

Magid v Sunrise Holding Group, LLC
2015 NY Slip Op 32816(U)
August 27, 2015
Supreme Court, Kings County
Docket Number: 511065/2014
Judge: Yvonne Lewis
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At an IAS term, Part 32 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street in Brooklyn, New York, on the 27th day of August 2015

PRESENT:

HON. YVONNE LEWIS,
Justice

-----	X
Ilya Magid as Trustee for the Magidenko	:
Family Irrevocable Trust,	:
	:
	:
Plaintiff,	:
	:
-against-	:
	:
Sunrise Holding Group, LLC.,	:
	:
Defendant.	:
-----	X

Index No.: 511065/2014

The plaintiff, Ilya Magid, as trustee for the Magidenko Family Irrevocable Trust moves, by order to show cause, for an order 1) declaring the UCC1 financing statement filed against the subject cooperative apartment null and void, 2) declaring the Notification of Disposition of Collateral invalid or improperly served and 3) granting a preliminary injunction enjoining defendant Sunrise Holdings Group LLC from foreclosing on the subject premises for the duration of this proceeding.

The plaintiff commenced this action seeking a declaratory judgment setting forth the rights and obligations of the parties with respect to a secured transaction. The plaintiff is the trustee of an irrevocable family trust executed on October 6, 2008 by the plaintiff's parents, Natan Magidenko and Tsilya Magidenko (the Magidenkos). The Magidenkos placed their shares of a cooperative into the Trust to be controlled and distributed in accordance with the terms of the Trust during their lifetime. The Trust provides that upon the death of the Magidenkos, the Trust property shall be distributed to the plaintiff or, if the plaintiff is deceased, to his children, Gabriella Magid and Allan Magid.

FILED: KINGS COUNTY CLERK 06/16/2017

NYSCEF DOC. NO. 67

INDEX NO. 511065/2014

RECEIVED NYSCEF: 06/23/2017

Magid v Sunrise Holdings et al Index No.:511065/2014 Page 2

On July 28, 2011, the plaintiff, as trustee, entered into a loan security agreement with the defendant and executed a promissory note, personally and as trustee, to secure the sum of \$150,000.00. Under the loan security agreement, the plaintiff pledged the shares of the subject cooperative placed into the Trust as collateral and executed an assignment of the proprietary lease to the unit, 2940 West Fifth Street, apartment 5A in Brooklyn. A UCC1 financing statement was recorded against the apartment on August 24, 2011. The plaintiff thereafter entered into loan modification and extension agreements with the defendant and made all payments thereunder until November 1, 2013. The loan security agreement provided that the plaintiff "states that [he] is the lawful owner of the Stock and the Lease, free and clear of all claims and other security interests" and that the plaintiff "has full right to pledge these security interests to [defendant]." Additionally, the loan modification and extension agreements contained provisions whereby the plaintiff represented that he "has full power, good right and authority to enter into" the agreements and that the "execution, delivery and performance" of the agreements "will not violate any agreement affecting [Plaintiff] or the Collateral (or any part thereof or interest therein)." The plaintiff defaulted under the terms of the loan security agreement and subsequent modification and extension agreements by failing to make the monthly payment which became due on November 1, 2013 or any month thereafter. By letter dated August 5, 2014, the defendant notified the plaintiff of his default and demanded payment of the outstanding indebtedness in the amount of \$183,912.10 by August 2, 2014, or else the shares would be put up for sale. The defendant scheduled a sale of the shares on November 25, 2014. The instant action ensued and the sale was stayed upon the signing of the instant order to show cause.

The authority of the trustee is subject to any limitations imposed by the trust instrument and every act in contravention of the Trust is void (*see* Estates, Powers

Magid v Sunrise Holdings et al Index No.:511065/2014 Page 3

and Trusts Law [EPTL] § 7-2.4; *Dye v Lewis*, 67 Misc 2d 426, 427-428 [Sup Ct, Monroe County 1971]). The plaintiff argues that his execution of the loan agreements exceeded the scope of his powers as trustee, thus rendering the transaction and security interest void, and the defendant, who received a copy of the Trust instrument prior to its issuance of the loan and had knowledge of its provisions, cannot claim good faith creditor status under EPTL § 7-3.2, which states in pertinent part that: "[a]n express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property."

Paragraph SIXTH of the Trust instrument delineates certain powers vested in the trustee. Section (11) of paragraph SIXTH provides, in relevant part, that "the Trustee and his successors shall have full right, power and authority, from time to time, in his [sic] discretion, in such manner and upon such terms and conditions as they deem advisable, without leave of court: * * * (11) To borrow, in his [sic] names as fiduciaries, from themselves or from others, including any corporate fiduciary acting hereunder, such sums of money or other property for such purposes and periods of time, at such rates of interest, as they may, in his [sic] discretion, determine, to execute promissory notes or other instruments evidencing such borrowing, and if necessary, to furnish any trust property as security therefore."

