proceeds from the Closing until there is a decision on a matter entitled National Council on Compensation Insurance v. Caro and Graifman, in the U.S. District Court, District of Connecticut, Civ. No.: 3:00-CV-1025, (AHN), (referred to herein as the Connecticut Federal Court Action), an action in which NCCI sought to declare the aforesaid mortgage between GALL and CARO & GRAIFMAN "invalid so that they (NCCI) can apply the proceeds from the sale of those properties towards unpaid restitution." [9] Defendant CARO & GRAIFMAN, and Nonparty Caro, also seek costs for having to oppose Defendant NCCI's motion.

In February 2008, the Defendant NCCI submitted a copy of the seventy (70)-page decision made by the Honorable Nevas in the aforesaid Connecticut Federal Court Action, which was made "after a three-day trial and extensive post-trial briefing and motion practice." (See Letter by Defendant NCCI's Counsel Mr. Tils, dated February 19, 2008).

Defendant NCCI later informed the Court that that part of the motions relating to the distribution of the escrow funds was rendered moot by Judge Nevas' Order; since, ***pursuant thereto***, the funds in escrow were released by the Escrow Agent. (See Letter, by Defendant NCCI's Counsel Tils, dated May 6, 2008).

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[9] See Order, made by Honorable Nevas, U.S. District Court Judge, dated February 15, 2008, p. 1, in the Connecticut Federal Court Action entitled: National Council on Compensation Insurance v. Caro and Graifman, in the U.S. District Court, District of Connecticut, Civ. No.: 3:00-CV-1025 (AHN).

However, this Court is astounded that Defendant NCCI's Counsel did not withdraw the remainder of his instant motion, (which was to have this Court hold Defendant CARO & GRAIFMAN and Nonparty Caro in contempt), and writes that he still demands a decision thereon.[10]

Accordingly, this Court was forced to spend a considerable amount of time deciding the remaining issues which are: the remainder of Defendant NCCI's motion, which seeks that this Court hold Defendant, CARO & GRAIFMAN, and Nonparty Caro, in contempt; and, presumably, the remainder of Defendant, CARO & GRAIFMAN, and Nonparty Caro's Cross Motion, which seeks costs. These branches of the Motion and Cross Motion, respectively, are all denied.

Discussion

"To establish civil contempt, it must be shown that the party to be held in contempt has, among other things, disobeyed "a lawful judicial order expressing an unequivocal mandate" ", and caused prejudice, by its noncompliance with the subject order. Upper Saranac Lake Ass'n v. New York State Dep't of Envtl. Conservation, 263 A.D.2d 916, 917 (3d Dept. 1999).

Where, as here, "the order at issue contains ambiguous and vague language, a finding of civil contempt is not tenable." Upper Saranac Lake Ass'n, supra. A Court cannot punish another party for contempt for allegedly disobeying an order which "was not clear regarding the germane issues." Quick v. ABS Realty Corp., 13 A.D.3d 1021, 1022 (3d Dept. 2004).

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[10] (See Letter, by Defendant NCCI's Counsel Tils, dated May 6, 2008).

Nonetheless, as far as a Nonparty Caro, any request for relief as against him is, also, denied upon the ground that Defendant NCCI has not shown how this Court has jurisdiction over Caro individually. Caro was not a party to this action, (which this Court emphasizes was merely a *foreclosure* action), and Defendant NCCI did not commence a special proceeding against Caro. (See Siegel, NY Practice, § 484 [4th Ed. 2005], and CPLR Art 4).

--Stipulations

The "WHEREAS" clause in the aforesaid So-Ordered Stipulation provides that: "**WHEREAS NCCI, Caro & Graifman, and Gall wish to reserve their rights with respect to the distribution of Gall's share of the property**". [emphasis added].[11] In this same vein, said Stipulation goes on to provide that: "**NCCI's and Caro & Graifman's liens, if any, shall attach to the proceeds of the Sale, subject to NCCI and Caro & Graifman's claims and defenses against the other"** [emphasis added]. [12] This language evidences that the parties were preserving their rights to GALL's share of the proceeds of the Sale; and that they were mindful of their respective liens, and that the proceeds would not be distributed, except to the parties rightfully entitled thereto. There is more language supporting this in the other paragraph invoked by NCCI, which provides as follows:

"***Subject to the liens of Caro & Grafman and NCCI*, as set forth in**

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[11] (See July 2004 Stipulation, p. 2, at Movant NCCI's Exhibit "E").

[12] (See July 2004 Stipulation, ¶ 9, at Movant NCCI's Exhibit "E").

> **paragraph 9**, **in the event that Caro & Graifman and NCCI have not made any arrangements as to the disposition of the remaining proceeds**, if any, an amount equal to the principal amount of Caro & Graifman's purported mortgage lien on Gall's interest in the Property (the Caro & Graifman Mortgage) shall be placed into an escrow account to be held by Carolyn R. Narango, Esq. ... until such time as either: (i) all pending litigation between Caro & Graifman and NCCI is finally resolved; or (ii) NCCI and Caro & Graifman sign a written agreement with respect to the Caro & Graifman Mortgage." [emphasis added] [13]

Defendant NCCI alleges that these clauses mean that the *only* amount that should have been escrowed from the sale of GALL's property was the sum of $800,000.00, (which was the principal amount of the CARO & GRAIFMAN mortgage).[14] However, that is not what these clauses *actually* state.

–Connecticut Federal Court Action

Furthermore, Defendant NCCI concedes that the validity of the CARO & GRAIFMAN mortgage would be decided in the active Connecticut Federal Court Action.[15]

In fact, it was as a result of the Judgment made in the Connecticut Federal

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[13] (See July 2004 Stipulation, at ¶ 11(g), at Movant NCCI's Exhibit "E"). These relevant provisions in the July 2004 Stipulation Order were not modified by the January 2007 Stipulation, which provided that the July 2004 Stipulation would otherwise remain in full force an effect. See Stipulation, dated January 2007, at Movant NCCI's Exhibit "F").

[14] (See Aff by Defendant NCCI's Counsel Tils, p. 4, dated April 2, 2007).

[15] (See Reply Aff of Defendant NCCI's Counsel Tils, p.2, dated May 16, 2007). In addition, in CARO & GRAIFMAN's Answer in the Federal Court Action, they asserted Counterclaims relating to the release of the subject escrowed funds.

Court Action setting aside the CARO & GRAIFMAN Mortgage, that the subject escrow funds – which were put into escrow by the parties' own Escrow Agreement – were released, while NCCI's motion in this Court was still pending. (See Letter by NCCI Counsel Tils, dated May 6, 2008).

Judge Nevas made his lengthy, and complex, seventy(70)-page decision after having the benefit of a three-day trial, on October 24, 25, and 26, 2007; and extensive post-trial briefing and motion practice, upon which he duly deliberated to arrive at his reasoned February 15, 2008 Order. [16]

The "active" Connecticut Federal Court was where crucial issues pertaining to the merits of the Defendants' respective positions were expected to be, and were ultimately, decided; so Defendant NCCI should not have engaged in frivolous motion practice in this Court where there is no active case pending, and where no hearing was ever held or requested. NCCI did not even move to restore this disposed foreclosure action. NCCI risked having inconsistent decisions.

NCCI's pursuit of a decision from this Court, ***even after*** having obtained Judge Nevas' decision, shows NCCI's disregard, disrespect, and lack of understanding about the limited resources of this Bronx Supreme Court which is absolutely inundated with motions and pressing matters.

There was no real prejudice that resulted from the parties abiding by their own March 2007 Escrow Agreement – to temporarily maintain the proceeds from the Closing in an ***interest-bearing*** escrow account – ***even if*** this was not in strict compliance with the terms of the parties' prior July 2004 Stipulation. (See Escrow

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[16] (See Letter, by NCCI's Counsel Tils, dated May 6, 2008).

Agreement, Movant NCCI's Exhibit "J"). However, there could have been severe prejudice if this Court had caused the release of millions of dollars to any party not rightfully entitled thereto, based merely on the ambiguous July 2004 Stipulation made in this foreclosure action, where the underlying merits – the validity of these Defendants' respective liens – is not even alleged to be part of the pleadings.

Accordingly, those branches of the Motion, and Cross Motion, that are not rendered moot by Judge Nevas' Order, are hereby denied.

This constitutes the decision and order of this Court.

Dated: June 18, 2008

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George D. Salerno, JSC