Horowitz v Horowitz
2014 NY Slip Op 33842(U)
January 9, 2014
Supreme Court, Nassau County
Docket Number: 601489/13
Judge: Karen V. Murphy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

x

THEODORA HOROWITZ, a/k/a
THEO HOROWITZ,

Plaintiff(s),

-against-

HARVEY R. HOROWITZ,

Defendant(s).

x

Index No. 601489/13

Motion Submitted: 002, 003, 004
Motion Sequence: 11/25/13

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....XX
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....XX
Defendant's/Respondent's.....XX

This motion by the defendant Harvey R. Horowitz for an order granting him permission to rent the premises at 113 Betty Road in New Hyde Park is determined as provided herein.

This cross-motion by the plaintiff for an order pursuant to CPLR § 2221(d) granting her reargument of this court's order and decision dated September 27, 2013 and upon reargument, directing the defendant to make monthly payments to her for all of her "medical treatment [and] other health care related expenses" as defined by the Rider to their deed dated March 17, 1994, retroactive to November 2013 and prospectively pending the final resolution of this action and an order pursuant to CPLR § 3124, 3126 compelling the defendant to produce evidence of personal assets or other sources of funding sufficient to finance her

"medical treatment [and] other health care related expenses" indefinitely absent a sale of the premises at 113 Betty Road in New Hyde Park and directing the sale of that property should he fail to make said payments as directed and to establish the financial viability of other sources of funding is determined as provided herein.

This motion by the defendant Harvey R. Horowitz for an order pursuant to CPLR § 2221(d) granting him reargument of this court's order and decision dated September 27, 2013 and upon reargument, declaring that he may maintain the defenses: (1) that the plaintiff waived enforcement of the provisions of ¶ 5 (a) (ii) and (iv) of the March 17, 1994 Rider to their deed and (2) that the provisions of ¶ 5 (a) (ii), (iii), (iv) and (v) of the March 17, 1994 Rider to their deed lack consideration and are therefore a nullity, is determined as provided herein.

The facts relevant to the determination of these motions are as follows:

Due to a variety of concerns including financial, on March 17, 1994, the defendant's parents, the plaintiff and her husband who has since died, deeded him their property at 113 Betty Lane in New Hyde Park for the sum of $135,000. The parties entered into a Contract and a mortgage and note were executed by defendant. Paragraph 5 of that contract provides as follows:

> In consideration for prior care and support rendered by Parents to Son, Son agrees that during the term of Parents' residency in the Premises:
>
> (i) Son shall not sell, convey or transfer the Premises or any part thereof or any interest therein without the express written consent of Parents.
>
> (ii) Aside from the lien created under the mortgage, no part of the Premises may be further encumbered by lien without express written consent of Parents.
>
> (iii) All proceeds from any sale of the Premises by Son, net of closing costs (including attorney fees, broker fees, etc.) and also net of any capital gains tax liability incurred by Son on such sale, shall be paid by Son to Parents.
>
> (iv) All proceeds from any equity-based financing taken or arranged by Son in connection with the Premises, or from any other means by which proceeds may be derived in connection with the value or use of the Premises, in each case net of closing costs, (including attorneys fees, broker fees, etc.) shall be paid by Son to Parents.

> (v) Son shall, upon written request of Parents, act promptly and proceed diligently to transact a sale of the Premises, **or an equity-based financing in connection with the Premises, or some other means by which proceeds may be derived in connection with the value or use of the Premises, provided that such sale, financing or other means is necessary absent other sources of financing to finance medical treatment or other health related measures which are chosen by Parents for Parents themselves . . . .** Healthcare related measures as used in this paragraph shall include a change of residence if such change would, in the discretion of Parents, better promote the health of Parents (emphasis added).

Pursuant to ¶ 5(v) of that contract, on April 25, 2013, the plaintiff demanded in writing that the defendant sell the property to enable her to relocate to New York City near her daughter for health reasons. A dispute ensued regarding whether the property needed to be sold. Relying on the option to utilize "other means by which proceeds may be derived in connection with the value or use of the Premises," the defendant wanted to rent it out and to use the rent income to provide the plaintiff with the necessary funds for her medical treatment and other health related measures. The parties were unable to amicably resolve that dispute.

The plaintiff commenced this action in June, 2013, seeking to compel the defendant to sell the property. The plaintiff sought injunctive relief requiring an immediate sale of the property. She maintained that ¶ 5(v) of the March 17, 1994 contract required the defendant to sell the property on account of the written demand that she sent him and that a sale of the property was necessary to afford her resources for "medical treatment or other health related measures." The plaintiff also maintained that the defendant had breached ¶ 5(i),(ii) (iii) and (iv) of that contract by mortgaging the property with Emigrant Bank in 2010 without her consent, let alone her written consent. Via an Order to Show Cause dated July 2, 2013, this court issued a temporary restraining order enjoining the defendant "from selling, conveying or transferring the Premises or any part thereof or any interest therein" without her "express written consent or further court order."

In opposing injunctive relief, the defendant maintained that the contract does not require a sale of the property at this juncture as there were "other sources of funding." As for the mortgage, he maintained that he told the plaintiff about the mortgage application and she agreed. More specifically, he maintained that the plaintiff learned of that application when the appraiser visited the property; that she knew that he was mortgaging the property before the mortgage was closed and she never objected; and, that she accordingly waived the applicability of ¶ (5) (a)(ii) and (iv) of the contract. In Reply, the plaintiff attested that she knew nothing about the mortgage "until minutes before an appraiser that Harvey arranged for arrived on [her] doorstep in 2010 . . . ." She attested that it was then that Harvey

told her about the mortgage application and he demanded that she not interfere with it.

By order dated September 27, 2013, injunctive relief was denied but the temporary restraining order was continued. More specifically, the plaintiff was enjoined:

> "from selling, conveying or transferring the premises or any part thereof or any interest therein without the express written consent of plaintiff or further court order; from further encumbering by lien any part of the premises without the express written consent of the plaintiff or further court order; and from failing to insure and maintain the premises in full repair pending its sale for the benefit of the plaintiff."

A "conveyance" includes "every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned...**except ... a lease for a term not exceeding three years...**(***Real Property Law*** *§290 [3]).*" Thus, the one year rental proposed by Defendant is not a conveyance. By renting the property on an annual basis, the defendant is not "selling, conveying or transferring the premises or any part thereof or any interest therein.' Accordingly, permission to rent the property is not required as the injunction does not preclude the defendant from renting the property (*comp,* ***Pondview Corp. v Russand, Inc.***, 10 Misc3d 1054[A] [Sup Ct, Rockland County 2005] [rent specified as prohibited]). The parties' contract does not preclude the defendant from renting the property, nor does it require the plaintiff's consent to do so. Accordingly, permission to rent is denied **as unnecessary**.

In seeking reargument, the defendant seeks to clarify so much of this court's decision as stated:

> It **appears** uncontroverted that the defendant encumbered the property, possibly without the plaintiff's consent but certainly without her written consent, and that he failed to give the proceeds to her in violation of their agreement (emphasis added).

The court held however that "as wrong as the defendant's conduct may have been, *i.e.*, the mortgaging of the property, the agreement does not afford the plaintiff the right to force a sale of the property on that ground." This court did not ultimately determine whether the defendant acted in violation of the agreement in procuring the mortgage from Emigrant Bank in 2010 or whether the plaintiff waived any of her rights under that agreement and is accordingly estopped from relying on them. In fact, this court stated that it "**appears uncontroverted**" and its determination was made only with respect to whether the plaintiff had established a likelihood of success on the merits which was required to obtain a preliminary injunction.

The defendant also seeks clarification of the following language in this court's September 27, 2013 decision and order:

> Initially the court notes that contrary to the defendant's position, this entire transaction cannot be said to have been without consideration and therefore a nullity.

This court did not address whether defendant's argument that ¶ 5 (a) (ii), (iii), (iv) and (v) of the contract were unenforceable due to a lack of consideration. And again, even if it had, it was addressing the requirements for a preliminary injunction and not ultimately resolving that issue. Defendant argues ardently in favor of a resolution of this issue in his favor at this juncture. Issues of fact, however, are raised with regard to whether the cited provisions lacked consideration; if the plaintiff knew of the mortgage; and whether her failure to object constituted a waiver and estops her from pursuing her rights under the contract, particularly since it appears that the notice was not in writing.

The defendants' motion pursuant to CPLR § 2221(d) for reargument of this court's order dated September 27, 2013 is granted and upon reargument, it is held that that order does not bar or preclude him from advancing the following two defenses: (1) that the plaintiff waived enforcement of the provisions of ¶ 5 (a) (ii) and (iv) of the parties' March 17, 1994 contract and (2) that the provisions of ¶5 (a) (ii), (iii), (iv) and (v) of that contract are unenforceable for lack of consideration and because their enforcement would render the defendant's consideration illusory.

Turning to the plaintiff's motion for reargument, plaintiff claims that her financial situation has changed dramatically since the preliminary injunction motion was decided. She alleges that she has incurred and continues to incur legitimate expenses related to her medical and healthcare needs as defined by the contract, which have caused her assets to dwindle considerably, thus calling into question her financial ability to meet all of her health related expenses absent additional funds. However, reargument pursuant to CPLR § 2221(d) does not lie because the relief she now seeks and the grounds therefor were not advanced in the prior motion. Accordingly, this court did not overlook or misapprehend any facts in rendering its decision (***CPLR*** § 2221[d]). To the extent that relief is being sought pursuant to CPLR § 2221, it would be pursuant to CPLR § 2221(e), i.e., based on new evidence. Nevertheless, since again, she does not seek the same relief, the motion cannot be considered under CPLR § 2221(e) either. The plaintiff's present application is clearly a new one for alternative injunctive relief requiring the defendant to "finance medical treatment or other health care related measures which are chosen by" her, including costs related to her change of residence.

While the defendant has technically opposed her motion, he has repeatedly expressed his

willingness, if he is permitted to rent the subject property, to allocate one hundred percent of the rental income from the premises to pay for plaintiff's monthly rental cost of her Manhattan apartment and all other health care related expenses. He has attested that he will accept financial responsibility of the plaintiff's "out of pocket" medical expenses which are not paid by insurance, more specifically, her Medicare and her Supplemental health insurance (AARP), which premium defendant has also represented he will personally pay.

Accordingly, the plaintiff's motion for injunctive relief is granted, on consent, to the extent that the defendant volunteered and thus, is directed to pay the plaintiff $4,150.00 per month for November and December of 2013 and $4,242.00 per month beginning January 2014 to cover the rent on her apartment pending further order of this Court. These payments do not preclude the plaintiff from further recovery should she establish additional expenses that fall within the parties contract, nor does the Court expressly find that the contract requires such payments by defendant to plaintiff. Prospective payments are due on or before the 1st of the month, commencing February 1, 2014 and the retroactive payments for the November, December and January payments shall be paid no later than 60 days after the receipt of the first rental payment on the defendant's premises.

Finally, the plaintiff's motion to compel the defendant to provide all outstanding disclosure is denied.

Although it is axiomatic that New York favors liberal discovery (***Murphy v Hamilton***, 90 AD3d 1294, 1295 [3d Dept 2011]), a discovery demand may nonetheless be deemed palpably improper where the demand is demonstrably overbroad. The appropriateness of a discovery demand is a matter addressed to the sound discretion of the court (***Rodriguez v Metropolitan Cable Communications***, 79 AD3d 841, 842 [2d Dept 2010]), which must balance the parties' competing interests by weighing the importance of the information sought against the consequences of disclosure. (***Feger v Warwick Animal Shelter***, 59 AD3d 68, 70 [2d Dept 2008]). The discovery sought must be relevant to the issues at bar, with the test employed being that of usefulness and reason. (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406 [1968]). Demands, however, which are unduly burdensome or lack specificity, or seek privileged or irrelevant information, or are otherwise improper, will be denied.

While it is not always true that the designation of documents by the use of such phrases as "all," "all other" or "any and all" necessarily renders a request for documents pursuant to CPLR § 3120 improper, the use of such phrases continues to be viewed as some indication of a lack of requisite specificity and is generally frowned upon. (***Mendelowitz v Xerox Corp.***, 169 AD2d 300, 303 [1st Dept 1991]). Exceptions exist, however, in certain limited circumstances where the discovery request is specific enough to apprise the recipient of a narrowly defined category of documents. (***Ensign Bank v Gerald Modell, Inc.***, 163 AD2d 149 [1st Dept 1990]).

Where discovery demands are improper in that they are overbroad, lack specificity or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand, rather than to prune it. (***Ural v Encompass Ins. Co. of Am.***, 97 AD3d 562, 566 [2d Dept 2012]). The burden of serving a proper demand is upon counsel and it is not for the court to attempt to correct a palpably bad one. (***Board of Mgrs. of the Park Regent Condominium v Park Regent Assoc.***, 78 AD3d 752, 753 [2d Dept 2010]).

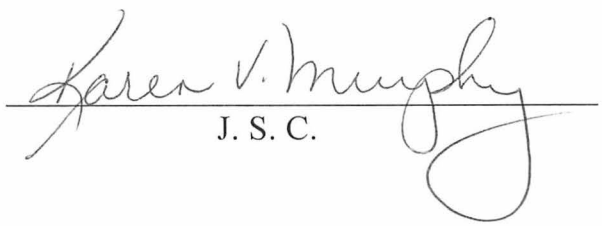
While plaintiff maintains that items of discovery currently outstanding are highly relevant to prosecution of plaintiff's case, the number of disputed demands is extensive and multiple arguments have been proffered by each side both for and against discovery. Given that a preponderance of the items contained in plaintiff's various discovery demands are overbroad and potentially privileged or irrelevant, it is incumbent upon plaintiff to serve a proper demand.

It is not the role of the court to attempt to parse out the acceptable items from the objectionable items or prune an improper demand. (***Haszinger v Praver***, 12 AD3d 485, 486 [2d Dept 2004]).

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 7th of February, 2014, at 9:30 a.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the plaintiff shall serve a copy of this Order upon Defendant. A copy of the Order with affidavit of service shall be served on the DCM Clerk within seven (7) days after entry.

The foregoing constitutes the Order of this Court.

Dated: January 9, 2014
Mineola, N.Y.



J. S. C.