

Silverstein v Silverstein

2007 NY Slip Op 31982(U)

July 6, 2007

Supreme Court, Richmond County

Docket Number: 0101236/2006

Judge: Philip G. Minardo

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

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JASON SILVERSTEIN and
CAROLANNE SCUTARO,

Plaintiffs,

DCM PART 6

Present:
Hon. Philip G. Minardo

-against-

Decision and Order

STEVEN E. SILVERSTEIN and
BARBARA A. SILVERSTEIN,

Index No. 101236/06
Motion Nos. 958-003
1281-004

Defendants.
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The following papers numbered 1 to 4 were used on these motions the 17th day of May, 2007:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendants Steven E. Silverstein and Barbara A. Silverstein, with Supporting Papers and Exhibits (dated March 29, 2007).....	1
Notice of Cross Motion for Summary Judgment by Plaintiffs Jason Silverstein and Carolanne Scutaro, with Supporting Papers and Exhibits (dated April 23, 2007).....	2
Affirmation in Opposition to Cross Motion, with Affidavit (dated May 10, 2007).....	3
Reply Affirmation by Plaintiffs (dated May 15, 2007).....	4

Upon the foregoing papers, defendants' motion is granted and plaintiffs' cross motion is denied.

Defendants Steven E. Silverstein and Barbara A. Silverstein move by notice of motion for an order pursuant to CPLR 3212 granting them summary judgment and dismissing the complaint. Plaintiffs Jason Silverstein and Carolanne Scutaro oppose such application, and cross-move for summary judgment in their favor.

This action evolves from an alleged breach of an oral contract pertaining to the ownership of real property. Plaintiffs allege that on or about December of 1997, they paid \$12,000.00 to defendants to become 50% owners of the premises known as 61 Turf Road, Staten Island, New York (hereafter "the premises"). Defendants are the parents of plaintiff Jason Silverstein; co-plaintiff Carolanne Scutaro is his wife. Defendants purchased the premises on January 13, 1998. Defendants' names appear on the deed. Plaintiffs allege that it was orally agreed that they would initially occupy the premises as tenants, paying defendants \$700.00 per month in rent, plus utilities. It is further alleged that plaintiffs' names were ultimately to be placed on the deed. Plaintiffs commenced this action for a partition and/or sale of the premises by the filing and service of a summons and complaint on or about April 3, 2006. Issue was joined by the service of an answer on or about May 4, 2006.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see Rotuba Extruders v. Ceppos, 46 NY2d 223; Herrin v. Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment, the function of the court is issue-finding, not issue-determination (see Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (see Glennon v. Mayo, 148 AD2d 580). To prevail on the motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v.

Prospect Hosp., 68 NY2d 320, 324), and upon its failure to do so, the motion will be denied.

Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v. City of New York, 49 NY2d 557, 562). In this regard, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable (*id.* at 562). Thus, summary judgment, which operates to deprive a party of his or her day in Court, is only appropriate where the movant’s initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (see Persaud v. Darbeau, 13 AD3d 347).

In support of their motion for summary judgment dismissing the complaint, defendants rely on (1) the deed to the premises, (2) the deposition testimony of all of the parties, and (3) a final decree of bankruptcy for Jason R. Silverstein and Carolanne Scutaro dated August 31, 1999. It is undisputed that the deed to the premises is in the name of defendants only. Moreover, neither plaintiff sought financing for the premises, nor did they list their alleged ownership interest on “Schedule A” of their bankruptcy petition. In addition, plaintiffs stated on their “Schedule G” that they had no interest in any contracts for the purchase or sale of real property, thereby undermining their present claim of an ownership interest in the premises since 1997. Finally, while defendants assert that the \$8,000.00 they obtained from plaintiffs towards the purchase of the house was a “gift”, the complaint alleges that plaintiffs “paid” \$12,000.00 towards the purchase. However, plaintiffs’ deposition testimony indicates that they paid defendants the sum of \$17,394.32 towards the purchase price.

Based, *inter alia*, on the deed and the bankruptcy filings, it is the opinion of this court that defendants have demonstrated *prima facie* their entitlement to summary judgment. Thus, it becomes incumbent upon the plaintiffs to create a triable issue of fact or suffer dismissal of their

complaint. In attempting to meet this burden, plaintiffs have submitted their joint affidavit, as well as an affidavit by Carol Parkhurst (the mother of plaintiff Carolanne Scutaro) and selected excerpts from the deposition testimony.

It is well settled that plaintiffs' failure to list a legal claim such as their alleged ownership interest in the subject premises in their bankruptcy petition deprives them of their capacity to pursue the claim stated in the complaint (see Whelan v. Longo, 7 NY3d 821; Dynamics Corp. of Am v. Marine Midland Bank-New York, 69 NY2d 191; Nationwide Assocs. v. Epstein, 24 AD3d 738, app withdrawn 7 NY3d 899; 123 Cutting Co. v. Topcove Assocs., 2 AD3d 606). As a result, the complaint must be dismissed (*cf.* Lyons v. Gandin, Schotsky, Rappaport, Glass & Green, 8 AD3d 347, *lv denied* 4 NY3d 705).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that plaintiffs' cross motion is denied as academic; and it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,

S/ Philip G. Minardo
J.S.C.

DATED: July 6, 2007
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