

Kotler v 979 Corp.

2020 NY Slip Op 31803(U)

June 8, 2020

Supreme Court, New York County

Docket Number: 653398/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

In the Matter of the Application of

**STUART B. KOTLER, as EXECUTOR OF
THE ESTATE OF GAIL LOWE HAYNES,**

Petitioner,

INDEX NO. 653398/2019

**For an Order Pursuant to Article 78
Of the Civil Practice Law and Rules,**

MOTION DATE

MOTION SEQ. NO. 3

- against -

MOTION CAL. NO.

979 CORPORATION,

Respondent.

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits

PAPERS NUMBERED



Cross-Motion: Yes X No

Petitioner Stuart B. Kotler, as Executor of the Estate of Gail Lowe Haymes (“Petitioner”), moves pursuant to Judiciary Law § 753 et seq., for an order (1) finding Respondent 979 Corporation (“Respondent”), and Respondent’s President, Joshua Angel (“Mr. Angel”), in contempt of Court for their willful disobedience of this Court’s January 7, 2020 Decision and Order (the “Order”) directing that “the Board of Directors and 979 Corporation shall approve and effect the transfer of the Shares and Lease from the Estate to Starr Elizabeth Haymes Kempin”; (b) directing Respondent to deposit the requisite documentation with the Clerk of the Court to approve and effect the transfer; (c) directing Respondent to post an undertaking of \$2.8 million to provide security for Petitioner's damages incurred during the appeal process; and (d) compelling Respondent to perfect its appeal for the June Term of the Appellate Division, First Apartment.

Petitioner states that “Respondent was required to effect the transfer of the Stock and Lease to Ms. Kempin within 30 days of the date the notice of entry of the Order was filed.” Petitioner further states, “Respondent has not done so, and has not complied with the requirements of the CPLR to obtain a stay.” Petitioner states, “Respondent has not complied with this Court’s directives, and both Respondent and its President, Mr. Angel, should be held in contempt.”

Factual Background

Petitioner brought this proceeding to reverse the Board's decision to refuse the transfer of 510 shares (the "Shares") and the assignment of the proprietary lease (the "Lease") allocated to Apartment 2/3 (the "Apartment") located at 9 E. 79th Street, New York, New York, from the Petitioner, as executor of the estate of Gail Lowe Haymes (the "Estate"), to the deceased's daughter, Ms. Kempin. Respondent filed a motion to dismiss the Petition.

On January 7, 2020, the Court granted the Petition and denied Respondent's motion to dismiss. The Court annulled and vacated the Board's decision, made on February 21, 2019, that refused Petitioner's request to transfer the 510 shares allocated to Apartment 2/3 in the Building. The Court ordered the Board and 979 Corporation to "to approve and effect the transfer of the Shares and Lease" from the Estate to Ms. Kempin. The Court further ordered Petitioner to cover reasonable legal and other expenses of Respondent in connection with such assignment and transfer of shares and reasonable attorneys' fees and disbursements incurred in connection with this proceeding.

Petitioner's counsel David L. Berkey states that he sent an email to Respondent's counsel Maurice W. Heller on January 14, 2020, asking if Petitioner should contact the managing agent to effect the transfer of the Shares and Lease or if Mr. Heller would act as the transfer agent. On January 15, 2020, Mr. Heller responded that the Board was reviewing its options and would get back to him. On January 28, 2020, Mr. Berkey sent a letter to Mr. Heller demanding that Respondent set a closing date for the transfer of the Shares and Lease to Ms. Kempin on or before February 10, 2020, which was 30 days from the date of the Notice of Entry of the Order.

On January 31, 2020, Respondent filed a notice of appeal of the Order.

On February 5, 2020, Mr. Heller advised Mr. Berkey that execution of the Order would be stayed automatically, pursuant to CPLR § 5519(a)(5), following Respondent's filing of a "Consent to Transfer" document signed by Mr. Angel. Mr. Berkey informed Mr. Heller that the Order involved the transfer of the Shares and Lease which is real property, and required an undertaking to be posted in order for an automatic stay to be put into effect. Mr. Heller advised Mr. Berkey if Respondent did not move to set an undertaking on appeal, Petitioner would file a motion for contempt because of Respondent's refusal to obey the Order. Petitioner contends that Estate is being forced to continue to pay maintenance and other charges, and Ms. Kempin is being prohibited from using and occupying the Apartment pursuant to the Order.

According to Respondent, on February 11, 2020, Respondent filed a Notice of Deposit with the Clerk of the Court pursuant to CPLR § 5519(a)(5), which

included a notarized written consent of the Board of Directors of 979 Corporation pursuant to Paragraph 6 of the Proprietary Lease, to be held by the clerk pending resolution of the appeal.

According to Respondent, on February 11, 2020, Petitioner filed a notice of cross-appeal with respect to the portion of the Order that denied certain damages to Petitioner.

Parties' Contentions

Petitioner contends that Respondent has not complied with CPLR §5519(a)(5) to obtain a stay. Petitioner contends that Respondent and Mr. Angel should be held in contempt of court for their failure to deposit the required transfer documents with this Court, and for their failure to post an undertaking in an amount of \$2.8 million, or an amount to be determined by this Court.

Petitioner contends that Respondent has not complied with CPLR §5519(a)(5) to obtain a stay. Petitioner contends, "To date, Respondent has 'approved' the transfer by virtue of the 'Consent to Transfer' (Exhibit F), but it has not deposited the instruments that would effect the transfer, nor has it allowed for the Shares and Lease to be conveyed." Petitioner contends, "Here, the 'Consent to Transfer' indicates approval of the transfer of the Shares and Lease, but various other documents are required to effectuate a transfer, such as Respondent's consent to the assignment of the proprietary lease from the Estate of Gail Lowe Haymes to Starr Elizabeth Haymes Kempin, new signed share certificates bearing Ms. Kempin's name, and a new proprietary lease in Ms. Kempin's name." Petitioner contends, "Until these documents are deposited with the Clerk's Office, Respondent will be in non-compliance with this section."

Petitioner further contends that Respondent has failed to post an undertaking pursuant to CPLR §5519(a)(6). Petitioner contends that "[t]he transfer of the shares and lease of a cooperative apartment is considered a conveyance of real property," and therefore "when the Decision and Order directed Respondent to convey or deliver the Shares and Lease to Ms. Kempin, the Court was directing the conveyance or deliverance of real property." Petitioner contends that Respondent was therefore required to post an undertaking sufficient to protect Petitioner's interest but failed to do so. Petitioner contends that Respondent has failed to comply with the Order and should be held in contempt.

More specifically, Petitioner contends that Respondent should post an undertaking for at least \$2.8 million, which is "[t]his sum is equal to the damages to be sustained by the Estate during the pendency of the appeal, consisting of

approximately \$200,000 in maintenance charges that may be paid during such time (\$15,000 per month over the next 400 days), plus \$2.56 million based on the lost value of apartment use, which both Ms. Kempin and the Estate are being deprived of (0.1% per day times the \$6.4 million value of the Shares for each of the next 400 days), plus the Estate attorneys' fees for the appeal, estimated to be approximately \$40,000."

Respondent contends that enforcement of the Order has been stayed pending appeal. Respondent contends that it has complied with the Order, the Lease, and CPLR § 5519(a)(5). Respondent contends that "[t]he only obligation that is affirmatively required of the Respondent is item 'e,' the written instrument consenting to the assignment, which Respondent has executed and deposited with the Court." Respondent contends that "[t]here is no obligation upon the Respondent to issue new a share certificates." Respondent contends it "is only required to issue a new Proprietary Lease upon the surrender of the old one, which Petitioner has not done." Respondent, however, states it "will, as an accommodation, issue a new share certificate and proprietary lease to the putative transferee, Ms. Starr, should the Order become final and unappealable and the old certificate and Proprietary Lease is surrendered (or lost certificate/lease affidavits be supplied)."

Respondent also contends that the bylaws do not impose any obligation on Respondent "to do anything other than abide by the terms of the Proprietary Lease in approving a transfer and assignment."

Respondent further contends that it is not required to post a monetary undertaking pursuant to CPLR §5519(a). Respondent argues that "CPLR § 5519(a)(6) provides that 'the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered.'" Respondent argues it is not currently and was never in possession or control of the Apartment during the term of the Lease and "is a third party to the proposed transaction between Petitioner and Ms. Kempin." Respondent argues, "Although it is acknowledged by the courts that § 5519(a)(6) applies to the transfer of cooperative shares, research has uncovered not a single case where a cooperative corporation, or any party for that matter, not in possession of property had to post a bond pursuant to this section." Respondent argues, "[t]he cases involving cooperative corporations, or their landlord analogues, show that §5519(a)(6) is primarily used to protect a landlord's interest in its rental property while an eviction warrant is being appealed by the tenant who is already in possession of the premises" and "the undertaking is posted by the tenant and is used to protect the landlord from the tenant's waste of the premises and failure to pay reasonable use and occupancy."

Lastly, Respondent contends that even if it has not effectuated an automatic stay, there is no basis for an order of contempt. Rather, Respondent contends that should it should be given the opportunity to cure and provide the undertaking that the Court deems necessary to secure a stay.

Legal Standard

“To sustain a finding of civil contempt based on alleged violation of a court order, it is necessary to establish that a lawful order of the court was in effect, clearly expressing an unequivocal mandate. It must also appear with reasonable certainty that the order has been disobeyed and that the party had knowledge of its mandate.” (*Gryphon Dom. VI, LLC v. APP Intl. Fin. Co.*, 58 A.D.3d 498, 499 [1st Dept 2009], citing *Matter of Department of Env'tl. Protection of City of N.Y. v. Department of Env'tl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 240 [1987]).

Specifically, Judiciary Law §753 sets forth:

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

3. A party to the action or special proceeding, ... or other person, ... for any other disobedience to a lawful mandate of the court. N.Y. Jud. Law § 753(A)(3).

CPLR § 5519(a)(5) provides as follows:

(a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

* * *

5. the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is

entered to abide the direction of the court to which the appeal is taken[.]

Under CPLR § 5519(a)(6) an automatic stay will be put into place with the filing of a notice of appeal where:

(6) the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency.

Here, the Court's Order required "that the Board of Directors and 979 Corporation shall approve and effect the transfer of the Shares and Lease from the Estate to Starr Elizabeth Haymes Kempin."

Section 6 of the Lease which is entitled "Assignment" states:

The Lessee shall not assign this lease or transfer the stock appurtenant thereto or any interest therein, and no such assignment or transfer shall take effect as against the Lessor for any purpose, until

a. an instrument of assignment executed by the assignor shall have been delivered to the Lessor; and

b. an agreement by the assignee assuming and agreeing to perform and comply with all the covenants and conditions of this lease to be performed or complied with by the Lessee on and after the effective date of said assignment shall have been executed and acknowledged by the assignee and delivered to the Lessor, but no such assumption agreement shall be required if the assignee

surrenders the assigned lease and enters into a new proprietary lease for the remainder of the term, as hereinafter provided; and

c. all shares of stock of the Lessor appurtenant to this lease shall have been presented to the Lessor with all necessary documents to enable the Lessor to transfer the said shares to the on the Lessor's books, with proper transfer stamps affixed; and

d. all sums due from the Lessee, together with a sum to be fixed by the Board of Directors of the Lessor to cover reasonable legal and other expenses of the Lessor in connection with such assignment and transfer of stock, shall have been paid to the Lessor; and

e. consent to such assignment shall have been duly given by an instrument in writing which is to be signed either (i) by a majority of the then authorized total number of directors of the Lessor or (ii) by the Managing Agent of the Lessor, or any officer of the Lessor, when they, or either of them are duly authorized either by a resolution of the Lessor's Board of Directors or by a resolution adopted at any annual or special meeting of stockholders.

Article V, section 2, of Respondent's Bylaws provides as follows:

Assignment: Proprietary leases shall be assigned or transferred only in compliance with, and shall never be assigned or transferred in violation of, the terms, conditions or provisions of such proprietary lease. A duplicate original of each proprietary lease shall always be kept on file in the principal office of the corporation or with the managing agent of the apartment building. Proprietary leases of space in the apartment building or the corporation shall be executed by the president or a vice president.

Article VI, section 4, provides as follows:

Transfers: Transfers of shares of stock shall be made upon the books of the corporation only by the holder in person or by power of attorney, duly executed and filed

with the secretary of the corporation and on the surrender require [sic] the owner of the lost, or the owner to make an affidavit or affirmation setting forth such facts as to the loss, destruction or mutilation as it deems necessary, and to give the corporation a bond in such reasonable sum as it directs, to indemnify the corporation.

Discussion

The Order required “that the Board of Directors and 979 Corporation shall approve and effect the transfer of the Shares and Lease from the Estate to Starr Elizabeth Haymes Kempin.”

Pursuant to the Lease, in order to effect such a transfer, Respondent must provide “consent to such assignment ... by an instrument in writing which is to be signed either (i) by a majority of the then authorized total number of directors of the Lessor or (ii) by the Managing Agent of the Lessor, or any officer of the Lessor, when they, or either of them are duly authorized either by a resolution of the Lessor’s Board of Directors or by a resolution adopted at any annual or special meeting of stockholders.” According to Respondent, on February 11, 2020, Respondent filed a Notice of Deposit with the Clerk of the Court Pursuant to CPLR §5519(a)(5), which included a notarized written consent of the Board pursuant to Paragraph 6 of the Proprietary Lease, to be held by the clerk pending resolution of the appeal.

Petitioner claims that the Board’s consent is not sufficient to satisfy CPLR §5519(a)(5). Petitioner contends that “various other documents are required to effectuate a transfer, such as Respondent’s consent to the assignment of the proprietary lease from the Estate of Gail Lowe Haymes to Starr Elizabeth Haymes Kempin, new signed share certificates bearing Ms. Kempin’s name, and a new proprietary lease in Ms. Kempin’s name.” As stated above, Respondent represents that it has deposited the consent to assignment. As for the other documents, the Lease nor the Bylaws do not obligate the Respondent to issue new share certificates and Respondent is only required to issue a new Lease upon the surrender of the previous lease, which has not occurred. Further, CPLR §5519(a)(6) does not apply because Respondent is not in possession or control of the Apartment. As a stay of the Order has been effected, Respondent is not in contempt of the Order.

Wherefore it is hereby

ORDERED that Petitioner's motion is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 8, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION