

Dooley v Dooley

2013 NY Slip Op 30082(U)

January 10, 2013

Sup Ct, Suffolk County

Docket Number: 11-23640

Judge: Daniel Martin

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ORDERED that the motion by the defendant for an order pursuant to CPLR 3211, 3212 and 3213 granting summary judgment awarding the defendant costs and attorney's fees and scheduling a hearing on the amount of compensatory damages is denied; and it is further

ORDERED that the parties are directed to appear for a hearing to determine the amount of the undertaking to be filed by the plaintiff on **January 31, 2013** at the Supreme Court, Part 9, One Court Street, Riverhead, New York at 10:00 a.m.; and it is further

ORDERED that the parties are directed to serve all parties and file with the Court at least three (3) business days prior to said hearing date a proposal setting forth their contentions regarding the amount of a reasonable undertaking herein, with an explanation, documentation and justification for said contention; and it is further

ORDERED that the temporary restraining order dated July 22, 2011 (Gazzillo, J.) shall remain in effect pending the hearing scheduled herein; and it is further

ORDERED that counsel for the parties shall contact Chambers by telephone (631-852-2422) at least one (1) business day prior to the hearing date to confirm appearances. No adjournments will be granted without the approval of the Court.

This is an action in which the plaintiff seeks to impose a constructive trust on real property located at 72 Atlantic Avenue, Amagansett, New York (the property), and a determination of her claim to ownership pursuant to RPAPL Article 15. On July 21, 2011, the plaintiff commenced this action and moved by order to show cause for a preliminary injunction and a temporary restraining order enjoining the defendants from selling the property or interfering with her use and occupancy thereof. The Court (Gazzillo, J.) granted the order to show cause, and the temporary restraining order, on July 22, 2011.

To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]; *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 808 NYS2d 418 [2d Dept 2006]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see Dixon v Malouf, supra; Ruiz v Meloney*, 26 AD3d 485, 810 NYS2d 216 [2d Dept 2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see Dixon v Malouf, supra; Ruiz v Meloney, supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (*Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]; *see Hoeffner v John F. Frank, Inc.*, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2000]; *Peterson v Corbin*, 275 AD2d 35, 713 NYS2d 361 [2d Dept 2000]; *Nalitt v City of New York*, 138 AD2d 580, 526 NYS2d 162 [2d Dept 1988]).

Applying these principles here, the Court finds that the plaintiff has sufficiently demonstrated her

entitlement to injunctive relief pending the determination of the action (*see* CPLR 6301; *Winchester Global Trust Co. Ltd v Donovan*, 58 AD3d 833, 873 NYS2d 130 [2d Dept 2009]). First, the likelihood of success on the merits has been demonstrated regarding her cause of action to impose a constructive trust upon the subject property. 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 (*Simonds v Simonds*, 45 NY2d 233, 408 NYS2d 359 [1978]; *Sharper v Harlem Teams for Self-Help, Inc.*, 257 AD2d 329, 696 NYS2d 109 [1st Dept 1999]). In determining whether the imposition of a constructive trust is warranted to prevent an unjust enrichment, a court looks to four factors: the existence of a fiduciary or confidential relationship, a promise, a transfer in reliance thereon, and an unjust enrichment (*Bankers Sec. Life Ins. Soc. v Shakerdge*, 49 NY2d 939, 428 NYS2d 623 [1980]; *Matter of Wieczorek*, 186 AD2d 204, 587 NYS2d 755 [2d Dept 1992]; *Coco v Coco*, 107 AD2d 21, 485 NYS2d 286 [2d Dept 1985]). The required promise may be inferred or implied where the totality of the transactions and the relations of the parties would render an express promise superfluous (*see eg. Bankers Sec. Life Ins. Soc. v Shakerdge, supra; Matter of Wieczorek, supra; Coco v Coco, supra*). Unjust enrichment is the heart of the constructive trust doctrine (*see Bolla v Bolla*, 10 Misc 3d 906, 810 NYS2d 853 [Sur Ct, Bronx County 2005]). “A person may be deemed to be unjustly enriched if he (or she) has received a benefit, the retention of which would be unjust (Restatement, Restitution, §1, Comment *a*). A conclusion that one has been unjustly enriched is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties. It is a conclusion reached through the application of principles of equity” (*Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1976]).

In her affidavit in support of the motion, the plaintiff swears that she and her husband were originally in contract to purchase the property in early 1994. However, because she was experiencing marital difficulties, her attorney advised her not to complete the purchase. In a conversation with her and her attorney, her father agreed to purchase the property as her nominee. In reliance on that promise she allowed her father to close title to the property. She states that she paid the purchase price for the property with her own money and with funds from a trust created by her grandmother for the benefit of her grandmother’s grandchildren. The plaintiff further swears that she has been occupying the property since 1994, and that she never changed title into her name because it was owned by “family.” At the end of April 2011, her father took the position that he was sole owner of the property, he sent a worker who destroyed plantings, trees and the plaintiff’s personal property, he placed a sign stating “for sale by owner” on the property, and he held one or more open houses to show the property to potential buyers. In July 2011, her father served her with a Statutory Notice to Quit the property. She indicates that, in 1994, she had a close personal relationship with her father.

In opposition to the motion, the defendant submits his verified answer with counterclaims. In essence, his defense is that he only agreed to purchase the property as sole owner, and as a personal investment. In his verified answer, the defendant alleges that the plaintiff defaulted on her contract to purchase the property, and that he used his own money to make the purchase. He alleges that the plaintiff lost the down payment that she had made on the original contract, and that he independently purchased the property at a reduced price. He claims that the plaintiff was allowed to occupy the property in exchange for her agreement to pay the “taxes and maintenance expenses,” which she did until 2007. The defendant asserts that the plaintiff never made any mortgage payments, and that she did

not have a vested interest in, nor did she receive any money from, her grandmother's trust in 1994. He also claims that the plaintiff has defaulted on a promissory note which he holds.

A review of the record reveals that the exhibits provided by the parties establish the plaintiff's likelihood of success on the merits herein. It is clear that the defendant closed title to the property on the same terms as the plaintiff's contract with the seller, that the defendant received the benefit of credits attributable to the plaintiff, and that letters and correspondence between the parties indicate a confidential relationship that includes more than a sole purchase by the defendant. In addition, documents indicate the probability that the parties interacted in a manner which acknowledged the plaintiff's interest in her grandmother's trust, or otherwise gave the plaintiff financial support and an interest in the property. As discussed above, considering the plaintiff's claim of unjust enrichment, the question whether there was an express promise by the defendant to take the property as a nominee is not a barrier to the plaintiff's success herein. In addition, the question whether the plaintiff received sufficient financial benefit from said trust to purchase the property, or if she received any benefit at all, does not negate the likelihood of success herein. The existence of an issue of fact, is not, in itself grounds for denial of a motion for injunctive relief (*Stockley v Gorelik, supra*) as a preliminary injunction may be granted to maintain the status quo (*Grant Co. v Srogi*, 52 NY2d 496, 438 NYS2d 761 [1981]; *Calo v Chui*, 254 AD2d 191, 679 NYS2d 42 [1998]; *Abed v Zach Assocs.*, 124 AD2d 531, 507 NYS2d 676 [1986]).

The plaintiff has also demonstrated irreparable injury in the absence of a preliminary injunction herein. It has been held that the loss of ownership and possessory rights in one's home is irreparable harm in and of itself (*see Ying Fung Moy v Hoho Umeki*, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]; *Bryne v Bryne*, 194 AD2d 640, 599 NYS2d 82 [2d Dept 1993]; *Tompkins v Jackson*, 20 Misc 3d 1108 [A], 866 NYS2d 96 [Sup Ct, New York County 2008]). Moreover, a preliminary injunction may be granted to prevent a party from taking possession of property which has been in the possession of the plaintiff for a considerable time (*see Rubin v Goldring Inc.*, 150 AD2d 261, 541 NYS2d 8 [1st Dept 1989]; *see also Braschi v Stahl Assoc. Co.*, 74 NY2d 201, 544 NYS2d 784 [1989]; *Bass Bldg. Corp. v Village of Pomona*, 142 AD2d 657, 530 NYS2d 595 [2d Dept 1988]). It is obvious that the disruption to the use and enjoyment of one's residence and the potential sale of that residence are not compensable by monetary damages.

Lastly, a balancing of the equities in this case weighs in favor of the plaintiff. The plaintiff has occupied the property for almost 18 years, and it is undisputed that she has made significant financial contributions towards the purchase of the property. The defendant acknowledges that the property is merely a personal investment, and he does not indicate that there is any reason to dispossess the plaintiff, or to sell the property at this time, other than to enforce the plaintiff's alleged debt to him or, presumably, to reap the rewards of his investment. These are clearly matters which can be remedied, if necessary, by the award of damages in accordance with the counter claims asserted by the defendant in his verified answer.

Thus, it is clear that the plaintiff is entitled to the relief sought herein. However, the Court notes that the motion papers fail to discuss the subject of an undertaking, which is a mandatory prerequisite to an injunction (*see*, CPLR 6312 [b]). The sum fixed by the Court for the undertaking must be sufficient

to compensate the party being enjoined for the damages and costs sustained by them as a result of the issuance of the preliminary injunction in the event that it is later determined that the requester was not entitled to the injunctive relief (CPLR 6312 [b]; *Carter v Konstantatos*, 156 AD2d 632, 549 NYS2d 131 [2d Dept 1989]). The absence of an undertaking renders the preliminary injunction voidable (*Olechna v Town of Smithtown*, 51 AD2d 1036, 381 NYS2d 321 [2d Dept 1976]; see also *Livas v Mitzner*, 303 AD2d 381, 756 NYS2d 274 [2d Dept 2003]; *Promenade Condominium v J.J. & P. Corp.*, 243 AD2d 293, 662 NYS2d 509 [1st Dept 1997]). Unfortunately, the Court is not able to fix an undertaking of the plaintiff in the absence of evidence which establishes the relevant considerations herein.

Accordingly, the Court grants the plaintiff's motion to the extent of granting a preliminary injunction against the defendants pending final disposition of this action enjoining the defendant from selling the real property known as 73 Atlantic Avenue, Amagansett, New York, or from interfering with the plaintiff's use and occupancy of said property, upon the filing of an undertaking as set forth herein. The preliminary injunction shall become effective based upon the decision and orders of the Court at the hearing scheduled to determine the undertaking to be filed herein by the plaintiff.

The defendant now moves for summary judgment "pursuant CPLR §§ 3211(7) (*sic*), 3212 and 3213 and demanding denials of Plaintiff's request for a temporary restraining order and request for a constructive trust ..." Initially, the Court notes that CPLR 3213 is not applicable herein, and that it is unclear which subsection of CPLR 3211 the defendant relies upon in making his motion. It appears that the motion contains a typographical error and should be deemed to be based on CPLR 3211 (a) (7). However, the contentions in the motion papers appear to refer solely to issues involved in a determination pursuant to CPLR 3211 (a) (1). Regardless, the motion should be denied. Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). Here, a review of the complaint reveals that the plaintiff has plead cognizable causes of action for a constructive trust and the benefits due thereunder. Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Vitarelle v Vitarelle*, 65 AD3d 1034, 885 NYS2d 320 [2009]; *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401, 873 NYS2d 326 [2009]). Here, a review of the documents submitted reveals that they do not conclusively resolve all factual issues herein. Accordingly, that branch of the defendant's motion which seeks to dismiss the complaint pursuant to CPLR 3211 (7) (*sic*) is denied.

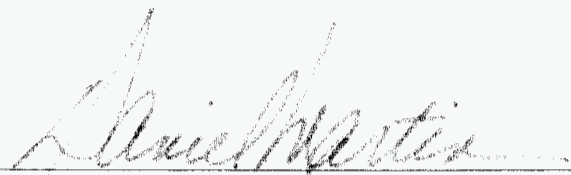
Pursuant to CPLR 3212, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be

viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of his motion, the defendant submits, among other things, his affidavit, and many of the same documents as those reviewed by the Court in its determination of the plaintiff's motion. A review of the defendant's submission reveals the he has failed to establish his entitlement to summary judgment herein. There are numerous issues of fact which require a trial of this action including, but not limited to, whether the defendant agreed to take the property as a nominee, who actually paid the balance of the purchase price either directly or indirectly, what credits or loans make up the principal balance that the defendant alleges is due under a promissory note given to him by the plaintiff, what credits, loans or moneys due to the plaintiff, if any, were utilized by the defendant as trustee of the subject trust to purchase and maintain the property, and when did the relationship between the parties break down.

Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*). Accordingly, the defendant's motion for summary judgment is denied.

Dated: JANUARY 10, 2013.



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION