SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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PHOENIX EAGLE COMPANY PTY LTD.,

Plaintiff,

-against-

DR. WILLIAM JAMES ARDREY,

Defendant.

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Index No. 154206/15

Mot. seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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For nonparty Kamysek:
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For nonparties Farkas and DFE:
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By notice of motion, plaintiff moves pursuant to CPLR 5104 and Judiciary Law §§ 753, 756, and 773 for an order adjudging nonparties Phyllis Marie Kamysek, Esq., Diana A. Farkas, and Deborah Fredericks Enterprises (DFE) in contempt for willfully refusing and failing to comply with an order dated April 29, 2015 temporarily restraining the sale of a condominium unit under a contract of sale by defendant. (NYSCEF 25).

I. PERTINENT FACTS

In March 2015, defendant, convicted and imprisoned in Australia for fraud committed against plaintiff, his former employer, sought to sell his Manhattan condominium to a non-party through nonparty Farkas, a real estate agent at DFE. Plaintiff thus commenced this action against defendant for fraud and simultaneously obtained, pending a hearing, an order temporarily

restraining defendant, and among others, his agents, attorneys, and any and all acting on his behalf or in concert, from transferring or otherwise encumbering any money and assets, including the condominium, to the extent of at least $445,000. The hearing was scheduled for May 13, 2015 when defendant was to show cause as to why an order of attachment pursuant to CPLR 6201 should not issue. (NYSCEF 11). By letter of the same date, plaintiff's attorney informed Farkas and DFE of the TRO, enclosing a copy of it (NYSCEF 29), whereupon Farkas and DFE took the condominium off the market.

On May 13, 2015, the show cause hearing was adjourned to May 27, and then to June 10, 2015.

In the meantime, on May 29, 2015, defendant was sentenced in Australia to a term of imprisonment, and by compensation order of the same date, ordered to pay plaintiff approximately $301,838.55, with a reservation of the determination of plaintiff's claimed interest and attorney fees. (NYSCEF 30, 53). Plaintiff also commenced a civil action against defendant in Australia, which was held in abeyance pending the resolution of the criminal charges. (NYSCEF 3).

On June 10, 2015, the show cause hearing was adjourned to July 1.

By settlement agreement dated June 11, 2015 and signed by both parties, the parties agreed that the condominium was

> (2)(a)(ii) permitted to be sold by the Defendant to the Purchaser at a price of US$752,500, subject to the terms of this agreement and the orders of the Supreme Court of the State of New York; [and that]
>
> (iii) the net proceeds of the sale, after discharge of the mortgage . . . in favour of PHH Mortgage Corporation and the usual reasonable sale costs are to be paid directly by the Purchaser to, and will be held in trust by [plaintiff's attorneys] for the purposes of satisfying the Compensation Order and any further debt owed by the Defendant to the Plaintiff arising out of the [Australian] Proceeding in place of the Condominium being

subject to attachment of those debts.

(c) After this Agreement is fully executed by all parties, the Plaintiff will file in the New York Proceeding the attached Stipulation [of Discontinuance] to be So Ordered by the Court.

(NYSCEF 31).

On June 26, 2015, plaintiff informed me of the settlement, that the sale of the condominium was to close on July 21, 2015, and that it would confirm the closing date and file a stipulation of dismissal a week before the closing. (NYSCEF 32). Correspondence ensued concerning the closing date and settlement figures among the parties and Kamysek, plaintiff's lawyer here. (NYSCEF 33).

Plaintiff also requested that the show cause hearing scheduled for July 1 be adjourned indefinitely and without a future date. (NYSCEF 32). As the court rules do not permit adjournments without a future date, the hearing was scheduled for September 16, 2015. Subsequently, plaintiff withdrew its motion seeking an attachment, and the hearing was cancelled. (NYSCEF 16).

By email dated July 8, 2015, Kamysek sent plaintiff a draft closing statement reflecting that out of the sale proceeds, defendant's taxes in the amount of $102,540.54 and an unrecorded second mortgage in the amount of $56,688.93 would be paid prior to the payment of any amounts due plaintiff. (NYSCEF 34). Believing that these payments were "contrary" to the settlement agreement, plaintiff's Australian counsel set about attempting to resolve it with defendant's Australian counsel. (NYSCEF 35).

On August 18, 2015, having learned that the closing was scheduled for August 19, plaintiff's counsel advised Kamysek that "issues relating to the settlement and the sale of the property" were being discussed by counsel in Australia, that the TRO "remains in effect" and

that "the parties cannot proceed with the closing tomorrow." (NYSCEF 37). Learning that the closing had been rescheduled for August 24, counsel again advised Kamysek that "we are not prepared to seek withdrawal of the attached TRO" until the issues were resolved. (NYSCEF 38).

The closing proceeded on August 24, 2015, to the "surprise" of defendant's Australian counsel, who denied having participated in making the decision to close on that day. He observed, however, that Kamysek had advised him that plaintiff would receive approximately $288,167 from the sale. (NYSCEF 39).

II. CONTENTIONS

Relying on the above stated facts, plaintiff argues that given the alleged contemnors' knowing violation of the clear terms of the TRO, its right to full recovery has been prejudiced, having received $293,067.87 of the $452,297.34 owed. In light of the contempt, plaintiff maintains that the alleged contemnors should be required to pay it at least $159,229.47, plus attorney fees and costs for bringing the motion. (NYSCEF 26).

In opposition, Kamysek argues that as she relied on the settlement agreement containing plaintiff's promise to discontinue the action and lift the TRO, and ensured, before agreeing to the closing, that plaintiff would receive more than it was entitled to under the compensation order, contempt does not lie. She observes that the settlement agreement specifies no dollar amount that plaintiff was to realize from the sale, but only that it was to receive net proceeds after the discharge of the PHH mortgage and the usual reasonable costs, and that a failure to pay the other mortgage would have prevented the closing or force the buyer "to hold double in escrow." (NYSCEF 53). She thus believed that the TRO was no longer outstanding and was aware that the proposed buyer was anxious to close given the possibility that the first mortgage would be foreclosed. After ensuring that there would be sufficient net proceeds from the sale to cover the

compensation order, Kamysek agreed to proceed with the closing.

III. ANALYSIS

A court of record may punish by fine and/or imprisonment:

> 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 . . . [a] party to the action or special proceeding, an attorney, counsellor or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court.

(Jud. Law § 753). A judgment or order of the court "may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it, by punishing him for a contempt of court." (CPLR 5104). Otherwise, knowledge of the order is required, if not actually served on the alleged contemnor, and it is not necessary that the disobedience be deliberate or willful. (*Rosado v Edmundo Castillo Inc.*, 54 AD3d 278 [1st Dept 2008] [defendants who had not been served with temporary restraining order but had knowledge of it could be held liable for contempt]; *Casavecchia v Mizrahi*, 57 AD3d 702, 703 [2d Dept 2008]; *Doors v Greenberg*, 151 AD2d 550, 551 [2d Dept 1989]).

The purpose of a TRO is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. (*Ruiz v Meloney*, 26 AD3d 485 [2d Dept 2006]). Here, the TRO was issued to prevent the sale of the condominium until a hearing could be held on plaintiff's application to attach and sell the property to satisfy the Australian judgment. Before the hearing was held, however, the parties agreed that the alleged contemnors would be permitted to sell the unit, which is the subject of the instant action and the TRO. The parties' intent to end the matter by permitting the sale of the condominium is reflected in plaintiff's counsel's request that the show cause hearing be adjourned without a future date. As

the parties agreed to the sale of the condominium, plaintiff cannot complain that the alleged contemnors violated the TRO by doing what had been agreed. And, as the parties agreed that the matter would be discontinued once the settlement agreement was signed, the alleged contemnors' belief that the signing of the agreement removed any obstacle to the condominium's sale was reasonable.

Moreover, and in any event, a settlement agreement terminates an action and no further proceedings may be held therein. (19A NY Jur 2d, Compromise, Accord, and Release § 57 [2016]; *Rudovic v Rudovic*, 131 AD3d 1225 [2d Dept 2015] [valid release constitutes complete bar to an action on claim which is subject of release, and signing of release is "jural act" binding on parties]). Here, the parties not only agreed to settle, but plaintiff agreed to discontinue the action on signing the agreement; the discontinuance was not otherwise conditioned. The action thus terminated when the agreement was signed. (*See Rotter v Ripka*, 138 AD3d 567 [1st Dept 2016] [stipulation of settlement containing express and unconditional stipulation of discontinuance sufficient to terminate action]; *compare Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51 [1979] [where parties had not yet executed stipulation of discontinuance and settlement agreement contemplated discontinuance of action only after defendant had made required payments, action did not terminate by agreement], and *Berrian v McCombs*, 280 AD2d 442 [2d Dept 2001] [as discontinuance of action conditioned on payment, parties did not unequivocally terminate action]).

As the action terminated, the TRO was lifted as a matter of law and was not extant when the condominium was sold, notwithstanding plaintiff's counsel's belief. (*See eg,* 12A Carmody-Wait 2d § 78:179 [ex parte temporary restraining order is interim protective measure and effective only until hearing held on request for preliminary injunction and hearing must be held

within earliest possible time]; 12A Carmody-Wait 2d § 78:178 [preliminary injunction continues until, *inter alia*, action is terminated; formal order dissolving injunction unnecessary where action discontinued or case terminated]; *see Kelly v City of Yonkers*, 11 NYS2d 434 [Sup Ct, Westchester County 1939], *affd* 257 AD 966 [2d Dept] [discontinuance of action dissolved preliminary injunction as matter of law]; *see also Gardner v Gardner*, 87 NY 14 [1881] [where temporary injunction prevented defendant from interfering with plaintiff's occupation of house, and judgment was entered settling rights of parties, injunction was dissolved by judgment and defendant could not be held liable for contempt for violating injunction]; *compare In re Estate of Perri*, 1 Misc 3d 902[A], 2003 NY Slip Op 51476[U] [Surr Ct, Nassau County 2003] [as TRO restrained party from entering into contract of sale for property with anybody other than petitioner, and as parties' subsequent stipulation of settlement contemplated further action by parties and did not contain language, explicit or implicit, indicating parties intended to discontinue proceeding, party violated TRO by signing contract with person other than petitioner]).

Moreover, plaintiff was to file a stipulation discontinuing the action upon the execution of the agreement. Had plaintiff done so, the action would have been discontinued as of June 11, 2015, when the agreement was executed, well before the sale. Equity precludes plaintiff, who breached the agreement, from relying on that breach in seeking to hold Kamysek, Farkas, and DFE in contempt for closing on the sale of the condominium.

Nothing in the agreement supports plaintiff's claim that it was agreed that the action would be discontinued after the closing, nor is the settlement or discontinuance contingent on the parties' agreement as to any other terms. Any dispute that plaintiff may have with defendant or the alleged contemnors relating to the agreement is not before me.

For all of these reasons, plaintiff's motion is denied in its entirety.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order holding the alleged contemnors in contempt is denied.

ENTER:

Barbara Jaffe, JSC
HON. BARBARA JAFFE

DATED: June 20, 2016
New York, New York