

Ashman v Central Funding LLC
2018 NY Slip Op 32946(U)
November 19, 2018
Supreme Court, Kings County
Docket Number: 502447/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 11

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MAURICE ASHMAN,
Plaintiff,

Decision and order

- against -

Index No. 502447/18

CENTRAL FUNDING LLC, BHNWN 244 PUTNAM LLC
and FRANK TEHRANI,
Defendants,

ms # 182

November 19, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendant BHNWN 244 Putnam LLC has moved pursuant to CPLR 3212 seeking summary judgement dismissing the complaint. The plaintiff has opposed the motion and has cross-moved seeking to add a party and to add causes of action. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior proceeding regarding the foreclosure of the subject property, Fastine Thompson was the subject owner of the property located at 244 Putnam Avenue in Kings County. On January 10, 2007 Thompson deeded the property to the plaintiff who executed a mortgage in the amount of \$428,000 with Columbia Home Loans DBA. The mortgage was assigned numerous times and on June 1, 2009 a foreclosure action was commenced for failure to pay the mortgage as required. It is true that during the foreclosure proceeding Ashman discovered

the deed had been transferred to an entity named 33rd Street Astoria Inc., and that it had been fraudulently conveyed to defendant Frank Tehrani the principal of that entity, however, the deed was transferred back to Ashman who recorded it on April 8, 2015 and on September 28, 2015 the deed was transferred back to Thompson. On April 11, 2016 an order was granted permitting a foreclosure sale. As noted, on July 7, 2016 a foreclosure sale was conducted and the property was purchased by BHNWN 244 Putnam Avenue LLC for \$790,000. The plaintiff filed a motion seeking to vacate the foreclosure sale and on July 31, 2017 this court denied the motion.

The plaintiff has now instituted the instant action and has alleged five causes of action. They include a cause of action to quiet title, unjust enrichment, constructive trust, declaratory judgement and punitive damages. The defendant has now moved seeking summary judgement dismissing the complaint.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no

right of action exists foreclosing the continuation of the lawsuit.

The doctrine of res judicata or claim preclusion prevents a party from relitigating an issue which has already been decided in a prior proceeding (Parker v. Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 690 NYS2d 478 [1999]). Thus, in the prior litigation in which Ashman participated the court order dated July 31, 2017 stated that the motion to vacate the foreclosure sale was denied. Thus, defendant BHNWN was declared the lawful owner of the property. Ashman had the opportunity to reargue that determination or effectuate an appeal. Although an appeal was filed it was never perfected. Thus, the plaintiff's allegation in the complaint that "Defendant BHNWN 244 PUTNAM LLC has no legal or equitable title to the property" (see, Amended Complaint, ¶21) cannot be litigated since that issue has already been judicially determined. Thus, the present action is surely barred by res judicata. It is well settled the doctrine bars recovery on a different theory where the issues arise from the same facts and transactions (Tsabbar v. Delena, 300 AD2d 196, 752 NYS2d 636 [1st Dept., 2002]). Therefore, based on the foregoing, the motion seeking summary judgement concerning the first cause of action is granted.

Turning to the motion seeking to dismiss the cause of action

for unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The court has already determined that the purchase price BHNWN paid was reasonable. Consequently, the claim of unjust enrichment is dismissed.

Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula

through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (id).

As repeated again, BHNWN's ownership of the property is lawful. Consequently, the motion seeking to dismiss the constructive trust cause of action is granted.

The cause of action seeking a declaratory judgement merely reiterates the claim that the plaintiff is entitled to the subject premises "because the transfer was unlawful and without authorization" (supra at ¶33). However, that argument is barred at this time. Likewise, any claims seeking punitive damages are dismissed (see, Kelly v. Defoe Corp., 223 AD2d 529, 636 NYS2d 123 [2d Dept., 1996]).

The cross-motions of the plaintiff are denied. As explained the plaintiff has no basis upon which to assert these claims. The proposed claims are equally improper there are no questions of fact that require any adjudication. The plaintiff had a fair and full opportunity to challenge the legitimacy of the foreclosure and sale to defendant BHNWN. Indeed, the plaintiff did seek to challenge the foreclosure sale and such challenge was denied. The current lawsuit is nothing more than an attempt to relitigate that denial and seek another opportunity to seek


relief. The doctrine of res judicata bars this lawsuit.

Therefore, the motion seeking summary judgement dismissing all the allegations of the complaint is granted. The cross-motion seeking to add parties and causes of action is denied.

So ordered.

ENTER:

DATED: November 19, 2018
Brooklyn N.Y.



Hon. Leon Ruchelsman

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