

Messam v Chevannes
2016 NY Slip Op 30667(U)
March 8, 2016
Supreme Court, Bronx County
Docket Number: 260066/15
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4



-----x
Rosalee Messam

Plaintiff

Decision and Order

Index No.260066/15

-against-

Gary Chevannes and Gary Lloyd

Defendants

Howard H. Sherman

J.S.C.

-----x
The following papers numbered 1 read on motion for summary judgment

Notice of Motion , Affirmation in Support, Exhibits A-C 1

Plaintiff commenced this action in February 2015, seeking declaratory relief and \$1,000,000.00 in damages arising out of the 2004 purchase of residential premises located at 945 East 214th Street, Bronx, New York. Plaintiff alleges that defendant Gary Chevannes (Chevannes) was acting as her nominee when he obtained title to the premises , plaintiff having provided the \$20,000. down payment. Chevannes held a mortgage on the property in the amount of \$360,000. Plaintiff alleges that in addition to providing the funds for the down payment, she also was "making all payments on the mortgage." [Verified Complaint ¶ SIXTH]. Plaintiff further alleges that the parties had agreed that Chevannes would convey the property to her upon demand , and he failed to do so, and has transferred the property to his son , the co-defendant. Plaintiff seeks to vacate that transfer, and to impose a trust on the premises , and a declaration that defendants hold legal title in trust for her benefit, and an order restraining defendants from selling, or transferring, or further encumbering the property .

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Issue was joined in April 2015, with the service of defendants' answer consisting of a general denial, and assertions that they are the lawful owners of the property, and there is no privity of contract between plaintiff and either defendant.

Related Action

In July 2010, Wells Fargo Bank, N.A. commenced a foreclosure action against Chevannes with respect to the subject property alleging that he had defaulted in the payment of the monthly mortgage installment as of June 1, 2009. After issue was joined and several appearances in the Residential Foreclosure Conference Part , the case was settled in November 2011, with defendant qualifying for a HAMP modification of the mortgage.

Motion

Plaintiff now moves for an award of summary judgment on the grounds that she has demonstrated as a matter of law her claim for a constructive trust to be impressed on the premises for her benefit. The motion is supported by a copy of the pleadings, and plaintiff's affidavit, and the copy of a letter attributable to the defendant . To the extent that this document is not authenticated it is not considered on this motion.

In pertinent part, plaintiff attests to the terms of the 2004 agreement with Chevannes, with whom she has two children. The purchase price of the residence was \$375,000., and as noted , plaintiff paid the down payment and closing costs in reliance on defendant's promise that he would hold title as her nominee . Plaintiff also attests that she also made

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all payments on the mortgage. Prior to the commencement of this action, plaintiff demanded that Chevannes execute and deliver to her a deed conveying title, and he refused to do so. Plaintiff states that on October 4, 2013, Chevannes transferred the property to his son without consideration, or notice to her.

Discussion and Conclusions

Summary judgment may be granted only when it is clear that no triable issue of fact exists (see, Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; Phillips v Joseph Kantor & Co., 31 NY2d 307, 311, 291 N.E.2d 129, 338 N.Y.S.2d 882 [1972]). The court's function on this motion for summary judgment is "issue finding" rather than issue determination (Sillman v Twentieth Century—Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]), it being incumbent upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Dispositive relief should not be granted where there is any doubt as to the existence of such issues (see, Braun v. Carey, 280 App. Div. 1019, 1020 [1952]), or where the issue is "arguable". (Barrett v. Jacobs, 255 N. Y. 520, 522 [1931]; Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439, 239 N.E.2d 725 [1968] ; Asabor v. Archdiocese of N.Y., 102 A.D.3d 524, 527 , 961 N.Y.S.2d 17 [1st Dept. 2013]). Furthermore, the court should view the evidence in the light most favorable to the non-moving party and give the non-moving party the benefit of all reasonable inferences which can be drawn from

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the evidence (Fundamental Portfolio Advisors, Inc., v Tocqueville Asset Mgt. L.P., 7 NY3d 96, 105-106, 850 N.E.2d 653, 817 N.Y.S.2d 606 [2006]).

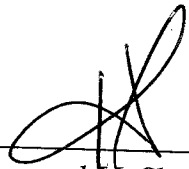
Upon consideration of this applicable law, and the record here, it is the finding of this court that plaintiff has failed to come forward with evidentiary proof to establish as a matter of law the elements of her claim for the imposition of a constructive trust, i.e., the underlying confidential or fiduciary relation with defendant; the terms of the promise and the transfer of the funds for the down payment, and the monthly mortgage payments in reliance on the promise (see, Sharp v. Kosmalski, 40 NY2d 119, 351 N.E.2d 721 [1976]).

Moreover, the gravamen of the claim devolves from a promise, the existence of which is denied by Chevannes, and "determinations of credibility, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he (or she) is ruling on a motion for summary judgment or for a directed verdict." (Anderson v Liberty Lobby, Inc., 477 US 242, 255, 106 S Ct 2505, 91 L Ed 2d 202 [1986]; Asabor v. Archdiocese of N.Y., 102 A.D.3d 524, 961 N.Y.S.2d 17 [1st Dept. 2013]).

Accordingly, for the reasons above-stated, the motion is denied.

This shall constitute the decision and order of this court.

Dated: March 8, 2016


Howard H. Sherman