Vermont Human Rights Comm'n v. Benevolent and Protective Order of Elks, Hartford, Vt. Lodge No. 1541, No. 404-8-98 Wncv (Toor, J., Dec. 29, 2008)



STATE OF VERMONT
WASHINGTON COUNTY, SS

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| VERMONT HUMAN RIGHTS COMMISSION, et al.,<br>Plaintiffs<br><br>v.<br><br>BENEVOLENT AND PROTECTIVE ORDER OF ELKS, HARTFORD, VERMONT LODGE NO. 1541,<br>Defendant | SUPERIOR COURT<br>Docket No. 404-8-98 Wncv |

RULING ON MOTION FOR INJUNCTION AND ORDER OF CONTEMPT

Judgment was entered in this case in January of 2007. Since that time, litigation has been ongoing over attorneys' fees. The issue of fees is currently pending before Judge Pearson. Plaintiffs have now filed a motion for Preliminary and Permanent Injunction.[1] The motion also seeks contempt findings against two members of the defendant. A hearing was held on the motion for preliminary injunction on December 10, 2008. At the close of the hearing, all parties agreed that the court could address both the request for a preliminary injunction and the request for a permanent injunction on the basis of the evidence presented.

[1] The motion was filed on behalf of all plaintiffs and signed by three attorneys: Attorneys Hobson, Shaw, and Appel. Attorney Shaw has since withdrawn due to his relocation to California and has been replaced by Attorney Hobson.

## Findings of Fact

The relevant facts established at the hearing by a preponderance of the evidence were as follows. This is a sex discrimination case in which judgment was entered for Plaintiffs in January 2007 in the amount of $25,000 plus interest. Plaintiffs also have a writ of attachment on the property of the defendant ("the Elks") in the amount of $550,000, for the purpose of securing a potentially large award of attorneys' fees.[2] The writ was issued on July 3, 2008. It replaced an earlier writ issued in 2004 in the amount of $ 450,000.

The State of Vermont terminated the Elks' corporate charter in 1989. The charter was reinstated on May 2, 2008.

Defendant ("the Elks") is currently in bad financial straits and unable to pay its bills. Its mortgage – with interest, a total of about $474,000 in June – has been unpaid for some time. In June, a Robert Daniels entered into a transaction with the bank holding the mortgage, Mascoma Savings Bank. The bank had been about to initiate foreclosure proceedings against the Elks due to the ongoing default on the mortgage.[3] Daniels has been a member of the Elks for approximately a year and since May 2008 has been a trustee of the organization. He acted in his personal capacity, not on behalf of the Elks.

In the transaction, Daniels purchased from Mascoma the mortgage and note for their full value (including interest and fees due). He then gave the bank a collateral assignment of the mortgage and note as security for a personal loan in the same amount. In other words, he pledged the right to collect and foreclose upon the note and mortgage

[2] The writ was not offered in evidence. However, it appears in the court's files and the court therefore takes judicial notice of the writ.

[3] The town also had the property listed as ready for a tax sale.

(in the event of his default) as collateral for the loan.[4] In addition, he placed $50,000 in a CD at the bank with an agreement that he would maintain that amount while the loan was outstanding. The transaction was an arms length one with transfer for actual value. The current right to collect on the note and mortgage is solely Daniels', as he is current with his payments to the bank. Daniels has paid about $22,000 in property taxes.

The bank understood that Daniels wished to buy the debt so that the building would not be sold by the bank in foreclosure for less than it was worth. Daniels, through counsel, has now initiated non-judicial foreclosure proceedings on the property pursuant to 12 V.S.A. §§ 4531a(b) and 4532. A sale is scheduled in January. Through counsel, Daniels has hired a professional auctioneer to advertise and sell the real estate so as to maximize any sale price. If it does not sell, he plans to put some money into the building to fix it up for rental, such as installing a sprinkler system. He has been in contact with at least two potential commercial tenants. He would allow the Elks to stay and use the basement of the building for their lodge as long as they paid rent. Daniels is a businessman who owns seven or eight business properties, including public warehouses, in Vermont and New Hampshire. He has in the past bought distressed properties and developed real estate. If he ends up bidding for the property at the foreclosure sale, he intends to put $40,000 to $50,000 into it to improve it for the rental market. For example, he would install sprinklers and fire alarm systems. He believes the building, if properly managed, can make money -- $15,000 to $16,000 a month in rental income for the upstairs. He did not enter into this transaction for the purpose of extinguishing junior lienholders such as the Plaintiffs. The Plaintiffs, if they had the funds, could buy the property at the sale just as anyone else could.

[4] The bank frequently takes collateral assignments of leases on rental buildings.

The current mortgage debt, which would have to be paid by any buyer at the sale, is around $527,000. The property was appraised in 1989 at $1,600,000, and the Elks had a contract to sell the building for $1,200,000 in 2006 that fell through. The bank believed in June that there was substantial value in excess of their mortgage.[5] The bank entered into the transaction with Daniels because he was bringing the loan current, he was a much stronger borrower than the Elks in terms of assets and cash flow, and he gave the bank $50,000 cash collateral.

## Conclusions of Law

Plaintiffs argue that the transactions between Daniels and Mascoma Bank constitute a fraudulent conveyance and constitute contempt of court by Daniels. Plaintiffs further argue that Richard Blodgett, the Exalted Ruler of the Elks since May 22, is in contempt of court.

## Contempt

Plaintiffs argue that Daniels and Blodgett are in contempt of a prior court order in this case. When asked what court order was allegedly violated here, Attorney Hobson stated that it was the writ of attachment. Presumably he means the 2004 writ of attachment, as the one currently in effect was not issued until after the property transfer. Neither writ, however, directs anyone other than the Sheriff, Constable or Town Clerk to do anything. Moreover, all it orders the officers to do is to attach the property. It is undisputed that that has been done. No one, least of all Mr. Daniels or Mr. Roberts, has been alleged to have done anything that could by any stretch of the imagination be considered a violation of the order to attach the property. The court finds no support at all

[5] Daniels believes the building is worth about $700,000 to $750,000 today.

for the claim that Mr. Daniels and Mr. Roberts are in contempt of court for violating the writ.

Injunctive Relief

Plaintiffs seek preliminary and permanent injunctions. To obtain a preliminary injunction, irreparable harm must be established. Here, the court will skip over the issue of preliminary relief because the parties have agreed that the request for a permanent injunction rests on the same facts, and can be considered by the court at this time.

The gist of Plaintiffs' argument is that by purchasing the note and mortgage from the bank, and then initiating non-judicial foreclosure proceedings, Daniels is somehow conducting a fraud upon the court and purposely attempting to void the Plaintiffs' writ of attachment. However, the court concludes that Plaintiffs have not been harmed by his actions. The bank was about to start foreclosure proceedings at the time Daniels bought the rights to do so. If the bank had initiated non-judicial foreclosure, Plaintiffs would be in exactly the same position they are in now. Nothing has changed but the name on the action. Regardless of whether Daniels acted in part to help the Elks stay in the building, he had every right to buy the note and mortgage in an arms length transaction, and the bank had every right to sell them. There was nothing fraudulent or collusive about the transaction with the bank.

Plaintiffs also argue that Daniels, as a member of the Elks, is personally liable for the judgment and any attorneys' fee award, and thus has concocted a scheme to get out from under the personal liability. Plaintiffs also argue that this personal liability means

that there was a merger of title when he took over the mortgage from the bank. These arguments are based upon the argument that the Elks was an unincorporated association at the time of the judgment in this case, thereby making all of its members personally liable.

The Elks' corporate charter was terminated by the State in 1989 and reinstated in May 2008. Vermont law states that upon reinstatement of a corporate charter, the reinstatement "shall relate back to and take effect as of the date of the corporation's termination as if the termination had never occurred." 11A V.S.A. § 14.20. Thus, Daniels argues that the Elks' 2008 reinstatement insulates the individual members from liability for the judgment issued in 2007. The Elks argue, on the other hand, that reinstatement post-dating the judgment, particularly where the Eks' defense was in part on the basis of being an unincorporated association, cannot retroactively insulate them. *Compare*, *e.g.*, Kingfield Wood Products, Inc. v. Hagan, 827 A. 2d 619, 624 (R.I. 2003)(noting its prior holding that "to discourage fraud and abuse, the retroactive reinstatement of a corporate charter does not provide relief from personal liability to individuals for acts occurring during the period of revocation") *with* Karp v. American Legion Department of Connecticut, Inc., __ A. 2d __, 1996 WL 457012 *2 (Ct. Super. 1996)(unpublished opinion) (reinstatement of corporation means that the individual members of the Legion "are excluded from liability").

The court does not reach this question, however, because the issue before the court is narrower. It is whether Daniels himself is personally liable. Even the Plaintiffs argue only that the judgment is binding personally on members of the Elks at the time of the acts on which the judgment is based. *See, e.g.*, F.R.Patch Mfg. Co. v. Capeless, 79 Vt.

1 (1906), cited by Plaintiffs for the proposition that "judgment against an unincorporated association [is] conclusive on all person who were members thereof when the liability merged in the judgment was created." *See also*, Johnson v. Paine, 84 Vt. 84(1911)(liability of member of association depended upon whether he was a member when the liability accrued). The evidence was clear that Daniels became a member of the Elks only in the last year – after the judgment was issued in this case. Thus, regardless of the effect of the reinstatement of the corporation, Daniels cannot be personally liable. Plaintiffs' arguments based upon his alleged personal liability therefore fail.

Order

The motion for a finding of contempt is denied. The requests for a preliminary and a permanent injunction are denied. All other pending motions are moot.

Dated at Montpelier this 23rd day of December, 2008.

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Helen M. Toor
Superior Court Judge