

Aber v Ashkenazi

2016 NY Slip Op 30640(U)

March 14, 2016

Supreme Court, Kings County

Docket Number: 503142/14

Judge: Johnny Lee Baynes

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This opinion is uncorrected and not selected for official publication.

At a(n) IAS Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse thereof, at 360 Adams Street, Brooklyn, NY 11201, on the 14^h day of March, 2016.

PRESENT:

HON. JOHNNY L. BAYNES,

JSC.

-----X

Index No. 503142/14

NUCHEM ABER,

Plaintiff,

-against-

DECISION AND ORDER

ZALMEN ASHKENAZI, ZMA 42 LLC and MIRIAM ABER,

Defendants,

-----X

Plaintiff, Nuchem Aber (hereinafter "Plaintiff") moves by Notice of Motion for an Order pursuant to CPLR §3215, granting a Default Judgment against Defendant Miriam Aber; and pursuant to CPLR § 3212, granting Summary Judgment in favor of Plaintiff and against Defendant ZMA 42, LLC, cancelling and setting aside a deed to the premises located at 1037 42nd Street, Brooklyn, NY

Defendants Zalmen Ashkenazi and ZMA 42, LLC (hereinafter "Ashkenazi Defendants") Cross-Move for an Order pursuant to CPLR 3212 granting Summary Judgment in favor of the Ashkenazi Defendants dismissing the cause of action against them.

Defendant Miriam Aber (hereinafter "Defendant wife") moves by Notice of Cross Motion for an Order pursuant to CPLR § 3215 granting her leave to interpose an Answer to the Amended Complaint herein.

FILED
KINGS COUNTY CLERK
2016 APR 11 AM 8:01

This action involves a property allegedly transferred on or about January 27, 2009 from Plaintiff and Defendant Aber to the Ashkenazi Defendants. Plaintiff asserts that his now estranged wife acted only on his behalf pursuant to Power of Attorney and that the property was transferred without him receiving any consideration for the transfer. Miriam Aber submits an Affirmation in support of her cross-motion, in which she states that Plaintiff did receive consideration for the property. She states that she did not answer initially because she did not understand what her estranged husband was seeking since it was her belief that the property was transferred in 2009. The Ashkenazi defendants submit copies of checks purporting to be consideration tendered for the property in question. Those checks do not indicate that they were cashed or by whom they were cashed.

Summary judgment, while a drastic remedy, is warranted when there are no factual disputes to be resolved by the trier of fact. *Mallard Construction Corp v County Fed Savings*, 32 NY2d 285 [1973], whether all issues to be resolved are strictly issues of law, *Long Island RR Co v Northport Industrial Corp.*, 42 NY2d 455 [1977], or when the uncontroverted facts can only be determined in one fashion as a matter of law. *Alvord and Swift v Muller Constr. Co., Inc.*, 46 NY2d 276 [1978]. “It is well settled that ‘the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’.” *Olan v Ursino*, 235 AD2d 406 [AD2d 1997].

Once this showing is made, the burden shifts to the party opposing the motion for Summary Judgment. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]. In considering a motion for summary judgment, the Court must view all facts in a light most favorable to the non-moving party. *See, Zuckerman v City of New York*, 49 NY2d 557 [1980]

In this case, Plaintiff has made the prima facie showing that he did not receive consideration for the property in question. Defendants raise facts such as would tend to show that Plaintiff did, in fact, receive consideration for the property in question. Mrs. Aber goes further, stating that Plaintiff participated in the closing of the property when it was sold on January 27, 2009. Given the issues of fact raised by the parties, herein, Summary Judgment is not an appropriate remedy and the Court is bound to deny the motion and cross-motion for Summary Judgment. *Zuckerman, Id* at 49 NY2d 557.

The Court also wishes to take judicial notice that Nuchem and Miriam Aber are involved in two active matrimonial actions in this Courthouse. The first, before the Honorable Carl Landicino, under Index No. 506362/15, is returnable for conference before Judge Landicino on July 20, 2016. The second, before the Honorable Dolores Thomas, under Index No. 54224/16, is returnable for conference before Judge Thomas on April 18, 2016. This Court has no way of knowing if the property forming the basis of this action is or should be somehow related to issues raised before either of those two Justices of this Court. In any event, it is clear that there are issues of fact to be addressed by a trier of fact which cannot be resolved on a Motion for Summary Judgment.

With respect to the Cross-Motion of Miriam Aber for an Order allowing her to interpose an Answer to the instant Action, while the Court believes that her reasons for not interposing an Answer were misguided, it is clear that she has a “reasonable excuse” and the potential for success on the merits. *Mellon v Ismirigel*, 88 AD3d 930 [2nd Dept 2011]; *Wells Fargo Bank NA v Cervai*, 84 AD3d 789 [2d Dept 2011].

WHEREFORE, it is hereby

ORDERED AND ADJUDGED that Plaintiff’s Motion for an Order


pursuant to CPLR §3215, granting a Default Judgment against Defendant Miriam Aber; and pursuant to CPLR § 3212, granting Summary Judgment in favor of Plaintiff and against Defendants ZMA 42, LLC, cancelling and setting aside a deed to the premises located at 1037 42nd Street, Brooklyn, NY are denied in all respects; and it is further

ORDERED AND ADJUDGED that the Cross-Motion of Defendants Zalmen Ashkenazi and ZMA 42 LLC, pursuant to CPLR 3212 seeking Summary Judgment in their favor dismissing the complaint is denied in all respects; and it is further

ORDERED AND ADJUDGED that the Cross-Motion of Defendant Miriam Aber pursuant to CPLR § 3215 granting her leave to interpose an Answer to the Amended Complaint herein is granted in all respects and Defendant Aber is directed to file and serve her Answer within thirty (30) days of service of a copy of the within Order with Notice of Entry upon her.

The foregoing constitutes the Decision and Order of the Court.

ENTER



JOHNNY L. BAYNES, JSC

HON. JOHNNY LEE BAYNES

FILED
KINGS COUNTY CLERK
2016 APR 11 AM 8:12