

Bernard v Charova

2010 NY Slip Op 34091(U)

May 4, 2010

Supreme Court, New York County

Docket Number: 109494/2009

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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Thomas G. Bernard,
Plaintiff,

-against-

Irena Charova a/k/a Iraida Charova,
Defendant.

Index No. 109494/2009

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Louis B. York, J.:

The court file is sealed, pursuant to an interim order dated January 6, 2010. A second order was also issued on January 6, 2010 under motion sequence number 001.¹ Under motion sequence number 002, plaintiff Thomas G. Bernard (Bernard) now moves (1), pursuant to CPLR 3211 and Civil Rights Law §§ 80-a, 81 and 83, for an order dismissing the counterclaims with

¹Under motion sequence number 001, Bernard sought summary judgment on the issue of liability, an inquest for damages, and an order directing the City Marshall to eject Charova from Bernard's apartment. On January 6, 2010, this court issued an order under that motion sequence which denied that motion with leave to renew pending the expiration, withdrawal or modification of the temporary orders of protection. The first temporary order of protection was issued on April 23, 2009 by the Hon. James D. Gibbons and the second on September 22, by the Hon. Tandra L. Dawson. The September 22, 2009 order referred to Charova's home as being 711 East 11th Street, Apt. 9E.

Though Charova asserts in paragraph 10 of her cross motion, under motion sequence number 002, that the orders of protection are in full force and effect until the end of 2011, none of the motion sequence number 001 or 002 exhibits support her assertion. Pursuant to Exhibit H, attached to Bernard's motion, and Exhibit B, attached to Charova's cross motion, the first temporary order of protection, dated April 23, 2009, expired on May 15, 2009 and the second on October 26, 2009.

A third subsequent order of protection, which was issued by Justice Dawson on February 22, 2010, did extend the order of protection until December 21, 2011. However, it did not include a reference to 711 East 11th Street, Apt. 9E as being Charova's home address. The February 22, 2010 order of protection was not included as an exhibit in the party's papers under either motion sequence numbers 001 or 002, but was included as part of a March 12, 2010 letter sent from Bernard's counsel to the court and Charova's counsel. Plaintiff thereafter moved, under motion sequence number 003, to reargue and renew the court's motion sequence number 001 decision.

prejudice; and (2) pursuant to Civil Rights Law §§ 80-a, 81 and 83, for an order granting a judgment for imprisonment of five years and a fine of \$5,000.00 against both Irena Charova a/k/a Iraida Charova (Charova) and her attorney, Peter Sayer, Esq. (Sayer).

Charova cross-moves (1) for an order denying all of the motion relief sought by Bernard; and (2) pursuant to 22 NYCRR 130-1.1, for an order imposing sanctions against Bernard and his attorney, Benjamin Kaplan, Esq. (Kaplan).

In her original pro-se answer, Charova counterclaims for breach of contract based upon promissory estoppel, and seeks restitution pursuant to Civil Rights Law § 80-b (*see* Notice of Cross Motion, ¶¶ 24 and 26). The restitution being sought includes a “claim for monies expended” (*id.*, ¶ 31). Bernard raises the affirmative defenses of failure to state a cause of action and the statute of frauds in his answer to her counterclaim.

The breach of contract is premised upon a series of unwritten verbal promises (the Agreement) allegedly made by Bernard (*see* Charova Answer and Counterclaim, ¶ 4), which resulted in expenditures that she incurred and certain services that she rendered on behalf of Bernard. The expenditures allegedly started accruing in 2005 while Bernard was not working and was completing law school. Bernard argues that the promises were made in anticipation of marriage and, as such, they are not enforceable under Civil Rights Law § 80-a, known as the “Heart Balm” statute.

The promises were (1) to pay for all her expenditures incurred on behalf of Bernard; (2) to support her and her child after Bernard finished law school, for as long as they stayed together and until her child was grown (which she estimates would be \$60,000.00 per year for the years 2009 to 2018); (3) in the event they did not stay together, to pay Charova a portion of the value of

Bernard's law license (which she estimates to be worth \$1,000,000.00); (4) to marry her (which she bases upon discussions and their shopping for a wedding ring); (5) to allow her to live in the apartment for the indefinite future until her child was 18 years old; and (6) to transfer to her one-half of his titled interest in the apartment (which she estimates to be worth \$850,000.00).

The underlying action is that of an action for the ejectment² of Charova from the cooperative apartment purchased by Bernard on July 7, 1998 (the apartment). Bernard is the sole shareholder of 272 ½ shares of Class B common stock in Village East Towers Incorporated. Village East is a limited profit cooperative housing project incorporated pursuant to the Limited-Profit Housing Companies Law of the state of New York (*see Notice of Motion, Exhibit G*), more commonly known as "Mitchell Lama" in the Private Housing Finance Law (*see Riverbay Corporation v Houston*, 23 Misc 3d 1104[A], 2009 NY Slip Op 50588[U] [Civ Ct, Bronx County 2009]), and, as such, is income-sensitive in its statutory design (*see Limited-Profit Housing Companies Law* § 31 [3] and [5]). The resale price of shares is regulated by statute (*see Limited-Profit Housing Companies Law* § 31-a [a] through [e]).

The record does not reflect any contribution from Charova toward the original purchase of the apartment. It only reflects that Bernard and Charova met in 1997 and that, eight years later, in December 2005, Charova moved into Bernard's apartment³ along with her then five-

²Subsequent to a domestic altercation, two temporary orders of protection were issued which directed Bernard to stay away from Charova at her "home." Charova is currently residing in Bernard's co-op apartment where, prior to the orders of protection, Bernard had resided since 1998 and Charova has resided since 2005.

³She states in her January 24, 2010 affidavit that because he promised to marry her, she moved out of her spacious apartment and moved all of her belongings into his apartment. She claims that she supported him while he was in law school by contributing all of her income to the daily household expenditures, and as a result, has saved no income for her or her son.

year-old son.⁴ She states that, in 2007, 2008 and 2009, Bernard listed Charova and her son on the “Tenant/Shareholder Annual Income Affidavit” form. The court notes that a redacted version of the notarized form is attached as an exhibit to her October 26, 2009 Affirmation in Opposition under motion sequence number 001. That form indicated, amongst other things, that Bernard and Charova filed separate tax returns.

Discussion

On a motion to dismiss, the court must treat the facts alleged in the complaint, or in a counterclaim, to be true and give the plaintiff, or counter-claimant, the benefit of every reasonable favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sanders v Winship*, 57 NY2d 391, 394 [1982]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Garner v Natural China Gas, Inc.*, 2010 NY Slip Op 02095[U] [2d Dept 2010], *2). “However, bare legal conclusions, as well as factual claims flatly contradicted by the record are not entitled to any such consideration” (*Garner* at *2). Here, the counterclaim is that of a breach of a contract, the Agreement, which is comprised of a series of alleged promises with one of the promises being a promise to marry (*see* promise number four, above; *see also* Notice of Cross Motion, Exhibit A, ¶ 3).

The Agreement, as a whole, specifically alludes to the possibility of their not staying together (*see* promise numbers two and three above) and includes alternative results should a marriage not happen. That scenerio was apparently an understood possibility as inferred in an undated letter from Bernard to Charova (*see* motion number 001 Charova Affirmation in

⁴There are no children in common, and Charova receives child support from the biological father.

Opposition, Exhibit E). That letter indicated that there were evolving domestic problems. The parties never did marry. Instead an altercation occurred and the temporary orders of protection were issued.

“[U]nmarried partners are not entitled to the same property and financial rights upon termination of the relationship as married people” (*cf. Ericson v Baron*, NYLJ, 3/26/2010, at 48; col 5 [Sup Ct, NY County, Gesmer, J.] [cause of action for a constructive trust premised upon time, effort and language such as “what’s mine is yours,” dismissed]; *see also Sharp v Kosmalski*, 40 NY2d 119 [1976] [the transfer of funds or other valuable property, either alone or in addition to time and effort, are needed to establish a constructive trust based upon a promise]; *Vassel v Vassel*, 40 AD2d 713 [2d Dept 1972], *aff’d* 33 NY2d 533 [1973] [statements reflecting emotions of a happier time do not constitute a promise for the purposes of imposition of a constructive trust as to property owned separately]). Although Charova has not specifically alleged the existence of a constructive trust, she seeks similar relief under promises number three and six. Regarding services that were rendered (*see* Notice of Cross Motion, Affirmation in Support, ¶ 7), “As a matter of human experience, personal services will frequently be rendered by two people living together because they value each other’s company or because they find it a convenient or rewarding thing to do” (*Morone v Morone*, 50 NY2d at 488).

Pursuant to section 80-a of the Civil Rights Law, originally enacted as section 61-b of the Civil Practice Act (L 1935, ch 263), “[t]he rights of action to recover sums of money as damages for alienation of affections, criminal conversation, seduction, or breach of contract to marry are abolished. No act done within this state shall operate to give rise . . . to any such right of action.” (*Marmelstein v Kehillat New Hempstead*, 45 AD3d 33, 35 [1st Dept 2007], *aff’d* 11

NY3d 15 [2008]). A “complaint cannot be sustained on the basis of an alleged breach of contract to marry since that would violate section 80-a of the Civil Rights Law which prohibits such causes of action” (*Roney v Janis*, 77 AD2d 555, 556 [1st Dept 1980], *aff’d* 53 NY2d 1025 [1981]).

“Under settled principles of New York law, a contributor to a pre-marital gift entitles the contributor not to the retention of the entire gift, but to a lien against the asset to the extent of the contribution” (*DeFina v Scott*, 195 Misc 2d 75, 79 [Sup Ct, NY County 1990]; see also *Gaden v Gaden*, 29 NY2d 80, 84-88 [1971] [a lien may exist to the extent of contribution]). Such a result is not precluded by Civil Rights law § 80-a. Pursuant to Civil Rights Law § 80-b, the court may either award a lien against an asset or money damages based on a contribution to a pre-marital gift, which abolished suit for breach of contract to marry” (*DeFina v Scott*, 195 Misc 2d at 79-80). Where a wedding does not occur, those monies jointly spent are not recoverable under the Heart Balm Statute (Civil Rights Law § 80-a), though, pursuant to Civil Rights Law § 80-b, certain funds are legitimate items for recovery where the sole consideration for their donation was a marriage that did not occur, *i.e.*, funds deposited in a joint account (*Bruno v Guerra*, 146 Misc 2d 206, 207 [Sup Ct, NY County 1990]). Civil Rights Law § 80-b, entitled “Gifts made in contemplation of marriage,” provides in pertinent part:

Nothing contained in this article shall be construed to bar a right of action for the recovery of a chattel, the return of money ... or the value thereof when the sole consideration for the transfer ... was a contemplated marriage which has not occurred, and the court may, if in its discretion justice so requires, (1) award ... a lien upon the chattel ... or real property for monies expended in connection therewith or improvements made thereto, (2) deny judgment for the recovery of the chattel ... or for rescission of the deed and award money damages in lieu thereof.

“[T]he foreseeable and detrimental reliance on a promise may suffice as ‘consideration’ supporting a contract claim. It may even overcome objections based on the statute of frauds in

extreme instances. The promisor in such cases is estopped to deny his promise” (3 Dobbs Law of Remedies, § 2.3 [5]). In her response to his demand for a bill of particulars, and in various exhibits attached to her opposition papers submitted under motion sequence numbers 001 and 002, Charova lists services that she has performed and provides a portion of the receipts for the expenditures that she has incurred since December 2005.⁵ Though Exhibit C indicates that she provided certain expenditures on a monthly basis, those funds are nonetheless denoted on the exhibit receipts signed by Bernard as being for “rent.” Exhibit B, the “Tenant/Shareholder Annual Income Affidavit” form is redacted and does not reflect what the monthly rent was on the apartment. The court is unable to determine if the monthly expenditure, identified as the rent, paid for Bernard’s entire monthly mortgage payment and monthly fees, or comprised a 50% portion for her share of the rent which she would otherwise be paying had she remained in her own apartment and not moved in with Bernard. Charova may be entitled to recoup a certain portion of what she refers to as her expenditures, minus 50 % for rent, if the receipts show that they are more than her proportionately fair share of monthly payments on the apartment. That amount could be easily determined from, amongst other things, a review of the unredacted “Tenant/Shareholder Annual Income Affidavit” forms. Exhibit D, the ring receipt, does not indicate any contribution on her part towards that item.

As a matter of law, it is clear to the court that, while there may be proof of contributions sufficient to form a basis for the validity of the damages sought by Charova in item number one, there is no basis for the damages sought in items two through six of the Agreement. While the

⁵In support of her damages discussion presented in her cross motion under motion sequence number 002, Charova makes references to Exhibits B, C and D in her opposition papers submitted under motion sequence number 001.

relief that she seeks mimics that sought by a partner in a validly recognized common law marriage, or a same-sex partner relationship validly recognized in another jurisdiction, or a spouse, as in *O'Brien v O'Brien* (66 NY2d 576 [1985]), here, there is no basis to grant similar relief other than that for alleged contributions in item number one.

The court notes that a claim may be barred by the statute of frauds, which requires a writing where a contract, by its terms, “is not to be performed within one year from the making thereof” (*Pandian v New York Health & Hospitals Corp.*, 54 AD3d 590, 591 [1st Dept 2008]; General Obligations Law § 5-701 [a] [1]). However, given the tenuous nature of some of the promises in the Agreement, and the fact that Charova did not have a lease with Bernard, the court views the receipts, submitted as exhibits for a portion of the contributions or expenditures under item number one of the Agreement, to be a series of separate rent receipts given on a month-to-month basis.

Counsel for both parties, in their role as officers of the court, have zealously sought to represent the interests of their clients. A note of issue has not been filed. The exhibits supporting Charova’s claim for reimbursable expenditures under item number one of the Agreement appear to be incomplete. On April 2, 2010, this court issued an interim order, under motion sequence number 003, which found that, despite the orders of protection, Charova had no right to the apartment (*see Borkowski v Borkowski*, 38 AD2d 752 [2nd Dept 1972]), and Bernard had made a cause of action for ejectment. Bernard now has the option to renew his motion to recoup possession of his apartment through proper procedures. Charova is entitled to depart from the apartment with all of her possessions that she brought from her old apartment,

and is obligated to depart the apartment, leaving it in the condition it was in before the orders of protection were issued, as, since the parties never married, she is not a family member with any automatic rights to possession of the apartment (*compare Matter of Levin v Department of Housing Preserv. and Development of City of N.Y.*, 140 Misc 2d 110, 111-113 [Sup Ct, NY County 1988], *mod and remanded* 151 AD2d 264, 264-265 [1st Dept 1989]). The parties are required, pursuant to Civil Rights Law § 80-b, to fairly divide any new household items, purchased subsequent to December 2005, toward which both have made a contribution. Charova needs to provide certain outstanding documentation, pursuant to this order and in accordance with the court's April 2, 2010 interim order (*see* footnote 5 above). Accordingly, based on the aforesaid, it is

ORDERED that that portion of Thomas G. Bernard's motion to dismiss the counterclaim is granted to the extent of dismissing that portion of the Answer concerning items two through six of the Agreement set forth in par. 4 of the Answer, and is otherwise denied; and it is further

ORDERED that those remaining portions of Bernard's motion seeking sanctions against Irena Charova and her attorney, Peter Sayer, Esq., are denied in their entirety; and it is further

ORDERED that that portion of Irena Charova's cross motion seeking to deny the relief sought by Bernard regarding the dismissal of items one through six of the Agreement comprising her counterclaim for breach of contract is granted to the extent of denying the dismissal of that portion of the action concerning item number one of the Agreement, and is otherwise denied; and it is further

ORDERED that that portion of Charova's cross motion seeking to impose sanctions on Bernard and his attorney, Benjamin Kaplan, Esq., is denied in its entirety.

Dated: *May 4, 2010*

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J.S.C.

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