

Jairam v Guevara

2007 NY Slip Op 31839(U)

June 15, 2007

Supreme Court, Queens County

Docket Number: 0010934/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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KRISHNA SINGH JAIRAM,	No. 10934/05
Plaintiff,	Motion
-against-	Date April 10, 2007
ALVARO GUEVARA AND	Motion
JAMIE CIRO,	Cal. No. 16
Defendants.	Motion
-----	Seq. No. 1

PAPERS
NUMBERED

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Plaintiff commenced this action seeking to recover damages due to a fire on May 19, 2003 at premises known as 87-08 126th Street, a/k/a 125-22 Jamaica Avenue, Richmond Hill, in the County of Queens, City and State of New York.

Defendant Jamie Ciro (Ciro) moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against him.

Plaintiff cross-moves for an order striking the answer of the defendants for failure of defendant Alvaro Guevara (Guevara) to appear for court ordered examination before trial, compelling further discovery and to preclude the defendants from offering any testimony at the trial hereof.

Contentions of the Parties

Defendant Ciro asserts that plaintiff alleges that he was sleeping in the premises and was injured due to the negligence of defendant Ciro and defendant Guevara. On the date of the fire, it is admitted by plaintiff in his complaint and, it is a matter of record, that defendant Ciro

did not own the fee interest to the premises. On that date, defendant Ciro was a tenant at the premises. The complaint further admits that defendant Ciro became the fee owner on June 2, 2004 subsequent to the fire. In addition, plaintiff asserts in the complaint that defendant Ciro paid only \$10.00 as the consideration for the transfer of the deed thereby giving rise to a claim against defendant Ciro under the New York State Debtor and Creditor Law with respect to fraudulent conveyances. However, defendant Ciro, in connection with the purchase of the premises, executed a note and mortgage in the principal sum of \$400,000.00 to defendant Guevara, the owner at the time of the fire. Clearly there was fair consideration given and received. Plaintiff has not submitted any proof of an actual intent to hinder or defraud creditors. Defendant Ciro submits his affidavit as well as the transcript of his examination before trial and plaintiff's transcript.

Plaintiff asserts that it was discovered that defendant Guevara had transferred the premises to defendant Ciro by a quit claim deed for \$10.00 on June 2, 2004 and executed a note and mortgage dated June 4, 2004 which was notarized on June 5, 2005. Plaintiff requires discovery including copies of checks, money orders or cashier checks paid to defendant Guevara to show his property was purchased and sold for fair consideration and not just to avoid a judgment. Defendant Guevara has not yet been deposed and has repeatedly refused to appear for deposition. Defendant Ciro has a note and mortgage on the property with defendant Guevara who, by retaining an equity interest in the premises, remains the owner thereof for all intents and purposes. Issues of fact exist with respect to the conveyance of the premises and the mortgage.

In reply, defendant Ciro asserts that there is no basis to preclude him or to strike his answer. The request for further discovery is without merit and should have been made many months ago as required by the preliminary conference order. There is no showing that defendant Guevara has any control over the premises or over defendant Ciro or that the transfer was for the purposes of defeating creditors' rights. The value of the premises for the 2004/2005 tax year was, according to the assessment roll, \$269,000.00 which was far below the stated purchase price of \$400,000.00.

Although served with the motion and cross-motion, defendant Guevara has not submitted any papers in opposition

thereto.

Decision of the Court

The motion by defendant Ciro is granted to the extent that the causes of action insofar as they are based upon ownership of the premises are hereby dismissed as against him. The causes of action based upon negligence and fraudulent conveyance continue. The cross-motion by plaintiff is granted solely to the extent that defendant Alvaro Guevara is hereby precluded from offering testimony at the trial of this action based upon his failure to appear for examination before trial.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

Defendant Ciro has established his entitlement to judgment as a matter of law with respect to the causes of action sounding in ownership of the subject property. Defendant Ciro's affidavit and deposition testimony show that he had no ownership interest in the premises as of the date of the fire. He purchased the property on June 2, 2004 subsequent to the subject fire. In opposition to that branch of the motion, plaintiff has failed to submit any evidence to show an ownership interest of the subject premises on behalf of defendant Ciro.

Further, it is well settled that: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see, Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404, NE2d 718; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649, 444 NYS2d 305; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 NYS2d 494)." (Winegrad v New York

University Medical Center, 64 NY2d 851 at 853).

Here, defendant Ciro has failed to make any argument or submit any evidence with respect to the plaintiff's claims based on negligence as to the cause of the fire. Therefore, defendant Ciro has failed to sustain his burden with respect to such cause of action.

The motion is further denied as to the cause of action based upon fraudulent conveyance. The court notes the following as stated in Grumman Aerospace Corp. v. Rice, 199 AD2d 365 at 366-367: "Even if the issues of fair consideration and the defendant Bruce J. Rice's solvency following the conveyance were conclusively established, the plaintiff's cause of action predicated upon Debtor and Creditor Law § 276 would remain, since such a cause of action may lie even where fair consideration was paid and where the debtor remains solvent. It is the intent to 'hinder, delay or defraud' with which Debtor and Credit Law § 276 is concerned. The determination of such intent is ordinarily a question of fact which cannot be resolved on a motion for summary judgment [citations omitted]. 'Fraudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act' (Marine Midland v. Murkoff, 120 AD2d 122, 128, 508 NYS2d 17)."

In the instant case, the conveyance took place shortly after the fire which is alleged to have caused personal injury and property damage. The deed is dated June 2, 2004 and the mortgage and note are dated June 4, 2004. The mortgage was not notarized until May 5, 2005 and was recorded on May 17, 2007. Defendant Ciro has not submitted any evidence with respect to the circumstances surrounding the transfer which must be "scrutinized very carefully." Grumman Aerospace Corp. v. Rice, at 367. As defendant Ciro has not sustained his burden with respect thereto, that branch of the motion must be denied.

With respect to plaintiff's cross-motion relating to discovery, by order dated March 26, 2007 (Weinstein, J.), it was ordered that discovery in this matter was deemed complete. Plaintiff has failed to set forth any reason or explanation as to why the documentary evidence was not previously sought. With respect to plaintiff's seeking preclusion or striking of the defendants' answers, it appears that defendant Ciro was, in fact, deposed. However,

defendant Guevara was not deposed, has defaulted on the motion and cross-motion and has failed to comply with court ordered discovery. Therefore, preclusion at trial is granted solely as against defendant Guevara.

Accordingly, the motion by defendant Ciro is granted to the extent that the causes of action insofar as they are based upon ownership of the premises are hereby dismissed as against him. The causes of action based upon negligence and fraudulent conveyance continue. The cross-motion by plaintiff is granted solely to the extent that defendant Alvaro Guevara is hereby precluded from offering testimony at the trial of this action based upon his failure to appear for examination before trial.

Dated: June 15, 2007

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HON. DAVID ELLIOT