Reading the above provision in isolation, it is clear that the plaintiff was granted the power to enter into the loan and pledge the shares as collateral. However, when the provisions of paragraph SIXTH are read in conjunction with paragraph FIFTH (J) of the Trust instrument, which provides, in part, that "[a]ny provision of this Agreement notwithstanding: (1) if a Trustee of a trust created herein is also beneficially interested in the income or principal of such trust or is legally obligated to support a beneficiary of such trust, such Trustee shall be

FILED: KINGS COUNTY CLERK 06/16/2017

NYSCEF DOC. NO. 67

INDEX NO. 511065/2014

RECEIVED NYSCEF: 06/23/2017

Magid v Sunrise Holdings et al Index No.:511065/2014 Page 4

disqualified from participating in the exercise of any discretion granted the Trustee herein or by law in favor of himself" (emphasis added).

Thus, because the plaintiff is a beneficiary, the paramount question is whether the loan was "in favor" of the plaintiff personally. the defendant states that as part of the transaction it wired the sum of \$138,400.00 into the escrow account of its attorneys. At the closing, \$1,750.00 was paid to the defendant's counsel, \$40.00 was paid to the New York City Department of Finance, \$30,000.00 was paid to Money Spot, Inc. to satisfy a judgment against the Trust, \$85,922.50 was wired to Austern & Austern, P.C., attorneys which had previously represented the Trust, and \$10,000.00 was paid to the defendant. The remainder of the sums was maintained in the defendant's escrow account to pay the cooperative maintenance and common charges. The defendant states that the \$11,600.00 difference between the wired sums and the promissory note represents a loan origination fee, several months of pre-paid interest and per diem interest for the remainder of July 2011. the defendant also asserts that the \$10,000.00 it received from the loan proceeds represents the repayment of a prior loan made to the plaintiff in a "handshake deal," which the plaintiff flatly denies making. In its opposition papers, the defendant submits copies of checks and wire transfer forms purporting to show the amounts and recipients of the disbursements from the loan.

The Plaintiff asserts in his affidavit in support of the order to show cause that the loan was for his "personal use", as a result, the court finds that the plaintiff has established that the subject loan and UCC1 financing statement securing the loan are void. In support of his order to show cause, the plaintiff further argues that the Notification of Disposition of Collateral is invalid as it was never sent to the beneficiaries of the Trust- Natan Magidenko, Gabriella Magid and Allan Magid. Under Uniform Commercial Code [UCC] § 9-611 ©, the following persons must be sent a Notification of Disposition of Collateral: (1) the debtor; (2) any secondary obligor; and (3) if the collateral is other than consumer goods: (A) any other person from

FILED: KINGS COUNTY CLERK 06/16/2017

NYSCEF DOC. NO. 67

INDEX NO. 511065/2014

RECEIVED NYSCEF: 06/23/2017

Magid v Sunrise Holdings et al Index No.:511065/2014 Page 5

which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral; (B) any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that: (I) identified the collateral; (ii) was indexed under the debtor's name as of that date; and (iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and © any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in Section 9-311(a). The defendant has not offered any evidence to establish that proper notice was given to the named beneficiaries.

Pursuant to CPLR §3001, the supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. It is undisputed that the plaintiff provided the defendant with a copy of the Trust which articulated the prohibition of encumbering the subject cooperative for the plaintiff's personal benefit. It is also undisputed that the plain language of the trust evinced that the plaintiff had no authority to place the Premises as collateral pursuant to the Trust, and had a fiduciary duty not to jeopardize the corpus of the trust where his father resided. It appears from the documents before the Court that the proceeds from the loan were used for the plaintiff's benefit which is outside of the scope of the Trust. As such, any liability for the funds should be enforced against him personally opposed to the Trust. Accordingly, the plaintiff's motion is granted. It is hereby

ORDERED and ADJUDGED, that the UCC1 financing statement filed against the subject cooperative apartment is null and void,. It is further

ORDERED and ADJUDGED, that the Notification of Disposition of Collateral is invalid. It is further

FILED: KINGS COUNTY CLERK 06/16/2017

NYSCEF DOC. NO. 67

INDEX NO. 511065/2014

RECEIVED NYSCEF: 06/23/2017

Magid v Sunrise Holdings et al Index No.:511065/2014 Page 6

ORDERED, that the plaintiff is awarded a preliminary injunction enjoining the defendant Sunrise Holdings Group LLC from foreclosing on the subject premises. It is further,

ORDERED, that the defendant, Sunrise Holdings LLC, is granted a money judgment against Ilya Magid in the amount of the unpaid loan.

Settle Judgment on Notice.

The foregoing constitutes the decision and order of the court.

E N T E R,



Yvonne Lewis, JSC