

Teerath v Teerath

2015 NY Slip Op 31882(U)

October 9, 2015

Supreme Court, Queens County

Docket Number: 5443/2013

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

SHARMA TEERATH,
Plaintiff(s),

Index
No. 5443 2013

- against -

Motion
Date August 12, 2015

JEAN TEERATH, et al.,
Defendant(s).

Motion
Cal No. 114

Motion
Seq. No. 1

The following papers numbered 1 to 12 read on this motion by plaintiff for an order, *inter alia*, granting him summary judgment in his favor and against defendant Jean Teerath (defendant) on his complaint; dismissing defendant's answer with counterclaims or, in the alternative, declaring that defendant pay use and occupancy while the matter is pending before the court; awarding him a final judgment of possession of the premises at issue with a warrant of ejectment; and granting costs and disbursements together with counsel fees.

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Plaintiff and defendant were married on March 30, 1999. They had two children of the marriage, born in 1999 and 2001. They obtained a Judgment of Divorce on October 15, 2002. Approximately three-and-a-half years later, in or around March 2006, plaintiff as purchaser, and Harjinder Singh as seller, entered into a residential contract of sale for the purchase of the premises known as 119-14 89th Avenue, Richmond Hill, New York (subject premises), a two-family home. The closing was held on April 21, 2006, at which both plaintiff and defendant were present. The closing statement indicated a purchase price of

\$731,300.00. Plaintiff became the record owner of the subject premises pursuant to a bargain and sale deed dated the same date, and recorded on May 22, 2006. Only plaintiff was named on said deed. According to the verified complaint, filed herein on March 21, 2013, “defendants” entered into possession of the first floor of the subject premises pursuant to an oral license given to them by plaintiff. Plaintiff alleges that defendant has no equitable interest in the subject premises, and that she has never paid use and occupancy since she came into possession. Plaintiff then commenced a summary holdover proceeding against defendant in the Civil Court under Index No. 85180/2012. Therein, the parties entered into a stipulation of settlement on February 13, 2013, whereby plaintiff, the petitioner therein, agreed to discontinue the proceeding without prejudice “to commence an ejectment action or any other eviction action in a court of competent jurisdiction.” Defendant also filed an illegal lockout action in the Civil Court under Index No. 11510/2013. Therein, the parties entered into a stipulation of settlement on May 29, 2013 whereby defendant, the petitioner therein, was restored to possession, and the parties reserved their rights and defenses in all other proceedings including the within action. Thereafter, in a separate proceeding in Civil Court under Index No. 1422/2013, defendant obtained an order dated September 27, 2013, directing plaintiff to restore electricity immediately, as he had the electricity turned off in the subject premises. Plaintiff, by this action, seeks a judgment of possession and a warrant of ejectment, with a writ of assistance to effectuate the “removal of all defendants and their personal effects,” together with attorney’s fees in the amount of \$5,000.00.

Defendant has answered the complaint, asserting various affirmative defenses and interposing what appears to be a counterclaim to impose a constructive trust based upon a reading of the facts as alleged therein. The copy of the verified answer with counterclaims annexed to the motion papers, as well as a copy which is on file with the County Clerk, however, are missing the penultimate page thereof. As such, plaintiff, in support of the motion “reserve[s] the right to file a Verified Reply in the future.” In opposition to the motion, defense counsel states that on or about May 12, 2013, defendant served her verified answer with counterclaims and that, “[a]lthough the plaintiff’s [sic] says it was an incomplete document, a complete copy of the Verified Answer and Counterclaims Annexed [sic] hereto as Exhibit A.” Defendant’s second counterclaim seeks an accounting for all rents, profits, and income plaintiff has received from the subject premises. On the answer backing, service was admitted on May 14, 2013, though it is unclear whether service of the complete document was admitted, as defense counsel does not specify that, indeed, a complete copy of the answer with counterclaims was served.

Plaintiff has not sought any affirmative relief by way of this motion with respect to the remaining defendants named herein as “John Doe” and “Jane Doe.”

In support of plaintiff's motion, he submits, *inter alia*, a copy of the pleadings, a copy of the contract of sale, a copy of the recorded deed to the premises listing plaintiff as the sole record owner thereof, a copy of the closing documents, a copy of plaintiff's personal check dated March 7, 2006, drawn by him in the amount of \$10,000.00, to be paid to counsel for the seller, a bank check dated April 19, 2006, in the amount of \$20,000.00, to be paid to the title insurance company, showing plaintiff as the remitter, a copy of a note and corresponding mortgage, both dated April 21, 2006, regarding the subject property, in the amount of \$511,910.00, given to American Brokers Conduit by plaintiff, copies of subsequent loans, whereby plaintiff was the sole obligor thereon, mortgaging the subject premises, and copies of checks representing several mortgage payments plaintiff made.

Plaintiff states in his affidavit that the entire down payment for the purchase of the subject premises was solely funded from his personal bank account without contribution from defendant, said funds having been generated, rather, from plaintiff's business whereby he is a self-employed tailor. He states that defendant has never been legally or financially responsible for the subject premises, as she did not work and "never had a career and never maintained consistent employment not even on a part-time basis," except for money he "provided her for periodic assistance" with his tailoring business. To that extent, plaintiff has paid all mortgage payments, taxes, and carrying charges with respect thereto. Plaintiff states that, from the date of purchase, plaintiff permitted defendant to reside in the subject premises as a licensee, notwithstanding the fact that: (1) the two were divorced; (2) plaintiff was married to another woman at the time of purchase (from whom he is now divorced); and (3) defendant was married to another man at the time of purchase; all because plaintiff believed it to be in the best interest of their children, of whom they both shared legal custody, but were to reside with defendant pursuant to the terms of the parties' Judgment of Divorce, and "he did not want his children to displaced [sic] due to Defendant's lack of employment."

Plaintiff further states that "the arrangement was terminated" in or about January 2012 as a result of incidents of domestic violence resulting in the issuance of several Orders of Protection against both parties. Plaintiff states that, despite having served defendant with a Notice to Quit, she continues to reside at the subject premises. Moreover, plaintiff indicates that defendant was unlawfully collecting rental income from the upstairs tenant, refusing to tender same to plaintiff. Plaintiff also states that, among other things, defendant's poor maintenance of the subject premises has led to the issuance of violations from the Environmental Control Board and a fine in the amount of \$24,000.00. Plaintiff further avers that, due to defendant's behavior, noted above, he was unable to maintain his mortgage payments and, consequently, the mortgagee of the subject premises commenced a foreclosure proceeding against him.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Only if it meets this burden will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman*, 49 NY2d at 560). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

As a preliminary matter, though it cannot be determined whether plaintiff indeed was served with a complete copy of defendant's answer with counterclaims, it is clear that, to the extent plaintiff seeks summary judgment dismissing said counterclaims, same must be denied. Plaintiff has not established that issue has been joined with respect to either (or both) counterclaim(s) (CPLR 3212 [a]; see *Elias v Serota*, 103 AD2d 410 [1984]; 97 NY Jur 2d, Summary Judgment and Pretrial Motions to Dismiss § 41). Furthermore, since plaintiff failed to make any arguments with respect to defendant's second counterclaim seeking an accounting (presumably because he did not have notice of it), he is not entitled to any affirmative relief with respect to same. However, to the extent plaintiff, in effect, seeks an extension to serve a reply to the counterclaims, same is granted. The complete copy of the answer together with counterclaims, annexed to defendant's opposition papers as Exhibit A thereto, is deemed served as of the date of this order. Plaintiff shall have 30 days from the entry date of this order to serve a reply thereto.

Turning to that branch of the motion seeking summary judgment in his favor on his complaint, plaintiff established, *prima facie*, his entitlement to judgment as a matter of law by production of documentary evidence exhibiting that he is the sole owner – legal and equitable – of the subject premises, and that defendant was occupying the first floor thereof without plaintiff's consent (see *247 E. 32nd LLC v Gasparich*, 95 AD3d 790 [2012]; *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403 [2009]; *Osborne v Tooker*, 36 AD3d 778 [2007]; see also *Marini v Lombardo*, 79 AD3d 932 [2010], *lv denied* 17 NY3d [2011]).

In opposition to the motion, defendant argues that plaintiff is not entitled to prevail on his ejectment action to the extent that she has an equitable interest in the subject premises. To that end, she has asserted a counterclaim for the imposition of a constructive trust. Defendant submits, *inter alia*, her affidavit, in which she states that, contrary to plaintiff's assertion about the status of their relationship, the two, despite their divorce in 2002, have continued to maintain a "marital relationship" up until January 2012 by living together in the subject premises as a family. Furthermore, defendant counters that she worked in a beauty

salon for 10 years prior to the birth of their son and practiced cosmetology at home while taking care of both of their children. She states that all monies received by her were turned over to plaintiff in good faith and he placed the money into his bank account, as they were saving money to purchase the subject premises “as a family.” She asserts that the bank account from which the down payment came was only in his name since, at that time, both parties were married to other people. After the purchase of the subject premises, she worked with plaintiff at his tailoring store and later at a bar and lounge he opened up, but she was not permitted to return due to the Order of Protection which was in place. It was from those monies that permitted the first floor of the subject premises to be furnished. Defendant also indicates that she is currently paying all the bills for plaintiff in order to maintain the heat and hot water, and that “all of the bills in this house is [sic] under my name and my social security number.” Defendant also refers to her first counterclaim, in which she has stated that, despite demanding that plaintiff execute and deliver a deed conveying the premises to both of them, he has refused to do so.

Further, defendant denies collecting rental income from any tenant, stating that it is plaintiff who converted the house into four apartments and “pocketed” the rental income. Finally, defendant maintains that by seeking to eject her from the subject premises, he is also effectively ejecting his own children, of which defendant has physical custody.

Plaintiff does not submit an affidavit in reply. Rather, counsel argues, *inter alia*, that defendant has not submitted any proof that she is or was ever an owner of the premises.

“The equitable remedy of a constructive trust may be imposed “[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest” (*Dee v Rakower*, 112 AD3d 204 [2013], quoting *Sharp v Kosmalski*, 40 NY2d 119 [1976]; *Beatty v Guggenheim Exploration Co.*, 225 NY 380 [1919]). To state a legally sufficient cause of action for the imposition of a constructive trust, it is well established that the proponent must plead and prove four essential elements: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment caused by breach of the promise (*see Sharp*, 40 NY2d at 121; *Gaentner v Benkovich*, 18 AD3d 424 [2005]; *Satler v Merlis*, 252 AD2d 551 [1998]). In particular, “it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed” (*Eickler v Pecora*, 12 AD3d 635 [2004], quoting *Bontecou v Goldman*, 103 AD2d 732 [1984]; *see Ladone v Ladone*, 121 AD2d 512 [1986]). A constructive trust may be imposed when “property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest” (*Sharp*, 40 NY2d at 121). In such cases, equity converts the legal holder into a trustee (*Simonds v Simonds*, 45NY2d 233 [1978]).

Finally, the elements noted above serve only as a guideline and a constructive trust may still be imposed even where all four elements are not established (*id.*).

Where, as here, defendant did not have an actual prior interest in the subject property, she is required to show that “an equitable interest developed through the expenditure of money, labor, and time in the property” (*see Marini*, 79 AD3d at 934). However, merely showing that funds were transferred or expended does not necessarily satisfy the requirement of proving a transfer in reliance on a promise. In this regard, courts have rejected claimants’ attempts to establish the “transfer” element based on improvements to property inasmuch as the improvements also benefitted those claimants (*see id.*). Proof of payments being made by the claimants for the mortgage, operating expenses and real estate taxes have likewise been held insufficient given that such payments could be considered rent (*see Wilson v La Van*, 22 NY2d 131 [1968]; *Marini*, 79 AD3d at 934; *Matter of Lefton [Bedell]*, 160 AD2d 702 [1990]; *Onorato v Lupoli*, 135 AD2d 693 [1987]).

Although the parties were not married at the time the subject premises were purchased, there is – at least – an issue of fact as to whether the parties had a confidential relationship (*see Thompson v Pittman*, 123 AD2d 683 [1986]). Moreover, defendant has averred sufficient facts to suggest that she has an equitable interest in the premises such that a trial is required on that issue. Though defendant did not submit documentary evidence by way of checks or otherwise, her affidavit was sufficient to raise a triable issue of fact by detailing the facts surrounding their relationship and, more particularly, the manner by which the two have historically handled their finances based on that confidential relationship, to wit: the nature of their relationship was such that she trusted him to take monies she earned and place them into his own bank account for their mutual benefit. She directly contradicted plaintiff’s own account as to the source of funds used for the purchase of the house as well as the payments made over time; *i.e.*, they pooled their money together to purchase the subject premises, and plaintiff would be unjustly enriched were he permitted to eject defendant outright. As such, summary judgment in plaintiff’s favor is unwarranted on his cause of action, as is that branch of his motion seeking dismissal of defendant’s first counterclaim to impose a constructive trust (*see Tyree v Henn*, 109 AD3d 906 [2013] [person who provides funds to another with whom that person had a confidential relationship, taken together with the fact that those funds were used towards the purchase of the subject premises, is sufficient to warrant imposition of constructive trust]; *see also Danza v Danza*, 222 AD2d 481 [1995]; *Thompson*, 123 AD3d at 686; *Muller v Sobol*, 277 AD 884 [1950]).

Inasmuch as plaintiff has not established his entitlement to judgment as a matter of law on his ejectment action, he is not, at this juncture, entitled to damages for the value of use and occupancy (*cf. Valvo v Spitale*, 305 AD2d 668 [2003]); in any event, there has been

no evidence submitted establishing, *inter alia*, the fair market rental value of the subject premises (*see Marini*, 79 AD3d at 935).

Accordingly, plaintiff's motion is denied. The complete copy of the answer with counterclaims, annexed to defendant's motion, is deemed served as of the date of this order. Plaintiff shall have 30 days from the entry date of this order to serve a reply thereto.

A copy of this order is being mailed to both counsel on this date.

Dated: October 9, 2015

J.S.C.