

LMT Capital Mgt., LLC v Gerardi
2009 NY Slip Op 32184(U)
September 23, 2009
Supreme Court, Suffolk County
Docket Number: 17891/2004
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

LMT Capital Management, LLC,

Index No.: 17891/2004

Plaintiff,

Motion Sequence No.: 010; MD

Motion Date: 5/7/08

-against-

Submitted: 6/10/09

Diane Gerardi, North Fork Bank, JP Morgan Chase Bank, and all individuals or entities claiming to have any interest in the property described in the deed attached hereto as Exhibit "A",

Motion Sequence No.: 012; MD

Motion Date: 1/14/09

Submitted: 6/10/09

Defendants.

Motion Sequence No.: 013; XMOT. D

Motion Date: 1/28/09

Submitted: 6/10/09

Motion Sequence No.: 014; XMD

Motion Date: 6/10/09

Submitted: 6/10/09

Attorneys [See Rider Annexed]

Upon the following papers numbered 1 to 72 read on this motion for preliminary injunction: motion and cross motion for summary judgment; and cross motion to vacate prior order; notice of motion and supporting papers, 1 - 5; 6 - 22; Notice of Cross Motion and supporting papers, 23 - 33; 34 - 56; Answering Affidavits and supporting papers, 57 - 61; 62 - 65; 66 - 67; Replying Affidavits and supporting papers, 68 - 71; 72 ; Other, plaintiff's memorandum of law (#012, #013 & #014); Chase's reply memorandum of law (#013); Chase's second reply memorandum of law (#013).

This is an action, *inter alia*, to impose a constructive trust on the residential real property located at 35 Wireless Way, Southampton, New York. The action was commenced on August 3,

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2004. Defendant Diane Gerardi is the current title owner of the property. Defendant North Fork Bank is the holder of a first mortgage on the property. Defendant JP Morgan Chase Bank (“Chase”) is the holder of a second mortgage in connection with a home equity line of credit (HELOC) on the property.

According to John Liegey,¹ the plaintiff’s chairman and CEO, he and Diane Gerardi were engaged to be married for nearly two years prior to the commencement of this action. During the period of the engagement, Gerardi was an officer of the company. In June, 2003, the plaintiff entered into a contract to purchase the property from the prior owners. Prior to the closing of title in September, 2003, in reliance on Gerardi’s promise to transfer the property to the plaintiff upon request within one year from the date of closing, the plaintiff assigned its rights under the contract to Gerardi. As evidenced by a resolution dated September 25, 2003, Gerardi took title to the property as nominee for the plaintiff. The plaintiff subsequently advanced the sum of \$412,810.00 to purchase the property and, until Liegey and Gerardi ended their engagement in June, 2004, paid in excess of \$300,000 in maintenance, renovation, upkeep and carrying charges for the property. The plaintiff claims that Gerardi, with the assistance of the Southampton Police Department, forcibly took possession of the property shortly after Gerardi and Liegey ended their engagement, that Gerardi has maintained possession of the property since that time and that Gerardi has refused the demand to convey the property to the plaintiff. The plaintiff also claims that Gerardi has accumulated in excess of \$400,000 in rental income since she took over the property, which she has retained for her exclusive use.

Gerardi’s version of the facts is substantially different. She claims that she was never a director, officer or shareholder of the plaintiff and that she was never in any way connected with the plaintiff’s operations or management. According to her, in the spring of 2003, Liegey offered to make the down payment to help her purchase the Southampton property. He subsequently negotiated on behalf of the plaintiff a purchase price of \$1.55 million, informing Gerardi that his contribution of the downpayment was a gift with no strings attached but that she was responsible for obtaining a mortgage for the balance of the purchase price. After Gerardi was approved for a mortgage in the amount of \$1,162,500.00 with North Fork Bank and a \$77,500.00 line of credit with JP Morgan Chase Bank, the plaintiff assigned the sales contract to her; as such, she denies that her interest in the property was solely as the plaintiff’s nominee. At the closing on September 29, 2003, Gerardi supplied \$1.24 million of the \$1.55 million purchase price. When she and Liegey terminated their personal relationship in the summer of 2004, he attempted to force her from the property, claiming that it belonged to him. This action followed. Since the commencement of the action, she has been maintaining and managing the property as well as paying the mortgage, the line of credit, property taxes and homeowner’s insurance without any assistance from Liegey or the plaintiff.

¹ When this action was commenced, Liegey and LMT Capital Management, LLC were the named plaintiffs. By order dated August 14, 2007, this Court granted the plaintiffs’ motion, *inter alia*, to amend the caption by removing Liegey as plaintiff.

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The plaintiff pleads five causes of action in its amended complaint: the first, to impose a constructive trust on the property; the second, seeking a declaration that the plaintiff is the owner of the personal property which was used to furnish and decorate the property; the third, for damages based on Gerardi's retention of rental income and profits; the fourth, for an accounting of the income, expenses, debts and profits realized by Gerardi in connection with the property; and the fifth, for the appointment of a receiver. Chase asserts a cross claim against Gerardi, alleging that in the event the plaintiff obtains relief against Gerardi, it will be entitled, under the terms of the HELOC and the mortgage, to all amounts due thereunder, any sums which it paid to satisfy any liens or claims awarded to the plaintiff, any sums which it paid to satisfy any superior liens or claims, and its reasonable attorney's fees and expenses incurred in respect of this action.

The plaintiff now moves, in part, for a preliminary injunction relative to the proceeds received by Gerardi from the rental of the property. The plaintiff claims that Gerardi has accumulated in excess of \$400,000 in rental income since she took over the property, which she has retained for her exclusive use, and that the plaintiff is at risk of being irreparably harmed should Gerardi fail to apply the proceeds toward the maintenance and upkeep of the property.

CPLR §6301 provides, in relevant part, that

[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual * * *.

A preliminary injunction is a drastic remedy that should not be granted unless the plaintiff establishes a clear right to the relief under the law and the undisputed facts (see, Omakaze Sushi Rest. v. Ngan Kam Lee, 57 AD3d 497 [2nd Dept., 2008]).

As the plaintiff has failed to demonstrate that Gerardi has done or threatened to do any act in violation of its rights regarding the property, its request for a preliminary injunction is denied.

Gerardi's motion is also denied. Regarding the first cause of action, it is axiomatic that the purpose of a constructive trust is to prevent unjust enrichment (see, Hennessey v. Hunt, 272 AD2d 756, [3rd Dept., 2000]) and that such a trust will be imposed whenever necessary to satisfy the demands of justice (see, Simonds v. Simonds, 45 NY2d 233 [1978]). While the elements set forth in Sharp v. Kosmalski (40 NY2d 119 [1976]) – a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise, and unjust enrichment—are often cited as requirements for the imposition of a constructive trust, these elements are not to be applied rigidly (Simonds v. Simonds, 45 NY2d 233 [1978]; Cruz v. McAneney, 31 AD3d 54 [2nd Dept., 2006]).

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity

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converts him into a trustee * * *. A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.

(*Beatty v. Guggenheim Exploration Co.*, 225 NY 380 [1919], *superseded by statute on other grounds as recognized in Israel v. Chabra*, 12 NY3d 158 [2009]). Here, viewing the evidence in a light most favorable to the plaintiff (see, *Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept., 1990]), it is apparent that Gerardi, having reaped the benefits of the plaintiff's substantial contributions toward the purchase, maintenance, renovation, upkeep and carrying charges for the property, would be unjustly enriched were she permitted to retain an exclusive interest in the property. Thus, even if it may not be possible to establish the existence of a confidential or fiduciary relationship between the plaintiff, a limited liability company, and Gerardi, the former fiancée of its chairman and CEO,² this does not render the equitable remedy unavailable as a matter of law (see, *Sutton v. Sandler*, 13 NY2d 1007 [1963]). The Court further notes that the constructive trust doctrine extends to cases where, as is alleged here, a plaintiff invests funds, time or effort toward the purchase or improvement of property in reliance on a defendant's promise to share in some interest in the property (see, e.g., *Lester v. Zimmer*, 147 AD2d 340 [3rd Dept., 1989]). As for the third and fourth causes of action and the notice of pendency, Gerardi failed to support her motion with any relevant argument or proof.³

Chase's cross motion, which is for summary judgment dismissing the complaint against it and in its favor on its crossclaim against Gerardi, is granted only to the extent of granting summary judgment dismissing the complaint insofar as asserted against it, as the plaintiff has alleged no cause of action against it. As for the crossclaim, insofar as the relief requested is premised on the theory that Gerardi has defaulted under the terms of the HELOC and the mortgage, Chase has failed to demonstrate the existence of any default, whether under paragraph 15 of the HELOC⁴ or paragraph

² On September 6, 2006, Justice Blydenburgh held a conference on the record in which he granted an order of preclusion resolving in Gerardi's favor all issues addressed in her demands for a bill of particulars and for discovery and inspection with which the plaintiff failed to comply. The transcript of the conference was "so ordered" by Justice Blydenburgh on December 13, 2006. Although Gerardi claims that the plaintiff is barred, by virtue of Justice Blydenburgh's order, from demonstrating that she held any position with or owed any fiduciary duty to the plaintiff, the Court is unable to determine on this record what documents were timely served in response to her demand and, hence, what issues may be deemed resolved in her favor.

³ Relative to the notice of pendency, it is presumed that the requested cancellation is premised on the granting of summary judgment dismissing the first cause of action; a viable cause of action to impose a constructive trust on real property is sufficient to support the continued effectiveness of a notice of pendency (see, e.g., *Morice v. Garritano*, 62 AD3d 971 [2nd Dept., 2009]).

⁴ Paragraph 15 of the HELOC provides, in relevant part, that the borrower will be in default if she engages in fraud or material misrepresentation at any time in connection with the HELOC, if

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17 of the mortgage.⁵ Likewise, insofar as Chase seeks to recoup its alleged losses based on Gerardi's breach of the warranty in the mortgage that she will be fully responsible for any losses which "someone other than myself has some rights in the Property which I promise that I have," it has failed to demonstrate that such a breach occurred. To the extent that Chase seeks to accelerate amounts allegedly due under the HELOC—and it would appear to be undisputed that Gerardi is not in default in payment—it may not do so absent a showing that it complied with the provisions of paragraph 17 of the mortgage (*see*, n 5, *supra*). Finally, as for Chase's request for attorney's fees, based on paragraph 6 of the mortgage which establishes the lender's right to such fees upon the commencement of a "legal proceeding that may significantly affect the Lender's right in the Property," it is denied, in the interest of judicial economy, without prejudice to renewal upon the conclusion of the case.

The plaintiff's cross motion to vacate the Court's prior orders relating to the items of personal property which were used to furnish and decorate the property is also denied. The plaintiff contends that because each of those orders preceded the amendment of the complaint which added the (second) cause of action relating to the personal property, the Court lacked jurisdiction over the subject matter of the personal property at the time those orders were issued. It suffices to note, however, that such a "defect" does not implicate subject matter jurisdiction, which pertains to the Court's power to adjudicate a matter, and does not warrant the granting of the relief requested.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see*, CPLR §3212 [e] [1]).

In accordance with the foregoing, it is

ORDERED that the motion by the plaintiff (motion sequence #010) for an order preliminarily enjoining defendant Diane Gerardi, her employees, agents, servants, attorneys, and/or other persons, firms or entities acting for or on her behalf, from taking any steps or actions to

the lender does not receive the full amount of any minimum payment due within 60 days of its due date or the borrower fails to meet any of the repayment terms set forth in the HELOC or the mortgage, or if the borrower's action or inaction adversely affects the property or the lender's rights in the property.

⁵ Paragraph 17 of the mortgage provides that the borrower will be in default if she fails to make any payment required by the mortgage or the HELOC, if she engaged in or engages in fraud or material misrepresentation, either by act or omission, in connection with the mortgage and the HELOC, or if she acts or fails to act in a way that adversely affects the lender's security under the mortgage or any right the lender has in such security under the mortgage. It further provides that the lender may require immediate payment in full from the defaulting borrower only in the event that it sends the borrower a notice complying with certain stated conditions, and that the borrower fails to correct the default by the date stated in the notice.

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transfer, pledge, hypothecate, encumber, dispose of, dissipate, waste and/or use any and all proceeds received from the rental of the real property located at 35 Wireless Way, Southampton, New York for any purpose other than the necessary maintenance and preservation of the property, the motion by defendant Diane Gerardi (motion sequence #012) for an order pursuant to CPLR §3212 granting summary judgment dismissing the first, third, and fourth causes of action in the plaintiff's complaint, and vacating the notice of pendency filed against the subject property, the cross motion by defendant JP Morgan Chase Bank (motion sequence #013) for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint and in its favor on its first cross claim against defendant Diane Gerardi, and the cross motion by the plaintiff (motion sequence #014) for an order pursuant to CPLR 5015 (a) (4) vacating each of this Court's prior orders relating to the personal property which is currently the subject of this action, to wit, the order dated November 22, 2005 (Henry, J.), the order dated July 6, 2006 (Blydenburgh, J.), the December 6, 2006 decision on the record (Blydenburgh, J.), and the order dated December 13, 2006 (Blydenburgh, J.), upon the ground that the Court lacked subject matter jurisdiction, are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff (motion sequence #010) is denied; and it is further

ORDERED that the motion by defendant Diane Gerardi (motion sequence #012) is denied; and it is further

ORDERED that the cross motion by defendant JP Morgan Chase Bank (motion sequence #013) is granted to the extent of granting summary judgment dismissing the complaint insofar as asserted against it, and is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiff (motion sequence #014) is denied.

Dated: September 23, 2009


HON. WILLIAM B. REBOLINI, J.S.C.

RIDER

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