

Meagher v Doscher

2016 NY Slip Op 32853(U)

April 14, 2016

Supreme Court, Suffolk County

Docket Number: 605850/2015

Judge: Jerry Garguilo

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SHORT FORM ORDER

E-FILE

INDEX NO. 605850/2015

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

DECISION AFTER HEARING

MICHAEL MEAGHER, MICHAEL MEYER, and STEPHEN SMITH,

Attorneys for Meagher, Meyer and Smith:

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NEW YORK, NY 10019
ATTN: JAMES CATTERSON, ESQ.

Plaintiffs,

-against-

DREW DOSCHER,

Defendant,

and

Attorneys for Michael Meyer and

148 S. Emerson Partners LLP
MICHAEL BURROWS, ESQ.
GREENBERG TRAUIG, LLP
MET LIFE BLDG, 200 PARK AVE.
NEW YORK, NY 10166
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148 SOUTH EMERSON PARTNERS, LLC,

Nominal Defendant.

MICHAEL J. MEYER, individually and derivatively on behalf of 148 SOUTH EMERSON ASSOCIATES, LLC.,

Attorney for Drew Doscher:

DEVEREAUX LAW GROUP
D/B/A MICHAEL J. DEVEREAUX & ASSOC., PC
39 BROADWAY, SUITE 910
NEW YORK, NY 10006

Plaintiff,

and

MICHAEL MEAGHER & STEPHEN SMITH,

Receiver:

CHARLES RUSSO, ESQ.
RUSSO KARL WIDMAIER & CORDANO, PLLC
400 TOWN LINE RD
HAUPPAUGE, NY 11788

Nominal Plaintiffs,

-against-

148 SOUTH EMERSON, ASSOCIATES, LLC and DREW DOSCHER,

Attorney for Charles Russo, Esq.

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JERICHO, NY 11753
ATTN: SETH L. BERMAN

Defendants.

The Court conducted a hearing in the action indexed 605850/2015 on January 25th, February 1st and February 2nd of 2016. The hearing came from a direction by this Court in its September 16, 2015 short form order:

The eviction action noted hereinabove (605850/2015) has been calendared for a summary hearing on October 26, 2015 at 11 a.m. An issue to be heard by the Court concerns the existence or non-existence of a leasehold interest in favor of the Associates entity d/b/a The Sloppy Tuna. The document which purports to be a lease was presented subsequent to the Court's determination in February of this year [2015]. From a practical standpoint a determination of no leasehold interest in favor of the business, The Sloppy Tuna, will lead to an eviction of the business. On the other hand, a finding of a viable leasehold interest will require the continuation of the litigation going back in time and forward in time.

The hearing consisted of testimony from the following witnesses:

1. Michael Meagher (January 25, 2016)
2. Michael Meyer (January 25, 2016)
3. Michael Meyer, continuation (February 1, 2016)
4. Allan Povol, CPA (February 1, 2016)
5. Steven Smith (February 1, 2016)
6. Matthew Brown, Esq. (February 2, 2016)
7. Drew Doscher (February 2, 2016)

The only issue to be heard was whether or not the document marked as Petitioner's exhibit 1 is a valid lease contract between 148 South Emerson Partners, LLC (the owner of the real estate upon which The Sloppy Tuna sits) and 148 South Emerson Associates, LLC d/b/a "The Sloppy Tuna." The document format harkens the Court back to the days of the Bar's reliance on the Blumberg form. The document is a preprinted, fill in the blanks form. The signature page of the Lease finds a purported execution on behalf of 148 South Emerson Partners, LLC and 148 South Emerson Associates, LLC. Relevant precedent requires reference to ¶30 of the purported lease:

At the end of the aforementioned lease term, this lease agreement will automatically renew for an additional period of one (1) year, unless tenant elects to terminate this Lease Agreement by written notice to the landlord within thirty (30) days of the end of the lease term. Notwithstanding the foregoing, this Lease Agreement shall be limited to ten (10) one (1) year automatic renewals. (emphasis added)

Additionally, at ¶20 of the proffered document the following is noted:

The failure of the landlord to insist upon a strict performance of any of the terms, conditions and covenants herein, shall not be deemed a waiver of any rights or remedies that the landlord may have, and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions and covenants herein, contained. This instrument may not be changed, modified, discharged or terminated orally.

It is clear that the document referred to as the "purported lease" during the hearing, does not have the names of the alleged signatories typed or printed beneath the signature. There are no corporate or limited liability company titles for any signatory, no notarizations and no witnesses to the signatures.

Section 5-703 of the General Obligations Law Sub division 2 reads as follows:

A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent there unto authorized by writing. (emphasis added)

The Court further finds that no one credibly testified as to whose signatures are on the Lease and/or by what authority said signatures appear. More particularly, there was no written authorization produced authorizing non-members to execute the document on behalf of either LLC. Associates can claim no leasehold interest stemming from the "purported lease."

At the commencement of the hearing, the Court inquired as to the availability of Mr. Allan Povol, Certified Public Accountant. The Court was compelled to do so as it was in possession of conflicting documents. The Intervenor Respondent, Drew Doscher, submitted on or about October 5, 2015, a verified answer with counterclaims, wherein he alleged that "Alan Povol, CPA upon information and belief, signed the lease agreement on behalf of 148 South Emerson Partners, LLC (the landowner) with the authority and consent of Michael Meyer." An affidavit subsequently submitted by Mr. Povol denied the allegation.

Mr. Povol, an accountant who was engaged by Associates (The Sloppy Tuna) for a

period of time testified that he did not sign his name, or anyone else's name to the purported Lease. He denied being the scrivener of the document. Mr. Meyer testified that he also did not sign the purported Lease nor did he authorize Mr. Povol or anyone else to sign the document on behalf of either LLC. It should be noted that the Court directed the production of Mr. Povol. He was, in fact, subpoenaed by counsel for the Intervenor who made much noise concerning a missing witness charge in the event Mr. Povol was not produced. Thereafter, counsel for Intervenor noted upon Mr. Povol's appearance that his testimony was not necessary. In essence, "never mind" what he pleaded or suggested concerning the authority of Mr. Povol to execute the document.

Two (2) witnesses, Michael Meagher and Steven Smith also testified. It is acknowledged that at the time of the creation of the purported Lease they were also 25% members of Associates. Each offered testimony that they did not sign the purported Lease nor did they authorize Alan Povol or anyone else to sign the document on behalf of either LLC.

The Intervenor produced two witnesses. Matthew Brown, an attorney, who was called upon to testify. The Court must note that Mr. Brown arrived at the courthouse in the afternoon of February 1, 2016. By the time he was reached the Court had come to the end of the day. The Court, most apologetically, explained to Mr. Brown that he was expected, as a subpoenaed witness, to return the following morning. He objected and had the audacity to disrespectfully confront the Court and ask if it "worked on commissions." The Court maintained its composure and directed him to appear. At the close of Mr. Brown's testimony, he was called upon to stand before the Court. Thereafter, he apologized for the comment. Mr. Brown testified that he signed the Lease on behalf of (The Sloppy Tuna) at the request of Mr. Doscher. The Court does not know nor is it clear whose name Mr. Brown signed. He was certain he did not sign on behalf of South Emerson Partners, LLC and it is further certain that Mr. Brown was not authorized in writing to sign on behalf of any of the parties to the purported lease.

The Court does not exist in a vacuum sealed bubble surrounded by books and briefs. Although speculation is discouraged, it was apparent from Mr. Brown's testimony that he was the expediter in connection with the construction and opening of The Sloppy Tuna. It is certainly within the realm of reality to find that in connection with the application to the State Liquor Authority for licensure that the necessity of a lease became apparent. As noted above, a Blumberg form was produced, the blanks were filled in, and things that resembled signatures were put in place for purposes of the submission to the State Liquor Authority.

In connection with Mr. Brown's testimony and appearance he produced no documents. Nevertheless, Intervenor-Doscher submits to the Court that subsequent to Mr. Brown's

departure from the Court proceedings, Mr. Brown visited his own beach house and came upon more than one hundred (100) pages of papers. For a reason completely unknown to the Court and in absolute derogation of a party's right to confrontation the Intervenor-Doscher's counsel, has submitted all of Mr. Brown's trove of documents in his post trial submission. The Court orders that those documents are de hors the record and are stricken.

The last witness produced was Drew Doscher, the Intervenor. At one point, the Court directed a comment to Mr. Doscher:

A little while ago you told the court that it's your--it appears to be your name, but you didn't sign it.

The witness: Well, I didn't physically sign my signature.

Although the Court admonished the parties prior to taking testimony that if, the purported Lease was, in law and fact, not a lease, submissions of the same to the State Liquor Authority could represent a *prima facie* violation of law (offering a false instrument).

Intervenor's argument that the purported lease, is outside the statute of frauds (General Obligations Law 5-703) as it is for a one (1) year term is unavailing. As pointed out by Petitioner:

In a diversity action in the Southern District of New York, plaintiff tenant sought enforcement of a 1-year oral lease that included an option to renew. Plaintiff claimed that even though oral, because the lease was capable of performance within one (1) year, it was not subject to the statute of frauds--and, further, that the option to renew did not otherwise subject it to the statute of frauds. The Court disagreed, holding that where the option to renew is limited unilaterally to the plaintiff [tenant] it is illusory, from the point of view of the defendant, to consider the contract terminable or performable within one year. *Special Event Entertainment v. Rockefeller Center, Inc.*, 458 F.Supp. 72, 76 (S.D.N.Y. 1978). (emphasis added)

The Court explained: It is the party to be charged with the contract whom the Statute of Frauds is designed to protect. Were plaintiff to have a right, based only upon an oral representation, to unilaterally extend the contract for more than one year, the defendant would be at the mercy of such representation without

any protection from possible fraud. Thus, the rule that unilateral control in the hands of plaintiff brings the contract within the Statute of Frauds furthers the salient objectives of the statute. (emphasis added)

In essence, the *Special Events* court was saying that unless the option terms are to be mutually agreed upon as opposed to unilaterally controlled by the tenant, it is within the Statute of Frauds. The option language in the purported lease places unilateral control in the hands of one party. It is within the Statute of Frauds.

Counsel for the Receiver submits an argument sounding in estoppel against the purported landlords. In *Dorothy M. Faison v. Tonya Lewis*, 25 N.Y.3d 220, the Court of Appeals noted:

As this Court held in *Marden*, a forged deed is void not merely voidable. That legal status cannot be changed, regardless of how long it may take for the forgery to be uncovered. As this Court made clear in *Riverside Syndicate, Inc. v. Munroe*, a statute of limitations "does not make an agreement that was void at its inception valid by the mere passage of time" (10 N.Y.3d 18, 24, 853 N.Y.S.2d 263, 882 N.E.2d 875 [2008], citing *Pacchiana v Pacchiana*, 94 A.D.2d 721, 462 N.Y.S.2d 256 [2nd Dept 1983]). Consequently, plaintiff may seek to vacate the deed and defendant's encumbrance upon the property.

Indeed, this is the prevailing approach in other jurisdictions (*see e.g. Moore v Smith-Snagg*, 793 So 2d 1000, 1001 [Fla Dist Ct App, 5th Dist 2001]). The high court of West Virginia, for example, has observed that "there is no statute of limitations regarding void deeds" (*MZRP, LLC v Huntington Realty Corp.*, 2011 WL 12455342, 4, 2011 W Va LEXIS 240. While the high court of Idaho held that "because [a] lease agreement was *void ab initio*, it could be challenged at any time" (*Thompson v Ebbert*, 144 Idaho 315, 318, [Attempted lease void based on a lack of authority to lease only a portion of the property]).

"An act which is completely void, or *void ab initio*, has no validity and can be challenged by anyone at any time. An act which is simply voidable, however, is valid unless and until it is undone at the behest of someone who has a legitimate interest

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in so doing so. *See, Sikes v. Global Marine, Inc.*, 881 F.2d 176,
178 (5th Cir. 1989).

The Court rejects Receiver's estoppel argument.

The Court finds the absence due execution and/or express authorization to execute the document on behalf of either LLC, at best renders the lease voidable, at worst *void ab initio*. It is therefore,

ORDERED ADJUDGED AND DECREED, as follows:

1. There is no leasehold between "Partners and Associates."
2. The Court, sua sponte, stays the ejectment of Associates pending the determination of the Appeal of this Court's Order declaring that all equity in "Partners," the landowner, vests equally in Messers Meyer, Meagher, Smith & Doscher on the condition that the Receiver, within thirty (30) days of this Short Form Order negotiates a month to month occupancy between the two LLCs ending the Tuesday after Labor Day 2016.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: April 14, 2016


HON. JERRY GARGUILO, JSC