SHORT FORM ORDER INDEX NO. 24673-2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

MOTION #001 002 003
004 005 **Mot. D**

PRESENT:
HON. MELVYN TANENBAUM
Justice

R/D: 07/22/09
S/D: 03/30/09

MARY KOGEL,

Plaintiff,

-against-

JOHN KOGEL,

Defendant.

PLTF'S/PET'S ATTY:
KENNETH C. HENRY, JR., P.C.
900 Merchants Concourse
Suite 303
Westbury, New York 11590

DEFT'S/RESP'S ATTY:
TARTAMELLA TARTAMELLA & FRESOLONE
Attorney for Defendant/Third Party Plaintiff
235 Brooksite Drive
Hauppauge, NY 11788

JOHN KOGEL,

Third Party Plaintiff,

-against-

LISA KOGEL and EDWARD KOGEL,

Third Party Defendant.

BLODNICK & BAUM, P.C.
Attorney for Third Party Defendants
1205 Franklin Avenue, Suite 110
Garden City, NY 11530

Upon the following papers numbered 1 to 72 read on this motion for an order pursuant to §§ 6301, 3212, 3211(a)(7) & 3215 Notice of Motion/Order to Show Cause and supporting papers 1-9 ; Notice of Cross Motion and supporting papers 10-13, 14-16, 17-22, 23-30 Answering Affidavits and supporting papers 31-32, 33-52, 53-55, 56-61, 62-65, 66-69 Replying Affidavits and supporting papers 70-72 Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff MARY KOGEL brought on by Order to Show Cause (Pines, J.) seeking an order of attachment against the assets of defendant JOHN KOGEL, and the cross motion by defendant JOHN KOGEL for an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint and the motions by third party defendants LISA KOGEL and EDWARD KOGEL seeking an order pursuant to CPLR Section 3211(a)(1)&(7) & 22 NYCRR Section 130-1.1 dismissing the third party complaint and imposing sanctions against the third party plaintiff JOHN KOGEL and/or his attorney, and the motion by defendant/third party plaintiff JOHN KOGEL for an order pursuant to CPLR Section 3215 granting a default judgment against the third party defendants are determined as follows:

Plaintiff MARY KOGEL is the mother of defendant JOHN KOGEL and third party defendants LISA KOGEL and EDWARD KOGEL. In 1962, plaintiff MARY KOGEL and JOHN E. KOGEL, her husband, purchased the marital premises located at 154 Grassy Pond Drive,

Smithtown, NY. In 1986 plaintiff suffered a stroke rendering her partially paralyzed. Her husband, JOHN E. KOGEL, died in 1989.

On January 24, 2003 plaintiff executed a deed transferring one-half interest in the premises to her son, defendant JOHN KOGEL. Defendant executed a mortgage on the same day in the sum of $130,000.00. On January 18, 2005 defendant refinanced the original mortgage increasing the mortgage indebtedness to $171,000.00. On March 17, 2007 defendant refinanced for a third time increasing the total mortgage amount to $275,000.00.

The parties entered into an Agreement dated April 5, 2008 which provides that the residential premises would be sold with the proceeds to be divided equally between mother and son, after $10,000.00 payments to third party defendants LISA KOGEL and EDWARD KOGEL. A contract of sale was entered into on May 20, 2008 and the premises were sold on July 7, 2008 for $460,000.00. On the same day plaintiff commenced this proceeding seeking an order of attachment.

Plaintiff's complaint seeks to recoup moneys received by the defendant from each of the three mortgage loans during the period the parties resided in the home. Plaintiff claims that defendant used the majority of the borrowed funds for personal use and seeks to recover $206,000.00. Plaintiff's complaint sets forth causes of action sounding in fraud, conversion, breach of fiduciary duty and seeks an accounting of the mortgage proceeds. Defendant claims that he was his mother's primary care giver since 1989 and needed the proceeds from the mortgage refinancing to pay household expenses including real estate taxes, living expenses, utilities, medical supplies, home improvements and renovations.

In support of plaintiffs motion seeking an order of attachment and in opposition to defendant's summary judgment cross motion, plaintiff submits two affidavits and two affirmations of counsel and claims that she was defrauded by her son when he refinanced her home three times and failed to account for more than $206,000.00. Plaintiff claims that she conveyed a one-half interest in her home based upon defendant's promise to use the mortgage proceeds solely for "KOGEL's" benefit to pay medical bills and for maintenance and repair of the premises. Plaintiff claims that in March, 2007 defendant falsely promised to borrow only $40,000.00 to be used to relocate his brother and sister (third party defendants) and instead refinanced the home for a third time increasing the mortgage indebtedness an additional $104,00.00. Plaintiff asserts that defendant used the majority of the proceeds for his own benefit and argues that an attachment order is necessary to prevent "KOGEL" from absconding with the proceeds remaining from the sale of the premises. Plaintiff claims that the April 5, 2008 Agreement did not resolve the issues surrounding defendant's fraudulent actions and valid causes of action exist based upon fraud, conversion, breach of fiduciary duty and an accounting. It is plaintiff's position that substantial issues of fact exist concerning defendant's failure to account for the moneys he obtained upon refinancing the premises on three separate occasions. Plaintiff contends that she is entitled to conduct discovery to ascertain the precise amount of money defendant used personally without her permission. Plaintiff claims

that under these circumstances an order of attachment must be granted and defendant's cross motion for summary judgment must be denied.

In opposition and in support of his cross motion, defendant "KOGEL" submits an affidavit and two affirmations of counsel and claims that no basis exists to grant plaintiff's application for an order of attachment. Defendant claims that he has no intention of leaving the state or removing any assets to Trinidad or any other place. He asserts that after the July 7, 2008 sale of the residential premises where all parties resided, he and his wife leased a Suffolk County apartment and he is working in Queens County as a New York Court Officer. Defendant argues that no viable claims exist against him since the April 5, 2008 agreement signed by both parties resolved any remaining claims asserted by his mother concerning his management of her financial affairs, and acted as a global settlement which discharged him from all claims set forth in plaintiff's complaint. Defendant also denies having defrauded his mother and maintains that he fully informed her about the need to refinance the home to pay all necessary expenses. Defendant claims that his mother consented to each of the three mortgage loans and asserts that she is now being manipulated by his siblings (third party defendants) to maintain this action.

In support of their motions seeking an order dismissing the third party complaint and imposition of sanctions against the third party plaintiff and/or his counsel, the third party defendants submit three affirmations of counsel and assert that no valid claim for six years use and occupancy of the family home can be maintained since the relief sought is against public policy (for recovery of moneys allegedly due for leasing an illegal apartment) and since such claims are barred by the Statute of Frauds absent proof of a written agreement. Movants claim that no written agreement exists and no viable use and occupancy claim therefore is stated. Third party defendants also claim that sanctions must be imposed based upon the third party plaintiff's submission of an application seeking a default judgment against them. Movants argue that service of the third party summons and complaint upon both third party defendants did not comply with the requirements of CPLR Section 1007 which requires that the underlying complaint and all pleadings in the main action also be served. Counsel claims that service of those prior pleadings was not made until October 16, 2008, more than 30 days after third party defendants motion to dismiss was served. It is therefore the third party defendants position that no basis exists to grant "KOGEL's" motion seeking a default judgment and sanctions should be imposed based upon counsel's refusal to withdraw the motion. Movants also claim that service of the third party pleadings was made by substituted service on both third party defendants on August 19, 2008 (on EDWARD KOGEL) and on August 14, 2008 (on LISA KOGEL) with affidavits of service filed on August 31, 2008 and August 29, 2008 respectively. Movants argue that the 30 day period within which to serve their answer had not expired prior to service of the September 17 motion to dismiss.

In opposition and in support of the third party plaintiff's motion for a default judgment, "KOGEL" submits two affidavits together with an affidavit from a process server and three affirmations of counsel. The third party plaintiff claims that a default judgment must be granted

against third party defendant LISA KOGEL based upon her failure to timely serve an answer to the third party complaint. "KOGEL" claims that his sister was personally served with a copy of the third party pleadings on August 14, 2008 and defaulted in serving a timely answer within twenty days. Movant claims that a default judgment should therefore be entered against LISA KOGEL. The third party plaintiff also claims that both motions submitted by the third party defendants must be denied since a valid claim based upon unjust enrichment is stated in the third party complaint and since no basis exists to impose sanctions. "KOGEL" claims that he is entitled to be compensated by his siblings for the equitable value of the use and occupancy of the residential premises for the period of their residence. The third party plaintiff also claims that counsel attempted to resolve the issues underlying the parties applications and sanctions should not be imposed under these circumstances.

CPLR Sec. 6201(3) provides:

Grounds for attachment.

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when . . .

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts;

"The mere removal or assignment or other disposition of property is not grounds for attachment. There must co-exist an intent of the debtor to defraud his creditors." (EATON FACTORS CO., INC. v. DOUBLE EAGLE CORP., 17 AD2d 135, 323 NYS2d 90a (1st Dept., 1962)).

There is insufficient evidence submitted to sustain plaintiff's application for imposition of an order of attachment. Defendant has been a resident of Suffolk County for more than 25 years and no proof has been submitted to support plaintiff's claim that "KOGEL" intends to secrete the moneys obtained from the sale of the residence to Trinidad. Accordingly plaintiff's motion for an order of attachment must be denied.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230

(2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

Discovery proceedings including depositions of the parties have not been conducted. Plaintiff is entitled to complete all relevant discovery matters particularly since the defendant may possess information and exclusive knowledge of the issues raised in the pleadings. Under these circumstances defendant's motion for an order granting summary judgment must be denied without prejudice to renewal upon completion of all discovery proceedings (CPLR Section 3212(f)).

With respect to the third party plaintiff's default judgment application, the record indicates that the parties entered into an agreement in which the third party plaintiff's counsel provided the underlying pleadings and motion papers in the main action on October16, 2008 to "cure" the jurisdictional defect in serving the third party summons and complaint. No basis therefore exists to grant a default judgment against the third party defendant LISA KOGEL since the third party defendant's motion to dismiss the complaint had previously been served in September, 2008. The third party plaintiff's motion seeking a default judgment must therefore be denied.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

Causes of action for quantum meruit and unjust enrichment are quasi-contract doctrines developed to ensure that a party whose work has benefitted another will be paid the worth of his or her services (ZOLOTAR v. NY LIFE INS. CO., 172 AD2d 27 (1st Dept., 1991)). Neither doctrine applies where there is a written document that covers the particular subject matter underlying the parties dispute (CLARK FITZPATRICK, INC. v. LIRR , 70 NY2d 382 (1987); COOPER, BAMUNDO, HECHT & LONGWORTH LLP v. KUCZINSKI, et al, 14 AD3d 644, 789 NYS 2d 508 (2d Dept., 2005)).

Unjust enrichment occurs where a party holds or retains property under such circumstances that in equity and good conscience he ought not to retain it and does not require the performance of any wrongful act by the one so enriched (see SIMONDS v. SIMONDS, 45 NY2d 233, 242 (1979); CHEMICAL BANK v. EQUITY HOLDING CORP., 228 AD2d 338, 644 NYS2d 709 (1st Dept.,

1996)).

No viable cause of action for unjust enrichment is stated in the third party complaint. The evidence submitted indicates that the "KOGELs'" resided in what was their family residence until it was sold in July, 2008. There was no agreement or understanding, either oral or written, which required that plaintiff's children (defendant and/or the third party defendants) make "rent" payments for the privilege of staying in their parent's home. "KOGEL's" third party complaint seeks, in effect, to retroactively recover what he terms "rent" from his siblings, for the years each resided in the home. Such claims do not state a valid cause of action for the equitable relief known as "unjust enrichment" and cannot form the basis for recovery of moneys based upon the family's long-term living arrangements. The third party defendants motion to dismiss the third party complaint must therefore be granted. Accordingly it is

ORDERED that plaintiff's motion for an order of attachment pursuant to CPLR Section 6201(3) is denied, and it is further

ORDERED that defendant's motion for an order pursuant to CPLR Section 3212 is denied, and it is further

ORDERED that the third party plaintiff's motion for an order pursuant to CPLR Section 3215 is denied, and it is further

ORDERED that the third party defendants motion for an order pursuant to CPLR Section 3211(a)(7) dismissing the third party complaint is granted. The third party complaint is hereby dismissed, and it is further

ORDERED that the third party defendants application for the imposition of sanctions against the third party plaintiff and/or his attorney is denied, and it is further

ORDERED that a conference shall be held on **August 19, 2009 at 9:30 a.m.** at the Supreme Court Trial Term Part XIII, Cohalan Court Complex, 400 Carleton Avenue, Central Islip, New York to resolve all outstanding discovery issues. No appearance shall be required if the parties enter into a preliminary conference disclosure and discovery schedule and submit same to the Court prior to August 19, 2009. A copy of the form is attached to this order for the parties use and convenience. All discovery proceedings must be completed on or before October 2, 2009.

Dated: July 21, 2009

MELVYN TANENBAUM

J.S.C.