

Carlo v 310 West 88th St., LLC

2013 NY Slip Op 31984(U)

August 8, 2013

Sup Ct, New York County

Docket Number: 106706/11

Judge: Joan M. Kenney

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8-16-13
cc

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.

FILED
Justice

PART 8

Index Number : 106706/2011
CARLO, LAURA GARAFOLO
vs.
310 WEST 88TH STREET
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

AUG 26 2013

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 106706/11
MOTION DATE _____
MOTION SEQ. NO. 003

The following papers, numbered 1 to 50, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-29</u>
Answering Affidavits — Exhibits _____	No(s). <u>30-42</u>
Replying Affidavits _____	No(s). <u>43-50</u>

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/8/13

Joan M. Kenney, J.S.C.
JOAN M. KENNEY
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER REFERENCE
- DO NOT POST FIDUCIARY APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

FILED

AUG 26 2013

-----X
Laura Garafolo Carlo, as the Executrix
of the Estate of Philip Carlo, and
Laura Garafolo Carlo, individually,

**COUNTY CLERK'S OFFICE
NEW YORK**

Plaintiffs,

DECISION AND ORDER

-against-

Index Number: 106706/11

Motion Seq. No.: 003

310 West 88th St., LLC, Robert Ganer,
Doreen Mannanice, Joseph Mannanice,
Ganer, Grossbach & Ganer, LLC,

Defendants.

-----X
KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	Numbered
Notice of Motion, Affirmations, and Exhibits	1-29
Opposition Affirmation and Exhibits	30-42
Reply Affirmation, Exhibits, and Memo of Law	43-50

In this action, defendants, 310 West 88th St., LLC (310W), Doreen Mannanice, and Joseph Mannanice, move for an Order, pursuant to CPLR 3212, dismissing the claims against them, and for an Order, pursuant to CPLR 3212, granting summary judgment on their counterclaims.

Factual Background

The facts are presumed to be known as they are recited in this Court's prior decision dated January 31, 2013, and will not be repeated herein.

Arguments

Defendants assert that plaintiffs do not offer any admissible evidence to support their claims, and that plaintiffs fail to plead fraud with the necessary specificity.

Plaintiffs maintain that defendants fraudulently acquired title to 310 West 88th St., and that any evidence proving otherwise is hearsay.

Discussion

Pursuant to CPLR 3212(b), “a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense lacks merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law to direct judgment in favor of any party. Except as provided in subdivision ‘c’ of this rule, the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

The rule governing summary judgment is well established: “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 issues of fact from the case.”

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]).

“Unjust enrichment is a quasi-contract theory of recovery, and is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. A plaintiff claiming unjust enrichment must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit the other party to

retain what is sought to be recovered; although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part.” (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406 [1st Dept. 2011]). Here, defendants were not enriched at plaintiff's expense, as defendants' 50% share in 310W was vested before the signing of Philip Carlo's will, when it was transferred to them from Frank Carlo. Philip never had a 100% ownership interest in the property to begin with, so defendants could not benefit at plaintiffs' expense.

The elements necessary for the imposition of a constructive trust include: 1.) the existence of a confidential or fiduciary relationship; 2.) a promise; 3.) a transfer in reliance upon promise; and 4.) an unjust enrichment. (*In re Gupta*, 38 AD3d 445 [1st Dept. 2007]). Here, since defendants were not unjustly enriched, plaintiffs have not satisfied their burden of proof for the imposition of a constructive trust.

The elements necessary to sustain a cause of action for fraud include: 1.) a misrepresentation of a material fact; 2.) falsity of that representation; 3.) scienter; 4.) reliance; and 5.) damages. (*Stuart Silver Associates, Inc. v Baco Development Corp.*, 245 AD2d 96 [1st Dept. 1997]). “Actionable fraud claim[s] require proof that defendant made a misrepresentation of fact which was false and known to be false; it also requires a showing that the misrepresentation was made with the intent to induce another party's reliance upon it.” (*NYC Transit Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78 [1st Dept. 2000]). CPLR 3016(b) states: “where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be

stated in detail.” In this action, plaintiffs were not damaged in any way, as they were never entitled to own more than 50% of the property. Even assuming, *arguendo*, that plaintiffs had actual damages, and asserted each of the elements, plaintiffs have failed to satisfy the burden delineated by CPLR 3016(b) with regard to specificity. Plaintiffs’ third cause of action alleges as follows¹:

“The plaintiffs repeat, reiterate, and re-allege each and every allegation contained in paragraphs ‘FIRST’ through ‘FIFTY-FOURTH’ inclusive with like force and effect as if fully set forth at length herein above.

That in each instance, the transfer(s) and/or conveyances of the Premises were fraudulent, as a matter of law.

That in each instance, the transfer(s) and/or conveyances of the Premises were fraudulent, in accordance with the Debtor and Creditor Law of the State of New York.

Based on all the foregoing, the Court should issue an [O]rder directing the defendants to convey the Premises to the Estate of PHILIP CARLO or in the alternative award the Plaintiffs monetary damages in the sum of FIVE MILLION (\$5,000,000.00) DOLLARS.”

Nothing in the fraud cause of action as pled specifies the actual acts of purported fraud.

RPAPL 1501 states: “where a person claims an estate or interest in real property; or where he claims such estate or interest as executor or administrator of a deceased person; ...such person or municipal corporation, as the case may be, may maintain an action against any other person, known or unknown, including one under disability as hereinafter specified, to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make...” RPAPL 1515(1) further states that “the complaint must state that the action is brought pursuant to this article...” Not only does the complaint fail to satisfy the statute and state that the

¹Plaintiffs’ assertion that this Court need not consider defendants’ motion for failure to attach the pleadings, is moot, as plaintiffs have attached the pleadings to their opposition.

action is brought pursuant to RPAPL Article 15, but they admit as much in their opposition (“Though RPAPL 1501 was not specifically referenced in Plaintiffs’ complaint...”). As such, this cause of action cannot be maintained.

To seek an accounting, a member of an LLC must show that the individual the accounting is sought against is also a member of the LLC. (*East Quogue Jet, LLC v East Quogue Members, LLC*, 50 AD3d 1089 [2nd Dept. 2008]). Here, plaintiff Doreen became a member of 310W upon Philip’s death, as outlined in the operating agreement. Defendants are clearly members of 310W also, as 310W is a named defendant. Defendants’ counterclaim for an accounting is granted and severed.

Defendants’ summary judgment on their 2nd, 3rd, 4th, 5th, and 6th counterclaims is denied.

Accordingly, it is hereby

ORDERED, that defendants’ motion seeking summary judgment dismissing plaintiffs’ claims, is granted; and it is further

ORDERED, that defendants’ motion, seeking summary judgment on their counterclaims, is granted in part, and denied in part; and it is further

ORDERED, that the portion of the movant’s action that seeks an accounting is severed and the issue is referred to a Special Referee to hear and report; and it is further

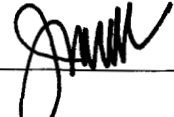
ORDERED that counsel for the defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet², upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is

²Copies are available in Rm. 119M at 60 Centre Street and on the Court’s website at www.nycourts.gov/suptctmanh under the “References” section of the “Courthouse Procedures” link).

directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: 8/8/13

ENTER:



Joan M. Kenney, J.S.C.

FILED

AUG 26 2013

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NEW YORK