

Liquori v Mark

2010 NY Slip Op 31247(U)

May 12, 2010

Supreme Court, Suffolk County

Docket Number: 29353/2008

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 29353/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 ELEANOR VIOLET LIQUORI,

Plaintiff,

-against-

ROBERT MARK and JACOB MARK,

Defendants.

ORIG. RETURN DATE: JANUARY 14, 2009
 FINAL SUBMISSION DATE: OCTOBER 8, 2009
 MTN. SEQ. #: 001
 MOTION: MOT D

ORIG. RETURN DATE: FEBRUARY 19, 2009
 FINAL SUBMISSION DATE: OCTOBER 8, 2009
 MTN. SEQ. #: 002
 MOTION: MOT D

ORIG. RETURN DATE: FEBRUARY 19, 2009
 FINAL SUBMISSION DATE: OCTOBER 8, 2009
 MTN. SEQ. #: 003
 MOTION: MOT D

PLTF'S/PET'S ATTORNEY:

JOSEPH A. MILLER, III, ESQ.
 213-1 MONTAUK HIGHWAY
 WEST SAYVILLE, NEW YORK 11796
 631-563-1188

DEFT'S/RESP ATTORNEYS:

LAW OFFICE S OF JOHN P. DI MASCIO
 & ASSOCIATES, LLP
 300 GARDEN CITY PLAZA - SUITE 306
 GARDEN CITY, NEW YORK 11530-3318
 516-747-4343

Upon the following papers numbered 1 to 19 read on these motions TO AMEND PLEADINGS, TO DISMISS, TO DISQUALIFY ATTORNEY, AND FOR OTHER RELIEF. Order to Show Cause and supporting papers 1-3; Order to Show Cause and supporting papers 4-6; Order to Show Cause and supporting papers 7-9; Affidavit in Opposition to Motions and supporting papers 10, 11; Replying Affidavit and supporting papers 12, 13; Replying Affidavit and supporting papers 14, 15; Supplemental Affidavit and supporting papers 16, 17; Affidavit in Response to Supplemental Affidavit and supporting papers 18, 19; it is,

ORDERED that this motion (seq. #001) by defendant JACOB MARK ("Jacob"), for an Order:

- (a) granting Jacob leave to amend his Verified Answer;
- (b) directing plaintiff to pay directly to Jacob the sum of \$1,086.00 on the first day of each month, representing twenty (20%) percent of the monthly mortgage payment, inclusive of homeowner's insurance and property taxes, in connection with the residence and property located at 27 Canal Road, Oakdale, New York ("property");
- (c) directing plaintiff to pay for twenty (20%) percent of the costs of any repairs to or maintenance of the property, including but not limited to landscaping, plumbing system, heating system, air conditioning, and roof repair; and
- (d) directing plaintiff to pay for fifty (50%) percent of the costs of utilities in connection with the property, including but not limited to heating oil, electricity, water, telephone, internet and cable,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion (seq. #002) by defendant ROBERT MARK ("Robert"), for an Order:

- (a) pursuant to CPLR 3211, dismissing plaintiff's first cause of action based upon Civil Rights Law § 80-b as against Robert;
- (b) pursuant to CPLR 3211, dismissing plaintiff's second cause of action based upon Debtor and Creditor Law §§ 276, 276-a, and 278 as against Robert;
- (c) pursuant to CPLR 3211, dismissing plaintiff's third cause of action based upon Real Property Actions and Proceedings Law § 901 *et seq.* as against Robert; and
- (d) pursuant to 22 NYCRR § 1200.21, disqualifying Joseph A. Miller, III, Esq. as counsel for plaintiff herein,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion (seq. #003) by Jacob for an Order:

- (a) pursuant to CPLR 3211, dismissing plaintiff's first cause of action based upon Civil Rights Law § 80-b as against Jacob;
- (b) pursuant to CPLR 3211, dismissing plaintiff's second cause of action based upon Debtor and Creditor Law §§ 276, 276-a, and 278 as against Jacob; and
- (c) pursuant to 22 NYCRR § 1200.21, disqualifying Joseph A. Miller, III, Esq. as counsel for plaintiff herein,

is hereby **GRANTED** solely to the extent set forth hereinafter.

The Court has received an affidavit of plaintiff in opposition to defendants' motions, reply affidavits from both defendants in further support of their motions, a supplemental affidavit from Robert in further support of his motion to dismiss, and an affidavit of plaintiff in response to Robert's supplemental affidavit.

Plaintiff commenced this action on August 7, 2008, with the filing of a summons with notice and verified complaint, seeking monetary damages in the amount of \$250,000 and partition of the property, all stemming from the marriage engagement of plaintiff and Robert. Issue was joined with the service of Verified Answers by both defendants on or about October 2, 2008. Plaintiff alleges that she became engaged to marry Robert in May of 2004, and that in May of 2006, the couple traveled to the Dominican Republic and participated in a wedding ceremony on May 13, 2006, but that Robert thereafter refused to sign the necessary documents to legalize the marriage.

Plaintiff seeks damages based upon three causes of action. The first cause of action is based upon Civil Rights Law § 80-b, which addresses gifts *in contemplation of marriage*. Plaintiff seeks to be reimbursed for expenditures made by her during her engagement to Robert, including reimbursement for a loan taken by plaintiff on or about August 4, 2004 for the purchase of a Sea Ray boat; improvements to the property; and wedding expenses in the amount of \$13,718 in connection with the Dominican Republic ceremony. The second cause of action is based upon Debtor and Creditor Law §§ 276, 276-a, and 278, which permit creditors to set aside fraudulent conveyances. Plaintiff seeks to set

aside a note and mortgage in the amount of \$640,500 executed by plaintiff and Jacob in connection with the purchase of the property on May 13, 2005; a retail installment contract for the Sea Ray boat; and a home equity loan taken by plaintiff's mother in the amount of \$133,933.96, which monies were used towards a down payment on the property. Plaintiff's third cause of action seeks partition of the property, which is owned by plaintiff and Jacob as tenants in common but alleged to have been purchased as a marital residence for plaintiff and Robert, and restitution for funds she allegedly paid to the sellers at the closing.

Jacob has now filed the instant motion for an Order granting Jacob leave to amend his Verified Answer to seek affirmative relief from plaintiff; directing plaintiff to pay to Jacob the sum of \$1,086.00 on the first day of each month, representing twenty (20%) percent of the monthly mortgage payment in connection with the property, including homeowner's insurance and property taxes; directing plaintiff to pay for twenty (20%) percent of the costs of any repairs to or maintenance of the property, including but not limited to landscaping, plumbing system, heating system, air conditioning, and roof repair; and directing plaintiff to pay for fifty (50%) percent of the costs of utilities in connection with the property, including but not limited to heating oil, electricity, water, telephone, internet and cable.

By deed dated May 13, 2005, plaintiff and Jacob acquired title to the property as tenants in common, with an eighty (80%) percent interest conveyed to Jacob and a twenty (20%) percent interest conveyed to plaintiff. However, Jacob indicates that since the purchase of the property, he has made "almost all" of the monthly mortgage payments, notwithstanding the fact that plaintiff, not Jacob, resides at the property. As such, Jacob seeks to amend his answer to receive a credit from plaintiff in the amount of twenty (20%) percent of the mortgage payments made by him.

CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (CPLR 3025 [b]). Leave to amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 2007 NY Slip Op 5247 [2d Dept]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 2007 NY Slip Op 5234 [2d Dept]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

Plaintiff has indicated that she has no objection to Jacob amending his answer as it "places in issue all credits due me." In view of the foregoing, that branch of Jacob's motion for leave to amend his Verified Answer is **GRANTED** to the extent that Jacob is granted leave to serve the proposed Amended Verified Answer, annexed to Jacob's moving papers as Exhibit "D," upon plaintiff and Robert. The proposed Amended Verified Answer shall be deemed served upon plaintiff and Robert as of the date of service of the instant Order with notice of entry. The parties may then serve responsive pleadings in accordance with CPLR 3025 (d).

Jacob also seeks a direction from the Court that plaintiff begin paying to Jacob the sum of \$1,086.00, representing twenty (20%) percent of the monthly mortgage payment of \$5,433.06. Further, Jacob seeks a direction that plaintiff begin paying to Jacob twenty (20%) percent of the costs of maintenance and repairs to the property, and fifty (50%) percent of the costs of utilities, during the pendency of this action, so that the property does not fall into a state of disrepair. As discussed, pursuant to the deed dated May 13, 2005, Jacob holds an eighty (80%) percent interest in the property and plaintiff holds a twenty (20%) percent interest. In addition, plaintiff currently resides at the property. In view of the foregoing, those branches of Jacob's motion seeking contribution from plaintiff towards the mortgage, maintenance and repairs, and utilities, is **GRANTED** to the extent that plaintiff shall be responsible for twenty (20%) percent of the following, during the pendency of this action: (a) the monthly mortgage payment; (b) the costs of reasonable and necessary maintenance and repairs; and (c) the costs of the utilities.

With respect to those branches of Robert's motion seeking dismissal, Robert argues that plaintiff's first cause of action pursuant to Civil Rights Law § 80-b must be dismissed as plaintiff alleges that she and Robert did in fact marry. Moreover, Robert claims that plaintiff's contemplated marriage to Robert could not have been her sole consideration for purchasing the property, as she received the benefit of residing at the property. Further, Robert alleges that plaintiff's second cause of action pursuant to Debtor and Creditor Law §§ 276, 276-a, and 278 must also be dismissed, as the aforementioned statutes are designed to permit a creditor to set aside a fraudulent conveyance designed to hinder, delay or defraud the collection of a debt; however, Robert argues that plaintiff is not a creditor of Robert. Thus, Robert alleges that plaintiff lacks standing to assert such a cause of action. In addition, Robert seeks dismissal of plaintiff's third cause of action against Robert seeking partition of the property, as

Robert contends that plaintiff fails to allege that he holds an ownership interest in the property.

Regarding those branches of Jacob's motion seeking dismissal, Jacob argues that plaintiff's first cause of action must be dismissed, as plaintiff fails to allege that there was ever a contemplated marriage between plaintiff and Jacob. Rather, as discussed, the contemplated marriage between plaintiff and Robert. Jacob reiterates Robert's argument that plaintiff lacks standing to assert her second cause of action.

On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

Pursuant to Civil Rights Law § 80-b, an individual may recover property or other gifts where the sole motivation for the transfer was a contemplated marriage which never occurred (see *Gaden v Gaden*, 29 NY2d 80 [1971]; *Von Bing v Mangione*, 309 AD2d 1038 [2003]; *Clapper v Kohls*, 169 AD2d 860 [1991]). Here, the Court finds that plaintiff has sufficiently pleaded a cause of action pursuant to Civil Rights Law § 80-b as against Robert, but not as against Jacob. It is undisputed that plaintiff and Robert, not Jacob, were engaged to be married. While defendants argue that plaintiff's complaint is fatally flawed in that it recites that plaintiff and Robert did marry, the Court notes that the complaint goes on to allege that Robert would not sign "certain paperwork to make the marriage official."

Next, the purpose of Debtor and Creditor Law §§ 276, 276-a, and 278 "is...to aid specific creditors who have been defrauded by the transfer of a debtor's property" (*HBE Leasing Corp. v Frank*, 48 F 3d 623, 634 [2d Cir 1995]). "[O]nly creditors of the transferor are entitled to assert claims under [these statutes] for fraudulent conveyances" (*Adelphia Recovery Trust v Bank of Am., N A.*, 390 BR 80 [SDNY 2008], quoting *Lippe v Bairnco Corp.*, 225 BR 846 [SDNY 1998]). In the instant matter, plaintiff is not a creditor of either defendant in any of the transactions she seeks to set aside, to wit: the mortgage executed by plaintiff and Jacob; a retail installment contract for the Sea Ray boat; and a home equity loan taken by plaintiff's mother in the amount of \$133,933.96.

Therefore, the Court finds that plaintiff's second cause of action must be dismissed as to both defendants.

With respect to plaintiff's third cause of action, RPAPL Article 9 governs actions for partition. RPAPL 901 provides in pertinent part that "a person holding and in possession of real property as joint tenant or tenant in common . . . may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners" (RPAPL 901 [1]; see *Quattrone v Quattrone*, 210 AD2d 306 [1994]; *Bufogle v Greek*, 152 AD2d 527 [1989]). While it has been held that the right of partition is not absolute and may be precluded by the equities present in a given case (see e.g. *Kopsidas v Krokos*, 294 AD2d 406 [2002]; *Stressler v Stressler*, 193 AD2d 728 [1993]; *Ferguson v McLaughlin*, 184 AD2d 294 [1992]; *Barol v Barol*, 95 AD2d 942 [1983]), it does not appear from this record that there are equitable reasons to prevent partition. It appears that the property is improved by a single family residence. Consequently, the partition of said property between the owners would most likely result in great prejudice to the owners. Moreover, it is undisputed that the property is held by plaintiff and Jacob as tenants in common. Thus, the Court finds that plaintiff's third cause of action must be dismissed as against Robert, as he does not hold an ownership interest in the property.

In view of the foregoing, and upon favorably viewing the facts alleged in plaintiff's verified complaint and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether she can ultimately establish the truth of her allegations before the trier of fact, the Court finds that plaintiff has sufficiently pleaded a cause of action pursuant to Civil Rights Law § 80-b as against Robert, and has sufficiently pleaded a cause of action pursuant to RPAPL 901 *et seq.* as against Jacob.

Accordingly, those branches of Robert's motion seeking dismissal are **GRANTED** to the extent that plaintiff's second and third causes of action are dismissed as asserted against Robert. Those branches of Jacob's motion seeking dismissal are **GRANTED** to the extent that plaintiff's first and second causes of action are dismissed as asserted against Jacob.

Finally, with respect to those branches of defendants' motions seeking to disqualify Joseph A. Miller, III, Esq. from representing plaintiff herein, Disciplinary Rule 5-102 of New York's Code of Professional Responsibility

provides that when a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of his client, the lawyer shall not serve as an advocate on issues of fact before the tribunal (22 NYCRR § 1200.21). Courts, in determining whether a party's lawyer, at its adversary's instance, should be disqualified during litigation, must also consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437 [1987]).

Further, disqualification of counsel may be required only when it is likely that the testimony to be given by the witness is necessary, and that such testimony is or may be prejudicial to the client (see *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Goldberger v Eisner*, 21 AD3d 401 [2005]; *Daniel Gale Assoc. v George*, 8 AD3d 608 [2004]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Matter of Porter*, 35 AD3d 477 [2006]).

After reviewing the papers submitted, and balancing the aforementioned factors, the Court finds that disqualification of Mr. Miller is not warranted herein. Defendants' arguments in support of disqualification, i.e., that Mr. Miller's testimony is necessary because he represented plaintiff and Jacob in the real estate transaction at issue and in the negotiations regarding the respective ownership interests, and that Mr. Miller is the only source of information regarding conversations between himself and the parties, is unpersuasive, as defendants could also elicit the information from other sources including the parties herein. Moreover, regarding the issue of the division of the ownership interests in the property and the modification of the deed at the closing to change the ownership interests from fifty (50%) percent each to eighty (80%) percent to Jacob and twenty (20%) percent to plaintiff, the Court similarly finds that Mr. Miller is not the only source of information on this issue. Defendants themselves may testify on the issue, and defendants may also seek the testimony of Richard Zimmer, of First American Title Company; Robin Long, Esq., the seller's attorney; and/or Margaret McVey, the notary public who notarized the signatures on the deed, who were all present at the closing and may have personal knowledge of the circumstances surrounding the modification of the deed. Further, Mr. Miller indicates that the only testimony he can offer would

relate to the recorded documents, all of which speak for themselves, and that he has no knowledge of what the parties' intentions were with respect to the division of ownership as he did not mediate or negotiate such division between the parties. Finally, the Court notes that at a status conference of this matter conducted on May 6, 2010, counsel for plaintiff and defendants stipulated to sell the property and to place the proceeds of the sale in escrow pending the ultimate resolution of this matter.

In view of the foregoing, those branches of defendants' motions seeking to disqualify Mr. Miller from representing the plaintiff herein are **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 12, 2010


HON. JOSEPH FARNETI
Acting Justice Supreme Court