

Bowman v DiPlacidi

2004 NY Slip Op 30015(U)

June 9, 2004

Supreme Court, New York County

Docket Number: 0602000/2003

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

0602000/2003

BOWMAN, JOHN
VS
DI PLACIDI, GEORGE

SEQ 02

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JUN 08 2004
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
JUN 08 2004

Dated: 6/4/04

COUNTY CLERK'S OFFICE
WALTER B. TOLUB, S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x

JOHN BOWMAN, individually and as successor-
in-interest to 2069 Realty, Inc. and
JAMES JONES,

Plaintiffs,

Index No. 602000/2003
Mtn Seq. 002

-against-

GEORGE DiPLACIDI, individually, and
GLD REALTY CORPORATION,

Defendants.

-----x

WALTER B. TOLUB, J.:

Defendants move pursuant to CPLR 3211(a)(5) to dismiss the
complaint based upon the statute of frauds.

Plaintiffs allege that they conveyed real property deed
to defendant GLD Realty Corp. ("GLD") in order to obtain loans
from two New York City agencies that would be used to
rehabilitate the property. Plaintiffs allege that defendant
DiPlacidi orally agreed that GLD would reconvey the title to
plaintiffs three years after GLD completed the rehabilitation.
Plaintiffs allege that the parties also agreed orally to share
equally in the proceeds generated from the operation of the
building for three years of GLD's ownership. Plaintiffs allege
that defendants failed to reconvey the building after the three
year period and that defendants did not share proceeds during the
three years after completion of rehabilitation.

Plaintiffs have sued defendants for breach of contract,

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specific performance, unjust enrichment and an accounting.

Defendants move to dismiss the complaint, prior to answering, based upon the plaintiffs' admission that the agreement at issue was not memorialized in writing. Defendants argue that plaintiffs' cause of action for breach of the oral agreement to reconvey the property is proscribed by General Obligations Law § 5-703(1), which provides that any interest in real property cannot be created unless it is subscribed by the grantor in writing. Because no writing to reconvey the property exists, defendants argue the cause of action to reconvey must be dismissed.

Defendants argue that plaintiffs' cause of action for failure to pay proceeds received from operating the building for the three year period is proscribed by General Obligations Law § 5-701(1). That section renders void any oral agreement that cannot by its terms be performed within one year of the agreement. Defendants argue that the oral agreement, by its plain terms, could not be performed within one year of its making and therefore is barred by the statute of frauds.

Plaintiffs argue in opposition that the agreement should be enforced by the court on the basis of part performance. Under General Obligations Law § 5-703(4), a court retains equitable powers to compel specific performance where evidence establishes part performance of an oral agreement to convey real property.

Plaintiffs argue that part performance applies to this action because the deed of title indicates that the property was transferred for "no stated consideration" and that because the title indicates that it was transferred for "no stated consideration", the court should infer that the original transfer is referable to the parties' agreement to reconvey the property after three years.

The doctrine of part performance recognizes that a party who permits another party to perform in reliance of an agreement would be perpetrating a fraud if the agreement were not enforced.

Er *er* *c atteser Euro RSCG Inc.. v. Aegis Group PLC*, 93 NY2d 229, 235 (1999). Part performance alone, however, is not sufficient; the performance must be unequivocally referable to the agreement. *Id.* A plaintiff cannot avoid the statute of frauds by merely claiming part performance but instead must establish that the acts described unequivocally refer to the oral promise. *Nelson Bagel Bakery Co. v. Moshcorn Realty Corp.*, 289 AD2d 69, 69 (1st Dept. 2001). "It is insufficient that the [oral] agreement confess some 'significance' on or provides some motivation for plaintiff's conduct." *Steele v. Delverde S.R.I.*, 242 AD2d 414, 414 (1st Dept. 1997). The actions alone must be unintelligible or extraordinary and explainable only with reference to the oral agreement. *Baytree Assocs., Inc. v. Forster*, 240 AD2d 305, 306 (1st Dept.

1997). "What is done must itself supply the key to what is promised." Burns v. McCormick, 233 NY 230, 232 (1922).

Partial performance is inapplicable to plaintiffs causes of action. The transfer of the deed without consideration stated on the deed does not unequivocally refer to the oral agreement to reconvey because it is the fact of consideration paid, not the statement on the deed, that is significant. Upon defendants' prima facie showing that no written document evidencing an agreement to reconvey the property existed, plaintiffs, in avoidance of the statute of frauds, were required to submit evidence in admissible form to raise a question of fact as to part performance. Cf. Subgar Realty Corp. v. Gothic Lumber & Millwork, Inc., 80 AD2d 774, 774 (1st Department 1981).

The plaintiffs' attorney conclusorily avers that the deed does not state the consideration paid and that therefore the transfer is inexplicable except with reference to an oral agreement to reconvey the property. Plaintiffs' attorneys' affirmation is of no probative weight as to factual issues that are not based upon his personal knowledge. Plaintiffs failed to submit evidence in admissible form to establish that defendants paid no consideration for the original transfer. The conclusory statement in plaintiffs' amended complaint that the oral promise to reconvey was consideration for the original conveyance does not establish, nor allege, that plaintiffs received no

consideration. Nor did plaintiffs interpose failure of consideration in support of their causes of action. Because there is no evidence that suggests defendants paid no consideration for the transfer, the plaintiffs have only established that the deed does not state that consideration was paid.

Defendants, in contrast, submitted proof that defendant DiPlacidi executed a satisfaction of mortgage to 2069 Realty, Inc., plaintiffs predecessor in title, contemporaneously with the transfer of the property to defendants. Given that plaintiffs predecessor in interest received a satisfaction of mortgage at the time of the transfer to defendants, the transfer of the property cannot does not unequivocally refer to the oral agreement to reconvey after three years. See Lincolnshire Mgt., Inc. v. Les Gantiers Holdings B.V., 303 AD2d 180, 180 (1st Dept. 2003) (holding dismissal appropriate where conveyance is readily explainable without reference to oral agreement).

Having failed to establish that the transfer is unequivocally referable to the oral agreement to reconvey the property, part performance does not apply and plaintiffs' cause of action for reconveyance of the property based upon an oral agreement must be dismissed.

Plaintiffs' cause of action based upon defendants' failure to share the proceeds generated by operating the building for

three years are not subject to the partial performance exception created by General Obligations Law § 5-703. See Stephen Pevner, Inc. v. Ensler, 309 AD2d 722, 722 (1st Dept. 2003) (holding that exception of part performance not extended to General Obligations Law § 5-701).

Plaintiffs' cause of action for unjust enrichment, however, is not automatically barred by the statute of frauds. See RTC Properties, Inc. v. Bio Resources, Ltd., 295 AD2d 285, 286 (1st Dept. 2002). The case referred to by defendants in support of dismissal of this claim address General Obligations Law § 5-701(10), which addresses the statute of frauds application to pay compensation for services rendered in negotiating the sale of real estate or business opportunity. That section does not apply to plaintiffs allegations and therefore the case is irrelevant to this action. Defendant failed to establish their right to dismissal as a matter of law of the fourth cause of action for an accounting. In particular, defendant failed to address whether an accounting is available as relief in a cause of action for implied contract. The motion to dismiss the third and fourth causes of action therefore is denied. Accordingly it is

ORDERED that defendants' motion to dismiss the first and second causes of action is granted; and it is further

ORDERED that defendants' motion to dismiss the third and fourth causes of action is denied; and it is further


ORDERED that the third and fourth causes are hereby severed and shall continue.

Counsel for the parties are directed to appear at I.A. Part 15, Room 335, 60 Centre street, New York, NY for a compliance conference on June 11, 2004 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

6/9/04



HON. WALTER B. TOLUB, J.S.C.

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