

Horowitz v Horowitz

2013 NY Slip Op 34128(U)

September 27, 2013

Supreme Court, Nassau County

Docket Number: 601489/13

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

**THEODORA HOROWITZ a/k/a
THEO HOROWITZ,**

Index No. 601489/13

Plaintiff(s),

Motion Submitted: 8/22/13

Motion Sequence: 001

-against-

HARVEY R. HOROWITZ,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....XX
- Defendant's/Respondent's.....X

This motion by the plaintiff Theodora Horowitz a/k/a Theo Horowitz for an order pursuant to CPLR § 6301 enjoining the defendant Harvey R. Horowitz from (1) selling, conveying or transferring 113 Betty Road, New Hyde Park, New York ("the premises") or any part thereof or any interest therein without her express written consent or court order; (2) from furthering encumbering by lien any part of the premises without her express written consent or court order; (3) from failing to insure and maintain the premises in full repair pending its sale for her benefit; and, (4) requiring the defendant to "market the premises for sale forewith" and to remit the proceeds of that sale to the plaintiff to finance healthcare related measures chosen by the plaintiff, is determined as provided herein.

In this action, the plaintiff Theodora Horowitz seeks to recover of her son the defendant Harvey Horowitz for breach of contract, breach of fiduciary duty, unjust enrichment and conversion and to impose a constructive trust on the property at 113 Betty

Road in New Hyde Park. She alleges that in violation of their contract, the defendant improperly mortgaged that property without her permission, converted the proceeds of that mortgage and has refused to sell the property. She seeks to have the property sold to enable her to use the proceeds to move to an environment that she believes is more suitable to her health.

The plaintiff alleges that she has lived at the subject premises since 1954. She alleges that her husband Emanuel's retirement in 1994 prompted concerns regarding their future finances and needs and that the defendant devised a plan to alleviate those concerns. More specifically, the plaintiff alleges that the defendant proposed that he buy their home at a significant discount and that he agreed that any future equity based financing or net proceeds of a sale of the property would be available exclusively to them. The plaintiff alleges that pursuant to this plan, she and her husband sold their home to the defendant on March 17, 1994, subject to a purchase money mortgage in the amount of \$135,000 and a contract allegedly "deemed secured by the mortgage." Emanuel passed away in 2008.

The parties' contract provides that:

- (i) Son [Harvey] shall not sell, convey or transfer the Premises or any part thereof or any interest therein without the express written consent of Parents.
- (ii) Aside from the lien created under the [1994] mortgage, no part of the Premises may be further encumbered by lien without the express written consent of Parents.

It also provides that:

All proceeds from any equity-based financing taken or arranged by Son in connection with the Premises, or any other means by which proceeds may be derived in connection with the value or use of the Premises, in each case net of closing costs (including attorney fees, broker fees, etc.), shall be paid by Son to Parents.

Finally, it provides:

Son shall, upon the written request of Parents, act promptly and proceed diligently to transact a sale of the premises, or an equity-based financing in connection with the Premises, or some other means by which proceeds may be derived in connection with the value or use

of the Premises, **provided that such sale, financing or other . . . means is necessary absent other sources of financing** to finance medical treatment or other healthcare related measures which are chosen by Parents for Parents themselves (including any healthcare related measures which are to be administered to parents in connection with a formal living will and healthcare proxy executed by parents, in which case said written request of parents shall not be required for Son to so act). **Healthcare related measures as used in this paragraph shall include change of residence if such change would, in the discretion of Parents, better promote the health of Parents** (emphasis added).

The plaintiff alleges that in August, 2010, the defendant mortgaged the premises with Emigrant Mortgage Company via a note in the amount of \$261,900 without her knowledge let alone permission. She further alleges that shortly thereafter, her son stopped paying her \$1,600 a month which he had been paying her pursuant to an oral agreement to fund the maintenance of the house. She alleges that since November 2010, her son has made just six of the 32 monthly payments. The plaintiff also alleges that the defendant has not paid the water or exterminator's bills which she has paid and that he allowed the insurance on the property to lapse. She also alleges that the defendant has defaulted on the mortgage on his own property in California evidencing serious financial difficulties.

The plaintiff alleges that via a letter dated April 25, 2013, she demanded that the defendant sell the property so that she could use the proceeds to relocate for health reasons to an apartment in New York City near her daughter, Amy Schoor.

In support of her motion for injunctive relief, the plaintiff avers that at the age of 84, she can "no longer live alone in the multi-story private home in the suburbs, where a car is necessary and help, when needed, is not readily accessible." In view of her pressing health concerns, she has decided to relocate closer to her daughter. The plaintiff itemized in detail both the immediate and long term costs of relocating as well as her financial condition and in so doing, has attempted to establish a dire need for money to effectuate her plan which allegedly necessitates that the property be sold.

By Order to Show Cause dated July 2, 2013, the defendant was enjoined from selling, conveying or transferring the premises or any part thereof or any interest therein without the express written consent of plaintiff or further court order; from further encumbering by lien any part of the premises without the express written consent of the plaintiff or further court order; and, from failing to insure and maintain the premises in full repair pending its sale for the benefit of plaintiff.

“The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits (citations omitted)” (*Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2d Dept 2005]). “To be entitled to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant’s favor (citations omitted)” (*Rowland v Dushin*, 82 AD3d 738, 739 [2d Dept 2011]; see CPLR § 6312[c]; 306 *Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028 [2d Dept 2011]). “It is settled that absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment” (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005], citing *St. Paul Fire and Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348-349 [1st Dept 2003]). “In addition, mandatory preliminary injunctions are not favored and should not be granted absent extraordinary or unique circumstances, or where the final judgment may otherwise fail to afford complete relief, especially if the status quo would be disturbed (citations omitted)” (*SHS Baisley, LLC v Res Land, Inc.*, *supra* at p. 728, citing *St. Paul Fire and Mar. Ins. Co. v York Claims, Serv.*, *supra*; see also, *Willow Woods Manufactured Homeowner’s Assn., Inc. v R&R Mobile Home Park*, 81 AD3d 930 [2d Dept 2011]; *Board of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822 [2d Dept 2010]). “Where the plaintiffs can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief (citations omitted)” (*Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763 [2d Dept 2009]).

Initially the court notes that contrary to the defendant’s position, this entire transaction cannot be said to have been without consideration and therefore a nullity. Not only did the defendant enjoy the tax benefits of ownership, he stood a chance of owning the property outright if his mother pre-deceased him. It appears uncontroverted that the defendant encumbered the property, possibly without the plaintiff’s consent but certainly without her written consent, and that he failed to give the proceeds to her in violation of their agreement.

Nevertheless, the plaintiff has not established a likelihood of success on the merits. Standing alone, the defendant’s breach of the agreement by mortgaging it without the plaintiff’s written consent does not entitle her to force a sale of the property. It appears that the defendant received title to the property at a modest price in exchange for his promise, *inter alia*, that the property would be sold or its equity tapped for his parents’ health benefits, which benefits included a change in residency if, in their discretion, a change of residence would better promote their health. Nevertheless, the contract only requires a sale for these purposes “absent other sources of funding” The plaintiff has acknowledged that she receives social security payments of \$1,512 and that she has nearly \$50,000 in cash savings. She represents that she will be able to meet her existing needs for a year and a half and she has relocated. In addition, the defendant maintains that rental proceeds from the property

coupled with a supplemental payment by him would meet the plaintiff's needs.

Again, as wrong as the defendant's conduct may have been, *i.e.*, the mortgaging of the property, the agreement does not afford the plaintiff the right to force a sale of the property on that ground. In addition, while the plaintiff has the unfettered right to make health decisions including a change of residence, that change cannot be used to force a sale of the property "absent other sources of funding," which presently presents an issue.

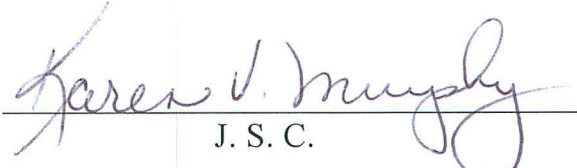
Nor does Harvey's alleged tenuous financial condition satisfy the irreparable harm threshold (*AIU Ins. Co. v Robert Plan Corp.*, 17 Misc 3d 1104 [A] [Supreme Court New York County 2005]; *Petro, Inc. v Serio*, 9 Misc 3d 805 [Supreme Court New York County 2005]). Imminent harm has not been demonstrated.

Finally, in seeking a sale of the premises, the plaintiff seeks an interim award of the ultimate relief sought in this action. Extraordinary or unique circumstances warranting such relief has not been demonstrated. And, the damages alleged can be satisfied via a money judgment.

The plaintiff's motion for a preliminary injunction is denied. However, in the interest of maintaining the status quo, this court's temporary restraining order continues pending further order of this court.

The foregoing constitutes the Order of this Court.

Dated: September 27, 2013
Mineola, N.Y.


J. S. C.

ENTERED
OCT 04 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE