

Tishelman v Tishelman
2015 NY Slip Op 30628(U)
April 8, 2015
Supreme Court, Kings County
Docket Number: 500309/14
Judge: Wavny Toussaint
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At an IAS Term, Part 70 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 8th day of April, 2015.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

-----X
ALEXANDER TISHELMAN, INDIVIDUALLY
AND DERIVATIVELY IN THE RIGHT AND ON
BEHALF OF 4218 18 REALTY LLC,

Plaintiff,

- against -

Index No. 500309/14

IRINA TISHELMAN, ET AL.,

Defendants.

-----X

The following papers numbered 1 to 8 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-5_____
Opposing Affidavits (Affirmations)_____	6-7, 8_____
Reply Affidavits (Affirmations)_____	_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Irina Tishelman (IT) moves, pursuant to CPLR 3211(a)(1), (3), (5) and (7), for an order dismissing plaintiff's complaint in its entirety, as well as cross-claims asserted by co-defendant Roshel Yusupov (RY).

BACKGROUND

The instant motion arises out of an action commenced by plaintiff Alexander Tishelman (AT) in New York for certain relief concerning the disposition of property located in Brooklyn, New York. The context of the present action is an underlying Judgment of Divorce obtained between AT and IT in New Jersey. Plaintiff alleges causes of action for constructive trust, fraud, and conversion, and seeks a declaration nullifying the sale, and a vacatur of the judgment of divorce.

According to plaintiff's amended complaint, dated July 22, 2014, defendant 4210 18 Realty, LLC (the LLC) was created under the laws of the State of New York on December 20, 1999. The LLC was held by two shareholders, namely plaintiff and Yusupov, each owing a 50% interest. On December 23, 1999, the LLC acquired the fee ownership, by bargain and sale deed, of the real property located at 4212 18th Avenue, Brooklyn, New York (the property).

On December 20, 1999, AT and IT were husband and wife. On that same date, AT transferred all of his interest in the LLC to IT, allegedly in reliance upon her oral promise that she would transfer it back to him at some unspecified time.

On December 19, 2012, IT obtained, on default, a Judgment of Divorce against AT in the State of New Jersey.¹ Plaintiff herein claims that he made a demand "sometime after December 12, 2012." However, on January 9, 2014, IT and YR, without plaintiff's

¹According to the complaint, plaintiff and defendant were still living together on the date of the Judgment of Divorce.

knowledge, transferred the property to themselves as tenants in common and then sold the property to defendant ZD Max, LLC. This transfer allegedly unjustly enriching IT in an amount in excess of over \$700,000. Plaintiff also alleges that within 45 days after issuance of the Judgment of Divorce, he advised IT that he was about to retain an attorney to appeal same, but refrained from doing so after she orally promised that she would “transfer 50% of the interest” in the LLC back to plaintiff, in accordance with their agreement of 1999. Plaintiff claims that in reliance on said promise, which he alleges was known by defendant to be false, but upon which he relied to his detriment, he refrained from appealing said judgment.

In moving to dismiss both the complaint and RY’s cross claim, IT alleges that plaintiff lacks capacity to sue, lacks standing to bring the causes of action both individually and derivatively, and that his complaint fails to state a cause of action. In addition, she asserts res judicata, collateral estoppel, laches, and Statute of Frauds, and seeks counsel fees, costs, and, if deemed appropriate, the conversion of the instant motion to one for summary judgment pursuant to CPLR 3211(c).

In support of said relief, IT denies that AT ever had an interest in either the LLC or the real property held by it, and points out that he himself fails to allege such status in his unverified complaint, and fails to support any such allegation with documentary evidence. She further points to his sworn affidavit in support of his application for an Order of Attachment dated January 27, 2014, wherein he states that he and RY “formed” the LLC,

without stating that he was a member. She contends that any oral promise to convey the real property is void under the Statute of Frauds.

Further, the moving defendant claims that the terms of the Judgment of Divorce, a copy of which is annexed to the moving papers, as well as the transcript of trial, resolved the issue of the LLC by declaring that IT is a 50% owner of same, and that the parties were to share equally in the rental proceeds therefrom. She argues that plaintiff is estopped from taking a contrary position in the present action, and that the doctrine of full faith and credit mandates that said judgment be given res judicata effect.

DISCUSSION

On a motion to dismiss made pursuant to CPLR 3211(a)(7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *In re Loukoumi, Inc.*, 285 AD2d 595, 596 [2d Dept 2001]). Further, “[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate” (*Guggenheimer*, 43 NY2d at 275; *Steve Elliot, LLC v Teplitsky*, 59 AD3d 523 [2d Dept. 2009]; *Doria v Masucci*, 230 AD2d 764 [2d. Dept

1996]). Finally, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Well v Rambam*, 300 AD2d 580 [2d Dept 2002]).

Plaintiff's action sounds in constructive trust, and the action as pled references the parties' Judgment of Divorce filed on December 19, 2012 in the Chancery Division of the Superior Court of New Jersey. That Judgment, entered on default, expressly refers to the parties' Notice of Alimony and Equitable Distribution, as not merged with, but to survive, the Judgment of Divorce. Paragraph 10 thereof specifically addresses the LLC, stating that "the wife is 50% owner of this property." Also annexed to the moving papers is what appears to be a transcript of proceedings held on December 19, 2012, but which is uncertified and thus lacks any evidentiary value on the present motion. However, based upon what may be considered by the court, it is clear that plaintiff's action sounds in constructive trust, and the action arises out of the confidential relationship between plaintiff and defendant. Accordingly, any arguments sounding in res judicata and collateral estoppel, based upon the decision of the New Jersey court are inapplicable to the instant action (*see Asinoff v Asinoff*, 39 Misc3d 1207[A][Sup. Ct. Kings Cty. 2013]).

Moving defendant's motion for dismissal on the grounds that a cause of action has not been stated must be denied. "The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment" (*Rock v Rock*, 100 AD3d 614, 616 [2d Dept 2012] [internal quotation marks omitted]). Plaintiff has

alleged, without dispute, the existence of a fiduciary relationship, and set forth the other factors necessary to state a cause of action for constructive trust (*see Id.* at 616 [(t)he transfer concept extends to instances where funds, time and effort were contributed in reliance on a promise to share in the result. Where the party has no actual prior interest in the property, he or she will be required to show that an equitable interest developed through the expenditure of money, labor and time in the property”] [citations and internal quotation marks omitted]). There is thus no merit to said branch of defendant’s motion.

Additionally, plaintiff has established the elements of conversion in his complaint. “A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Plaintiff’s allegation that monies that belonged to him were, without his knowledge or consent, fraudulently appropriated by defendants and that, upon demand, defendants refused to return the money, sets forth a cause of action for conversion.

Finally, there is no merit to moving defendant’s contention that the within causes of action are (1) time barred, as plaintiff states that the unlawful transfer of the property which is the subject of his claims occurred in 2014 (CPLR 213[1]; *see Auffermann v Distl*, 56 AD3d 502 [2d Dept 2008]), or barred by the Statute of Frauds (*see Livathinos v Vaughan*, 121 AD3d 485 [1 Dept 2014] [(t)he...cause of action, alleging breach of oral agreements, is not barred by the statute of frauds, which does not render void oral partnership or joint

venture agreements to deal in real property”]). Any contentions that plaintiff lacked ownership in the LLC so as to deprive him of standing in the present lawsuit may be explored by way of the discovery process.

The court, declining moving defendant’s request to convert this motion into one for summary judgment, has considered the parties’ remaining contentions and finds them to be without merit. Additionally, while RY appears to request affirmative relief, he has not cross-moved for same, and his papers will only be considered as opposition to the motion herein.

In view of the foregoing, moving defendant’s motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. WAVNY TOUSSAINT

FILED
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