

**Jacobi v Goscinski**

2009 NY Slip Op 32342(U)

October 2, 2009

Supreme Court, Nassau County

Docket Number: 016113/09

Judge: Daniel R. Palmieri

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*Sum*

**SHORT FORM ORDER**

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

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**DEBORAH JACOBI and JAMES DRUDY,**

**TRIAL PART: 47**

**Plaintiff,**

**INDEX NO.:016113/09**

**-against-**

**MOTION DATE:9-2-09**

**SUBMIT DATE: 9-25-09**

**SEQ. NUMBER - 001**

**CAROLE S. GOSCINSKI,**

**Defendant**

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**The following papers have been read on this motion:**

- Order to Show Cause, dated 8-13-09..... 1**
- Affidavit in Opposition, dated 9-8-09.....2**
- Reply Affidavit, dated 9-15-09.....3**

This motion pursuant to CPLR 6311 for a preliminary injunction enjoining the defendant's encumbrance, or interference with the plaintiffs' exclusive possession, use and enjoyment, of premises commonly known as 18 Moss Lane, Levittown, New York, and tolling the plaintiffs' time for performance under an alleged purchase agreement, is granted to the extent that defendant is enjoined from encumbering the property, or interfering with the plaintiffs' exclusive possession, use and enjoyment of the subject property, including the commencement of any action or proceeding to remove them from the premises in this or any other court, upon the giving by the plaintiffs of an undertaking in the amount of \$5,000

within 30 days of the date hereof. CPLR 6312(b). The motion is otherwise denied. The temporary restraining order granted upon the execution of the order to show cause will remain in effect pending the expiration of the 30-day period given to provide the undertaking.

This is an action for specific performance, breach of contract and fraud based on an alleged agreement regarding the sale to the plaintiffs, or, in the alternative, sharing proceeds of a sale to a third party, with regard to a certain home in Levittown, New York. The parties to that agreement are the plaintiffs and the defendant. Plaintiff Deborah Jacobi is the daughter of defendant Carole S. Goscinski. Plaintiffs currently reside in the home with their minor child. The property is titled to the defendant.

The facts and circumstances leading to the current litigation are a muddle of accusations and counter-accusations concerning the history and dynamics of the family, and how the agreement came into existence. The essential contention of the plaintiffs is that the agreement was made because they were caring for Goscinski's aged and ill father, Jacobi's grandfather, at the premises. The home had been purchased with the grandfather's funds but title was placed in his name and defendant's, as joint tenants with right of survivorship, and she became the sole beneficiary of his estate under his will. However, because the agreement at issue here concerns real property and a writing is presented, the Court need not make any findings with respect to the family history underlying the litigation for purposes of deciding this motion. Its task is to determine whether the plaintiffs have made the requisite showings for a preliminary injunction in light of that writing.

The well-established requirements for the granting of a preliminary injunction are: a demonstration of likelihood of success on the merits of the underlying action, irreparable harm absent the granting of the injunction, and a showing that the equities lie in favor of the

moving parties. *See, e.g., Aetna Ins. Co. v Capasso*, 75 NY2d 860 (1990). In the present case, the plaintiffs are residing in the house and it is undisputed that the defendant has taken steps to reclaim the property, including serving them with a notice to quit. If they are removed, the house is sold and the proceeds taken by the defendant, they will lose rights in the premises they claim is given to them by the agreement. The Court therefore finds that irreparable harm has been shown absent the granting of the injunction. In addition, the loss of their home will force a relocation with their minor child, and while the defendant has alleged that she has been forced to defend her interest in the house by paying taxes and insurance, the potential loss of a residence to a family outweighs these payments, which will be recouped on a sale. Accordingly, the equities favor the plaintiffs. The motion therefore turns on whether the plaintiffs can demonstrate the likelihood of success on the merits.

This calls on the Court to evaluate the writing submitted. In its entirety, it reads precisely as follows:

As of April 09, Deborah Jacobi & James Drudy will live @ 18 Moss Lane Levittown, N.Y. 11756 rent free but will pay for utilities & taxes that have incurred on said house. Then they will try & get a mortgage for what ever they want. I am asking for \$150,000.00 clear monies no less.

They must do this by the end of Aug 09. If they cannot get mortgage by then, we will as said in June 06 sell house. She will get \$200,000 minus incurred bills. This is final as agreed upon.

The writing is signed by Carole S. Goscinski, with an address and telephone number provided. The document is dated April 27, 2009, and the signature is notarized by a notary public from Tennessee, where the defendant resides.

The Court finds this to be an enforceable contract to sell the home to the plaintiffs for \$150,000, or, in the alternative, to give the Deborah Jacobi \$200,000 from a sale to a third

party<sup>1</sup> upon plaintiffs' failing to obtain a mortgage by the end of August, 2009. It is signed by the party to be charged, identifies the parties to the contract, describes the subject matter and states the essential terms. *See, Atai v Dogwood Realty of N.Y., Inc.*, 24 AD3d 695 (2d Dept. 2005); *Sabetfard v Djavaheeri Realty Corp.*, 18 AD3d 640 (2d Dept. 2005); *Came Realty, LLC v Canadian Imperial Bank of Commerce*, 10 AD3d 348 (2d Dept. 2004).

Nevertheless, for the same reason that the contract is enforceable the plaintiffs are not entitled to an injunction barring a sale by the defendant. It is clear from the record that no mortgage was obtained by the end of August, 2009. Notwithstanding all the alleged misrepresentations and bad behavior of which mother and daughter accuse one another, there is no proof that the defendant played any role in the plaintiffs' failure to meet the deadline for obtaining a mortgage. Under the terms of the agreement, this means that the house was to be sold and \$200,000 of the proceeds given to plaintiff Deborah Jacobi, less incurred bills – those charges for utilities and taxes still owed at the time of closing, and/or were previously paid for by the defendant, as these charges were the plaintiffs' responsibility under the agreement. There is no statement from the defendant that she plans not to pay her daughter this amount, and indeed she is obligated to do so.

A court cannot rewrite the clear terms of a contract, which of course includes one concerning real property. *RKO Properties Ltd. v Boymelgreen*, 62 AD3d 683 (2d Dept. 2009); *H. Fox & Co. v Blumenfeld*, 24 AD3d 722 (2d Dept. 2005). Here, the plaintiffs wish

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<sup>1</sup> The use of the feminine pronoun excludes James Drudy from receiving the proceeds jointly with Deborah Jacobi, but the use of the plural elsewhere indicates that he is to be a vendee if the plaintiffs purchased the house.

to have the Court recognize the validity of the agreement, which it has done, but at the same time escape the effect of one of its clear provisions, that is, that they must have a mortgage by the end of August, 2009 or the alternative would occur, sale of the premises and a payment to Deborah Jacobi. They therefore have failed to demonstrate likelihood of success on the merits of their action to the extent they seek to purchase the home for \$150,000, or, relatedly, that there is any basis for tolling the period by which they were to obtain a mortgage enabling them to do so.

However, the Court finds the injunction warranted to the extent that it would bar the defendant from attempting to immediately remove the plaintiffs from the home. The agreement contains no express terms as to whether the plaintiffs could continue to reside at the premises while it was being offered for sale. Nevertheless, reading the agreement as a whole, it cannot be said that the right to occupancy terminates upon the failure to obtain a mortgage. The plaintiff Deborah Jacobi continues to have a gross \$200,000 interest in the premises. Given that fact and the silence of the agreement otherwise, it appears to have been within the intendment of the parties that the plaintiffs would continue to live in the house rent-free until the agreement was fully performed -- either by the plaintiffs' purchase of the premises, or by the purchase by a third party and payment of the proceeds under its terms.

Accordingly, the Court finds that the plaintiffs have demonstrated the likelihood of success on the merits to the extent that Deborah Jacobi seeks specific performance of the agreement to pay her \$200,000 for her interest in the premises, and her concomitant right to remain until that interest has been satisfied by such payment. Because the defendant has

made it clear that she intends to seek plaintiffs immediate removal, an injunction is appropriate. The Court rejects defendant's assertion that plaintiffs should not prevail on this motion because defendant paid a recent insurance bill, as well as back taxes to avoid a tax lien sale, demonstrating the plaintiffs' breach of the April 27 contract. Even assuming that there was a failure to meet these requirements, the agreement itself accounts for such an omission on plaintiffs' part by way of its provision calling for a deduction from the \$200,000 for any such "incurred expenses".

The Court also finds, however, that the agreement must be read to mandate cooperation by the plaintiffs in the defendant's efforts to sell the premises, as a contrary interpretation would clearly frustrate the intent of the parties as expressed in the writing. They are thus bound to allow access to the home, and to permit the examination of the premises, by defendant and others authorized by her for purposes related to the sale and financing thereof. A refusal to do so would constitute a breach of the agreement just as much as the defendant's attempt to remove them prior to the closing of a third-party sale, and would give grounds to the defendant to move to vacate or modify the injunction granted herein. CPLR 6314.

The Court would point out that in view of current conditions in the financial markets there may be little advantage to the defendant to refuse a sale to the plaintiffs for the \$150,000 net sum ("clear monies"), even at this juncture, as she will still owe her daughter a gross sum of \$200,000 from a third-party sale. An appraisal of the home annexed to plaintiffs' reply papers indicates a value of \$365,000. As a practical matter, this means that unless the defendant is confident that she will realize a good deal more than \$350,000 from

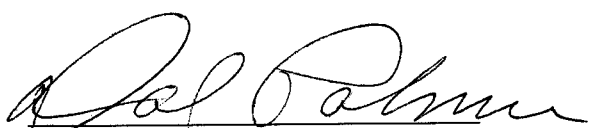
a sale (based upon the appraisal, unlikely after broker's fees and other expenses), she may not make any more money from a third-party sale than she would from a direct sale to the plaintiffs for \$150,000 – and would gain the additional benefit of not having to be concerned about the condition of the house or the level of cooperation the plaintiffs would provide a real estate broker.

Finally, this matter must now be litigated as would any other matter pending before the undersigned. Accordingly, counsel for the parties are directed to appear for a preliminary conference in the basement of the courthouse at 9:30 a.m. on **November 6, 2009**. Failure to appear as directed may lead to the imposition of sanctions pursuant to 22 NYCRR § 202.27.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 2, 2009

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Jablonski and Jablonski  
Attorneys for Plaintiff  
50 Glen Street, Ste. 208  
Glen Cove, NY 11542**

**ENTERED  
OCT 06 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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