

MEMORANDUM

SUPREME COURT : STATE OF NEW YORK
COUNTY OF QUEENS : PART 20C

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In the Matter of

HON. JANICE A. TAYLOR

Index No.: 6651/1999

DENNIS DIAZ

Dated: February 17, 2004

An Incapacitated Person.

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After a hearing before this Court held on October 14th, 27th, 28th, 30th and 31st, 2003, the determination of the court as to whether or not to ratify a contract for the purchase of a tavern which was entered into by Mr. Dennis Diaz was made on the record with the court determining that the contract is voidable as follows:

By Order dated of the Hon. Charles J. Thomas, dated October 17, 2001, Dennis Diaz was adjudicated an incapacitated person pursuant to Article 81 of the Mental Hygiene Law. His mother, Doris Diaz, was appointed as guardian for his personal needs, and Julie Stoil Fernandez, Esq. was appointed guardian for property management purposes. At the hearing to determine his legal status, which was held before Hon. Edwin Kassoff on July 1, 1999, it was determined that Dennis, who is currently 28 years of age, suffers from cerebral palsy, apparently induced by malpractice which occurred at birth, resulting in functional level approximately equal to that of a fifth-grader. While Dennis Diaz was determined to be able to do many things himself, the court found that he required assistance in handling his own finances, and also appointed his mother as guardian of his person to assist him in the activities

of daily living which he might not be able to perform for himself. Apparently due to the inability of the guardian of the person, Doris Diaz, to qualify to act, by obtaining a bond, Counselor Stoil Fernandez was also unable to qualify as guardian of the property inasmuch as her ability to be bonded was tied to that of Doris Diaz. As a result, Mr. Diaz was without a guardian for his personal needs or property management, until the court examiner moved for the removal of the appointed fiduciaries for failure to qualify and to file an accounting in November of 2002. This court, by Order of the Hon. Janice A. Taylor dated March 21, 2003, then removed Doris Diaz and appointed Counselor Stoil Fernandez as the sole guardian of the person and property, but Counselor Stoil Fernandez requested an order of the court permitting her to resign/decline due to person problems, which this court granted. Thereafter, by order of Hon. Janice A. Taylor, Luis R. Sepulveda, Esq. was substituted as guardian of the person and property. The transaction at issue was first brought to the court's attention in connection with the court examiner's amended motion to remove Doris Diaz as guardian, dated January 10, 2003.

On or about January 31, 2002, utilizing some of the proceeds from the five-million-dollar settlement of a legal malpractice claim, arising from a medical malpractice action involving his alleged injuries at birth, Mr. Diaz retained counsel and entered into a transaction for the purchase of a tavern located in Queens, New York. Specifically, on that date, Dennis Diaz entered into an agreement with Miodrag Celaj for the purchase of "Mio's Sports Bar and Grill", (hereinafter "Mio's"), located at 24-01 29th Street, Astoria, New York 11105. The total purchase price was \$15,000, which covered the chattels, fixtures and equipment, leasehold,

goodwill and restrictive covenant. On September 9th, 2002, with the assistance of counsel, Mr. Diaz assigned the aforementioned contract to Silenus Bar & Grill Corp., (hereinafter “Silenus”), a corporation he has set up for the tavern business he purchased, presumably to insulate himself from personal exposure for the business’ debts. On September 9, 2002, Silenus received a Bill of Sale for the inventory and equipment in the tavern from Miodrag Celaj on behalf of Mio’s. Also on September 9th, the lease agreement dated November 1, 1998 between Zef Celaj, as landlord, and Mio’s Sports Bar and Grill Corp., as tenant, was assigned by Mio’s to Silenus with Miodrag Celaj and Dennis Diaz as the respective signatories. Previous thereto, on April 9, 2002, the aforesaid parties, Miodrag Celaj and Dennis Diaz, on behalf of Mio’s and Silenus respectively, filed an application for the transfer of the inventory of alcoholic beverages on the premises from Mio’s to Silenus. It is uncontroverted that Mr. Diaz was represented by counsel in connection with the execution of all of the transfer documents, and there was no evidence presented tending to establish that the seller knew, or should have known, that Mr. Diaz may not have understood or appreciated that the nature of the transaction or its consequences. In fact, the evidence indicated that Mr. Diaz took reasonable measures to purchase, conduct and assist in the operation of the business, while at the same time shielding himself from personal liability. It is uncontroverted that the seller of the tavern did not know of Mr. Diaz’ incapacity.

Under decisional law, contracts made by persons adjudicated *incompetent*, for whom committees were appointed were considered presumptively void (*see, Hughes v. Jones*, 116 N.Y. 67 [1889]; *Carter v. Beckwith*, 128 N.Y. 312 [1891] [*emphasis supplied*]).

Dennis Diaz was never adjudicated an *incompetent person*, pursuant to former Article 77 and 78 of the Mental Hygiene Law, but has been adjudicated an *incapacitated* person pursuant to Article 81 of the Mental Hygiene Law [*emphasis supplied*]. Thus, it is his lack of the requisite ability to understand the nature and consequences of this transaction which supports this court's finding, on the record, that the contracts were voidable and not void. Contracts of persons without committees, but of such unsound mind as to lack the requisite ability to understand the nature and consequences of the transaction, were considered voidable (*see, Blinn v. Schwarz*, 177 N.Y. 252 1904]; *Finch v. Goldstein*, 245 N.Y. 300 [1927]; *see also, Verstandig v. Schlaffer*, 296 N.Y. 62 [1946]; *Dudyak v. Dudyak*, 21 A.D.2d 53 [2d. Dept. 1964]; *Ortelere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196 [1969]).

Article 81 of the Mental Hygiene Law was enacted in 1992 based upon the conclusion that former articles 77 and 78 of the Mental Hygiene Law failed to provide relief sufficient to meet the needs of persons who, while neither incompetent nor substantially impaired under Mental Hygiene Law former articles 77 and 78, were nevertheless unable to provide for the activities of daily living by reason of functional limitations (*see, Recommendation of Law Rev Commission to 1992 Legislature, 1993 McKinney's Session Laws of NY, at 2025*). Courts presiding over Article 81 proceedings are thus charged with tailoring each guardianship to meet the needs of the incapacitated person and limiting fiduciary encroachment into that person's daily life and decision-making capabilities to the least restrictive form of intervention. Determinative of that which constitutes the least restrictive form of intervention is the functional level of the individual which is defined as the ability of

the individual to provide for personal needs and/or ability with respect to property management (*see*, Mental Hygiene Law § 81.03 [b]).

Pursuant to Mental Hygiene Law § 81.29 (d), this court could revoke the contract at issue if it finds that Dennis Diaz was incapacitated at the time it was made, rendering him incapable of consenting thereto by reason of want of understanding. The proof adduced in the case at bar establishes that on January 31, 2002, when the contract of sale was entered into, and September 9, 2002, when the transfer documents were signed, Dennis Diaz was capably represented by counsel, who took measures to protect him from personal liability by transferring his interest in the premises to a corporate vehicle. The Court further notes that Mr. Diaz' guardian did not, at any point, move for rescission of the contract at issue on the basis of his incapacity, nor was any claim interposed that the incapacitated person was in any way damaged as a result of having entered into the contract as a result of his incapacity. No evidence was presented to the court which would allow the court to determine if Dennis Diaz made a profit or took a loss on this venture. Consequently, absent such evidence, this court could only guess at a figure to be awarded to Luis R. Sepulveda, Esq. as guardian of Dennis Diaz. Since this court chooses not to pick numbers out of the air, the court determines to leave the parties in the position they were in at the time of execution of the documents.

Thus, under the unusual circumstances of this case, the court finds that the contract at issue, as voidable, is hereby revoked as of October 31, 2003, and possession restored to the landlord as of that date, without return of the purchase price by the seller. Mr. Diaz shall bear no further personal liability for rent, use or occupancy arising out of the agreements of

January 31, 2002 and September 9, 2002. The contents of the tavern, if any, remain the property of Silenus, subject to any claims of the corporation's creditors.

The court finds that the above result comports with the purpose of Article 81 by limiting fiduciary intrusion to the least restrictive level, thereby allowing Mr. Diaz to control his destiny within the parameters of his functional abilities, while at the same time recognizing that he may not entirely recognize the parameters of his own functional limitations.

Settle order within 45 days.

Hon. Janice A. Taylor, J. S. C.