

39E67th LLC v Bivins
2016 NY Slip Op 31581(U)
August 11, 2016
Supreme Court, New York County
Docket Number: 161316/14
Judge: Saliann Scarpulla
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----X
39E67TH LLC, BEACHTON TUXEDO LLC,
ERIK SCHAFER, JEDEDIAH TURNER, ZACHARY
TURNER, ALEX DE BIE and EDWARD KUHNEL,

Plaintiffs,

-against-

Index No.:
161316/14

OLIVER BIVINS, Jr., OLIVER BIVINS, Jr. as
PERSONAL REPRESENTATIVE OF THE
ESTATE OF LORNA BIVINS and THE ESTATE
OF LORNA BIVINS,

Defendants.

-----X
SALIANN SCARPULLA, J.:

In this breach of contract action, defendants Oliver Bivins, Jr. (“Bivins”), Oliver Bivins, Jr. as personal representative of the Estate of Lorna Bivins and the Estate of Lorna Bivins (“the Estate”) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Plaintiffs 39E67th LLC (“39E67th”), Beachton Tuxedo LLC (“Beachton”), Erik Schafer (“Schafer”), Jedediah Turner, Zachary Turner, Alex De Bie (“De Bie”) and Edward Kuhnel (“Kuhnel”) (collectively, “plaintiffs”) cross-move, pursuant to CPLR 3212 for partial summary judgment in their favor on the first cause of action alleging breach of contract.

Background

Bivins' mother, Lorna Bivins ("Lorna") died on February 25, 2011, leaving Bivins as the sole heir to her estate. Bivins' parents had previously divorced and his father, Oliver Bivins, Sr. ("Bivins Senior"), was under guardianship ("the Guardianship").¹ Bivins was appointed personal representative of Lorna's estate in Florida and ancillary administrator of her estate in New York.

Lorna's estate contained substantial assets, including four properties: 808 Lexington Ave ("808 Lex") and the 39 East 67th Street property in New York City (the 67th Street Property); a property in London, England; and a property in Palm Beach, Florida (collectively, the Properties). The two New York City properties were income producing, but the mortgages on both properties were in default.

Deborah Kuhnel, Kuhnel's mother and Bivins' godmother, was a family friend who had worked as a bookkeeper for Lorna. Deborah suggested that her son could assist Bivins with managing the Properties. Kuhnel eventually put together an investor group (the "Investor Group") which consisted of Kuhnel and plaintiffs Shafer, Jedediah Turner, Zachary Turner and De Bie. The Investor Group initially worked to purchase the 808 Lex mortgage and note.

¹ Bivins senior died in 2015.

The December 12, 1988 deed for 808 Lex was in the names of Lorna Bivins a/k/a Lorna M. Bivins and Oliver Bivins, III. The mortgage on the property was held by Sovereign Bank and Sovereign was threatening foreclosure.

According to Bivins, Kuhnel reviewed the deed and convinced Bivins that Bivins III actually referred to Bivins and that Bivins was the sole owner of 808 Lex (Bivins aff, ¶ 41).² However, Bivins had not been born when the deed was created and it is now conceded that Oliver Bivins III actually was a misnomer for Bivins Senior.

The Investor Group created Beachton, a limited liability company, for the purpose of acquiring the mortgage for 808 Lex from Sovereign Bank and, on October 4, 2012, Beachton,³ and Bivins, individually, as the purported owner of 808 Lex, entered into an agreement (the “Equity Exchange Agreement”). The Equity Exchange Agreement states, in pertinent part:

“1. Upon Investor Group’s acquisition of the note, at such time as the Investor Group shall determine, **provided that all amounts due under the Note is not first paid in full to Investor Group . . .**, Owner shall immediately execute and deliver any documents necessary to convert the note into a 40% equity ownership in the Building by Investor Group”

“2. Upon Investor Group’s acquisition of the note, at such time as Kuhnel shall determine, provided that all amounts due under the Note is not first paid in full to Investor Group . . . , Owner

² Bivins is referred to as either Oliver Bivins, Jr. or Oliver Bivins, II. There is no family member named Oliver Bivins, III and, it is undisputed that Bivins had not been born at the time the 808 Lex deed was filed.

³ Beachton is alternatively referred to as the Investor Group.

shall also immediately execute and deliver any documents necessary to transfer an additional 2% of equity ownership in the Building to Kuhnel for his role in organizing the Investor Group and the Investor Group's purchase of the note . . . ”

(Bivins aff., exhibit 7) (emphasis supplied).

The Equity Exchange Agreement also states that:

“Owner agrees that upon completion of the Transfer, Investor Group shall have the right and obligation to substantially manage the affairs of the Building, including, but not limited to, the hiring of independent bookkeeper, the evaluation and implementation of renovations and improvements of the Building, conducting lease and tenant negotiations, the hiring of currently unforeseen outside contractors/employees with the sole purpose to increase the revenue generation of the Building . . . ”

(*id.*).

On October 31, 2012, Beachton acquired the 808 Lex mortgage and note from Sovereign Bank. According to the complaint, the Investor Group was aware that there would likely be litigation regarding the ownership 808 Lex and that the Estate could possibly lose its claim to title (amended complaint ¶ 21).

In January 2013, the Guardianship sued the Estate, Oliver, Beachton and others claiming that the Guardianship, not the Estate, had title to all the assets of the Estate. The parties involved in that litigation engaged in a mediation session in May 2013, which resulted in a global settlement agreement. Pursuant to the global settlement agreement the Guardianship took title to the 808 Lex and the Palm Beach properties. The Estate, in turn, retained title to the property in London and the 67th Street property.

The global settlement agreement also provided that the note that Beachton had acquired would remain as a lien on 808 Lex and that it would be satisfied by the Guardianship as the new owner of the property. Also, as part of the global settlement agreement, Beachton, as mortgagor, released its claims against Bivins Sr. and the Guardianship relating to the matters described in the global settlement (Kuhnel reply aff, ¶ 8).

In addition, Bivins, the Estate and Beachton entered into a side agreement (the “Summary of Terms”), which provides that the Estate and Bivins, as owner/transferor, shall convey to Beachton, as transferee, 20% of East 67th Street, in exchange for Beachton’s release of its claims relating to 808 Lex and its claims under the Equity Exchange Agreement between Beachton and Bivins.

The parties to the Summary of Terms also agreed to form a new entity with Bivins as 80% owner and Beachton as 20% owner and manager of East 67th Street. In addition, the Summary of Terms provides that: the parties would share the income from East 67th Street 80/20 in favor of Bivins, Bivins would maintain the status quo of East 67th Street, including debt service payments on the existing mortgage; and the parties would sign all documents arising out of the Summary of Terms (*id.*).

Bivins and the Estate also agreed to convey East 67th Street to a new entity, or to Bivins, individually, who would then convey the property to the new entity. It was agreed that the new entity would be owned 80% by Bivins and 20% by Beachton (*id.*).

East 67th Street was transferred to Bivins individually in June 2013 and, although plaintiffs created 39E67th LLC in July 2013, Bivins was not named as a member or owner of that LLC. 39 E67th LLC was owned 100% by plaintiffs. In addition, after the Summary of Terms was signed, no other documents relating to the transfer of ownership in East 67th Street were generated until November, 2014 (Bivins aff., ¶¶ 62, 63, Bivins reply aff, ¶ 45).

According to Bivins, he sold East 67th Street on October 28, 2014 for \$22.5 million (Bivins aff, ¶ 66). The property had been marketed for several months and it appears that Kuhnel was aware of the impending sale. In November, *after* the sale of East 67th Street had been consummated, Bivins received a letter from Kuhnel's attorney which contained a "Memorandum of Contract". That Memorandum of Contract states, in pertinent part:

"Transferor has agreed to sell and Transferee has agreed to buy the right to convey the Property to an entity in which Transferee owns a Twenty Percent (20%) interest and/or the right to Twenty Percent (20%) of the net profits from the property upon the terms and conditions set forth in the Contract, which terms and conditions are incorporated in this Memorandum by reference. Except as provided in the Contract from the date hereof, Transferor shall not have the right, with respect to the Property, to enter into any new contracts, leases or agreements, oral or written, without the prior consent of the Transferee"

(Bivins aff, exhibit 17).

Bivins did not sign that Memorandum of Contract and did not convey any portion of the sale proceeds of East 67th Street to plaintiffs.

Plaintiffs then commenced this litigation, alleging: 1) breach of contract by failing to convey title to East 67th Street to plaintiffs or failing to provide plaintiffs a 20% share of the proceeds of the sale of the 67th Street property; 2) breach of fiduciary duty regarding the sale of East 67th Street; 3) unjust enrichment/quantum meruit; 4) constructive trust; 5) equitable lien; 6) attachment; and 7) preliminary injunction.

Defendants asserted counterclaims against plaintiffs for usury (in connection with repayment of a loan on the UK property); breach of fiduciary; and unjust enrichment. Prior to the close of disclosure, the parties moved for summary judgment.

In support of their motion for summary judgment dismissing the complaint, defendants argue that the "Summary of Terms" is not an enforceable contract because it lacks consideration. Defendants also argue that the written Equity Exchange Agreement between Beachton and Bivins is void and unenforceable because it erroneously identifies Bivins as the owner of 808 Lex and as having responsibility for the mortgage when, in fact, 808 Lex was jointly owned by the Estate and Bivins Sr. and only the Estate had responsibility for the mortgage.

Alternatively, defendants contend that, even if the Equity Exchange Agreement is construed as a valid agreement, Beachton exercised its right under the agreement by filing its August 4, 2014 foreclosure action in lieu of the equity exchange.

Next, defendants contend that the breach of fiduciary duty and constructive trust claims must be dismissed because there was no fiduciary or confidential relationship

between the parties. As to the unjust enrichment claim and other equitable claims, defendants' argue that plaintiffs did not perform any valuable services which would entitle them to 20% of the purchase price of East 67th Street.

In opposition to summary judgment dismissing the complaint, and in support of partial summary judgment in its favor on the breach of contract cause of action, plaintiffs argue that the Summary of Terms was a valid contract supported by consideration and that defendants breached that contract by failing to transfer a 20% ownership interest in East 67th Street to plaintiffs. Plaintiffs also contend that both the Equity Exchange Agreement and the Summary of Terms created joint ventures and, as a result, a fiduciary relationship was created among the parties. Plaintiffs contend that Bivins breached that fiduciary relationship by retaining 100% of the sale proceeds for the 67th Street property. Finally, they argue that they can succeed in quasi-contract because the weight of the equities is in their favor.

Discussion

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to

defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562; *see also Ellen v Lauer*, 210 AD2d 87, 90 [1st Dept 1994])[it “is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . .”]).

The Breach of Contract Cause of Action

Defendants have made a prima facie showing that they are entitled to summary judgment dismissing the breach of contract cause of action by submitting a copy of the 1988 deed to 808 Lex, which identifies Lorna and Bivins Sr. as the owners of 808 Lex and by producing a copy of the Equity Exchange Agreement, prepared by plaintiffs, which erroneously identifies Bivins, individually, as the owner of 808 Lex. Bivins avers that Kuhnel examined the deed and convinced Bivins that Bivins, individually, was the sole owner of the property (Bivins aff, ¶41). In the complaint and in his affidavit, Kuhnel admits that when he reviewed the deed and spoke with his advisors, he was aware that there were questions about the ownership of 808 Lex (Kuhnel aff, ¶¶ 9, 10; complaint, ¶ 21). Kuhnel also admits that he knew that Bivins had not been born when the 1988 deed was created (Kuhnel aff, ¶ 9).

Accordingly, when Bivins signed the Equity Exchange Agreement as owner of 808 Lex, he was not the owner of 808 Lex. He therefore could not convey any interest therein to the plaintiffs (*see Real Property Law* § 245; *see also Miller v Long Is. R R. Co.*, 26 Sickels 380, 71 NY 380, 383 [1877] [“A deed from a person . . . not shown to be the owner, establishes no title”]; *O’Brien v Town of Huntington*, 66 AD3d 160, 167 [2d Dept 2009] [“conveyances of land to which the grantors had no title convey no interest to the grantees”]; *Robbins v Whitesell*, 128

AD2d 764, 764 [2d Dept 1987]). Plaintiffs admit that they reviewed the deed and, thus, they are charged with “notice of the facts which a proper inquiry would have disclosed” (*see e.g. Congregation Beth Midrosh of Monsey, Inc. v Rolling Acres Chestnut Ridge, LLC*, 101 AD3d 797, 799 [2d Dept 2012]). Because Bivins, individually, had no interest in 808 Lex when he signed the Equity Exchange Agreement, his purported agreement to convey a 42% interest in the property to plaintiffs had no force or effect (*see Mack v Igweebe*, 2013 WL 1699247 *4, 2013 NY Misc LEXIS 1508, *8, 2013 NY Slip Op 30750 [U] *5 [Sup Ct, Queens County 2013]).

Moreover, to the extent that plaintiffs’ purported 20% interest in the 67th Street property under the Summary of Terms was intended to be in exchange for a 42% grant of equity in the invalid Equity Exchange Agreement regarding the 808 Lex property, it is of no force or effect because the Summary of Terms was not supported by consideration. Bivins did not own the 80 Lex property and did not have the authority to pledge it. Therefore, plaintiffs’ agreement to give up their claims under the Equity Exchange Agreement amounted to illusory consideration – that is, plaintiffs merely agreed to give up an equity interest that they did not have to begin with (*see Curtis Props. Corp. v Grief Cos.*, 212 AD2d 259, 265 [1st Dept 1995] [“Because the promises of both parties to a bilateral contract must be supported by consideration, the contract is unenforceable if the promise of either party is illusory”]).

Finally, plaintiffs’ release of their claims under litigation relating to 808 Lex did not convey any benefit to defendants and therefore could not qualify as consideration for the Summary of Terms. Pursuant to the release, plaintiffs only released their claims, if they had any, against Bivins Sr. and the Guardianship; they did not release any claims they may have had against any of the defendants herein (Kuhnél aff, exhibit AC).

For the foregoing reasons, plaintiffs' cause of action for breach of contract is dismissed.

The Equitable Causes of Action

In essence, the equitable causes of action are based on plaintiffs' allegations that they performed services for defendants in good faith; that Bivins and the Estate accepted those services and that plaintiffs expected to be compensated for their efforts but were not, and, accordingly, it is against equity and good conscience to allow Bivins to retain the 20% equity interest in the 67th Street property (*see Citibank N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]).

Plaintiffs have offered some evidence to support their contention that Kuhnel and the Investor Group assisted Bivins with both 808 Lex and the 67th Street properties, as well as the property in London. According to Kuhnel, in August 2012, he determined that the annual Real Property Income and Expense Statement had not been filed for the 808 Lex property and he assisted the Estate in filing the correct forms (Kuhnel aff., ¶ 13 and exhibit K). Moreover, he asserts that he raised \$385,000 to place the mortgage in Beachton's hands which, in turn, kept the Estate solvent through the rental income it earned and, in addition, the Investor Group introduced a broker who found a tenant for the 67th Street property and the Investor Group put tenants into 808 Lex which added additional income for the Estate (*id.* ¶¶ 13, 14). According to Kuhnel, the Investor Group also brought in architects and other building professionals to advise Bivins regarding renovations to the third floor of the 67th Street property (*id.* ¶ 26).

Kuhnel also claims that he helped Bivins go through family belongings to identify items of value and have them sold at auction (*id.*; exhibits O, P, Q, R, S and T). Additionally, plaintiffs contend that they staved off foreclosure of the London property and freed that property from claims that would have prevented a sale. They claim that they opened a United Kingdom (UK)

Estate, paid UK Estate taxes, evicted the tenant who was occupying the property and renovated the premises – all of which resulted in its sale for \$1,841,400 (*id.*, exhibits V, W, X, AE and AG). I note, however, that the Investor Group received \$587,652.70 as a 22% consulting fee (Bivins aff., ¶ 76).

In contrast, Bivins tells a far different story. According to Bivins, during the time of the events at issue he was young, with one deceased parent and the other under Guardianship, and that the plaintiffs took advantage of him and his situation for their own benefit. Bivins contends that he managed the Estate assets himself with the assistance of his mother's former employees, in particular, Deborah Kuhnel, who took over many of the duties involved in running the Estate properties, leasing and collecting rents. Bivins notes that Deborah Kuhnel was properly compensated for her efforts (Bivins reply aff., ¶ 16, 17, 18 and exhibit 2).

According to Bivins, plaintiffs were well rewarded for their efforts with respect to the 808 Lex property – Beachton paid \$387,843 for the 808 Lex mortgage and received \$538,154 from the payoff of the mortgage loan, which amounts to a 40% return on its investment (*id.*, exhibit 5, Bivins aff, exhibits 11, 12).

Bivins states that neither Beachton nor any of the other plaintiffs ever managed 67th Street and that Zachary Turner worked for Blue Ray Realty Group to lease the apartments in the 67th Street property. Here again, Bivins avers that Zachary Turner was compensated for his efforts in leasing apartments at the 67th Street property (Bivins reply aff, ¶ 18).

Finally, Bivins contends that plaintiffs milked the London property for their own benefit and that they were amply compensated by receiving 22% of the gross sale price for the property. He claims that the Investor Group, through a new entity called Regent, did little or nothing in

regards to management of the London property and made no repairs and settled no debts. Bivins claims that he arranged everything for the London property with limited assistance from plaintiffs (Bivins aff., ¶¶ 75, 76, 77).

Given the parties contradictory affidavits, and because defendants have not submitted sufficient documentary evidence to show that plaintiffs have no claim to any part of the proceeds from the sale of the 67th Street property, the branch of defendants motion in which they seek dismissal of the second through sixth causes of action (for breach of fiduciary duty, unjust enrichment/quantum meruit, constructive trust, equitable lien, and attachment) is denied (*see e.g. Bank of N.Y. v Irwin Intl. Imports*, 197 AD2d 462 [1st Dept 1993]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v BKF Asset Mgt.*, 2009 WL 3412985, 2009 NY Misc LEXIS 5522, 2009 NY Slip Op 32379(U) [Sup Ct, NY County 2009])

The branch of the motion for summary judgment seeking dismissal of the seventh cause of action for an injunction is denied. The parties failed to address this cause of action, thus I have no ability to determine whether it has merit. In any event, plaintiffs' allegations, in the amended complaint, that Bivins intends to relocate to London and to transfer funds to a London bank account, are mere conjecture (amended complaint, ¶¶ 91, 92).

Accordingly, it is

ORDERED that the motion of defendants Oliver Bivins, Jr., Oliver Bivins Jr., as personal representative of the Estate of Lorna Bivins and the Estate of Lorna Bivins for summary judgment dismissing the complaint is granted to the extent of dismissing the first cause of action for breach of contract and the motion is otherwise denied; and it is further

ORDERED that plaintiffs 39E67th LLC, Beachton Tuxedo LLC, Erik Schafer, Jedediah Turner, Zachary Turner, Alex De Bie and Edward Kuhnel's cross motion for summary judgment in their favor on the first cause of action is denied; and it is further

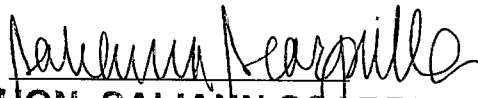
ORDERED that the action shall continue as to the second through seventh causes of action; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208 at 60 Centre Street on September 28, 2016, at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: August 11, 2016

ENTER:


HON. SALIANN SCARPULLA
J.S.C.