

Anninos v Kondilys

2011 NY Slip Op 33947(U)

November 7, 2011

Sup Ct, Queens County

Docket Number: 17439/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

GERIASIMOS ANNINOS and DEMETRA ANNINOS

Plaintiff,

-against-

KONSTANDINA KONDILYS a/k/a
KONSTANDINA KONDILIS a/k/a
KONSTANDINA KONDILES,
ANASTASIA KONDILYS VASQUEZ,
LISTORIEL VASQUEZ,
Defendants.

Index No.: 17439/11

Motion Date: 10/5/11

Motion Cal. No: 4

Motion Seq. No.: 1

The following papers numbered 1 to 23 read on this motion by plaintiffs for a preliminary injunction, removal and consolidation of the summary proceeding pending in the Housing Court and upon removal, consolidation with the instant action; and cross motion by defendants to dismiss the causes of action asserted in the complaint pursuant to CPLR 3211(a)(1) & (3) and vacature of the lis pendens

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 7
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Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows.

Plaintiffs, Geriasimos Anninos(GA) and Demetra Anninos(DA), have moved for, inter alia, an order consolidating this action with a summary eviction proceeding pending in the Civil Court of the City of New York, Queens County (Vasquez v. Anninos, L&T Index No. 69420/11). Defendant Konstandina Kondilys (KK), defendant Anastasia Kondilys Vasquez (AKV) and defendant Listoriel Vasquez (LV) have cross moved for, inter alia, an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them.

The plaintiffs allege the following: The plaintiffs, who are husband and wife, and their seven year old daughter reside at 23-37 26th Street, Astoria, New York (the subject premises) where they have occupied the second floor and basement of a legal two family dwelling for fifteen years. Defendant KK, the mother of plaintiff DA and defendant AKV, occupies the first floor of the premises. Defendant KK and Gregory Kondilys (GK), her husband, owned the subject premises as joint tenants with right of survivorship until his death on or about July 31, 2009. Defendant KK and GK encumbered the subject premises, which is worth more than \$500,000, with a mortgage for \$65,000 in favor of Astoria Federal Savings & Loan Association. In or about 2008, prior to his death, GK, with the consent of defendant KK, stated that the subject premises "should be deemed to be owned by Defendant Konstandina, his wife, with his daughter, plaintiff Demetra Kondilys and her husband having an undivided one half interest therein." In consideration of the plaintiffs' paying all carrying charges and other expenses of the subject premises, they were to receive a deed conveying an undivided 50% interest in the premises with the right to occupy the basement and second floor. Beginning in or about 2008, the plaintiffs made mortgage payments and paid other expenses on the subject premises. In or about 2010, the plaintiffs also spent over \$45,000 on the renovation of the basement. GK died before a deed evidencing the plaintiffs' 50% interest in the premises could be executed, and after his death defendant KK failed to execute a deed to the plaintiffs. Instead, on or about April 15, 2011, defendant KK deeded the subject premises to defendant AKV and her husband, defendant LV, reserving to herself a life estate. On May 26, 2011, the plaintiffs discovered a notice from defendant AKV taped to the front door of the second floor of the premises stating that the "Landlord elects to terminate your tenancy" and demanding that they leave the premises by June 30, 2011. The notice threatened summary proceedings, and the defendants subsequently began such a proceeding in the Civil Court of the City of New York, Queens County. The defendants changed the locks on the basement, and the plaintiffs had to call the police who convinced the defendants to give the plaintiffs a new key.

That branch of the cross motion by the defendants which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them for failure to state a cause of action is granted as to the fifth cause of action and is otherwise denied.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and

according the plaintiff the benefit of every possible favorable inference***." (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [1999]; Leon v. Martinez, 84 NY2d 83 [1994]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633 [1976]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159 [1996]). As a general rule, where a CPLR 3211(a)(7) motion is not converted into one for summary judgment, the court may only "consider affidavits for the limited purpose of remedying any defects in the complaint ***." (One Acre, Inc. v. Town of Hempstead, 215 AD2d 359 [1995]; see, Nonnon v. City of New York, 9 NY3d 825 [2007]). In the case at bar, the affidavit of defendant KK, which contradicts the plaintiffs' version of the facts, improperly deals with the merits of the complaint.

The plaintiffs' first claim adequately states a cause of action for the imposition of a constructive trust. The elements of a cause of action to impose a constructive trust are: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (Bodden v. Kean, 86 AD3d 524 [2011]). In the case at bar, there was a familial relationship between defendant KK and the plaintiffs which may have given rise to a confidential relationship (see, Almasy v. Ward, 53 AD3d 946 [2008]), and the plaintiffs allegedly paid the carrying charges on the house and paid for a \$45,000 renovation of the basement in reliance upon defendant KK's alleged promise to convey a 50% interest in the premises. The plaintiffs did not have the burden on this CPLR 3211(a)(7) motion of rebutting the defenses based on the Deadman's Statute (CPLR 4519) and the Statute of Frauds (see, Sokol v. Leader, 74 AD3d 1180 [2010]) In any event, the Deadman's Statute would not bar evidence of independent events in which GK interacted with third parties such as his lawyer (see, Durazinski v. Chandler, 41 AD3d 918 [2007]) and would not bar evidence of the plaintiffs' transactions with defendant KK. As for the Statute of Frauds, it does not bar an action to impose a constructive trust (Mackenzie v. Croce, 54 AD3d 825 [2008]; Ubriaco v. Martino, 36 AD3d 793 [2007]).

The plaintiffs' second claim adequately states a cause of action for a declaratory judgment, there being a justiciable

controversy between the parties, (see, Tilcon New York, Inc. v. Town of Poughkeepsie, 87 AD3d 1148 [2011]), and in regard to the third cause of action, although "it is permissible to plead a cause of action for a permanent injunction ***, permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted by a plaintiff." (Corsello v. Verizon New York, Inc., 77 AD3d 344, 368 [2010]).

The third cause of action is adequately supported by the plaintiffs' first two claims which are sufficiently stated.

The fourth cause of action is sufficiently stated since partition is an available remedy for the defendants' alleged unjust enrichment (see, Watson v. Pascal, 65 AD3d 1333 [2009] [constructive trust and partition]). The plaintiffs may maintain the cause of action for partition upon first establishing that they are entitled to be joint tenants or tenants in common with defendant KK (see, RPAPL §901; Graffeo v. Paciello, 46 AD3d 613 [2007]).

The fifth cause of action does not adequately state a cause of action for common law fraud and/or for a fraudulent conveyance pursuant to the Debtor & Creditor Law. In regard to common law fraud, the plaintiff must plead that the defendant made a false statement of a material existing fact (see, Urstadt Biddle Props., Inc. v Excelsior Realty Corp., 65 AD3d 1135 [2009]), and promises of future performance or statements of future expectations are not enough to support a cause of action for fraud (Dowlings, Inc. v. Homestead Dairies, Inc., ___ AD3d ___, 2011 WL 5083471; International Finance Corp. v. Carrera Holdings Inc., 82 AD3d 641 [2010]). In regard to a cause of action for a fraudulent conveyance, the plaintiffs did not adequately allege that they were creditors of defendant KK (see, Debtor and Creditor Law § 270).

The sixth cause of action, which is for unjust enrichment, is adequately stated (see, MT Property, Inc. v. Ira Weinstein and Larry Weinstein, LLC, 50 AD3d 751 [2008]; Smith v. Chase Manhattan Bank, USA, N.A., 293 AD2d 598 [2002]).

The seventh cause of action, which is for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty, is adequately stated. "[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." (Rut v. Young Adult Inst., Inc., 74 AD3d 776, 777 [2010]). Defendant KK allegedly breached her fiduciary duty as

the alleged constructive trustee of the subject premises by deeding it to defendant AKV and defendant LV.

The eighth cause of action, which is for an accounting, is adequately stated. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." (Adam v. Cutner & Rathkopf, 238 AD2d 234, 242 [1997]; Palazzo v. Palazzo, 121 AD2d 261 [1986]). The plaintiffs may seek an accounting in connection with their causes of action for the imposition of a constructive trust and for breach of fiduciary duty.

That branch of the cross motion by the defendants which is for an order dismissing the first and second causes of action pursuant to CPLR 3211(a)(1) is denied.

In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim * * * " (Fernandez v. Cigna Property and Casualty Insurance Company, 188 AD2d 700,702 [1992]; see, Vanderminden v. Vanderminden, 226 AD2d 1037 [1996]; Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1995]). The documentary evidence properly considered pursuant to CPLR 3211(a)(1) does not dispose of the plaintiffs' first two causes of action. Although affidavits may be used on a CPLR 3211(a)(1) motion as "connecting links," affidavits may not be used as proof in themselves of a fact in issue (see, Realty Investors of USA Inc. v. Bhaidaswala, 254 AD2d 603 [1998]; Standard Chartered Bank v. D. Chabbott, Inc., 178 AD2d 112 [1991]; 7 Weinstein-Korn-Miller, NY Civ. Prac. ¶ 3211.06).

That branch of the cross motion by the defendants which is for an order pursuant to CPLR 3211(a)(3) dismissing the fourth cause of action, which is for a partition and sale of the subject premises, is denied. The fourth cause of action is not dismissable for lack of capacity at this juncture because the plaintiffs have alleged that they are entitled to be tenants in common through the imposition of a constructive trust over the subject premises (see, RPAPL §901; Graffeo v. Paciello, supra).

That branch of the cross motion by the defendants which is for an order cancelling the notice of pendency filed by the plaintiffs against the subject premises is denied. The defendants failed to show that the plaintiffs did not begin this action in

good faith (see, CPLR 6514[b]).

That branch of the plaintiffs' motion which is for an order removing the summary proceeding from Civil Court and consolidating it in this court with the instant action is granted.

CPLR 602 provides: "(b) Cases pending in different courts. Where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." (see, Kally v. Mount Sinai Hosp., 44 AD3d 1010 [2007][landlord and tenant proceeding consolidated with Supreme Court action]; DeCastro v. Bhokari, 201 AD2d 382 [landlord and tenant proceeding consolidated with Supreme Court action]). Consolidation is proper where there is an absence of prejudice and two cases present common questions of law or fact (see, Galasso, Langione & Botter, LLP v. Galasso, 81 AD3d 879 [2001]; RCN Constr. Corp. v. Fleet Bank, N.A., 34 AD3d 776 [2006]). The determination of issues pertaining to the ownership of the subject premises in the instant action will be virtually dispositive of the summary eviction proceeding.

That branch of the plaintiffs' motion which is for a preliminary injunction enjoining the defendants from (1) renting, selling, transferring, assigning or encumbering the subject property and (2) from taking any action to evict or interfere with the plaintiffs' use and occupancy of the second floor and basement at the subject premises is granted to the extent that the defendants are prohibited from interfering with the plaintiffs' use and possession of the second floor and basement at the subject premises until the final disposition of the instant action.

"A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor." (Berkoski v. Board of Trustees of Inc. Vil. of Southampton, 67 AD3d 840, 844 [2009]). The plaintiffs demonstrated their entitlement to a preliminary injunction in regard to the imminent summary eviction from their home, however, inasmuch as the court has granted transfer and consolidation of the summary holdover proceeding with this action a preliminary injunction regarding the summary holdover proceeding is unnecessary. Finally, the notice of pendency should be effective in preventing defendants from transferring, assigning or

encumbering the subject premises on condition that plaintiffs post an undertaking pursuant to CPLR 6312 and in accordance with Article 25 of the CPLR, in the amount of \$2,500.00.

Accordingly it is,

ORDERED, that the defendants' cross motion is granted solely to the extent that the fifth cause of action is dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7), and is denied in all other respects, and it is further

ORDERED, that branch of the plaintiffs' motion which is for a preliminary injunction is granted to the extent that the defendants are prohibited from interfering with the plaintiffs' use and possession of the second floor and basement at the subject premises until the final disposition of this action, and it is further

ORDERED that the injunction is condition upon the plaintiffs posting an undertaking, pursuant to CPLR 6312 and in accordance with Article 25 of the CPLR, in the amount of \$2,500.00, within 30 days of service of a copy of this order with notice of entry, and it is further

ORDERED, that the action pending in the Housing Part of the Civil Court of the City of New York, Queens County, under L&T Index No. 69420/11 shall be removed to the Supreme Court, Queens County, and upon removal shall be consolidated for all purposes with the instant action under Index No. 17439, and it is further

ORDERED, that upon being served with a copy of this Order, and payment of the applicable fees, if any, Clerk of the Civil Court of the City of New York, Queens County shall forthwith transfer the papers on file pending under L&T Index No. Index No. 69420/11 to the Clerk of the Supreme Court, Queens County who shall combine all of the papers filed in both actions under Index No. 17439/11.

ORDERED, that a copy of this Order with notice of entry shall be served, within 30 days of entry of this Order, on all parties to the actions combined on the Clerk of the Civil Court of the City of New York, Queens County and upon the Clerk of Supreme Court, Queens County, and it is further

Dated: November 7, 2011

J.S.C..