

Stolzberg v Freed

2019 NY Slip Op 32135(U)

July 19, 2019

Supreme Court, Kings County

Docket Number: 506735/2019

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

x

RACHEL STOLZBERG,

Plaintiff,

-against-

PINCHAS FREED,

Defendant.

x

DECISION / ORDER

**Index No. 506735/2019
Motion Seq. No. 1 & 2
Date Submitted: 07/18/19
Cal No. 48 & 49**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff Rachel Stolzberg's motion for a preliminary injunction and defendant Pinchas Freed's cross-motion to dismiss

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits Annexed.....	<u>4 - 11</u>
Cross Motion, Affirmation and Exhibits Annexed.....	<u>12 - 28</u>
Affirmation in Opposition to Cross Motion and Exhibits Annexed....	<u>31 - 35</u>
Reply to Cross Motion.....	<u>36 - 53</u>
Reply to Motion.....	<u>54</u>
Amended Complaint	<u>30</u>

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

In this action to set aside a conveyance in 2012 of a two-family house by plaintiff Rachel Stolzberg, which deed was executed by her husband pursuant to a previously recorded Power of Attorney, (hereinafter "plaintiff) and Pinchas Freed (hereinafter defendant), plaintiff alleges in her initial complaint: (1) a cause of action under RPAPL 1501; (2) a cause of action for a constructive trust; and (3) fraud. The summons and complaint were served along with an order to show cause which seeks a preliminary injunction restraining defendant from selling, conveying, etc. Defendant cross-moved to

dismiss, based on the statute of limitations and/or failure to state a cause of action.

Plaintiff then served an amended complaint, which omits the cause of action for fraud and adds a second cause of action under RPAPL 1501.

Oral argument was held on July 18, 2019. Plaintiff's motion for a preliminary injunction is denied, as plaintiff did not demonstrate a probability of success on the merits. Defendant averred that the motion to dismiss was equally applicable to the amended complaint. For the reasons which follow, defendant's cross motion is granted and the complaint is dismissed.

FACTS

Plaintiff argues that she is the rightful owner of the property and that the defendant has no legal grounds to bring an eviction action against her family or to transfer the property to any third party. Plaintiff maintains that the power of attorney that she had granted her husband had been orally revoked before the transfer of the property by her husband to the defendant.

Defendant contends that he is the rightful owner of the property and that the plaintiff's causes of action are all time-barred by the statute of limitations. In support, defendant points to the deed, which was signed by plaintiff's husband and conveyed to him on May 30, 2012, prior to the date the plaintiff signed a revocation of the power of attorney, which was also recorded as required by GOL 5-1511. It is noted by the court that the power of attorney from plaintiff to her husband was executed in 2011, but the original was apparently given to the title closer, as it was recorded simultaneously with the deed. Further, defendant provides an affidavit from the notary, who was the title closer, that states that Mr. Benjamin Stolzberg executed the deed on May 23, 2012, and that is the date he notarized it, but it was delivered to Mr. Freed, the defendant, at the

closing on May 30, 2012, and that there is nothing unusual or untoward about this. Additionally, defendant points to various other facts and details that should have given notice to the plaintiff that she no longer owned the house, such as: (1) defendant paid off her mortgage and recorded a satisfaction of mortgage and obtained his own mortgage, which he has been paying for years; (2) plaintiff and her relatives stayed at the property and were paying rent to the defendant for years; (3) defendant took plaintiff and her husband to a Rabbinical Court when plaintiff's family stopped paying rent; and (4) defendant has been paying the real estate taxes and utilities for the building for years.

Therefore, the issues before the court are: (1) whether plaintiff meets the requirements for obtaining a preliminary injunction; (2) whether defendant's 3211 motion to dismiss should be applied to the amended complaint; and (3) if it is so applied, whether the amended complaint survives the motion to dismiss.

Plaintiff's Motion for a Preliminary Injunction

"To obtain a preliminary injunction, the moving party must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor." (*159-MP Corp. v Cab Bedford, LLC*, 53 Misc 3d 803, 810 [Sup Ct 2016]). This standard, a higher burden of proof than a mere preponderance of the evidence, is not met here. None of the allegations in the complaint or the amended complaint or the motion papers shows that the plaintiff would likely succeed in this action or that the equities balance in her favor. It is not arguable that the plaintiff would suffer irreparable injury at the hands of defendant, as it is really her husband that she has to blame, if in fact she did not agree to go through with the transaction with defendant. The court notes that she

herself signed the recorded (2011) contract of sale between herself and defendant, so she certainly cannot claim she did not know about the transaction. In any event, as the court grants the cross motion and dismisses the complaint, the motion for a preliminary injunction is rendered academic. Therefore, the plaintiff's motion for a preliminary injunction is denied.

Defendant's Cross Motion to Dismiss

First, the court must determine whether the causes of action are time barred, pursuant to CPLR 3211(a)(5), as alleged by defendant. If any are not, then the court must consider whether the applicable cause of action should be dismissed for failing to state a cognizable cause of action. In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2d Dept 2005]. See also *Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2d Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, "but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache*

Halsey Stuart, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez*, 84 NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

A Plaintiff is allowed to file and serve an amended complaint without seeking permission from the court if he or she does so in a timely fashion. If a plaintiff chooses to exercise this option while a 3211(a) motion to dismiss is pending, the amended complaint becomes “the only complaint in the case,” (*D’Amico v Correctional Medical Care, Inc.*, 120 AD3d 956, 957 [4th Dept 2014]) and the original complaint is a nullity. However, the 3211(a) motion to dismiss is not necessarily abated. The court has the discretion to determine how to proceed, depending in part on whether the amended complaint repeats the causes of action in the original complaint, whether parties are added, whether the moving party wants to proceed with the motion, and other factors. The First Department has held that, when an amended complaint is filed with a pending motion to dismiss, defendant “has the option to decide whether its motion should be applied to the new pleadings.” (*Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35 [1st Dept 1998]). This assumes that plaintiff’s amended complaint does not remedy the defects in the original complaint which are raised in the motion. Thus, the plaintiff is

required to respond to the motion, unless it is withdrawn so that the court may decide the issue on the return date. Here, defendant's attorney averred that his motion, claiming statute of limitations and failure to state a cause of action, was equally applicable to the amended complaint. Thus, the court will proceed with the motion. A discussion of this issue is provided by David Siegel in *New York Practice Sixth Edition* at section 273.

Plaintiff's first cause of action in the amended complaint, brought under RPAPL 1501, has a ten year statute of limitations (*Koo v Robert Koo Wine and Liquor Inc.*, 170 AD2d 360 [1st Dept 1991]). As ten years have not expired, the court must determine whether the complaint should be dismissed under CPLR 3211 (a)(7). Plaintiff avers that the deed must be declared void because it was signed and notarized seven days before the delivery date and that this makes it invalid. (NY St Cts Elec Filing [NYSCEF] Doc No. 30 at Pages 3-5). However, this allegation is not a valid legal argument and does not constitute a valid cause of action under RPAPL 1501. As the notary and title closer Alex Grunwald states in his affidavit, "Mr. Benjamin Stolzberg signed the deed and accompanying closing documents before me on May 23, 2012. As a notary public, I acknowledged his signature. Seven days later, on May 30, 2012, the closing moved forward and the deed was delivered to the new purchaser. . . .There is nothing unusual about a deed being executed before a notary public a week before delivery at the closing." In any event, as plaintiff was the transferor, a claim such as this cannot be made, that is, one attacking the plaintiff's own transfer as a basis to invalidate the transfer. Thus, the first cause of action is dismissed for failing to state a cause of action.

Plaintiff's second cause of action is similarly defective. It too is alleged to be a cause of action under RPAPL 1501, which has a ten year statute of limitations. Plaintiff alleges that she had verbally revoked her husband's power of attorney before the conveyance, and that this revocation was known to both her husband and the defendant. (NYSCEF Doc No. 30 at Pages 5-6). However, a verbal revocation of a power of attorney is not sufficient. This is particularly true here, as plaintiff had recorded a power of attorney to her husband in 2006, which was not revoked, in addition to the 2011 power of attorney which was recorded along with the deed to defendant. GOL 5-1511 (4) specifically requires a revocation of a power of attorney to be recorded if the power of attorney was recorded. Thus, as the plaintiff's recorded revocation was not signed and notarized until June 4, 2012, the power of attorney was not revoked on the date her husband signed the deed or on the date he conveyed the deed to the defendant. There is no possibility the title closer would have had any indication that the original 2011 power of attorney he was given to record with the deed had been revoked, nor was there any revocation recorded on the date of the closing, when a "continuation search" would have been conducted. Therefore, the second cause of action fails on documentary evidence, as the revocation was signed after the date of the conveyance, and thus the second cause of action is dismissed for failing to state a cause of action for which relief may be granted. It is further noted that this is not really a cause of action under RPAPL 1501, but the need for brevity prevents a discussion of the statute.

Plaintiff's final cause of action, to impose a constructive trust, relies on the sole allegation that the defendant "was not a purchaser in good faith." (NYSCEF Doc No. 30 at Page 7). The elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment

(*Gargano v Morey*, 165 AD3d 889, 890 [2d Dept 2018]). The complaint does not plead these elements, and as such, fails to plead a cause of action for a constructive trust. Thus, the third cause of action is dismissed.

Further, the documentary evidence presented shows that the defendant paid off the plaintiff's mortgages, and satisfactions of the mortgages were recorded, and then, after the Rabbinical Court decision, determined that he could assume that whatever right of redemption plaintiff may have had pursuant to whatever arrangement he had made with plaintiff (which seems to have included taking title to the property, preventing the impending foreclosure, and letting plaintiff and her family live there as long as they paid rent), that he could take out a mortgage on the property, which he did in 2017. As such, the bank would be a necessary party to this action, as the relief plaintiff requests, to void the deed to defendant, would extinguish its mortgage. The failure to name the bank as a necessary party is fatal.

Accordingly, the court grants defendant's cross motion to dismiss plaintiff's amended complaint in its entirety. The temporary stay against defendant provided for in the order to show cause is hereby vacated.

This shall constitute the decision and order of the court.

Dated: July 19, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**