

Occhino v Morrissey

2007 NY Slip Op 30233(U)

March 15, 2007

Supreme Court, Queens County

Docket Number: 0013917

Judge: David Elliot

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RPAPL 901; Greshin v Sloane, 138 AD2d 569 [1988]).

Where a defendant moves pursuant to CPLR 3211(a)(1) to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (Trade Source v Westchester Wood Works, 290 AD2d 437 [2002]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]; Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 [2003]; Allstate Ins. Co. v Raguzin, 12 AD3d 468 [2004]; Tougher Indus. v Northern Westchester Joint Water Works, 304 AD2d 822 [2003].) Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence. (Berger v Temple Beth-El of Great Neck, *supra*; (see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20)

It is well settled that "[i]n considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleadings must be liberally construed (see CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2003]; see also Bovino v Village of Wappingers Falls, 215 AD2d 619 [1995].) The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration. (See Morone v Morone, 50 NY2d 481 [1980]; Gertler v Goodgold, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985].) When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.' (Guggenheimer v Ginzburg, *supra* at 275.) This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it. (See Guggenheimer v Ginzburg, *supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39.)" (Gershon v Goldberg, 30 AD3d 372 [2006]; Hispanic Aids Forum v Estate of Bruno, 16 AD3d 294, 295 [2005]; Sesti v N. Bellmore Union Free Sch. Dist., 304 AD2d 551, 551-552 [2003]; Mohan v Hollander, 303 AD2d 473, 474 [2003]; Doria v Masucci, 230 AD2d 764, 765 [1996]; Rattenni v Cerreta, 285 AD2d 636, 637 [2001]; Kantrowitz & Goldhamer v Geller, 265 AD2d 529 [1999]; Mayer v Sanders, 264 AD2d 827, 828 [1999]; Sotomayor v Kaufman, Malchman, Kirby & Squire, 252 AD2d 554 [1998].)

Mr. Morrissey states in his affidavit that Stars and Stripes occupies the portion of the premises known as 33-11 37th Avenue

pursuant to an oral lease, with a rent of \$5,500.00 a month.

Mr. Morrissey in support of his claim that said real property is partnership property has submitted the following documents:

An agreement dated January 1, 1995, between New York Decorating Company, Inc. (New York), and Stars and Stripes Decorating Company Inc. (Stars and Stripes) for the sale of New York's assets for sum of \$82,500.00 and 34 shares of common stock of Stars and Stripes.

A copy of a deed dated August 11, 2000 between New York, the seller, and Brian Occhino and Brian Morrissey, the purchasers of the real property known as 33-11 and 33-17 37th Avenue, Long Island City, New York, for the recited consideration of \$10.00.

A copy of a 15 year purchase money mortgage dated August 11, 2000, between New York and Brian Morrissey and Brian Occhino, for the sum of \$560,000.00, with interest at 7.5%.

A copy of a general partnership agreement dated August 11, 2000, naming Brian Occhino and Brian Morrissey as equal partners in real estate; stating that the partnership's principal place of business is 33-11 37th Avenue; and that the purpose of the partnership is the ownership of real property at 33-11 37th Avenue. The partnership agreement provides that it "shall commence on and continue until dissolved by mutual agreement of the partners" and contains provisions for the arbitration of certain types of disputes, with the aim of preserving the partnership.

Brian Morrissey states in his affidavit that at the time of the sale of New York assets its sole stockholder was his father; that it had operated its business from the subject premises; and had employed Mr. Occhino and Mr. Morrissey. Following the sale, New York ceased doing business, and Stars and Stripes commenced its business operations at that portion of the premises identified as 33-11 37th Avenue. Mr. Morrissey states that rental payments received from Stars and Stripes and from tenants Kaufman and Michaelcheck were deposited in a joint bank account he maintained with Occhino, until July 1, 2006 at which time Occhino withdrew one-half of the funds. Mr. Morrissey states he thereafter withdrew the remaining half, and that at the present time the rent is paid one-half to himself and one-half to Occhino, and that they each pay in equal amounts one-half of the monthly mortgage payments.

Plaintiff, in opposition, has submitted copies of his Schedule E (supplemental income and loss) personal income tax

forms for 2003, 2004 and 2005, in which he declared rental income from his 50% ownership of the premises located at 33-11 37th Avenue. Mr. Occhino has also submitted a copy of a lease entered into by Brian Morrissey with defendants Rick Kaufman and Loretta Michaelcheck, whereby they leased a portion of the premises known as 33-17 37th Avenue, for a term of "6m/12 months commencing September 1, 2005" and terminating on "6 month/1 year 2006," with a rent of \$650.00 a month. It is undisputed that these tenants vacated the premises on August 1, 2006.

The court finds that the documentary evidence submitted by the defendants is insufficient to establish that the subject real property is in fact partnership property. Although the deed to the premises is in the individual names of Morrissey and Occhino, partnership ownership may be proven expressly or by circumstantial evidence. (See Benham v Hein, 50 AD2d 808, 809 [1975].) Although Mr. Morrissey's affidavit does not constitute documentary evidence, the court notes that it is undisputed that the partnership did not maintain a bank account and that rental payments were made to Mr. Occhino and Mr. Morrissey, individually. No business records were submitted to demonstrate whether partnership funds defrayed the cost of mortgage obligations, property taxes or maintenance expenses. (See, Johnson v Johnson, 111 AD2d 1005 [1985].) Plaintiff's acknowledgment of the partnership agreement does not resolve the issue in defendant Morrissey's favor. The intent of the parties as to whether the property was to be considered a tenancy in common owned by the individuals or partnership property cannot be determined from the documents submitted. Therefore, as factual issues remain, dismissal on the grounds of documentary evidence is unwarranted. (See Del Pozo v Impressive Homes, 29 AD3d 621 [2006].) The court further finds that plaintiff has stated a cause of action for the partition and sale of the subject real property.

In view of the foregoing, defendants motion to dismiss the complaint is denied.

Dated: March 15, 2007

J.S.C.