

Simpson v Powell

2014 NY Slip Op 33551(U)

September 11, 2014

Supreme Court, Queens County

Docket Number: 23158/2013

Judge: Robert J. McDonald

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show cause seeking a stay of the landlord tenant proceedings was denied for failure to make proper service of the order to show cause. The cross-motion to dismiss the complaint for failure to state a cause of action was denied on the merits, the court holding that the plaintiff's cause of action to set aside the March 2013 deed on the grounds of fraud was pled with sufficient particularity.

On May 16, 2014, the plaintiff filed a second order to show cause to stay the landlord-tenant proceedings. The facts, as set forth in this courts prior decision, are as follows:

Plaintiff, Swiftly Simpson, commenced this action against the defendant, Dorine Powell, by filing a summons and complaint seeking to set aside a deed dated March 11, 2013 in which the plaintiff deeded her interest in the property located at 149-04 133rd Avenue, South Ozone Park, New York, to the defendant, Dorine Powell, and for a judgment declaring plaintiff to be an owner of said premises. Plaintiff alleges that the transfer of her interest was made without consideration and was based upon fraudulent misrepresentations made by the defendant.

In her complaint, filed on December 23, 2013, the plaintiff alleges that in 2006, her sister, Dorine Powell, and her sister's husband, Sebert George Powell, sought to purchase the premises at 149-04 133rd Avenue, South Ozone Park, Queens County. However, as neither Dorine Powell nor her husband could obtain the necessary financing to purchase the subject premises, Dorine Powell requested plaintiff to become a co-purchaser and join her and her husband in obtaining the requisite financing to purchase the subject premises. Plaintiff agreed, and by deed dated November 29, 2006, title to the premises was taken in the name of Dorine Powell and Sebert Powell who received a 99% interest and plaintiff, Swiftly Elise Powell, who received a 1% interest. The mortgage, in the principal amount of \$300,000, was taken in the name of the plaintiff and defendant. Plaintiff alleges that she resided in the premises and paid 50% of the monthly costs including the mortgage, real estate taxes, and insurance.

Plaintiff further alleges that on March 11, 2013, defendant Dorine Powell, induced plaintiff to execute a bargain and sale deed transferring her 1% interest to Dorine Powell without consideration. Plaintiff asserts that the defendant failed to advise her that plaintiff's name would still remain on the mortgage. Subsequent to the transfer of her 1% ownership interest, the defendant, as 100% owner, commenced a holdover proceeding against her sister in the Landlord-Tenant Court claiming that her sister was a tenant in the premises who failed

to pay rent. Plaintiff now seeks an order setting aside the March 2013 deed on the basis of fraud and lack of consideration, for an order declaring that she is an owner of the premises and for an order staying the landlord-tenant proceedings pending the determination of the Supreme Court complaint.

In her affidavit in support of the order to show cause, Ms. Simpson states that she did not realize that when she signed her interest in the property to her sister that her name would remain on the mortgage and that she would be evicted from the premises. She states that she is not a tenant but in fact an equitable owner of 1% of the premises and therefore she is seeking to cancel of record the deed of March 11, 2013 on the ground of fraud and regain her legal interest in the property.

In opposition, the defendant cross-moves for an order vacating the temporary stay of the landlord-tenant proceeding and for an order dismissing the plaintiff's complaint for failure to state a cause of action. Defendant asserts that the complaint fails to plead the essential elements of fraud with particularity as required by CPLR 3016(b). In addition, the defendant seeks an order directing the plaintiff, during the pendency of the action to pay outstanding rent from November 1, 2014 through May 1, 2014 totaling \$9,100.00 and \$1,300 monthly beginning on June 1, 2014.

In her affidavit in support of the cross-motion, dated May 29, 2014, defendant Dorine Powell, states that her sister, Ms. Simpson has lived with her for 25 years and has paid rent during that time. Defendant states that she purchased the premises, a two-family dwelling, on August 3, 2006 for the sum of \$875,000.00. She states that she took out a mortgage for \$300,000 and paid cash for the balance. She states that the plaintiff put no money down towards the purchase price but was given a nominal 1% interest in the property because she signed the note and her name was on the mortgage and the deed. The defendant contends that it was always agreed and understood by the plaintiff that plaintiff had no real ownership of the property and would agree to remove her name from the deed at some point. In January 2013 defendant decided that she wanted the deed in her sole name and wanted to remove her husband Siebert and her sister Swiftly from the deed. Defendant contends that the plaintiff knowingly and willingly transferred her 1% share of the premises to her and had the documents explained to her by an attorney, Robert Kane, Esq. who was retained by the defendant and who prepared the new deed. She states that when she attempted to raise the plaintiff's rent, plaintiff refused, and therefore she commenced the holdover proceeding.

The defendant also attaches an affidavit from Robert Kane Esq. who states that when he prepared the new deed he explained to the plaintiff that her name would remain on the mortgage. Kane states he spoke to the plaintiff at least five times prior to the deed transfer. Thus, defendant contends that the plaintiff was not coerced into signing the deed and did so voluntarily and with the assistance of counsel. Further, counsel asserts that plaintiff is not entitled to injunctive relief as she cannot show success on the merits nor irreparable harm. In addition, the defendant asserts that the complaint fails to plead the necessary elements of fraud with particularity.

Upon review and consideration of the plaintiff's order to show cause, defendant's cross-motion and affirmation in opposition and the plaintiff's reply thereto, this Court finds as follows:

As previously stated in the court's prior decision "defendant's cross-motion to dismiss the complaint for failure to state a cause of action is denied. This court finds that pursuant to CPLR 3106, the complaint sufficiently pleads a cause of action to vacate the deed of March 11, 2013 based upon fraud and misrepresentation. The complaint states that the plaintiff relied on the defendant's misrepresentations, that the misrepresentations were knowingly made by the defendant and were made with intent to deceive the plaintiff, and plaintiff suffered a loss of her share of the title in the premises as a result (see Lunal Realty, LLC v DiSanto Realty, LLC, 88 AD3d 661 [2d Dept. 2011]; Leno v DePasquale, 18 AD3d 514 [2nd Dept. 2005])".

This court finds that as the plaintiff has been living with the defendant in the premises since the time the premises were purchased in 2006 and as there is a question of fact as to whether the plaintiff knowingly and willingly signed her interest in the premises to the defendant in March 2013, this court finds that a balancing of the equities favors restraining the defendant from proceeding with the summary holdover proceeding to evict the plaintiff pending the resolution of the complaint. The plaintiff has shown that any injury she is likely to sustain by being evicted will be more burdensome to her than the harm likely to be caused to the defendant by maintaining the status quo. A preliminary injunction may be granted to maintain the status quo, even if the movant's success on the merits cannot be determined when the motion for that relief is brought (see Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 [1st Dept. 2006] [the purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties]). Further, the existence of factual disputes will not preclude the

granting of temporary injunctive relief in order to maintain the status quo U.S. Reinsurance Corp. v Humphreys, 205 AD2d 187 [1st Dept 1994]).

Therefore, this court finds that there are questions of fact as the circumstances surrounding the plaintiff's signing of the deed to the defendant and whether the deed was voluntarily signed or was signed based upon fraud and misrepresentation. Therefore, a balance of the equities favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action (see Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 [2d Dept. 2009]; S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc., 57 AD3d 642 [2d Dept. 2008]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that plaintiff's motion for a preliminary injunction staying the Landlord-Tenant holdover proceeding filed in Queens County under Index No. L & T 81617/13 is granted pending the resolution of the instant action, and the defendant, Dorine Powell, shall be preliminary enjoined from taking any action that would interfere with the status quo by taking any action to interfere with the plaintiff's residence in the premises until such time as the action is finally resolved, and it is further,

ORDERED, that pending the resolution of this action, the plaintiff is directed to pay her share of the mortgage or rent in the amount of \$1,300.00 per month. The plaintiff's payment shall be made by bank check given to the plaintiff's attorney to be paid directly to Chase Bank commencing June 1, 2014.

Dated: September 11, 2014
Long Island City, N.Y.

FILED
SEP 29 2014
COUNTY CLERK
QUEENS COUNTY

ROBERT J. MCDONALD
J.S.C.