Edgar v Edgar
2015 NY Slip Op 31947(U)
October 8, 2015
Supreme Court, Suffolk County
Docket Number: 9163/2014
Judge: James Hudson

Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x----------x

BRUCE EDGAR and VIRGINIA EDGAR,

Plaintiffs,

- against -

BRUCE M. EDGAR and JOYCE EDGAR,

Defendants.

x----------x

INDEX NO.:9163/2014

SEQ. NOS.:001-MOT D
003-MD

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Upon the following papers numbered 1 to 23 read on this Motion/Order to Show Cause to Compel; Notice of Motion/ Order to Show Cause and supporting papers 1-11; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers ~~12-23~~;~~Replying Affidavits and supporting papers 0; Other 0; (and after hearing counsel in support and opposed to the motion)~~, it is

ORDERED, that Defendants' motion (seq.# 3) for an order compelling Plaintiffs to comply with a prior order of the court is denied under the circumstances presented. It is further

ORDERED, that Defendants' motion (seq.#1) for an order dismissing Plaintiffs' complaint is granted in part and denied in part (CPLR Rule 3211 [a][1][7]. It is further

ORDERED, that the second, third, fourth, fifth, seventh, eighth and ninth causes of action in Plaintiffs' complaint are dismissed. The tenth, eleventh, fourteenth and fifteenth causes of action shall be deemed as requests for relief under the "wherefore" clause of the complaint. It is further

ORDERED, that Defendants' application (seq.#1) for an order canceling the *lis pendens* in this matter is denied (CPLR § 6514).

*Erubiscit lex filios castagares parentes.** Whether the observation of the immortal Lord Coke proves to be prescient or inapposite will be resolved at the conclusion of this case.

The matter *sub judice* arises from a dispute between persons, who according to the accepted (and ancient) tenets of society, should be closely bound by the natural impulses of parental devotion and filial piety. As disquieting as the acrimony between the parties is, however, their relationship cannot diminish, in any way, their respective rights to seek justice in an impartial forum, witness the maxim "*consuetudo, licet sit magnæ auctoritatis, nunquam tamen, præjudicat manifestæ veritati.*"**

Initially, the Court wishes to commend Mr. Ring and Mr. Grandinette for the eloquence of their respective briefs. The Bench and Bar are well served by such advocates.

In succinct terms the allegations in this case are as follows: Plaintiffs contend that the house in which they reside was the subject of an oral contract of sale with the Defendants and in reliance thereon, maintained and made improvements thereto. Defendants dispute that any sale occurred and contend that Plaintiffs are in effect trespassers at the present time.

Plaintiffs have asserted fifteen causes of action, styled as: (1) constructive trust, (2) breach of agreement, (3) breach of fiduciary duty, (4) breach of covenant of good-faith and fair dealing, (5) unjust enrichment, (6) promissory estoppel, (7) fraud and fraud in the inducement, (8) negligent misrepresentation, (9) seeking an accounting, (10) punitive damages, (11) no remedy at law, (12) costs and fees, (13) declaratory judgment, (14) equitable lien and (15) permanent injunction.

This decision encompasses two applications. The first is a motion (seq.#3) for an Order "compelling Plaintiffs to immediately comply with the Order" of the Court dated March 5, 2015 (amended March 10, 2015). The second application is a motion (seq.#1) for an Order of dismissal and to cancel Plaintiffs' lis pendens (CPLR Rule 3211 and § 6514).

Initially the Court will address Defendants' motion to compel compliance with our March 10, 2015 Order. In that decision, Plaintiffs were directed to pay a certain sum of money to Defendants and to continue making payments during the pendency of these actions. Plaintiffs oppose the application, claiming, *inter alia,* that they have engaged in good faith efforts to resolve the litigation and are unable to pay the sums directed by the Order.

The Court's original Order is intended to compel obedience by its very terms. In enforcing an order, it is beyond cavil that a court is possessed with certain inherent powers. Those inherent powers, however, have been traditionally narrow and circumscribed to prevent abuse by the bench (***Fludd v. Goldberg***, 51 A.D.3d 153, 158, 854 N.Y.S.2d 362, 366 [1st Dept.2008]; ***Gabrelian v. Gabrelian***, 108 A.D.2d 445, 454, 489 N.Y.S.2d 914, 922 [2d Dept.1985], lv. dismissed, 66 N.Y.2d 741, 497 N.Y.S.2d 365, 488 N.E.2d 111 [1985]).

"Inherent power is a recognized adjunct to judicial power when a judge must discharge a responsibility, but lacks guidance from explicit legislative or decisional authority" (***Alvarez v. Snyder***, 264 A.D.2d 27, 35, 702 N.Y.S.2d 5, 13 [1st Dept. 2000]). This is readily contrasted with the application before us in which there is a clear statutory procedure to follow in order to insure compliance with our order and to punish wilful disobedience to its terms (Judiciary Law §§ 750, 753, 756; ***Department of Housing Preservation and Development of City of New York v. Deka Realty Corp***. 208 A.D.2d 37, 42, 620 N.Y.S.2d 837 [2nd Dept.1995]). Accordingly, the motion to compel compliance will be denied with leave to re-file as a motion for contempt.

We now turn to Defendants motion for dismissal (CPLR Rule 3211) and to cancel the *lis pendens* (CPLR § 6514).

"In considering a motion to dismiss pursuant to CPLR [Rule] 3211 (a) (7), the court should 'accept the facts as alleged in the complaint as true, accord Plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory,'" (***Simos v. Vic-Armen Realty, LLC***, 92 A.D.3d 760 [2nd Dept 2012], *citing*, ***Sinensky v. Rokowsky***, 22 AD3d 563 [2nd Dept 2005], quoting ***Leon v. Martinez***, 84 NY2d 83, 87-88 [1994]). Furthermore, "a court may consider evidentiary material submitted by a [party] in support of a motion to dismiss pursuant to CPLR Rule 3211 (a) (7) (*see,* CPLR Rule 3211 [c]; ***Sokol v. Leader***, 74 AD3d 1180, 1181 [2nd Dept 2010]). "When 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, dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275 [1977]); *see also,* ***Sokol v Leader***, *supra*). In this matter, the Court considered all of the exhibits attached to both the moving papers and the papers in opposition and gave appropriate weight to each.

Furthermore, where the motion seeks to dismiss a complaint for failure to state a cause of action, the Court must determine whether, accepting as true the factual averments of the complaint and granting Plaintiffs every favorable inference which may be drawn from the pleading, Plaintiffs can succeed upon any reasonable view of the facts stated, (***Bartlett v. Konner,*** 228 AD2d 532 [2d Dept 1996]). If 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, (***Wayne S. v. County of Nassau Dept. of Social Services,*** 83 AD2d 628 [2nd Dept 1981]). Additionally, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the Plaintiff's claim (*see,* ***Estate of Menon v. Menon,*** 303 AD2d 622, 756 NYS2d 639 [2nd Dept 2003], *citing,* ***Leon v Martinez,*** 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, ***Roth v Goldman,*** 254 AD2d 405, 406, 679 NYS2d 92).

Defendants argue that any claim of Plaintiffs relating to a contract is barred by the Statute of Frauds on the basis of a failure to reduce the purported understanding to writing (GOL 5-703, derived from 29 Charles II, ch. 3, 8 Stat at Large 405 [1677]).

Plaintiffs do not dispute the absence of a writing. Instead, they contend the oral agreement is enforceable under the part-performance exception to the statute of frauds "[t]he doctrine of part performance may be invoked only if [defendant's] actions can be characterized as unequivocally referable to the agreement alleged. "It is not sufficient...that the oral agreement gives significance to [defendant's] actions. Rather, the actions alone must be unintelligible or at least extraordinary, [and] explainable only with reference to the oral agreement" (***Nicolaides v. Nicolaides***, 173 A.D.2d 448, 449-50, 569 N.Y.S.2d 968, 969 [2nd Dept. 1991] *citing,* ***Anostario v. Vicinanzo***, 59 N.Y.2d 662, 664, 463 N.Y.S.2d 409, 450 N.E.2d 215, quoting from dissenting opn of Mahoney, J., at 56 A.D.2d 406, 412, 392 N.Y.S.2d 933). A review of the ***Nicolaides*** decision and other authority such as ***Kurlandski v. Kim***, 111 A.D.3d 676, 975 N.Y.S.2d 98 (2nd Dept. 2013), demonstrate that Plaintiffs have failed to sufficiently plead such unequivocal behavior. Accordingly, the second cause of action sounding in breach of contract will be dismissed. We agree with defense counsel that Plaintiffs' third, fourth and eighth causes of action are clearly derived from a breach of contract theory and as such, must also be dismissed.

The Statute of Frauds cannot be used as a shield against a properly pled action sounding in fraud (***Channel Master Corp. v. Aluminum Limited Sales, Inc.*** 4 N.Y.2d 403, 151 N.E.2d 833 [1958]). Nor will it prevent a valid claim invoking promissory estoppel (***Ginsberg v. Fairfield-Noble Corp.*** 81 A.D.2d 318, 440 N.Y.S.2d 222 [1st Dept. 1981]). The claims sounding in fraud, promissory estoppel and a constructive trust will be discussed *ad seriatim.*

We will examine the claim of Plaintiffs sounding in fraud. "[A] cause of action alleging fraud must be pleaded with the requisite particularity pursuant to CPLR Rule 3016 (b)" (***Pace v. Raisman & Associates, Esqs., LLP***, 95 A.D.3d 1185, 945 N.Y.S.2d 118 [2nd Dept 2012]). Specifically, it must be alleged that "(1) the Defendant made a false representation of fact, (2) the Defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the Plaintiff's reliance, (4) there was justifiable reliance on the part of the Plaintiff, and (5) the Plaintiff was injured by the reliance." (Id at 1189).

Applying well settled law to the claimed facts, it is clear that elements (2) and (3) have not been alleged with sufficient particularity. This obliges the Court to dismiss the seventh cause of action.

We now examine if Plaintiffs have stated a viable cause of action for promissory estoppel. "The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (***Rock v. Rock***, 100 A.D.3d 614, 616, 953 N.Y.S.2d 165 [2nd Dept.2012]). The Court in ***Rock*** was following an accepted principle of equity expressed in ***American Bartenders School, Inc. v. 105 Madison Co.*** 59 N.Y.2d 716, 450 N.E.2d 230, 463 N.Y.S.2d 424 N.Y. [1983]: "The purpose of invoking the doctrine is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another (***3 Williston, Contracts*** [3d ed], § 533A, at p.798; ***Imperator Realty Co. v. Tull***, 228 N.Y. 447, 453, 127 N.E. 263)." The facts as pled by Plaintiffs are at a direct variance with the averments of Defendants on this issue. Accepting them as true for the purposes of this motion, the Court concludes that the elements of promissory estoppel have been met.

On the issue of whether a claim for a constructive trust has been pled, the case law set forth in ***Canzona v. Atanasio***; 118 A.D.3d 837, 989 N.Y.S.2d 44 [2nd Dept. 2014] is of particular guidance. The ***Canzona*** Court stated that "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'" (cites omitted). "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 thereon, and (4) unjust enrichment" (Cites omitted) (Id. at 839-840).

A claim for a constructive trust does not demand that the claimant allege a prior interest in the *locus in quo*. It is incumbent on Plaintiffs, however, to assert that they have contributed "funds, time or effort to the property in reliance on a promise to share in some interest in it" (***Henness v. Hunt***, 272 A.D.2d 756, 708 N.Y.S.2d 180, 3rd Dept. 2000] *citing,* ***Lester v. Zimmer***, 147 A.D.2d 340, 342, 542 N.Y.S.2d 855). Plaintiffs have clearly articulated such a claim and the motion to dismiss this cause of action must be denied.

The thirteenth cause of action seeks relief in the form of declaratory judgment. Although largely subsumed by the two remaining claims, a claim for declaratory relief is one which does not lend itself easily to dismissal as the party seeking the relief need only present justiciable controversies in their complaint, as Plaintiffs in this case have done, *see,* ***State Farm Mut. Auto. Ins. Co. v Anikeyeva***, 89 A.D.3d 1009 (2nd Dept 2011).

We agree with defense counsel that causes of action (9) seeking an accounting, (10) punitive damages, (11) no remedy at law, (12) costs and fees, (14) equitable lien and (15) permanent injunction are not proper causes of action but instead should be placed in the "wherefore" clause of the complaint since they have a bearing on the relief requested, not on

the theory or facts to obtain same (compare §§ CPLR 3013 and 3017). The ninth cause of action, however, relates to the dismissed claim of breach of contract so it must follow the demise of that stricken theory. As to the remainder, rather than dismiss them as improperly pled, they shall be considered as part of Plaintiffs' prayer for relief

We finally examine the propriety of cancelling the notice of pendency for the *locus in quo*. In light of our decision denying the motion to dismiss the first, sixth and thirteenth causes of action, it cannot be said that a judgment concerning the realty has been "settled, discontinued or abated" (CPLR § 6514[a]); ***OneWest Bank, FSB v. Mgbeahuru***, 100 A.D.3d 846, 953 N.Y.S.2d 883, 884 [2nd Dept.2012] *citing*, ***Nastasi v. Nastasi***, 26 A.D.3d 32, 805 N.Y.S.2d 585). This obliges the Court to deny Defendants motion to cancel the *lis pendens*.

Therefore, under the circumstances presented, Defendants motion for dismissal is denied as to the first, sixth and thirteenth causes of action sounding in constructive trust, promissory estoppel and declaratory judgment respectively. The second, third, fourth, fifth, seventh, eighth and ninth causes of action are dismissed. The tenth, eleventh, fourteenth and fifteenth causes of action shall be deemed as requests for relief under the "wherefore" clause of the complaint.

DATED: OCTOBER 8, 2015
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.

*The law blushes when children correct their parents (8 Coke 116).

** A custom, though it be of great authority, should never prejudice manifest truth (4 Coke 18).