

Freedman v Hason

2016 NY Slip Op 32611(U)

April 11, 2016

Supreme Court, Nassau County

Docket Number: 602343/12

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

MARK FREEDMAN Individually and
derivatively on behalf of Pinewood Terrace, LLC,

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Plaintiff,

MOTION DATE: March 15, 2016
Motion Sequence # 007

-against-

URI HASON,

Defendant.

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation/Affidavit in Support..... XX
- Affirmation in Opposition..... X
- Affirmation in Partial Opposition..... X

Motion by defendant Uri Hason for an order directing the escrowee Simon Rothkrug to release the escrowed funds to plaintiff Mark Freedman is **denied**, with leave to renew upon proper papers.

This is an action for breach of contract. In 2006, plaintiff Mark Freedman purchased membership interests in a group of companies owned by defendant Uri Hason. More specifically, Freedman purchased a 50 % interest in 399 West John, LLC; a 55.5 % interest in Hunting Hill Estates, LLC; a 36 % interest in Pinewood Terrace, LLC; a 30 % interest in The Knolls at Pinewood, LLC; a 50 % interest in Pinewood Development Inc.; and a 40 %

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interest in Islandia Partnership, LLC. 399 West John owns an office building, and the other companies are involved in real estate development projects.

On October 27, 2010, Hason, acting through Pinewood Terrace, LLC, entered into a confession of judgment on behalf of Northwood Village, LLC, which was owned by Pinewood. Northwood Village holds title to 18 lots in Patchogue. The confession of judgment was in favor of Unique Designs by Uzi, Ltd. and was in the amount of \$347,845.15. On November 10, 2010, Unique entered judgment in Suffolk County pursuant to the confession of judgment (Chicago Title's ex A). Although the judgment correctly named Northwood Village, LLC as the defendant in the caption, the decretal paragraph incorrectly referred to the judgment debtor as "Northwood Estates, LLC." However, both the caption and the decretal paragraph correctly showed the judgment debtor's address as 399 West John Street in Hicksville.

On November 23, 2010, shortly after entry of the Suffolk judgment, Freedman and Hason entered into the agreement which forms the basis of the present action. Pursuant to the agreement, Hason was to repurchase Freedman's interests in 399 West John, Hunting Hill, Pinewood Terrace, Pinewood Development, and Islandia Partnership for \$1,400,000. The agreement further provided that Pinewood Terrace was to continue to make payments on a \$600,000 loan from State Bank of Long Island, and the Knolls was to continue to make payments on a \$5,578,752 loan from Hudson Valley Bank. Additionally, Freedman was to receive \$50,000 upon the sale of ten condominium units of Pinewood Terrace. Although Freedman retained his 30 % membership interest in the Knolls, he agreed not to exercise any management rights in that company.

The parties entered into an amendment agreement on January 20, 2011, apparently the date of the closing. The amendment provided that \$1,300,000 of the purchase price was to be paid by bank check at the closing. The balance of the purchase price was to be paid by a \$100,000 promissory note dated January 20, 2011 and payable one year after the closing. The note carried interest at the rate of 7 % and contained a provision for attorney's fees.

This action was commenced on November 19, 2012. The first cause of action is on the \$100,000 promissory note. Plaintiff also asserted various other claims, including breach of the November 2010 agreement by failing to make loan payments, as well as the \$50,000 payment to Freedman, breach of the duty of good faith and fair dealing, an accounting with respect to Pinewood Terrace and The Knolls, breach of fiduciary duty, and waste of corporate assets.

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By order dated January 30, 2013, plaintiff's motion for a preliminary injunction was granted to the extent of restraining defendant from transferring his ownership interest in Pinewood Terrace, LLC and restraining defendant from transferring any real property owned directly or indirectly by that company. By order dated May 29, 2013, the court granted plaintiff partial summary judgment to the extent of liability on his first cause of action.

On September 4, 2014, Hason, acting through Pinewood Terrace, LLC, sold a 72 % interest in Northwood Village LLC to Terrace Lane LLC, in violation of the preliminary injunction. The purchase price was \$365,000 to be paid into escrow with Jonathan Fisher, Esq (defendant's attorney), as well as an assignment to be delivered in escrow with Simon Rothkrug (purchaser's attorney) of the proceeds of the sale of 2 Pinewood Terrace, a condominium in Patchogue, up to \$360,000.

By order dated December 11, 2014, Supreme Court, Suffolk County amended the judgment to refer to Northwood Village, LLC as the judgment debtor in the decretal paragraph. The amended judgment was entered in Suffolk County on December 26, 2014. On September 8, 2015, the amended judgment was assigned to Chicago Title Insurance Company, who had apparently insured Terrace Lane's title. On November 12, 2015, the judgment creditor served restraining notices on Hason, Northwood Village, and Pinewood Terrace.

On February 16, 2016, Freedman and Hason entered into a "settlement agreement and mutual release of claims," settling the present action. The settlement agreement provides that Hason shall pay Freedman the sum of \$725,000 "to be paid from funds held in escrow." The agreement further provides that the payment was to be made by "Jonathan Fisher, Esq and Simon Rothkrug, Esq in immediately available funds...." As noted, Fisher is Hason's attorney, and Rothkrug is the attorney for the purchaser in the Northwood Village transaction.

By order to show cause dated February 23, 2016, Hason moves for an order directing Rothkrug to "release [to Freedman] the escrowed funds," apparently the proceeds of the sale of the Pinewood Terrace condominium, which were covered by the assignment. Hason argues that he is entitled to dispose of the escrowed funds by virtue of the settlement agreement.

In opposition, the judgment creditor Chicago Title argues that it is entitled to the escrowed funds pursuant to its judgment and restraining notice. In support of Hason's application, Freedman argues that the court's January 30, 2013 preliminary injunction

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operates to give plaintiff priority over the November 12, 2015 restraining notice, and the escrowed funds are not property in which the judgment debtor has an interest.

A judgment debtor served with a restraining notice is forbidden to make or suffer any sale or transfer of any property in which he has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated (CPLR § 5222[b]). Although a restraining notice operates as an injunction, it does not give the judgment creditor a lien on the defendant's property or priority over other judgment creditors (Practice commentary C5222:4,8). While Chicago Title did not acquire any lien upon the escrowed funds by serving its restraining notice, the court must determine whether the judgment creditor acquired a valid lien against the property.

CPLR § 5203 provides that no transfer of an interest of the judgment debtor in real property is effective against the judgment creditor from the time of the docketing of the judgment with the clerk of the county in which the property is located. A judgment is "docketed" by making an entry in the proper docket book "under the surname of the judgment debtor" (CPLR 5018[c]). The entry shall consist of, among other information, the name and last known address of the judgment debtor (Id). If the judgment is docketed under the judgment debtor's correct surname, the docketing creates a lien on the debtor's real property, at least where the first name shown on the docket is a "commonly known derivative" of the first name of the grantee on the deed to the property (*Soressi v SWF, LP*, 81 AD3d 1143 [3d Dept 2011]). In *Soressi*, the deed showed the judgment debtor's first name as "John," whereas the judgment was docketed as against "Jack" McCabe. Both the deed and the judgment showed the correct surname of the owner of the property. *Soressi* makes clear that, with respect to judgments against individuals, docketing under a "nickname," or common variation of the judgment debtor's first name, will not effect the validity of the lien of the judgment. With respect to judgments against corporate entities, it appears to be an open question whether docketing under a variation of the corporate name will create a lien on the corporate debtor's real property.

As the party seeking relief, it is Hason's burden to proffer evidence demonstrating that Chicago Title's judgment did not create a lien on the real property (*Soressi v SWF, LP*, supra, 81 AD3d at 1144). Chicago Title asserts that the judgment was "misindexed" and the judgment did not appear as a "record lien" on any property owned by Northwood Village (Affirm of Brian Tretter at ¶ 11). However, a judgment against Northwood Village, or Northwood Estates, would presumably be docketed under "Northwood," the judgment

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debtor's "surname." Similar to a surname, the name "Northwood" is actually the identifier, while terms such as "Estates," "Village," or "Glen" would seem to be merely "common derivatives," consistent with the property's condominium status. In any event, since Hason does not offer the actual docket, it is not clear what information was actually shown on the docket, and whether the docketing of Chicago Title's original judgment gave notice of the judgment to prospective purchasers of the property (See, *Flagstar Bank v New York*, 114 AD3d 138, 145 [2d Dept 2013]). The court notes that the docket apparently showed the correct address of the property. Accordingly, defendant Hason's motion for an order directing the release of the escrowed funds is **denied**, with leave to renew upon proper papers showing that the judgment did not create a lien on the property.

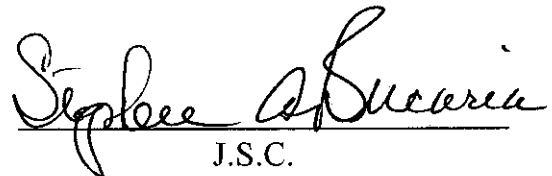
One additional matter requires comment at this time. Hason asserts that, if the escrow funds are not released to Freedman, the settlement agreement will be "null and void" (Affirm of Jonathan Fisher at ¶ 4). However, it is by no means clear that the validity of the settlement is dependent upon the escrowed funds being turned over. Where a contract provides for payment from a specific fund, such as an escrow, the existence or availability of that fund shall not be a condition precedent to the obligation to pay, absent specific and unqualified language in the contract (NY Jur2d Contracts § 287). Because the settlement agreement operated as a substituted agreement with respect to the original contract, (See, *Goldbard v Empire State Mutual Life Ins.*, 5 AD2d 230, 234 [1st Dept 1958]), it is clear that the risk of loss with regard to the escrow is on the defendant rather than the plaintiff.

So ordered.

Dated APR 11 2016

ENTERED

APR 13 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE


J.S.C.