

Patti v Holdings

2008 NY Slip Op 32574(U)

September 16, 2008

Supreme Court, Nassau County

Docket Number: 5814-08/

Judge: Daniel Martin

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SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK**

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

CHRISTOPHER PATTI.

Plaintiff.

- against -

Sequence No.: 001 & 002

Index No.: 005814/08

MARIE HOLDINGS AND THOMAS GUBITOSI
TTEE MARIE HOLDINGS INC., RET PSB FBO
THOMAS GUBITOSI.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Cross-Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, plaintiff's motion for a preliminary injunction enjoining defendants herein from taking any enforcement proceedings in connection with the confession of judgment that is the subject of the instant action is denied. Defendant's cross-motion for a preliminary injunction enjoining plaintiff herein and the executors or trustees of the estate of Joseph James Patti from distributing any funds or assets from either the estate of Joseph James Patti or any trusts thereunder to plaintiff is granted.

The following facts are undisputed. On July 6, 2006 plaintiff herein executed separate promissory notes which were both secured by mortgages in connection with plaintiff's purchase of the real property located at 105 Norwood Avenue, Malverne, New York. Each note was for the sum of \$250,000.00 plus interest, one being given to defendant Marie Holdings, Inc. and the other note being given to defendant Thomas Gubitosi TTEE Marie Holdings, Inc. Ret PFB FBO Thomas Gubitosi. On August 5, 2006 plaintiff defaulted on both loans by failing to make payments thereon. On November 5, 2007 the parties executed an agreement pursuant to which Marie Holdings, Inc. would take title to the subject property, defendants terminated all interest due as of July 5, 2006 and plaintiff executed confessions of judgment in favor of the defendants in which plaintiff acknowledged that he owed each defendant \$303,709.92. Said confessions of

judgment were to be held in escrow pending the determination of any deficiency remaining after a sale of the property. Pursuant to the agreement the plaintiff would be liable to defendants for the difference between the amount owed by plaintiff to defendants and the net sales proceeds and plaintiff was to pay said amount off over a period of sixty months at 12% interest. Pursuant to the agreement Marie Holdings, Inc. was to list the property at \$540,000.00 for six months and in the event that there are no offers during that time, to list the property at a list price of \$510,000.00. In the event Marie Properties, Inc. received no offers at \$510,000.00 it was permitted to reduce the list price to \$495,000.00. Plaintiff expressly authorized Marie Holdings, Inc. in said agreement to sell the property at a price within 5% of the list price.

By letter dated January 31, 2008 defendants' attorney informed plaintiff's attorney that Thomas Gubitosi had decided to purchase the property for \$470,250.00 or 95% of the then current list price of \$495,000.00. After making certain adjustments for such items as outstanding taxes, fuel, broker's commission, title expenses and legal fees defendants calculated the net sales proceeds to be \$414,230.36 which sum was divided equally between defendants. Reducing each of the net receipts enjoyed by the respective defendants by the amount owed to each by plaintiff results in plaintiff's owing a deficiency of \$96,594.48 to each defendant.

Plaintiff now moves for a preliminary injunction which enjoins defendants from enforcing their judgments against plaintiff. Defendants cross-move for a preliminary injunction enjoining plaintiff and/or the executor or trustee of the estate of plaintiff's father or any trusts established by plaintiff's father from paying any funds or assets from said estate or trusts to plaintiff until the judgments against plaintiff are satisfied.

Plaintiff's Motion for a Preliminary Injunction

The court shall first determine plaintiff's motion for a preliminary injunction. Neither plaintiff in his supporting affidavit nor his attorney in his affirmation set forth a basis for why this court should issue an injunction. In the complaint, plaintiff asserts that defendants breached the November 5, 2007 agreement by "unilaterally and unconscionably" determining the amount of the confession of judgment. It is not until the reply affirmation that plaintiff's attorney sets forth, if briefly, what plaintiff believes constituted the inequitable calculation of the amount of the judgment by stating that in determining the amount of the net proceeds of the sale defendants included an expense of \$32,500.00 payable to a title company.

