

**Hotung v Cosmopolitan Props. & Sec.
Ltd.**

2008 NY Slip Op 32112(U)

July 17, 2008

Supreme Court, New York County

Docket Number: 0114118/2007

Judge: Milton A. Tingling

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

PRESENT: MILTON A. TINGLING
Justice

PART 441

Hutung
-v-
Cosmopolitan Properties
et al

INDEX NO. 11418/07
MOTION DATE _____
MOTION SEQ. NO. 002
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 ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion decided in accordance with attached decision

FILED
JUL 29 2008
NEW YORK COUNTY CLERK'S OFFICE

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/17/08 mgf
J.S.C.

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

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

Eric Edward Hotung,

Plaintiff,

-against-

Index No. 114118/07

Cosmopolitan Properties
and Securities Limited,
Sean Eric McLean Hotung,
and Gabrielle Hotung-Davidson,

Defendants.

-----x

Judge Milton A. Tingling:

In this declaratory judgment action, plaintiff Mr. Eric Edward Hotung (Hotung) moves, pursuant to CPLR 3212, for an order granting summary judgment in his favor, declaring that he has the sole, unencumbered right to transfer ownership/title to any purchaser of two cooperative apartments (Apartments), notwithstanding the fact that the titles, shares of stock and proprietary leases appurtenant to the Apartments were issued in the name of co-defendant Cosmopolitan Properties and Securities Limited (Cosmopolitan Properties) as trustee of respectively drafted trusts (Trusts). In addition, Hotung moves, pursuant to CPLR 603 and 3212 (e), for severance of the counterclaims against him and the cross claims against Cosmopolitan Properties being asserted by Mr. Sean Eric McLean Hotung (McLean Hotung).

In essence, McLean Hotung claims that Hotung and Cosmopolitan Properties conspired to purchase the Apartments with

misappropriated funds and fraudulently place them as assets of the Trusts.

While Cosmopolitan Properties expresses no interest in the portion of Hotung's motion seeking summary judgment, it does support the portion seeking severance of McLean Hotung's claims. Cosmopolitan Properties argues that the cross claims asserted against it by McLean Hotung: (1) are irrelevant to the issues being raised in this action, (2) will cause unwarranted delay and confusion, and (3) relate to events which occurred in Hong Kong.

McLean Hotung opposes Hotung's motion in its entirety and cross-moves, pursuant to CPLR 3212, for summary judgment declaring that the trustee under the terms and conditions set forth in the Trusts, rather than Hotung, has the right to conduct a sale of the Apartments. In addition, McLean Hotung opposes that portion of Hotung's motion seeking severance of his counterclaims against Hotung and his cross claims against Cosmopolitan Properties. McLean Hotung contends that his counterclaims and cross-claims are relevant to the assets at issue in this action.

Co-defendant Ms. Gabrielle Hotung-Davidson (Hotung-Davidson) is no longer involved in this action, in that claims asserted against, as well as those raised by, her have been withdrawn. However, there is no indication in the court's records that the caption has been amended to reflect her withdrawal as a party.

Solely for the purpose of this motion, the facts are as follows:

At all times relevant, Hotung has been the chairman of the board of Cosmopolitan Properties. Hotung is also the father of McLean Hotung and Hotung-Davidson.

Hotung sought and obtained "accommodations to [for] himself and his family in the U.S." (see Cosmopolitan Properties Meeting Minutes of September 16, 1998, first Resolution). What follows is a summary of the means utilized or caused to be utilized by Hotung in order to achieve his goal.

In September of 1998, Cosmopolitan Properties convened a board meeting wherein a board resolution (Board Resolution) was issued authorizing Cosmopolitan Properties to participate in the purchase of the Apartments so as to provide residential accommodations for Hotung and his family in the United States. The purchase of the Apartments was to be subject to terms and conditions of the contracts of sale, as well as any other terms and conditions Hotung saw fit. It was further resolved that Hotung was authorized to execute on behalf of Cosmopolitan Properties the contracts of sale and any other documents pertinent to the purchase of the Apartments. In addition, the resolution states that "Mr. Eric Hotung [Hotung] declared his interest in the Properties [Apartments] as the Properties would be used by Mr. Eric Hotung [Hotung] and his family" (see Board

Resolution, Section 2, ¶ 2). The board meeting was initiated and chaired by Hotung.

