

Knopf v Perdicaro

2009 NY Slip Op 30803(U)

March 31, 2009

Supreme Court, Albany County

Docket Number: 08-019900

Judge: Edward G. McCabe

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. EDWARD G. McCABE,
Supreme Court Justice

	FORECLOSURE PART NASSAU COUNTY
HAL KNOPF and SONDRALISI,	INDEX NO.: 08-019900
Plaintiffs,	MOTION SEQ. NO.: 1

-against-

CHARLES PERDICARO, SALVATORE MELI, ESQ.
and "JOHN DOE, RICHARD ROE, JANE DOE,
CORA COE, DICK MOE AND RUBY POE" the six
defendants last named in quotation marks being intended to
designate tenants or occupants in possession of the herein
described premises or portions thereof, if any there be, said
names being fictitious their true names being unknown
to plaintiffs.

Defendants.

X

The following papers were read on this application:

Notice of Motion.....	1
Plaintiff's Memorandum of Law.....	2
Defendant Meli's Memorandum of Law.....	3
Reply Affirmation.....	4

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Motion by the attorneys for the defendant John J. Meglio, Esq., for an order pursuant to 22 NYCRR Disciplinary Rule 1200.21 [DR 5-102] disqualifying plaintiff's counsel, Gregory S. Lisi, Esq.

In May, 2005 defendant, Salvatore Meli, an attorney at law (Meli) represented the Estate of Vera Lena Laghi (seller) in the conveyance of a vacant parcel of real property (subject property). The subject property is being foreclosed upon pursuant to the within mortgage foreclosure proceeding. The purchaser of the subject property was defendant Charles Perdicaro (Perdicaro) who was represented in the purchase of the subject property by Gregory Lisi, Esq. (Lisi). The latter also represents the plaintiffs' mortgagees in the within mortgage foreclosure proceeding. Meli is a party defendant in the within mortgage foreclosure proceeding. Meli entered and docketed a judgment in the sum of \$31,040.56 in the Nassau County Clerk's Office on March 12, 2008 against defendant Perdicaro. On July 5, 2007, Perdicaro executed the bond and mortgage in the sum of \$250,000 which is the subject of the within foreclosure action. Attorney Lisi represented the plaintiffs-mortgagees in the subject mortgage transaction.

Pursuant to the executory contract dated August 2, 2005 for the purchase of

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the subject property, defendant Perdicaro issued a deposit check in the sum of \$22,000. The check was made payable to defendant Meli "as escrowee." On or about September 20, 2005, Meli deposited the \$22,000 check into his escrow account to be held by him until the closing of title. It is not disputed that about three days later defendant Meli's bank notified him that Perdicaro's check was returned for "uncollected funds." Meli notified Perdicaro's attorney, Lisi, that Perdicaro's check had been returned uncollected. Lisi advised Meli to redeposit the check. On or about September 29, 2005, defendant Meli contends he contacted his bank and was mistakenly informed that this time Perdicaro's check had cleared.

On February 27, 2006, a closing took place regarding the conveyance of the subject property. Lisi represented Perdicaro at the closing. At the closing Perdicaro received a credit of \$22,000 toward the purchase price based on the amount of the contract deposit.

Incredulously, in February of 2007, during an annual audit of his escrow account Meli discovered that Perdicaro's \$22,000 check had not been collected or paid in September, 2005. On or about June 28, 2007, Meli commenced an action against Perdicaro in Civil Court Queens County to recover the amount due on the

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dishonored check issued by Perdicaro. The action was settled on November 13, 2007. Perdicaro defaulted on the terms of the Stipulation of Settlement and Meli entered judgment against Perdicaro on March 10, 2008 in the amount of \$31,040.56. The judgment was docketed in the Nassau County Clerk's Office on March 12, 2008. Attorney Lisi represented Perdicaro in the Queens County Civil Court action, from answering the summons and complaint to the execution of the Stipulation of Settlement.

In the within action, defendant Meli has interposed a counterclaim against the plaintiffs and a cross claim against defendant Perdicaro alleging the following:

30. The Subject Mortgage constitutes a conveyance under the terms of the Debtor and Creditor Law.
31. The defendant Meli was a creditor with a matured, liquidated and fixed claim against the defendant Perdicaro when the defendant Perdicaro executed and delivered the Subject Mortgage on July 5, 2007.
32. The conduct of the Attorney Lisi, the defendant Perdicaro, and the plaintiffs herein constitutes a conspiracy designed and intended to hinder, delay and defraud the defendant Meli.
33. As a result of the foregoing the Subject Mortgage is void and unenforceable against the defendant Meli since it constitutes a transfer in fraud of a creditor under the provisions of the Debtor and Creditor Law of the State of New York.

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Meli asserts that from on or about February 7, 2007, and on several occasions thereafter, both orally and in writing, he notified Lisi that Perdicaro's check had not been paid and was returned uncollected.

Meli brings this motion to have Lisi disqualified as the attorney representing the plaintiffs. Defendant Perdicaro refinanced the existing mortgage on the subject property. He paid off the existing lien in the approximate sum of \$210,000 by taking the subject mortgage from the plaintiffs in the sum of \$250,000.00. Meli argues that Lisi should be disqualified since he may be called upon to give testimony that will be adverse and prejudicial to his clients, the plaintiffs-mortgagees (see DR5-102). Meli asserts he will establish that his judgment is superior in right to the plaintiffs' mortgage based on a violation of the Debtor and Creditor Law. Defendant Perdicaro has not appeared in this action although served.

Lisi's argument that the attorney client privilege (between himself and his former client Perdicaro) and the Disciplinary Rules preclude him from testifying is misplaced. Perdicaro's check was returned unpaid. At the time Perdicaro refinanced the mortgage, Lisi, his former attorney, represented the mortgagees. Meli has set forth credible proof to support the allegation that Perdicaro engaged in fraudulent conduct by issuing a check with insufficient funds and attending the

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mortgage refinance where he may have received the balance of the mortgage proceeds without thereafter using any part of the balance of the mortgage proceeds to make Meli whole. A well-established exception to the attorney-client privilege applies to communications with counsel for the purpose of furthering a fraud. The attorney-client privilege set forth in CPLR 4503 and 3101(b)(c) “may not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct.” *See Superintendent of Insurance of State v Chase Manhattan Bank*, 43 AD3d 514, citing *Ulico Casualty Co. v Wilson, Elser, Moskowitz & Dicker*, 1 AD3d 223, 224.

A trial lawyer who functions also as a trial witness is thought to be more easily impeachable for interest, and thus a less effective witness for the client (Code of Professional Responsibility EC 5-9). By the same token, the interest of the adversary in a fair trial is said to be threatened in that opposing counsel may be handicapped in challenging the credibility of a lawyer-witness who also appears as an advocate in the case. Recognizing that the roles of an advocate and a witness are inconsistent, and that it is, from a public image point of view, “unseemly” for a lawyer in a trial to also argue his own credibility as a witness, the Code of Professional Responsibility directs that a lawyer, who *ought to be called* as a

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witness on behalf of his client, shall withdraw from the conduct of the trial and not continue representation. Code of Professional Responsibility DR 5-102(A); DR 5-105(D); *see S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 444; *see also Tru-Bite Labs v Ashman*, 54 AD2d 345.

By letter dated March 21, 2007, Meli advised Lisi that he was in continuous contact with Perdicaro's bank and still waiting a reply regarding the status of the bounced check. In the letter to Lisi, Meli stated, "If your client feels the check was paid when it was redeposited at his request, a copy of both sides of the cancelled check would greatly expedite the resolution." (Exhibit A, Affirmation of Gregory S. Lisi). Lisi asserts he only represented the plaintiffs, not Perdicaro, in the mortgage refinance of the subject property, and his representation of the plaintiffs was limited to preparing the mortgage documents. Lisi states the title search by the plaintiffs showed no liens and that "the title company insured free and clear of any judgments and liens."

Disqualification motions premised on the advocate-witness rule are subject to strict scrutiny because of the great potential for abuse when a lawyer seeks to call opposing counsel as a witness and moves to disqualify him as counsel. Meli has the burden of demonstrating that the testimony to be given by the attorney (Lisi) is necessary and substantially likely to be prejudicial to the plaintiffs in the

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within mortgage foreclosure proceeding. See DR5-102 (22 NYCRR § 1200.21).

Lawyers as Witness; also see *S & S Hotel Ventures Ltd. Partnership v 777 SH Corp.*, 69 NY2d 437; *Rose Ocko Foundation v Liebovitz*, 155 AD2d 426. Among other inquiries, Meli seeks to probe Lisi to determine whether Lisi was merely a scrivener who drew up the mortgage and note, or also was responsible for procuring the title report, and clearing any liens or claims against the subject property (one of which may be Meli's claim against Perdicaro for giving him the down payment check subsequently dishonored by the bank for insufficient funds). This testimony is relevant to the allegations set forth in Meli's counterclaim and cross-claim and may be substantially prejudicial to the plaintiffs.

Meli's motion to disqualify plaintiff's counsel is granted. Plaintiffs shall have until May 7, 2009, to engage new counsel.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the 14th day of May, 2009, at 9:00 AM. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the defendants shall serve a copy of this

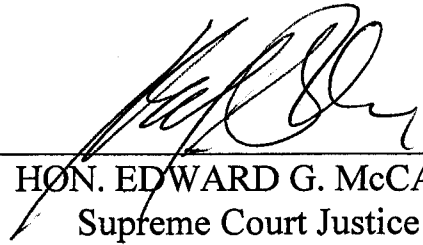
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order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

This constitutes the decision and order of the Court.

ENTER:

Dated: March 31, 2009
Mineola, NY



HON. EDWARD G. McCABE
Supreme Court Justice

ENTERED
APR 08 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

EGM/lmb/hh

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