

McMaster v Dadey

2007 NY Slip Op 30343(U)

March 16, 2007

Supreme Court, Suffolk County

Docket Number: 0032721

Judge: Emily Pines

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**Supreme Court - State of New York
I. A. S. Part 23, Suffolk County**

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 01-31-2007
Submit Date: 02-01-2007
Motion Numbers: 001 MD
002 MOTD
003 MD

RICHARD McMASTER,

Plaintiff,

Attorney of Plaintiff
Schaub & Daly, LLP
By: Heather Schaub, Esq.
131 West Main Street
Riverhead, New York 11901

-against-

VIRGINIA DADEY,

Defendant.
_____X

Attorney of Defendant
Nesenoff & Miltenberg, LLP
By: Megan S. Goddard, Esq.
363 Seventh Avenue, Fifth Floor
New York, New York 10001

Defendant DADEY moves, in this action to impose a constructive trust on real property, by Notice of Motion (motion sequence number 001) for an Order, dismissing the Plaintiff's Verified Complaint pursuant to CPLR § 3211 (a) (7) and canceling the Notice of Pendency connected to the action. Defendant also cross-moves, by Notice of Motion (motion sequence number 002) for an Order, compelling Plaintiff to accept the Defendant's response to the Summons and Complaint in this Action, on the grounds of reasonable excuse for delay and a meritorious defense. Plaintiff, RICHARD MCMASTER moves, by Notice of Motion (motion sequence number 003) for an Order, entering a Default Judgment against the Defendant pursuant to CPLR § 3215 (b) .

Plaintiff commenced this action, by the filing of a Summons and Complaint on November 22, 2006. In the Complaint, the Plaintiff asserts essentially that the parties have a child together; that in 2004, the Plaintiff expended over \$100,000 to renovate real property in Sag Harbor; that in return for his work on the property, Plaintiff believed his name would be placed on the deed; and that the Defendant had failed to do so, resulting in unjust enrichment. In its motion for a Default Judgment, Plaintiff's counsel asserts that she granted

Defendant's counsel an extension of time to answer until December 22, 2006 and that her office received the Motion to Dismiss, under an incorrect Index Number, several days after that date. She argues that the extension of time to Answer never afforded her adversary an extension of time to submit a motion.

In response to that motion, Defendant cross-moves to require the Plaintiff to accept its motion on the grounds of excusable delay and a meritorious defense. Defendant's counsel submits evidence that although she had prepared the papers for service and filing on December 22, 2006, the Clerk of the Court had advised her legal secretary that the index number was incorrect; that the case bore a different index number; and that the matter had already been assigned to Justice Kent. Accordingly, the legal secretary altered the index number as instructed and had the papers served and filed. It was only after several weeks that Defendant's attorney realized that the court clerk had proffered the incorrect information because a lawsuit between the same parties was pending in a matrimonial part before Justice Kent. As a result, Defendant's counsel re-served the exact motion papers and simultaneously received the Plaintiff's motion for a Default Judgment. Defendant's counsel argues that Plaintiff's attorneys have been in possession of her motion to dismiss since December 23, 2006, one day following the original extension of time to serve the answer. With regard to the merits, Defendant argues the Plaintiff's Complaint fails to set forth the elements required to establish a constructive trust.

Defendant's additional motion seeks to dismiss Plaintiff's action on the ground, as set forth, that the Plaintiff has failed to set forth the requisite criteria to establish a constructive trust.

Although no Default Judgment has, as yet been entered, since all three motions were made returnable simultaneously before the Court, the Court will treat Defendant's motion akin to one made to vacate a Default pursuant to **CPLR § 5015 (a)**. See, Siegel, New York Practice (Fourth Ed. 2005). Courts are indeed liberal in vacating defaults, since they prefer that a case be decided on the merits, provided that there

exists an excuse for the delay and an Affidavit of Merit. see, Harcztark v Drive Variety Inc., 21 A.D. 3d 876, 800 N.Y.S. 2d 613 (2d Dep't 2005). Both criteria have been met in the case at bar. It appears that court personnel and not Defendant contributed to the delay in filing the motion, based on the fact that a case with the same caption was pending before another Justice in a matrimonial Part. Had Defendant been in possession of the correct information, her papers would have been late by one day. Moreover, unless otherwise stated, a stipulation extending the time to answer "(w)ill also extend the time to make the CPLR 3211(a) motion." Siegel, New York Practice, at 453 (Fourth Ed. 2005). Finally, Defendant does annex her own affidavit to the moving papers, in which she states that she invested her life savings in the property and never made a promise to the Plaintiff that he would have any interest in the property. Based on all of the above, Defendant's motion to vacate the default is granted and Plaintiff's motion to enter a Default Judgment is denied. Defendant's application for sanctions is denied in view of the confusion caused, at least in part, by the court in this case.

The four factors necessary to impose a constructive trust are as follows: 1) a confidential fiduciary relationship; 2) a promise, express or implied; 3) reliance on that promise; and 4) unjust enrichment. see, Byrd v Brown, 208 A.D. 2d 582, 617 N.Y.S. 2d 192 (2d Dep't 1994). Those factors are not to be applied as an unyielding formula, limiting the court's freedom to establish an equitable remedy when equity so requires. see, Simonds v Simonds, 45 NY2d 533, 408 N.Y.S. 2d 359 (1978). At the pleading stage of this litigation, which the Court will now allow to continue, Plaintiff has set forth allegations, which, if true, could provide a basis for imposition of that equitable remedy. As set forth in the Verified Complaint, Plaintiff asserts that the parties have a confidential relationship and have a child; he states, further, that based on his belief that the parties were going to reside together in a home with their daughter, he expended in excess of \$100,000 for renovations to the home; that he was responsible for obtaining all the necessary permits for renovation of the home following a fire, including negotiating with contractors, managing the design and

obtaining significant discounts for the work; and that Defendant would be unjustly enriched if she retains full ownership of the property. Plaintiff has, therefore, stated a cause of action. Accordingly, Defendant's the motion to dismiss pursuant to **CPLR § 3211 (a)(7)** is hereby denied. In view of the Court's decision to vacate the Defendant's default, the Court directs Defendant to file and serve a Verified Answer to the Complaint within twenty (20) days from the date of Entry of this Order.

Counsel are directed to report to the Differentiated Case Management Part, located at the Supreme Court Courtroom Annex, Room 203A, One Court Street, Riverhead, New York for a Preliminary Conference on Thursday, May 3, 2007 at 9:30 o'clock a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 16, 2007
Riverhead, New York



Emily Pines
J. S. C.