

Lambert v Kramer

2008 NY Slip Op 33147(U)

November 21, 2008

Supreme Court, New York County

Docket Number: 103963/08

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer

PART 8

Index Number : 103963/2008

LAMBERT, ALAN

VS.

KRAMER, SARITA

SEQUENCE NUMBER : # 001

DISMISS

Justice

INDEX NO. 103963-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to for dismiss

PAPERS NUMBERED

1, 2
3, 4, 5
6, 7, 8

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

~~Notice of Cross Motion~~
Answering Affidavits — Exhibits — Memo of Law

Replying Affidavits Memo of Law

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss the complaint
is granted and the cross-motion to amend is
denied in accord with the annexed
memorandum.

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

FILED

NOV 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER

J.S.C.

Dated: 11/20/08

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

ALAN LAMBERT, INDEX NO. 103963/08
Plaintiff, MOTION SEQ. NO. 001

-against-

SARITA KRAMER, Defendant.

The following papers, numbered 1 to 8, were read on this motion to dismiss the complaint:

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affidavits – Affirmation – Exhibits	1,2
Notice of Cross-Motion – Affirmation – Exhibits	3,4
Memorandum of Law in Support of Cross-Motion	5
Reply Memorandum of Law	6
Reply Affidavit	7
Reply Memorandum of Law	8

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NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, the motion by defendant to dismiss the complaint is granted and the cross-motion is denied.

Introduction

This is a motion to dismiss an action concerning a New York City apartment which is a contested asset in a divorce pending in Venezuela.

Background

On this motion to dismiss a complaint, and cross-motion to amend the complaint, the following facts are undisputed. The parties, who are both citizens of Venezuela, were married in 1991 and have lived in Venezuela. In 1993, the defendant wife, Sarita Kramer, purchased an apartment in New York City with her own and her mother's funds and took title to the apartment in her name alone. Title to the apartment has always been in her name alone. The plaintiff husband, Alan Lambert, paid the maintenance and other expenses associated with the apartment for ten years.

The parties are separated and there are divorce proceedings pending in Venezuela. Lambert initiated this action in New York claiming he is the joint owner of the apartment because, at the time the apartment was purchased, he and his wife purchased the apartment jointly and "agreed that the Defendant would advance the entire purchase price of the apartment and Plaintiff's contribution would be to pay the maintenance, taxes and associated expenses of the Apartment." Lambert admits that Kramer has never acknowledged him as a co-owner of the apartment.

Kramer moves to dismiss the complaint on the ground that it is barred by documentary evidence, the statute of frauds and the statute of limitations. She denies that she ever agreed to make Lambert a co-owner of the apartment and states that, shortly after the apartment was purchased, Lambert he offered to pay the maintenance, electric and telephone charges without condition or consideration, because she was paying all the expenses of their homes in Venezuela. Kramer submits a pre-nuptial agreement, entered in Venezuela in 1991, under which all assets acquired during the marriage remain separate property. She argues that an oral

[* 4]

agreement concerning an interest in real property is within the statute of frauds, codified in General Obligations Law 5-703(2), and unenforceable. Finally, she argues that an agreement made in 1993 is subject to a 6-year statute of limitations and time-barred.

Kramer additionally argues that neither party lives in New York and the overall resolution of their rights and obligations, including the interpretation of the pre-nuptial agreement, should be determined in the plenary proceedings in Venezuela.

Lambert opposes the motion arguing that this action concerning a New York City apartment has nothing to do with the Venezuelan divorce. He argues that the agreement is removed from the statute of frauds by (1) Kramer's admission that she accepted his offer to pay the maintenance charges; and (2) his payment of the maintenance charges which is unequivocally referable to the agreement. Moreover, he argues the Venezuelan courts are incompetent. Finally, Lambert cross-moves to amend the complaint, in order to clarify that the statute of limitations did not begin to run until 2007, when he demanded, and Kramer refused, to acknowledge his interest in the apartment.

Discussion

A motion to dismiss, pursuant to CPLR §3211, raises the inquiry as to whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from the four corners of the complaint. (*Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]). Accepting, for the purposes of this motion, plaintiff's allegations as true, his complaint utterly fails to state any claim cognizable under the laws of the State of New York.

It is well settled that under New York's Statute of Frauds an oral agreement to convey an estate or interest in real property, other than a lease for term not exceeding one year, is "nugatory

and unenforceable” and “[a] party to the agreement may legally and rightfully refuse to recognize or perform it.” (*Messner Vetere Inc v Aegis Group LLC*, 93 NY2d 229 [1999]; *General Obligations Law* § 5-703(1)) The agreement Lambert describes in his complaint is an agreement to convey an interest in real property for a term exceeding one year. It is nugatory and unenforceable under the statute of frauds.¹ Lambert argues that the agreement is removed from the statute of limitations by Kramer’s admission and/or his partial performance. This argument is completely without merit.

To say that Kramer acknowledges the agreement flies in the face of the plain language of her affidavit in which she explicitly denied any agreement to make Lambert co-owner of the apartment. The only agreement Kramer acknowledges is her acceptance of Lambert’s offer to pay the carrying charges of the apartment. Thus, Kramer has said nothing to remove the agreement from the Statute of Frauds.

A party may, however, lose the benefit of the defense of the Statute of Frauds, or “waive its protection, by inducing or permitting another party to the agreement to do acts, pursuant to and in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter the situation and make the interposition of the statute against performance a fraud.” (*Messner, supra* at 235; *General Obligations Law*, § 5-703 (4)) The doctrine of part performance is based upon principles of equity, and, specifically, recognition of the fact that it would be a fraud to allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement. Part performance alone, of

¹ The statute of frauds also renders unenforceable any oral agreement which, like this one, cannot be completed within one year. (*General Obligations Law* §5-701(a)(1))

course, is not sufficient. The performance must be unequivocally referable to the agreement (*Id*)

In analyzing the nature of the performance sufficient to overcome the Statute of Frauds, there must be performance “unequivocally referable” to the alleged agreement, performance which alone and without the aid of words of promise is unintelligible or at least extraordinary unless unequivocally referable to the alleged agreement. An act which admits to explanation without reference to the alleged contract or a contract of the same general nature and purpose is not, in general, admitted to constitute part performance (*Christou v Christou*, 109 AD2d 1058 [4th Dept 1985])[making mortgage and real estate tax payments could be considered rent]

In light of the foregoing, it is evident that Lambert’s payment of certain charges relating to the apartment is not unequivocally referable to an agreement to convey part ownership of the apartment sufficient to support an inference or raise a material question of fact on the issue of whether he may avoid the dispositive effect of the Statute of Frauds under the doctrine of part performance.

Since the agreement sued upon is a nullity, we need not reach the other grounds upon which the motion to dismiss is predicated.²

Insofar as Lambert’s cross motion is concerned, although it is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (CPLR 3025 [b]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]), the Court of Appeals has consistently held that, in order to conserve judicial resources, an examination of the proposed causes of action is warranted. (*Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d

² This Court notes, however, its agreement with Kramer that Venezuela is the proper forum for the adjudication of all the parties’ rights and obligations.

107 [1st Dept 1998]) Leave to amend will be denied where the proposed pleading fails to state a cause of action (*Tishman Constr Corp v City of New York*, 280 AD2d 374 [1st Dept 1991]), or is palpably insufficient as a matter of law. (*Bankers Trust Co v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067[1993]; *Davis & Davus, PC v Morson*, 286 AD2d 584 [1st Dept 2001]) Lambert's amendment seeks to clarify the timing of the alleged breach of the agreement. Since the agreement is unenforceable, it is irrelevant whether or not the alleged breach is timely.

We have considered the other arguments raised by the parties and find them without merit.

Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the cross-motion by plaintiff to amend the complaint is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This reflects the decision and order of this Court.

Dated: 11/21/08

FILED
 NOV 24 2008
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 NEW YORK

MARILYN SHAFER
 J.S.C.

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