

Siony v Siunykalmi

2014 NY Slip Op 30740(U)

March 25, 2014

Supreme Court, Kings County

Docket Number: 014562/2012

Judge: Carolyn E. Demarest

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At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of March, 2014.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

-----X
RACHEL SIONY and DAVOUD AZAD BARDI,
Plaintiffs,

- against -

RAHIM SIUNYKALIMI a/k/a DANNY SIONY,
et al.

Defendants.
-----X

**DECISION
AND
ORDER**

Index No. 14562/12

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NYSCEF
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Defendants move to dismiss the fifth, tenth, eleventh, fifteenth, sixteenth, eighteenth, and nineteenth causes of action, to the extent that they pertain to property located at 2023 East 24 Street, Brooklyn, New York, pursuant to CPLR 3211(a)(1), (5), and (7), for failing to state a cause of action, having a defense based upon documentary evidence, and as barred by the statute of frauds. Further, defendants move to dismiss the first, fifth, tenth, eleventh, twelfth, thirteenth, fourteenth, seventeenth, eighteenth, nineteenth, and twentieth causes of action as barred under the clean hands doctrine.

BACKGROUND

This action arises out of a dispute among family members that operated a real estate business. Plaintiff Rachel Siony ("Rachel") and defendant Danny Siony ("Danny") are siblings who worked with their sibling non-party Nathan Siony ("Nathan"), plaintiff Davoud Bardi ("Davoud"), defendant Nazila Bardi ("Nazila"), Danny's spouse, and counterclaim defendant

Shirin Siony (“Shirin”), sibling of plaintiff Rachel and the ex-wife of Davoud. After an earlier dispute and litigation between the siblings involving Nathan, on January 14, 2008, Justice Michael A. Ambrosio so-ordered a stipulation of settlement (“Settlement”) that provided for the distribution of 27 properties (*Nathan Siony v Danny Siony*, Sup Ct, Kings County, January 14, 2008, Ambrosio, J., index No. 36145/06). On October 9, 2009, Danny, Nazila, Rachel, Shirin, and Davoud entered into a Master Operating Agreement (“Master Operating Agreement”) to address their intentions with respect to the ownership and management of the properties distributed in the Settlement.

In the Second Amended Complaint (“Complaint”), plaintiffs allege that Rachel, Davoud, and Nazila (collectively, the “Partners”) entered into the Master Operating Agreement “to formalize the ownership structure of the Partnership Property.”¹ However, the complaint does not actually identify which properties are included in the purported “Partnership Property.” Although the parties refer to the Master Operating Agreement in their motion papers, and it is an exhibit to the complaint, it was not included in the motion papers.² Further, the court takes judicial notice that Schedule A to the Master Operating Agreement, which purportedly identifies the companies and properties that are the subject of the Master Operating Agreement, was not electronically filed with the Complaint and is not included in the motion papers. Accordingly, the court does not have Schedule A to the Master Operating Agreement. According to the Complaint, “[a] majority of the Properties were deeded in the name of the defendant Holding Companies; the remainder were deeded in the name of individual Partners or listed the Partners’ interests on the deeds.”

As alleged in the complaint, in December of 2011, a dispute arose between Danny, Shirin, Rachel and Nazila over the payment of salaries to Rachel and Shirin, salaried employees of the defendant operating companies Australian Open, LLC, Kensington Realty Services, Inc., and Maccabi Property Management, Inc. (collectively, “Operating Companies”). In January 2012, Danny changed the locks on the partnership’s office and closed out any bank accounts to which plaintiffs had access. A family member, non-party Yosef Soleimani (“Soleimani”), was

¹ As appears from the Amendment, Danny and Shirin also executed the Master Operating Agreement.

² A complete copy of the complaint, with attached exhibits, was not included in the motion papers.

brought in to assist in mediating the dispute. On February 6, 2012, Danny purportedly told Soleimani, “a fictitious story that [Danny] fabricated that Plaintiffs were the targets of a criminal investigation” and Soleimani told Rachel, Davoud, and Shirin the purportedly fictitious story. Rachel, Davoud, and Shirin were also purportedly told the story on February 7, 2012 by Danny himself. On February 7, 2012, Danny purportedly insisted that Davoud and Rachel transfer their twenty-percent ownership interest in the “Partnership Property” to Nazila “in trust.” “Danny and Soleimani insisted that the best course of action for the family was to place all Partnership Property in Nazila’s name for safe-keeping because some family members were facing possible criminal proceedings, Davoud was suffering from health issues, and the salary dispute was fomenting mistrust” and that “the property would be returned at a future date.” Plaintiffs allege that Danny and Soleimani continued to call plaintiffs in February to pressure them to transfer their interests to Nazila and plaintiffs feared being locked out of the business.

On March 1, 2012, plaintiffs, Shirin, Danny and Nazila signed an Amendment to the Master Operating Agreement (“Amendment”) which, in part, stated:

1. All Parties have signed the Master Operating Agreement, as hereinabove, which includes several properties, a list of which is hereby annexed to and made a part of this Amendment.^[3]

4. Rachel Siony, Shirin Siouny and Davoud Azad Bardi acknowledge that they have transferred their respective shares to Nazila Bardi with respect to certain LLCs, as listed herein, thereby making Nazila Bardi as the sole member of those LLCs, constituting 100% ownership.^[4]

On or about April 5, 2012, Soleimani contacted Rachel and revealed that Danny had lied about the criminal investigation and fabricated the story. Plaintiffs allege that, between February and May of 2012, plaintiffs transferred ownership in several properties to Nazila or defendant Joshua Siony (“Joshua”), son of Danny and Nazila. The complaint also includes numerous allegations that Danny sold and refinanced some of the properties and kept the proceeds for himself.

Plaintiffs allege that the property located at 2023 East 24th Street, Brooklyn, NY (“2023 Property”), “was left in trust for Rachel by her mother Miriam Taji Siony” (“Miriam”). Plaintiffs

³ The list of properties is not attached in the exhibit to the motion.

⁴ The list of “certain LLCs” is not attached in the exhibit to the motion.

allege that the deed to the 2023 Property was transferred to Nazila in 2012, “in reliance upon the same fictitious story and misrepresentations made by Danny,” but the 2023 Property was not subject to the Operating Agreement, and the transfer to Nazila was fraudulent. Plaintiffs allege that Rachel has lived in the 2023 Property since 1985.

In support of their motion, defendants argue that a search of the recording of deeds establishes that Miriam never had title to the 2023 Property and could, therefore, not “leave” the property to Rachel. Further, General Obligations Law 5-703(1) requires that the transfer of real property be in writing and plaintiffs have not provided any writing to that effect. Accordingly, defendants argue that the fifth, tenth, eleventh, fifteenth, sixteenth, eighteenth, and nineteenth causes of action,⁵ to the extent that they pertain to the 2023 Property, be dismissed.

Defendants further argue that, according to the allegations in the complaint and specific representations by plaintiffs’ counsel on the record in open court, the plaintiffs transferred property to Nazila for the purpose of avoiding a criminal investigation. When asked by this court for the basis of plaintiffs’ allegation of fraudulent inducement, on March 21, 2013, plaintiffs’ counsel stated:

The inducement, Your honor - - there has been certain criminal issues within the family and the threat was that FBI agents were coming and that they needed to get the properties out of their name and move it over to Nazila much like Danny did. So, everybody all of a sudden got nervous. The FBI never showed up but meanwhile they signed this [Amendment].

Defendants argue that the conveying of property, with the intent to defraud, bars the plaintiffs’ first, fifth, tenth, eleventh, twelfth, thirteenth, fourteenth, seventeenth, eighteenth, nineteenth, and twentieth causes of action⁶ pursuant to the doctrine of unclean hands.

In opposition to the motion, plaintiffs argue that the 2023 Property is deeded to 2023 East 24th Street LLC and Rachel is the sole member of that LLC. Plaintiffs note that in the 2008 Settlement, the 2023 Property was referred to as being separate from the property owned by the “partnership” as Miriam, now deceased, was then living at the 2023 Property. Accordingly,

⁵ The causes of action are, respectively, conversion, unjust enrichment, breach of fiduciary duty, conversion, fraudulent transfer, declaratory judgment, and constructive trust.

⁶ The causes of action are, respectively, action to avoid contract, conversion, unjust enrichment, breach of fiduciary duty, aiding and abetting of breach of fiduciary duty, fraudulent inducement, fraud, declaratory judgment, declaratory judgment, constructive trust, and an accounting.

defendants have not established that Rachel does not have an interest in the 2023 Property. Plaintiffs also argue that property was not transferred in an attempt to defraud the courts or creditors, rather, they were coerced by their older brother Danny and the property was transferred out of family loyalty. Further, defendants' answer regarding the affirmative defense of unclean hands is one sentence and does not contain any specific allegations to support the defense. Since defendants filed an answer, little discovery has been completed, the defendants have not submitted any affidavit by a person with knowledge in support of their motion, and there are issues of fact as to the basis for the transfers of property. Plaintiffs argue that defendants' motion should be treated as a motion for summary judgment and issues of fact preclude dismissal. Plaintiffs also indicated their intention to move for leave to amend the Complaint to correct the error regarding the description of Rachel's interest in the 2023 Property, but no such motion has been made.

ANALYSIS

Upon review of the motion papers, the defendants' motion is denied, without prejudice, as defendants have not provided this court with the entire complaint or complete copies of the Master Operating Agreement or Amendment. Regardless of whether this motion is treated as a motion to dismiss or for summary judgment, as defendants have filed an answer, the Master Operating Agreement and Amendment are the most critical documents at issue in this action and are highly relevant to the motion.

According to the parties, and the language of the first page of the Amendment, plaintiffs transferred "several properties" and shares of "certain LLCs" to Nazila. However, the lists of those properties and shares were not attached to the motion papers despite the Amendment indicating that they were annexed. Further, neither party submitted the Master Operating Agreement with the list of relevant properties in support or opposition to the motion. While it is noted that the plaintiff has apparently not e-filed the lists purportedly attached to the Master Operating Agreement or Amendment, despite the documents being included as exhibits to the Complaint, defendants were signatories to the documents and they have not alleged that they are not in possession of those documents. Accordingly, defendants should have included those documents in the motion.

Defendants argue that the plaintiffs' purported conveyance of property bars their claims and that Rachel never had an interest in the 2023 Property. However, it is premature to rule on

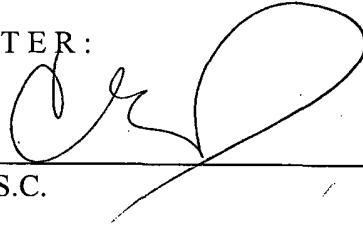
these issues as the transferred property at issue has not even been fully identified. Further it is not clear whether the purported transfer included membership in 2023 East 24th Street LLC which appears to hold the deed to the 2023 Property in which, at one point, Rachel was the sole member.

CONCLUSION

Accordingly, Defendants' motion to dismiss is denied without prejudice.

This constitutes the decision and order of the court.

ENTER:



J.S.C.

HON. CAROLYN E. DEMAREST