

Rubin v Salters

2009 NY Slip Op 31482(U)

June 30, 2009

Supreme Court, Nassau County

Docket Number: 011687/07

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

MARK RUBIN, individually and derivatively on behalf of and in the right of PRODIGY HOMES, LLC, MJM REALTY CO., LLC, MJM SOUTH CAROLINA, INC., MJM NORTH CAROLINA, INC., MJM LOUISIANA CORPORATION and MJM CAPITAL PARTNERS, INC.,

Plaintiffs,

INDEX NO.: 011687/07
MOTION DATE: 04/09/2009
MOTION SEQUENCE: 020 and 021

-against-

JAMES SALTERS, DANISMINE CORP., CATALYST DEVELOPMENT CORP., SALTERS AND SALTERS, INC., MARTIN J. BUSH, RICHARD BUCKHOLZ and, as nominal derivative defendants, PRODIGY HOMES, LLC, MJM REALTY CO., LLC, MJM SOUTH CAROLINA, INC., MJM NORTH CAROLINA, INC., MJM LOUISIANA CORPORATION and MJM CAPITAL PARTNERS, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Appendix & Exhibits Annexed	2
Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	3

PRELIMINARY STATEMENT

There are three motions which remain open among the parties. Sequence No. 18 seeks renewal and re-argument of an Order of this Court dated September 26, 2008, which denied the Plaintiffs' motion to hold Defendants James Salters and Dansimine Corp. in contempt. At a

conference of the parties on June 24, 2009, counsel for the Plaintiffs has withdrawn this motion without prejudice to renewal at a later time. Sequence No. 20 is also a motion by the Plaintiffs for re-argument or renewal of the Court's order of September 19, 2008, which directed a hearing on the issue of whether the sale of six "Congaree Road" properties on April 21, 2008 violated the August 3, 2007 and September 26, 2007 orders of Justice Bucaria.

This Decision and Order will deal with Sequence Nos. 20 and 21.

Motion Sequence No. 20

In this motion the Plaintiff contends that no hearing, as ordered by the Court in its September 19, 2008 decision, is required, in that the facts are undisputed and were perhaps misapprehended by the Court. In the order of September 19, 2008 ¹ the Court indicated that the imposition of sanctions against defendants other than Buckholz would be considered at a hearing. The purpose of the hearing would be to determine if they violated a lawful order of the court which expressed an unequivocal mandate of which the defendants were aware.

The orders which they are alleged to have violated is dated August 3, 2007 ² and September 26, 2007. They are the result of an application by the Plaintiffs for an order restraining the defendants from "selling, transferring, alienating or otherwise affecting the ownership of the property of any plaintiff, and from divesting, secreting, transferring, alienating or dissipating any funds that they have received from any of the plaintiffs and any funds that they have received from the sales of any of plaintiff's property." The August 3, 2007 Order restrained and enjoined, pending a determination on the preliminary injunction, from selling, transferring or conveying, but not from contracting to sell, any real property owned by the plaintiffs or the defendants, irrespective of whomever held title. Contracts of sale signed by the defendants were to be provided to counsel for the defendants, counsel for the plaintiffs, and co-counsel for the plaintiffs on the date executed.

In the event the defendants did sell any real property referenced in the order, all net proceeds of the sale were to be held in escrow by counsel for the defendants, and not to be

¹ Exh. "A" to Motion.

² Exh. "B" to Motion.

released without further order of the Court

A subsequent Order, dated September 27, 2007, also enjoined the plaintiffs and defendants from “selling, transferring, conveying, assigning, contracting to sell or otherwise encumbering or alienating any real property owned and/or controlled by any plaintiff or any defendant in this matter, until further written order of the Court, unless same is consented and agreed to in a writing signed by all counsel of record in this matter.”³ This order, however, modified the term “property” by limiting it to that “which is the subject matter of this action and does not include any real property unrelated to this action.”

The movant annexes to the motion copies of deeds from Rubin to MJM South Carolina dated July 1, 2004, from MJM South Carolina to Danismine dated June 20, 2006, and from Danismine to Yoland M. Smith-McCrae dated April 21, 2008. Only the latter postdates the aforementioned orders of the Court. The Plaintiff claims that this sale violated the orders of the Court and constituted contempt of Court.

The issues to be determined include whether or not the conveyed parcel is “the subject matter of this action” and whether this was reasonably knowable by the alleged contemnors.

The import of this motion is that the documentary evidence submitted with the motion was adequate to establish that Danismine conveyed title to one of the parcels involved in the proceeding after the entry of an Order precluding such transfer, and ipso facto, Danismine is guilty of contempt.

The first issue is whether or not the parcel conveyed by deed dated April 21, 2008 is “involved in the proceeding.” The movant contends that this is the “Congaree Road” property referred to in ¶¶ 29 and 235 of the Amended Complaint. ¶ 29 states as follows:

29. There are at least two (2) additional properties owned by MJM Realty (known as “Boulder Park”) and MJM South Carolina (known as “Congaree Road”), which, upon information and belief, are being improperly controlled by Defendants after Salters falsely advised Rubin that they had been sold to third parties, but instead Salters and the Defendant Entities have retained them for their own benefit.

³ Exh. “C” to Motion.

¶ 235 states as follows:

235. As yet another example of his dishonesty and self-dealing, Salters has falsely advised that another property belonging to MJM South Carolina, known as “Congaree Road” has been sold when, upon information and belief, it was not but simply retained by Defendants for their own benefit.

In opposing the original motion, the Defendants conceded knowledge of the orders of August 3, 2007 and September 26, 2007, but challenged the clarity of its application to the Congaree Road property. They take the position that the aforementioned paragraphs of the Amended Complaint are not appropriate for consideration, since that document post-dated the orders which the movant claims the Defendants violated. The Court also notes that while the deed in question (Exh.”F”) contains an annexed description, it is not a metes and bounds, referring to Congaree Road, but identifies the parcel as Lots 2 — 7 on a subdivision plot. However, all parties seem to agree that this is the Congaree Road property, and the Court will accept this as a stipulated fact.

It is clear that the deed from Danismine on April 21, 2008 was subsequent to the orders of August 3, and September 26, 2007, which superseded the August 3 order. It was only in October 2007, that the amended complaint made specific reference to the parcel known as Congaree Road. The opposition to the original motion stated that the original complaint made no such reference, although that document does not appear to be before the Court. The opposition further contended that Congaree Road was not involved in the litigation, since it had been conveyed, allegedly for “valuable consideration”, from MJMSC, by deed signed by Plaintiff Rubin, to Danismine. If no Plaintiff had an interest in the property as of June 21, 2008, when Danismine conveyed to McRae, it would certainly raise an issue as to whether or not the property was involved in the litigation.

The September 26, 2007 Order prohibits the transfer of any real property which is the subject matter of this action and does not include any real property unrelated to this action. The transferor, on June 21, 2008, may well have believed that Congaree Road was unrelated to the action, either because it was not referred to in the original complaint, or because it had been taken out of play by virtue of the conveyance by MJM South Carolina, Inc. to Danismine Corp.

on June 20, 2006. If the June 20, 2006 conveyance was for adequate consideration, Danismine may well have concluded that it was no longer a part of the joint efforts of the Plaintiffs and Defendants to develop and market the property.

The Court cannot conclude the issue of contempt in the absence of this information. As previously determined, a hearing is required to make any such determination. A hearing on this issue of contempt will be conducted along with the trial of this matter.

The motion to reargue (Motion Sequence No. 20) is denied. The Court did not misapprehend an issue of fact or law so as to warrant reconsideration. Neither has there been provided newly discovered evidence which obviates the need for a hearing.

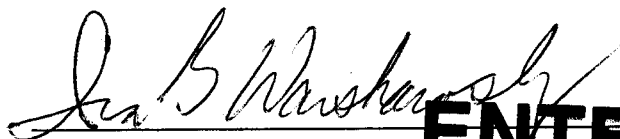
Motion Sequence No. 21 - Leave to Serve an Amended Complaint by Buckholz

Buckholz was not named as a defendant in the original complaint, but was named in the Amended Complaint of October 2007. It appears that the original answer, interposed before Court-ordered discovery in September 2008, did not include cross-claims or counterclaims. As a result of the aforementioned discovery, Buckholz believes that he has valid counterclaims and cross-claims, involving what is referred to as a ponzi scheme, in which moneys invested by him and others was never used for the stated purposes, and has been diverted by those against whom he now interposes a claim.

The motion for leave to serve an amended answer as annexed to the motion papers at Exh. "C" is granted and is deemed served as of the date of this decision. Movant has not been dilatory, and provides a rational basis for not having interposed the cross-claims and counterclaims until after the benefit of discovery.

This constitutes the Decision and Order of the Court.

Dated: June 30, 2009



J.S.C.

ENTERED

JUL 06 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**