

Robak v Hanying Liu
2016 NY Slip Op 30016(U)
January 5, 2016
Supreme Court, New York County
Docket Number: 156212/15
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK
 COBUNTY OF NEW YORK: IAS PART 50 (formerly part 57)

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 ESPEN ROBAK,

Plaintiff,

-against-

Index No.: 156212/15

HANYING LIU,

Defendant

-----X
 PETER H. MOULTON, J.S.C.:

On June 22, 2105, the Clerk of the Court entered a Judgment under Index Number 156212/2015, based on a Confession of Judgment (the “Confession”). The Confession was given by Hanying Liu to Espen Robak in connection with a settlement agreement, dated July 22, 2014 and signed with the benefit of counsel (the “settlement agreement”). The settlement agreement arose out of a partition action commenced by Robak under Index Number 157390/13. The main subject of the settlement agreement is an apartment located at 165 Hudson Street (the “apartment”). The stock certificate and shares for the apartment are owned by Robak and Liu, as tenants in common. The Building is owned by the cooperative Spice House Corp. (the “cooperative”).

In this motion, Liu moves by Order to Show Cause to stay all proceedings by Robak, his counsel, and the Marshal to sell the apartment and Liu’s unspecified personal property at auction. I granted a temporary restraining order (“TRO”) pending the hearing and continued it after oral argument, pending my determination. Liu also seeks to vacate the Judgment and the Confession because she maintains that at the time that the Confession was entered, no default existed.

Both sides agree that the default is premised on one thing only: the cooperative’s denial of Liu’s application to have the stock certificate and lease transferred into her name alone.

The settlement agreement, as is relevant here, required that Liu make an application to the cooperative to place the stock certificate and lease for the apartment in her name alone, and provided that in the event of certain defaults, the apartment would be sold. Unfortunately for Liu, the cooperative denied her transfer request on September 5, 2014, without providing any reason. Liu argues that the cooperative's failure to approve her application "was not caused by any fault on the part of the Defendant." She also points out that on June 30, 2015 the United States Department of Housing and Urban Development issued a determination after investigation that probable cause existed to believe the cooperative engaged in unlawful discriminatory practices in connection with the denial. Also, on November 12, 2015 the New York State Division of Human Rights filed an action against the cooperative on behalf of Liu under Index No. 453040/15. Liu also seeks relief in the interest of justice and maintains that the entry of the Judgment could trigger a default on the mortgage.

In opposition to the motion, Robak points out that the settlement agreement reflected both parties' desire to have the stock and lease transferred to Liu, but that it was "subject to the approval of the Board of the Cooperative." In fact, the agreement contemplated that the cooperative might not approve the sale because it provided that if "Liu fails to obtain a new Stock and Lease solely in her name, as provided in paragraph 3 of this Agreement, then Liu shall be deemed to be in default of this Agreement." The settlement agreement describes a procedure for a sale of the apartment upon default, and after a failure to cure the default within 60 days of Liu's counsel's receipt of a default notice. Robak also points out that under the settlement agreement the apartment was to be sold if the mortgage was not refinanced within nine months from its execution. He further argues that any claims that Liu might have against the cooperative does not relieve her of her obligations under the

settlement agreement. Additionally, because Liu was in receipt of the default notice dated September 29, 2014 and moved previously in the partition action to stay the cure period, res judicata bars the requested relief. Liu previously sought to vacate the agreement under CPLR §5015, sought the return of certain monies and sought a stay of enforcement of the settlement agreement. The basis of that motion was because the cooperative “has not had shareholder meeting for three years since 2011 and I have not been provided any certified annual financial statements since 2011.” Liu also alleged discrimination, but that issue was pending in a separate Article 78 proceeding under Index Number 150026/2015 before Judge Donna Mills. Although I previously signed a TRO which stayed the cure period in the default notice, I denied the motion on March 30, 2015. Robak argues that in addition to previously moving to vacate the settlement agreement, Liu could have alternatively moved for a declaration the default notice was void, because no default had occurred. Because she did not do that, Robak argues that she cannot make that argument now.

Discussion

For purposes of this decision, the court assumes that the application is not barred by res judicata.

A judgment on the merits precludes the maintenance of a second action based upon the same transaction if the evidence and the issues in both are the same. The former judgment is final not only as to every essential matter which was received to sustain or defeat the claim or demand, but as to any other admissible and essential matter which might have been offered for that purpose.

(*Eidelberg v Zellermayer*, 5 AD2d 658 [1st Dept 1958] [internal citations omitted]).

However, no judgment entered in the partition action; instead the judgment was entered in this action. Additionally, the prior relief sought to vacate the agreement. The court was not asked

to interpret the settlement agreement. Robak has not demonstrated that *res judicata* applies.

The motion is nevertheless denied. “When parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms” (*Bailey v Fish & Neave*, 8 NY3d 523 [2007] [internal citations omitted]). “[W]here the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language” (*id.* [internal citations omitted]). Courts “may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing” (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] quoting *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

Contrary to Liu’s position, a default occurred when the cooperative denied her transfer request, whether it was her fault or not. Even assuming that Liu will prevail in her discrimination action, and that the cooperative did not deny her application for a valid financial or other valid reason, the settlement agreement contemplated that the cooperative might reject Liu’s application. The settlement agreement provides that “[t]he parties acknowledge and agree that any transfer of the sale of the Stock and Lease—whether to Liu or to a third party—shall be subject to the approval of the Board of the Cooperative” and that “[i]n the event that the Board approves the transfer of the sale of the Stock and Lease to Liu, then Liu shall pay all fees.” It did not carve out any exceptions to a default in the event that the cooperative unlawfully denied the transfer. The deemed event of default, where “Liu fails to obtain a new Stock and Lease solely in her name,” can be considered a provision which allocates the risk of loss in the event of the cooperative’s denial of the transfer – for whatever reason. While Liu cites the interests of justice and alleges that it was not her fault that the

cooperative denied her application, it was also not Robak's fault. The settlement agreement, as written, cannot be reasonably construed to frustrate the sale of the apartment and the division of proceeds - - the very purpose of the partition action - - merely because Liu cannot remain in the apartment. The purpose of the settlement agreement, to uncouple this former couple, would be frustrated if the court granted the requested relief for an indeterminate period of time. Lui's remedies lie against the cooperative.

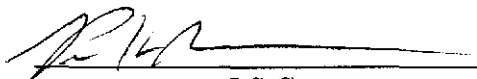
Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety and the TRO is dissolved.

This Constitutes the Decision and Order of the Court.

Dated: January 5, 2016

ENTER:



J.S.C.

HON. PETER H. MOULTON