Sometime thereafter, McLean Hotung, while working for Hotung, advised Hotung that the validity of the September 1998 board meeting and the resulting resolutions was questionable. Consequently, another board meeting was convened and the actions undertaken at the September 16, 1998 meeting (including the Board Resolutions), were ratified.

In October of 1998, an agreement entitled "Limitation as to Occupancy and Designation" was entered into by and between Hotung, Cosmopolitan Properties and Osborne Tenants Corp. (the Osborne coop corporation of the building where the Apartments are located), recognizing that despite Cosmopolitan Properties' ownership of the shares, Hotung and his family were to reside in the Apartments.

In November of 1998, Hotung provided and paid the funds necessary to conclude the purchase of the Apartments. Cosmopolitan Properties as trustee of the Trusts, took title to each of the Apartments and has since held them under the terms and conditions of the Trusts. The respective shares and proprietary leases appurtenant to the Apartments were also issued to Cosmopolitan Properties. The relevant proprietary leases and Osborne's by-laws, inter alia, require that the Osborne board approve all transfers of ownership of the Apartments.

A Declaration of Trust was contemporaneously issued concerning each of the Apartments (the Trusts). In pertinent part, the Trusts state:

NOW THIS DEED WITNESSETH that in consideration of the premises the Trustee hereby DECLARES . . . it has held and now holds and will henceforth hold the Shares and Leases and the rent and profits thereof ON TRUST for the Principal [Hotung] and that the Trustee will at the request of the Principal transfer the Shares and Lease to the Principal or to such person or persons at such time or times and in such manner or otherwise deal with the same as the Principal shall direct and appoint.

In addition, "Letters of Indemnity" were issued by Hotung indemnifying Cosmopolitan Properties for any and all costs concerning the Apartments.

Since 1998, Hotung has provided and paid the funds for all maintenance and any other expenses concerning the Apartments. Inasmuch as there were no rents or profits to be considered or involved with, the only trustee obligation under the Trusts performed by Cosmopolitan Properties was to hold title, shares and leases appurtenant to the Apartments.

Hotung recently advised Cosmopolitan Properties of his decision to sell the Apartments. Cosmopolitan denies that it has refused to perform its fiduciary obligations as trustee under the Trusts. Rather, Cosmopolitan Properties claims to have been ready to proceed with the sale were it not for circumstances beyond its control. Those circumstances include curing complained-of breaches of the respective Apartment leases, as

well as alleged subsequent interference by McLean Hotung and Hotung-Davidson. Hotung claims that the Osborne Tenants Corporation will continue to withhold its approval of a sale or transfer of the Apartments because his son and daughter wrote letters claiming to have an ownership interest in the Apartments and threatening legal action against the cooperative corporation should it approve such a transfer.

The instant action ensued. Hotung seeks a declaratory judgment ordering: (i) enforcement of the Trusts, and (ii) transfer of the Apartments by Cosmopolitan Properties as directed by him. Hotung also seeks a decision from the court declaring that McLean Hotung has no interests, claims or rights in the Apartments. In addition, Hotung has asserted a claim for damages arising out of, and in connection with, McLean Hotung's interference.

Within the context of his verified answer, McLean Hotung has asserted counterclaims and cross claims sounding in the misappropriation of assets, fraud as to the formation and utilization of the Trusts, fraud as to the misrepresented purpose of forming the Trusts, fraudulent transfer of assets, and conspiring to accomplish such complained-of tortious conduct. Specifically, McLean Hotung claims that Hotung and Cosmopolitan Properties conspired to use misappropriated funds to purchase and maintain the Apartments, and, upon such purchase, place the

Apartments in Trusts for the purpose of securing them as an asset for his personal use and enjoyment. McLean Hotung further contends that if the Trusts are deemed valid, then he, as a member of Hotung's family, and as a beneficiary under the Trusts, is entitled to living accommodations as stated in the underlying, authorizing Board Resolution. On the other hand, if the Trusts are deemed invalid, then he, as a family member who reasonably relied upon the Board Resolution language setting forth the beneficial purpose of the Trusts, is likewise entitled to such living accommodations. In lieu of such accommodations, McLean Hotung seeks damages arising out of, and in connection with, not being provided use of the Apartments.

After issue was joined, some of the parties sought judicial intervention by way of bringing the instant motion and cross motions. In opposition, McLean Hotung asserts that Hotung's verified complaint is an act of fraud, conspiracy and attempted theft. McLean Hotung argues that the alleged personal funds used by Hotung to purchase the Apartments were in fact funds wrongfully appropriated by Hotung from certain family-involved business entities and trusts of which he is either a shareholder, officer, director, beneficiary, or some combination thereof.

Upon review of the record, together with the applicable law, I can resolve certain issues of law within the context of the motions now before me. Specifically, I refer to the validity of

the Trusts.

A trust is a tripartite arrangement by and between a creator, a trustee, and a beneficiary (see Estates, Powers and Trusts Law [EPTL] §7-1.3). It is a fiduciary relationship the creator intentionally establishes. under which a trustee holds title to the property, but has an enforceable duty to administer it for the benefit of another person (ibid.). A trust is not valid unless the trust corpus is separate from the beneficiary's equitable or beneficial interest (*National Superlease, Inc. v Reliance Ins. Co. of NY*, 126 Misc 2d 988 [Sup Ct, Queens County 1985], affd, 123 AD2d 608 [2nd Dept 1986]). Without such a separation, the legal title is said to merge with the beneficial interest (EPTL §7-1.1, Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, at 203).

However, EPTL §7-1.1, in pertinent part, states:

A trust is not merged or invalid because a person, including but not limited to the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest therein, provided that . . . other persons hold a beneficial interest therein, whether such interest be vested or contingent, present or future, and whether created by express provision of the instrument or as a result of reversion to the creator's estate [emphasis added].

In this case, it is quite apparent that Hotung is the creator, as well as the sole, de facto trustee. As the Chairman of the Board of Cosmopolitan Properties, Hotung has significant control necessary to enable him to utilize the corporate trustee

as an extension of himself. Likewise, as stated in the subject Trusts, the "Trustee will at the request of the Principal transfer the Shares and Lease to the Principal or to such person or persons at such time or times and in such manner or otherwise deal with the same as the Principal shall direct and appoint [emphases added]". Nonetheless, a trust is not invalid if other persons hold a [future or contingent] beneficial interest, in the Trust as a result of a reversion to the creator's estate" (EPTL §7-1.1 [emphasis added]). In this case, since no such beneficial interest has been established, the Trusts must be deemed invalid. As such, all interests and rights of the creator, trustee and beneficiary are merged together and the Apartments are thereby rendered under the sole, unencumbered possession and control of Hotung.

Moreover, a similar conclusion can be reached upon further consideration of another aspect of EPTL §7-1.1. Where, as here, it is shown that the only "actual" duty of the trustee is to passively hold the property for the beneficiary, no trust is created, and the property devolves to the beneficiary as a legal estate. In this case, though stated otherwise by the Trusts (i.e., hold the rent and profits), the only "actual" duty of the trustee is to hold the Apartments for Hotung, the beneficiary. Since the Trusts are thereby deemed void, legal title vests directly with the beneficiary by operation of law. Here,

pursuant to the unambiguous, clearly expressed terms of the Trusts, Hotung is that beneficiary. As such, the right to legal title of the Apartments vests in him.

Furthermore, application of EPTL §7-1.3 renders the Trust abolished as against certain creditors.

Under EPTL §7-1.3, "Purchase-money resulting trust abolished," "if a payor places title to the real or personal property in someone else's name, he is presumptively acting in fraud of his then existing creditors. The title vests in the transferee, but a trust results in favor of the creditors unless the presumption is rebutted (EPTL §7-1.3, Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B at 218). While evidence sufficient to rebut the statutory presumption of fraudulent intent, has not been offered, none of the parties has sufficiently established an applicable creditor's claim upon which to impose such relief.

In conclusion, regardless of whether the Trusts are deemed invalid or void, the end result is the same, in that upon either declaration, Hotung is deemed entitled to sole, unencumbered interests and rights to do with the Apartments as he sees fit. If the Trusts are deemed void, than those interests and rights vest in him by operation of law. If the Trusts are deemed invalid, than those interests and rights are bestowed upon him, in that they are merged together from those purportedly separated

by the Trusts.

As to any remaining claims subject to an application for summary judgment, the test is "whether the pleadings raise a triable issue of fact" (*Creighton v Milbauer*, 191 AD2d 162, 165 [1st Dept 1993]). The court's function on such a motion is issue finding, not issue determination (*ibid.*). Summary judgment will only be granted if there are no material and triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

There are significant issues of fact in this case that can not be resolved upon the papers before the court, but require a plenary trial for proper disposition. Such issues of fact include, but are not limited to: (1) whether McLean Hotung to his detriment reasonably relied upon purportedly fraudulent misrepresentations concerning the purpose (i.e., use by Hotung and his family) of establishing the Trusts; (2) Hotung's intent in obtaining the Apartments and establishing the Trusts; (3) whether Hotung and Cosmopolitan Properties wrongfully conspired together in carrying out the allegedly fraudulent scheme of converting and secreting misappropriated funds by using those funds for the purchase and maintenance of the Apartments and placing the Apartments as assets of the Trusts; (4) what is a reasonable interpretation of the Board Resolution phrase "providing accommodations for Mr. [Eric] Hotung and his family in

the U.S.," together with the Limitation of Occupancy and Designation agreement phrase, "No individuals other than Eric Hotung and his spouse, children, grandchildren, parents, grandparents, brothers, sisters . . . shall be permitted to occupy the Apartment"; and (5) whether the letters to Osborne from McLean Hotung and Hotung- Davidson interfered with the issuance from Osborne of its approval of a prospective Apartments purchaser.

Accordingly, summary judgement is denied in all respects as to the remaining claims in this action.

Furthermore, though complicated and somewhat disjointed, McLean Hotung has, at this juncture, sufficiently demonstrated that the claims he has asserted against Hotung and Cosmopolitan Properties are relevant to this action. Severance is not to be granted where, as here, the convenience of disposing all issues in one trial clearly outweighs any possible prejudice to the complaining party (*Kidder Peabody & Co. v Loewe*, 12 AD2d 917 [1st Dept 1961]). As such, severance is denied, and the parties are directed to proceed in a timely and appropriate manner with the prosecution and defense of all of the remaining claims being asserted in this action.

To reiterate, partial summary judgment is granted in favor of Mr. Eric Hotung, and it is hereby;

ADJUDGED and DECLARED that Eric Edward Hotung has the

sole, unencumbered right to transfer ownership/title of the Apartments to any purchaser; and it is further

ORDERED that Sean Eric McLean Hotung's cross motion seeking summary judgment declaring that trustee Cosmopolitan Properties and Securities Ltd., rather than Eric Edward Hotung, as creator of the Trusts, has the right to sell the apartments, is denied in all respects; and it is further

ADJUDGED and DECLARED that under the Trusts and the applicable law deeming the Trusts void and/or invalid, Sean Eric McLean Hotung has no rights to and/or interests in the Apartments; and it is further

ORDERED that, inasmuch as Eric Edward Hotung's motion seeking severance is denied in its entirety, the parties are to proceed with the timely and appropriate execution and defense of the remaining claims in this matter.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/17/08

ENTER:

FILED
JUL 29 2008
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COUNTY CLERK'S OFFICE

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J. S. C. JUDGE MILTON A. TINGLER