

Frater v Lawson-Calder
2017 NY Slip Op 33268(U)
August 29, 2017
Supreme Court, Nassau County
Docket Number: 603324/17
Judge: Julianne T. Capetola
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At a Term of the Supreme Court
of the State of New York held in
and for the County of Nassau,
100 Supreme Court Drive,
Mineola, New York, on the 29th
day of August 2017

P R E S E N T:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

(6)

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NORMAN FRATER,

Plaintiff,

**DECISION AND
ORDER ON MOTION**

Index No: 603324/17

Motion Sequence: 001

- against -

JANET LAWSON-CALDER,

Defendant.

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The following papers were read on this Motion:

Plaintiff's Notice of Motion and Supporting Documents and Memorandum of Law

Defendant's Affirmation in Opposition

Plaintiff's Reply Affirmation

Plaintiff in this civil action has moved by notice of motion for an order pursuant to CPLR §3211(a)(1), (5), and (7) dismissing Defendant's counterclaims and pursuant to CPLR §3211(b) dismissing the affirmative defenses. Defendant has opposed the motion, Plaintiff has replied, and the motion was deemed submitted August 10, 2017.

The underlying action was commenced by the Plaintiff by Summons and Complaint, and relates to a series of deed transfers. In 2007, Defendant owned a residential property (hereinafter the "Subject Property") subject to a mortgage which was in foreclosure. Plaintiff purchased the property subject to said mortgage and Defendant executed a deed to Plaintiff dated October 2, 2007 which was recorded October 23, 2007 (hereinafter the "2007 Deed"). Defendant claims that the parties simultaneously executed a contract titled a "Sales Agreement, Hold Harmless and Indemnification". Though Plaintiff refers to same as an "alleged contract", Plaintiff does not dispute the existence thereof nor his signature thereon. In that document (hereinafter the "Sales Agreement") Plaintiff agreed, amongst other things, to pay off the mortgage within two years from the date of closing and to keep the Subject Property "in good order including repairs, necessary improvements, lawn care, etc." and that "in the event purchaser fails or refuses to comply

with any of the terms and conditions herein, he represents, warrants and covenants that he will immediately re-transfer the property back to the seller or her successors and/or assigns for no consideration”.

Plaintiff claims that, on June 6, 2016, Defendant, through fraudulently executed deed bearing his forged signature, conveyed the Subject Property back to herself (hereinafter the “2016 Deed”) and thereafter rented the Subject Property for profit. Plaintiff commenced the underlying action alleging six causes of action. Plaintiff claims the 2016 Deed is *void ab initio*, he claims conversion, that he is entitled to an accounting of the rents and profits Defendant has accrued since the unlawful conveyance, unjust enrichment, and seeks punitive damages and attorney’s fees.

Defendant has counter-claimed for the following relief: a declaratory judgment declaring the 2007 Deed defective and *void ab initio*, or, in the alternative, declaring that Plaintiff held the Subject Property in a constructive trust for Defendant and fraudulently induced Defendant to execute the 2007 Deed in Plaintiff’s favor, breach of contract, specific performance in the form of the return of the re-conveyance of the property to Plaintiff, and fraud.

At the outset, Defendant argues that this Court should not entertain Plaintiff’s motion as same was untimely pursuant to CPLR §3012 which states, in relevant part, that “Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds”. Defendant argues that, inasmuch as she interposed her answer with counterclaims on May 9, 2017, Plaintiff’s reply and/or timely motion to dismiss would have had to have been made on or before May 29, 2017. As the motion was made May 30, 2017, Defendant argues it was untimely.

May 29, 2017 was Memorial Day, a Federal Holiday. New York General Construction Law §25-a reads, in relevant part: “When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day and if the period ends at a specified hour, such act may be done at or before the same hour of such next succeeding business day”. Accordingly, Defendant’s argument with respect to timeliness of the instant motion is preposterous as well as meritless.

Procedurally speaking, Defendant next argues that the Court should not entertain the instant motion until such time as Plaintiff has joined, what Defendant argues are, all

necessary parties to the action. Defendant claims that Plaintiff should have joined Bank of New York Mellon FKA the Bank of New York as Trustee for the Certificateholders of the CWABS, Inc. Asset-Backed Certificates Series 2005-3 as mortgagee (hereinafter the “Mortgagee Bank”), and “current tenants and/or occupants at the Subject Property, whose rights will surely be affected by the proposed changed of ownership”.

With respect to Defendant’s assertion that the current tenants and/or occupants must be joined as necessary parties, Defendant cites no case law or statutory authority in support of that assertion. Defendant merely argues that their rights may be effected by a change of ownership of the Subject Property but fails to provide any specificity or evidentiary support for those assertions.

As it relates to the Mortgagee Bank, Plaintiff has argued in their reply papers that they are not a necessary party inasmuch as the underlying complaint seeks the nullification of the 2016 Deed and that, because the deed was void at its inception it had no legal force or effect so the relief sought is not a change in ownership of the Subject Property but rather a declaratory judgment returning the parties to their rightful status with respect to its ownership. Defendant argues that, inasmuch as the Mortgagee Bank’s rights will obviously be effected by the instant proceedings, they are a necessary party, and cites *Menorah Home and Hosp. for Aged and Infirm v. Jelks*, wherein the Appellate Division Second Department held that,

“It is a fundamental legal principle that an individual may not be deprived of property without due process of law, which requires that one be accorded notice and an opportunity to be heard’ (Friedman v. Friedman, 125 A.D.2d 539, 541, 509 N.Y.S.2d 617). Contrary to the plaintiff’s contention and the determination of the Supreme Court, the plaintiff was required to join the nonparty-appellant, Green Tree Credit, LLC, f/k/a Conseco Finance Credit Corp. (hereinafter Green Tree), the mortgagee of the subject premises, as a necessary party in its cause of action to set aside the conveyance of the subject premises as fraudulent, and to declare the subject deed null and void (see CPLR 1001[a]; *Ameriquet Mtge. Co. v. Gaffney*, 41 A.D.3d 750, 751, 839 N.Y.S.2d 203; *Losner v. Cashline, L.P.*, 284 A.D.2d 433, 726 N.Y.S.2d 874; *Friedman v. Friedman*, 125 A.D.2d 539, 541, 509 N.Y.S.2d 617; see e.g. *Skiff–Murray v. Murray*, 17 A.D.3d 807, 793 N.Y.S.2d 243)”. 61 A.D.3d 64 (2d. Dept. 2009).

Plaintiff argues that *Menorah Homes* is not applicable inasmuch as this case involves a fraudulent, and therefore void, deed and not merely a voidable deed. Notably,

Defendant's counterclaims include a dispute as to the validity of the original 2007 Deed and Sales Agreement. Neither party has annexed a copy of the mortgage held by Mortgagee Bank that encumbers the Subject Property and was executed by Defendant prior to the 2007 conveyance thereof. Accordingly, it cannot be ascertained whether, according to the terms of the mortgage, the property could have been rightfully conveyed from the start and, therefore, the Mortgagee Bank must have their own opportunity to assert any such claims on their own behalf and this Court cannot proceed without them being provided such opportunity. The remainder of the motion must be denied with leave to renew at such time as all necessary parties have been properly joined, served, and provided an opportunity to answer.

In light of the forgoing, it is hereby:


ORDERED, that Plaintiff's motion is hereby denied with leave to renew at such time as all necessary parties have been joined. Accordingly, Plaintiff is granted leave to amend the complaint to add the necessary parties.

Plaintiff shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

Dated: 8/29/17

ENTER



HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED

AUG 30 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE