

Marinello v George's Auto and Truck Repair, Inc.

2018 NY Slip Op 31133(U)

January 18, 2018

Supreme Court, Kings County

Docket Number: 015697/2013

Judge: Theresa M. Ciccotto

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At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of January, 2018.

P R E S E N T:

HON. THERESA M. CICCOTTO,
Acting Justice.

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MARIA MARINELLO and AMELIA MARINELLO,
Co-executors of the Estate of Angelina J. Marinello
Under the Last Will and Testament of Angelina J.
Marinello and co-trustees of the Trust under the Last
Will and Testament of Vincent George Marinello,

Plaintiffs,

-against-

GEORGE'S AUTO AND TRUCK REPAIR, INC.,
GEORGE V. MARINELLO USED TRUCKS, INC.,
and GEORGE V. MARINELLO,

Defendants.

Index No. 015697/2013

DECISION/ORDER

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A bench trial in the instant matter was commenced before this court on September 11, 2017, continued on October 20, 2017 and finished on November 29, 2017. Plaintiffs were represented by Andrew P. Saulitis, Esq. Defendants were represented by Jason Ablove, Esq. and Raymond C. Baierlein, Esq. Amelia Marinello who resides in Florida and is in poor health, did not appear in court.

This matter involves a long standing familial feud concerning rent arrears on commercial property, consisting of two lots or parcels located at 1368 Ralph Avenue, Brooklyn, New York, 11236. The parties are all involved in another legal proceeding not related to this case, but which concerns the distribution of stock funds contained in a UBS account. Said stock is worth approximately \$738,125.26. The court notes that this UBS account was referred to frequently during the duration of the trial.

Defendant businesses are situated on said property, which was purchased by the parties' father, Vincent, in the seventies. At that time, Vincent started a vehicle repair business which soon became quite profitable. When he unfortunately became seriously ill several years later, sixteen year old George was forced to quit high school to help operate the business. Under George's care, the business prospered exponentially and ultimately expanded into a second related business, "George V. Marinello Used Trucks, Inc." Now, George contends that during his father's protracted illness, he paid all bills related to both businesses, and subsequent to his father's untimely death, he assumed the financial care of his mother. He also argues that his mother absolved him of any further rent payments and that neither sister did anything pro-active to collect rent prior to the instant action. Both Maria and Amelia argue that they are legally entitled to rent arrears under both leases.

Vincent and his wife Angelina owned the subject property as tenants in common. When Vincent died on March 31, 1996, his interest was succeeded by a trust and Angelina's half interest was continued. During his lifetime, Vincent opened the aforementioned UBS brokerage account wherein it was devised that upon his death, all shares in the various stocks would go to Angelina.

Vincent's will, admitted in evidence as defendants' exhibit "A," designated his wife as the sole beneficiary of his entire estate, including the income generated from a trust created by the will.

The will also decreed that upon Angelina's death, George Marinello would inherit the Ralph Avenue property, Amelia and Maria Marinello would inherit the family residence and its contents, and the balance of the aforementioned brokerage account would be divided among the three siblings in equal shares. It should also be noted that pursuant to a deed dated November 29, 1999, Angelina, in her capacity as Executrix of the Estate of Vincent G. Marinello, transferred the interest in the property to a Trust.

Following Vincent's untimely death, Angelina, in her capacity as landlord of the subject properties and Executrix of her husband's estate, entered into two separate leases with George. Both leases were drafted by Maria and were signed by George without benefit of counsel. George testified that he signed the leases in his mother's kitchen and believed he did not require legal representation because he was dealing with family. Both leases listed Angelina Marinello and the Estate of Vincent G. Marinello as landlord. One lease lists as tenant, George V. Marinello Used Trucks, Inc., and the other as George's Auto & Truck Repair Inc. The period of both leases began on November 1, 1996 and ended on October 31, 2011. The lease designating George's Auto & Truck Repair Inc. indicates the monthly rental fee to be \$1,200.00, with the additional amount of 25% of the annual real estate taxes and water/sewer taxes related to the property, (Plaintiffs' Exhibit #1). The lease designating George V. Marinello Used Trucks, Inc., indicates the monthly rental fee to be \$3,000.00 (Plaintiffs' Exhibit #2). Both leases covered a period of fifteen years.

It is undisputed that defendant George ceased paying rent under both leases in September 2002. When Angela died on September 21, 2012, her will devised her interest in the subject property solely to George. The Summons and Complaint asserts seven causes of action, with each accompanied by a demand for a specific amount of money. As such, plaintiffs now seek

approximately \$506,899.73, in rent arrears for the aforementioned property. Defendant George admits that he ceased paying rent, based on his belief that further rent payments had been waived.

Prior to the commencement of the instant action, George commenced an action now pending in Surrogate's Court concerning issues with the trust. He adamantly maintains that this instant case is retaliation for his lawsuit against his sisters.

Maria Marinello's testimony:

During a rather brief direct examination, Maria testified that she is an attorney whose practice is primarily devoted to real estate matters. She testified that she and Amelia are co-executors of their mother's estate and co-trustees of the trust created under their father's will. She also testified that she and Amelia were issued letters of trusteeship and administration from Kings County Surrogate's Court. Maria testified that she personally prepared the subject leases and was witness to same. She also testified that while there had been prior leases to the ones which are the subject of this case, no additional leases followed. Moreover, Maria testified that during and subsequent to her mother Angelina's death, she and Emilia as co-trustees, never executed any waiver of rent to her brother George.

During cross-examination, Maria testified that George paid a portion of his rent payments directly to Angelina, with the balance being paid to the estate. However, in September 2002, George unexpectedly ceased paying rent. Maria conceded that she never served George with a formal rent demand, but insisted that they discussed his failure to pay rent on several occasions. Defendants' Exhibit "C," admitted in evidence contains an e-mail communication from Maria to George dated January 5, 2011.

The subject e-mail states in pertinent part: "You should not be the one doing the checks. This

way there can be no questions of what was spent on her (Angelina). You can have copies of the bills if you want but let's face it you should not control the money. Let [sic] be honest--this whole situation was created by your [sic] not paying your rent. The rent hasn't [sic] been paid since August 2002. That is \$428,400. You say we got plenty. That is a ridiculous statement. You have gotten the windfall and you would never have pulled that if daddy was still alive. Amelia and I are taking financial [sic] beating because of what you did. You should have paid your rent and just taken your share of the cash and stocks after mommy died....."

During cross-examination, in response to the question, "what does that mean that you would never have pulled this if Daddy was still alive," Maria responded, "if my father had not died first my brother would not have stopped paying rent" (Tr at 58, lines 6-9). After agreeing with the assertion that her father would have insisted that George continue to pay rent, she added, "[M]y mother--well, I can't speak for my mother, she is deceased. I will tell you that the situation would not have come up if my father was alive" (*Id.* at 58, lines 15-17).

During cross-examination, Maria testified that a portion of the UBS account which was in Vincent's name was part of his estate and Angelina was the sole beneficiary. She also agreed that Angelina chose not to place the UBS account in the trust, and as a result, had sole discretion concerning said account proceeds. Maria also conceded that Angelina could have utilized these funds to pay bills. The presumption of said cross-examination was that Angelina did not suffer financial hardship as a result of George's decision to cease paying rent on the subject property.

Testimony of George Marinello:

George testified that he assumed control of his father's business - George's Auto and Truck Repair at 1368 Ralph Avenue, when his father suffered a heart attack. Upon recuperating, his father

was able to come to work for limited periods of time. During this time, George was paying the land tax, insurance and various other bills associated with the maintenance of the property and business. George's father suffered a second heart attack, necessitating open heart surgery. After this, he was permanently disabled and received Workman's Compensation checks. Since the money from Workman's Compensation was insufficient for his parents to live on, George testified that he was giving them money and was also paying all the bills related to 1368 Ralph Avenue.

Subsequently, George became a licensed state dealer and expanded the business to include the refurbishment and sale of used trucks. He also bought into the towing and low boy business, working exclusively out of the Ralph Avenue location. At this time, with his father's consent, and at his own expense, George expanded the property to 8,000 square feet. With this expansion, George "took a mortgage out," with his mother. Despite this, his parents did not contribute to the payment of same.

George also testified that he had been writing one rent check to the Estate of Vincent Marinello and the other check directly to his mother. In August 2002, George approached Angelina and explained that he had paid over a million dollars in rent and that these continued rental payments were proving to be financially burdensome to his family. After some discussion, she agreed to waive future payment of rent. In January 2011, Maria called and informed him that he owed her back rent in the amount of \$500,00.00 for Ralph Avenue. George testified that he believed this request related to the fact that his sisters were writing checks out of his mother's account to pay for the home care she required. He also testified that he was not aware of the contents of said account because Maria had sole access to all the check books, bank statements and other financial documents.

In response to the rent demand, George consulted with his own personal attorney, who

prepared a document entitled "DECLARATION." In the presence of a notary, both George and his mother affixed their signatures on said document which waived any future payments of rent on the Ralph Avenue property. The court notes that it permitted said document to be marked for identification pending the notary's presence in court to lay the proper foundation to move it in evidence. However, the notary was unable to testify due to illness. The court mentions it merely to explain George's state of mind. George also testified that he never received any formal legal rent demands from either sister between the period of October 2002 through the beginning of January 2011.

During cross-examination, George testified that he did not keep records of the payment of expenses he assumed for his mother. However, he testified that he paid for the landscaping, brickwork and various repairs of his mother's house. He also testified that he paid all the expenses related to the business.

Positions of the parties:

At the end of the trial on November 29, 2017, defense counsel stated that the defense intended to rely on the defense of waiver, in view of the fact that plaintiffs had failed to collect any rent for so many years. Both parties requested that they be afforded the opportunity to submit written summations, and this request was granted.

Defendant argues that "[u]nder Court of Appeals and Second Department authority, all that is required is that Plaintiffs' *conduct* evidence [*sic*] a waiver. The undisputed evidence is that for over a decade, after multiple family gatherings regarding the rent, and knowing that Defendants had ceased paying rent, no action was taken. A waiver has been conclusively proved" (Defendant's Closing Argument & Proposed Findings of Fact, ¶ 1).

Plaintiff Maria argues that in her capacity as co-trustee under Vincent Marinello's will, she never waived any provision of either lease, including but not limited to the payment of rent. She also argues that to be binding, a waiver of rent would be required to be in writing signed by both she and her sister.

Conclusions of law:

"[T]he existence of a binding contract is not dependent on the subjective intent of [the parties]" (*Brown Bros. Elec. Contrs. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 399 [1977]). Rather, the court must look "to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*id.*).

"A waiver is the voluntary abandonment or relinquishment of a known right" (*Jespaul Garage Corp. v. Presbyterian Hosp. in City of N.Y.*, 61 N.Y.2d 442, 446 [1984]). "Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.*, 7 N.Y.3d 96, 104 [2006]; see *Hannigan v. Hannigan*, 960 N.Y.S.2d 492 [2d Dept. 2013]; *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 184 [1982]). "Such abandonment 'may be established by affirmative conduct or by **failure to act so as to evince an intent not to claim a purported advantage**' (emphasis added) (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.*, 7 N.Y.3d at 104, quoting *General Motors Acceptance Corp. v. Clifton-Fine Cent. School Dist.*, 85 N.Y.2d 232, 236 [1995]). "Generally, the existence of an intent to forego such a right is a question of fact" (*Fundamental Portfolio Hosp. Advisors, Inc. v. Tocqueville Asset Mgt., L.P.*, *supra* at 104).

The court, after observing and evaluating the testimony adduced at trial and the demeanor of the witnesses on the stand, finds George to be the more credible witness. Furthermore, the court

concludes that the blatant failure of either sister to make any viable, concerted effort to procure these arrears by legal means until eleven years after the initial breach of the leases, constitutes a waiver of same. Indeed, it was clear that Maria had no conception as to what her mother's intentions may have been with regard to absolving George of future rent payments. As such, George's allegation that his mother absolved him of rental payments was not sufficiently challenged or undermined.

With regard to plaintiffs' claim for attorney's fees, the subject leases state that the tenant is responsible for all attorney's fees "incurred by the Landlord in enforcing any of the obligations" under said leases (Plaintiff's Exh. "1" - "2," at ¶ 3). The court finds that as the landlords waived their obligations under the leases, they are not entitled to attorney's fees.

Therefore, in accordance with the foregoing, the instant case is hereby dismissed.

This constitutes the decision and order of the court.

DATED: January 18, 2018

ENTERED:



Hon. Theresa M. Cicchetto
A.J.S.C.