

Radolinski v Radolinski
2017 NY Slip Op 31384(U)
June 29, 2017
Supreme Court, Richmond County
Docket Number: 150277/2015
Judge: Philip G. Minardo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

STEVEN RADOLINSKI,

Plaintiff,

-against-

VICTORIA RADOLINSKI,

Defendant.

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 150277/2015

Motion Nos.: 1064 003
1493 004

The following papers numbered 1 to 6 were fully submitted on the 20th day of April, 2017:

	Papers Numbered
Defendant’s Notice of Motion, dated March 13, 2017 with Exhibits and Supporting Papers _____	1
Plaintiff’s Notice of Cross-Motion, Affirmation in Support and in Opposition to Defendant’s Motion dated April 12, 2017 and with Exhibits and Supporting Papers _____	2
Defendant’s Reply Affirmation, dated April 19, 2017 with Exhibits and Supporting Papers _____	3

Defendant VICTORIA RADOLINSKI moves this Court seeking 1) to strike Plaintiff’s Note of Issue to the extent that it demands a trial by jury as the matter is one in equity and 2) leave to reargue and upon reargument granting summary judgment pursuant to CPLR 3212, dismissing plaintiff’s complaint and granting defendant’s counter-claim; Plaintiff STEVEN RADOLINSKI

cross moves seeking leave to reargue and renew and upon reargument granting summary judgment against the defendant and dismissing defendant's counterclaim. For the reasons set forth below, that portion of defendant's motion seeking leave to reargue is granted and upon reargument, the Court reverses its original determination to the extent that the Court grants summary judgment dismissing plaintiff's complaint. The Court adheres to its original determination denying that portion of defendant's motion seeking summary judgment granting defendant's counter-claim. Plaintiff's cross motion for leave to renew and/or reargue is denied.

In addressing motions to reargue, it is within the sound discretion of the Court to grant reargument upon a showing that the Court overlooked or misapprehended the facts or law. (CPLR 2221(d)(2)). In the present matter, defendant has demonstrated that the Court overlooked and/or misapprehended the facts of this case and/or applicable law.

It is well settled law that a motion for summary judgment is a drastic remedy which should only be utilized when there is no doubt as to the absence of any triable issues of fact since it deprives the litigant of their day in Court. (Andre v. Pomeray, 35 NY2d 361 [1974]). Moreover, a moving party has the burden of setting forth evidence in admissible form sufficient to establish entitlement to judgment as matter of law and its failure to do so, regardless of the sufficiency of opposition papers, requires the Court to deny the motion. (Zuckerman v. City of New York, 49 NY2d 557 [1980]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Jacobsen v. New York City Health and Hospital Corp. 23 NY3d 824;[2014]; Collado v. Jiacono, 126 AD3d 927 [2nd Dept., 2015]).

The present matter involves the issue of ownership of real property located at 775 Barlow

Avenue, Staten Island, New York. Plaintiff brings this action against the defendant, his sister, for partition, removal of defendant from the deed and conversion.

Pursuant to the subject deed, the property was transferred to the plaintiff and defendant on June 11, 2002, and recorded with the County Clerk's office on July 23, 2002. The deed grants title of the property to both plaintiff and defendant as "joint tenants with rights of survivorship". Prior to the instant action, the deed as recorded was not disputed by either party.

Plaintiff alleges, inter alia, that he and the defendant are owners as joint tenants of the property pursuant to the June 11, 2002 deed, that a mortgage in the sum of \$170,000.00 was obtained by the plaintiff and defendant to purchase the subject property and that defendant was only to be a co-signor on the mortgage.

On February 16, 2017 this Court denied defendant's motion for summary judgment dismissing plaintiff's complaint. In support of her present motion, defendant submits a copy of her original motion seeking summary judgment, including a copy of the recorded deed, plaintiff's Verified Complaint, defendant's Verified Answer, defendant's two sworn affidavits, the deposition testimony of both the plaintiff and defendant and a portion of the non-party deposition of the parties' father, Thomas Radolinski.

Defendant alleges that she never agreed to transfer her interest in the property and it was never the intention of defendant or plaintiff that defendant be merely a co signor. Further, defendant avers she was always a co-owner. Defendant also testified at her deposition that the property was purchased as an investment property for plaintiff and defendant and that she contributed \$43,108.00 toward the purchase of the property as well as carrying costs. Non-party witness, Thomas

Radolinski, the parties' father, testified at a deposition that he gave plaintiff and defendant money toward the purchase price of the property. Also annexed to defendant's initial moving papers is Thomas Radolinski's handwritten record of monies and the dates of his deposits into each of the separate accounts of the plaintiff and defendant.

It is the opinion of this Court that defendant has satisfied her initial burden of proof in establishing that there is no triable issue of fact as to the joint ownership of the property, thereby precluding partition and removal of defendant from the deed. Defendant, having satisfied this prima facie burden, the burden now shifts to the plaintiff to establish by admissible evidence that there exists a triable issue of fact as to ownership of the subject property.

In opposition to defendant's motion, plaintiff's counsel relies upon portions of the deposition transcripts of both parties, documentary evidence and the parties' course of conduct to establish that an agreement existed in which the defendant was solely a co-signor for the mortgage and that defendant agreed to transfer her interest in the property. It is unclear what documentary evidence plaintiff's counsel relies upon. The Court can only review the documentary evidence that has been submitted for the purposes of these motions, i.e. the recorded deed. As previously noted, prior to this litigation and since its recording in 2002, there has been no reformation/amendment or correction of the deed nor any attempt to set aside the deed or dispute ownership of the subject property.

Clearly, the deed annexed to plaintiff's complaint establishes that the defendant and the plaintiff owned the property as joint tenants - a fact plaintiff conceded in his deposition. Plaintiff further testified at his deposition that he refinanced the mortgage on two separate occasions (2007

and 2012) and each time it was necessary for him to obtain defendant's signature.

Plaintiff's unsupported testimony that the defendant agreed to simply be a co-signor on the mortgage and also agreed to transfer her interest in the property is purely self-serving. Equally unavailing is counsel's argument that no written document is necessary to establish these agreements because an oral agreement may be determined based upon evidence of the parties course of conduct. This argument is conclusory and insufficient as a matter of fact and law. Plaintiff submits no evidence in admissible form as to a course of conduct by the parties that demonstrates defendant was merely a co signor on the mortgage or that defendant agreed to transfer her interest in the property. Moreover, any alleged oral agreements would violate the Statute of Frauds, an affirmative defense properly asserted by defendant in her Answer. Conveyances regarding real property are required to be in some form of writing, designating the parties, identifying and describing the subject matter and state all the essential terms of a complete agreement. (GOL section 5-703), none of which exist here.

Accordingly, plaintiff has failed to meet his burden of proof in establishing that there exists a triable issue of fact precluding the granting of summary judgment dismissing plaintiff's complaint. Therefore, defendant having established that there is no issue of fact as to her rightful ownership interest in the subject property, summary judgment in her favor is warranted.

However, that portion of defendant's motion seeking summary judgment on her counterclaim, is denied. Defendant alleges she was denied the use and enjoyment of the property while plaintiff had exclusive use and occupancy of the premises from 2004-2012 while failing to compensate her. Beyond the sworn affidavit submitted by the defendant alleging the above and her testimony that the plaintiff occupies a one family home on the property with his family, no evidence

has been submitted that defendant was denied and/or excluded from using and enjoying said property. Nor has defendant alleged the amount due her for this alleged exclusion. Furthermore, plaintiff testified that if defendant needed a place to stay, he would allow her to do so at the house. Issues of fact exist as to this alleged exclusion and/or denial of use and enjoyment and the value of such exclusion precluding summary judgment. Although plaintiff's complaint has been dismissed, defendant's counter claim remains viable and is severed and continued.

As to that portion of defendant's motion seeking to strike plaintiff's Note of Issue to the extent the Note of Issue requests a trial by jury, same is denied as moot.

Finally, plaintiff's cross motion seeking leave to reargue and upon reargument granting summary judgment as against defendant, is denied. As noted, plaintiff has failed to satisfy his burden of proof to establish entitlement to summary judgment for partition and removal of the defendant from the deed. Similarly, plaintiff fails to satisfy his burden of proof to establish entitlement to summary judgment against the defendant for conversion. There has been no evidence demonstrating a conversion of funds. The testimony of both parties reveal that plaintiff's wife, a non party, voluntarily sent defendant a check in the sum of \$35,000.00 signed by her and issued from her individual account. The parties dispute the purpose of the check, raising a question of fact precluding summary judgment in any event. According to plaintiff's testimony, this check represented (1) payment to defendant for co-signing on the mortgage and/or (2) payment to defendant in exchange for transferring her interest in the property. Moreover, even assuming arguendo that this check represented some form of payment for the transfer of interest in real property, said check does not comply with the Statute of Frauds, which is a complete bar to recovery

in this matter.

As to that portion of plaintiff's cross motion seeking renewal, same is denied as plaintiff has failed to demonstrate the existence of new facts or facts and/or applicable law unknown at the time of his original cross-motion.

Accordingly, it is

ORDERED, the portion of defendant's motion seeking reargument is granted, and upon reargument summary judgment dismissing plaintiff's complaint is granted and summary judgment on her counterclaim is denied; and it is further

ORDERED that so much of defendant's motion as seeks reargument and upon reargument striking plaintiff's Note of Issue to the extent it demands a trial by jury is denied as moot; and it is further

ORDERED that plaintiff's cross motion for reargument and/or renewal seeking summary judgment as against defendant is denied and it is further

ORDERED the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and Order of this Court.

E N T E R

Dated: June 29, 2017

/s/ Philip G. Minardo

J. S. C.