

Francis v Paul

2007 NY Slip Op 30309(U)

March 19, 2007

Supreme Court, Queens County

Docket Number: 0021194

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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FRANCINE FRANCIS,

Plaintiff,

Index No: 21194/06

Motion Date: 1/3/07

Motion Cal. No: 08

-against-

MICHAEL PAUL, SHERNELL PRESCOTT,
A&M CONSULTANTS, SEAN HUDSON,
STRUCTURE APPRAISALS, STRUCTURE
HOLDINGS, LLC and JOAN BARRAZA,

Defendants.

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The following papers numbered 1 to 20 read on this motion for an order staying the eviction proceeding commenced by the defendants which is pending in the Landlord/Tenant Part of the Civil Court of the City of New York, Queens County, under index number 68227/2006 and prohibiting the defendants from taking any further steps to remove and/or lock out plaintiff from the property known as 204-24 Caney Road, Rosedale, New York 11422, and prohibiting defendants from transferring and/or encumbering the subject property with any liens or mortgages during the pendency of the legal action against defendants; and upon this cross-motion by defendants Hudson, Structure Appraisals and Structure Holdings, LLC, for an order vacating the temporary restraining order, dismissing the action pursuant to CPLR §§ 3212 and 3211, and granting movants judgment on their counterclaims, attorneys fees and court costs.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 11
Notice of Cross-Motion-Affidavits-Exhibits.....	12 - 16
Reply.....	17 - 20

Upon the foregoing papers, it is ordered that the motion and cross-motion are disposed of as follows:

This is an action sounding in breach of contract and fraud arising from the transfer of property known as 204-24 Caney Road, Rosedale, New York, from plaintiff to defendants. Plaintiff, who has lived at the property since 2000, alleges that she hold a legal interest in the property by way of a power of attorney granted to her by Lloyd Francis and Mark Nedd, her brother and nephew, respectively, whom plaintiff claims the property was deeded to for her

benefit in 2004. Plaintiff, who retained possession and paid the carrying costs of the property, began having financial difficulty in 2005, and was allegedly solicited by defendants Michael Paul and Shernell Prescott, of defendant A & M Consultants, to avoid foreclosure of the property. As such, on June 1, 2005, plaintiff entered into a Constructive Trust Agreement with defendant Juan Barraza, whereby he purchased the property in trust for plaintiff for consideration of \$5,000.00, and was to retain the premises for one year at which time plaintiff “must be in a position to repurchase or refinance the premises in [her] name or a designated party’s name [].” Moreover, the agreement stated that if plaintiff was delinquent in the mortgage for 30 days or more, defendant Barraza had the option of selling the property upon 14 days notice to plaintiff, and the proceeds of the sale shall be paid to plaintiff.

Thereafter, plaintiff again had financial setbacks, and the property was transferred to defendant Structure Holdings, LLC sometime in June 2006 for \$5,000.00. Defendant Sean Hudson, the president of defendant Structure, alleges that as a licensed appraiser, he has a professional relationship with defendants A & M Consultants, and was apprised of this “investment opportunity” to purchase the deed to the property in question from defendant Barraza. Prior thereto, defendant Hudson conducted an appraisal of the property which he valued at \$200,000.00. Subsequently, eviction proceedings were commenced against plaintiff, and she contends that “defendants insisted on a [purchase] price between \$600,000.00 to \$700,000.00 before they would see the property back to me.”

It is upon the foregoing that plaintiff moves for an order staying the eviction proceeding commenced by the defendants which is pending in the Landlord/Tenant Part of the Civil Court of the City of New York, Queens County, under index number 68227/2006 and prohibiting the defendants from taking any further steps to remove and/or lock out plaintiff from the property known as 204-24 Caney Road, Rosedale, New York 11422, and prohibiting defendants from transferring and/or encumbering the subject property with any liens or mortgages during the pendency of the legal action against defendants. Defendants Hudson, Structure Appraisals and Structure Holdings, LLC (“defendants”), cross-move for an order vacating the temporary restraining order, dismissing the action pursuant to CPLR §§ 3212 and 3211, and granting movants judgment on their counterclaims, attorneys fees and court costs. As resolution of the cross-motion would be dispositive of the motion for injunctive relief, the Court will address the cross-motion for summary judgment and dismissal first.

On a cross-motion to dismiss, pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. Leon v. Martinez, 84 N.Y.2d 83 (1994); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). In viewing the instant complaint in its most favorable light, this Court finds potential viable claims are asserted therein.

Likewise denied is that branch of defendants' cross-motion for dismissal upon the ground that there is a defense based upon documentary evidence. "In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the document relied upon must conclusively dispose of the plaintiff's claim [see, Sammarco Garden Ctr. v. Sammarco, 173 A.D.2d 456, 570 N.Y.S.2d 80 (2nd Dept. 1991); Greenwood Packing Corp. v. Associated Tel. Design, 140 A.D.2d 303, 527 N.Y.S.2d 811 (2nd Dept. 1988)]." Mest Management Corp. v. Double M Management Co., Inc., 199 A.D.2d 479, 480 (2nd Dept. 1993); see also, New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2nd Dept. 2003). Here, defendants' proffered evidence does not conclusively dispose of this action. As such, that branch of the cross-motion for dismissal of the claims upon the ground that there is a defense based upon documentary evidence is also denied.

Similarly, that branch of the cross-motion for summary judgment is also denied. Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*. In the case at bar, the record is replete with factual issues that preclude a summary determination of the various issues presented in this matter, particularly with respect to the interplay between the parties and the facts leading up to the current posture of the property. Consequently, the cross-motion by defendants, for an order granting dismissal of the action, pursuant to CPLR § 3211, on the grounds that the complaint fails to state a cause of action, and there is a defense based upon documentary evidence, and for summary judgment, is denied in its entirety.

With respect to plaintiff's motion for injunctive relief, the purpose of a preliminary injunction is to preserve the status quo of an action pending trial. As such, the granting of the a preliminary injunction is a drastic remedy which is to be used sparingly, and such remedy will not be granted "unless a clear right thereto is established." Doe v. Poe; 189 A.D.2d 132 (2nd Dept. 1993). To prevail on a motion for preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence: (1) the likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) that a balancing of equities favors movant's position. See, Ocean Club v Incorporated Vil. of Atlantic Beach, 6 A.D.3d 593 (2nd Dept. 2004); Price Paper and Twine Co. v. Miller, 182 A.D.2d 748 (2nd Dept. 1992); Aetna Ins. Co. v Capasso, 75 N.Y.2d 860, 862 (1990).

Notwithstanding the contentions of defendants, as the criteria for an injunction have been met, the motion for injunctive relief is granted, and defendants are prohibited from commencing

or continuing to prosecute any eviction proceeding, or take any further steps to remove and/or lock out plaintiff from the property known as 204-24 Caney Road, Rosedale, New York 11422. Moreover, the eviction proceeding currently pending in the Landlord/Tenant Part of the Civil Court of the City of New York, Queens County, under index number 68227/2006, hereby is stayed during the pendency of this action, and defendants are further prohibited from transferring and/or encumbering the subject property in any way during such pendency.

“Although the fixing of the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court [see, Blueberries Gourmet v. Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557 (2nd Dept. 1998); see, Clover St. Assocs. v. Nilsson, 244 A.D.2d 312, 313, 665 N.Y.S.2d 537 (2nd Dept. 1997)], the language of CPLR 6312(b) is "clear and unequivocal," and it requires the party seeking the injunction to give an undertaking [see, Carter v. Konstantatos, 156 A.D.2d 632, 633, 549 N.Y.S.2d 131 (1996); Walter Karl, Inc. v. Wood, 137 A.D.2d 22, 29, 528 N.Y.S.2d 94 (2nd Dept. 1988); Burmax Co. v. B & S Indus., 135 A.D.2d 599, 601, 522 N.Y.S.2d 177(2nd Dept. 1987)].” Schwartz v. Gruber, 261 A.D.2d 526, 527 (2nd Dept. 1999); see, Livas v. Mitzner, 303 A.D.2d 381 (2nd Dept. 2003). The standard to be applied in fixing the undertaking is an amount that is rationally related to the damages the nonmoving party might suffer if the court later determines that the relief should not have been granted. See, Lelekakis v. Kamamis, 303 A.D.2d 380 (2nd Dept. 2003); Schwartz v. Gruber, 261 A.D.2d 526 (2nd Dept. 1999); Carter v. Konstantatos, 156 A.D.2d 632 (2nd Dept. 1996); Bennigan's of New York, Inc. v. Great Neck Plaza, L.P., 223 A.D.2d 615 (2nd Dept. 1996). As a general rule, however, the amount is fixed by the court after a hearing held for such purpose. See, Cohn v. White Oak Coop. Hous. Corp., 243 A.D.2d 440 (2nd Dept. 1997); Peron Rest. v. Young & Rubicam, Inc., 179 A.D.2d 469 (1st Dept. 1992); Times Sq. Stores Corp. v. Bernice Realty Co., 107 A.D.2d 677 (2nd Dept. 1985).

Accordingly, the motion is granted to the extent that the parties are directed to appear before this court in Part 19, courtroom 63, on April 26, 2007, at 9:30 A.M., for a hearing to determine the amount of the undertaking. Copies of this order are being sent to counsel for the parties on the motion by facsimile.

Dated: March 19, 2007

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J.S.C.