

Jones v Gottlieb

2018 NY Slip Op 30639(U)

April 10, 2018

Supreme Court, New York County

Docket Number: 652849/2016

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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MICHAEL JONES, both individually and derivatively as a member of,
771 ST. NICHOLAS AVENUE LLC,

Plaintiff,

DECISION & ORDER
Index No. 652849/2016

-against-

Mot. Seq.: 007

ADRIAN GOTTLIEB, a/k/a ARTY GOTTLIEB, both as EXECUTOR OF
THE ESTATE OF MARTIN GOTTLIEB a/k/a MARTIN O. GOTTLIEB,
and individually, DOROTHY GOTTLIEB, NACRA LLC, STUART
SHAW and JOHN and JANE DOES 1 to 5,

Defendants.

-----X
HON. ARLENE BLUTH, J.:

The motion by plaintiff for a preliminary injunction is denied.

Background

This real estate dispute arises out of a property located at 771 St. Nicholas Avenue in Manhattan. Plaintiff and Dr. Martin Gottlieb purchased the building with the intention to convert it into a medical facility. In November 2007, plaintiff and Dr. Gottlieb transferred their ownership interests in the property to 771 St. Nicholas Avenue LLC (the "LLC"). At the time of the transfer, the property had a \$750,000 mortgage. In 2009, plaintiff alleges that he had a dispute with Dr. Gottlieb and both refused to fund the LLC's mortgage payments which caused the property fall into arrears. Eventually, the mortgagee filed a foreclosure action.

Plaintiff contends that he reached an agreement with Dr. Gottlieb to resolve their differences but Dr. Gottlieb never followed through and deposited the money he was supposed to contribute into a trust account held by his attorney, defendant Stuart Shaw. In 2014, Dr. Gottlieb passed away.

Plaintiff alleges that he discovered in March 2015 that the note and the judgment of foreclosure and sale on the property had been assigned to Nautilus Capital, LLC. Plaintiff asked for a pay-off letter from Nautilus only to learn that Nautilus had assigned the note and the mortgage to defendant Nacra LLC. Nacra is allegedly an entity in which defendant Adrian Gottlieb (Martin Gottlieb's sole heir, twin brother and executor of Martin's estate) is a member or stakeholder.

Plaintiff claims that Adrian ignored his fiduciary responsibility to plaintiff and their partnership by purchasing the mortgage note through Nacra. Plaintiff claims that this purchase was completed at a discount, which resulted in a profit of thousands of dollars for Adrian. Plaintiff insists that Adrian has usurped control over the LLC and the premises.

Plaintiff requests that this Court grant him immediate control of the operations of the LLC, restrain defendant from interfering with plaintiff's operation of the LLC, direct that all means of access to the property be turned over to plaintiff and restrain defendants from impeding plaintiff's access and management of the premises. Plaintiff claims that he is entitled to a preliminary injunction because there will be imminent irreparable harm caused by defendants' wrongful seizure of the premises and failure to complete the renovation of the premises.

In opposition, defendants claim that Nacra paid approximately \$985,000 for the assignment of the judgment of foreclosure and sale- an amount allegedly over the face value of

the mortgage. Defendants insist that Nacra has not taken any steps to enforce the judgment of foreclosure and sale because Adrian wants to be fair with plaintiff.

Discussion

“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous. Inc.*, 4 NY3d 839, 840, 800 NYS2d 48 [2005] citing CPLR 6301). “Entitlement to a preliminary injunction depends upon probabilities, any or all of which may be disproven when the action is tried on the merits” (*Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 216, 889 NYS2d 793 [1st Dept 2009] [internal quotations and citation omitted]).

“Preliminary injunctions which in effect can determine the litigation and give the same relief which is expected to be obtained by the final judgment, if granted at all, are granted with great caution [and] only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile . . . Such an injunction, if ever permissible in advance of final judgment, is plainly inappropriate unless the undisputed facts are such that a trial is futility. If there are motives to be probed and opposing equities to be weighed, there must be the searching scrutiny of a trial and the sanction of a judgment” (*Xerox Corp. v Neises*, 31 AD2d 195, 197, 295 NYS2d 717 [1st Dept 1968] [internal quotations and citations omitted]).

Here, plaintiff’s first cause of action “asks this Court for a declaration that, under prevailing New York law, the Plaintiff is entitled to have full unrestricted access and control over

the management of the LLC. Plaintiff further asks this Court for an order directing Defendants to cease and desist from exerting any management and/or control over the Subject Premises and to turn over access, including providing Plaintiff copies of any keys to locks that Defendants may have changed providing full and complete access to the Subject Premises" (NYSCEF Doc. No. 1, ¶¶ 53-54). This cause of action is nearly identical to the relief sought in the instant motion. Therefore, the Court denies the motion because plaintiff is not entitled to the ultimate relief he seeks in this action, especially where he has not established undisputed facts supporting a motion for a preliminary injunction.

The fact is that plaintiff brought this case because he thinks that Adrian improperly usurped plaintiff's management over the LLC and plaintiff wants to get control over the premises before he loses his investment. Plaintiff also argues that Adrian, as executor of Dr. Gottlieb's estate, does not have the power to manage Dr. Gottlieb's interest in the LLC. Defendants suggest that Adrian is renovating the building and wants to maximize return if the premises are sold. Defendants also contend that Adrian stepped in to purchase the note and the mortgage to prevent the property from being sold at a foreclosure sale. Adrian insists that it was his duty, as executor of Adrian's estate, to preserve the estate's interest in the LLC by preventing it from being sold at less than fair market value.

These disputed facts require this Court to deny plaintiff's motion. If discovery ultimately supports plaintiff's allegations, then defendants' purported unwillingness to properly maintain the property might increase the amount of damages awarded to plaintiff. But at this early stage of the litigation, it would be wholly inappropriate to grant a preliminary injunction that gives plaintiff the affirmative relief sought in the complaint. If plaintiff believes that he is entitled to

the relief requested in his first cause of action, then he may move for summary judgment at the appropriate time.

Summary

The Court stresses that “the function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits” (*Olympic Tower Condominium v Cocozziello*, 306 AD2d 159, 160, 761 NYS2d 179 [1st Dept 2003]). Here, the requested relief does not seek to maintain the status quo; instead, it seeks to drastically change the current circumstances and have this Court require defendants to take certain actions. There are other ways to ensure that a property, which is the subject of litigation, is properly managed throughout the pendency of a case. That could include the appointment of a receiver— but a preliminary injunction is not an appropriate remedy in this case.

The Court observes that plaintiff claims in reply that he has not yet received a copy of the books and records of the LLC. This demand was included as part of the temporary relief requested in connection with plaintiff’s order to show cause but was not listed as part of the ultimate relief sought in the motion. However, because the Court signed that portion of plaintiff’s order to show cause requiring defendants to turn over the LLC’s books and records, the Court now orders that defendants must turn over these records so that they are received by plaintiff’s counsel at least seven days before the next discovery conference (which is scheduled on May 8, 2018).

Accordingly, it is hereby

ORDERED that the motion by plaintiff for a preliminary injunction is denied and it is further

ORDERED that defendant's shall turn over the books and records of the LLC so they are received by plaintiff's counsel by May 1, 2018.

This is the Decision and Order of the Court.

The parties are directed to appear for the already-scheduled compliance conference on May 8, 2018 at 2:15 p.m.

**Dated: April 10, 2018
New York, New York**



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH