

Pearl v Berger

2008 NY Slip Op 32656(U)

September 24, 2008

Supreme Court, Nassau County

Docket Number: 8886/08

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

DEBORAH PEARL and GENE PEARL,

Plaintiff(s),

MOTION DATE: 9/17/08

INDEX NO.: 8886/08

-against-

SEQ. NOS. 1 & 2

JOSEPH BERGER, MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. as nominee for NJ LENDERS CORP.,
REBECCA SAMSON, and THE UNITED STATES OF AMERICA,

Defendant(s)

JOSEPH BERGER,

Third-Party Plaintiff(s),

-against-

JENNIFER BERGER,

Third-Party Defendant(s).

The parties' respective motions are determined as hereinafter provided.

The defendant/third-party plaintiff and the third-party defendant were married on December 8, 1996 (see plaintiff's Exhibit D). Approximately seven years later, on October 23, 2003, the defendant/third-party plaintiff and the plaintiffs, the third-party defendant's parents, purchased 643 Ricca Lane in Woodmere (Section 39, Block 485, Lots 61 and 75) which became the defendant/third-party plaintiff and the third-party defendant's marital residence. Title was issued to the plaintiffs and defendant/third-party plaintiff as tenants in common (see plaintiffs' Exhibit J).

On May 8, 2006, however, shortly before the third-party defendant's July 19, 2006 commencement of an action for divorce (Index No. 202085/06), the plaintiffs allegedly conveyed their interest in the property to the defendant/third-party plaintiff. That deed was subsequently recorded on August 11, 2006 (see

plaintiffs' Exhibit A) or approximately a month after the third-party defendant filed for divorce. Issue was joined in that action on or about November 8, 2007 with the defendant/third-party plaintiff's service of a verified answer and counterclaim (see plaintiffs' Exhibit E). Each spouse demanded equitable distribution of their marital assets and assorted ancillary relief. Moreover, on December 21, 2006 the court (Stack, J.) directed the defendant/third-party plaintiff to pay interim maintenance, child support for the parties' two infant issue (i.e., Jake and James) and the carrying charges and other expenses related to the marital residence (see plaintiffs' Exhibit G). Ultimately, on May 14, 2008 the plaintiffs filed this action alleging, in sum, that the defendant/third-party plaintiff fraudulently converted their interest in the residence by forging their signatures on the May 8, 2006 deed.

Issue was joined by the defendant/third-party plaintiff on or about June 17, 2008 (see plaintiffs' Exhibit B). His pleading also interposed three (abuse of process, malicious prosecution and equitable lien) purported counterclaims. The defendant Rebecca Samson, Esq., who allegedly acknowledged the plaintiffs' execution of the disputed deed, interposed an August 25, 2008 amended answer and counterclaim (intentional infliction of emotional distress) requesting sanctions (see 22 NYCRR §130-1.1) and counsel fees (see defendant/third-party plaintiff's Exhibit F). The defendant MERS, a mortgagee, and the defendant United States of America, which holds a \$22,976.22 tax lien against the defendant/third-party plaintiff, have, apparently, not formally appeared (see plaintiffs' Exhibit R). Lastly, on or about June 12, 2008 the defendant/third-party plaintiff implied his wife alleging, in effect, an entitlement to conditional common law contribution and the imposition of an equitable lien to reimburse him for one-half of the improvements to the marital residence in the event the plaintiffs successfully vacate the May 8, 2006 deed (see plaintiffs' Exhibit C).

Presently, prior to disclosure, the plaintiffs and third-party defendant have moved, pursuant to CPLR 3211(a)(4) and (7), to dismiss the defendant/third-party plaintiff's counterclaims and the third-party complaint. (Comparable relief is, however, not sought as to Ms. Samson's counterclaim). The defendant/third-party plaintiff has, in effect, cross moved, pursuant to CPLR §602(a), to consolidate this action with the pending divorce action (Driscoll, J.) for purposes of a joint trial.

More specifically, the plaintiffs and third-party defendant's joint motion to summarily dismiss the defendant/third-party plaintiff's counterclaims and the third-party complaint is premised upon the third-party defendant's potential receipt of a distributive award in the earlier action representing her equitable interest in the marital residence (see CPLR 3211[a][4]) as well as the counterclaims and third-party complaint's alleged failure to state valid causes of action (see CPLR 3211[a][7]) (see July 25, 2008 affirmation of Seth L. Berman, Esq., paras. 17-28).

A marital residence acquired after the marriage is, of course, presumed to be marital property subject to equitable distribution although the presumption is rebuttable (see DRL §326B; Murphy v Murphy, 4 AD3d 460,461). Here, the May 8, 2006 disputed deed, which allegedly transferred the premises to the defendant alone, instead of to both spouses, is challenged by the plaintiffs but not the third-party defendant (see plaintiffs' Exhibit A). Despite their joint motion, there is nothing in the record which indicates that the third-party defendant is seeking a distributive award as to that asset. Indeed, an affidavit from her is conspicuous by its absence. Nor have the plaintiffs alleged that this facially separate asset transmuted into marital property (see Loria v Loria, 46 AD3d 768,770). Contrary to the plaintiffs and third-party defendant's contentions, the pending divorce action is therefore not a bar to the defendant/third-party plaintiff's counterclaims. It is, moreover, rather incongruous for them to simultaneously argue that the pending divorce action bars the defendant/third-party plaintiff's counterclaims (see CPLR 3211[a][4]) while opposing his cross motion for a joint trial (see CPLR §602[a]).

Conversely, even liberally construing the second counterclaim in a light most favorable to the defendant/third-party plaintiff and assuming the facts pleaded therein to be true (see Gershon v Goldberg, 30 AD3d 372), it fails to plead a valid cause of action for malicious prosecution (see Engel v CBS, Inc., 93 NY2d 195; Laing v Cantor, 280 AD2d 519). Similarly, if, as the defendant/third-party plaintiff's pleadings posit, the plaintiffs' claim of conversion is valid (see plaintiffs' Exhibit B, para.77 and Exhibit C, paras.13 & 17), no cause of action for an equitable lien or common law contribution exists. In any event, his claim for a distributive award representing the value of improvements he reportedly made to the former marital residence is a subject for the divorce action. Alternatively, if the plaintiffs intentionally commenced this action

and filed the May 14, 2008 notice of pendency for the ulterior purpose of harming the defendant/third-party plaintiff while aware of the contested deed's validity, an action for abuse of process may lie (see Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Assn., Local 1889 AFT AFL-CIO, 38 NY2d 397; CPLR §6514; 2 NY PJI 3d 3:50 and 3:51).

Accordingly, those branches of the plaintiffs and third-party defendant's motion, pursuant to CPLR 3211(a)(4) and (7), which seek dismissal of the defendant/third-party plaintiff's second and third counterclaims as well as the third party action are granted and that branch of their motion which seeks dismissal of the initial counterclaim is denied. The defendant/third-party plaintiff's cross motion, in effect, pursuant to CPLR §602(a), to consolidate this action with the divorce action for purposes of a joint trial is denied. Unlike in Sagnard v Sagnard, 80 Misc.2d 984 [Sup. Ct., Nass. Co., 1975], affd. 49 AD2d 751 [2nd Dept;1975]), upon which the defendant/third-party plaintiff relies, both spouses were not parties to the allegedly fraudulent conveyance and the record is devoid of any admissible evidence which indicates that the third-party defendant is seeking equitable distribution of the former marital residence - the defendant/third-party plaintiff's purported separate property.

The court hereby schedules an October 31, 2008 (9:30 a.m.) preliminary conference in this matter to be held in the Preliminary Conference Part (lower level).

The plaintiffs are directed to serve a copy of this order upon all parties in both actions.

Dated: 9-24-08



A.J.S.C.

ENTERED

SEP 26 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**