

Somerstein v Bistate Oil Mgt. Corp.

2009 NY Slip Op 32017(U)

August 27, 2009

Supreme Court, Nassau County

Docket Number: 007184/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

STUART SOMERSTEIN and MARIANNA
SOMERSTEIN,

Plaintiffs,

INDEX No. 007184/09

MOTION DATE: July 7, 2009
Motion Sequence # 001, 002, 005

-against-

BISTATE OIL MANAGEMENT CORP.,

Defendant.

The following papers read on this motion:

- Order to Show Cause..... XX
- Cross-Motion..... X
- Affirmation in Opposition..... XX
- Affirmation/Affidavit in further Support.. XX
- Sur-Reply Affidavit..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

This motion, by plaintiffs Stuart and Marianna Somerstein, brought on by order to show cause, for an order staying enforcement of a judgment by confession entered March 20, 2009 in the amount of \$915,225 pending the outcome of this action to vacate the Judgment, vacating all restraining notices, information subpoenas and other enforcement mechanisms in connection with the Judgment served by defendant Bistate Oil Management Corp. pending the outcome of this action is **granted** in part and **denied** in part, and it is

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ordered that enforcement of the Judgment is **stayed** pending the outcome of this action or further order of the court provided plaintiffs file an undertaking in the amount of \$1,000,000 (see, **Schwartz v Gruber**, 261 AD2d 526, 1999), and vacatur of the enforcement mechanisms is **denied**; and a motion, by defendant Bistate Oil Management Corp., brought on by order to show cause, for an order transferring venue to New York County and requiring an undertaking is **denied** with respect to venue and **granted** with respect to an undertaking, and a cross-motion, by defendant Bistate, for an order transferring venue or for an order converting this proceeding to a plenary action and allowing discovery is **granted** in the alternative and this proceeding is deemed a plenary action pursuant to CPLR 103(c) on consent, and defendant shall have twenty days after service upon its counsel of a copy of this order to serve an answer and the parties are directed to appear for preliminary conference to schedule discovery in chambers at 9:30 a.m. on October 15, 2009.

This summary proceeding, now deemed an plenary action, was brought by petitioners, now plaintiffs, Stuart Somerstein and Marianna Somerstein, to vacate Judgments by Confession and stay enforcement of such Judgments. They allege that a Collateral Assignment and Settlement Agreement dated 2/5/09 (the Agreement) which settled an action commenced by Bistate in New York County was the basis for the Confessions of Judgment and a Mortgage on a residence owned by Marianna Somerstein. They contend that the Agreement was not fully executed or binding. Therefore, they argue, Bistate wrongfully entered judgment against them and filed a mortgage on their residence in Nassau County. They filed a Petition in this court on April 15, 2009 to declare the Agreement null and void and to vacate the Judgments. Although the Petition does not allege fraud, the Somersteins now aver that Bistate committed fraud in filing the Judgments and the mortgage on premises owned by Marianna Somerstein.

The main issue in this action is whether the Collateral Assignment and Settlement Agreement dated 2/5/09 (the Agreement) between the parties is effective and binding. A crucial procedural issue, that of venue, must be resolved prior to addressing the merits of the Agreement as related to plaintiffs' application to vacate.

The settlement agreement arises out of an action commenced by Bistate in New York County under Index No. 600234/09 to recover \$940,000 due on a \$1,000,000 loan against Stuart M. Somerstein, Marianna Somerstein, a/k/a Marika Somerstein and Quinn Restaurant Corporation d/b/a Water's Edge Restaurant (the New York Action). Without service of process upon the Somersteins in the New York County Action, Bistate and the Somersteins executed the Collateral Assignment and Settlement Agreement dated 2/5/09, a guarantee,

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Affidavits of Confession of Judgment, a mortgage on premises owned by Marianna Somerstein, and an Escrow Agreement appointing David S. Frydman, Esq., Bistate's counsel, as escrow agent.

The Collateral Assignment and Settlement Agreement recites that it is between Marianna & Stuart Somerstein (collectively Assignor) and Bistate Oil Management Corp. (the Assignee). The Agreement indicates that the Somersteins had contracted to sell stock of a wholly owned corporation, M.S. Marine Development Corp. (owner of Quinn Restaurant Corp.), to one H&R Convention & Catering Corp. They agreed to assign the Note resulting from that transaction to Bistate. The Assignor disputed that anyone other than Stuart was obligated on the loan, but nevertheless agreed to:

(i) pledge to Assignee all of Assignor's right, title and interest in and to the \$1,000,000 "Note" . . . and secure purchaser's recognition of such Pledge, (ii) cause the "Note" . . . to be issued to the Assignee, and (iii) guarantee the full and timely payment of the Loan balance, \$915,000, and all amounts under the Note, with such guarantee secured by confessions of judgment and a subordinate mortgage on Assignor's home at 200 Ocean Avenue, Lawrence, NY 11559

The Agreement does not contain an explicit statement that the purchaser's recognition of the Somersteins' pledge is a condition precedent to the effectiveness of the Agreement.

There is no issue with regard Stuart Somerstein's obligation to Bistate regarding the balance due on the loan. Indeed, his letters from January to November of 2007 to Richard Siegal, President of Bistate, express his "love" and "gratitude" to his "true friend", thank him for his "graciousness", acknowledge that Stuart has "taken advantage" of Richard's "good nature". Stuart explicitly promises: "I will make you whole I promise I will".

The Somersteins failed to secure H&R Convention & Catering Corp.'s acknowledgment of the Pledge. They nevertheless insisted that Bistate discontinue the New York Action against Quinn Restaurant Corporation, owned by M.S. Marine Development Corp., as the pending litigation negatively impacted upon the proposed transaction between M.S. Marine and H & R Convention.

In this action, the Somersteins take the position that the Agreement never took effect due to the failure of a condition precedent, i.e., the signature of H&R Convention, the

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purchaser of M.S. Marine to the Acknowledgment. Bistate takes the position that there was no condition precedent, and that the Somersteins fully executed the Agreement rendering it effective.

A factual issue exists, for, as noted, the Agreement can be taken as silent or ambiguous with respect to a condition precedent. Both parties, in writing, previously took positions regarding the Agreement which contravene those taken in this proceeding. The Somersteins, by their counsel Todd Pickard, stated in an email dated 2/12/09 "We do not consider execution by H&R Convention and Catering Corp. . . . to be a condition precedent to the effectiveness of the Collateral Assignment and Settlement Agreement." By February 23, however, the Somersteins appear to change that position in an e-mail in which they demand return of the signed confessions of judgment and the mortgage on the Lawrence residence, and offer two new proposals "in light of the collapse of the negotiated settlement agreement due to failure of condition precedent". This change of position was apparently triggered by Bistate's refusal to provide a discontinuance against Quinn as agreed until H&R, Quinn's purchaser, acknowledged the Pledge and Assignment (see 2/13/09 e-mail from Marika [Somerstein] to Richard [Siegal]).

Bistate, on the other hand, in an email dated 2/12/09 takes the position that the Collateral Assignment and Settlement Agreement had to be "fully executed" with an Acknowledgment and Consent executed by H&R (the Acknowledgment). However, when it became clear that H&R would not execute the Acknowledgment, Bistate also altered its position, and refused to return the Agreement, retaining the Mortgage and Confessions of Judgment, stating in an e-mail to Somersteins' counsel dated 2/23/09 "no documents will be returned to you." Abandoning its position that the acknowledgment of H&R was a condition precedent, by letter dated 2/25/09 Siegal declared the Somersteins in "default" under the Collateral Assignment and Settlement Agreement, and provided ten days notice to cure the default in assigning the "Note, Pledge Agreement and Guaranty" to them.

After petitioners commenced this action Bistate filed an Amended Complaint in the New York County Action on April 30, 2009 seeking a declaration regarding its rights under the Collateral Assignment and Settlement Agreement. Prior to the filing the Amended Complaint, Bistate discontinued the New York County Action against Quinn Restaurant Corp., d/b/a Water's Edge Restaurant. Bistate's change of position in this regard is not explained.

It is noted that several things are not in dispute notwithstanding the alleged wrongful

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filing of the Judgments by Confession. Bistate Oil Management Corp. provided a one million dollar check to and in favor of Stuart Somerstein. \$85,000 was repaid with one \$20,000 installment made via Quinn Restaurant Corporation check during settlement negotiations.

Turning to the issue of venue, it is necessarily the first procedural issue, for if venue is changed, the remaining issues would be transferred. Defendant's application to change venue to New York County is premised upon the contractual venue provision of the Agreement. Even were the validity of the Agreement established, which it is not, public policy precludes placing venue in New York County.

CPLR 3218 governs judgments by confession and "reflects a carefully devised scheme providing for entry of judgment by the clerk of the county in which the debtor resides" (CPLR 3218). A "judgment by confession may be entered only in the county designated in the debtor's affidavit" (*Terezakis v. Goldstein*, 168 Misc.2d 298, 300, Supreme Court, New York County 1996). The policy is intended to protect third party creditors, and entry of a judgment by confession in an unauthorized county will render the judgment void (CPLR 3218[b]). Moreover, a defective confession of judgment which does not place venue in the debtor's county will not be "treated as innocent, i.e., should not be considered a mere matter of venue, as in a contested action" as the "main purpose of the affidavit is the protection of third persons" who may assure themselves that the confession is for a legitimate debt; "the county to which such third person should be able to turn in order to check on the confession is the debtor's residence county" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, Civil Practice Law & Rules, C3218:8). To comport with policy considerations, parties to litigation should not be permitted to contract away third party interests and a motion to vacate should be "restricted to its original venue" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, Civil Practice Law & Rules, C3218:16). Vacatur of a judgment by confession "must be sought in the court in which the judgment was entered" (*Gkanios v. Gkanios*, 233 AD2d 367, 2d Dept 1996). Accordingly, venue shall remain in this court.

Bistate also seeks dismissal of the petition, now complaint, on the grounds that a prior action is pending. However, the original complaint in the New York County Action addresses the Somersteins liability on a loan; it does not concern the Agreement. The Amended Complaint was filed after commencement of this proceeding. Accordingly, Bistate's amended claim for a declaratory judgment regarding the Agreement was not filed

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prior to plaintiffs' application for a declaratory judgment and vacatur.

Turning to the application for a preliminary injunction, in order to be entitled to a preliminary injunction, plaintiffs must show "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in [its] favor" (Aetna Ins. Co. v Capasso, 75 NY2d 860, 862, 1990), and must file an undertaking (Schwartz v Gruber, 261 AD2d 526, 1999).

Although the Agreement is ambiguous confessions of judgment "are always closely scrutinized ... and in judging them a liberal attitude should be assumed in favor of the judgment debtor" (Rae v. Kestenberg, 23 AD2d 565, 2d Dept, *affd* 16 NY2d 1023, 1965). An ambiguous agreement and a liberal attitude toward the debtor is sufficient to establish a likelihood of success on the merits and satisfy the equities in plaintiffs' favor. Irreparable injury as established at the hearing before Justice Palmieri on April 15, 2009, is sufficient.

Dated AUG 27 2009

Stephen A. Bucarea
J.S.C.

ENTERED
AUG 31 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE