

Rybner v Chertov

2007 NY Slip Op 31908(U)

June 26, 2007

Supreme Court, Richmond County

Docket Number: 0103850/2006

Judge: Robert Gigante

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----x
JACOB RYBNER and LEON RYBNER,

Plaintiff,

-against-

HELEN CHERTOV and SEMYON CHERTOV,
Defendants.

-----x

DCM PART 4

Present:

Hon. Robert J. Gigante

DECISION & ORDER

Index No. 103850/06
Motion No. 606-001

The following papers numbered 1 to 3 were used on this motion the 27th day of April, 2007:

	Pages Numbered
Defendants' Notice of Motion to Cancel Notice of Pendency and Dismiss Plaintiffs' Second Cause of Action, with Supporting Papers.....	1
Plaintiffs' Affirmation in Opposition.....	2
Reply Affirmation.....	3

Upon the foregoing papers, defendants' motion to cancel a Notice of Pendency and to dismiss plaintiffs' second cause of action is denied in its entirety.

In this action, it is alleged that plaintiffs (brothers) and defendants (husband and wife) orally agreed to purchase for purposes of re-sale, the parcel of real property which is the subject of the notice of pendency, i.e., 246 Fanning Street, Staten Island, New York, on which they

planned to construct a new home. Although title was placed solely in the name of defendant Helen Chertov so that “it would be easier to secure a mortgage,” said defendant allegedly agreed to hold title “for the benefit of all four participants” of that “joint business venture.” Plaintiffs claim that upon the sale of the subject premises, the proceeds were to be distributed between themselves and the Chertovs in the ratio of 2:1. Based on the foregoing, the complaint asserts causes of action for (1) breach of contract, (2) imposition of a constructive trust, (3) unjust enrichment, (4) breach of fiduciary duty and (5) fraud in fact.

In moving to dismiss the second cause of action, defendants maintain that the requisite elements of a constructive trust have not been pleaded. In particular, the Chertovs claim that (1) there was no confidential or fiduciary relationship between themselves and the Rybners, and (2) plaintiffs did not transfer the real property in reliance upon the alleged promise i.e., plaintiffs had no interest in the subject property prior to obtaining the alleged promise.

Although defendants correctly argue that in order to impose a constructive trust, plaintiffs must show, *inter alia*, a transfer in reliance on a promise (*see Sylvester v Sbarra*, 268 AD2d 424), “courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, *even though no transfer actually occurred*” (*Moak v Raynor*, 28 AD3d 900, 902 [emphasis supplied]; *see Cinquemani v Lazio*, 37 AD3d 882;). Thus, even absent allegations that the Rybners had a prior ownership interest in the property which they transferred to defendants, their claim of having contributed funds towards the purchase of the subject property is legally sufficient to state a cause of action for the imposition of a constructive trust (*see Marini v Lombardo*, 39 AD3d 824; *McNeil v Mohammed*, 32 AD3d 829, 830; *Maynor v Pellegrino*, 226 AD2d 883, 885; *cf. Dutcher v Shaver*, ___ AD3d ___, 2007 NY Slip Op 03824; *Sylvester v Sbarra*, 268

AD2d at 424- 425). Moreover, while defendants deny that any confidential or fiduciary relationship existed between the parties, plaintiffs have adequately pleaded this element of their cause of action to withstand dismissal at this stage of the proceedings.

In moving to cancel the notice of pendency, defendants maintain that it was improperly filed. In support, they contend that the notice of pendency recites that the within action was commenced for a distribution of the net proceeds upon the sale of the subject property. Defendants point out that the filing of a notice of pendency is not authorized in an action to recover money damages.

CPLR 6501 provides that “[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.” However, in view of “the powerful impact that this device has on the alienability of property,” along with “the facility with which it may be obtained”, a narrow interpretation has been applied in reviewing whether the filing of a notice of pendency is appropriate (5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313, 315-316; *see* Shkolnik v Krutoy, 32 AD3d 536; Rajic v Sarokin, 214 AD2d 663, 664).

Consonant with the foregoing, it is the opinion of this Court that plaintiffs in this action were entitled to file a notice of pendency. Contrary to defendants’ contention, the subject of these proceedings is not solely to recover money damages arising out of an alleged breach of contract (*cf.* Bennett v John, 151 AD2d 711). Rather, the controversy here directly affects title to 246 Fanning Street, Staten Island, New York in that plaintiffs seek, *inter alia*, to impress a constructive trust upon said premises, to reform the deed to include the Rybners as equal owners, and to sell the property and distribute the proceeds (*cf.* Distinctive Custom Homes Bldg. Corp. v Manual Esteves, 12 AD3d 559).

Accordingly, it is

ORDERED, that defendants' motion is denied in its entirety.

E N T E R,

Dated: June 26, 2007

Robert J. Gigante, J.S.C.