

Morrison v Shanti

2007 NY Slip Op 33128(U)

September 20, 2007

Supreme Court, Queens County

Docket Number: 0018026/2007

Judge: David Elliot

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

BOBBIE JEAN MORRISON	X	INDEX NO. 18026/07
- against -		SEQ. NO. 1
VIJAY K. SHANTI, et al.	X	BY: ELLIOT, J.
		DATED: SEPTEMBER 20, 2007

In this action to set aside a fraudulent conveyance, plaintiff seeks to stay her eviction as well as the summary nonpayment proceeding pending in the Civil Court, Queens County entitled Shanti v Bobbie Jean Morris, et al (L&T Index No. 8825/2006) and for the removal of that proceeding and consolidation with this action. Defendant Shanti cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (4), (5) and (10).

The court will first address the cross motion for dismissal as it may be dispositive of this action. To prevail under CPLR 3211(a)(1), the documentary evidence relied upon must conclusively dispose of plaintiff's claim as a matter of law. (Held v Kaufman, 91 NY2d 425 [1998]; Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34 [2006].) In light of the nature of plaintiff's claim of fraud, the affidavits and documentary evidence submitted are inadequate to resolve the issues raised and definitively dispose of the action. (See, Del Pozo v Impressive Homes, 29 AD3d 621 [2006];

Sta-Brite Servs. v Sutton, 17 AD3d 570 [2005]; Allstate Ins. Co. v Raguzin, 12 AD3d 468 [2004].)

A party may move to dismiss under CPLR 3211(a)(4), when another action is pending between the same parties for the same cause of action. While the actions arise out of the same factual circumstances, the injunctive and declaratory relief sought in this action were neither raised nor available in a summary Civil Court proceeding. (NY City Civ Ct Act § 203.) Thus, dismissal is not warranted and plaintiff is not estopped from pursuing this relief under the doctrine of res judicata as contended by defendant. (CPLR 3211[a][5]; see, Matter of Hodes v Axelrod, 70 NY2d 364 [1987].)

Inasmuch as Jacob O'Garro was named along with plaintiff as grantors of the property located at 123-18 Montauk Street to Joseph L. Falleta and Falleta was the named seller on the deed dated August 30, 2005 which conveyed the property to defendant Vijay K. Shanti, they shall be joined as party plaintiffs in this action and upon refusal to do so may be made defendants. (CPLR 1001.) Plaintiff is, therefore, directed to serve a supplemental summons and amended complaint on Jacob O'Garro and Joseph L. Falleta and the amended pleading on all other parties, within 45 days after service of a copy of this order.

As to the necessity of joining Jacob O'Garro in this action, the parties have failed to set forth his status with

respect to the subject property, thus, no determination on this issue can be made at this juncture.

The remaining requests for dismissal under CPLR 3211(a)(3) and (7) set forth in the supporting papers were not properly demanded in the notice of cross motion. (CPLR 2214[a].) These issues will, however, be entertained in that plaintiff has addressed them in reply papers.

Contrary to defendant's contention, plaintiff is the real party in interest in the fraudulent transaction alleged and, therefore, has legal capacity to sue under CPLR 3211(a)(3). (See generally, Schlackman v Robin S. Weingast & Assocs., 18 AD3d 729 [2005].) In addition, the complaint is sufficiently supported by factual allegations to establish the essential elements of an action sounding in fraud. (See, Channel Master Corp. v Aluminum Ltd. Sales, 4 NY2d 403 [1958]; Heaven v McGowan, 40 AD3d 583 [2007].)

With respect to plaintiff's request for injunctive relief, movant must establish a likelihood of success, irreparable injury and the balancing of equities in her favor. (Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]; McNeil v Mohammed, 32 AD3d 829 [2006].) While plaintiff's ultimate success on the merits cannot be presently determined, in the absence of injunctive relief staying defendant from evicting her from the subject premises, a later judgment in plaintiff's favor may be rendered

ineffectual. (See, Ruiz v Meloney, 24 AD3d 485 [2006] Gaentner v Benkovich, 18 AD3d 424 [2005].) Under these circumstances, the equities lie in favor of preserving the status quo. (See, Coinmach v Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2006]; Ying Fung Moy v Hoho Umeki, 10 AD3d 604 [2004].)

Accordingly, a preliminary injunction is granted to the extent that defendant Shanti and the City Marshall are stayed from pursuing summary proceedings and/or executing a warrent of eviction against plaintiff or otherwise transferring, assigning or encumbering the subject premises located at 123-18 Montauk Street, Springfield Gardens, New York.

The foregoing is conditioned upon plaintiff timely paying use and occupancy on a monthly basis and filing an undertaking in accordance with CPLR 6312. Upon settlement of the order, the parties may submit proof and recommendations as to the monthly payments and the amount of the undertaking.

Settle order.

J.S.C.