

Billing v McGann

2011 NY Slip Op 32063(U)

July 14, 2011

Sup Ct, Suffolk County

Docket Number: 25691/2010

Judge: Joseph Farneti

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

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 LORRI BILLING, individually and as parent
 and Natural Guardian of Joseph Hilding
 Billing,

Plaintiff,

-against-

DIANE E. McGANN,

Defendant.

ORIG. RETURN DATE: SEPTEMBER 24, 2010
 FINAL SUBMISSION DATE: NOVEMBER 4, 2010
 MTN. SEQ. #: 001
 MOTION: MOT D

ORIG. RETURN DATE: OCTOBER 21, 2010
 FINAL SUBMISSION DATE: NOVEMBER 4, 2010
 MTN. SEQ. #: 002
 CROSS-MOTION: XMOT D

PLTF'S/PET'S ATTORNEY:

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Upon the following papers numbered 1 to 12 read on this motion _____
TO DISMISS AND CROSS-MOTION TO AMEND PLEADINGS _____

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-
 motion and supporting papers 5-7; Answering Affidavit and supporting papers 8, 9;
 Memorandum of Law 10; Reply Affirmation and Affidavit 11, 12; it is,

ORDERED that this motion by defendant, DIANE E. McGANN
 ("defendant"), for an Order, pursuant to CPLR 3211 (a) (2), (3), (5), (7) and (10),
 dismissing the complaint of plaintiff, LORRI BILLING, individually and as parent
 and Natural Guardian of Joseph Hilding Billing ("plaintiff"), upon the grounds that
 the Court does not have subject matter jurisdiction of the trust alleged in the
 complaint, plaintiff does not have the capacity or standing to sue on behalf of her

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assignees, the relief sought by plaintiff is barred by the Statue of Frauds, the complaint fails to state a cause of action, and the Court should not proceed in the absence of persons who should be parties, is hereby **GRANTED** to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion by plaintiff for an Order, pursuant to CPLR 3025 (b), granting plaintiff leave to amend the complaint and caption herein, is hereby **GRANTED** as provided hereinafter.

Plaintiff commenced this action on July 27, 2010, seeking: (1) a judgment requiring that certain real property located at 12 Robinson Road, Southampton, New York ("property"), which is owned by plaintiff's sister, the defendant herein, in constructive trust for plaintiff, be deeded by defendant to plaintiff's "male life partner," Joseph Lester Walker ("Walker"), in trust for plaintiff's minor son, subject to a life estate for plaintiff; (2) damages in the amount of \$1,000,000 or the appraised value of the property if the property is not conveyed, to be paid by defendant to plaintiff's assignee as damages by reason of defendant's alleged unjust enrichment; (3) damages resulting from defendant's alleged breach of fiduciary duty to plaintiff under a testamentary trust contained in a 2008 Will of the parties' mother; and (4) an accounting of the aforementioned trust created under this Will. Defendant argues that all of the causes of action set forth in plaintiff's complaint should be dismissed.

Defendant alleges that she purchased the subject property in or about 1981, and that in or about 1993, she sold the property to the parties' mother, Florence A. Billing, for the sum of \$100,000. The property was allegedly purchased for the benefit of plaintiff; however, title remained in defendant allegedly so that plaintiff could continue to receive Social Security Disability benefits. In the instant action, plaintiff seeks to have this Court direct that title to the property be transferred to Walker, to be held in trust for plaintiff's minor son who was born after 1993, subject to a life estate for plaintiff. The parties' mother allegedly intended that title be held by defendant and that plaintiff have exclusive use and occupancy of the property during her lifetime. Defendant informs the Court that plaintiff does in fact live at the property, and has done so uninterrupted since 1993. Plaintiff alleges that on numerous occasions, plaintiff contacted defendant requesting that the deed to the property be transferred from defendant to plaintiff's assignee or to plaintiff, but that defendant has refused.

Plaintiff further seeks damages in the amount of \$1,000,000 or the appraised value of the property in the event title to the property is not transferred, based upon the allegation that plaintiff made repairs and improvements to the property in the amount of \$100,000. Furthermore, plaintiff asserts causes of action for breach of fiduciary duty and an accounting with respect to a testamentary trust allegedly created in the Last Will and Testament of the parties' mother.

Defendant now moves to dismiss plaintiff's complaint in its entirety, arguing that the complaint fails to state a cause of action for a constructive trust on the property, as plaintiff has failed to allege, among other things, a promise to plaintiff to ever transfer title to her name. In addition, defendant argues that even assuming that plaintiff made \$100,000 worth of repairs and improvements to the property, plaintiff would not be entitled to the entire value of the property. Moreover, defendant argues that plaintiff seeks relief on behalf of a person who is not a party herein, and that plaintiff does not have the standing to bring an action on behalf of the non-party. Further, defendant contends that plaintiff seeks to enforce an agreement that is illegal and/or against public policy. Finally, defendant argues that the Will has yet to be admitted to probate, and therefore the testamentary trust is not yet in existence.

In response, plaintiff has filed a cross-motion in opposition to the motion to dismiss, and seeking to amend the complaint and caption: (1) to amend the caption to add a necessary party; (2) to add various causes of action; and (3) to amend the pleading of various causes of action. Plaintiff acknowledges that a necessary party was not named as a plaintiff herein, to wit: Walker, and seeks to add him as a co-plaintiff. Further, plaintiff argues that she has met the burden for the imposition of a constructive trust on the property, as the elements of a constructive trust are not rigid, and may be flexibly applied. Plaintiff also contends that she has sufficiently pled a cause of action for unjust enrichment. Furthermore, plaintiff alleges that she is not seeking to enforce an illegal contract, as the agreement regarding the property was "simple estate planning with the interest of preserving an asset and preventing same from being attached by the Department of Social Services upon the passing of the disabled party." Plaintiff now alleges that the agreement also included a provision that the property would be conveyed to her issue upon her death.

Finally, plaintiff seeks to amend the complaint to reference a different trust – a bank account in trust for plaintiff which contains proceeds from her

mother's life insurance policy. The trustees of those life insurance proceeds are defendant and another sister, Donna Billing. Plaintiff alleges that defendant has been improperly utilizing the funds in that bank account and spending the funds for her own personal benefit. Thus, plaintiff seeks to add three causes of action relating to those trust funds: (1) conversion; (2) breach of fiduciary duty; and (3) an accounting.

Defendant opposes plaintiff's motion to amend, and has addressed her arguments to plaintiff's proposed amended complaint. Defendant argues that plaintiff has failed to cure the "fatal defects of the original complaint" with respect to her causes of action for a constructive trust and unjust enrichment. Specifically, defendant alleges that plaintiff has failed to allege a promise, express or implied, and a transfer in reliance thereon. Defendant argues that plaintiff seeks to enforce the agreement between her mother and defendant that title to the property would be held by defendant for plaintiff's benefit, yet now seeks to have title conveyed to Walker, as trustee for plaintiff's minor son, subject to a life estate for plaintiff. In addition, defendant contends that plaintiff has failed to allege that a transfer in reliance upon this alleged promise had occurred sufficient to warrant the imposition of a constructive trust. Moreover, defendant alleges that plaintiff's second cause of action for unjust enrichment should be dismissed as duplicative of the first cause of action, and that assuming plaintiff is a lawful life tenant, she would not be entitled to be paid for any repairs or improvements. Lastly, defendant alleges that while plaintiff's third through fifth causes of action may be sufficiently pled, plaintiff has failed to join a necessary party, to wit: co-trustee Donna Billing.

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*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

As leave to amend is freely given, and as defendant has now addressed her arguments to plaintiff's proposed amended complaint, plaintiff's motion to amend is **GRANTED**. The Court shall now determine defendant's motion to dismiss with respect to plaintiff's amended complaint.

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]).

Imposition of a constructive trust requires proof of four elements, namely, a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise, and unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119 [1976]). Generally, a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, as when a plaintiff conveys property to a defendant on faith of the latter's promise to reconvey it (*Sharp v Kosmalski*, 40 NY2d 119, supra; *Bontecou v Goldman*, 103 AD2d 732 [1984]), or when a plaintiff invests funds, time or effort toward the purchase or improvement of property in reliance on a defendant's promise to share in some interest in the property (see e.g. *Lester v Zimmer*, 147 AD2d 340 [1989]). In *Watson v Pascal*, 65 AD3d 1333 (2009), the Second Department held that "[t]he remedy is flexible and a constructive trust may be imposed even without an express promise where, given reliance upon the confidential relationship of the parties, 'a promise may be implied or inferred from the very transaction itself'" (*Watson v Pascal*, 65 AD3d 1333, 1334, citing *Sharp v Kosmalski*, 40 NY2d 119 [1976]).

While this Court acknowledges that the remedy of a constructive trust is flexible, the promise plaintiff alleges is that her mother purchased the property in 1993 "for the purpose of having plaintiff live there throughout her life and upon her death said property conveyed to any issue she may have." Notably, the alleged promise did not include a transfer of title to plaintiff or her assignees. Indeed, plaintiff acknowledges that title remained in defendant as due to her disability, "title could not be conveyed to [plaintiff] individually and that said property would always be held for [plaintiff] by defendant." It is undisputed that plaintiff has been living at the property since 1993. Plaintiff now seeks an Order directing defendant to convey a deed to the property to plaintiff's assignee, Walker, as parent and natural guardian of Joseph Lester Walker, a minor, subject to a life estate for plaintiff. Even accepting plaintiff's allegations as true, the Court finds that there was no promise to convey title to plaintiff or her assignees, and no transfer in reliance on that promise. As such, the Court finds that the elements of

a constructive trust are lacking herein. Therefore, plaintiff's first cause of action must be dismissed.

With respect to plaintiff's second cause of action for unjust enrichment, when one person has obtained money or property from another under such circumstances that in good conscience it should not be retained, the law imposes a duty to repay or return it. An action for restitution based on unjust enrichment requires that: (1) the defendant received money, property or services belonging to or provided by the plaintiff; (2) the defendant benefitted from the receipt of the money, property or services; and (3) under principles of equity and good conscience, the defendant should not be permitted to retain the money or property or should be required to pay for the services (*State v International Asset Recovery Corp.*, 56 AD3d 849 [2008]; *Baron v Pfizer, Inc.*, 42 AD3d 627 [2007]; *Matter of Estate of Witbeck*, 245 AD2d 848 [1997]). To recover under a theory of quasi contract, the plaintiff must be able to prove that performance was rendered *for the defendant* resulting in her unjust enrichment. It is not even enough to show that the defendant consented to improvements of property or received a benefit from the plaintiff's activities (see *Outrigger Constr. Co. v. Bank Leumi Trust Co.*, 240 AD2d 382 [1997]; *Metropolitan Elec. Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758 [1992]; *Kagan v K-Tel Entertainment*, 172 AD2d 375 [1991]).

Here, plaintiff alleges that in or about 2005, she expended approximately \$100,000 in repairing and improving the property. Plaintiff fails to allege that these improvements were made for defendant, or at her behest. As discussed, plaintiff has occupied the property since in or about 1993, and according to her complaint, it was agreed that after her mother's death she would be responsible for the maintenance, taxes and insurance of the property. Further, although plaintiff claims to have expended \$100,000, she seeks to hold defendant liable to *plaintiff's assignee* in the sum of \$1,000,000 or the actual appraised value of the property. Based upon the foregoing, the Court finds that plaintiff has failed to sufficiently plead a cause of action for unjust enrichment.

However, upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submissions (*Ossining Union Free School Dist. v Anderson*, 73 NY2d 417 [1989]), 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 the amended complaint sufficiently pleads causes of

action for conversion, breach of fiduciary duty, and an accounting. Although defendant argues that Donna Billing is a necessary party herein and must be made a defendant relative to these causes of action, CPLR 1001 provides in pertinent part that “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants” (CPLR 1001 [a]). The Court finds that Donna Billing would not be inequitably affected by a judgment rendered on these causes of action. The claimed conversion of the trust funds and breach of fiduciary duty is alleged solely against defendant, and Donna Billing would not be inequitably affected by a judgment rendered against defendant for the amounts claimed to have been converted.

Accordingly, defendant’s motion is **GRANTED** to the extent that plaintiff’s first and second causes of action are dismissed. Plaintiff’s proposed amended verified complaint, annexed to her moving papers as Exhibit “J,” shall be deemed served upon defendant as of the date of service of the within Order upon defendant with notice of entry. Defendant may then serve responsive pleadings in accordance with CPLR 3025 (d).

The foregoing constitutes the decision and Order of the Court.

Dated: July 14, 2011



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION