

Drupek v Jones

2007 NY Slip Op 30501(U)

March 23, 2007

Supreme Court, Suffolk County

Docket Number: 0007040/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x
STEVEN DRUEK and DRUEK'S HARDWARE, INC.,

Plaintiffs,

-against-

RICHARD D. JONES, FRANCINE JONES and
JONESY'S HARDWARE, INC.,

Defendants.
-----x

CALENDAR DATE: September 20, 2006
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:

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DEFT'S/RESP ATTORNEY:

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment _____;
Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross-Motion and supporting
papers _____; Answering Affidavits and supporting papers 9-19; Replying Affidavits and
supporting papers 20-22; Other 23; and after hearing counsel in support of and opposed to
the motion it is,

ORDERED that this motion by the defendants, Richard D. Jones, Francine Jones and Jonesy's Hardware, Inc., (hereinafter Jones) for summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 on Statute of Frauds grounds as well as vacating the lis pendens filed against the property is hereby denied in its entirety as there are factual issues properly raised which warrant denial of summary disposition as a matter of law.

Plaintiffs (hereinafter Druerk) instituted this action seeking a constructive trust on a commercial building and lot located at 422 Main Street in Center Moriches, Suffolk County on Long Island, New York where Druerk operates a hardware store named Jonesy's Hardware. This property has been owned by Jones, Druerk's brother-in-law and sister-in-law, since 1971 and Druerk alleges that the property was the subject of a purchase agreement in June 2003. Druerk purchased the hardware store at this location for \$150,000.00 and tendered part payment in the amount of \$75,000.00 with the balance of \$75,000.00 payable over time at 6% in monthly payments of \$1500.00 and took possession of the hardware store in August 2003. There was no written agreement but Druerk claims he was induced by the familial relationships between the Druerk and Jones to purchase the property and tender payments. Druerk claims that he has paid not only the initial purchase price of \$75,000.00 but also some \$54,000.00 in monthly payments and instituted this lawsuit for a constructive trust when Jones balked at selling him the property at fair market value as called for in the oral agreement. Jones deny the allegations.

Jones now moves for summary judgment and dismissal of the Druerk's complaint pursuant to CPLR §3212 as well as vacating the lis pendens filed on the property arguing that

the Statute of Frauds is a bar to Druek's action. Druek opposes the requested relief arguing that he has a constructive trust on the property and that the payments tendered by him constitute partial performance of the oral agreement and therefore the Statute of Frauds does not apply.

For the following reasons, the motion by Jones for summary judgment and dismissal of Druek's complaint, pursuant to CPLR §3212, as well as vacating the lis pendens filed on the property is denied in its entirety. There are readily identifiable issues of fact which preclude summary disposition in Jones favor.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, and after looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [Robinson v. Strong Memorial Hospital, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact which preclude a grant of summary disposition to Jones as a matter of law, including the issue of part payment of \$75,000.00 in August 2003 as well as the continual tender of \$1500.00 per month as set forth in the alleged oral agreement to purchase the commercial hardware store and property.

General Obligations Law (hereinafter GOL) Section 5-703 (2) states that a contract for the sale of real property is void unless the contract or some note or memorandum thereof, expressing the consideration and sufficiently identifying the property, is in writing, subscribed by the party to be charged. *Boyajian v. Casey*, 52 AD2d 1014, 383 NYS2d 714 (3rd Dept. 1976). GOL §5-703 (2), known as the Statute of Frauds, also provides in subdivision (4) that nothing contained within the statute abridges the power of the Courts, sitting as a court of equity, to compel specific performance of an agreement where there has been part performance. See, *Panetta v. Kelly*, 17 AD3d 163, 792 NYS2d 455 (1st Dept. 2005) lv to app dis. 5 NY3d 783, 801 NYS2d 803 (2006). This requirement of a writing under the Statute of Frauds when the agreement involves real property has been found unnecessary in some limited circumstances, such as, if there has been substantial performance of the agreement. *Murphy v. Whitney*, 140 NY 541, 546 (1894); *Bordeau v. Oakley*, 185 AD2d 417, 585 NYS2d 623 (3rd Dept 1992). While Jones argues that there was no agreement to sell and this is a fabricated attempt at an oral option agreement, Jones has not explained to the satisfaction of this Court the tender and acceptance of not only the initial down payment of \$75,000.00 by Druek but the continually \$1500.00 payment per month since August 2003. While Jones appears to make a claim that these are rent payments, there is still the issue of the tender of \$75000.00 by Druek to Jones which goes unexplained. It has been held that the taking of possession of realty together with the making of improvements, tendering a partial payment and also the payment of rent may be sufficient to constitute part performance necessary to come within the exception to the Statute of Frauds. See, *Avitabile v. Silvestri*, 3 Misc3d 393, 773 NYS2d 275 (2004).

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. *VanNoy v. Corinth Central School District*, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). However, in the instant case, there are a multitude of factual issues in regard to part performance by Druek that need to be addressed prior to a determination as a matter of law that the Statute of Frauds applies. If the \$75,000.00 was for the hardware store business and inventory, the question remains how the valuation was concluded and what documentation was used to establish valuation. Druek's claims that the familial relationships between the parties "lulled" him into not seeking a more formal written agreement and that Jones has been unjustly enriched by the \$75,000 payments plus the more than \$54,000.00 payments made in rent for the hardware store which was to be applied toward the option to purchase at a "fair market value" is sufficient to raise factual issues on the question of a constructive trust on the property and constitute an exception to the Statute of Frauds.

Accordingly, the motion by Jones for summary judgment and dismissal of the Druek's complaint pursuant to CPLR §3212 as a matter of law on Statute of Frauds [GOL §5-703 (2)] grounds is hereby denied in its entirety as there are readily identifiable issues of fact on the question of part performance to preclude summary disposition as a matter of law. *Panetta v. Kelly*, supra; *Club Chain of Manhattan, Ltd. v. Christopher & Seventh Gourmet Inc.*, 74 AD2d 277, 427 NYS2d 627 (1st Dept. 1980).

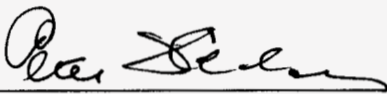
Jones' additional request to vacate the lis pendens filed on the property is also denied. Druek seeks a constructive trust on real property in which he claims an interest and therefore the lis pendens was properly filed. See, **5303 Realty Corp. v O & Y Equity Corp.**, 64 NY2d 313, 486 NYS2d 877 (1984). CPLR §6501 provides in part:

“ A notice of pendency may be filed in any action... in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property... .”

Druek's claim to a possessory interest in the real property based upon an alleged sale of the commercial building and the real property to him by Jones as set forth in his complaint alleging claims of a constructive trust on the property satisfies the requirements set forth in CPLR §6501. **Peterson v. Kelly**, 173 AD2d 688, 570 NYS2d 592 (2nd Dept.1991).

The foregoing constitutes the decision of the Court.

Dated: March 23, 2007



J.S.C.