

Rubin v Salters

2009 NY Slip Op 31877(U)

August 4, 2009

Supreme Court, Nassau County

Docket Number: 011687/2007

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 and in the right of PRODIGY HOMES, LLC, NJM REALTY CO., LLC, MJM SOUTH CAROLINA, INC., MJM LOUISIANA CORPORATION and MJM CAPITAL PARTNERS, INC.,

Plaintiffs,

INDEX NO.: 011687/2007
MOTION DATE: 06/26/2009
MOTION SEQUENCE: 022

-against-

JAMES SALTERS, DANISMINE CORP., CATALYST DEVELOPMENT CORP., SALTERS AND SALTERS, MARTIN J. BUSH, RICHARD BUCKHOLZ, and, as nominal derivative defendants, PRODIGY HOMES, LLC, NJM REALTY COL, 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:

Order to Show Cause, Affidavit & Exhibits Annexed	1
Affirmation of Kenneth E. Aneser in Opposition to Order to Show Cause & Exhibits Annexed	2

PRELIMINARY STATEMENT

The Defendant James Salters moves for a determination that the Plaintiff Mark Rubin is guilty of civil and criminal contempt for violations of the Orders of this Court dated September

26, 2007 and October 2, 2008.¹ These orders respectively provide in pertinent part as follows:

ORDERED that: (1) the defendants, their agents, servants, employees, and any and all others acting on behalf or in concert with them; and (2) the plaintiffs, their agents, servants, employees, and any and all others acting on behalf or in concert with them are all hereby restrained and enjoined 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.

* which is the subject matter of this action and does not include any real property unrelated to this action

* * * * *

Accordingly, it is ORDERED that the defendants, their agents, employees and contractors are preliminarily enjoined from (a) transferring any real property owned in the past or present by either plaintiffs or defendants without notifying plaintiffs of all facts and details of such transfer., or (b) entering into any contract for the sale of real property owned in the past or present by either plaintiffs or defendants without forwarding a copy of such contract to all counsel of record within twenty-four (24) hours, pending entry of a judgment in this action, on condition that the plaintiffs have filed in the Office of the Clerk of the Supreme Court, Nassau County, an undertaking pursuant to CPLR § 6312(b) in the amount of \$100,000, and served a copy of it upon the defendants.

BACKGROUND

The underlying action involves a series of investments in real estate. As of the present time, both the Plaintiffs and Defendants are enjoined from distributing or encumbering any of the properties which are the subject of this litigation. By this motion, the twenty-second in this proceeding, Defendant Salters claims that Plaintiff Rubin has violated the terms of the recent court orders prohibiting the alienation or encumbering of the properties. The claimed violations are set forth in the Salters affidavit annexed to the motion, and consist of the failure of Rubin to file a \$100,000 undertaking, allegedly in violation of the October 2, 2008 Order, and

¹ These orders are annexed to the moving papers as Exh. "A".

encumbering eight parcels of land of Prodigy in conjunction with a dispute which involved only one of the plots. This is a claimed violation of the September 27, 2007 Order.

The latter event arose from a contract between Bill Staz and Nancy Staz, as Purchasers, and Prodigy Homes, LLC as Seller, to construct a home at 20019 Northport Dr., Cornelius, Mecklenburg County, North Carolina.² When the construction of the home was delayed, Staz commenced an action against Prodigy Homes, LLC, MJM Realty Co, LLC, Mark Rubin and James Salters. The action was apparently resolved by a September 2007 confession of judgment by Prodigy Homes, LLC in the amount of \$50,000, with an agreement by the Plaintiff that it would take no action on the judgment until April 1, 2008.³

DISCUSSION

Civil Contempt

Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate.⁴ To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed.⁵ The party to be held in contempt must have knowledge of the order, although actual service on the party is not required.⁶ In order to find a party in contempt, actual prejudice to a party to the litigation must be demonstrated.⁷

Criminal Contempt

Unlike civil contempt, criminal contempt is intended to punish, since it involves an

² Exh. "J" to Motion.

³ Unexecuted copy at Exh. "L".

⁴ *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); *See also, Thorsen v. Nassau County Civil Services Com'n.*, 32 A.D.3d 1037 (2d Dept. 2006).

⁵ *Pereira v. Pereira*, 35 N.Y.2d 301, 308 (1974).

⁶ *People ex rel. Stearns v. Marr*, 181 N.Y. 463, 470 (1905).

⁷ *Matter of McCormick v. Axelrod* at 583.

offense against judicial integrity, and is designed to protect the process rather than reimburse another for their loss.⁸ “Although the line between the civil and criminal contempt may be difficult to draw in a given case and the same act may be punishable as both a civil and criminal contempt, the element which escalates a contempt to criminal status is the level of willfulness associated with the conduct.”⁹

In reviewing the foregoing principles, the Court first determines that Rubin is not in contempt of the Order of this Court dated October 2, 2008. That order makes the posting of a \$100,000 undertaking conditional upon the entry into a contract for the sale of real property by either party and the notification of the other party within 24 hours. The purpose was to impose an obligation on the seller to give prompt notification, but to become entitled to the benefit of this relief, the Plaintiff was required to post an undertaking.

It may well be that by failing to post security, the Plaintiff has deprived himself of the notification of a sale in the manner and time to which he was otherwise entitled. The failure, therefore, runs to the benefit of the Defendant. The Defendant has not been prejudiced in any way, and there is no financial loss which one could point to as a consequence of failing to post security. The motion for contempt for violation of the Order of October 2, 2008 is denied.

Neither has the Plaintiff violated the Order of September 26, 2007. That order enjoined both parties from “. . .selling, transferring, conveying, assigning, contracting to sell or otherwise encumbering, or alienating any property which is the subject matter of this action” The purchase and sale agreement between Prodigy and Mr. and Mrs. Staz was executed on September 21, 2006.¹⁰ Mr. and Mrs. Staz commenced their action against Prodigy in June, 2007.¹¹ While the copy of the Settlement Agreement submitted¹² is unexecuted, and undated, it does reflect its

⁸ *King v. Barnes*, 113 N.Y. 476 (1889).

⁹ *McCain v. Dinkens*, 84 N.Y.2d 216, 226 (1994), citing *Matter of McCormick v. Axelrod*.

¹⁰ Exh. “J” to Motion.

¹¹ Exh. “K” to Motion.

¹² Exh. “L” to Motion

preparation in September 2007, virtually contemporaneously with the September 26, 2007 Order. While Mr. Salters was a named Defendant in the action, it is unclear when he first became aware of it; but a January 18, 2008 correspondence from Plaintiffs' counsel indicates that the settlement had not been agreed upon as of that date, but that a copy of the proposed document was being forwarded. Mr. Salters then counsel responded by letter dated March 11, 2008 that the proposed settlement with Statz was unacceptable.¹³ By letter dated March 20, 2009, Plaintiffs' counsel advised Salters' attorney that their client was in default in the Statz matter, and that the relatively modest resolution was in the best interests of all parties, and they would execute the stipulation.¹⁴

This was obviously not a violation of the September 26, 2007 Order. The obligation to Mr. and Mrs. Statz arose in 2006. All of the named Defendants in the Statz action were responsible in an action which has been referred to as indefensible. The modest resolution was an obligation, not a choice. For Mr. Salters to establish that he was prejudiced by this action, he would have to show that a trial of the North Carolina action would have produced a favorable result for the Defendants, and that the costs of defense were less than the amount paid in settlement. There is not a scintilla of evidence that such would have been the case in the event of a trial.

The motion to hold the Plaintiff in contempt of the Order of September 26, 2007 is denied.

This constitutes the Decision and Order of the Court.

Dated: August 4, 2009


J.S.C.

ENTERED
AUG 13 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

¹³ Exh. "I" to Affirmation in Opposition.

¹⁴ Exh. "L" to Affirmation in Opposition.