In moving for a preliminary injunction plaintiff must demonstrate a likelihood of success on the merits, irreparable harm in the absence of the injunction and that a balancing of the equities favors granting the relief. See, Aetna Insurance Company v. Capasso, 75 N.Y.2d 860 (1990); J.A. Preston Corporation v. Fabrication Enterprises, Inc., 68 N.Y.2d 397 (1986); Grant v. Sgroi, 52 N.Y.2d 499 (1983).

Plaintiff has failed to demonstrate a likelihood of success on the merits. The interpretation of a contract is a matter of law and as such is within the province of the court. W.A. Olson Enterprises, Inc. v. Agway, Inc., 55 N.Y.2d 659 (1981); Automotive Management Group, Ltd. v. SRB Management Co., Inc., 239 A.D.2d 450 (2nd Dep't 1997). The contract is

“...to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.” Automotive Management Group, Ltd., supra at 55.; Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 (1960). “[C]lear, complete writings should generally be enforced according to their terms.” Automotive Management Group, Ltd., supra at 55; Wallace v. 600 Partners Co., 86 N.Y.2d 543, 634 N.Y.S.2d 669 (1995).

Having reviewed the agreement at issue the court notes that defendants herein, in disposing of the subject property complied with its requirements regarding the amount of the list price, the amount of the sale price and the calculation of the deficiency. The court finds unavailing plaintiff’s position that defendants may have included a large payment to the title company which decreased the amount of the net proceeds, which in turn had an adverse impact on the amount of the deficiency. In his reply affirmation defendants’ attorney affirms that he sent correspondence to plaintiff’s attorney that included in the \$32,548.88 paid to the title company the following was satisfied: transfer tax (\$1,881), recording of satisfaction of liens (\$250), unpaid real estate taxes (\$21,199.88) and an Internal Revenue Service tax lien (\$9,218).

Accordingly, the court finds that plaintiff has failed to demonstrate a likelihood of success on the merits herein. Plaintiff’s motion for a preliminary injunction is denied.

Defendants’ Cross-Motion for a Preliminary Injunction

Defendants seek the above stated preliminary injunction on the grounds that plaintiff’s father is now deceased and his will provided for a trust which provided that plaintiff and his brother, Joseph F. Patti, were to serve as co-trustees of the trust and the home of plaintiff’s father is in the trust. Further, counsel for defendants points out that plaintiff stands to inherit a significant amount of money from the estate, much of which is the result of a personal injury settlement on decedent’s behalf. Defendants’ attorney avers that he heard from plaintiff’s attorney that plaintiff intends to move to South Carolina. It is also undisputed that defendants issued restraining notices to the co-trustees of the trust, plaintiff and his brother not to disburse any funds or dispose of any assets therefrom.

The court finds that for the reasons stated above the defendants have demonstrated a likelihood of success on the merits.

The court will also find that defendants have demonstrated irreparable harm where the assets defendants seek to restrain are specific funds which can be regarded as the subject of the action. Compare, Coby Group, LLC v. Hasenfeld, 46 A.D.3d 593 (2nd Dep’t 2007). The assets of the estate and trust are specific funds and the subject of this action.

The court further finds that defendants have demonstrated that a balancing of the equities favors granting the relief sought herein as any inconvenience to defendants in the event the assets of the trust are dissipated outweigh any inconvenience to plaintiff.

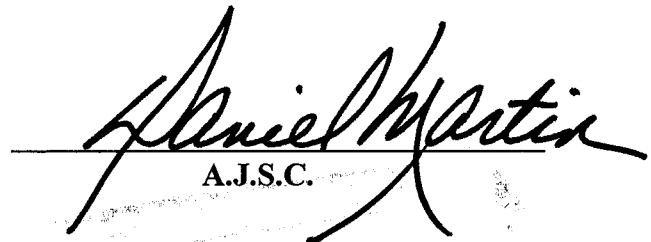
Accordingly, based upon the foregoing, it is directed that plaintiff as well as the executors of the estate of Joseph James Patti and the trustees of any trusts established thereunder are hereby

precluded from the disbursal of any funds or assets of said estate to plaintiff Christopher Patti pending resolution of the instant action.

Defendants are directed to post an undertaking in the sum of \$38,000.00. CPLR 6312.

So Ordered.

Dated: September 16, 2008


A.J.S.C.

ENTERED
SEP 19 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE