

Shri Guru Ravidas Sabha of N.Y., Inc. v Singh

2011 NY Slip Op 30303(U)

January 28, 2011

Sup Ct, Queens County

Docket Number: 7973/2010

Judge: David Elliot

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
JusticeIA Part 14

SHRI GURU RAVIDAS SABHA OF NEW YORK,
INC.

x

Index
Number 7973 2010Motion
Date October 5, 2010

- against -

Motion
Cal. Number 23

AMARJIT SINGH, et al.

Motion Seq. No. 2

x

The following papers numbered 1 to 17 read on this motion by plaintiff for an order granting specific performance and directing defendants Amarjit Singh and Darbara Singh to transfer title to the real property known as 61-01 Broadway, Woodside, New York to the plaintiff, within 30 days, pursuant to an agreement dated June 1998, and in the alternative, seeks an award of damages in the sum of \$1 million dollars. Defendants cross-move in opposition and seek an order granting summary judgment on their counterclaim for a rendition of accounts.

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Notice of Motion - Affirmation - Affidavits - Exhibits (A-I).....	1-6
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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff Shri Guru Ravidas Sabha of New York, Inc. (the Temple) was incorporated on February 19, 1998, and operates a house of worship located at 61-01 Broadway, Woodside, New York. Said real property was purchased by four members of the Temple, Avtar Bhatia, Hardial Duggal, Amarjit Singh and Darbara Singh pursuant to a contract of sale dated January 9, 1998 for a purchase price of \$560,000.00. It is asserted that the Temple

paid the down payment of \$25,000.00, and paid the sum of \$210,000.00 at the closing held on June 9, 1998. The four individual purchasers obtained a mortgage in the sum of \$325,000.00 from Maspeth Federal Savings and Loan Association, and title to the real property passed to Avtar Bhatia, Hardial Duggal, Amarjit Singh and Darbara Singh pursuant to a deed dated June 9, 1998.

In June 1998, Avtar Bhatia, Hardial Duggal, Amarjit Singh and Darbara Singh, entered into a written agreement with Shri Guru Ravidas Temple, which identifies the individuals as Members and states in pertinent part, as follows:

“THAT, a contract of sale for the purchase of property located at 61-01 Woodside Avenue [sic], Woodside, New York is authorized by the TEMPLE and to be signed by the MEMBERS;

THAT, the contract was entered into on January 9, 1998, by the MEMBERS as Purchasers and the Seller, YOUNG BAE LEE for the purchase of the aforementioned property at 61-01 Woodside Avenue [sic], Woodside, New York at a purchase of FIVE HUNDRED and SIXTY THOUSAND (\$560,000.00) DOLLARS containing a mortgage contingency clause of THREE HUNDRED AND TWENTY FIVE THOUSAND (\$325,000.00) DOLLARS;

THAT, a closing of title was held on June 9, 1998 wherein the property was purchased and the MEMBERS did sign a Bond and Mortgage in the amount of THREE HUNDRED and TWENTY FIVE THOUSAND (\$325,000.00) DOLLARS whereby said MEMBERS are personally liable for the repayment of said mortgage; that title to the property is vested in MEMBERS names only and that the TEMPLE does not appear as the legal owner or mortgagor;

THAT, said property is used as a house of worship only and that MEMBERS or their families will not personally reside therein;

THAT, the TEMPLE is hereby solely responsible for all payments of the MASPETH Mortgage and will advance said payments to MEMBERS in a timely fashion, on a monthly basis, in order to avoid jeopardizing the credit rating of MEMBERS;

THAT, MEMBERS agree to transfer said property to the TEMPLE upon request in writing from the TEMPLE upon satisfaction of the

MASPETH Mortgage. In the event that any transfer taxes are due to New York City or New York State, the TEMPLE agrees to reimburse MEMBERS for said expenses.

This Agreement shall be binding upon the heirs and assigns of all parties and any successors in interest of the TEMPLE.

This Agreement may not be changed except in writing duly signed by all the parties.”

On March 13, 2006, Maspeth Federal Savings and Loan Association issued a satisfaction of the mortgage dated June 9, 1998 that was made with Avtar Bhatia, Hardial Duggal, Amarjit Singh and Darbara Singh in the principal sum of \$325,000.00, which was recorded on July 14, 1998. The satisfaction of the mortgage was recorded on May 2, 2006.

