

Cohen v McMunn

2008 NY Slip Op 32203(U)

August 1, 2008

Supreme Court, New York County

Docket Number: 0105941/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Cohen

INDEX NO.

105941/07

- v -

MOTION DATE

Hickman

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

AUG 06 2008

COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

*Preliminary conference
to be held on 9/4/08 @
9:30 a.m. at Part 10.*

Dated: 8/1/08

[Signature]
HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

ALLAN COHEN,

Plaintiff,

Decision/Order

Index No: 105941/07

Mot. Seq: 002

-against-

IRENE MCMUNN,

Defendant.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

PAPERS

Def's n/m, affid IM, exhs.....

Pltf's affid in opp, exh.....

FILED NUMBERED 1
AUG 06 2008

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Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

By prior order of the court dated May 19, 2008, defendant's motion to dismiss was adjourned to June 12, 2008 and converted to one for summary judgment. CPLR § 3211 (c). Despite being given an opportunity to present additional evidence in support of their claims, the parties have chosen to rely on the papers initially submitted.

Issue has been joined and the note of issue has not been filed, therefore, this motion is properly considered on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision follows.

The following facts are undisputed. Defendant is the title owner of the apartment, which is a condominium unit. Defendant's late husband, Robert McMunn,

was previously the sole owner of the apartment and on September 18, 2004, prior to his death, Mr. McMunn deeded the apartment to himself and defendant, as tenants by the entirety.

Plaintiff entered into a two-year written lease on October 23, 2004 for the apartment with Robert McMunn. The term of the lease was October 1, 2004 through October 1, 2006. The lease was not renewed and plaintiff remains in possession of the apartment as a month-to-month tenant since October 1, 2006. Defendant served plaintiff with a 30-day notice to vacate the apartment on or about May 31, 2007 and she intends to bring a summary holdover proceeding to have plaintiff vacate the apartment, so she can sell it.

The remaining facts are in dispute. Plaintiff claims that at the time the written lease was executed, he and Mr. McMunn entered into an oral sales contract whereby plaintiff would eventually purchase the apartment for \$670,000. Plaintiff asserts that the defendant became a party to the oral sales contract when she acquired her one-half interest in the apartment. Plaintiff claims that in furtherance of that agreement he made monetary payments over and above the rent toward the purchase price in the amount of \$115,000. He also claims that he made substantial improvements and renovations to the apartment which cost him \$150,000. Plaintiff claims the cost of the improvements and renovations were to be a credit toward the purchase price of the apartment.

Defendant maintains that no such oral contract and no monies over and above what were due as rent were ever paid to her or her late husband.

Plaintiff has alleged ten causes of action in the verified complaint: [1] breach of

contract seeking money damages; [2] a declaration that plaintiff has the right to purchase the apartment; [3] an order imposing a constructive trust on the apartment; [4] breach of contract seeking specific performance; [5] unjust enrichment; [6] a permanent injunction enjoining defendant from taking any action to evict plaintiff or otherwise sell the apartment and deny plaintiff a right to purchase same; [7] a permanent injunction enjoining defendant from selling the subject premises and denying plaintiff the right to purchase the property or otherwise evict plaintiff so long as plaintiff's \$17,750 prepaid rent and security remains with the defendant; [8] money had and received; [9] overpayment of rent; and [10] quiet title (RPAPL Article 15).

On the instant motion, defendant argues that plaintiff's complaint should be dismissed as a matter of law for failure to state a cause of action and because the alleged oral sales contract violates the Statute of Frauds (GOL § 5-703). Plaintiff contends that the Statute of Frauds does not apply to the alleged oral sales contract because it falls within the part performance exception contained in GOL § 5-703 (4). Plaintiff further maintains that he has established each of the causes of action asserted in the complaint.

Discussion

A movant seeking summary judgment in its favor 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. Ctr., 64 NY2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 NY2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate

the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980).

The breach of contract claims

Plaintiff's first and fourth causes of action are for breach of an oral sales contract for the purchase of the apartment. In the first cause of action, plaintiff claims that defendant, as a successor-in-interest to plaintiff's oral contract with Mr. McMunn, breached the contract by failing to sell the apartment to him and plaintiff seeks money damages. The fourth cause of action seeks specific performance of the oral contract.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendants' failure to perform; and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Terminal Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

The Statute of Frauds, requires that a contract for the sale of an interest in real property be made in writing, unless it falls within the part performance exception [GOL § 5-703 (1), (4)].

The Statute of Frauds (GOL § 5-703) states that:

1. An estate or interest in real property ... cannot be created, granted, assigned, surrendered or declared unless ... by deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same or by his lawful agent, thereunto, authorized by writing.

...

4. Nothing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

The part performance exception to the Statute of Frauds is based on equitable principles, the purpose of which is to prevent a party from perpetrating a fraud by escaping performance of a real estate sales contract after permitting the other party to perform in reliance on the agreement (see Messner Vetere Berger Schmetterer Euro RSCG Inc. v. Aegis Group PLC, 93 NY2d 229 [1999]). The mere payment of money is not enough to constitute part performance; other acts such as taking possession or making improvements, combined with payment, may be sufficient (Club Chain of Manhattan, Ltd. v. Christopher & Seventh Gourmet, Ltd., 74 AD2d 277 [1st Dept 1980]). The part performance must unequivocally refer to the agreement (Jonestown Place Corp. v. 153 West 33rd St. Corp., 53 NY2d 847 [1981]; Messner Vetere Berger Schmetterer Euro RSCG Inc. v. Aegis Group PLC, *supra*).

In the case at bar, defendant has proven the application of the Statute of Frauds and plaintiff has failed to prove his alleged part performance which would otherwise point to the existence of the agreement. Plaintiff states that he made payments totaling \$115,000 in addition to the rent paid each month and made substantial renovations and improvements which cost him \$150,000. Defendant denies that any payments above and beyond rent were made and claims that the improvements were made of plaintiff's own volition and for his own benefit and not in furtherance of any alleged contract.

Even assuming that plaintiff can prove the existence of the oral contract with either Mr. McMunn or defendant, plaintiff has failed to demonstrate entitlement to the equitable relief contained in GOL § 5-703 (4). While summary judgment is drastic relief,

a party opposing summary judgment must lay bare its proofs. Plaintiff has not provided any proof of the payments to either Mr. McMunn or the defendant towards the purchase price of the apartment. At most, there is no dispute that plaintiff paid \$15,000 as prepaid rent, delivered at the time plaintiff executed the lease for the apartment, which was not credited to rent for the apartment as it became due. Plaintiff's overpayment of rent is not referable to the oral agreement he claims to have made because it was not made for the purchase of the apartment (Jonestown Place Corp. v. 153 West 33rd St. Corp., *supra*). The overpayment of rent, therefore, does not constitute part performance.

Moreover, plaintiff has not even identified the improvements and/or renovations he claims to have made, and therefore, cannot show that the improvements were substantial and permanent in character such as would not have been made except in reliance upon the alleged oral contract (see Lebowitz v. Mingus 100 AD2d 816 [1st Dept 1984]; see also Homeland Gardens v. Lenox, 106 NYS2d 741 [1951]).

Accordingly, plaintiff has not proven part performance which would take the claimed oral contract outside of the Statute of Frauds. Plaintiff's failure of proof on this motion compels summary judgment dismissing the breach of contract claims as a matter of law. Accordingly, defendant's motion for summary judgment on the first and fourth causes of action is granted and the first and fourth causes of action are hereby severed and dismissed.

The second cause of action for a declaration

Because plaintiff has failed to establish that the alleged oral contract falls outside the Statute of Frauds, defendant, therefore, had a right to repudiate the oral contract,

assuming a valid and enforceable contract even existed (Messner Vetere Berger Schmetterer Euro RSCG Inc. v. Aegis Group PLC, *supra*). Therefore, defendant is entitled to summary judgment dismissing plaintiff's cause of action for a declaration that he has a right to purchase the apartment based on the her repudiation of the agreement.

The third cause of action for imposition of a constructive trust

Generally, a constructive trust may be imposed on property that has been acquired in such circumstances where the holder of the legal title should not retain the beneficial interest thereof (Sharp v. Kosmalski, 40 NY2d 119 [1976]). The necessary elements for the imposition of a constructive trust are: (1) a confidential or fiduciary relationship; (2) a promise or agreement, express or implied; (3) a transfer in reliance upon the agreement; (4) breach of the promise; and, (5) unjust enrichment (*id.*).

Plaintiff's cause of action for the imposition of a constructive trust must also fail because there are simply no facts to establish there was a confidential relationship between plaintiff and either Mr. McMunn or defendant (see Saunders v. AOL Time Warner, Inc., 18 AD3d 216 [1st Dept 2005]), any transfers made in reliance upon the oral contract, or defendant's unjust enrichment.

Accordingly, the third cause of action is hereby severed and dismissed.

The tenth cause of action pursuant to RPAPL Article 15

Under RPAPL Article 15, a party can compel the determination of an adverse claim to that party's title to real property. A purchaser under a land sale contract acquires equitable title to the subject property and may bring an action under RPAPL Article 15 (see Karp v. Twenty Three Thirty Ryer Corp., 185 Misc. 440 ([1945], Bean v.

Walker, 95 AD2d 70 [4th Dept 1988]). However, because plaintiff has not prevailed on his claims to equitable title, the tenth cause of action must be severed and dismissed (see i.e. Roller v. City of New York, 250 A.D. 778 [1937]).

The causes of action for injunctive relief

In addition, because plaintiff's substantive causes of action upon which he has premised his claims to equitable title have been dismissed, plaintiff is not entitled to injunctive relief thereon. Accordingly, the sixth and seventh causes of action for injunctive relief must also be severed and dismissed.

The remaining causes of action

Plaintiffs' remaining causes of action are as follows: unjust enrichment (fifth cause of action), money had and received (eighth cause of action) and overpayment of rent (ninth cause of action). The only amount that plaintiff has established he has paid, above and beyond rent, which has not been disputed by defendant, is that amount advanced for prepaid rent.

Paragraph 9 of the Rider to the lease provides that "[u]pon signing of lease, tenant has paid \$17,75000 [sic] (towards prepaid rent and one month's security)." Directly below this paragraph, \$17,750. is handwritten. There is no dispute that plaintiff paid rent in the amount of \$15,000 (\$17,750 minus one month's security at \$2,750), for which he has not been credited. The court rejects defendant's claim that "[a]s long as the landlord and tenant relationship continues, the defendant has the right to hold the \$17,750 pursuant to the terms of the original lease" because this argument contradicts the clear and unambiguous terms of the lease (W.W.W. Associates, Inc. v. Giancontieri, 77 NY2d 157, 162 [1990]). Under the lease, defendant is only entitled to

hold onto the security until plaintiff vacates the apartment, assuming plaintiff fully performs all terms of the lease.

Accordingly, plaintiff's motion for summary judgment dismissing the eighth and ninth causes of action is denied.

An action to recover on the theory of unjust enrichment is based on the equitable principle that a person must not be allowed to enrich himself or herself unjustly at the expense of another (Waldman v. Englishtown Sportswear, Ltd., 92 AD2d 833 (1st Dept 1983). Plaintiff alleges that the "Defendant accepted Plaintiff's financial and material contributions to the subject property, including but not limited to the payment of rent, maintenance and real estate taxes, as well as Plaintiff's ongoing renovation costs." Plaintiff claims damages in the amount of \$380,000.

The only damages that plaintiff has established in this action are those arising from defendant's failure to credit plaintiff the prepaid rent he paid under the lease. Because a cause of action for unjust enrichment must fail in the face of a valid contract (Clark-Fitzpatrick v. L.I.R.R., 70 NY2d 382 [1987]), which in this case is the lease, the fifth cause of action must be severed and dismissed.

Accordingly, defendant's motion for summary judgment is only granted to the extent that the first, second, third, fourth, sixth, seventh and tenth causes of action are hereby severed and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant's motion for summary judgment is granted to the extent that the first, second, third, fourth, sixth, seventh and tenth causes of action are hereby

severed and dismissed; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further

ORDERED that there be a preliminary conference in this action on September 4, 2008 at Part 10 at 80 Centre Street, Room 122.


The clerk is hereby directed to enter judgment in accordance herewith.

Any requested relief which has not been addressed herein has been considered and is hereby expressly denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 1, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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