

Garcia-Valera v McLendon

2010 NY Slip Op 32623(U)

September 23, 2010

Supreme Court, New York County

Docket Number: 109583/2009

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON Justice

PART 5

Index Number : 109583/2009
GARCIA-VALERA, BARBARA
VS.
MCLENDON, ERIC
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/21/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-3
4-7
8-10

FILED
SEP 23 2010

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the enclosed memorandum decision and order.

NB 10/18/10 @ 11 AM
PC set at end of
decision

Dated: 9/23/10

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

----- X

BARBARA GARCIA-VALERA,

Plaintiff,

Index No. 109583/2009

- against-

DECISION AND ORDER

ERIC MCLENDON and WELLS FARGO BANK,

Defendants.

FILED
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JANE S. SOLOMON, J.S.C.:

Plaintiff Barbara Garcia-Valera's (Garcia-Valera) moves for summary judgment (CPLR 3212) in this action for partition. The motion is denied, with leave to renew upon completion of discovery. Defendant Eric McLendon's (McLendon) cross motion for leave to file an amended answer and counterclaims (CPLR 3025 [b]) is granted.

The complaint asserts five claims, without identifying any single cause of action (see CPLR 2014). Garcia-Valera first seeks a declaration that she and McLendon each owns a one-half undivided interest, as tenants-in-common, in premises located at 137 East 118th Street in Manhattan (the premises). She then seeks partition, a judicial sale of the premises, and an accounting, as well as attorneys' fees.

For clarity, the declaratory relief will be designated as the first cause of action; partition, as the second cause of

action; a judicial sale as the third cause of action, an accounting as the fourth cause of action, and the demand for attorneys' fees as the fifth.

Defendant Wells Fargo Bank (Wells Fargo) holds a mortgage(the mortgage) dated October 31, 2005 on the premises securing a note in principal amount of \$950,000. Garcia-Valera and McLendon are jointly and severally liable as borrowers, and each is listed as an owner. Wells Fargo has filed an answer, but has not appeared on this motion.

The premises consist of a four-story brownstone, originally purchased on April 25, 2002 by McLendon and David Ushery (Ushery) for about \$600,000 with mortgage loans from Wells Fargo. The building then was rehabilitated. According to McLendon, Ushery never had any financial or real ownership interest in the premises but co-signed with him to enhance his borrowing ability. McLendon contends that Garcia-Valera acted in the same manner, which she denies.

Pursuant to a bargain and sale deed dated October 31, 2005 (ex. A to Garcia-Valera aff.), McLendon and Ushery conveyed title to McLendon and Garcia-Valera, for a nominal consideration and Garcia-Valera and McLendon executed the current Wells Fargo mortgage which, among other things, satisfied the prior mortgages. Their deed does not specify the nature of the tenancy. Therefore, a tenancy-in-common is presumed, pursuant to EPTL 6-2.2 (a), which

provides: "[a] disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy."

While the building was being renovated the parties lived in her apartment. They moved into the premises in 2005 and lived there together until July of 2008, when Garcia-Valera left. Garcia-Valera states that they broke up, and McLendon asked her to leave. McLendon states that she left voluntarily. According to Garcia-Valera, they were planning to get married; McLendon does not deny this, but states that they were never formally engaged.

Thereafter, as documented by a series of e-mails, they negotiations about McLendon's purchase of Garcia-Valera's interest and allegedly agreed that on \$100,000, but no written agreement was ever executed, and Garcia-Valera denies that she orally agreed. An unexecuted agreement is in the record (ex. E to Goldman aff.).

Garcia Valera moves for partial summary judgment (CPLR 3212 [e]), granting partition, directing the immediate sale of the premises, and dividing the proceeds equally, after payment of all liens. She has not sought judgment on her claim for declaratory relief. In opposing the motion, McLendon argues that discovery is required, particularly of Garcia-Valera. He points out that she obtained an adjournment of her deposition and then made this motion. He also cross moves for leave to file an amended answer

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and counterclaims (CPLR 3025 [b]), expanding his affirmative defenses and asserting two counterclaims. At this early stage of the case, and in light of the policy of freely granting such leave in the absence of surprise or prejudice (see *Jacobson v McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652 [1st Dept 2009]), unless the proposed counterclaim is "patently devoid of merit" (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]), the cross-motion should be granted.

The first proposed counterclaim asserts that Garcia-Valera co-signed the deed and mortgage as an accommodation solely for the benefit of McLendon, so that her interest is illusory. McLendon further alleges that he has paid all costs and expenses related to the financing, care and upkeep of the premises.

As an alternative, the second counterclaim asserts that Garcia-Valera would be unjustly enriched if she were permitted to recover through partition because she has breached her promise to hold title to the premises in trust solely for McLendon's benefit, and that such promise was based on a personal, confidential relationship between the parties. McLendon seeks a declaration that he is the sole owner of the premises.

RPAPL § 901 (1) sets forth who may maintain a partition action and provides:

[a] person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, 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.

As the Appellate Division, First Department recently stated:

[p]ursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property. The right to seek partition, however, is not absolute and may be precluded where the equities so demand, or where partition would result in prejudice [citations omitted)

(*Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]).

"[P]artition is an equitable remedy in nature and Supreme Court has the authority to adjust the rights of the parties so each receives his or her proper share of the property and its benefits" (*Hunt v Hunt*, 13 AD3d 1041, 1042 [3d Dept 2004]).

By submitting the deed and mortgage, Garcia-Valera has made a threshold showing of her interest in the premises entitling her to maintain this action. She has not, however, demonstrated her entitlement to partition or a judicial sale and an equal share of the proceeds judgment as a matter of law . The parties' submissions are insufficient to determine their rights to the real estate. Garcia-Valera submits self-prepared summaries of financial transfers and expenditures allegedly relating to the premises (ex. E and I to mov. aff.), without any underlying

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documentation. McLendon has challenged the accuracy of this material.

Moreover, McLendon's proposed counterclaim for a constructive trust provides an "evidentiary basis ... to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). Discovery should provide enhance the evidentiary record to enable the court to rule on the issues. "[T]he right to partition is ... absolute in the absence of countervailing conditions ..., [and therefore] such issues as the interests of the parties and whether partition may be had without great prejudice should first be determined [citations and internal quotations omitted]" (*Bentley v Dox*, 12 AD3d 1187, 1187 [4th Dept 2004]; see *Grossman v Baker*, 182 AD2d 1119 [4th Dept 1992]).

A constructive trust is an equitable remedy available when the holder of the legal title may not in good conscience retain a beneficial interest. "The elements needed for the imposition of a constructive trust are (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Pereira v Glicker*, 61 AD3d 948, 949 [2d Dept 2009]). A finding of unjust enrichment must be "'based on a broad view of the human setting involved [citation omitted]'" (*Coco v Coco*, 107 AD2d 21, 26 [2d Dept 1985]).

Unlike partition, which is both a statutory and equitable remedy, a constructive trust is purely equitable, and is routinely pleaded in actions that also seek partition of real property. They are claims which invite discovery:

Both partition and constructive trust are remedies which compel the court to weigh the equities of the parties and fashion a resolution of the matter which achieves a fair distribution of the property in question, particularly where close familial relations, alleged implied or explicit promises made in the context of same and the reliance of defendant thereupon are at issue. Here, questions of intent, credibility and the parties' various contributions to, and connections with, the property necessitate further discovery and the denial of the summary resolution sought by plaintiffs.

(*Amato v Amato*, 24 Misc 3d 1216[A] *14, 2009 NY Slip Op 51465[U] [Sup Ct, Kings County 2009]).

Accordingly, it is

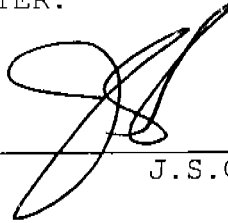
ORDERED that plaintiff Garcia-Valera's motion for partial summary judgment is denied, without prejudice to renewal upon completion of discovery; and it further is

ORDERED that defendant McLendon's cross motion for leave to serve and file an amended answer and counterclaims is granted, and the same in the form of Exhibit A to the cross motion is deemed served upon entry hereof; and it further is

ORDERED that the parties appear for a Preliminary Conference in Part 55, room 432 at 60 Centre Street on October 18, 2010 at 11 AM.

Dated: September 23, 2010

ENTER:



J.S.C.

FILED

SEP 23 2010

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NEW YORK**

JANE S. SOLOMON