

Dollinger, Gonski & Grossman v Landa
2016 NY Slip Op 31760(U)
September 20, 2016
Supreme Court, Kings County
Docket Number: 502312/2014
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of September, 2016.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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**DOLLINGER, GONSKI & GROSSMAN,
HELEN WEBSTER, YECHESKEL WEBSTER,
BORUCH WEBSTER, BENJAMIN WEBSTER
and MOSHE WEBSTER,**

Plaintiffs,

DECISION AND ORDER

- against -

Index # 502312/2014

**JUDY LANDA, DEBORAH PHILIPSON,
ANTHONY BACCHI, M.D., MARTIN
FARBENBLUM, ISRAEL SHERMAN, AHRON
HERSH, ROSA JANKLOWICZ, et. al.,**

Defendant(s).

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The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____

1-3

4-6

7,8

This is an interpleader action pursuant to CPLR 1006. The individual parties collectively owned and managed a number of nursing homes in the New York metropolitan area. Plaintiff DOLLINGER, GONSKI & GROSSMAN (“DGG”) represented the individual Plaintiffs (collectively referred to as the “Webster Plaintiffs”) in several highly contested lawsuits involving the ownership and management of said nursing homes. DGG also represented Plaintiff HELEN WEBSTER in connection with two “Membership Interest Purchase Agreements” for the purchase by the Webster Plaintiffs of two nursing homes, Fort Tryon Rehabilitation & Health Care Facility, LLC (“Fort Tryon”) and New Franklin Rehabilitation & Health Care Facility, LLC (“New Franklin”), from the individual Defendants, which is the subject of this interpleader action.

According to Plaintiffs, the Webster Plaintiffs, who originally owned 15% of Fort Tryon and New Franklin, made and delivered six notes dated January 13, 2009, with all fifteen individual Defendants herein named as payees under each note, to secure a portion of the purchase price for the individual Defendants' 85% share in the two companies. Each note provided that the outstanding principal balance, together with all accrued but unpaid interest, if any, shall be due and payable on January 13, 2014.

At the closing, which occurred on January 13, 2009, DGG states that the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf LLP ("Abrams Fensterman"), who represented all of the sellers selling their interest in Fort Tryon and New Franklin, took physical possession of the notes.

According to Plaintiffs, the Webster Plaintiffs were ready, willing and able to pay the notes on the January 13, 2014 due date, having deposited the owed funds totaling approximately \$2,115,383.32, into DGG's escrow account. However, that Abrams Fensterman indicated to them that the original notes could not be located. DGG thereafter proposed to deposit the funds with Abrams Fensterman in escrow pending delivery of the original notes marked "paid." Plaintiffs state that, on January 14, 2014, DGG delivered a proposed escrow agreement to Abrams Fensterman under which the money would be deposited but that no response was received by them. On March 17, 2014, Plaintiffs commenced this interpleader action.

In this interpleader action, twelve of the Defendant Payees are represented by Abrams Fensterman (collectively referred to as "Fensterman Defendants"). Two Defendant Payees, ANTHONY BACCHI and MARTIN FARBENBLUM are represented by Gulko Schwed LLP (collectively referred to as "Gulko Defendants"). One Defendant Payee, ROSA JANKLOWICZ, who has assigned her interest to her two sons - Jack and Leonard Janklowicz - are represented by Snitow Kanfer & Holtzer, LLP (collectively referred to as "Janklowicz Defendants").

The Fensterman Defendants now move for summary judgment seeking an Order directing Plaintiffs to pay "their respective share of the proceeds" from the notes to NFFT, LLC as "designee." It is the Fensterman Defendants' position that they collectively own 60% of the membership interests in Fort Tryon and New Franklin,¹ and that those interests translate to an aggregate 70.59% interest in the notes. The Fensterman Defendants thus contend that they are entitled to \$1,492,211.75 of the proceeds of the notes and seek an Order from the Court directing Plaintiffs to pay that amount to NFFT, LLC, their designee.

Plaintiffs, on the other hand, contend that there are issues with each individual Defendant's respective interest in the notes and they accordingly cross-move for an order allowing them to pay the funds into Court pursuant to CPLR 1006 in full satisfaction of the notes, less any amounts

¹ Defendants Mr. Bacchi and Mr. Farbenblum each own a 10% share. The Janklowicz Defendants own the remaining 5%.

awarded by the Court for costs and attorney's fees, and discharging them from liability to any party. Plaintiffs state that there is nothing in the notes that sets forth each payee's respective interests in the notes and that the notes are not payable to the payees in the alternative. That none of the other three payees have joined in the Fensterman Defendants' application and further, that the Gulko Defendants do not concede the claims made by the Fensterman Defendants and have filed a separate Answer and Counterclaim demanding that the total amount due under the notes be held in escrow pending resolution of all "open accounts" among the Defendants.

The Gulko Defendants also oppose the Fensterman Defendants' motion arguing that they have not met their prima facie burden because they do not provide any evidence regarding the distribution of the notes' proceeds among the sellers or any other evidence suggesting how the allocation should be determined. Moreover, the Gulko Defendants assert that they are owed more money for the sale of their interest in the companies than the subject notes' equivalent of their respective share in the companies. Lastly, the Gulko Defendants point out that no discovery has taken place.

The Janklowicz Defendants join in the Gulko Defendants' opposition to the Fensterman Defendants' motion.

In reply, the Fensterman Defendants argue that no issue of fact exists as to each party's respective interest in the notes and that the total amount due under the notes to the Fensterman Defendants is a simple math equation. In addition, the Fensterman Defendants oppose Plaintiffs' motion pursuant to CPLR 1006, which they argue is Plaintiffs' attempt to forestall the moving Defendants' right to monies under the note. Further, that Plaintiffs are not entitled to costs and attorney's fees associated with this interpleader action because each individual Defendant has always maintained that each was ready, willing and able to provide an affidavit of loss which would affirm that the notes would be deemed cancelled upon payment of the proceeds, presumably undermining the necessity of this action. Additionally, that Plaintiffs should not be rewarded for enabling this case to drag on for years.

Discussion

An interpleader action is designed to protect an entity from multiple liability when faced with two or more claims which are related in such a way that recovery on one claim should exclude or limit recovery on the other (*see* CPLR 1006[a]; *see also American Intern. Life Assur. Co. of N.Y. v Ansel*, 273 AD2d 421 [2d Dept 2000]). That is, where the same thing, debt or duty is claimed by more than one person, the entity seeking interpleader should not, in fairness, be required at its peril to decide the questions of fact or of law upon which the validity of the conflicting claims may depend (*Rosen v Equitable Life Assurance Soc.*, 289 NY 333, 338 [1942]; *Matter of Estate of Harris*, 8 Misc 2d 541, 167 NYS2d 106 [Sup Ct, Kings County 1957]).

Here, Plaintiffs assert that interpleader is necessary because the Fensterman Defendants seek to enforce their fractional interest in the notes, but that the notes fail to specify what fraction they

each own; that the notes identify all fifteen individual Defendants as payees and are not payable in the alternative; and finally, that no one can locate the original notes. None of the individual Defendants argue that Plaintiffs hold any independent liability in relation to the subject notes or that Plaintiffs are not mere stakeholders under CPLR 1006. Further, the individual Defendants do not collectively agree as to how the proceeds of the notes should be distributed.

Based on the foregoing, the Court finds that Plaintiffs are entitled to the relief that they seek (see *Mahon, Mahon, Kerins & O'Brien, LLC v Moskoff*, 85 AD3d 738, 926 NYS2d 540 [2d Dept 2011]). Further, the Court finds that it would be inappropriate to grant the Fensterman Defendants' motion for summary judgment at this time. The subject notes secured only a portion of the purchase price for Fort Tryon and New Franklin and, in light of the other parties' contentions herein, nothing in the Fensterman Defendants' submission conclusively establishes their entitlement to the \$1,492,211.75 they seek from the subject notes.

Pursuant to CPLR 1006[f], this Court may award Plaintiffs expenses, costs, and disbursements in this action, which can be taken from the subject matter of the action (see also *Fischbein, Badillo, Wagner v Tova Realty Co.*, 193 AD2d 442, 444-445, 597 NYS2d 676 [1993]). Only the Fensterman Defendants object to an award pursuant to CPLR 1006[f]. Plaintiffs, however, have not specified their expenses, costs, and attorney's fees in this action. Moreover, the Court does not find Plaintiffs' entitlement to an award under CPLR 1006[f] to be automatic (see *Lincoln Life & Annuity Co. v Caswell*, 31 AD3d 1, 9-10 [1st Dept 2006]). Nevertheless, Plaintiffs are directed to provide an itemized list of costs, disbursements, and attorney's fees, as well as justification for the latter, on notice to all parties, which will be subject to approval by this Court.

Accordingly, it is hereby

ORDERED that the Fensterman Defendants' motion for summary judgment is DENIED without prejudice; and it is further

ORDERED that Plaintiffs' motion pursuant to CPLR 1006 is GRANTED and Plaintiffs are directed to submit a proposed order on notice as well as supplemental papers as directed herein.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.