

Zaslavskaya v Boyanzhu

2018 NY Slip Op 33420(U)

December 18, 2018

Supreme Court, Kings County

Docket Number: 502219/2013

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 December, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

-----X
TSYLYA ZASLAVSKAYA

Plaintiff,

- against -

ALEKSANDR BOYANZHU and AMALGAMATED
WARBASSE HOUSES, INC.

Defendants.

-----X

Index No.: 502219/2013

DECISION & ORDER

Motions Sequence, #6, #7

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 3/4, _____
Opposing Affidavits (Affirmations).....	5, _____
Memorandum of Law.....	6, _____
Transcripts	7, 8, 9, 10, 11, 12, 13, _____

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiff Tsylya Zaslavskaya (hereinafter “the Plaintiff”) commenced this action seeking, *inter alia*, to be determined a constructive trustee, an order transferring shares of stock, punitive damages, and a permanent injunction in relation to interference with the Plaintiff’s occupancy of the subject premises. In her complaint, the Plaintiff alleges that sometime in 1996, Defendant Aleksandr Boyanzhu (hereinafter “the Defendant”) received more than \$20,000.00 from the Plaintiff and he used this money to buy shares in a New York State regulated “Mitchell-Lama” cooperative apartment located at 525 Neptune Avenue, Brooklyn, New York (hereinafter “the Premises”). The Plaintiff also alleges that the Defendant told the Plaintiff that he would sign the Occupancy Agreement to the Premises on behalf of both of them and that the apartment belonged to both of them.

On June 10, 2014, the Hon. Mark I. Partnow, JSC issued an Order directing the parties to appear before a Judicial Hearing Officer to hear and determine the issue of “what if any contribution Plaintiff made in connection with her occupancy of the premises.” During the hearing, and with the consent of the parties, Referee Richard N. Allman (hereinafter the “Referee”) made a notation on the original Order of Reference in the section entitled “Hear and Report” stating, “should P be given a declaration that she has occupancy rights in Apartment 11 A at 525 Neptune Avenue as a cotenant and cannot be evicted by the D.” On December 10, 2015, the Referee issued a Determination after Trial that made a finding that the Plaintiff had made a contribution of \$20,000.00 and a second finding that the Plaintiff has no rights of occupancy in the Premises. The Plaintiff appealed this determination and the Appellate Division, Second Department held that the Referee had exceeded his scope of authority when he sought to determine whether the Plaintiff had occupancy rights in the Premises. *See Zaslavskaya v. Boyanzhu*, 144 A.D.3d 675, 676, 41 N.Y.S.3d 237, 238 [2nd Dept, 2016]. On September 5, 2017, the Hon. Mark I. Partnow, JSC granted the Defendant’s motion to amend the initial order of reference. On February 23, 2018, the Referee issued a Recommendation on that Second Referral, reiterating the \$20,000.00 contribution by the Plaintiff, and again finding that the Plaintiff had no occupancy rights in and to the Premises.

The Plaintiff now moves (motion sequence #6) for an order pursuant to CPLR §4403 and NYCRR 202.44 confirming that portion of the Recommendation on Second Referral of Richard N. Allman, Referee, that reiterated that the Plaintiff contributed \$20,000.00. However, the Plaintiff also asks the Court to reject the remainder of the Recommendation on Second Referral and schedule this matter for a new hearing on the issue of Plaintiff’s occupancy and ownership rights in the Premises. The Defendant opposes the motion and cross moves for separate relief. Specifically, the Defendant cross moves (motion sequence #7) for an order pursuant to CPLR §4403 confirming the Recommendation on Second Referral, to the extent of finding that the

Plaintiff should not be declared to have occupancy rights in the Premises, that Plaintiff does not have occupancy or ownership rights in the Premises and that the Plaintiff does not have any rights to remain at the Premises.

CPLR §4403 provides in pertinent part that

Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing. The motion shall be made within fifteen days after the verdict or the filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action.

In general, “[w]here a referee's findings are supported by the record, the court should confirm the referee's report and adopt the recommendation made therein.” *Shen v. Shen*, 21 A.D.3d 1078, 1079, 803 N.Y.S.2d 579 [2nd Dept, 2005]. This is because “[a] referee's credibility determinations are entitled to deference on appeal because he or she had the opportunity to see and hear the witnesses and observe their demeanor.” *Chambliss v. Univ. Grp. Med. Assocs.*, 155 A.D.3d 996, 997, 64 N.Y.S.3d 582, 583 [2nd Dept, 2017].

Turning to the merits of the Defendant's cross motion, the Court finds that the Referee's Recommendation on Second Referral is supported by the record and should be confirmed. The Referee conducted hearings in conjunction with both the Determination after Trial and the Recommendation on Second Referral. This Court finds that the finding that the Plaintiff had made a contribution of \$20,000.00, as well as the finding that the Plaintiff has no occupancy rights in the Premises, should be confirmed.¹

¹ The Court disagrees with the Plaintiff's contention that the Referee's determinations were based upon bias as against the Plaintiff. While the Referee made some comments regarding matters not supported by the record, those comments were not central to the Referee's Recommendation on Second Referral, and the record otherwise supports the Referee's findings. The Court notes also that much of the determination was based on the credibility of the parties. As stated, the Referee was in the best position to determine credibility.

Of particular note, the Recommendation on Second Referral reiterated the finding of an initial contribution of \$20,000.00 by the Plaintiff, as first reflected in the Determination After Trial. In furtherance thereof, the Referee found that as to ongoing costs and maintenance paid, “[t]he defendant proved he outspent the plaintiff by \$91,473.77.”

The Recommendation on Second Referral, also found that a Constructive Trust was not available to the Plaintiff since it was both time barred and not otherwise established, given, among other things, the absence of unjust enrichment as determined by the Referee. The Referee found in the Recommendation on Second Referral, that the Plaintiff “has lived rent free in the apartment for the better part of eighteen years and since at least October 6, 2010 has made absolutely no contributions towards its upkeep.” This Court therefore finds that the Referee’s determination, after a hearing, that the Plaintiff had failed to satisfy the requirements in relation to the establishment of a constructive trust, should be confirmed. *See Sanxhaku v. Margetis*, 151 A.D.3d 778, 779, 56 N.Y.S.3d 238, 240 [2nd Dept, 2017].

As a result, the Defendant’s cross-motion seeking to confirm the Recommendation on Second Referral is granted solely to the extent that the Plaintiff has no occupancy rights in the Premises. The Plaintiff’s motion is granted solely to the extent that Plaintiff contributed \$20,000.00 so that Plaintiff and Defendant would be able to move into the Premises.

Based on the foregoing, it is hereby ORDERED as follows:

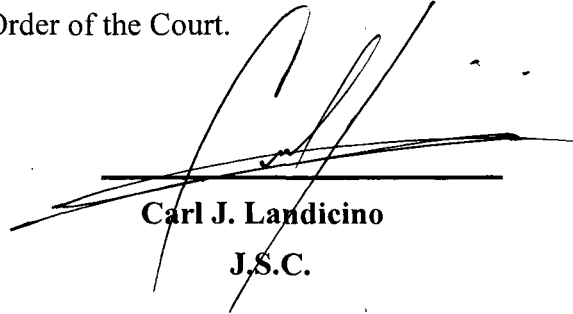
The Plaintiff’s motion (motion sequence #6) is granted solely to the extent that Plaintiff contributed \$20,000.00 so that Plaintiff and Defendant would be able to move into the Premises.

The Defendant’s motion (motion sequence #7) is granted solely to the extent that the Plaintiff has no occupancy rights in the Premises.

Settle an Order on Notice within thirty days of this Decision.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino
J.S.C.

2019 JAN -7 PM 10:15
FILED

