

Brown v Kass

2011 NY Slip Op 30963(U)

April 4, 2011

Sup Ct, Nassau County

Docket Number: 20937/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

ARTHUR BROWN,

Plaintiff(s),

-against-

ELCHANON KASS,

Defendant(s).

_____ x

**SUPREME COURT OF THE STATE OF NEW
YORK
COUNTY OF NASSAU**

_____ x

ARTHUR BROWN,

Plaintiff(s),

-against-

**ELCHANON KASS and 79 WEST 127 REALTY
LLC,**

Defendant(s).

_____ x

Index No. 20937/07

**Motion Submitted: 1/7/11
Motion Sequence: 003**

Index No. 925/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

X

DR. ARTHUR BROWN,

Plaintiff(s),

Index No. 9493/08

-against-

AARON FEINBERG and ELCHANON KASS,

Defendant(s).

X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

X

ARTHUR BROWN,

Plaintiff(s),

Index No. 6032/10

-against-

ELCHANON KASS and SHERI ANN MARGOLIS
a/k/a SHERI ANN KASS,

Defendant(s).

X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

X

US BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR CSMC TRUST 06-CF1,

Index No. 19667/07

Plaintiff(s),

-against-

ELCHONON KASS; FLEET NATIONAL BANK;
ARTHUR BROWN; RITA LOMBARDI,

Defendant(s).

X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

BANK OF AMERICA, N.A. SUCCESSOR BY MERGER
OF FLEET NATIONAL BANK, N.A.,

Plaintiff(s),

Index No. 9777/08

-against-

ELCHONON KASS, ARTHUR BROWN, ET AL.,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendant Kass moves this Court for an Order dismissing plaintiff Brown's complaints against Kass in the actions assigned the following Index Numbers: 20937/07, 9493/2008, 925/2010, and 6032/2010. Defendant seeks the dismissal of these complaints pursuant to CPLR §§ 3211 and 3212. Plaintiff opposes the requested relief.

In view of the fact that defendant Kass has interposed answers, that each of the parties have submitted various documents to the Court for its consideration on the determination of this motion, and that plaintiff acknowledges that the instant motion may be treated as one for summary judgment, the Court will treat the instant motion as one for summary judgment pursuant to CPLR §§ 3211(c) and 3212.

The six actions previously joined for trial represent a long history of litigation between plaintiff and defendant.

In Action # 1 (Index No. 20937/07), plaintiff Arthur Brown seeks a deed transferring back to himself fee ownership of property in Atlantic Beach ("the Atlantic Beach property") from defendant Kass, together with an accounting of monies received from a mortgage loan

on the Atlantic Beach property and a constructive trust over the Atlantic Beach property. Arthur Brown alleges that he was in arrears on his mortgage on the Atlantic Beach property; that Kass agreed to make the mortgage and tax payments until plaintiff could repay him, and that the Atlantic Beach property would remain plaintiff's, notwithstanding the deed from plaintiff to Kass.

In Action #2 (Index No. 925/2010), plaintiff Arthur Brown seeks various forms of relief including a constructive trust over, and an accounting from, a limited liability company known as 79 West 127 Realty LLC ("79 West"), that plaintiff allegedly formed with defendant Kass.

In Action #3 (Index No. 9493/08) plaintiff alleges claims against defendant Kass for fraud and breach of contract with respect to the Atlantic Beach property. Claims against defendant Feinberg in that action were dismissed by the Court.

In Action #4 (Index No. 6032/2010), plaintiff Arthur Brown claims to have a lien on property known as 1087 East 29th Street, Brooklyn, New York for repairs and alterations he made to the property owned by defendant Kass and defendant Sheri Ann Margolis.

In Action #5 (Index No. 19667/07), the plaintiff is US Bank National Association as Trustee for CSMC Trust 06-CF-1, formerly Washington Mutual Bank, FA ("Washington Mutual"). Brown is one of several defendants. Washington Mutual seeks to foreclose on its mortgage on the Atlantic Beach property, but Brown alleges that he is the victim of mortgage rescue fraud with respect to the Atlantic Beach property.

In Action #6 (Index 9777/08), the plaintiff is Bank of America, N.A., successor to Fleet National Bank, NA. Brown is one of several defendants. In this action Bank of America seeks to foreclose on the Atlantic Beach property, as the holder of a second mortgage on that property.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]), although, pursuant to CPLR § 3212(b), the Court has the authority to search the record and grant summary judgment to a party other than the moving party without the necessity of a cross-motion.

Also, issues of credibility generally require the denial of summary judgment and are to be resolved by the trier of fact. (*Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR § 3212:6*, at 14; *Donato v. ELRAC, Inc.*, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); *Frame v. Markowitz*, 125 A.D.2d 442, 509 N.Y.S.2d 372 [2d Dept., 1986]).

Based on the papers submitted by each of the parties, the Court finds that there exist profound questions of credibility relating primarily to the parties themselves, and also to their respective "witnesses." By way of example, defendant Kass has submitted the contract of sale to the Atlantic Beach property, claiming that plaintiff Brown signed it on April 28, 2002, thus serving as evidence of Kass's entitlement to that property. In opposition thereto, plaintiff Brown alleges that his signature on that contract of sale was forged (Brown Affidavit, paragraph 6).

Plaintiff Brown has submitted an affidavit purportedly signed by Kass on July 16, 2008 acknowledging that the sale of the Atlantic Beach property by Brown to Kass was not as necessarily as stated in the terms of the contract of sale, and memorializing an agreement that Brown could re-purchase the house from Kass for "the amount [Kass] paid out or owed, including the mortgage and disbursements."

In his reply papers, defendant Kass has failed to respond, or in any way address, the affidavit purportedly made by him. Thus, the truth of the assertions contained therein are deemed admitted (see *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 330 N.E.2d 624, 369 N.Y.S.2d 667 [1975]), which serves to raise a question of fact about the circumstances surrounding the sale of the Atlantic Beach property. On the other hand, in his reply papers, defendant has submitted a writing purportedly made by plaintiff Brown, dated November 9, 2003, essentially stating that Brown agrees to put the Atlantic Beach property up for sale if Brown cannot give Kass the mortgage payments to which Kass claims entitlement.

With respect to Actions #2 and #4 concerning the LLC and the repairs to property in Brooklyn, defendant Kass claims that he made an agreement to share profits with plaintiff Brown, but Brown did not acquire any ownership interest. In opposition, plaintiff Brown submits to the Court the affidavit of his rabbi claiming that defendant Kass acknowledged that plaintiff Brown was a fifty percent owner of the LLC. Plaintiff Brown has also submitted a notarized statement of the architectural designer of the Brooklyn project who claims that Kass admitted to him that Brown was a fifty percent "partner."

Defendant Kass also points out discrepancies in Brown's deposition testimony as compared to his affidavit in opposition on the issue of whether Brown was a general or sub-contractor for the Brooklyn project. Defendant also claims that Brown did no work on the Brooklyn property.

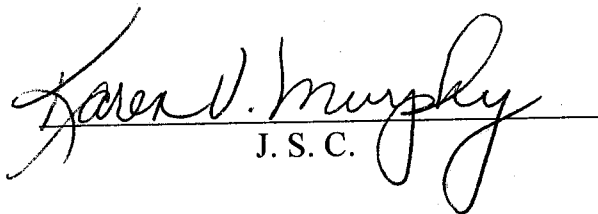
Suffice to state that these four actions which defendant Kass seeks to dismiss turn on the credibility of the parties and their "witnesses," which precludes the granting of summary judgment for either plaintiff Brown or defendant Kass.

Defendant Kass's motion for summary judgment is denied.

Counsel for all parties are directed to appear for a previously scheduled conference of this matter on April 11, 2011, at which time the actions will be certified for trial.

The foregoing constitutes the Order of this Court.

Dated: April 4, 2011
Mineola, N.Y.


J. S. C.

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