

Gargagliano v Gargagliano

2018 NY Slip Op 30541(U)

March 22, 2018

Supreme Court, Kings County

Docket Number: 521878/16

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

ANTHONY GARGAGLIANO,

Plaintiff(s),

-against-

ANNA GARGAGLIANO, DION GARGAGLIANO &
JESSICA NICOLE GARGAGLIANO,

Defendant(s).

Index No. 521878/16
Motion Calendar No.
Motion Sequence No.

DECISION / ORDER

Present:

Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss the plaintiff's complaint pursuant to CPLR § 3211(a)(1)(3)(7).

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	_____ 3 _____
Replying Affidavits.....	_____ 4 _____
Exhibits.....	_____
Other:.....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, Ann Gargagliano (“Ann”), Dion Gargagliano (“Dion”) and Jessica Nicole Gargagliano (“Jessica”), have moved, pursuant to CPLR § 3211(a)(1)(3) and (7), for an order to dismiss the complaint of the plaintiff.

Plaintiff, Anthony Gargagliano (“Anthony”) opposes the relief sought by defendants in their motion to dismiss, and maintains that the transfer of plaintiff’s interest in the subject property was the result of fraud on the part of the defendants, and that granting the relief would not be warranted as there are issues of fact with respect to this matter.

Background:

The plaintiff, Anthony Gargagliano, as well as Ann Gargagliano, purchased the real property located at 8821 23rd Avenue, Brooklyn, New York (“subject property”) on or about

October 27, 2000. Thereafter, the subject property was transferred to Dean Gargagliano (“Dean”) and Dion, who are the two sons of Anthony and Ann, by deed dated March 4, 2002. Title to the subject property remained in the names of Dean and Dion until August 18, 2010, when Dean transferred his one-half interest in the subject property to the Ann Gargagliano and Anthony Gargagliano 2003 Revocable Trust. Thereafter, in a deed dated September 15, 2012, Ann Gargagliano and Anthony Gargagliano, as Trustees of the Ann Gargagliano and Anthony Gargagliano 2003 Revocable Trust, transferred the one-half interest to Dion Gargagliano. As a result of the September 15, 2012 transfer, title to the entire property was solely in the name of Dion Gargagliano.

Plaintiff alleges that he did not execute any documents to transfer his share of the property, and that as a result of fraud he has been deprived of his interest in the property. The subject property was allegedly sold without his knowledge for the sum of \$1,300,000, of which he received none of those funds. Due to plaintiff having been damaged by the alleged fraud on the part of the defendants, plaintiff commenced an action by the service of a summons and complaint on or about December 1, 2016. Thereafter, the defendants moved to dismiss the complaint.

Defendants’ contentions:

The defendants, in moving to dismiss plaintiff’s complaint, assert that this matter should be dismissed based upon several grounds which include the lack of standing to commence this action; documentary evidence; as well as the failure on the part of the plaintiff to state a cause of action in the complaint.

In addressing the portion of the motion to dismiss, pursuant to CPLR § 3211(a)(3), the defendants maintain that the plaintiff, having sued in his individual capacity, lacks the requisite standing to assert the claims alleged in the complaint. The deed in question, which is the subject of this action, was executed by the plaintiff in his capacity as Trustee of the Revocable Trust and it is in that capacity that this action could have been commenced. Defendants assert “that persons suing or being sued in their official capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual” (Specialized Realty Servs., LLC v. Maikisch, 123 AD3d 801, 802, 999 NYS2d 430 [2nd Dept. 2014] citing Leonard v. Pierce, 182 NY 431, 432 [1905]). As such, pursuant to CPLR § 3211(a)(3), the complaint should be

dismissed since the party (the plaintiff) asserting the cause of action does not have the capacity to sue.

In addressing the portion of the motion to dismiss, pertaining to CPLR § 3211(a)(1), defendants maintain that dismissal is warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see Leon v. Martinez, 84 NY2d 83,88 [1994]). Defendants assert that the deed dated September 15, 2012 is prima facie evidence that it was duly executed by the plaintiff. Defendants maintain that the deed was not only prepared by an attorney, Peter F. Martin, Esq., but counsel also notarized and acknowledged the signatures that appear thereon. In further support of the motion, the defendants offer the affirmation of Peter F. Martin, Esq., who states that he prepared the deed in question, knows the Gargagliano family for over ten years and personally knows the individuals who signed the deed. Mr. Martin affirms that he was present in the home of Anthony Gargagliano when he signed the deed. Defendants allege that Mr. Martin has absolutely no interest in the outcome of this matter.

In addressing the portion of the motion which seeks to dismiss plaintiff's action, pursuant to CPLR § 3211(a)(7), defendants maintain that plaintiff's complaint fails to set forth a specific cause of action. The complaint appears to allege fraud and negligence, but since there is only one cause of action, the defendants assert that the complaint does not allege a valid cause of action upon which relief can be granted. A cause of action based on fraud should state the circumstances constituting the wrong in detail and include facts to establish the elements of a cause of action for fraud. Likewise, a claim based upon negligence must set forth the duty owed by defendants to the plaintiff, the act or omission that constituted the negligence and the damages that resulted therefrom. The defendants maintain that neither a cause of action based upon negligence or fraud is pled properly by the plaintiff.

Defendants further assert that a copy of a settlement offer which plaintiff has annexed to its opposition is not permitted to establish liability. CPLR § 4547 codifies the common law rule that "the settlement of a disputed claim or an offer to settle. . . is inadmissible to prove. . . the liability of the alleged wrongdoer." (Andersen v. Kirschner, 190 Misc.2d 779, 781, 742 NYS2d 474 [Sup. Ct. NY County 2001], rev'd on other grounds 297 AD2d 235, 746 NYS2d 258 [1st Dept. 2002]).

Plaintiff's contentions:

The plaintiff, in opposing the defendants motion to dismiss, alleges that he did not sign any documents to convey his interest in the property, did not consent to the property being transferred and had no knowledge of the conveyance. Plaintiff maintains that he never signed any documents pertaining to the deed transfer of September 15, 2012, and that the signature appearing on the document that purports to be Anthony Gargagliano is not his.

In addressing the issue of whether the plaintiff has standing because he sued in his individual capacity, rather than in his representative capacity, plaintiff asserts that if the Court finds that he did not sue in his proper capacity, the pleadings could be amended in accordance with the proof submitted. Plaintiff asserts that there is no unjust hardship if this purported defect was cured and the parties proceeded with the litigation. Plaintiff further maintains that it is well-settled that a complaint may be freely amended to add additional claims as long as the original pleading gives notice of the transactions or occurrences to be proved pursuant to the amended pleading (see CPLR § 3025(a)-(b); Andrews v. Donabella, 60 Misc. 2d 1007 [NY Sup. Ct. 1969]). Notwithstanding the above, plaintiff further asserts that the complaint does state a cause of action as it states in detail who are the necessary parties; indicates the subject property that is in issue; the specific date of the 2012 transfer which is the subject of this litigation; the cause of action asserted by the plaintiff; and the relief sought.

The plaintiff, in opposing defendants' motion to dismiss based on CPLR § 3211(a)(1), states that "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v. Martinez, 84 NY2d 83, 88 [1994]). Plaintiff asserts that the Court when considering a motion based upon CPLR § 3211(a)(1), should accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference. Plaintiff maintains that the settlement and release offer of the defendants is an acknowledgement of the latter's liability which is the result of the 2012 transfer of plaintiff's interest in the subject property.

The plaintiff contends that New York courts have repeatedly held that the submission of an affidavit by a party asserting that the notarized signature on a questioned document was forged is sufficient to raise an issue of fact as to the authenticity of the subject signatures and sufficient to withstand a summary judgment motion (see Seaboard Sur. Co. v. Earthline Corp.,

262 AD2d 253 [1st Dept. 1999]). Plaintiff maintains that the defendants have not produced evidence from disinterested witnesses which contradicts plaintiff's allegations nor have they offered any supporting circumstantial evidence for the court to conclusively infer that the claims of the plaintiff are without merit.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties, and considered the arguments presented herein, as well as the applicable law, in making this determination with respect to the motion by defendants to dismiss the complaint of the plaintiff.

At issue before the Court, is whether the complaint of the plaintiff should be dismissed, pursuant to CPLR § 3211(a)(1), (3) and (7), which is based upon the submission of documentary evidence (the deed and supporting documentation for the transfer of the subject property); whether the plaintiff has stated a cause of action in his complaint based upon allegations of fraud and negligence; and whether the plaintiff has standing to bring this action.

This Court's initial consideration of this motion begins with defendants' defense "founded upon documentary evidence" (CPLR § 3211(a)(7)). The type of evidence that can be considered documentary are judicial records and documents reflecting out-of-court transactions, such as notes, mortgages, deeds and contracts (see Sunset Café, Inc. v. Matt's Surf & Sports Corp., 103 AD3d 707, 959 NYS2d 700 [2nd Dept. 2013]; Siegel, New York Practice § 259 (Connors 5th ed.)). The documents dated September 15, 2012 that were submitted in this matter, which include a Bargain and Sale Deed with Covenants, a Real Property Transfer Report and an "Affidavit of Compliance with Smoke Detector Requirement for One and Two-Family Dwellings", (see Exhibit "B" annexed to the defendants' motion to dismiss) each contain the signature of the plaintiff, Anthony Gargagliano, which signature is notarized and acknowledged, where applicable, by Peter Martin, Esq. In support of defendants' motion, the defendants offer an affirmation from Mr. Martin. Mr. Martin affirms that he prepared the deed in question, in which Anthony and Ann Gargagliano, as Trustees of the Ann Gargagliano and Anthony Gargagliano 2003 Revocable Trust, transferred their ownership interest in the real property located at 8821 23rd Avenue, Brooklyn, New York. Mr. Martin further affirmed that he has known the Gargagliano family for over ten years and is personally familiar with Anthony Gargagliano. He further stated that on September 15, 2012, he appeared at the home of Anthony

Gargagliano, while both Ann Gargagliano and Dion Gargagliano were present, and they signed the documents, he notarized the signatures, as well as acknowledged Anthony Gargagliano's signature on the deed.

CPLR § 4538 provides that certification of the acknowledgment of proof of writing, the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state, is prima facie evidence that it was executed by the person who purported to do so. "A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption. . . can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed." A certificate of acknowledgment should not be overthrown. . . by a bare preponderance of evidence, but only on proof so clear and convincing as to amount to moral certainty" (Osborne v. Zornberg, 16 AD3d 643, 792 NYS2d 183 [2nd Dept. 2005] citing Lum v. Antonelli, 102 AD2d 258, 260-261 [2nd Dept. 1984]); Paciello v. Graffeo, 32 AD3d 461, 819 NYS2d 480 [2006]; John Deere Ins. Co. v. GBE/Alasia Corp., 57 AD3d 620, 869 NYS2d 198 [2nd Dept. 2008]).

The Court of Appeals has held that "something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381, 774 NYS2d 480 [2004]).

In Rivera v. Hernandez, 277 AD2d 301, 715 NYS2d 749 [2nd Dept. 2000]), the Court determined that the plaintiff, a real property owner, who had owned the property jointly with the defendant, but who claimed that his acknowledged signature on a deed transferring ownership of the property as to the defendant alone was forged, did not establish the transfer was invalid, where plaintiff failed to provide proof of forgery so clear as to amount to a moral certainty. In a case that was akin to the case at bar, the Court in Valenzano v. Valenzano, 98 AD3d 661, 950 NYS2d 150 [2nd Dept. 2012], in dismissing the plaintiff's complaint in which there was a claim that the signature was forged and finding that the defendants established their prima facie entitlement to a judgment as a matter of law, considered the signed deed with a certificate of acknowledgment, as well as the affidavit and deposition testimony of a notary, in which the notary claimed personally to have witnessed the plaintiff sign the deed.

In opposing defendants' motion, the plaintiff relies in part upon the determination made by the Court in the matter of Seaboard Sur. Co. v. Earthline Corp., 262 AD2d 253, 692 NYS2d

375 [1st Dept. 1999]. In Seaboard, the Court denied defendant's motion to dismiss the complaint and found that the plaintiff had set forth a sufficient argument that the notary's acknowledgement of his signature was not properly made. However, the plaintiff here failed to set forth that the Court in Seaboard found that there were discrepancies on the face of the notary's acknowledgment which lent further substance to defendant's claim that the notary's purported acknowledgment of his signature was not properly made. This fact makes the Seaboard holding distinguishable from the case at bar, as there is no claim or issue that there were any defects in the notarization of these documents.

Here, the plaintiff has failed to corroborate his claim that his signature on the deed in question, as well as the supporting documentation, was forged. An acknowledgement on an instrument such as a deed raises a presumption of due execution, which presumption can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed. To prove forgery, the proof must be clear and convincing and the plaintiff in support of his claim has merely submitted his own affidavit and a proposed settlement agreement, neither of which are compelling or persuasive. Further, the plaintiff has not offered any opposition to the affirmation of Peter Martin, Esq., who is unwavering and steadfast that he prepared the documents in question, knew the plaintiff and witnessed him executing the documents.

To succeed on a motion to dismiss based on a defense founded upon documentary evidence, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see Sheridan v. Town of Orangetown, 21 AD3d 365, 799 NYS2d 575 [2nd Dept. 2005]). Here, the Court finds that the submissions by the defendants satisfied this criteria to dismiss this action. Relief is appropriate where the evidence conclusively refutes the plaintiff's allegations or conclusively establishes a defense to this action (see Spoleta Construction, LLC v. Aspen Ins. UK Ltd., 27 NY3d 933, 30 NYS3d 598 [2016]).

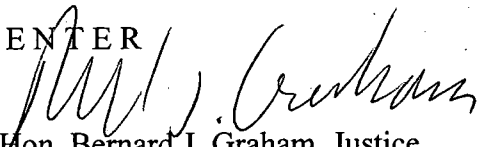
This Court, having determined that the defendants motion should be granted, pursuant to CPLR § 3211(a)(7) based upon documentary evidence, need not address the other aspects of defendants' motion which seeks a dismissal based upon lack of standing and failure to state a cause of action.

Conclusion:

The motion by defendants Ann Gargagliano, Dion Gargagliano and Jessica Nicole Gargagliano for an order to dismiss the complaint of the plaintiff, Anthony Gargagliano, pursuant to CPLR § 3211(a)(7), is granted.

This shall constitute the decision and order of this Court.

Dated: March 22, 2018
Brooklyn, New York

ENTER

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County