

**Buttiglione v Diehl**

2020 NY Slip Op 35106(U)

April 22, 2020

Supreme Court, Westchester County

Docket Number: Index No. 70215/2017

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
 IAS PART WESTCHESTER COUNTY  
 PRESENT : HON. JOAN B. LEFKOWITZ, J.S.C.

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ROBERT BUTTIGLIONE,

Plaintiff,

-against-

BARBARA DIEHL, ESQ., and MICHAEL A.  
 MAMONE,

Defendants.

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DECISION AND ORDER

Index No. 70215/2017

Motion Return Date:  
 November 22, 2019  
 Motion Seq. #2

The following papers (e-filed documents 56-59; 18-166; 193-194) were read on the motion by the plaintiff for an order granting summary judgment on the cause of action seeking specific performance.

Notice of Motion, Affirmation, Affidavit, Memorandum of Law (Exhibits A-T)  
 Affirmation in Opposition (Exhibits A-B) (Defendant Diehl)  
 Memorandum of Law (Defendant Diehl)  
 Affirmation, Affidavits, Memorandum of Law in Opposition (Exhibits A-O)  
 (Defendant Mamone)  
 Reply Affirmation  
 Reply Memorandum of Law

Upon reading the foregoing papers it is

ORDERED the motion is granted, and on or before May 5, 2020, the defendants shall (1) turn over to plaintiff the deed and other transfer documents which transfer title to 26 North Highland Avenue, Ossining, New York, from the defendant, Michael A. Mamone, to plaintiff, and (2) refund to plaintiff the sum of \$190.00 which sum plaintiff paid to Diehl to record the deed; and is is further

ORDERED with respect to the remaining causes of action the matter is referred to the Settlement Conference Part. Due to the coronavirus health emergency the Clerk of the Settlement Conference Part shall notify the parties of the date, time and method of the settlement conference.

On March 20, 2017, the defendant, Michael Mamone, sold a commercial building to the plaintiff, a friend of Mamone's sister, for \$100.00 and attorneys fees. The contract of sale, the deed and the closing documents were all signed on March 20, 2017. That day the deed was

given to Mamone's attorney, the defendant, Barbara Diehl, for recording. The deed was never recorded. When plaintiff insisted Diehl record the deed she refused claiming her client, Mamone, had reconsidered and refused to consent to the recording of the deed.

Plaintiff then commenced this action asserting causes of action for specific performance, breach of contract, and interference with a contractual relationship. Mamone's answer asserted a counterclaim against plaintiff for indemnification, and cross-claims against Diehl for legal malpractice and breach of a fiduciary duty. Diehl's answer asserted a cross-claim against Mamone for indemnification and contribution.

In 2017 Mamone was interested in selling premises known as 26 North Highland Avenue in Ossining New York. He discussed the sale with one real estate broker and had another inspect the building. Mamone was concerned with the condition of the building and the safety of his tenants. He believed that repairing a structural "bulge," refitting improper plumbing, laying a new sewer line and installing a sprinkler system would cost him more than the building was worth. In a March 2017 email he proposed giving the building to his church. On March 17, 2017, he discussed with his attorney Diehl the possibility of gifting the property.

The morning of March 20, 2017, Mamone called his sister "in a panic," fearing for the safety of his tenants. As described by his sister, Mamone was "hysterical[ly] ranting," talking nonstop for 20 minutes, fearing his building was about to collapse. She thought her brother was having a "complete mental breakdown." She then telephoned plaintiff, "a trusted friend," who knew her brother and who had experience in building repairs, hoping he could talk "Michael off the ledge."

Plaintiff called Mamone. During that 20 minute conversation Mamone agreed to sell the building to plaintiff for \$100.00. Mamone called his attorney, Diehl, who prepared the documents including a contract of sale, deed, and the necessary transfer papers. The closing occurred at 3:00 p.m. that day. Mamone suggested contract provisions including responsibility for liens and the turnover of tenants' security deposits. He made sure the contract provided the property was sold "as is."

After the closing Mamone called his sister and with "palpable euphoria" said, "It's all done. We did a closing. Buttiglione [the plaintiff] is such a great guy." He told plaintiff to make sure he had insurance, and he cancelled his own insurance. He forwarded the rent checks he received from tenants to plaintiff. He told friends he was glad to be rid of the building.

However, at some point Mamone reconsidered the sale and he directed Diehl not to record the deed. This action ensued.

Following the completion of discovery the plaintiff moves for an order granting summary judgment on his specific performance cause of action.

Plaintiff established his prima facie entitlement to judgment as a matter of law on the specific performance cause of action by demonstrating that Mamone entered into a binding contract for the sale of the premises.

In opposition, Mamone failed to raise a triable issue of fact.

Mamone argues plaintiff is not entitled to specific performance because he, Mamone, lacked the capacity to enter the contract<sup>1</sup> and was thus within his rights to rescind the sale and direct Diehl not to record the deed.

“[A] person is presumed to be competent at the time of the performance of the challenged action and the burden of proving incompetence rests with the party asserting incapacity” (*Matter of Obermeier*, 150 AD2d 863, 864 [3d Dept 1989]).

Thus, to prevail in his defense of lack of capacity Mamone was required to demonstrate that he was incompetent at the time he sold the property to plaintiff.

“As a general rule a party’s competence to enter a binding contract is presumed. To set aside [a contract] on the ground of lack of capacity, the party must establish that, at the time of the making of the agreement, the party was suffering from a mental illness or defect which rendered the party incapable of comprehending the nature of the transaction or making a rational judgment concerning the transaction, or that by reason of mental illness the party was unable to control his or her behavior” (*Horrell v Horrell*, 73 AD3d 979, 980 [2d Dept 2010] [internal quotation marks and citations omitted]).

Here, Mamone failed to demonstrate he was suffering from a mental illness at the time he agreed to sell the building to plaintiff. Mamone presented neither medical evidence nor expert opinion from which the court can conclude he suffered from a mental illness on March 20, 2017. At best, the evidence could suggest only that Mamone might have been unwise when he agreed to sell to plaintiff.<sup>2</sup> However, the law permits one to make an agreement that may seem to be unwise or foolhardy (*Ortelere v Teacher’s Retirement Bd. of the City of New York*, 25 NY2d 196 (1969)).<sup>3</sup>

Moreover, there is evidence in the record that Mamone comprehended the nature of the transaction. Mamone’s attorney, Diehl, testified at deposition that, in her opinion, Mamone had the legal capacity to enter the contract on March 20, 2017. Mamone suggested several relevant

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<sup>1</sup> Plaintiff previously moved for summary judgment before conducting discovery. The court denied the motion finding issues of fact including whether Mamone lacked the capacity to enter the contract. Plaintiff is thus on notice of the defense of lack of capacity and he has addressed the issue in his moving papers.

<sup>2</sup> However, Mamone submitted no evidence to show that his original assessment that the cost of repairs was more than the value of the building.

<sup>3</sup> Mamone has not argued the contract was unconscionable so the court need not address the issue.

clauses be added to the contract. He reminded plaintiff to get insurance. He cancelled his own. After the sale, Mamone was relieved, telling friends he was glad to have sold the building. He also forwarded the rent checks he received after the closing to plaintiff. Thus, Mamone's conduct demonstrates that at the time he sold the property he acted knowingly and rationally and was able to control his behavior.

In addition, there is evidence in the record that, under the circumstances, Mamone had reasons to sell his property at a low price, or to give it away. Mamone feared for the safety of his tenants due to structural problems with the building. He believed the cost of the repairs required to make the building safe, structurally sound, and code compliant were more than the building was worth. Moreover, Mamone presented no evidence that his fear for the safety of his tenants or his concerns for the high cost of required repairs were either exaggerated or imagined.

Accordingly, Mamone failed in his burden to demonstrate he suffered from a mental illness which prevented him from either making a rational judgment or prevented him from comprehending the nature of his actions. He also failed to present evidence to demonstrate the contract was unenforceable for any other reason. Therefore, Mamone must fulfill his obligations under the contract and deliver the deed to plaintiff.

E N T E R

Dated: White Plains New York  
April 22, 2020

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HON. JOAN B. LEFKOWITZ, J.S.C.