

Bourne v Bourne

2010 NY Slip Op 32765(U)

September 29, 2010

Sup Ct, Nassau County

Docket Number: 21804/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

KIMBERLY A. BOURNE,

Plaintiff,

- against -

VINCENT ROBERT BOURNE a/k/a VINCENT R.
BOURNE, JR., KRISTY L. BOURNE, KIMBERLY
GILLINGS and VINCENT BOURNE a/k/a
VINCENT R. BOURNE, SR.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 21804/09
Motion Seq. Nos.: 01, 02,
03, 04
Motion Dates: 04/19/10
06/10/10
07/12/10
08/11/10

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion, Affidavits, Memorandum of Law and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion, Affidavit, Affirmation and Exhibits</u>	<u>2</u>
<u>Amended Notice of Cross-Motion</u>	<u>3</u>
<u>Affirmation in Opposition to Cross-Motion</u>	<u>4</u>
<u>Affidavit in Opposition to Cross-Motion</u>	<u>5</u>
<u>Notice of Cross-Motion, Affidavits and Affirmation</u>	<u>6</u>
<u>Affirmation in Opposition to Cross-Motion</u>	<u>7</u>
<u>Reply Affidavit</u>	<u>8</u>
<u>Reply Affirmation</u>	<u>9</u>
<u>Sur-Reply</u>	<u>10</u>
<u>Defendant's Response to Plaintiff's Sur-Reply Affirmation</u>	<u>11</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Motion by defendants Kristy L. Bourne and Kimberly Gillings for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint is denied without prejudice to renewal upon

proper substitution of counsel. Cross-motion by defendants Vincent Bourne, Jr. and Vincent Bourne, Sr. for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint is denied. Amended cross-motion by plaintiff for an order granting a default judgment against defendants Mr. Bourne, Jr. and Mr. Bourne, Sr. and for an order pursuant to New York State Rules of Professional Conduct, Rule 1-9 and Rule 3.7 disqualifying Peter K. Ledwith and the law firm of Ledwith & Atkinson from representing any defendant is determined as hereinafter provided.

Initially, we note that the branch of plaintiff's motion which seeks a default judgment against Messrs. Bourne has been withdrawn.

Parties

Plaintiff is the mother of defendants Kristy L. Bourne and Vincent Robert Bourne, Jr. ("Vincent Jr."). Plaintiff is also the lawful spouse of Vincent R. Bourne, Sr. ("Vincent Sr."). Vincent Sr. is the father of Kristy L. Bourne and Vincent Jr. Defendant Kimberly Gillings is the companion of defendant Kristy L. Bourne.

The complaint alleges four causes of action based upon constructive trust, breach of fiduciary duty, fraud and unjust enrichment. Specifically, plaintiff alleges the following facts:

From in or about 2001 up to November 20, 2003 plaintiff and defendants with the exception of defendant Gillings, rented the Premises from one Patricia Hill, the Administratrix of the Estate of Robert C. Bourne.

Patricia Hill is the mother of Vincent, Sr., the mother-in-law of plaintiff Kimberly A. Bourne and the grandmother of defendant Vincent, Jr. and defendant Kristy L. Bourne.

In or about August, 2001, defendant Vincent Sr. was involved in a motor vehicle accident in which he sustained serious and protracted injuries.

Thereafter, Vincent, Sr. and plaintiff Kimberly A. Bourne

commenced an action in Supreme Court Nassau County against Doris Kosinski under Index No. 14829/01. Prior to November 20, 2003, this lawsuit was settled and the settlement proceeds were disbursed to Vincent, Sr. and Kimberly A. Bourne.

Plaintiff further alleges that:

“The settlement proceeds, or a portion thereof disbursed for the benefit of Vincent Sr. was thereafter gifted by Vincent, Sr. to Kimberly A. Bourne with the agreement that Vincent, Sr. and Kimberly A. Bourne would purchase the Premises from Vincent, Sr.’s mother for the benefit of the plaintiff and defendants, with the exception of defendant Gillings, so that the family would own the Premises.

For financial planning purposes it was agreed between Vincent, Sr. and plaintiff Kimberly A. Bourne that the purchase of the Premises would be effected in the name of their son Vincent, Jr. to hold in trust for the benefit of Vincent, Sr. and plaintiff Kimberly A. Bourne, his lawful spouse.

On or about November 20, 2003 Vincent, Sr. and plaintiff Kimberly A. Bourne purchased the Premises in the name of defendant Vincent, Jr. to hold in trust for the benefit of plaintiff and defendant Vincent, Sr.

From on or about November 20, 2003 to date plaintiff Kimberly A. Bourne paid virtually all of the carrying expenses on the Premises including but not limited to real estate taxes, utilities and maintenance.”

Plaintiff Kimberly A. Bourne has resided at the Premises as her principal residence from prior to November 20, 2003 to date.

On or about February 24, 2009, defendant Vincent, Jr. purported to convey title in fee to

defendant Kristy L. Bourne and defendant Kimberly Gillings without consideration.

On or about August 22, 2009, defendant Vincent, Jr. purported to convey his interest in the said trust to defendant Kristy L. Bourne.

Parties' Contentions

Defendants Kristy L. Bourne, Kimberly Gillings and Vincent Bourne, Sr. and Vincent Bourne, Jr. contend that the complaint fails to state a cause of action for constructive trust as defendants Kristy L. Bourne and Kimberly Gillings are good faith purchasers for value; and plaintiff's action is barred by General Obligations Law § 5-703.

In opposition to the motion and in support of the cross-motion, plaintiff alleges that the complaint pleads a cause of action for constructive trust, to wit:

- "a) Jr. made a promise to plaintiff to take title to the premises on the condition that he hold same in trust for plaintiff (the promise);
- b) in reliance on that promise plaintiff transferred money to Junior to purchase title (transfer);
- c) a confidential relationship existed between mother and son (confidential relationship between the parties);
- d) defendants are unjustly enriched (unjust enrichment)."

Plaintiff further seeks to disqualify Peter K. Ledwith and the law firm of Ledwith & Atkinson from representing any defendants.

In support of the cross-motion, plaintiff asserts that Mr. Ledwith, the attorney for defendants Kristy L. Bourne and Kimberly Gillings, has previously represented herself, her husband/defendant Vincent R. Bourne, Sr. and her mother-in-law Patricia Hill, the seller of the subject premises. Plaintiff further claims that Mr. Ledwith may be called as a witness on significant issues of fact in this matter and that his testimony may be prejudicial to her interests.

Notably, Mr. Ledwith admits that he represented plaintiff's husband in a limited capacity in connection with an automobile accident case where plaintiff was named as the spouse of Vincent Bourne in a cause of action for loss of services. Mr. Ledwith also concedes that he represented Patricia Hill, the former owner of the premises. In fact, by letter dated October 22, 2003, Mr. Ledwith served a 30-day notice of termination of a month-to-month tenancy at the premises known as 12 Madison Street, Franklin Square, NY 11010 upon the entire Vincent Bourne family. *See* Exhibit A annexed to cross-motion. Mr. Ledwith also referred Peter Zullo, Esq. to Vincent Jr. for the closing of title to the subject premises and prepared a power of attorney for Vincent Sr. appointing Kimberly Bourne as his attorney in fact and agent with an unlimited power to act on his behalf (a copy of the power of attorney prepared, acknowledged and notarized by Mr. Ledwith is annexed as Exhibit F to plaintiff's cross-motion).

In addition, Mr. Ledwith was involved with the preparation of the deed dated August 22, 2009 conveying the subject premises from Vincent Bourne to Kristy L. Bourne. *See* Exhibit H annexed to plaintiff's cross-motion.

Disqualification

A motion to disqualify an attorney is addressed to the sound discretion of the Supreme Court. *See Falk v. Gallo*, 73 A.D.3d 685, 901 N.Y.S.2d 99 (2d Dept. 2010); *Nationscredit Financial Services Corp. v. Turcios*, 41 A.D.3d 802, 839 N.Y.S.2d 523 (2d Dept. 2007). Any doubts are to be resolved in favor of disqualification. *See Stober v. Gaba & Stober, P.C.*, 259 A.D.2d 554, 686 N.Y.S.2d 440 (2d Dept. 1999).

"A party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted." *Falk v. Gallo, supra*. *See also Aryeh v. Aryeh*, 14 A.D.3d 634, 788 N.Y.S.2d 622 (2d Dept. 2005).

Hence, the party seeking to disqualify an attorney bears the burden on the motion. *See S & S Hotel Ventures, Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 515 N.Y.S.2d 735 (1987); *Falk v. Gallo, supra*.

In *Falk v Gallo, supra*, the Appellate Division noted that:

The advocate-witness rules contained in the Code of Professional Responsibility, which have been superseded by the Rules of Professional Conduct, provide guidance, but are not binding authority, for the courts in determining whether a party's attorney should be disqualified during litigation (*see S & S Hotel Ventures, Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 515 N.Y.S.2d 735 (1987)). Rule 3.7 of the Rules of Professional Conduct provides that unless certain exceptions apply, "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[a]).

At bar, Mr. Ledwith has knowledge regarding the source of the funds for the sale and purchase of the subject premises and the terms regarding the transaction. Hence, he is "likely to be called as a witness on a significant issue of fact." *See* Rules of Professional Conduct, 22 NYCRR 1200.0, Rule 3.7(a); *Falk v. Gallo, supra*. Thus, plaintiff's motion to disqualify is granted. Defendants are directed to obtain new counsel, if they so elect, and shall file with this Court a substitution of attorney within 45 days from service of a copy of this order upon their attorneys.

Constructive Trust

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must accept all facts as alleged in the complaint to be true and accord the plaintiff the benefit of every possible inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Breytman v. Olinville Realty LLC*, 54 A.D.3d 703, 864 N.Y.S.2d 70 (2d Dept. 2008).


Generally, a constructive trust may be imposed in situations " "[w]hen property has been

acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.’ ” *Maiorino v. Galindo*, 65 A.D.3d 525, 883 N.Y.S.2d 589 (2d Dept. 2009) quoting *Sharp v. Kosmalski*, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976). The necessary elements for the imposition of a constructive trust are: “(1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on that promise; and (4) unjust enrichment.” See *Watson v. Pascal*, 65 A.D.3d 1333, 886 N.Y.S.2d 440 (2d Dept. 2009); *Maiorino v. Galinda*, *supra*; *Sharp v. Kosmalski*, *supra*; *Pereira v. Glicker*, 61 A.D.3d 948, 876 N.Y.S.2d 910 (2d Dept. 2009; *Nastasi v. Nastasi*, 26 A.D.3d 32, 805 N.Y.S.2d 585 (2d Dept. 2005). “The remedy is flexible and a constructive trust may be imposed even without an express premise where, given reliance upon the confidential relationship of the parties, ‘a premise may be implied or inferred from the very transaction itself.’ ” *Watson v. Pascal*, *supra*; quoting *Sharp v. Kosmalski*, *supra*.

In light of the foregoing determination regarding disqualification of counsel, the motion and cross-motion which seek dismissal pursuant to CPLR § 3211(a)(7) may not be addressed on the merits at this juncture.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 29, 2010

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE