

Losner v Cashline, L.P.
2006 NY Slip Op 30022(U)
March 14, 2006
Sup Ct, Richmond County
Docket Number:
Judge: Philip G. Minardo
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: DCM 6

By: Philip G. Minardo, J.S.C.

Date: March 14, 2006

RONALD B. LOSNER, SHIRLEY LOSNER
and RONALD B. LOSNER, P.C.,

Plaintiffs.

vs.

CASHLINE, L.P. CANTICO INTERNATIONAL LTD.,
THOMAS NEELY, 2A SAGAMORE HILL ROAD CORP.,
RICK, STEINER, RUBIN & TANNENBAUM, P.C. and
North Fork Bank, as Trustee,

Defendants.

DECISION/ORDER

Index. No: 14146/94

Action No. 1

NORTH FORK BANK, As Trustee,

Plaintiff,

Index No. 11716/00

vs.

CANTICO INTERNATIONAL, LTD., NEW YORK CITY
PARKING VIOLATIONS BUREAU, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, RONALD B.
LOSNER, SHIRLEY LOSNER, RONALD B. LOSNER,
P.C., et al.,

Defendants.

NORTH FORK BANK, As Trustee,

Plaintiff,

Index No. 100482/05

vs.

RONALD B. LOSNER, SHIRLEY LOSNER, and
RONALD B. LOSNER, P.C.,

Defendants.

This action was tried before this court without a jury on January 4, 2006, January 9, 2006

through January 11, 2006 and January 18, 2006.

Plaintiffs, Ronald B. Losner, Shirley Losner and Ronald B. Losner, P.C. (hereinafter “Losners”) commenced the action bearing index number 14146/94 (1) to declare a constructive trust to title on real property located at 1072 Victory Boulevard, Staten Island, New York (hereinafter “premises”); (2) to declare a lease agreement between defendant Cantico International, Ltd. (hereinafter “Cantico”) to be an equitable mortgage; and (3) to declare certain mortgages subsequently placed on these premises by North Fork Bank, as Trustee, (hereinafter “North Fork”) to be null and void and canceling them as of record. Thereafter, North Fork commenced three mortgage foreclosure actions under index numbers 12828/95, 10401/96 and 11716/00. This court *sua sponte* consolidated all three actions under the most recent index number 11716/00. The last action under index number 100482/05 was commenced by North Fork to recover damages for the Losners’ alleged use and occupancy of the premises since 1994.¹

The evidence in this case consisted of the testimony of Peter Rosebaum, Ronald B. Losner, and Diane Tyrer. The parties also submitted numerous documents labeled one through fifteen and A through G into evidence. Peter Rosenbaum is the President and sole shareholder of defendants 2A Sagamore Hill Rd. Corp. (hereinafter “Sagamore”), Cashline, L.P., and GCM Corp. Diane Tyrer is a trust officer employed by North Fork Bank to administer Leo Kornblatt’s IRA.

This court finds the testimony of Peter Rosenbaum and Diane Tyrer to be credible and the testimony of Ronald B. Losner to be less than credible.

FINDINGS OF FACT

The premises were previously owned by Ronald B. Losner and Shirley Losner, his

mother and used as a law office and rental apartment. GreenPoint Savings Bank held a mortgage on the premises during the time that Ronald and Shirley Losner owed the property and commenced a mortgage foreclosure action in 1990. GreenPoint took title to the premises by Referee's Deed dated December 14, 1993. The Referee's Deed was recorded on February 3, 1994. On or about February 10, 1994, Cantico purchased the property from GreenPoint for \$150,000.00. On that same day, Cantico executed a \$200,000.00 mortgage to Sagamore. On or about March 1, 1994, Cantico entered into a one year lease with Ronald B. Losner, P.C. for \$3,300.00 per month.

On or about March 7, 1994, Cantico executed an additional Note and Mortgage to Sagamore in the amount of \$100,000.00, by its president, Thomas Neely. (see Exhibits 3 and 5). That same day, Thomas Neely as Vice President of Sagamore executed an assignment and consolidation of the February 10, 1994 mortgage of \$200,000.00 and the March 7, 1994 mortgage of \$100,000.00 to North Fork for \$300,000.00. (See Exhibit 1). It is undisputed that Thomas Neely who was not an officer, director or shareholder of Sagamore executed this assignment and consolidation without authority from Sagamore. Mr. Rosenbaum testified that Sagamore never funded the \$100,000.00 second mortgage on the premises, but that it was merely a bookkeeping convenience.

Also, on or about March 7, 1994 Sagamore, as mortgagee and Cantico, as mortgagor entered into a Modification Consolidation and Extension Agreement (hereinafter "Consolidation Agreement"). This agreement consolidated the two Sagamore mortgages and modified the lending rate. Thomas Neely signed as both President of Cantico and Vice President of Sagamore. Again, according to the testimony of Rosenbaum, Rosenbaum in essence ratified this agreement even though Thomas Neely had no authority to sign for Sagamore.

However, as a result of this assignment and consolidation North Fork wired \$300,000.00 out of Leo Kornblatt's² IRS account to defendant law firm Rick, Steiner, Rubin & Tannenbaum, P.C. (hereinafter "Rick, Steiner").

It appears that Rick, Steiner not only represented Sagamore, but also Cantico and Leo Kornblatt. It is undisputed that Sagamore received a payment of \$200,000.00 which Mr. Rosenbaum testified was payment in full satisfaction of Sagamore's mortgage. It is assumed Cantico or Mr. Neely received the remaining \$100,000.00. Mr. Rosenbaum also testified he handled or otherwise set up the mortgage between Leo Kornblatt's IRA and Cantico. Mr. Rosenbaum prepared the letter which Leo Kornblatt signed authorizing North Fork to wire \$300,000.00 out of Kornblatt's self directed individual IRA to Rick, Steiner's escrow account.

Cantico made twelve (12) interest only payments of \$4,500.00 each. Cantico has not made a mortgage payment since March 4, 1995. The ensuing foreclosure and use and occupancy proceedings were commenced by North Fork.

According to the Losners, they retained defendant Cantico and its president defendant Thomas Neely, a purported mortgage broker, to negotiate on their behalf (1) to settle GreenPoint's mortgage foreclosure action relating to their alleged default on the premises; (2) to repurchase the premises from GreenPoint after the foreclosure sale for the sum of \$150,000.00; and (3) to obtain a loan for them to fund the repurchase. Allegedly unbeknown to the Losners, and contrary to the parties' agreement, title to the premises was conveyed to Cantico upon payment to GreenPoint of \$150,000.00.

The Losners claim that Neely through Cantico thereafter demanded on or about March 1, 1994 that Ronald B. Losner, P.C. execute a one-year lease for the premises with Cantico. Losner maintains that this lease is in actuality an equitable mortgage and the rental payments were

actually usurious interest payments on the \$150,000.00 payment for the premises. He further contends that he executed the lease in reliance upon Neely's false representation that Cantico would reconvey title to the premises to the Losners upon the Losners obtaining \$150,000.00. Ronald B. Losner testified that Ronald B. Losner, P.C. had a fiduciary relationship with Neely in that it represented Neely sometime in 1994 without compensation. Ronald B. Losner, P.C. made approximately eight (8) monthly payments totaling \$24,000.00 under the lease agreement before stopping payment because Neely was apparently renegeing on the transfer deal. Ronald B. Losner concedes there was no provision in the lease for an option to buy. Neely said he would evict Ronald B. Losner, P.C. whereupon the Losners made a demand that Neely transfer the property to them. Neely ignored them whereupon the Losners commenced the first action in December 1994.

In September 1996 Ronald B. Losner individually filed a Bankruptcy Chapter 11 proceeding which was subsequently converted to a Chapter 7. Ronald B. Losner listed North Fork as a creditor and the first action under index number 14146/94 as an asset. Ronald B. Losner subsequently received a discharge under Bankruptcy dated June 26, 1997. This court notes that the above Bankruptcy discharge had no effect on Shirley Losner or Ronald B. Losner, P.C., the lesee and the alleged equitable mortgagor. Further, a discharge in bankruptcy does not extinguish a mortgage only the note. Ronald B. Losner further testified that based on Neely's advice he had his mother Shirley Losner deposit with Richard Zaltman, Esq., Neely's partner, \$150,000.00 to be held in escrow in an attempt to forestall mortgage foreclosures on various properties held by the Losners including the premises at bar. Apparently \$7,500.00 was paid to Samuel Scollar, Esq. and \$8,500.00 was returned to Shirley Losner. The balance of the funds were unaccounted for. Ronald B. Losner testified that a civil or criminal action was never

commenced to recover the unaccounted balance.

CONCLUSIONS OF LAW

“In order to impose a constructive trust upon real property, a plaintiff must prove: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment.” (Eickler v. Pecora, 12 AD3d 635 (2nd Dept. 2004).). “However, each of these requirements are not rigidly applied where equity cries out for some relief.” Bolla v. Bolla, (2005 WL 3240148 (N.Y.Sur.)). Ronald B. Losner testified to an express oral promise between him and Thomas Neely. A fiduciary relationship may be inferred from the totality of the transactions. Arguably, the plaintiffs Losners may have proven the first two elements but have failed to prove a transfer of the premises in reliance nor have they proved unjust enrichment. It is imperative that a party seeking to impose a constructive trust have some prior interest in the premises at or before obtaining the promise that the premises would be reconveyed to them. (Id.; *see also* Bontecou v. Goldman, 103 AD2d 732, 733). Proof at trial that a plaintiff contributed substantial time and money to purchase and maintained the subject property may also be sufficient to satisfy the “transfer in reliance” element. (Eickler v. Pecora, *supra* at 636; Matter of Bayside Controls, 295 AD2d 343, 346). The Losners only presented proof that they made \$24,000.00 in total payments to Cantico since 1994. Ronald B. Losner conceded that he has continually occupied the premises and has even subleased a portion as a studio apartment collecting rent in the amount of \$550.00 to \$650.00 per month. The Losners have also repaired and/or replaced the roof and heating system. However, pending the instant trial North Fork has satisfied a \$17,000.00 tax lien on the premises and made insurance payments.

Further, this court finds the one year lease to be unambiguous in its terms and does not create a mortgage interest. Ronald B. Losner was a duly admitted attorney in the State of New

York in 1994 and this court finds no credible reason for the parties not to simply enter into a contract of sale and/or purchase money mortgage. This court finds that there is no credible evidence the parties intended the lease to be an equitable mortgage. (*see Torna Tore v. Bruno*, 12 AD3d 1115 (4th Dept. 2004)).

Further for this court to grant equitable rights the proponent must not have unclear hands. This court finds the Losners intended to somehow repurchase the premises and avoid satisfying not only GreenPoint's mortgage but also to defraud numerous unsatisfied judgment liens. Ronald B. Losner testified if his scheme with Thomas Neely was completed as planned he would not have placed the title of the premises in his individual name but in the name of a corporate entity.

The Losners further failed to prove that any of the defendants were unjustly enriched. "Unjust enrichment is the heart of the constructive trust doctrine." (*Bolla v. Bolla, supra*). In fact, the only party that appears to be unjustly enriched are the Losners by occupying the premises since 1994 without paying rent, interest, mortgage, taxes, insurance, etc. , and in addition, by charging and collecting rent without having any legal right to do so.

North Fork's complaint under index number 100482/05 seeks to recover the fair and reasonable rental value as well as use and occupancy for the Losners' occupancy of the premises. It is undisputed the Losners have continuously occupied the premises since before the GreenPoint foreclosure on or about December 14, 1993. The plaintiff, North Fork became the mortgagee of the premises pursuant to the purchase by assignment of the Consolidation Agreement notarized on March 7, 1994. It is North Fork's contention that the Losners' occupation of the premises is derivation of Cantico's rights and obligations under the Consolidation Agreement.

Section 2.08 of the Consolidation Agreement provides in relevant part as follows:

“During the continuance of any event under default, and pending the exercise by the mortgagee of its right to exclude the mortgagor from all or any part of the premises, the mortgagor agrees to pay the fair and reasonable rental value for the use and occupancy of the premises on any portion thereof that is in its possession....”
(emphasis supplied)

Based upon the above section, North Fork contends it may sue the Losners for reasonable rental value and/or use and occupancy.

It is undisputed that North Fork is merely a mortgagee and not the title owner of the premises. Cantico is the title owner and mortgagor. North Fork has not submitted any documentation in which the Losners have agreed to pay rent to North Fork. In fact, North Fork has not even introduced the Consolidation Agreement into evidence during the trial. The Losners are tenants of the title owner Cantico pursuant to a lease agreement. If North Fork wished to collect rent from the premises it should have moved to appoint a receiver to do so, as was done in the past but later vacated for unrelated reasons.

This court finds that North Fork has failed to prove any legal or equitable right to collect the reasonable rental value for use and occupancy from the Losners and accordingly dismisses the complaint under index number 100482/05.

Accordingly, this court finds the Losners have failed to prove a *prima facie* case for an equitable mortgage and/or constructive trust and dismisses the complaint under index number 14146/94.

This court further finds North Fork did pay \$300,000.00 in consideration for the assignment and Consolidation Agreement and is entitled to foreclose on the Sagamore mortgages for Cantico's default in its mortgage payments since on or about March 1995. Accordingly,

North Fork is granted judgment for the relief requested in the complaint under index number 11716/00.

Accordingly, North Fork is directed to submit an order of reference with a copy of this decision, on notice to the parties, to the court.

This shall constitute the decision and order of the court.

ENTER,

¹By court order dated January 3, 1996, the action as against Rick, Steiner, Rubin & Tannenbaum, P.C. was dismissed. Also, the action as against Cashline, L.P. was discontinued with prejudice by stipulation dated January 31, 2000

²Leo Kornblatt is Mr. Rosenbaum's father-in-law.