

Aryeh v Aryeh

2008 NY Slip Op 30697(U)

February 28, 2008

Supreme Court, Nassau County

Docket Number: 8134-04/

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
MAHIN DOKHT ARYEH

Plaintiff,

-against-

**ANNETTE H. ARYEH, RAVELI ARYEH a/k/a
NATHANIEL ARYEH a/k/a HOMAYOUN ARYEH,
BANK UNITED, GILLIAR PHARMACY CO.,
and ANNA RHODES**

Defendant.

-----x

**TRIAL PART: 21
NASSAU COUNTY**

INDEX NO: 008134/04

MOTION SEQ. NO: 06

SUBMIT DATE: 2/6/08

The following papers having been read on this motion:

- Notice of Motion..... 1**
- Memoranda of law..... 2**
- Opposition 3**
- Reply..... 4,5**

Plaintiff has moved for summary judgment on the above-entitled partition action pursuant to CPLR 3212. The real property subject to partition is a single family residence that was occupied by plaintiff's son, defendant Nathaniel Aryeh, and his wife Annette Aryeh. The mortgage and the deed to the property is in the name of plaintiff and defendant, Annette Aryeh. Plaintiff claims that she was the only one who provided the monies for the down payment for the home, purchase price, closing price, closing costs, monthly mortgage payments, real estate taxes and insurance without contribution from Annette Aryeh. During the deposition of Annette Aryeh, she admits that she did not contribute to any of these payments. (Notice of Motion, Exhibit E, at 9.59, lines 7-25). Plaintiff has submitted the mortgage (Exhibit D), and deed (Exhibit B) as exhibits which indicate ownership

of the properties by plaintiff and defendant Annette Aryeh as joint tenants in common.

The defendant-husband, co-defendant, Nathaniel Aryeh, has not opposed the motion. Defendant, Annette Aryeh, filed and served a verified answer with the first affirmative defense that the plaintiff failed to state a cause of action, the second affirmative defense that plaintiff held the 50% share of the premises as a constructive trust for her son, Nathaniel Aryeh, the third affirmative defense, and counterclaim that the property was a gift to the defendant Annette H. Aryeh and the defendant Nathaniel Aryeh, although the deed for the premises was placed in the name of the plaintiff and defendant Annette H. Aryeh. The relief sought by defendant Annette Aryeh is an outright transfer of the plaintiff's ownership to defendant Annette Aryeh making her the sole owner, or in the alternative, adjudging the plaintiff as holding the property in trust for her husband, Nathaniel Aryeh, subject to defendant's equitable rights in the matrimonial action pending between the couple. (Notice of Motion, Exhibit C).

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. [*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853]. Plaintiff has satisfied the burden of demonstrating entitlement to summary judgment by presenting documentary evidence that the plaintiff and defendant Annette Aryeh both have an undivided one half interest in the residence as joint tenants in common. The deposition testimony of Annette Aryeh establishes that she did not contribute any monies whatsoever regarding the residence. Further, plaintiff has shown that an order of partition and sale is necessary as the subject premises is so situated that a division or partition thereof between herself and Annette Aryeh cannot be had without prejudice. (RPAPL §901(1); *Donlon v. Diamico*, 33 A.D.3d 841),

Once plaintiff has met its burden, the burden of proof shifts to the defendant to rebut the

inference of entitlement to summary judgment. [*Zuckerman v. City of New York*, 49 N.Y.2d 557]. Defendant has failed to do so. The affirmation in opposition submitted by counsel is defective since it is not signed. Secondly, the affirmation of counsel is all hearsay, and contains nothing more than conclusory statements. [*Riverhead Building Supply Corp., v. Starr, Inc.*, 249 A.D.2d 532]. There is also no affidavit submitted by the defendant setting forth any facts establishing the elements of a constructive trust, or a gift. [See, *Rainford v. Han*, 18 A.D.3d 638].

Even though the statute of frauds raised by plaintiff is not a defense in an action to impress a constructive trust, (*Shulman v. Shulman*, 130 A.D.2d 484; *Vanasco v. Angiolelli*, 97 A.D.2d 462), defendant has failed to establish the four elements of a constructive trust, which are 1) a confidential or fiduciary relationship; 2) a promise; 3) a breach of that promise; and 4) plaintiff's unjust enrichment as a result of his or her actions. [*Potter v. Davis*, 275 A.D.2d 961]. Defendant has not set forth any facts which show a *transfer* of defendant's interest in the property in question or monies in reliance on plaintiff's alleged express or implied promise. [Id, at 963-964]. Moreover, defendant has not shown that plaintiff would be unjustly enriched at defendant's expense if allowed to retain a 50% ownership of property that plaintiff alone has paid for, and which defendant has lived for free without paying the mortgage. [Id, at 964; *Valvo v. Spitale*, 305 A.D.2d 668].

Defendant's claim that the plaintiff made a gift of her 50% of the marital residence to defendant or her husband is barred by the statute of frauds. A gift of real property cannot be made by parol evidence, but must be in writing. [McKinney's General Obligations Law §5-701 (a)para.1; *Lowinger v. Lowinger*, 287 A.D.2d 39]. Finally, defendant's claim that the plaintiff did not request defendant to sell the subject premises prior to the commencement of the partition and sale action is without any merit because a pre-action demand is not a statutory requirement to maintain a partition action. [RPAPL , Article 9].

[* 4]

Accordingly, plaintiff's motion for summary judgment for a partition and sale is granted in its entirety. The affirmative defenses, and counterclaims in the defendant's verified answer are hereby dismissed. The appointment of a referee is necessary for the sale of the property, and to calculate and distribute the monies owed to the bank, Washington Mutual, before the distribution of monies to the parties, and to calculate and distribute the proper share of the net proceeds of sale to be paid to the respective parties. The court notes that a hearing is not necessary as to the plaintiff's claim for a greater share of the net sale proceeds since defendant did not raise triable issues of fact as to same. [Cf., *Lemcke v. Lemcke*, 13 A.D.3d 1062].

Plaintiff is directed to submit a judgment and order of reference.

This constitutes the decision and order of this Court.

DATED: February 28, 2008

ENTER


HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED

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