

Born to Build LLC v Saleh

2015 NY Slip Op 31958(U)

October 23, 2015

Supreme Court, Queens County

Docket Number: 13378 2011

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. DAVID ELLIOT
Justice

IAS Part 14

BORN TO BUILD LLC,

Plaintiff,
-against-

Index
No. 13378 2011

Motion
Date August 18, 2015

IBRAHIM SALEH, et al.,

Defendants.

Motion
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The following papers numbered 1 to 9 read on this motion by defendant Qing Ling Mei for, *inter alia*, an order pursuant to CPLR 3211 (a) (1) dismissing the complaint against her; and on this cross motion by plaintiff for an order permitting the service of a supplemental summons and an amended complaint.

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Notice of Motion - Affidavits - Exhibits.....	1-5
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Upon the foregoing papers it is ordered that: plaintiff's cross motion for an order permitting it to serve a supplemental summons joining Yaakoub Saleh as an additional defendant and to serve an amended complaint is granted. Plaintiff shall serve upon defendants the supplemental summons and amended complaint in the form annexed to the cross motion papers, together with a copy of this order with notice of entry, within thirty days of the entry date of this order. Said pleadings are deemed served upon defendant Mei as of the entry date of this order. Defendant Mei's motion is denied.

I. The Cross Motion to Amend the Complaint

Plaintiff seeks to serve a supplemental summons joining Yaakoub Youssef Saleh as an additional defendant and an amended complaint adding a new cause of action based on

RPAPL Article 15. CPLR 3025 (b) provides that leave to amend a pleading “shall be freely given upon such terms as may be just” (see *Holchender v We Transp.*, 292 AD2d 568 [2002]; *St. Paul Fire & Marine Ins. Co. v Town of Hempstead*, 291 AD2d 488 [2002]; *Whitney-Carrington v New York Methodist Hosp.*, 289 AD2d 326 [2001]). As a general rule, the amendment of a complaint will be permitted where there is no significant prejudice or surprise to the defendant (see *Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *Holchender v We Transport, Inc.*, *supra*; *Dal Youn Chung v Farberov*, 285 AD2d 524 [2001]).

In the case at bar, the defendants did not demonstrate prejudice or surprise.¹ In determining whether to permit a party to amend a complaint to add a cause of action, the court must also examine the merits of the proposed cause of action (see *Morgan v Prospect Park Assoc. Holdings*, 251 AD2d 306 [1998]; *McKiernan v McKiernan*, 207 AD2d 825 [1994]). The amendment will not be permitted where the proposed cause of action is patently lacking in merit (see *McKiernan v McKiernan*, *supra*). In view of plaintiff’s allegations, the court finds that the proposed cause of action seeking a declaration that Ibrahim Saleh, not Yaakoub Saleh, is the true owner of property known as 38-16 220th Street, Bayside, New York has sufficient merit for the purposes of CPLR 3025 (b).

II. Procedural Matters

Plaintiff began this action to set aside an alleged fraudulent conveyance on June 3, 2011, by the filing of a summons and a complaint. The instant motion is the fourteenth made before trial. When faced with the cross motion to serve an amended complaint, defendant Mei did not withdraw her CPLR 3211 motion; thus, the court will apply the motion to the amended complaint. Filing of an amended pleading does not automatically abate a motion to dismiss that was addressed to the original pleading; “the moving party has the option to decide whether its motion should be applied to the new pleadings” (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35 [1998]; see *Sobel v Ansanelli*, 98 AD3d 1020 [2012]; *49 West 12 Tenants Corp. v Seidenberg*, 6 AD3d 243 [2004]) or the court may consider it as such (see *Ferguson v Sherman, Sq. Realty Corp.*, 30 AD3d 288 [2006]).

III. The First Amended Complaint

The first amended complaint dated July 27, 2015 alleges the following:

Ibrahim Saleh (I. Saleh), who uses various aliases, and Yaakoub Youssef Saleh (Y.Y. Saleh) are fugitives from justice and may have returned to Lebanon to avoid arrest.

1. Indeed, defendant Mei did not submit opposition to the cross motion.

Plaintiff, whose managing member is George Hourani, acts as the general contractor on construction projects. Y.Y. Saleh held a deed on property located at 38-16 220th Street, Bayside, New York (the property). In or about 2005, Y.Y. Saleh and his sister, Ali Saleh (A.Saleh), met Hourani who learned that they wanted to build a house on the property. Hourani also met I. Saleh (their brother), who stated that he wanted to start a real estate development business, and the latter proposed that the former's company act as the general contractor in the construction of the house.

In or about September 2006, plaintiff began the demolition of an existing house and the construction of a new house on the property and, shortly thereafter, A.Saleh and Y.Y. Saleh returned to Lebanon. I. Saleh told Hourani that he had purchased the property and that he wanted plaintiff to finish the construction of the new house. Plaintiff completed the project in the middle of 2007, but I. Saleh did not pay sums due the contractor. I. Saleh and his family occupied the new house until April 2011, when he and his family returned to Lebanon. Despite I. Saleh's alleged purchase of the property, Y. Y. Saleh never transferred title to him.

In or about April 2007, I. Saleh also contracted with plaintiff for the construction of a hotel located at 1141 Broadway, New York, and he persuaded Hourani to open a checking account at a Banco Popular branch located in California, representing that he would deposit funds into the account to pay for plaintiff's work on the hotel. Hourani opened the account into which I. Saleh deposited more than \$3,000,000. However, in or about March 2009, Hourani discovered that I. Saleh had drained the account of all funds through a series of forged checks and unauthorized transfers.

Plaintiff began an action in the New York State Supreme Court, County of Nassau against I. Saleh seeking to recover its losses (*Born to Build LLC v. Saleh*, Index No. 2345/11). On or about April 15, 2011, a deed transferring the subject property from Y.Y. Saleh to Qing Ling Mei was recorded in the Office of the City Register of the City of New York, and she paid little or no consideration for the property. I. Saleh executed the deed in the name of Y.Y. Saleh. On or about May 24, 2011, plaintiff entered a judgment in the New York State Supreme Court, County of Nassau, in the amount of \$3,563,507 against I. Saleh.

IV. CPLR 3211 (a) (8)

Pursuant to an order signed by this court on or about April 1, 2013, this court provided: "Service of the Summons in this action upon defendant Qing Ling Mei shall be made by delivering the Summons and Complaint to her attorney, Yu Xi Liu, Esq., pursuant to CPLR 2103 (b) (1), (3) or (4) within thirty (30) days of the date of this Order. . . ."

On March 9, 2015, plaintiff submitted a motion for a default judgment against defendant Mei. Pursuant to a decision and order dated March 20, 2015, this court granted the motion unless Mei answered the complaint or made a motion pursuant to CPLR 3211 within thirty days from the entry date of the order. This court found: “[P]laintiff has demonstrated . . . that Mei was served with the summons and complaint and notice of pendency on March 18, 2014 pursuant to CPLR 2103 (b) (3). . . . Thus, plaintiff has established that Mei is in default in answering the complaint.”

The decision and order dated March 20, 2015 have already determined that the court has acquired *in personam* jurisdiction over Mei. Defendant did not state that she has new evidence to present to the court on the instant motion.

Moreover, Mei’s objection based on CPLR 2103 (b) has no merit. It is true that CPLR 2103 (b) applies only to the service of papers upon an attorney in a pending action (*see Jackson v State*, 85 AD2d 818 [1981]; Gleason, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, C:2103:3 [“The various methods listed in the subparagraphs of CPLR 2103(b) become operative after jurisdiction has been acquired and the action is pending”]). However, CPLR § 308 (5) allows personal service upon a defendant “in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section” (*see Keith X. v Kristin Y.*, 124 AD3d 1056 [2015]). In the case at bar, service upon defendant Mei through her attorney by methods specified in CPLR 2103 (b) was proper pursuant to CPLR § 308 (5) (*see Kelly v Lewis*, 220 AD2d 485 [1995]).

V. CPLR 3211 (a) (1)

CPLR 3211 provides in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . .” (*See Galvan v 9519 Third Ave. Rest. Corp.*, 74 AD3d 743 [2010]). In order to prevail on a CPLR 3211 (a) (1) motion, the documentary evidence submitted “must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff’s claim” (*Fernandez v Cigna Prop. and Cas. Ins. Co.*, 188 AD2d 700 [1992]; *see Galvan v 9519 Third Ave. Rest. Corp.*, *supra*; *Fontanetta v Doe*, 73 AD3d 78 [2010]; *Vanderminden v Vanderminden*, 226 AD2d 1037 [1996]; *Bronxville Knolls, Inc. v Webster Town Ctr. Partnership*, 221 AD2d 248 [1995]). In the case at bar, defendant did not produce any documentary evidence that is dispositive of the causes of action asserted against her.

VI. CPLR 3211 (a) (7)

Debtor and Creditor Law § 273, “Conveyances by insolvent,” provides: “Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration” (*see Citibank, N.A. v Plagakis*, 8 AD3d 604 [2004]; *Grace Plaza of Great Neck, Inc. v Heitzler*, 2 AD3d 780 [2003]; *St. Teresa’s Nursing Home v Vuksanovich*, 268 AD2d 421 [2000]).

Debtor and Creditor Law § 276, “Conveyance made with intent to defraud,” provides: “Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors” (*see B.M.H. Mgt., Inc. v 81 & 3 of Watertown, Inc.*, 13 AD3d 1182 [2004]; *Citibank, N.A. v. Plagakis, supra*; *Grace Plaza of Great Neck, Inc. v Heitzler, supra*).

Debtor and Creditor Law § 278, “Rights of creditors whose claims have matured,” provides in relevant part:

“Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,

“a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

“b. Disregard the conveyance and attach or levy execution upon the property conveyed” (*see Skiff-Murray v Murray*, 17 AD3d 807 [2005]; *Roth v Porush*, 281 AD2d 612 [2001]).

Defendant Mei has submitted evidence purporting to show that: (1) I. Saleh and Y.Y. Saleh are two different people; (2) Y.Y. Saleh, not I. Saleh, owned the subject property and conveyed it to her; (3) I. Saleh did not have an equitable interest in the subject property; (4) a buyer’s market, the lack of a certificate of occupancy, and the possibility of foreclosure caused a reduction in the selling price; and (5) she paid fair consideration for the subject property and had no knowledge of fraud at the time of the purchase.

“Where, as here, evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one

for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one . . .” (*Hallwood v Incorporated Vil. of Old Westbury*, 130 AD3d 571 [2015]; *Agai v Liberty Mut. Agency Corp.*, 118 AD3d 830 [2014]; *Fishberger v Voss*, 51 AD3d 627 [2008]). However, “unless it has been shown that a material fact as claimed by the plaintiff 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” (*Hallwood v Incorporated Village of Old Westbury, supra*; see *Agai v Liberty Mut. Agency Corp., supra*; *Fishberger v Voss, supra*). Consideration of evidentiary materials will almost never warrant dismissal of a cause of action pursuant to CPLR 3211 (a) (7) unless they conclusively establish that the plaintiff has no cause of action (*Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251 [2012]).

In the case at bar, the evidence submitted by defendant Mei on this motion does not conclusively establish that Y.Y. Saleh, rather than I. Saleh, actually owned the subject property; that I. Saleh had no interest in the subject property; and that Mei paid a fair consideration for the subject property. Plaintiff has alleged that I. Saleh spent approximately \$1,600,000 of his own money to improve the subject property which defendant Mei purchased for only \$700,000. Moreover, on the present state of the record, there are issues pertaining to Mei’s credibility.

CPLR § 5203, “Priorities and liens upon real property,” relied upon by defendant Mei, has no relevance on this CPLR 3211 (a) (7) motion. The statute “prescribes the moment that a judgment becomes a lien on the judgment debtor’s real property and determines priorities in that property among judgment creditors and between judgment creditors and certain transferees” (Reilly, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, C:5203:1). Plaintiff’s causes of action are not based upon CPLR § 5203, plaintiff has not asserted the priority of a lien based on the statute, and, in any event, Mei is not the type of transferee within the exceptions of the statute. Plaintiff’s causes of action are based on Debtor and Creditor Law §§ 273 and 276, which do not become operative only upon a judgment being docketed with the county clerk.

Real Property Law § 266, “Rights of purchaser or incumbrancer for valuable consideration protected,” also relied upon defendant Mei provides: “This article does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.” On the present state of the record, there are issues of fact pertaining to whether Mei had notice of the fraudulent intent of I. Saleh and whether she paid fair consideration for the property (*see Maiorano v Garson*, 65 AD3d 1300 [2009]).

VII. Conclusion

Plaintiff's cross motion for an order permitting it to serve a supplemental summons joining Yaakoub Saleh as an additional defendant and to serve an amended complaint is granted. The plaintiff shall serve the supplemental summons and amended complaint upon defendants, together with a copy of this order, within thirty days of the entry date of this order. Said pleadings are deemed served upon defendant Mei as of the entry date of this order. The motion by defendant Qing Ling Mei is denied.

Dated: October 23, 2015

J.S.C.