

Poles, Tublin, Stratakis & Gonzalez, LLP v Skinitis
2018 NY Slip Op 32315(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 160645/2015
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 160645/2015

POLES, TUBLIN, STRATAKIS & GONZALEZ, LLP, COMPANIA
NAVIERA AISNICOLAS, S.A., CHRIST STRATAKIS, MARY
STRATAKIS, JOHN STRATAKIS

MOTION DATE 06/15/2018

MOTION SEQ. NO. 002

Plaintiff,

- v -

KALLIOPI SKINITIS,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that the branch of plaintiffs' motion that seeks summary judgment in plaintiffs' favor on the first, second and third causes of action of the complaint and a declaratory judgment with respect to the subject matter of such causes of action is GRANTED; and it is further

ADJUDGED and DECLARED that plaintiffs are entitled to a declaration of their obligations to defendant as escrow agents under a certain Escrow Agreement, and of defendant's obligations with respect to real property known as Furzecroft; and it is further

ADJUDGED and DECLARED that defendant is liable for the costs and expenses of Furzecroft, including utilities, upkeep and maintenance, and that the plaintiff directors of plaintiff Compania Naviera Aisnicolas, S.A. have no obligations with respect to these expenses, and plaintiff Poles, Tublin, Stratakis & Gonzalez, LLP, as successors to Poles, Tublin, Petestides & Stratakis, LLP, as escrow agents under the Escrow Agreement, are obligated to hold the shares of Compania Naviera Aisnicolas, S.A. for the duration of defendant's life, after which the shares are to be distributed to defendant's two children as beneficiaries, and to execute and deliver any documents required in connection with loans related to encumbrances on Furzecroft; and it is further

ADJUDGED and DECLARED that under the Escrow Agreement, plaintiff directors of Compania Naviera Aisnicolas, S.A. for the duration of defendant's life, are obligated to retain ownership of Furzecroft and to cease issuing additional shares of Compania Naviera Aisnicolas, S.A. and the individual directors of Compania Naviera Aisnicolas, S.A. and Compania Naviera Aisnicols, S. A. owe no additional duties to defendant relative to Furzecroft; and it is further

ADJUDGED and DECLARED under the Escrow Agreement, defendant must reimburse plaintiff Poles, Tublin, Stratakis & Gonzalez, LLP as the escrow agent in connection with this action, including reasonable attorneys' fees and disbursements, where defendant has

not demonstrated any misconduct on the escrow agent's part regarding this action; and it is further

ORDERED that the issue of the reasonable value of legal services rendered and disbursements paid by movants is severed and referred for a determination pursuant to CPLR 3215 (b) to a Special Referee for a reference to hear and determine pursuant to CPLR 4317 (b) and that within 60 days from the date of this Order the plaintiffs shall cause a copy of this order with notice of entry including proof of service thereof to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to arrange for a reference to determine; and it is further

ORDERED and ADJUDGED that pursuant to CPLR 3215 (b) the Clerk is directed to enter judgment against defendant in accordance with the report of the Special Referee without any further application; and it is further

ORDERED that counsel for the movant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry and the accompanying Order of Reference, together with a complete Information Sheet,¹ upon the Special Referee Clerk in the General Clerk's Office (60 Centre Street, Room 119), who is directed to place this matter on the calendar of the Special

¹ Available on the Court's website at www.nycourts.gov/supctmanh (under the "References" link in the navigator bar).

Referee's Part for the earliest convenient date subsequent to the conclusion of the stay fixed above; and it is further

ORDERED that such service upon the Special Referee Clerk, the filing of a notice of appearance as provided above with the Clerk of the General Clerk's Office, and service of documents on the Special Referee shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that plaintiffs' motion for permanent injunctive relief is DENIED.

DECISION

Plaintiffs Poles, Tublin, Startakis & Gonzalez, LLP, as successors to Poles, Tublin, Patestides & Stratakis, LLP (Poles), Compania Naviera Aisnicolas, S.A. (Compania), Christ Stratakis, Mary Stratakis and John C. Stratakis move for summary judgment in this declaratory judgment action.

In this action, which concerns the rights and obligations of certain parties with respect to a residential leasehold known as 53 Furzecroft, London W1 (Furzecroft), plaintiffs seek several declaratory judgments as well as injunctive relief. In their complaint, plaintiffs allege the following facts:

Defendant was formerly married to nonparty Nicholas Samona (Samonas), who is the sole shareholder of defendant Compania, a Panamanian company whose sole asset is Furzecroft.

Defendant and Samonas were married on July 16, 1964, and thereafter lived in England where they eventually had two children, Maria and John. The marriage lasted until April 19, 1995, the date of the divorce.

Furzecroft, which is owned by Samonas, through Compania, was subject to an Escrow Agreement between the couple. To protect defendant's exploitation rights in Furzecroft, Poles was requested to serve as the escrow agent. Poles agreed and thereafter held possession of the shares in Compania.

Under the Escrow Agreement, defendant would receive an irrevocable life estate in Furzecroft, with rights to inhabit, occupy and lease it to others for the duration of her life, after which the shares in Compania would be distributed to her two children. The Escrow Agreement also includes provisions pursuant to which defendant is liable for the costs of maintaining electricity, water, gas, telephone and other utility services to the leasehold.

In addition to the Escrow Agreement pertaining to Furzecroft, the High Court of Justice, Family Division, London, England, issued a consent order. In such order, Samones agreed to cause the directors of Compania to resign in favor of

plaintiffs Christ and John C. Stratakis. Christ was a senior partner of Poles at the time, and John C. Stratakis is his father. Thereafter, his wife, plaintiff Mary Stratakis, who is also defendant's first cousin, became an additional director of Compania.

Defendant retained the services of her cousin, Diamantis Skinitis, to rent and manage Furzecroft, including the payment of all taxes and other expenses. This arrangement continued from May 1995 to the fiscal year ending April 5, 2011. By then, there was a dispute between defendant and Diamantis, after which Christ, John C. and Mary Stratakis resigned as directors of Compania. Defendant filed civil and criminal actions against Diamantis in the Multimember Court of First Instance of Athens, Greece, alleging mismanagement, misappropriation of funds and mental anguish. It is believed that Diamantis was acquitted in the criminal action and the civil action was dismissed.

On March 11, 2015, defendant sent an "extrajudicial invitation" to plaintiffs that requested that plaintiffs produce all documentation evidencing receipt of any "payments of expenses, returns of amounts, lease agreements, payments of taxes, common-use utility fees, etc." during the period Furzecroft was managed by Diamantis. By letter dated June 10, 2015, served upon defendant's Greek counsel, plaintiffs responded that none of them have ever received any of the

aforesaid documents. On June 18, 2015, defendant sent a second "extrajudicial invitation" in which she demanded that plaintiffs pay her 25,000 pounds "for the due expenses of the property during the period that Diamantis Skinitis served as its administrator, amount which I was compelled to pay with my own money." Plaintiffs contend that defendant is planning to bring legal action against them in Greece for her alleged losses related to the estate.

Plaintiffs argue that this court has personal jurisdiction over the defendant because of the forum selection provision in the Escrow Agreement, which provides that all parties to this Agreement shall submit to the courts of the state of New York to resolve issues concerning the responsibilities of the escrow agent.

Plaintiffs claim that they were never directly involved in the day to day administration of Furzecroft, that they never received regular documents as to the rent, taxation and maintenance of the estate, except for the Escrow Agreement, the consent order, the corporate books of Compania and the Compania stock certificates. For the duration of some twenty years, plaintiffs assert that defendant paid all expenses, lease agreements, and taxes, pursuant to the Escrow Agreement, and that they were not legally obligated to do so. According to

plaintiffs, the Escrow Agreement has not been revoked or amended to date.

Plaintiffs contend that there is nothing in the Escrow Agreement that obligates them to pay for defendant's expenses, and that until recently, plaintiffs never received any demands from defendant, Diamantis or anyone connected to Furzecroft for the payment of its expenses.

The complaint contains several requests for declaratory judgments upon which plaintiffs now seek summary judgment as a matter of law.

The first declaration sought is that the only function of Poles, as the escrow agent, is to hold the shares of Compania for the duration of defendant's life, and that there are no duties defined in the Escrow Agreement as to the Stratatkises other than their duties as directors of Compania, whose sole duty is to hold title to Furzecroft.

The second declaration sought is that the sole duty of Poles, as the escrow agent, is to hold the shares of Compania as defined in the Escrow Agreement.

The third declaration is that as defined in the Escrow Agreement, neither Compania, Christ Stratakis, John C. Stratakis, nor Mary Stratakis owe any duty to defendant besides holding title to the estate.

The fourth declaration is that, pursuant to the Escrow Agreement, defendant is obligated to reimburse the escrow agent for all losses, liabilities, costs and expenses incurred in connection with this action, including reasonable attorneys' fees and disbursements.

Plaintiffs also seek an injunction to enjoin defendant from commencing any legal action against them as it relates to Furzecroft or the Escrow Agreement.

Defendant opposes the motion and argues that: (1) the court lacks jurisdiction to determine the rights and responsibilities of Compania's directors, which are allegedly not covered under the Escrow Agreement; (2) the evidence submitted for summary judgment, including an unsworn, unsigned affidavit from plaintiff Christ Stratakis, is inadequate; (3) the court lacks personal jurisdiction over defendant, who does not live here, did not commit any tortious act here, or does no business here; and (4) there is an issue of fact as to Poles' alleged failure to accommodate defendant regarding an attempted loan transaction.

Defendant further argues that the Skinitises, who resigned as directors of Compania, cannot sue on behalf of Compania.

Finally, defendant argues that plaintiffs are not entitled to injunctive relief because she has a meritorious claim against plaintiffs, and plaintiffs have failed to show irreparable

injury. Defendant contends that since she has alleged that Poles acted with gross negligence and/or willful misconduct with respect to the attempted loan transaction, pursuant to the Escrow Agreement, Poles is not entitled to attorneys' fees or reimbursement.

Defendant claims that the escrow agents violated the Escrow Agreement, specifically Section 1 (b), which provides that the escrow agent has full authority to execute and deliver all documents that may be required in connection with the making of a loan and its collateralization by way of a mortgage on the estate. Defendant states that she attempted to procure a mortgage on Furzecroft for the benefit of her children, and Poles refused to provide the shares as collateral necessary for the loan. In response, plaintiffs argue that defendant has failed to supplement her claim with documents of any actual attempted procurement. Plaintiffs also note that under section 4 (a) of the Escrow Agreement, Poles cannot be subject to liability except for willful misconduct or gross negligence. While defendant alleges such conduct, plaintiffs argue that she has failed to substantiate with evidence any claim of willful misconduct or gross negligence.

Analysis

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the

existence of factual issues" (Birnbaum v Hyman, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]' " (People v Grasso, 50 AD3d 535, 545 [1st Dept 2008]).

With respect to the declaratory judgments sought by plaintiffs, "[t]he primary purpose of declaratory judgments is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary [citations omitted]" (Klosterman v Cuomo, 61 NY2d 525, 538 [1984]). A declaratory judgment requires an actual controversy between parties having a stake in the outcome (see Mt. McKinley Ins. Co, v Corning, Inc., 33 AD3d 51, 57 [1st Dept 2006]).

The controversy involves what plaintiffs specifically owe defendant regarding property on which she has a life-long leasehold. Defendant is subject to the forum selection provision in the Escrow Agreement but argues that the court has no personal or subject matter jurisdiction over Compania. She states, correctly, that Compania is a Panamanian company and cites section 444 of the Commercial Code of the Republic of Panama, which expands on the duties of directors towards shareholders of a corporation. Defendant asserts that

Compania's directors owed her fiduciary duties as described in the aforesaid section.

Defendant errs because she is not a shareholder, nor is she being sued as a shareholder of Compania. The sole shareholder of Compania, remains her ex-husband, and any fiduciary duties from the company's directors would be owed to him. Her life estate interest in the estate, of which title to Furzecroft is held by Compania, derive from the Escrow Agreement executed by Samonas and her.

The Escrow Agreement expressly provides that Samonas is the sole shareholder of Compania and Compania's sole purpose is to hold title to Furzecroft. The Escrow Agreement provides that defendant has an irrevocable life tenancy on Furzecroft and that upon her death, the shares of Compania, currently in the possession of Poles, the escrow agent, will transfer to her two children as beneficiaries. Under section 1 (e), Compania agrees not to issue additional shares during defendant's lifetime. Section 1 (a) entitles defendant to occupy and rent to others the estate during her lifetime, and requires her to maintain the costs of electricity, water, gas, and other utility services, as well as repairs and maintenance related to the upkeep of the estate.

The Escrow Agreement does not impose any obligations on plaintiffs regarding the payment of expenses as it relates to

Furzecroft. In any event, defendant has not addressed or responded the assertions of plaintiffs that they never received any information about defendant's financial use of the estate over the years and never intervened in making financial decisions concerning the estate.

Defendant makes vague claims about the obligations of Compania's directors and discussed an attempt at mortgaging the estate which was allegedly foiled by Poles. While the Escrow Agreement expressly holds Poles responsible for assisting defendant in procuring loans of that nature, her discussion of the attempted mortgage is so unsubstantiated, lacking in specifics, that, without more information, the court must dismiss this part of defendant's assertion against Poles as insufficient. Moreover, defendant's allegations of Poles' misconduct and gross negligence are too conclusory to raise an issue of fact (see Smith v Cohen, 24 AD3d 183, 183 [1st Dept 2005]).

The evidence submitted by the parties establishes that plaintiffs have prima facie established their entitlement to a declaration as to the respective rights and obligations of the parties under the Escrow Agreement.

In addition, the court finds that defendant has failed to provide any evidence that the escrow agent acted with willful misconduct in connection to any violation of its obligations

under the Escrow Agreement. Defendant is, therefore, obligated to pay expenses related to the litigation brought by the escrow agent in this court, including reasonable attorneys' fees.

The final issue here is the granting of a permanent injunction. In order to obtain one in this jurisdiction there must be a showing (1) that irreparable injury will result if the injunction is not granted; (2) that other remedies are inadequate; (3) that a balancing of the equities favors the applicant (see International Shoppes, Inc. v At the Airport LLC, 131 AD3d 926, 938 [2d Dept 2015]).

Plaintiffs argue that they need injunctive relief to avert defendant's effort to litigate against them in Greece or elsewhere regarding Furzecroft. They contend they have a strong case in their favor, and that they shall be subject to the time and expenses of abusive and pointless litigation unless their request for this relief is granted.

At this time, no legal proceedings have been commenced by defendant anywhere. This jurisdiction has traditionally declined motions for permanent injunctions involving such matters. The anticipation of impending judicial proceedings is not an injury justifying an injunction (see Genovese Drug Stores, Inc. v William Floyd Plaza, LLC, 63 AD3d 1102, 1104 [2d Dept 2009]; see also, Spellman Food Servs. v Patrick, 90 AD2d 791, 791 [2d Dept 1982]). Thus, this court will not grant a permanent injunction.

A foreign court may dismiss defendant's future action should it find that the herein declaratory judgment order justifies same.

9/17/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE