

Silber v Emigrant Savs. Bank

2012 NY Slip Op 32227(U)

August 8, 2012

Supreme Court, New York County

Docket Number: 113851/06

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

8/26
N

PRESENT: DEBRA A. JAMES
Justice

PART 59

HANNA SILBER, as ADMINISTRATRIX of the
ESTATE OF LEO SILBER,

Plaintiff,

- v -

EMIGRANT SAVINGS BANK,

Defendant.

Index No.: 113851/06

Motion Date: 02/28/12

Motion Seq. No.: 03

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion to interplead funds.

PAPERS NUMBERED	
Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____	<u>1</u>
Answering Affidavits - Exhibits _____	<u>2</u>
Replying Affidavits - Exhibits _____	<u>3</u>

FILED

Cross-Motion: Yes No

AUG 21 2012

Upon the foregoing papers,

This decision addresses motion seq ^{NEW YORK} COUNTY CLERK'S OFFICE 03, 05 and 06, all of which were brought on by orders to show cause. The three motions, which are based on the same facts and involved closely related issues, are consolidated herein for disposition.

In its motion (sequence number 03), Emigrant Savings Bank (Emigrant) seeks an order of this court: (1) authorizing its counsel, Belkin Burden Wenig & Golden LLP (BBWG), to deposit with the New York City Department of Finance (a) \$118,184.49, which is held in escrow by BBWG pursuant to a stipulation and settlement (the Stipulation), and the sum represents the "net surplus" from

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

the foreclosure sale by Emigrant, as the mortgage lender, of the cooperative apartment, its appurtenant lease and shares that were held by plaintiff Hanna Silber (Silber), as administratrix of the estate of Leo Silber, her deceased husband; and (b) 9,918.21, which is also held BBWG in escrow, and the sum allegedly represents the "net holdback" in the original amount of \$15,000.00, which was intended by Emigrant to be applied toward its post-sale legal fees and expenses, including fees and expenses incurred in bringing the instant motion; and (2) discharging Emigrant/BBWG of liability from the claims asserted by Silber.

In her motion (sequence number 05), Silber seeks an order of this court to compel BBWG to turnover the \$15,000 escrow fund, which represents the amount held by BBWG on behalf of Emigrant for "potential litigation" expense, plus an amount of \$4,974 (i.e. \$123,158 - \$118,184), which represents additional post-sale legal fees and expenses. In a separate motion (sequence number 06), Silber seeks an order of this court vacating the Apartment's foreclosure sale, alleging that the sale was permeated by fraud, as well as unwarranted and excessive legal fees.

The parties have been involved in protracted litigation since 2003. On March 11, 2008, Emigrant noticed the Apartment for foreclosure sale for April 17, 2008. On April 11, 2008, Silber requested a stay of the sale from the Appellate Division,

First Department, but the request was denied. On April 16, 2008, Silber filed a petition for Chapter 13 relief with the United States Bankruptcy Court for the Southern District of New York. On July 14, 2008, Emigrant moved to dismiss the Chapter 13 case and/or for an order vacating the automatic stay under the United States Bankruptcy Code. The Bankruptcy Court vacated the automatic stay by order dated September 12, 2008.

On October 8, 2008, Emigrant again noticed the Apartment for sale for October 31, 2008. Silber then commenced an adversary proceeding in the Bankruptcy Court and moved for an order to stay the sale from going forward. The dispute was ostensibly settled via the Stipulation dated December 9, 2008, the terms of which are discussed below. Silber asserts that the Stipulation was never approved by the Bankruptcy Court. Even though Emigrant initially conceded that the Stipulation had not been approved, it now disputes Silber's assertion.

On February 9, 2009, Emigrant again noticed the Apartment for sale for March 6, 2009. Coincidentally, the Bankruptcy Court entered an order dismissing Silber's Chapter 13 case on March 6, 2009. The sale to the highest bidder (with a successful bid of \$285,000) was closed on April 17, 2009. By notice to creditors dated April 23, 2009, Emigrant stated that the "net surplus" funds then available for distribution to the Chapter 13 creditors was \$123,158.67, after satisfaction of Emigrant's secured debt,

which included legal fees and other expenses. The notice also stated that Emigrant would retain \$15,000, as collateral security for "potential litigation" expenses between Emigrant and Silber.¹ On May 8, 2009, Silber filed a motion in the Bankruptcy Court seeking to re-open her dismissed Chapter 13 case and to set aside the sale. The motion was denied by the Bankruptcy Court in a memorandum decision dated June 10, 2009. Silber's appeal of that decision was denied in September 2010 because of her failure to timely prosecute the appeal. Due to Silber's pursuit of various post-sale legal actions, Emigrant alleged that it has incurred additional legal fees and expenses, which reduced the net surplus escrow funds to \$118,184.19.

Emigrant asserted that since Silber failed to cash the check reflecting the remaining escrow funds held by BBWG, BBWG stopped payment on the check and filed motion sequence number 03 on behalf of Emigrant. In response, Silber filed motions sequence numbers 05 and 06.

In response to Emigrant's motion which seeks court authority to allow BBWG to deposit the escrow funds with the New York City Department of Finance, Silber does not oppose the requested relief that such funds be deposited with the Department of

¹ Based on the closing statement for the Apartment sale, the gross proceeds of \$285,000.00, after subtracting the "secured claim" of Emigrant of \$146,841.33, was \$138,158.67. The net surplus available to Chapter 13 creditors, after subtracting the \$15,000 retainage for potential litigation, was \$123,158.67.

Finance. However, she argues that Emigrant and its counsel BBWG should not be discharged of liability as to her claims against them. In support of her argument, Silber alleges that: (1) she had the funds to repay the Emigrant debt and was willing and able to do so prior to the auction sale of the Apartment; (2) the notice of sale stated that it was to take place on March 6, 2009, but the sale took place on April 1, 2009 instead, as stated in Emigrant's notice to creditors dated April 23, 2009; (3) on March 17, 2009, Silber's counsel wrote to BBWG that she had the funds to "redeem" the collateral (i.e., the Apartment), but BBWG replied by letter dated March 25, 2009 that her time to redeem had expired; and (4) the auction sale was bogus, and a hearing should be conducted on the issue of whether a properly noticed auction was given and held by Emigrant. Notably, in motion sequence number 06 Silber also challenges the validity of the Apartment's auction sale and seeks an order of this court vacating the sale.

Plaintiff's arguments with respect to the validity of the auction sale are unpersuasive. Even assuming that the sale might have been improperly noticed (i.e., whether the sale took place on March 6, 2009 or April 1, 2009), it is undisputed that in May 2009, Silber filed a motion with the Bankruptcy Court seeking to re-open her Chapter 13 case and set aside the sale. Her motion was denied in a Bankruptcy Court decision dated June 10, 2009,

[*6]
which stated that the Apartment was sold at a public auction on April 1, 2009, and the sale was closed on April 17, 2009. The court also stated that Silber's objection to Emigrant's claim for legal fees, her challenge to the validity of the Stipulation and the auction sale, as well as her purported ability to pay off part of the Emigrant debt, did not constitute grounds for re-opening her Chapter 13 case or reconsideration of a prior court order that had dismissed her Chapter 13 case.

Separately, in an earlier decision dated January 14, 2008, this court also denied Silber's motion for a stay of the auction sale of the Apartment. The decision indicated that Silber failed to show that she would suffer irreparable harm if the Apartment was sold because she did not live there, and that any error in the calculation of her debts to Emigrant, including the amount of legal fees, would be compensable by monetary relief. As discussed above, her appeal of that decision to the Appellate Division, First Department, was denied.

These decisions demonstrate that there is no merit to Silber's argument that this court should vacate the auction sale, conduct a hearing on the validity of the sale and/or the propriety of the notice related thereto. In any event, such request is barred on the grounds of laches and collateral estoppel. Accordingly, the relief sought in motion sequence number 06 is denied.

As to the amount of post-auction sale legal fees, this court held at the oral argument held on May 10, 2011 (motion sequence 03), which sought court authority to deduct such fees from the escrow held by BBWG, that Emigrant/BBWG's request for such additional fees was denied.

As to the amount of pre-auction sale legal fees sought by Emigrant/BBWG, excluding the fees attributable to Emigrant's prior counsel Rosenberg & Estis (which apparently were documented and are not the subject of these motions), Emigrant/BBWG relies on the terms of the Stipulation as support. The Stipulation dated December 9, 2008, provided, in relevant part: (1) Silber was to notify Emigrant by November 15, 2008 as to whether she would accept Emigrant's offer to reduce the Emigrant debt due as of February 28, 2009 by \$15,000 in consideration of and exchange for her waiving the right to have a hearing on Emigrant's secured claim that included its claim for legal fees; (2) if Silber elected not to accept Emigrant's offer, all sums due to Emigrant would have to be paid without reduction, and in that scenario, the parties would contact the Bankruptcy Court to schedule a hearing on Emigrant's fees, and Emigrant would return to Silber that portion of the legal fees that the Bankruptcy Court found Emigrant was not entitled to; and (3) if Silber failed to notify Emigrant by November 15, 2008 whether she would accept the offer,

Emigrant could rescind the offer or apply the \$15,000 credit, even if Silber did not affirmatively accept the credit.

In motion sequence number 05, Silber seeks to compel BBWG to turnover the \$15,000 fund held by BBWG under escrow, and argues that the Stipulation was invalid because it was never approved by the Bankruptcy Court. The Bankruptcy Court decision, dated June 10, 2009, stated, in relevant part, that "[i]n February or March, 2009, the Debtor [Silber] and Emigrant signed a stipulation of settlement (the 'Stipulation'), purporting to resolve all outstanding issues, but the agreement quickly fell apart. The Stipulation was never so-ordered by the Court." While Emigrant/BBWG initially conceded that the Stipulation was never approved, it now argues that the Stipulation was "so-ordered" on December 10, 2009, and attaches a conformed copy of the electronically-signed Stipulation and Order (as Exhibit 4) to the Rifkin Affirmation in Opposition to Plaintiff's November 1, 2011 Order to Show Cause. Emigrant/BBWG contended that "it appears that the confusion lies in the docket entry for the stipulation was indexed under Plaintiff's adversary proceeding case number and not under the docket for her chapter 13 case."

The Stipulation has several notable issues. First, although the Stipulation appeared to have been so-ordered on December 10, 2008, it was not until November 16, 2011 that Emigrant/BBWG's counsel noticed that it had been approved by the Bankruptcy Court

almost three years earlier.² Second, while the Stipulation was ostensibly signed by the parties on December 9, 2008, it has a provision that would have required Silber to notify Emigrant by November 15, 2008 as to whether she would agree to Emigrant's reduction of the debt by \$15,000, in exchange for waiving her right to a fee hearing. This was unusual because the document signature date post-dated the required action date. Third, the Stipulation seemingly so-ordered by the Bankruptcy Court on December 10, 2008 (only one day after it was signed by the parties) was apparently without notice to any other party or creditor, including the trustee for the Chapter 13 case. This was unusual in that the Stipulation contained provisions that affected important claims against the Chapter 13 estate, namely the amount of Emigrant's secured claims, which included significant legal fees (when compared with the value of the estate's assets available for distribution to creditors), and Silber's waiver of her right to a fee hearing with prejudice.

Most importantly, and as noted above, Silber's Chapter 13 case was dismissed by the Bankruptcy Court on March 6, 2009, and it is undisputed that no fee hearing was ever conducted by the Bankruptcy Court. Thus, BBWG's fees have never been reviewed by

² Indeed, in Rifkin's Affirmation in Support of Emigrant's Order to Show, dated January 6, 2010, Rifkin noted that "[f]or reasons that are not clear, the Stipulation of Settlement was never 'so ordered' by the Bankruptcy Court." *Id.* at 4, note 6.

any court as to their reasonableness. Also, Emigrant/BBWG agrees and asserts that it should be "awarded its reasonable attorneys fees and expenses" On the other hand, there was a fee hearing conducted by a special referee of this court on December 18, 2003, pursuant to an order of Justice Gans dated July 2, 2003, with respect to the legal fees of Rosenberg & Estis, Emigrant's prior counsel. While the record in this case supports Emigrant's assertion that the significant fees and expenses incurred by it were due to Silber's pursuit of years of relentless litigation, the fact remains that BBWG's fees and expenses have not been subjected to judicial review with respect to their reasonableness. In such regard, and to the extent that Emigrant is entitled to be paid legal fees and expenses under the loan documents, Emigrant/BBWG shall submit an application for an award of its actual and reasonable fees and expenses incurred, within thirty (30) days from the date of entry of this decision and order. Unless the parties settle their dispute with respect to such fee application, all issues arising in connection therewith shall be heard by a Special Referee in accordance with the procedures stated below.

Accordingly, for all of the foregoing reasons, it is hereby ORDERED that, pursuant to CPLR 4311, all issues arising in connection with the fee application of defendant Emigrant Savings Bank (Emigrant) is referred to a Special Referee, to hear and

Bank (Emigrant) is referred to a Special Referee, to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation by the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall hear and determine all issues arising with such application; and it is further

ORDERED that, within thirty (30) days from the date hereof, a copy of this decision and order with notice of entry, together with a completed Information Sheet, shall be served by Emigrant's counsel upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar on the Special Referee's Part (Part 50R) for the earliest convenience date; and it is further

ORDERED that, pending the resolution of Emigrant's fee application, all issues arising in connection with motion sequence numbers 03 and 05, which were brought on by orders to show cause dated January 13, 2010 and June 2, 2011 respectively, shall be held in abeyance; and it is further

ORDERED that the relief requested by plaintiff Hanna Silber, as administratrix of the estate of Leo Silber, in motion sequence number 06 to vacate the coop apartment auction sale is DENIED.

Dated: August 8, 2012

ENTER:

FILED

AUG 21 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Debra A. James
DEBRA A. JAMES J.S.C.