

Sharaf v Sotnychuk

2012 NY Slip Op 32905(U)

November 14, 2012

Supreme Court, New York County

Docket Number: 113049/10

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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WAHID SHARAF and ISABEL FRASER-
SEWELL, as Administrators of the Estate of
Siyad Sharaf,

Plaintiffs,

Index No. 113049/10

-against-

Decision and Order

RAYMOND SOTNYCHUK and HUMBERTO
ABENOZA,

Defendants.

FILED

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JOAN B. LOBIS, J.S.C.:

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By this motion, defendant Raymond Sotnychuk seeks summary judgment dismissal of this action pursuant to C.P.L.R. Rule 3212. Plaintiffs Wahid Sharaf and Isabel Fraser-Sewell, as Administrators of the Estate of Siyad Sharaf, oppose the motion. For the reasons set forth below, the motion is denied.

**NEW YORK
COUNTY CLERK'S OFFICE**

This action arises out of conflicting claims of ownership to a condominium unit located at 184 East 2nd Street, Apartment 5E, New York, New York (the "Apartment"). The Apartment was owned by Siyad Sharaf, who occupied the premises until his death on May 16, 1997. In June or July 1997, Mr. Abenzoza moved into the Apartment without the prior approval of the condominium board. Mr. Abenzoza undertook to pay the mortgagee, Dime Savings Bank, after receiving notice that a foreclosure action had commenced in April 1998. About this time, the condominium board agreed to accept maintenance payments from Mr. Abenzoza. Mr. Sotnychuk was on the board and instrumental in getting the board to accept these payments, arguing that the building needed the revenue.

Wahid Sharaf was Siyad Sharaf's brother and the beneficiary of Siyad Sharaf's will. The sole asset of Siyad Sharaf's estate was the Apartment. In 1997, Wahid Sharaf gave the keys to the Apartment to a friend of his brother's so that he could look after the Apartment. Wahid Sharaf retained an attorney to probate the will and returned to his home in Switzerland.

The attorney retained by Wahid Sharaf neglected the matter and was subsequently disbarred. In 2002, Wahid Sharaf learned that the Apartment was being occupied by someone, but the Apartment was still in his brother's name. This information came from a member of the board, Marie Kripandhi, who was the president of the condominium board at the time and who applied for letters of administration for Siyad Sharaf's estate in 2003. Wahid Sharaf hired new counsel and received letters testamentary in July 2004. He was named co-executor of his brother's estate along with Isabel Fraser-Sewell, co-plaintiff in this action and a paralegal at the second law firm hired by Wahid Sharaf to probate took Siyad Sharaf's will.¹

In 2004, the co-executors sought to evict Mr. Abenzoza in a Housing Court proceeding. At approximately the same time, Mr. Abenzoza commenced a lawsuit against plaintiffs in this court seeking to enforce an alleged agreement to sell him the Apartment. See Humberto Abenzoza v. Wahid Sharaf and Isabel Fraser-Sewell, Index No. 111363/04 (the "Abenzoza Action"). A stay of the Housing Court action was granted. After a bench trial on the Abenzoza Action, this court issued a decision dismissing Mr. Abenzoza's claim as well as all of the co-executors' counterclaims except their counterclaim for ejection. Mr. Sotnychuk was not named as a third-

¹ Co-executors were needed because Wahid Sharaf resided outside of New York.

party defendant by the co-executors in the ejectment counterclaim. The stay of the Housing Court action was lifted and Mr. Abenzoa was evicted from the Apartment on February 25, 2010.

Plaintiffs commenced this action in October 2010. Prior to answering, Mr. Sotnychuk moved to dismiss the action. In a decision and order dated May 16, 2011, this court dismissed plaintiffs' second and fourth causes of action, leaving the first cause of action for \$70,000 in damages, plus attorneys' fees, based on the cost of repairing damage that Mr. Sotnychuk and Mr. Abenzoa allegedly caused the Apartment, and the third cause of action for \$273,000 in damages based on the difference between the actual sale price of the Apartment and \$900,000, which was the sale price in 2007 of a different apartment.

Mr. Sotnychuk argues that he is entitled to summary judgment in this action because plaintiffs cannot prove their case. He argues that plaintiffs have no credible evidence that he resided in the Apartment. He points out that plaintiffs never sought his eviction from the Apartment in connection with their ejectment counterclaim in the Abenzoa Action or in the Housing Court proceeding. Mr. Sotnychuk further argues that plaintiffs have no credible evidence valuing the Apartment at a price higher than that which plaintiffs accepted when they sold the Apartment. He posits that Mr. Abenzoa saved the Apartment from foreclosure and made mortgage payments which are not being credited against plaintiffs' claims for damages. He further asserts that plaintiffs cannot establish that he or Mr. Abenzoa made any changes to the Apartment after Siyad Sharaf's death because they have no evidence of the Apartment's condition at the time of his death. Finally, he argues that a release given to the condominium board for the Apartment by co-plaintiff Isabel Fraser-

Sewell relieves him from any liability on the claims against him in this action.

In support of his summary judgment motion, Mr. Sotnychuk offers his own affidavit; the pleadings; his supporting affidavit with exhibits from the earlier motion to dismiss and a copy of the court's decision on that motion; transcripts of his, Wahid Sharaf's, and Ms. Fraser-Sewell's examinations before trial; color copies of photographs taken of the Apartment sometime during the life of Siyad Sharaf; a copy of the decision after the trial in the Abenzoza Action; and a copy of a release given to the condominium board from the Estate of Siyad Sharaf, dated June 29, 2011. Defendants respond with an affidavit from Wahid Sharaf; black and white copies of the same pictures included in Mr. Sotnychuk's papers plus an additional black and white copy of a different picture that seems to be taken about the same time; affidavits from motion practice in the Abenzoza Action, including an affidavit dated January 31, 2005, from David Hurley, who was Siyad Sharaf's partner and swore to have been living with him until he passed away; an affidavit from Mr. Sotnychuk dated January 12, 2005; the decision from the Abenzoza Action; a copy of the proposal for a gut renovation of the Apartment; copies of electronic mail about water leaks in 2006; copies of electronic mail about accepting payments from Mr. Abenzoza; excerpts of the examinations before trial and the trial transcripts from the Abenzoza Action; excerpts from Mr. Sotnychuk's examination before trial in the instant action; a copy of a power of attorney allegedly signed by Wahid Sharaf; a copy of the June 29, 2010 release; a CD-ROM showing the condition of the Apartment after Mr. Abenzoza's eviction; and information about the listing of the Apartment from the Internet.

A party moving for summary judgment bears the initial burden of prima facie

establishing its entitlement to the requested relief by eliminating all material allegations raised by the pleadings. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985). The failure to meet that burden mandates the denial of the application, “regardless of the sufficiency of the opposing papers.” Winegrad, 64 N.Y.2d at 853. However, where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion’s denial. Alvarez, 86 N.Y.2d at 324. “[T]he remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court.” Gibson v. Am. Export Isbrandtsen Lines, 125 A.D.2d 65, 74 (1st Dep’t 1987) (internal citations omitted). Moreover, if the papers in support of summary judgment raise issues of fact, then summary judgment is not the appropriate vehicle to resolve the lawsuit. Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439 (1968).

In moving for summary judgment, Mr. Sotnychuk offers proof in the form of arguments and conclusions that only the trier of fact should reach. The supporting papers are not directly determinative of any of the issues in the case. Similarly, plaintiffs ask this court to make a credibility finding against Mr. Sotnychuk as to his relationship to Mr. Abenzoza. In addition, the question of damages is highly disputed. Questions remain about plaintiffs’ ability to prove the condition of the Apartment at the time of Siyad Sharaf’s death; what, if any, damage to the premises occurred after the eviction; and whether plaintiffs can prove that the actual Apartment’s sale price was below the reasonable value for the Apartment in the condition that it existed when Siyad Sharaf died. The “proof” offered by both sides requires credibility determinations, which is insufficient to

find that either side is entitled to summary judgment as a matter of law. The credibility determinations must be left to a jury. Finally, the argument that the release given to the Board bars plaintiffs from suing Mr. Sotnychuk herein is unavailing; the release has no bearing on the allegations in this lawsuit against Mr. Sotnychuk in his individual capacity. Accordingly, it is

ORDERED that this motion is denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on Tuesday, December 18, 2012, at 9:30 a.m.

Dated: November 14, 2012

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[Signature]
JOAN B. LOBIS, J.S.C.