

Ganci v Redhead

2019 NY Slip Op 33355(U)

November 6, 2019

Supreme Court, New York County

Docket Number: 156560/2016

Judge: Margaret A. Chan

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

GANCI, DAVID

Plaintiff,

- v -

REDHEAD, SCOTT R.

Defendant.

-----X

INDEX NO. 156560/2016

MOTION DATE _____

MOTION SEQ. NO. 004 007 008
009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 61, 62, 63, 64, 65, 66, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103
were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 120, 121, 122, 123, 124, 125, 137, 138, 139, 142, 147, 153, 154, 156
were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 008) 126, 127, 128, 129, 130, 140, 143, 145, 146, 148, 149, 150, 151, 152
were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE

The following e-filed documents, listed by NYSCEF document number (Motion 009) 131, 132, 133, 134, 141, 144
were read on this motion to/for EXTEND - TIME

Upon the foregoing documents and oral arguments held for Motion Sequence (MS) 004 on January 23, 2019, and MS 007, 008, and 009 on November 6, 2019, the four motions were resolved on the record. This Decision and Order reflects the determinations on the four motions.

In this property dispute matter, Plaintiff David Ganci and defendant Scott Redhead seek to determine the status of a variety of previously shared property. The parties were previously in a long-term relationship that has since dissolved.

Plaintiff moves in MS 004 for summary judgment pursuant to CPLR 3212 for entry of an interlocutory judgment pursuant to Real Property Actions and Proceedings Law (RPAPL) 915 directing a judicial sale of 24-42 Bennet Avenue, Apartment 51B and 54B in the city, county, and state of New York (NYSCEF #61 - Notice of Motion). Defendant moves in MS 007 for partial summary judgment

pursuant to CPLR 3212 to dismiss plaintiff's replevin claim (NYSCEF #121 – Notice of Motion). Defendant moves in MS 008 to strike plaintiff's amended complaint, or, in the alternative, vacate the note of issue with sanctions (NYSCEF #126 – Notice of Motion). Finally, defendant moves in MS 009 to extend his time to file an answer to plaintiff's amended complaint (NYSCEF #131 – Notice of Motion).

BACKGROUND

The parties were in a long-term relationship that has since ended. The parties first took title to Apartment 54B at 24-42 Bennet Avenue on August 29, 2003. The stock certificate recited that they owned the apartment as joint tenants with rights of survivorship (JTROS) (NYSCEF #62 – August 2003 Stock Certificate)¹. Defendant testified that the intent of the parties at the time they took possession of the property was that it was to be co-owned, fifty-fifty (50/50) (NYSCEF #62 – Redhead EBT at 15). A few months later, the parties learned that the adjoining apartment, 51B, was to be sold and defendant successfully negotiated a contract of sale. The parties closed on the 51B unit in September 2004 and this stock certificate also recited that they owned the apartment as joint tenants with rights of survivorship (NYSCEF #62 – September 2004 Stock Certificate). The second unit was also to be co-owned, 50/50.

The parties combined the two units into a single apartment that is approximately 2,000 square feet, with 4 bedrooms, 2.5 bathrooms, and in-unit laundry. Notably, defendant contributed a large sum of money to finance the purchase, renovation, and upkeep of the apartment. Plaintiff also provided financial contributions to the apartment. However, the parties dispute the exact amounts each contributed to ownership of the apartment.

The parties cohabitated until 2014 when plaintiff stopped sleeping at the apartment (NYSCEF #62 – Ganci EBT at 122). The parties do not dispute that plaintiff left personal property, consisting of clothing, furniture, toiletries, and other items, at the apartment. The parties were unable to resolve the disposition of the apartment and the personal property and this litigation commenced on August 5, 2016 (NYSCEF #1 – Complaint).

DISCUSSION

Summary Judgment Standard

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to

¹ Plaintiff's exhibits are contained in one large NYSCEF file, NYSCEF #62.

establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). “A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate” (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

MS 004 – Disposition of the Cooperative Apartments

Plaintiff seeks entry of interlocutory judgment pursuant to RPAPL 915 for a judicial sale of the premises, the combined cooperative units - Apartments 51B and 54B located at 24-42 Bennet Ave. Plaintiff claims that he and defendant are joint tenants with the right of survivorship in the combined apartments. Plaintiff bases his assertion on excerpts from his own testimony, the testimony of defendant, and the stock certificates showing ownership by both parties that all indicate that the apartment is held as a joint tenancy with right of survivorship.

Defendant argues that there are issues of fact with regards to plaintiff's interest in the apartment and that the proper disposition here is a physical partition of the apartments. Defendant also argues that the property is subject to a constructive trust the prevents summary judgment.

