

Mazzei v Kyriacou

2014 NY Slip Op 33747(U)

July 28, 2014

Supreme Court, Nassau County

Docket Number: 22907-10

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

MICHAEL MAZZEI,

Plaintiffs,

- against -

TRIAL/IAS PART 23
Motion Date: 5/20/14
Sequence No.: 005, 006
Index No.: 22907-10

NICOLE KYRIACOU a/k/a NICOLE DEBONIS,
ALL ISLAND EQUITY INC. and THOMAS
DEBONIS,

Defendants.

DECISION AND ORDER

U.S. BANK NATIONAL ASSOCIATION,

Intervenor-Defendant.

L1657
P 40

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits (<i>Sequence 5</i>).....	1
Reply Affidavit In Further Support (<i>Sequence 5</i>).....	2
Notice of Cross-Motion For Summary Judgment, Affirmation and Exhibits (<i>Sequence 6</i>).....	3
Memorandum of Law in Opposition (<i>Sequence 6</i>).....	4
Reply Affirmation and Exhibits (<i>Sequence 6</i>).....	5

PRELIMINARY STATEMENT

In Sequence 5, Plaintiff makes this application for an order, (i) pursuant to CPLR § 3211(a)(7) and RPAPL 1301(3), dismissing Intervenor-Defendant's answer with counterclaim and cross-claim dated September 4, 2012; and (ii) pursuant to CPLR § 3211(a)(4), dismissing Intervenor-Defendant's answer with counterclaim and cross-motion dated September 4, 2012, due to the prior action pending in this Court; and (iii) granting such other, further and different

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relief as may be just, proper and equitable.

In Sequence 6, Intervenor-Defendant makes this application for an order (i) pursuant to CPLR § 3212, granting summary judgment in favor of U.S. Bank and against the plaintiff, dismissing plaintiff's sixth cause of action for the imposition of a constructive trust and dismissing plaintiff's verified complaint in its entirety as against U.S. Bank; (ii) pursuant to CPLR § 6514(a), cancelling the notice of pendency filed by plaintiff in this action; and (iii) such other and further relief as this Court may deem just and proper.

BACKGROUND

Plaintiff obtained a default judgment against All Island Equity, Inc. ("All Island") and Thomas Debonis for \$951,405.00 in November 2010. This was based upon two loans of \$700,000 and \$200,000, for a total of \$900,000, to All Island, which were personally guaranteed by Debonis, Mazzei's nephew. In December, 2010, plaintiff brought this action against All Island, Debonis, and Nicole Kyriacou, a/k/a Nicole Debonis, the wife of Thomas Debonis, alleging that the funds received by Debonis and All Island, were given to her and used to purchase a parcel of real estate, known as 33 Anchor Drive, Massapequa, New York, in her name alone, all of which is claimed to have been in violation of the fraudulent conveyance statutes in the Debtor-Creditor Law. Plaintiff also sought the imposition of a constructive trust on the property held in Nicole's name.

In March 2011, U.S. Bank National Association ("U.S. Bank") commenced a foreclosure action against Nicole Kyriacou, Manufacturers and Traders Trust Company, Michael Mazzei (plaintiff herein), and other unidentified individuals who may be tenants or occupants of the real estate parcel purchased by Kyriacou. The Complaint in that foreclosure action, Exh. "G", recites that Kyriacou borrowed \$650,000 on February 3, 2010, and executed a Note calling for payment of \$3,589.32 per month commencing April 1, 2010, and continuing for 30 years, until March 1, 2040, when the unpaid balance was due and payable. It further alleges that as collateral security, Kyriacou executed a mortgage of even date, to MERS, as nominee for Mortgage Source, LLC. The mortgage was recorded in the Nassau County Clerk's Office on March 25, 2010, in Liber 34707, Page 751.

The parties of interest listed in the foreclosure complaint included Nicole Kyriacou, holder of a deed to 33 Anchor Avenue, recorded on May 29, 2010 in Liber 13613 Page 706;

Manufacturers and Traders Trust Company, holder of a subordinate mortgage recorded in Liber 34843, Page 908; Michael Mazzei, Lienor by virtue of Notice of Pendency dated December 10, 2010 and recorded in Nassau County Clerk's Office on December 15, 2010 under Index Number 022907/2010; and John and Mary Doe, fictitious names representing occupants, tenants or others claiming an interest in the premises being foreclosed.

Plaintiff now seeks an Order in accordance with CPLR § 3211(a)(7) striking the Answer of the present holder of the mortgage and promissory note on the ground that Real Property Actions and Proceedings Law § 1301 precludes an action to recover on a mortgage debt when a foreclosure action is pending, without leave of Court, and that U.S. Bank's appearance as and Intervenor-Defendant constitutes such an unwarranted action.

DISCUSSION

When determining a motion under CPLR § 3211(a)(7) to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*Uzzle v. Nunzie Court Homeowners Assn., Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments (*Brinkley v. Casablanca*, 80 A.D.2d 815 [1st Dept. 1981]).

Real Property Actions and Proceedings Law § 1301(3) provides as follows:

§ 1301. Separate action for mortgage debt.

...

3. While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

U.S. Bank contends that their intervention in the action by the judgment creditor as a

defendant does not constitute the commencement or maintenance of an action to recover the same debt which they are seeking in the foreclosure action. Thus, they claim, their appearance as a defendant does not violate the prohibition of Real Property Actions and Proceedings Law § 1301.

CPLR § 1012 provides for intervention as of right when representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or when the action involves the disposition or distribution of, or the title or a claim for damages for injury, to property, and the person may be affected adversely by the judgment. In *ABM Resources Corp. v. Doraben, Inc.*, 89 A.D.3d 773 (2d Dept. 2011), a foreclosure action, the Court determined that Residential Funding Corporation was entitled to intervene as of right pursuant to CPLR § 1012(a) as a defendant, since it established that the representation of its interest by the parties would be inadequate, the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale.

The action by Michael Mazzei, seeks to impose a constructive trust on the premises which is subject to the mortgage held by U.S. Bank. Mazzei certainly has no interest in protecting the rights of the mortgagee on such premises, since he is seeking to secure title on the basis of an unsecured loan, the proceeds of which were allegedly used to purchase the premises. Thus, in the Sixth Cause of Action, Mazzei claims that Debonis intentionally gave the entire loan proceeds to Kyriacou for the purchase of the premises, Kyriacou was unjustly enriched at the expense of plaintiff, and because she no longer possesses the funds, but used them to purchase the home, it would be unfair, unjust and inequitable for Kyriacou to retain title to the subject property. Plaintiff therefore requests equitable relief, including the execution of a deed to the premises to him from Kyriacou.

By Order dated August 15, 2012 (Brandveen, J.) the Court determined that U.S. Bank had a real interest in the outcome of this action, and that they met the statutory prerequisites for intervention. They showed that there was no potential for delay in the determination of the action, and no substantial prejudice to the parties. It appears from a reading of that Decision and Order, that the deed and mortgage between MERS and Nicole Kyriacou was filed under the

incorrect lot, and that the filing of the lis pendens, while subsequent to the original mortgage filing, placed the claim of U.S. Bank in heightened jeopardy, making their intervention in the action to protect their claimed priority essential.

Plaintiff's motion to strike the Answer of Intervenor-Defendant U.S. Bank is denied. The purpose of § 1301 is to prevent more than one action for a single debt, and thereby impose on the mortgagor the expense and annoyance of two separate actions at the same time for a single debt (*Central Trust Co. v. Dann*, 85 N.Y.2d 767 [1995]). Thus, once a foreclosure action has been commenced, as in this matter, the mortgagee cannot commence a separate action to recover on the Note, without leave of Court in the foreclosure proceeding. U.S. Bank has not commenced a separate action to recover the proceeds of the mortgage. Their position as Intervenor-Defendant will not result in the recovery of any funds, but merely protect their interest in the property.

U.S. Bank cross-moves for summary judgment under CPLR § 3212, dismissing the plaintiff's Sixth Cause of Action for imposition of a constructive trust, and dismissal of the entire complaint as against U.S. Bank. They assert that the February 3, 2010 purchase of 33 Anchor Drive was financed with a \$650,000 mortgage from Mortgage Source, LLC, which they substantiate by attachment of the Promissory Note, Mortgage and HUD Settlement Statement. The Mortgage was assigned to U.S. Bank by MERS, as nominee for Mortgage Source on February 25, 2011. At the time of the mortgage, Mortgage Source had no knowledge of a judgment against All Island Equity, Inc. or Thomas Debonis, as neither of them were listed as purchasers of the property.

The Mortgage was delivered to the Nassau County Clerk for filing, and it, as was the original deed, was filed under Lot 32 as opposed to Lot 37. A correction deed to identify the correct lot was filed on May 20, 2010 in the County Clerk's Office. Similarly, Kyriacou executed a correction mortgage to identify the correct lot, which was recorded in the County Clerk's Office on August 29, 2013. Plaintiff Mazzei obtained his judgment on November 12, 2010, some nine months after the first mortgage filing. The Judgment would not have put Mortgage Source on knowledge of a lien against the premises, since Kyriacou was not a judgment debtor.

The elements of a cause of action to impose a constructive trust are: (1) the existence of a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance of the promise; and,

unjust enrichment. The loans by Mazzei to his nephew and his nephew's company were unsecured, and bore no relationship to 33 Anchor Drive, Massapequa. To the contrary, the loans were ostensibly for business enterprises of defendant Debonis. The fact that, at best, a portion of the proceeds of the loan were used to purchase the premises does not entitle plaintiff to a constructive trust on the premises, which was not even a consideration at the time of the loans.

Plaintiff's claim of a fiduciary relationship with his nephew, Debonis, may well be accurate, but there is no allegation of a promise made with respect to the dwelling, a transfer in reliance upon that promise, and that Debonis was unjustly enriched as a result.

There is no question but that plaintiff was the victim of fraud on the part of his nephew and All Island Equity, Inc. and that Nicole Kyriacou participated in a fraud either upon, or with the complicity of the lender. Based upon material obtained from counsel for the seller of the premises, the contract of sale originally included Debonis as a purchaser. Only on the eve of closing was a contract redrawn to list Ms. Kyriacou as the sole purchaser. To justify her qualification for a \$650,000 loan, and her ability to pay the balance of the purchase price at closing, she certainly appears to have obtained a cashier's check from one Justin French in the amount of \$250.00, and modified it to reflect \$354,000.00, a gift from Mr. French (Exhs. "S" and "U" to Reply Affidavit of Michael Mazzei). Needless to say, it was not long before the mortgage was in foreclosure.

If the claim for a constructive trust is valid, it would take priority over the mortgage, first recorded against the proper parcel in 2013. But the premises were not involved in defendants All Island and Debonis' deceptive loan request to plaintiff. There was no representation that the purpose of the money was to acquire the property, that plaintiff relied on some promise with respect to the property, and that defendants failed to make good on their representation.

A valid constructive trust was imposed against land in *Parr v. Ronkonkoma Realty Venture I, LLC*, 65 A.D.3d 1199 (2d Dept. 2009). In that case the Court found a fiduciary relationship by virtue of plaintiff's member of a joint venture, thereby allowing a claim of constructive trust. *Id.* at 1201. Two parcels were owned by plaintiff individually, but were encumbered by mortgages, which were in arrears. As a result of an action against the Mortgagee, plaintiff became entitled to redeem the properties, and entered into an April 30, 1999 agreement

with Pitcairn-Properties, Inc., which provided for the conveyance of title to them, their satisfaction of the mortgage, and for development by Pitcairn-Parr, LLC, which plaintiff alleged was to become the title holder.

Plaintiff further established his transfer of beneficial title to defendant, based upon a promise that he would be entitled to 50% of the value of the property. He then established that defendant became unjustly enriched, when, rather than develop the property through Pitcairn-Parr, LLC, they mortgaged the property for \$4,000,000, which they used for their own purposes.

This case is distinguishable from the case at bar, since the property upon which a constructive trust was sought, was an integral part of the promise, breach of promise, and unjust enrichment. Such is not the case with respect to Mr. Mazzei's advance of funds to his nephew.

Plaintiff's Sixth Cause of Action alleging a constructive trust is dismissed. Consequently, with the premises unsecured by a constructive trust, there is no basis for a change in title, and the application for a cancellation of the Lis Pendens now a lien on 33 Anchor Dr., Massapequa, New York 11758, Section 65, Block 241, Lot 37 is granted. The Nassau County Clerk is hereby directed to appropriately note on the property records maintained in their Office, the cancellation of the Notice of Pendency against Section 65, Block 241, Lot 37.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 28, 2014

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C..

ENTERED

AUG 29 2014

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**