

39E67th LLC v Bivins
2017 NY Slip Op 31481(U)
July 12, 2017
Supreme Court, New York County
Docket Number: 161316/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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39E67TH LLC, BEACHTON TUXEDO LLC, ERIK
SCHAFFER, JEDEDIAH TURNER, ZACHARY TURNER,
ALEX DE BIE, AND EDWARD KUHNEL,

DECISION/ORDER
Index No. 161316/201

Plaintiffs,

-against-

OLIVER BIVINS, JR., OLIVER BIVINS, JR. AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF
LORNA BIVINS, AND THE ESTATE OF LORNA
BIVINS,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for breach of fiduciary duty, plaintiffs 39E67th LLC, Beachton Tuxedo LLC, Erik Schaffer, Jedediah Turner, Zachary Turner, Alex De Bie, and Edward Kuhnel (collectively “plaintiffs”) move for leave to reargue that branch of the August 11, 2016 decision and order which granted defendants Oliver Bivins, Jr. (“Bivins”), Oliver Bivins, Jr. as personal representative of the estate of Lorna Bivins, and the Estate of Lorna Bivins’ (collectively “defendants”) motion for summary judgment only to the extent of dismissing the first cause of action for breach of contract, and denied plaintiffs’ cross-motion for partial summary judgment on the first cause of action for breach of contract.

Bivins’ mother, Lorna Bivins, died on February 25, 2011, leaving Bivins as the sole heir to her estate. Her estate included four properties, including 808 Lexington

Avenue ("808 Lex"). 808 Lex was income producing, but the mortgage was in default and Sovereign Bank, the mortgage holder, was threatening foreclosure.

Plaintiffs Edward Kuhnel, Erik Schafer, Jedediah Turner, Zachary Turner and Alex De Bie formed investor group Beachton to purchase the 808 Lex mortgage and note. The 1988 deed for 808 Lex was in the names of Lorna Bivins a/k/a Lorna M. Bivins and Oliver Bivins, III. According to Bivins, Edward Kuhnel had suggested that Oliver Bivins, III referred to Bivins, however, Bivins had not been born when the deed was created, and it is now conceded that Oliver Bivins, III was actually a misnomer for Bivins' father. Kuhnel admitted that when he reviewed the deed and spoke with his advisors, he was aware that there were questions about the ownership of 808 Lex. He was also aware that Bivins had not been born when the 1988 deed was created.

On October 4, 2012, Beachton and Bivins individually, as the purported owner of 808 Lex, entered into an Equity Exchange Agreement which stated in relevant part,

1. Upon Investor Group's acquisition of the note, at such time as the Investor Group shall determine, provided that all amounts due under the Note is not first paid in full to Investor Group . . . , Owner shall immediately execute and deliver any documents necessary to convert the note into a 40% equity ownership in the Building by Investor Group
2. Upon Investor Group's acquisition of the note, at such time as Kuhnel shall determine, provided that all amounts due under the Note is not first paid in full to Investor Group . . . , Owner shall also immediately execute and deliver any documents necessary to transfer an additional 2% of equity ownership in the Building to Kuhnel for his role in organizing the Investor Group and the Investor Group's purchase of the note

Owner agrees that upon completion of the Transfer, Investor Group shall have the right and obligation to substantially manage the affairs of the Building, including, but not limited to, the hiring of independent bookkeeper, the evaluation and implementation of renovations and improvements of the Building, conducting lease and tenant negotiations, the hiring of currently

unforeseen outside contractors/employees with the sole purpose to increase the revenue generation of the Building . . .

On October 31, 2012, Beachton acquired the 808 Lex mortgage and note from Sovereign Bank. In January 2013, Bivins' father's guardianship¹ sued the Estate, Bivins, and Beachton in a partition action, claiming that the Guardianship, not the Estate, had title to all the assets of the estate. The parties reached a global settlement agreement. Pursuant to the global settlement agreement, the Guardianship took title to the 808 Lex and another property. The Estate retained title to other properties, including the 67th Street property. In addition, the note that Beachton had acquired would remain as a lien on 808 Lex and it would be satisfied by the Guardianship as the new owner of the property.² Beachton also released any claims against Bivins' father and the Guardianship.

Bivins, the estate and Beachton also entered into a Summary of Terms, in which they agreed that the Estate and Bivins would convey to Beachton a 20% ownership interest in the 67th Street property, in exchange for Beachton's release of claims in litigation relating to 808 Lex and claims under the Equity Exchange Agreement. They agreed to first convey the property to Bivins individually, and then to a new entity, 39E67th LLC, created by Bivins and Beachton. The 67th Street property was transferred to Bivins individually in June 2013, but never to 39E67th LLC. Bivins allegedly sold the 67th Street property on October 28, 2014 for \$22.5 million. Kuhnel was allegedly aware

¹ Bivins' father died in 2015.

² Beachton allegedly commenced foreclosure proceedings on 808 Lex on or about August 4, 2014.

of the impending sale however, only sent a Memorandum of Contract to Bivins after the sale, indicating that Bivins was to transfer 20% of the proceeds from the sale to plaintiffs. Bivins did not sign the contract and did not convey any of the proceeds from the sale to plaintiffs. This lawsuit ensued. Plaintiffs alleged causes of action for (1) breach of contract due to Bivins' failure to convey title to East 67th Street to plaintiffs or failure to provide plaintiffs its 20% share of the proceeds of the sale of the 67th Street Property; (2) breach of fiduciary duty regarding the sale of the East 67th Street Property; (3) unjust enrichment/quantum meruit; (4) constructive trust; (5) equitable lien; (6) attachment; and (7) preliminary injunction.

Defendants then moved for summary judgment dismissing the complaint, and plaintiffs cross moved for partial summary judgment on their breach of contract cause of action.

In the August 11, 2016 decision and order, I found that defendants made a prima facie showing of entitlement to summary judgment dismissing the breach of contract cause of action. The 1988 deed to 808 Lex identified Lorna and Bivins Sr. as the owners of 808 Lex, and the Equity Exchange Agreement, prepared by plaintiffs, erroneously identified Bivins, individually, as the owner of 808 Lex. When Bivins signed the Equity Exchange Agreement, he was not the owner of 808 Lex and thus his agreement to convey a 42% interest in the property to plaintiffs had no force or effect. In addition, to the extent that plaintiffs' purported 20% interest in the 67th Street property under the Summary of Terms was intended to be in exchange for a 42% grant of equity in the invalid Equity Exchange Agreement regarding the 808 Lex property, it was of no force or effect because

the Summary of Terms was not supported by consideration. As such, plaintiffs' agreement to relinquish their claims under the Equity Exchange Agreement amounted to illusory consideration, because they merely agreed to give up an equity interest which they did not own. In addition, plaintiffs' release of their claims relating to 808 Lex did not convey any benefit to defendants and therefore could not qualify as consideration for the Summary of Terms because plaintiffs only released their claims, if any, against Bivins' father and the guardianship.

Plaintiffs now move to reargue. They first argue that I erroneously concluded that the Equity Exchange Agreement was not supported by consideration because Bivins was not the owner of 808 Lex when he signed the Equity Exchange Agreement. Rather, Bivins became an owner of 808 Lex, as a matter of law, immediately upon the death of his mother, Lorna Bivins, who indisputably had an ownership interest in 808 Lex. In any event, he at least had an interest in the Estate. They also contend that Bivins is estopped from disclaiming his ownership in 808 Lex because he held himself out as an owner of 808 Lex by paying expenses and managing the property, claiming title to 808 Lex in sworn filings in the partition action, and executing a deed to 808 Lex in his individual capacity in 2014. Further, the investor group admittedly knew of the possibility that Bivins may not be the owner of 808 Lex and therefore, might not be able to perform the equity transfer upon demand. However, it accepted that risk as consideration for the Equity Exchange Agreement.

They next argue that it was erroneous to conclude that the Summary of Terms was not supported by consideration, which decision rested on two misunderstandings of fact:

(i) that Beachton released none of its claims, and (ii) that Beachton had no equity interest in 808 Lex to give up. Beachton released its claims by consenting to the dismissal, with prejudice, of the Partition Action, wherein it asserted crossclaims against the Defendants for a declaratory judgment declaring the Note and Mortgage valid and enforceable, and a declaratory judgment declaring the Equity Exchange Agreement valid and enforceable. Beachton's consideration took effect immediately upon signing the Summary of Terms, when Beachton agreed to the dismissal of its crossclaims against the Defendants for the equity interest in the 67th Street property pursuant to the Summary of Terms.

Defendants oppose the motion, arguing that plaintiffs have not shown that the court misconstrued relevant facts or misapplied governing law. Rather, plaintiffs are merely rehashing the same underlying arguments.³

According to defendants, the Summary of Terms states that Beachton must release claims under litigation relating to 808 Lex and claims under the Equity Exchange Agreement in exchange for 20% of the East 67th Street property. However, the court properly held that there could be no release of claims under litigation relating to 808 Lex because there were no claims for plaintiffs to release, i.e. they could not release claims relating to an equity interest that they did not have to begin with. Beachton's claims under litigation relating to 808 Lex were resolved in the global settlement where the parties agreed that Bivins' father owed fee simple title to 808 Lex. Because the parties

³ Defendants note that plaintiffs improperly submit two new exhibits in addition to the papers submitted in the original motions, i.e. the deed to 808 Lex dated December 16, 2014, and the stipulation of discontinuance in the partition action.

had already agreed that Bivins' father owned 808 Lex, any cross claims asserted by plaintiffs against Bivins in that action were moot and all other claims were resolved as part of the global settlement.

Defendants next argue that Bivins did not sign the Equity Exchange Agreement on behalf of the estate, he signed it in his individual capacity. In contrast, Bivins signed both the global settlement agreement and the Summary of Terms both individually and on behalf of the estate. In any event, Beachton did not release any claims under the Equity Exchange Agreement. Rather, it chose to commence foreclosure proceedings on August 4, 2014.

Discussion

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *Schneider v. Solowey*, 141 A.D.2d 813 (2nd Dept. 1988). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided. *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992).

Plaintiffs' motion lacks merit and is, essentially, an attempt to relitigate issues already argued and decided. There has been no showing here that the court overlooked or misapprehended the facts or the law in reaching my earlier decision. Based on the evidence presented on that motion, the Summary of Terms was not supported by consideration because (1) plaintiffs' agreement to relinquish their claims under the Equity

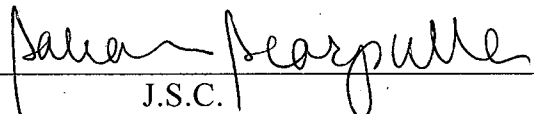
Exchange Agreement constituted illusory consideration, as they merely agreed to give up an equity interest that they could not have had to begin with; (2) plaintiffs' release of their claims relating to 808 Lex did not convey any benefit to defendants and therefore could not qualify as consideration for the Summary of Terms because plaintiffs only released their claims, if any, against Bivins' father and the guardianship; and (3) any purported claims relating to 808 Lex against Bivins and the estate, as set forth in plaintiffs' cross claims asserted against defendants in the partition action became moot, and therefore, incapable of being released.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs 39E67th LLC, Beachton Tuxedo LLC, Erik Schafer, Jedediah Turner, Zachary Turner, Alex De Bie, and Edward Kuhnel's motion for leave to reargue is denied.

This constitutes the decision and order of the court.

Dated: July 12, 2017
New York, New York


J.S.C.
HON. SALIANN SCARPULLA