

Winn v Winn
2019 NY Slip Op 31887(U)
May 3, 2019
Supreme Court, Queens County
Docket Number: 700133/2019
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

KEENAN WINN,

Index No.: 700133/2019

Plaintiff,

Motion

Date: April 3, 2019

-against-

Motion Cal. No.: 44

BERNADETTE WINN,

Motion Sequence No.: 1

Defendant.

The following efile papers numbered 1, 3-15 submitted and considered on this motion by defendant Bernadette Winn seeking an Order pursuant to Civil Practice Law and Rules (CPLR) sections 3211 (a)(1) and (7).

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 4-9
Affirmation in Opposition-Affidavits-Exhibits.....	EF 10-13
Reply Affirmation-Affidavits-Exhibits.....	EF 14-15
Summons and Verified Complaint.....	EF 1
Affidavit of Service.....	EF 3

This action was commenced by plaintiff Keenan Winn against defendant Bernadette Winn on January 3, 2019. Plaintiff is defendant's son. Plaintiff is seeking a constructive trust on premises located at 194-10 84th Road, Hollis, New York 11423¹. Keenan Winn maintained in his verified complaint that the premises were owned by him and the defendant Bernadette Winn with joint rights of survivorship prior to March 27, 2014. On March 27, 2014 plaintiff and defendant executed a deed for no consideration transferring the entire interest in the premises to defendant, with the promise by defendant that she would transfer the entire interest in the premises to the plaintiff at a later date. Plaintiff contended that he relied upon the promise of defendant to transfer the premises to plaintiff

¹ The documents submitted in support and in opposition to the instant motion state the address of the subject premises is "194-10 87th Road, Hollis, New York 11423."

at a later date in return for executing the March 27, 2014 deed transferring the entire interest to defendant. On numerous occasions since early 2015 he has requested that defendant convey the entire interest in the premises as promised, however she has failed to do so. Plaintiff claims that the defendant has been unjustly enriched with the ownership of the entire premises by her breach of her promise, and plaintiff requests the imposition of a constructive trust over the property.

Now, defendant Bernadette Winn seeks an Order pursuant to CPLR sections 3211 (a)(1) and (7) to dismiss plaintiff's complaint. In support of the motion, defendant Bernadette Winn annexed her affidavit. She stated that the Court lacked jurisdiction over her as a defendant. Defendant related the facts as she sees them. She stated that she owns the subject home and currently lives there, and has retired from the Military after serving for over twenty-seven years. She stated that she was advised when purchasing the home by the lender that putting her name on the deed would hold up the closing process because at the time she was on active duty in another state. Therefore, she agreed to put the plaintiff on the title to the property and the mortgage but only temporarily. She claimed that she financed the purchase and attached copies of bank transfers from her bank account. Prior to the closing plaintiff did not own a home. She further stated that it was agreed between these parties that plaintiff would live in the home and pay half of the mortgage payment while she was still in the Military, and that when she retired she would move into the home and transfer title and mortgage to her name alone. She stated that she added her name to the deed on November 26, 2010 and refinanced her home in 2012. She also paid money from January 2010 to March 2014 to live in her home even though she was living in another state.

Defendant further stated that she officially retired in November 2012 and moved back to New York and into her home, paying monies toward the mortgage in the home. She also related that she paid monies from her savings and refinanced the home around March 2014. According to defendant, it was always understood that she would be moving into the home permanently and would assume the mortgages. On or about March 27, 2014 the deed to the home was transferred to her name alone, and she assumed all of the prior mortgages and therefore plaintiff had not further financial obligations for her home. Since 2014 she claimed that plaintiff was living in the home without making any financial contributions. She contended that the plaintiff's complaint should be dismissed because her documentary evidence proves that there is no basis to warrant the imposition of a constructive trust, and plaintiff's complaint fails to state a cause of action. She maintained that she never made a promise to the plaintiff, and that they executed a deed transferring the interest in the home to her solely. Also, plaintiff has become aggressive with her and she has left the home temporarily but was still paying the bills associated with the home.

In opposition, plaintiff submitted his affidavit dated March 25, 2019. He stated that the defendant, who is also a licensed real estate agent bought him the house in 2009 to own and live in and for her to live in with him after she retired. In 2009 she gifted him \$200,000.00 to buy the subject property, and defendant filed a gift tax reflecting the gifts. She also paid his overdue credit cards and an unpaid bill to Hofstra. He claimed that in 2012 she obtained financing on the house and attached papers, claiming that he did not sign the loan documents. Further, he has made substantial improvements to the home. The 2010 deed was created to protect his mother in the event that some

harm came to him, as his occupation is a Firefighter. He was in an automobile accident in 2014 and was worried about losing the home and requested that she take temporary title to the home, however, he has cleared his legal issues. He recently learned that defendant had deeded the property to a revocable trust. Further, he is in the process of filing an amended complaint.

In response, defendant submitted documentary evidence, including bills and invoices related to improvements on the home. She claimed that her motion should be granted, and that plaintiff's opposition had no merit, and neither does this case.

DISCUSSION

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), 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." (*Teitler v Pollack & Sons*, 288 AD2d 302 [2d 2001]; see also *Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp.*, 153 AD3d 607 [2d Dept 2017]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity'" (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010] "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable, qualify as documentary evidence in proper cases...") (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]). Defendant further alleges that plaintiff's complaint should be dismissed pursuant to CPLR 3211(a)(7) because the facts alleged do not fit within any cognizable legal theory, lacking any merit (see generally *Hecht v Andover Assocs. Mgmt. Corp., et al.*, 114 AD3d 638 [2d Dept 2014]; *Salvatore v Bd. of Educ. of Mineloa Union Free School Dist.*, 89 AD3d 1078 [2d Dept 2011]; *Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]). "If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail" (*Cooper v 620 Prop. Assocs*, 242 AD2d 359 [1997]). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]; see also *Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]).

There are four elements of a constructive trust: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment. (See *Sharp v Kosmalski*, 40 NY2d 119 [1976]; *Vitarelle v Vitarelle*, 65 AD3d 1034 [2d Dept 2009].) "[T]o establish that there was a transfer in reliance on the promise, it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed, and that this interest was parted with in reliance on the promise." (See *Edwards v Walsh*, 169 AD3d 865 [2d Dept 2019].)

CPLR §6501 provides that a notice of pendency may be filed in any action in a court of the state in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property. The pendency of such an action is constructive notice from the time of filing of the

notice only to any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. The notice of pendency is filed with the notice, which must state the names of the parties of the parties to the action; the object of the action and a description of the relevant property (see CPLR §6511[b]; 5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313 [1984]; Israelson v Bradley, 308 NY 511 [1955]). "A notice of pendency is an extraordinary privilege which demands strict compliance with applicable statutory requirements" (see Old World Custom Homes, Inc. v Crane, 33 AD3d 600 [2d Dept 2006]).

The defendant's motion to dismiss is granted. Plaintiff's verified complaint and notice of pendency are defective. Plaintiff failed to allege the correct address for the premises in his verified complaint and notice of pendency for which he sought a constructive trust. In the aforementioned, he alleged the address of the premises as 194-10 84th Road, Hollis, New York 11423. However, the deed and other documents indicate that the address at issue is actually 194-10 87th Road, Hollis, New York 11423. The notice of pendency contains a block and lot number which may coincide with the correct address, however, the notice is to enforce a claim of interest to property against the wrong address. Although plaintiff claimed that he was in the process of filing amended papers, same were not filed at the time the Court renders its decision. Although defendant argued in her affidavit that the Court lacked jurisdiction over her, there was no proof of same or any arguments related to lack of jurisdiction set forth in her papers, therefore this argument has not been considered by the Court. Therefore, it is

ORDERED, the defendants motion to dismiss pursuant to CPLR sections 3211 (a) (1) and (7) is granted; and it is further

ORDERED, the Clerk of the County of Queens is directed to cancel and discharge a Notice of Pendency, if any, filed in this action against the property located at 194-10 84th Road, Hollis, New York 11423; and it is further

ORDERED, the Clerk of the County of Queens is directed to cancel and discharge a Notice of Pendency, if any, filed in this action against the property located at 194-10 87th Road, Hollis, New York 11423.

The foregoing constitutes the decision and Order of the Court.

This constitutes the decision and order of this court.

Date: May 3, 2019



Hon. Chereé A. Buggs, JSC

FILED
MAY - 9 2019
COUNTY CLERK
QUEENS COUNTY