Counsel for the Temple, in a letter dated December 17, 2009, and addressed to Amarjit Singh and Darbara Singh, demanded that they comply with the June 1998 agreement and transfer their interest in the subject real property to the Temple. Counsel for the Temple, in a letter dated February 26, 2010 and addressed to Amarjit Singh and Darbara Singh, set a time of the essence closing date of March 12, 2010 for the purpose of executing the deed and transfer documents, so that the subject real property could be transferred to the Temple in accordance with the June 1998 agreement. The letter stated that after the mortgage had been satisfied in full several years ago, the Temple had made numerous demands on the Singhs to execute the deed and transfer the property to the Temple.

Amarjit Singh and Darbara Singh did not attend the March 12, 2010 closing. Avtar Bhatia, and Hardial Duggal, as well as officers and members of the Temple, attended the March 12, 2010 closing and Bhatia and Duggal executed a deed transferring their interest in the subject property to the Temple. Other documents pertaining to the transfer taxes were executed on behalf of the Temple.

The Temple commenced this action on March 31, 2010. The first cause of action seeks to enforce the parties' June 1998 agreement to convey the subject real property and the second cause of action appears to be an action to impose a constructive trust. Plaintiff seeks specific performance of the parties' agreement and in the alternative, seeks to recover the sum of \$1 million dollars.

Defendants' prior motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), (7) and (10) was denied, as the motion papers were insufficient for the court to make any determination regarding the alleged June 1998 agreement alleged in the complaint.

Defendants thereafter served an answer and interposed eight affirmative defenses and a single counterclaim for an accounting and to recover surplus funds based upon a December 1998 lease agreement between the parties. The Temple served a reply to the counterclaim.

Plaintiff Temple now seeks an order granting specific performance of the parties' June 1998 agreement and directing defendants Amarjit Singh and Darbara Singh convey their interest in the subject real property to the Temple. Defendants cross-move in opposition and seek summary judgment on their counterclaim for an accounting. Although not stated in the notice of motion, defendants, in their moving papers, seek to dismiss the complaint on the grounds of documentary evidence, statute of limitations, statute of frauds, failure to state a cause of action, and failure to join necessary parties, pursuant to CPLR 3211(a)(1), (5), (7) and (10); that the June 1998 agreement is barred by the parole evidence rule; that the motion for summary judgment is premature as discovery has not been completed, and that the action is barred by the doctrine of laches.

Where a defendant moves pursuant to CPLR 3211(a)(1) to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]; see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]; *Allstate Ins. Co. v Raguzin*, 12 AD3d 468 [2004]; *Tougher Indus. v Northern Westchester Joint Water Works*, 304 AD2d 822 [2003]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, *supra*; see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20).

Here, the documentary evidence submitted by the defendants in support of the cross motion does not conclusively dispose of the plaintiff's claim. Defendants' assertion that the written lease agreement supersedes the June 1998 agreement, is rejected. An examination of said lease, which was acknowledged on December 28, 1998, reveals that it is a standard form store lease, published by the Real Estate Board of New York, Inc. Said lease refers to Shri Guru Ravidass [sic] of New York, Inc. as the owner, and to Avtar Bhatia, Hardial Duggal, Darbara Singh and Amarjit Singh as tenants, and recites that the owner leases to the tenants the building known as 61-01 Broadway, Woodside, New York for a term

of five years, with an annual rent of \$72,000.00, to be paid in equal monthly installments. In view of the fact that the Temple, in its reply, admits to entering said lease, it appears that the reversal of the names of the owner and the tenants was a scrivener's error. The printed lease agreement, however, does not require the Temple to pay the mortgage and mortgage insurance, or to repair or renovate the property, and does not require the Temple to account to the defendants for any sums it expended for this purpose or to turn over any alleged surplus funds to the defendants. There is no rider to said lease agreement. The written lease agreement expired by its terms no later than December 28, 2003. The written lease agreement is silent as to the June 1998 agreement, and, thus, is insufficient to conclusively dispose of the action to enforce the June 1998 agreement. Accordingly, defendants' request to dismiss the complaint pursuant to CPLR 3211(a)(1), is denied.

Contrary to defendants assertion, the June 1998 agreement between the parties in which the Temple agreed to pay the mortgage, and the individual co-owners agreed to convey the real property upon a satisfaction of the mortgage and a written demand is sufficient to satisfy the statute of frauds (*see* GOL §§ 5-701, 5-703). Although the June 1998 agreement identified the property as 61-01 Woodside Avenue, Woodside, New York (in certain paragraphs thereto), this appears to be a scrivener's error, as it is undisputed that the correct address of the real property at issue is 61-01 Broadway, Woodside, New York. Defendants' request to dismiss the complaint on the grounds of statute of frauds, pursuant to CPLR 3211(a)(5), is denied.

Defendants' assertion that plaintiff's complaint is barred by the statute of limitations is rejected. Plaintiff's causes of action to enforce the June 1998 agreement and for the imposition of a constructive trust are governed by a six-year statute of limitations (CPLR 213). Plaintiff's causes of action, however, did not accrue until it obtained a satisfaction of the mortgage and made a written demand for the transfer of title to the property. Therefore, as the satisfaction of the mortgage was not obtained until March 13, 2006, and the written demand for a transfer of title was not made until December 17, 2009, the six-year statute of limitations did not expire prior to the commencement of this action. Defendants' request to dismiss the complaint on the grounds of statute of limitations, pursuant to CPLR 3211(a)(5), is denied.

It is well settled that "[i]n considering a motion to dismiss for failure to state a cause of action (*see* CPLR 3211[a][7]), the pleadings must be liberally construed (*see* CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2003]; *see also Bovino v Village of Wappingers Falls*, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true

and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, *supra* at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see Guggenheimer v Ginzburg*, *supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]). Here, contrary to defendants' assertions, the documentary evidence establishes that the plaintiff has a cause of action for the specific enforcement of the June 1998 agreement, and for the imposition of a constructive trust. Defendants' request to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), therefore, is denied.

Avtar Bhatia and Hardial Duggal both state in their affidavits that they were aware that the Temple had paid off the mortgage in early 2006, that they received a time of the essence letter in February 2010, and that they each conveyed their respective interest in the real property to the Temple in accordance with the terms of the June 1998 agreement. Plaintiff has submitted a copy of a deed, acknowledged and dated March 12, 2010, which recites that Avtar Bhatia and Hardial Duggal conveyed interest in the subject real property to the Temple. Therefore, as Bhatia and Duggal are no longer co-owners of the subject real property, they are not necessary parties to this action. Defendants' request to dismiss the complaint for the failure to join necessary parties, pursuant to CPLR 3211(a)(10), therefore, is denied.

Plaintiff's motion for specific performance of the June 1998 agreement is supported by the affidavits of Avtar Bhatia and Hardial Duggal, who are members of the Temple, signatories to the June 1998 agreement, and former co-owners of the subject real property, as well as by the documentary evidence which establishes that the satisfaction of the mortgage was given by the lender, and that a written demand was made on Amarjit Singh and Darbara Singh to transfer their interest in the subject property pursuant to the June 1998 agreement. Under these circumstances, an additional affidavit from a corporate officer is not required in order to support the within motion for summary judgment, as plaintiff has

submitted affidavits from persons with personal knowledge of the facts as required by CPLR 3212(b).

Contrary to the defendants' contention, the plaintiff's motion for summary judgment on the action for specific performance is not premature as the defendants have "failed to offer an evidentiary basis to suggest that [further] discovery may lead to relevant evidence" (*Conte v Frelen Assoc.*, 51 AD3d 620, 621 [2008]; see *Woodward v Thomas*, 77 AD3d 738 [2010]; *Lopez v WS Distrib., Inc.*, 34 AD3d 759 [2006]; *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [1999]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (*Lopez v WS Distrib. Inc.*, 34 AD3d at 760; see *Woodward v Thomas*, *supra*; *Conte v Frelen Assoc.*, 51 AD3d at 621; *Min Whan Ock v City of New York*, 34 AD3d 542 [2006]).

Absent fraud or mutual mistake, where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing (*Marine Midland Bank-Southern v Thurlow*, 53 NY2d 381, 387 [1981]). Furthermore, "where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement" (*American Broadcasting-Paramount Theatres v American Mfrs. Ins. Co.*, 48 Misc 2d 397, 403 [1965], *affd* 24 AD2d 851 [1965], *affd* 17 NY2d 849 [1966], *cert den* 385 US 931 [1966]; *Northville Industries Corp. v Fort Neck Oil Terminals Corp.*, 100 AD2d 865 [1984]). Here, defendants' assertion that the December 1998 lease agreement superseded or abrogated the June 1998 agreement is unfounded. Pursuant to the June 1998 agreement, the Temple agreed to pay the co-owners' mortgage on the subject real property, and the co-owners agreed to deed the property over to the Temple upon proof of the satisfaction of the mortgage and a written demand. During a portion of the time that the Temple was paying said mortgage, it also entered into an agreement to lease the real property from the co-owners. The December 1998 lease agreement, however, makes no reference to the June 1998 agreement, and, thus, did not supersede said agreement to transfer ownership of the property. Defendants' assertion that the June 1998 agreement is barred by the parol evidence rule, therefore, is rejected.

Contrary to defendants' assertion, the principle of laches cannot be applied here. It is settled that laches is an affirmative defense which must be pleaded (see *Markwica v Davis*, 64 NY2d 38, 42 [1984]; *Surlak v Surlak*, 95 AD2d 371, 383 [1983]; *Kromer v Kromer*, 177 AD2d 472, 473 [1991]). A failure to plead those affirmative defenses may be remedied by amendment of the answer (see *Surlak v Surlak*, *supra*). Here, not only have defendants failed to plead this affirmative defense in their answer, they also failed to seek leave to

amend their answer. Therefore, defendants' failure to assert the affirmative defense of laches in their answer constitutes a waiver of such defense.

In view of the foregoing, that branch of the defendants' cross motion which seeks to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), (7) and (10), and on the grounds that the June 1998 agreement is barred by the parole evidence rule, that the motion for summary judgment is premature as discovery has not been completed, and that the action is barred by the doctrine of laches, is denied.

Plaintiff Temple's motion for summary judgment on its claim for specific performance of the June 1998 agreement is granted. Plaintiff has established that it has fully complied with the June 1998 agreement, as it paid the subject mortgage on the property in full, and has provided the co-owners with proof of the satisfaction of the mortgage and a written demand for the transfer of title. Although Amarjit Singh asserts that he was unaware of the June 1998 agreement at the time the Temple demanded the transfer of the subject real property, he does not deny executing said agreement. In addition, neither the parties' motivation regarding the purchase of the real property, nor the Temple's motivation for seeking to enforce the June 1998 agreement raise a triable issue of fact which would warrant the denial of the motion for specific performance of the June 1998 agreement.

Turning now to defendants' counterclaim, it is alleged that the parties entered into a lease, dated December 1998, wherein the plaintiff agreed to pay the sum of \$72,000.00 per year towards rent; that "plaintiff agreed after adjusting the payment of mortgage amount and other expenses incurred on renovation of the subject property, the plaintiff would pay to the answering defendants and Avtar Singh and Hardial Duggal," and that the "plaintiff failed to render any accounts and to pay the balance." Defendants in their counterclaim demand "a judgment for rendition of the accounts and for money judgment towards the surplus amounts after adjusting the mortgage, taxes and other amounts spent on renovation." Plaintiff, in its reply to the counterclaim, concede only that the lease was entered into, in part, to pay back the four Temple members for their contributions towards obtaining the mortgage on the leased premises.

Defendant Amarjit Singh states in his affidavit in support of the cross motion for summary judgment on said counterclaim that "[t]he temple always assured the defendants that they were spending monthly rent on mortgage and renovation and never accounted the expenses to the defendants" and that the defendants are "entitled [to a] rendition of accounts and are entitled to receive their share for the balance amount after rendition of the accounts."

It is well settled that "the right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject matter of the controversy at issue" (*Town of*

New Windsor v New Windsor Volunteer Ambulance Corps., 16 AD3d 403, 404 [2005]; *see Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616 [2007]; *El-Khoury v Karasik*, 265 AD2d 372, 373-374, [1999]; *Wesselmann v Intl. Images*, 259 AD2d 448 [1999]; *Chalasanani v State Bank of India, N.Y. Branch*, 235 AD2d 449, 450 [1997]).

Here, the relationship between the Temple and the defendants, pursuant to the December 1998 lease, was that of landlord and tenant. Said lease, which expired in December 2003, only required the tenant to pay an annual rent in equal monthly installments, to maintain and repair the public portions of the building, both exterior and interior, to maintain general public liability insurance and to pay water charges. The lease provided that the tenant could make non-structural alterations, at its own expense, provided that it obtained the owner's prior written consent. It makes no reference to the payment of the mortgage. Since the December 1998 lease did not create a fiduciary relationship between the parties, defendants do not have a right to an accounting (*see Bradkin v Leverton*, 26 NY2d 192, 199 [1970]). The counterclaim for an accounting, therefore, is dismissed.

The court further finds that as defendants do not claim that the Temple failed to pay the yearly rent as stated in the written lease, the claim for surplus funds is unfounded, and must also be dismissed.

Accordingly, it is hereby ORDERED, that plaintiff's motion for summary judgment is granted to the extent that plaintiff is entitled to specific performance of the June 1998 agreement; and it is further

ORDERED, that defendants' cross motion is denied; and it is further

ORDERED AND ADJUDGED, that defendants are hereby directed to execute a deed and any other documents necessary to effectuate the transfer of their interest in the real property known as 61-01 Broadway, Woodside, New York, to the plaintiff, within 30 days from the service of this order, together with notice of entry; and it is further

ORDERED AND ADJUDGED, that defendants' counterclaim is hereby dismissed with prejudice.

Dated: January 28, 2011

J.S.C.