Summary judgment is granted to plaintiff only on the branch his motion that seeks, in essence, a declaration that plaintiff is a 50% owner in the combined apartments. The deposition testimony of the parties and the stock certificates unambiguously show that the apartment is owned as a joint tenancy with right of survivorship subject to 50/50 ownership interests. There is thus no issue of fact in determining whether the apartment is owned 50/50 by the parties.

Defendant is correct, however, that the parties have unequally shouldered financial responsibilities for payments related to the apartment. Hence, a court-appointed referee shall hear and report on the debits and credits due to each party as a set-off to their equal shares (see *Gilgoff v Maldonado*, 8 Misc 3d 1016[A], NY Slip Op 5112[U] [Sup Ct, NY County 2005] [a factually similar case to the instant matter wherein a joint tenancy shares were partitioned 50/50 with subsequent offset as determined by referee]).

As such, it is premature to order a judicial sale pursuant to RPAPL 915 of the apartment without a determination of the credits and debits of each party to this

suit. Thus, the branch of plaintiff's motion for summary judgment to order an immediate judicial sale of the property pursuant to RPAPL 915 is denied.

Instead of an immediate sale, a determination will be made on the value of the combined apartments. The parties may each appoint an appraiser to determine the value of the premises. If the appraisals of the two appraisers are less than \$15,000.00 apart, the average of the values set by the two appraisers shall be binding upon the parties. In the event that the appraisals are more than \$15,000.00 apart, the two appraisers are to agree to engage the services on a neutral third appraiser, and upon receipt of third appraiser's report, the average of the values set by the three appraisers shall be binding on the parties.

After the value is set, defendant has the option to purchase plaintiff's interest in the premises within 60 days after service of the value to the court-appointed referee. Should defendant fail to timely exercise the option to purchase plaintiff's interest, defendant shall be deemed to have waived his right to exercise his option. In the event defendant chooses not to purchase plaintiff's share, the property will be put up for public auction by the court-appointed referee, with the proceeds divided equally between the parties except for any set-offs as determined by referee.

Defendant's constructive trust argument is rejected. "The usual elements of a constructive trust are (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Bankers Sec. Life Ins. Soc. v Shakerdge*, 49 NY2d 939, 940 [1980]). There is no constructive trust here as there is a valid JTROS, and there has been no subsequent transfer of property between the parties. Plaintiff is not unjustly enriched as he is legally entitled to a 50/50 share of the property, as originally intended by the parties and as is clearly stated on the stock certificates to the apartment units. As such, defendant's counterclaims for constructive trust and unjust enrichment are dismissed.

Additionally, defendant's third counterclaim for fraud is dismissed as insufficiently pleaded. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Claims for fraud must meet the heightened pleading standard of CPLR 3016(b) (*see id.*). CPLR 3016(b) states that "[w]here a cause of action... is based upon misrepresentation, fraud... breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." The "purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents" (*Eurycleia*, 12 NY3d at 559). To plead with sufficient particularity to satisfy CPLR 3016(b), "the complaint must 'allege the basic facts to establish the elements of the cause of action'" (*id.* [citations omitted]). "CPLR 3016(b) is satisfied when the facts suffice to permit a 'reasonable inference' of the

alleged misconduct” (*id.*). And, “in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud” (*id.*). “The misrepresentations must be misstatements of material fact or promises made with a present, but undisclosed intent not to perform them” (*Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 [1st Dept 1994]).

Here, defendant does not plead any misstatements of material fact or promises made with a present, but undisclosed intent not to perform them. Defendant merely states that “[p]laintiff made representations of his willingness and ability to contribute financially to the purchase and maintenance of Apt 54B and Apt 51B with the intention of inducing [defendant] into purchasing shares in the cooperative” (NYSCEF #107 – Amended Complaint). There is no specificity in defendant’s pleadings that indicate a present but undisclosed intent to not perform or any material misstatements of fact. As such, defendant’s counterclaim must be dismissed.

MS 007 – Defendant’s Summary Judgment Motion on Plaintiff’s Replevin Claim

Defendant moves for partial summary judgment on plaintiff’s cause of action for replevin. Plaintiff claims that he sent defendant an email requesting the return of certain personal items that belonged to plaintiff, and that defendant failed to give him possession of those items (*see Feld v Feld*, 279 AD2d 393 [1st Dept 2001]; *Khoury v Khoury*, 78 AD3d 903, 904 [2d Dept 2010]).

Here, defendant does not dispute plaintiff’s right to possession of the items listed in a November 12, 2018 email and made those items immediately available (NYSCEF #125 – November 12, 2018 Email). As such, defendant did not unlawfully withhold plaintiff’s property. Therefore, partial summary judgment must be granted as it relates to the items listed in the November 12, 2018 email.

MS 008 and 009 – Defendant’s Motions to Strike and Extend Time

Defendant moves in MS 008 to strike plaintiff’s amended complaint, submitted on February 2, 2019, or, in the alternative, to vacate the note of issue with sanctions. Defendant argues that plaintiff’s amended complaint was filed without leave of court and over two-and-a-half years after the initial complaint was filed.

Plaintiff objects to both the primary and alternative relief sought in the motion. Plaintiff claims that defendant’s alternative relief is a dilatory tactic. Plaintiff argues that defendant’s amended answer², filed on February 19, 2019, revived plaintiff’s ability to amend his complaint without leave of court for twenty

² NYSCEF #113 – Plaintiff’s February 19, 2019 Amended Complaint

days. Plaintiff argues that he is adding new facts to conform his complaint to the evidence.

Defendant's motion to strike plaintiff's amended complaint is granted. Plaintiff cannot amend his complaint as of right under these particular procedural circumstances. CPLR 3025(a) allows plaintiff to amend his complaint, as of right, within 20 days of initial filing. That period has elapsed. And defendant's amended answer did not assert new affirmative defenses or counterclaims and in fact deleted affirmative defenses (*see Pagan v Quinn*, 51 AD3d 1299, 1300 [3d Dept 2008]; *Bryant v City of New York*, 188 AD2d 446, 447 [2d Dept 1992]).

Plaintiff's assertion that he is only adding new facts to conform his pleading to the evidence cavalierly attempts to convert these "new facts" into defenses to defendant's counterclaims, which were in the initial answer. As such, plaintiff's new claims in the guise of new facts are prejudicial to defendant. Accordingly, plaintiff's amended complaint must be stricken.

Additionally, plaintiff's newly asserted cause of action for conversion is moot in light of the decision on the replevin cause of action addressed above in MS 007.

MS 009 is denied as moot given the decision striking the amended complaint in MS 008 as addressed above.

CONCLUSION

Accordingly, it is ORDERED, DECLARED, and ADJUED that the branch of plaintiff's motion for summary judgment to declare the property located at 24-42 Bennet Avenue, Apartments 51B and 54B in the city, county, and state of New York as a joint tenancy with right of survivorship with a fifty-fifty (50/50) share between plaintiff David Ganci and defendant Scott Redhead is granted; it is further

ORDERED that the branch of plaintiff's motion for summary judgment to order an immediate judicial sale of the combined Apartments 51B and 54B is denied; it is further

ORDERED that a referee shall be appointed in a subsequent order to hear and determine on the debits and credits due to each party as a set-off to their equal shares; it is further

ORDERED that each party is to appoint an appraiser within thirty (30) days of this order who is familiar with the property values in the area in which the Apartments are located. The appraisers will appraise the Apartments within thirty (30) of their appointment. In the event the appraisals are more than \$15,000.00 apart, the two appraisers are to appoint a neutral third appraiser within fifteen (15)

days, and upon receipt of the third appraiser's report the average of the values set by the three appraisers shall be binding upon the parties, or, in the event the appraisals are less than \$15,000.00 apart, the average of the values set by the two appraisers shall be binding upon the parties; each party shall pay the fees of the appraiser appointed by him, and in the event a third appraiser is necessary, the fee shall be paid equally by the parties; it is further

ORDERED that defendant may exercise an option to purchase plaintiff's interest in the combined Apartments 51B and 54B within sixty (60) days after service upon plaintiff and the court-appointed referee of a notice of the values so fixed; the option shall be exercised in a writing to be served upon counsel for the plaintiff by certified mail, return receipt requested; the date set for the closing shall be for 60 days after the exercise of the option; it is further

ORDERED that if defendant chooses not to purchase plaintiff's interest, the referee shall preside over the public auction of the combined Apartments 51B and 54B, and the proceeds of the sale shall be divided equally between the parties except for any set-offs as determined by the referee; it is further

ORDERED that defendant's counterclaims are dismissed; it is further

ORDERED that defendant's motion for partial summary judgment regarding plaintiff's replevin claim is granted; the replevin claims regarding all items listed in the November 12, 2018 email are dismissed; it is further

ORDERED that defendant's motion to strike plaintiff's amended complaint is granted; plaintiff's amended complaint is hereby stricken; it is further

ORDERED that plaintiff's claim for conversion is dismissed as moot as plaintiff's amended complaint is stricken; it is further

ORDERED that defendant's motion to extend time to answer the amended complaint is denied as moot as plaintiff's amended complaint is stricken; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

11/6/2019
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE