Bekas v Valiotis
2017 NY Slip Op 30351(U)
February 27, 2017
Supreme Court, Queens County
Docket Number: 9939/2014
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

VAIA BEKAS, Index No.: 9939/2014

Plaintiff, Motion Date: 2/7/17

- against - Motion No.: 12

STAMATIKI VALIOTIS, Motion Seq.: 4

Defendant.

- x

The following papers numbered 1 to 12 read on this motion by defendant for an Order pursuant to CPLR 3212 granting defendant summary judgment and dismissing plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law...	1 - 5
Affirmation in Opposition-Exhibits.....	6 - 8
Reply Affirmation-Exhibits-Memo. of Law.....	9 - 12

This is an action for a constructive trust to be placed upon the property located at 16-48 201st Street, Bayside, New York. Plaintiff also requests a permanent injunction, precluding defendant from selling or transferring title to the property other than to plaintiff.

Plaintiff commenced this action by filing a summons and complaint and notice of pendency on June 30, 2014. The complaint alleges that the down payment for the subject Bayside property came from plaintiff and her husband, Demetrios Bekas, (collectively hereinafter the Bekases) when they sold real property located on Samos Lane, Whitestone, New York in February of 2005 and the proceeds of $251,612.07 were given to defendant's husband, Efstathios Valiotis. The additional $74,000 for the down payment was given by plaintiff to defendant on July 7, 2005. The closing of the Bayside property was, therefore, consummated with the $251,596.16 plus the $74,000 for a total of $325,596.16. This was done in reliance on defendant's promise that defendant would

hold title to the Bayside property in trust for plaintiff and that defendant would, at any time, convey the premises to plaintiff upon plaintiff's request. The complaint further alleges that defendant repudiated the inferred trust agreement on August 5, 2012 by stating to plaintiff that due to the litigation issues between Mr. Valiotis and the Bekases and the strain that the Bayside property is becoming on the relationship between the families, defendant might have a change of mind about the Bayside property if the property issue is not resolved by the end of 2012.

Defendant now moves for summary judgment based upon res judicata and collateral estoppel and on the ground that no material issue of fact exists. Plaintiff opposes the motion, contending that the doctrine of res judicata and collateral estoppel are inapplicable because the issue herein was not decided in the prior actions as defendant was not a party to any of the prior actions. Plaintiff further contends that the $70,000 given by plaintiff to defendant for a down payment on the Bayside property was never previously addressed. Moreover, defendant argues that genuine issues of fact exist.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

It is well settled that "the doctrine of res judicata operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding" (Kafka v Meadowlark Gardens Owners, Inc., 34 AD3d 676 [2d Dept. 2006] quoting Luscher v Arrua, 21 AD3d 1005 [2d Dept. 2005]; see Matter of Schachter v State of N.Y. Div. of Hous. & Community Renewal, Office of Rent Admin., 14 AD3d 615 [2d Dept. 2005]). The doctrine of collateral estoppel is a bar to a party re-litigating an issue previously raised and litigated in a prior action (see Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343 [1999]).

By way of relevant background, previously Mr. Valiotis commenced a foreclosure action against Mr. Bekas in Supreme Court, Queens County under Index No. 23426/2010. Mr. Bekas commenced a third-party action against Mr. Valiotis for, inter

alia, a constructive trust on the Bayside property. In the third-party complaint, Mr. Bekas alleged the same facts as the complaint herein. On December 7, 2016, the Appellate Division, Second Department issued a Decision in the matter, entitled Valiotis v Bekas, affirming in its entirety the Order of the Supreme Court, Queens County Index No. 23426/2010 (Elliot, J.). The Decision found that the "Supreme Court properly determined that the third-party complaint fails to state a cause of action for a constructive trust" on the Bayside property.

Defendant argues that as the Appellate Division has already ruled on the exact claim asserted herein, the doctrines of res judicata and collateral estoppel apply and bar plaintiff's sole cause of action in this matter seeking once again to impose a constructive trust on the Bayside Property.

In opposition, plaintiff argues that the prior action does not preclude the claim herein as the prior claim for a constructive trust was asserted against Mr. Valiotis and not defendant.

This Court finds that the doctrines of res judicata and collateral estoppel preclude plaintiff from re-litigating the constructive trust claim asserted herein. Plaintiff must be deemed in privity with Mr. Bekas as to the impact of the decisions in the prior legal proceedings. Plaintiff herself submitted an affidavit dated September 18, 2012 in the prior Bekas v Valiotis matter. Regarding the Bayside property, she affirmed that she deposited to defendant $74,000 on July 7, 2005 for defendant to take title of the property in her name for plaintiff's benefit. Additionally she affirmed that the "closing of the Bayside property was consummated with the $251,596.16 plus the $74,000 for a total of $325,596.16 as the money for the down payment of the purchase." She further affirmed that defendant threatened her on August 5, 2012 by stating that she may have changed her mind about the Bayside property. Plaintiff's prior affidavit submitted in the prior matter is nearly identical to the complaint herein. Moreover, Mr. Bekas in the prior action certainly had an interest in protecting plaintiff's alleged interests in the Bayside property.

Nevertheless, even if plaintiff was not precluded from re-litigating the constructive trust claim, plaintiff fails to create an issue of fact warranting denial of defendant's summary judgment motion.

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 (see Sharp v Kosmalski, 40 NY2d 119 [1976]; Quadrozzi v Estate of Quadrozzi, 99 AD3d 688 [2d Dept. 2012]; Rowe v Kingston, 94 AD3d at 853 [2d Dept. 2012]; Poupis v Brown, 90 AD3d 881 [2d Dept. 2011]). A party must establish the elements of a constructive trust by clear and convincing evidence (see Diaz v Diaz, 130 AD3d 560 [2d Dept. 2015]; Ning Xiang Liu v Al Ming Chen, 133 AD3d 644 [2d Dept. 2015]).

To establish a confidential or fiduciary relationship, it must be shown that the relationship was so "pregnant with opportunity for abuse and unfairness" as to require equity to intervene and scrutinize the transaction (see Sharp v Kosmalski, 40 NY2d 119 [1976]). Merely being social friends or having a close family relationship is insufficient to establish a confidential or fiduciary relationship (see Bontecou v Goldman, 103 AD2d 732 [2d Dept. 1984]; Prado v De LaTorre, 194 AD2d 656 [2d Dept. 1993]; Meltzer v Koenigsberg, 99 NYS2d 143 [Sup. Ct., Kings Cnty. 1950], aff'd 277 AD 1050 [2d Dept. 1950]).

The complaint alleges that over the last 21 years the Bekases and Valiotises have had a confidential and fiduciary relationship based on numerous business transactions, including a 1992 foreclosure transaction with the Bank of Leumi whereby the Bekases held a security interest and certain co-op shares on behalf of defendant. Plaintiff allegedly released the shares without any consideration paid by defendant. The remaining transactions, which plaintiff does not address in opposition to this motion, cannot be used to establish a fiduciary relationship with defendant as the transactions were with non-party Mr. Valiotis and not defendant. Moreover, at least four New York courts have already deemed the transactions to be legitimate arm's length business transactions between business persons and not the result of a fiduciary relationship between Mr. Bekas and Mr. Valiotis. Thus, the doctrines of res judicata and collateral estoppel preclude plaintiff from relitigating the same issue.

Regarding the single transaction with the Bank of Leumi, the documents annexed in opposition, demonstrate that the Bank of Leumi transaction was between plaintiff and Alma Realty, a company owned by Mr. Valiotis. Additionally, the Financing Statement is signed only by Mr. Valiotis. As the documentary evidence demonstrates that the transaction did not even involve defendant, such transaction is insufficient to establish a confidential or fiduciary relationship between plaintiff and defendant. Moreover, no evidence has been put forth to suggest that defendant had superior expertise than plaintiff to establish a fiduciary or confidential relationship necessary to impose a constructive trust.

As to the second element, the promise must be sufficiently specific to be enforceable (see Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 417 NY2d 105 [1981]; Matter of Zelnick, 273 AD2d 18 [1st Dept. 2000]; Matter of Lublin, 40 Misc.3d 1208[A][Surrogate's Ct., Nassau Cnty. 2013]; In re Lefton, 553 NYS2d 783).

Here, the complaint sworn to by plaintiff on June 30, 2014, contends that the proceeds of $251,612.07 from the Bekases to Mr. Valiotis when they sold the Whitestone property in February of 2005 and the additional $74,000 from plaintiff to defendant was done in reliance on defendant's promise that she would hold title to the Bayside property in trust for plaintiff and that defendant would, at any time, convey the premises to plaintiff upon plaintiff's request. This promise alleged in the complaint is also confirmed by plaintiff's affidavit sworn to on September 18, 2012 submitted in the prior action captioned Bekas v Valiotis, plaintiff's affidavit in opposition to defendant's motion to dismiss sworn to on April 19, 2014, and plaintiff's deposition testimony given in this action on March 30, 2016.

However, plaintiff's affidavit submitted in opposition to this motion changes the terms of the promise. Plaintiff now asserts that she paid only the $74,000 to defendant as a down payment for the Bayside Property, that she had an agreement with defendant as to the ownership of the Bayside property, that prior to commencing this action, she made a demand to defendant to transfer title to the Bayside property, and that plaintiff would pay the mortgage and note obtained in defendant's name and that upon request to transfer the property to plaintiff, plaintiff would obtain a mortgage from a bank in her own name or finance directly from defendant. This Court notes that the $251,612.07 given by Mr. Bekas to Mr. Valiotis has already been deemed a partial payment of a prior judgment unrelated to the Bayside property. Therefore, the $251,612.07 cannot now, for the purposes of this litigation, be considered a down payment for the Bayside property.

As the contents of the promise have changed including, inter alia, the amount given to defendant for the down payment and the new assertion that plaintiff would pay off the mortgage at the time of the transfer of title, plaintiff failed to establish, by clear and convincing evidence, a specific and definite promise.

Additionally, to effectively oppose a summary judgment motion, a party must submit evidentiary proof, in admissible form, sufficient to require a trial of material questions of fact on which that party rests his or her claim (see Zuckerman v City

of New York, 49 NY2d 557 [1980]). Where an affidavit submitted by a party in opposition directly contradicts the party's prior version of events, courts routinely disregard such affidavit (see Branham v Loews Orpheum Cinemas, Inc., 31 AD3d 319 [1st Dept. 2006]). A party cannot raise an issue of fact sufficient to defeat a summary judgment motion by submitting an affidavit that is tailored to avoid the consequences of prior testimony (see Phillips v Bronx Lebanon Hosp., 268 AD2d 318 [1st Dept. 2000]). The allegations that plaintiff now makes in this case contradict those made in at least four other documents that she signed as early as 2012. Summary judgment cannot be defeated by allegations that are "patently incredible" as a matter of law (see Citibank, N.A. v Plagakis, 8 AD3d 604 [2d Dept. 2004]).

Lastly, the circumstances surrounding the purchase of the Bayside property do not support plaintiff's assertion that defendant was unjustly enriched. Unjust enrichment constitutes a benefit conferred upon the defendant without adequately compensating the plaintiff (see Henning v Henning, 103 AD3d 778 [2d Dept. 2013]). Here, plaintiff admits that she has no claim to the $251,596.16 paid by defendant to purchase the Bayside property. Thus, even if this Court were to find that plaintiff paid $74,000 to defendant in reliance upon a promise, plaintiff can be made whole by repayment of the $74,000. A constructive trust cannot be imposed unless the legal remedy of a money judgment would be inadequate (see Evans v Winston & Strawn, 303 AD2d 331 [1st Dept. 2003]; Bertoni v Catucci, 117 AD2d 892 [3d Dept. 1986]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that defendant's motion for summary judgment is granted, plaintiff's complaint is dismissed in its entirety, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED, that the County Clerk of Queens County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain notice of pendency filed in this action on June 30, 2014, against property known as 16-48 201st Street, Bayside, NY 11360 (BLOCK 5779, LOT 30) and said Clerk is hereby directed to enter upon the margin of the record of same, a Notice of Cancellation referring to this Order.

Dated: Long Island City, NY
February 27, 2017

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ROBERT J. McDONALD
J.S.C.