

Meyer v Valverde

2003 NY Slip Op 30227(U)

April 10, 2003

Supreme Court, Suffolk County

Docket Number: 23407-02

Judge: William L. Underwood

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SHORT FORM ORDER

INDEX NO. 23407-02

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XIV - SUFFOLK COUNTY

PRESENT:**Hon. WILLIAM L. UNDERWOOD, JR.**

 RISA MEYER and ALVIN MEYER, as Trustees
 of the Eric Wald Trust, #2, RISA MEYER, as
 Executor of the Estate of CATALINA MEYER,
 ERIC WALD and SUSAN WALD,

Plaintiff(s),

-against-

JORGE VALVERDE,

Defendant(s).
 _____**ORIG. RETURN DATE: 10/09/02****FINAL RETURN DATE: 01/30/03****MTN. SEQ. #: 001-MG****PLTF'S/PET'S ATTORNEY:**

KLEINBERG, KAPLAN, WOLFF & COHEN, P.C.
 BY: EDWARD P. GROSZ, ESQ.
 551 Fifth Avenue, 18th Floor
 New York, New York 10176

DEFT'S/RESP ATTORNEY:

SHATZ MEIER FRANZINO & SCHER, LLP
 18 East 48th Street
 New York, New York 10017

Upon the following papers numbered 1 to 32 read on this motion for an order staying and tolling the time to cure the alleged default Notice of Motion/Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 18-27; Replying Affidavits and supporting papers 28-32; Other ____; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the plaintiffs Risa Meyer and Alvin Meyer, as Trustees of the Eric Wald Trust #2, Risa Meyer, as executor to the Estate of Catalina Meyer, Eric Wald and Susan Wald's motion for an order staying and tolling the time to cure the alleged default of plaintiff Eric Wald under a lease agreement between Wald and defendant Jorge Valverde, which expires on September 26, 2002, and to match an offer to purchase the subject property at issue herein which expires on November 7, 2002, pending the final determination of this action is granted under the circumstances presented herein. (CPLR 6313). It is further

ORDERED that the plaintiffs are directed to file an undertaking in the amount of one

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hundred and ~~fifty~~thousand (\$150,000.00) dollars within ten (10) days of service of this order with notice of entry.

This is **an** action arising out of a dispute as to the ownership of real property located at 439 Cobb Road, Water Mill, Southampton, Suffolk County, New York designated as Lot No. **4** on a certain map entitled "Map of Palak Realty Corp." filed in the Office of the Clerk of Suffolk County on March 22, 1984, as Map 7716. The plaintiffs aver that the subject property **was** purchased in 1992 by Catalina Meyer for the sole benefit of her son, Eric Wald through the establishment of the Eric Wald Trust #2. Plaintiff Risa Meyer and defendant Jorge Valverde were the nominated trustees at the time of the purchase. The plaintiff trust entered into a contract to purchase the property from its then owner, Robert Brophy on July 18, 1992. Prior to closing of title, mortgagee John Saladin commenced a foreclosure action and subsequently a contract of sale was entered into by Saladin and the defendant on November 9, 1992. Title closed on November 25, 1992, and a deed was executed by referee Pierre G. Lundberg, Esq. as grantee to the defendant, individually.

On December 1, 1992, the defendant and plaintiff Eric Wald executed an Indenture Net Lease wherein Wald was to pay an annual rental rate of \$12,000.00 ~~from~~ December 1, 1992 through November 30, 1997, \$15,000.00 from December 1, 1997 through November 30, 2002 and \$18,000.00 from December 1, 2002 through November 30, 2007. A second

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agreement was executed by plaintiff Eric Wald and the defendant on December 4, 1992. It provided in part that title to the subject premises shall be in the name of Jorge Valverde (record owner) and that an undivided beneficial interest to the entire premises shall belong to Eric Wald (beneficial owner). It further provided that the record owner will not sell the premises without the written permission of the beneficial owner and that title will be transferred to the beneficial owner or his nominee upon demand. A consent to assignment was also executed by the defendant and Eric Wald on December 4, 1992, wherein Valverde agreed to execute a bargain and sale deed with covenants against grantors acts to the Eric Wald Trust #2, to be held in escrow by Catalina Meyer until payment pursuant to the terms set forth in 13.04 of the Indenture Net Lease was made. Such unrecorded deed was executed by the defendant to the Eric Wald Trust #2 on December 4, 1992.

It is undisputed that plaintiffs Eric and Susan Wald have resided at the subject property since 1992. During such time period, the Walds have not paid any rent to Valverde, nor has Valverde previously demanded such payment. However, by letter dated June 28, 2002, Valverde demanded the payment of all rent due from December 1, 1992 through May 30, 2002, as well as providing notice that failure to pay would constitute a default. Thereafter, by letter dated July 10, 2002, Valverde notified Eric Wald that he had received an offer to purchase the property and that, pursuant to paragraph 13.01 of the lease, he was giving him 120 days notice, as required.

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The plaintiffs have moved, by way or order to show cause, for a preliminary injunction staying and tolling the time to cure the alleged default of Eric Wald pursuant to the terms of the aforementioned lease and to match the purported offer to purchase the property. “The law is well settled that in order to prevail on a motion for a preliminary injunction, the movant must clearly demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in his favor. Preliminary injunctive relief is a drastic remedy which will not be granted “unless a clear right thereto is established * * * and the burden of showing an undisputed right rests upon the movant [citations omitted].” (**Doe v. Poe**, 189 A.D.2d 132 [2nd Dept.1993], 595 N.Y.S.2d 503, 505). However, the courts, in granting Yellowstone relief, require far less than the showing normally required for obtaining preliminary injunctive relief. (**Ave & 42nd St. Corp. v 380 Lexchamp Operating**, supra, at 423; **Sloan’s Supermarkets v Barbellen Props. Corp.**, 184AD2d 337; **Heavy Cream v Kurtz**, 146AD2d 672, 673). In an application for a Yellowstone injunction, evidence of a mere possibility, rather than proof of the likelihood, of ultimate success on the merits has been accepted. (See, **Finley v. Park Ten Assoc.**, 83 AD2d 537, 441 N.Y.S.2d 475 [1st Dept. 1981]).

In the matter at bar, the defendant asserts that a Yellowstone injunction is not available in an action stemming from a default based upon non-payment of rent. Herein,

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however, the plaintiffs aver that the injunction is necessary to not only allow them to cure the alleged default, but also to insure their ability to purchase the subject property pursuant to an option **as** set forth in the purported lease. Clearly issues of fact are present as to the ownership of the subject property, and under the circumstances presented, the plaintiffs application for a preliminary injunction is granted. However, the plaintiffs are directed to furnish an undertaking in the amount of one hundred and **fifty** thousand **(\$150,000.00)** dollars within ten (10) days of service of this order with notice of entry. (*See, Bennigan's of New York v. Great Neck Plaza, LP.*, 223 A.D.2d **615**, 636 N.Y.S.2d 835 [2nd Dept. 1996]).

This shall constitute the decision and order of the **Court**.

So ordered.

Dated: April 10, 2003



HON. WILLIAM L. UNDERWOOD, JR.

J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION