Strasser v Strasser
2019 NY Slip Op 30350(U)
February 5, 2019
Supreme Court, Kings County
Docket Number: 524192/18
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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FRAIDA STRASSER,

Plaintiff, Decision and order

- against - Index No. 524192/18
mS # 2

JONATHAN STRASSER,

Defendant, February 5, 2019
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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved by order to show cause seeking an order requiring the defendant to make certain specific payments pursuant to an agreement signed by the parties. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On August 8, 2018 the plaintiff and defendant, husband and wife, entered into an agreement. The agreement, signed by both spouses as well as two witnesses was designed to foster marital problems that had arisen between the couple. In addition, the agreement provided specific sums which the defendant was required to pay the plaintiff as well as her children from a previous marriage. The plaintiff has alleged the defendant has breached the agreement and has failed to make any payments pursuant to the agreement. The plaintiff instituted this lawsuit alleging six causes of action. Five causes of action relate to various breaches allegedly committed by the defendant. The sixth cause of action seeks an accounting. The plaintiff filed the instant

order to show cause directing the defendant to make certain payments, immediately, pursuant to the agreement. First, the plaintiff seeks an order directing the defendant to pay all life insurance premiums for a policy on behalf of the plaintiff pursuant to paragraph 4 of the agreement. Second, the plaintiff seeks an order directing the defendant to pay all life insurance premiums for a policy on behalf of the defendant pursuant to paragraph 6 of the agreement. Third, the plaintiff seeks an order directing the defendant to pay the plaintiff's outstanding taxes due pursuant to paragraph 4 of the agreement. Fourth, the plaintiff seeks an order directing the defendant to change the terms of a trust pursuant to paragraph 6 of the agreement. Lastly, the plaintiff seeks an order directing the defendant to provide the addresses for thirteen homes located in Lakewood, New Jersey the defendant agreed to purchase for the plaintiff pursuant to paragraph 3 of the agreement.

The defendant has opposed the motion on various grounds. First, defendant argues the motion only seeks monetary damages which is generally not a proper basis for an injunction. Further, defendant argues the motion seeks the ultimate relief of the lawsuit and cannot summarily be granted without a hearing. Concerning the agreement itself, defendant argues the agreement lacks consideration and is therefore not enforceable. In addition, the defendant asserts the document presented in the

motion is not the document he signed and that in any event he was fraudulently induced to sign the document, therefore, the plaintiff cannot establish a likelihood of success on the merits. Thus, the defendant asserts the motion must be denied.

Conclusions of Law

It is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]).

Thus, whether the plaintiff is entitled to an injunction must necessarily turn upon whether the plaintiff has sufficiently demonstrated it maintains a valid and enforceable contract.

The defendant argues the contract is unenforceable since it lacks consideration. The defendant notes that "the document recites no consideration to Jonathan in exchange for" his performance pursuant to the agreement (see, Memorandum of Law in Opposition, page 8). The plaintiff counters that the opening paragraph of the agreement states the parties undertake to perform certain acts for "valuable consideration" (see, Agreement, Preamble, submitted within Exhibit 'B' of Plaintiff's Order to Show Cause). The plaintiff further argues the contract

contains five distinct promises exchanged by her that support consideration including "to respect each other appropriately" to "exhibit signs of affection" to "not to speak ill of each other" to "do and to refrain from doing whatever the expert so advises" and lastly to "consult with an expert in this field" of marriage counseling "once every week" (id, at §1).

First, the recital of valuable consideration without more does not thereby create any consideration (see, Stokes v. Stokes, 148 NY 708, 43 NE 211 [1896]).

It is well settled that "to constitute consideration, a performance or a return promise must be bargained for" (see, Restatement (Second) of Contracts §71). Thus, the plaintiff must demonstrate some performance or a return promise that **was** bargained for by the defendant's promise to fulfill the terms of the agreement. Although very early English cases seemed to endorse love and affection as valid consideration (see, Lord Grey's Case, Bodl, MS Rawl, C112, F292 (1567) noting that "the benefit of my friend is to my benefit and case also" cited and quoted in Kevin M. Teeven, *A History of the Anglo-American Common Law of Contract* 59 n 103 (Greenwood 1990), the modern trend holds that a promise of love and affection is generally not valid consideration (see, McRay v. Citrin, 270 AD2d 191, 706 NYS2d 27 [1st Dept., 2000]). Primarily, there are three reasons advanced why love and affection is not considered valid consideration.

The first reason offered is that promises made in affectionate relationships tend to be impulsive and ill-considered (see, *Donative Promises*, by Melvin A. Eisenberg, 47 University of Chicago Law Review 1 [1979]). A second reason offered is that courts cannot evaluate or consider expectations that are fostered through love, friendship and affection. These promises are generally emotional and are thus subjective, leaving the court little basis upon which to measure them (see, *The World of Contract and the World of Gift*, by Melvin A. Eisenberg, 85 California Law Review 821 [1997]). Lastly, enforcement of promises motivated by love and affection would dilute these familial relationships since at root, then, they are no different than business or other contractual arrangements. As one commentator has argued "the social realm is pictured as rich in precisely the attributes that are thought to be almost wholly absent from the economic realm. The communal forms in which it abounds, islands of reciprocal loyalty and support, neither need much law nor are capable of tolerating it. For law in this conception is the regime of rigidly defined rights that demarcate areas for discretionary action" (see, *The Critical Legal Studies Movement* by Mroberto Mangabeira Unger, 96 Harvard Law Review 561 [1983]).

Thus, in Williams v. Ormsby, 131 Ohio St3d 427, 966 NE2d 255 [Supreme Court of Ohio 2012] the court held love and

affection were insufficient consideration to enforce a contract. In that case Amber Williams lived in a house and Frederick Ormsby, married to someone else at the time, moved in. He paid the mortgage payments and eventually paid off the entire $300,000 mortgage wherein Amber deeded the property to him. The relationship deteriorated and Amber moved out. The couple agreed to attend counseling on condition Frederick sign an agreement they were equal partners in the house. The agreement was signed in June 2005, however, Amber sued Frederick seeking its enforcement. Frederick countered the agreement was unenforceable since there was no consideration. The Supreme Court of Ohio agreed. The court based its decision upon universal principles of contract law. The court noted that "the evidence demonstrates that the only consideration offered by Amber for the June 2005 agreement was her resumption of a romantic relationship with Frederick. There is no detriment to Amber in the June 2005 document, only benefit. Essentially, this agreement amounts to a gratuitous promise by Frederick to give Amber an interest in property based solely on the consideration of her love and affection. Therefore, the June 2005 document is not an enforceable contract, because it fails for want of consideration" (id). New York law is in accord. In Hadley v. Reed, 58 Hun 608, 34 NY St Rep 949, 12 NYS 163 [Supreme Court General Term Second Department 1890] the court stated that "the law seems to be

firmly settled that natural love and affection do not constitute a sufficient consideration to support an executory contract" (id). Therefore, the love and affection provisions of the agreement, namely the promises to "to respect each other appropriately" to "exhibit signs of affection" and to "not to speak ill of each other" are all promises of love and affection and are insufficient to support any consideration.

Concerning the other two promises contained in the agreement, it is well settled that valid consideration exists where "something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made" (see, Anand v. Wilson, 32 AD3d 808, 821 NYS2d 130 [2d Dept., 2006]). It can be argued the plaintiff's promise to consult with a marriage counselor once each week is merely an extension of invalid consideration of love and affection (see, Williams, supra). However, it may be argued that such an undertaking by the plaintiff constitutes valid consideration. There are further questions whether the clause in the agreement wherein the parties agree "to do and to refrain from doing whatever the expert so advises" (see, Agreement, § 1) is an act or forbearance that is rooted in any contractual provision or that flows from consultation with the expert, and is therefore not adequate consideration. Thus, there are questions of fact whether the contract is supported by adequate consideration.

Consequently, there are key facts in dispute which cannot support a likelihood of success on the merits (Merrell Benco Agency, Inc., v. Safrin, 231 AD2d 614, 647 NYS2d 952 [2d Dept., 1996]).

Even if the plaintiff could establish a likelihood of success on the merits, economic loss which can be compensated by money damages does not constitute irreparable harm necessitating an injunction (EdCia Corp., v. McCormack, 44 AD3d 991, 845 NYS2d 104 [2d Dept., 2007]). It is not disputed that all of the harm alleged by the plaintiff in the absence of an injunction can be compensated with money damages (see, International Shoppes v. At the Airport, 131 AD3d 926, 16 NYS3d 72 [2d Dept., 2015]). The plaintiff does not even attempt to demonstrate irreparable harm except concerning four items, namely the premiums of the two life insurance policies, changes in the trust, the payment of taxes and the identification of the homes in Lakewood New Jersey. Thus, the plaintiff has conceded the remaining obligations under the agreement are not of an emergency nature necessitating an injunction. The plaintiff asserts that "Jonathan has offered no evidence to support his claim that the premiums will automatically be paid from their accumulated cash value" (see, Plaintiff's Reply Memorandum, page 5). However, the defendant submitted an e-mail from an insurance broker which stated that without any further premium payments the insurance policy for the defendant will lapse in six years and the policy for the

plaintiff will lapse in nine years. The e-mail does note that five semiannual payments have not been made, however, that does not change the continued existence of the current policies. Thus, the defendant has presented evidence that no such irreparable harm exists concerning the possibility of any lapsing insurance premiums. Even if the premiums would suddenly lapse during the pendency of the litigation it is difficult to understand how the failure to pay them could constitute irreparable harm. While under that scenario the premiums would lapse, however, the plaintiff herself admits that "Jonathan has not alleged that he is unable to meet the financial obligations he undertook in the Contract" (id). Thus, while the plaintiff might not be able to secure new insurance as argued, that is a mere monetary claim, which the defendant could easily meet if necessary. Therefore, the plaintiff has failed to present any irreparable harm concerning the insurance premiums.

Concerning changes to the trust, the agreement merely states the defendant will "make the necessary changes in the Trust so that the wife shall be secure that at the end of the day she will receive the share that is due her" (see, Agreement, §6 submitted within Exhibit 'B' of Plaintiff's Order to Show Cause). These necessary changes are not elaborated upon in the agreement itself, although Mrs. Strasser states such changes will "ensure that, if Jonathan predeceases me, I will receive my agreed upon

share of the proceeds of the Trusts" (see, Affidavit of Fraida Strasser, §3(d)). While the precise nature of the changes have not been disclosed it is difficult to imagine that defendant's estate could not compensate the plaintiff pursuant to those changes in equivalent amounts should the plaintiff prevail in this action. Therefore, there is no irreparable harm that has been presented.

Next, the plaintiff asserts that if the defendant does not pay her taxes pursuant to the agreement such failure could result in fines or a lien against her. However, the plaintiff has the means to pay her taxes and seek reimbursement from the defendant. The plaintiff cannot demonstrate any harm suffered by the failure to grant the injunction at this time, other than the payment of money, which is an improper basis upon which to obtain an injunction. Lastly, concerning the addresses of the houses the defendant promised to build for the plaintiff, the plaintiff does not even allege an emergency basis for such injunctive relief. The plaintiff merely asserts that "as long as the parties have not resolved the identifies of the 14 houses in Lakewood, New Jersey that Fraida is to receive pursuant to the Contract (and the Second Contract, which increased the number of houses in Lakewood that she is to receive from 13 to 14), she will be unable to begin seeking buyers or tenants for the houses, or applying for loans against the value of the houses" (see,

Plaintiff's Reply Memorandum, page 6). However, that does not even allege any emergency or immediate relief necessitating an injunction ordering the immediate fulfillment of that requirement.

Moreover, it is well settled that absent extraordinary circumstances a preliminary injunction is improper where to grant such relief the movant would thereby obtain the ultimate relief she would receive in a final judgement (Zoller v. HSBC Mortgage Corp. (USA), 135 AD3d 932, 24 NYS3d 168 [2d Dept., 2016]). The plaintiff argues the injunctive relief requested does not seek any ultimate relief since all that is being sought is interim relief pending the continuation of the lawsuit. Thus, for example, the plaintiff argues she is not seeking injunctive relief that defendant pay all her taxes in the future, just the taxes currently due.

First, the two requests seeking to change the trust and for the addresses to the houses in Lakewood are surely the ultimate relief to which the plaintiff would be entitled. Indeed, the plaintiff admits as much. She argues that, regarding any changes to the trust, "if the Court should ultimately find for Jonathan, it can direct that the changes made pursuant to a grant of interim relief be reversed, restoring the *status quo ante*" (see, Plaintiff's Reply Memorandum, page 7), acknowledging

that any interim relief is really ultimate relief. Likewise, once the addresses are disclosed to her no further relief is possible.

Concerning the payment of taxes and the insurance premiums, plaintiff, as noted, argues the relief is not ultimate since she is not asking for future payments, just payments already due. However, an order the defendant must pay the taxes and the premiums is surely a significant component of the ultimate relief being sought. It cannot seriously be argued that once the court orders the defendant to pay the current taxes he would not thereby be likewise obligated to pay taxes next year and the years after that as well. There would be no legal or logical distinction that could be made differentiating the current taxes or premiums paid or those due next year. Indeed, the only reason those requests are not included within this motion is because they are not yet due. The fact the premiums or the taxes are not yet due does not mean an order directing current payment due is not an ultimate relief.

Therefore, based on the foregoing, the motion seeking a preliminary injunction is denied.

So ordered.

ENTER:

DATED: February 5, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC