

Gleizer v Gleizer

2020 NY Slip Op 31353(U)

May 11, 2020

Supreme Court, Kings County

Docket Number: 509690/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 509690/2019
Motion Date: 10-7-19
Mot. Cal. No.:

-----X
MAX GLEIZER, as Non-Domiciliary Administrator of
the Estate of Michael Gleizer, Deceased,

Plaintiff,

-against-

DECISION/ORDER

IRINA GLEIZER,

Defendant.

-----X

The following papers numbered 1 to 6 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of aw.....	1-2
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	3-4
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	5-6
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action alleging causes of action for slander of title, malicious prosecution, constructive trust and unjust enrichment, the defendant, IRINA GLEIZER, moved by pre-answer motion, for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint, vacating plaintiff's Lis Pendens on the real property located at 394 Kings Highway, Brooklyn, New York, and awarding defendant attorneys' fees and costs in this action; or in the alternative, granting the defendant leave to file an Answer within thirty (30) days of the decision on this motion. By order dated August 12, 2019, the court advised the parties that the motion would be treated as a motion for summary judgment pursuant to CPLR §3211(c) and gave the parties an opportunity to submit supplemental papers. The Court will now address the motion.

Background:

Defendant Irina Gleizer and non-party Rudy Gleizer were married for 20 years and are parties to an action for divorce that was commenced by Rudy Gleizer on February 10, 2016, which is pending in Supreme Court, Kings County index number 50577/2016 (“the 2016 divorce action”). The 2016 divorce action was commenced after a prior action for divorce commenced by Irina Gleizer in 2008 (“the 2008 divorce action”) was dismissed by order of Justice Adams on July 2014. That action was also commenced in Supreme Court, Kings County and proceeded under index number 54969/08. In both divorce actions, Irina Gleizer maintained that certain real property located at 394 Kings Highway, Brooklyn New York, which is held by RAM Realty Corp., was a marital asset which Rudy Gleizer fraudulently conveyed to his brother, Michael Gleizer, who is now deceased, to avoid having the asset considered part of the marital estate for purposes of equitable distribution. The alleged fraudulent conveyance was accomplished by a "stock swap" in which Rudy conveyed all his interest in RAM Realty Corp. to Michael Gleizer in exchange for 50% of 516 Realty Corp., which Irina claims is now worthless. Counsel for Irina averred in an affirmation submitted in support of the motion for summary judgment that Michael Gleizer was in full control of 516 Realty Corp. until the corporation’s dissolution in April 2012 and sold the corporation’s only asset, a gas station located at 616 Broadway, Amityville, New York on February 10, 2011. He averred that Michael and kept the entire proceeds of the sale for himself. No admissible proof was submitted establishing this to be true.

After Irina commenced the 2008 divorce action, she commenced a separate action to set aside the alleged fraudulent conveyances in Supreme Court, Kings County under index number 18626/11 (the 2011 fraudulent conveyance action) which was assigned to the undersigned. Irina

named Rudy Gleizer, Alla Gleizer (Rudy's mother) and Michael Gleizer, who was alive at the time, as party defendants. After Rudy Gleizer, Alla Gleizer and Michael Gleizer failed to timely appear in the action, Irina moved to enter a default judgment against them. Her motion was granted and the Court a default judgment was entered against all three defendants on October 10, 2012 declaring and setting aside the "stock swap" as fraudulent and directing the parties be restored to their pre "stock swap" positions. While the 2008 divorce action was still pending, Rudy Gleizer moved to set aside the default judgment insofar as effected his interests and the motion was granted.

After the 2008 divorce action was dismissed, this Court dismissed the 2011 fraudulent conveyance action as moot inasmuch as there was no longer a pending divorce action in which marital assets and equitable distribution were at issue. At the time this court dismissed the action, there were pending motions before the Court brought by Alla Gleizer and Michael Gleizer to vacate the default judgment entered against them. These motions were denied as moot.

After Rudy Gleizer commenced the 2016 action for divorce, Irina commenced a second action to set aside the alleged fraudulent "stock swap." That action was commenced in Supreme Court, Kings County under index number 502946/18 ("the 2018 fraudulent conveyance action"). At the time she commenced the action, she filed a Lis Pendens on the property owned by RAM Realty. Inasmuch as Michael Gleizer was deceased when this action was commenced, his son, Max Gleizer, the Limited Administrator of his Estate, was named as his Estate's representative.

Max Gleizer subsequently brought a motion to dismiss the 2018 fraudulent conveyance action on the ground that the action was commenced after the expiration of the statute of limitations and on the ground that the complaint failed to state a claim. The motion was denied.

Max Gleizer also brought a motion to vacate the default judgment that was entered against his father in the 2011 fraudulent conveyance action. That motion was also denied.

On or about March 26, 2019, Irina filed a Motion for Summary Judgment in the 2018 fraudulent conveyance action. In the motion she asked for various relief, including a declaration that the transfer of shares of RAM Realty to Michael Gleizer was fraudulent and that they be returned to Rudy Gleizer. By a so-ordered stipulation dated July 8, 2019, between counsel for Irina Gleizer and Rudy Gleizer, the motion for summary judgment was withdrawn and the two agreed to be bound by the default judgment dated October 10, 2012 that was entered in the 2011 fraudulent conveyance action. The stipulation effectively settled the action between Irina Gleizer and Rudy Gleizer. Moreover, since the Court denied the motion of Max Gleizer to vacate the default judgment against Michael Gleizer in the 2011 fraudulent conveyance action, the default judgment fully resolves all the issues between all the parties as to whether the “stock swap” involved fraudulent conveyances. Notwithstanding the above, to date, the parties have not been re-stored to their pre-stock swap positions as the default judgment directed. The shares in RAM Realty Corp. have not been transferred back to Rudy Gleizer nor have 50% of the shares in 516 Realty Corp. been transferred back to Michael Gleizer or his Estate.¹

Despite the entry of the default judgment directing Michael Gleizer to transfer back to Rudy Gleizer the shares in RAM Realty Corp., Max Gleizer, as Michael Gleizer’s Estate representative, attempted to sell the real property held by RAM to a prospective buyer in connection with a Stipulation of Sale entered into in a Surrogate’s Court proceeding, claiming the

¹Again, accordingly to Irina’s counsel, 516 Realty Corp. no longer has any assets.

shares to be an asset of the Michael Gleizer's Estate. By order dated November 6, 2018, this Court stayed the sale and by order dated January 28, 2019, this Court denied Max Gleizer's motion to vacate the Lis Pendens filed by Irina on the property held by RAM. Notably, the Hon. Harriet Thompson, the Kings County Surrogate, also denied a motion brought by Max Gleizer to vacate the Lis Pendens.

On July 29th, 2019, Max Gleizer, through his attorneys, filed a Chapter 7 Bankruptcy Petition for RAM Realty Corp. which was signed by Max Gleizer as president of RAM. Irina's counsel subsequently filed an order to show cause in Bankruptcy Court to dismiss the petition, which was signed by Hon. Carla E. Craig. The status of the Bankruptcy proceedings is unclear.

The Current Action:

Plaintiff MAX GLEIZER, as Non-Domiciliary Administrator of the Estate of Michael Gleizer, Deceased, subsequently commenced this action alleging causes of action for slander of title, malicious prosecution, constructive trust and unjust enrichment. With respect to the cause of action alleging slander of title, plaintiff alleges that Irina has deliberately put an improper Lis Pendens on the real property owned by RAM Realty Corp. with the sole consequence of preventing the Estate of Michael Gleizer from selling the property pursuant to a prospective buyer who would have closed on the sale but for the Lis Pendens. Plaintiff contends that Irina's actions have encumbered the title of the Property wrongfully and intentionally. With respect to the cause of action alleging malicious prosecution, the plaintiff alleged that Irina brought the 2018 fraudulent conveyance action without merit and solely to create a lien on the real property owned by RAM Realty Corp. With respect to the cause of action alleging constructive trust, the plaintiff alleges that Irina has taken, without authority or right, property belonging to the Decedent, which

now belongs to his estate and that a constructive trust should be imposed on any interest Irina may have in the property or its proceeds for the Estate. Finally, with respect to the cause of action alleging unjust enrichment, the plaintiff alleged that by putting a Lis Pendens on the Property, Irina has or will enrich herself at the expense of the Plaintiff and that Irina has taken money and/or property to which she is not entitled as a matter of law.

Defendant's Motion for Summary Judgment:

The proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Alvarez v. Prospect Hosp., supra*).

With respect to the cause of action for slander of title, a necessary element of the claim is that the defendant **falsely** cast doubt on the validity of a party's title to property (*Rosenbaum v. New York*, 8 NY3d 1 [2006]). Inasmuch as the default judgment entered in the 2011 fraudulent conveyance action now applies to all parties, the defendant had every right to file the Lis Pendens on the real property owned by RAM Realty Corp. and did not **falsely** cast doubt on the validity of plaintiff's title to property. Accordingly, the defendant has demonstrated her prima facie entitlement to summary judgment dismissing the claim and the plaintiff failed to raise a triable

issue of fact (*see* CPLR 3212 [b]; *Zuckerman v. City of New York*, *supra*, at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).

The defendant also demonstrated her prima facie entitlement to summary judgment dismissing the claim for malicious prosecution. “ ‘The elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury’ ” (*Hudson Val. Mar., Inc. v. Town of Cortlandt*, 79 A.D.3d 700, 702–703, 912 N.Y.S.2d 623, quoting *Castro v. East End Plastic, Reconstructive & Hand Surgery, P.C.*, 47 A.D.3d 608, 609, 850 N.Y.S.2d 483; *see Engel v. CBS, Inc.*, 93 N.Y.2d 195, 204–206, 689 N.Y.S.2d 411, 711 N.E.2d 626; *347 Cent. Park Assoc., LLC v. Pine Top Assoc., LLC*, 83 A.D.3d 689, 690, 919 N.Y.S.2d 892). A plaintiff must “prove an entire lack of probable cause in the prior proceeding” (*Engel v. CBS, Inc.*, 93 N.Y.2d at 204, 689 N.Y.S.2d 411, 711 N.E.2d 626; *see Perryman v. Village of Saranac Lake*, 41 A.D.3d 1080, 1081, 839 N.Y.S.2d 290; *Black v. Green Harbour Homeowners' Assn., Inc.*, 37 A.D.3d 1013, 1014, 829 N.Y.S.2d 764; *see also Ellman v. McCarty*, 70 A.D.2d 150, 155–156, 420 N.Y.S.2d 237). Here, the record clearly demonstrates that the defendant had probable cause to commence the two fraudulent conveyance proceedings and to file the Lis Pendens. Moreover, neither action terminated in plaintiff’s favor. Thus, the defendant has demonstrated her prima facie entitlement to summary judgment dismissing the malicious prosecution claim and the plaintiff failed to raise a triable issue of fact.

The defendant also demonstrated her prima facie entitlement to summary judgment dismissing the constructive trust claim. “‘The elements of a cause of action to impose a

constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment' ” (*Mazzei v. Kyriacou*, 139 A.D.3d 823, 824, 33 N.Y.S.3d 291, quoting *Quadrozzi v. Estate of Quadrozzi*, 99 A.D.3d 688, 691, 952 N.Y.S.2d 74). None of these elements are present, especially a transfer from Irina to Michael Gleizer or to his Estate in reliance on a promise. Thus, the defendant has demonstrated her prima facie entitlement to summary judgment dismissing the claim and plaintiff failed to raise a triable issue of fact.

Finally, the defendant demonstrated her prima facie entitlement to summary judgment dismissing the unjust enrichment claim. The elements of a cause of action to recover for unjust enrichment are “(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*Mobarak v. Mowad*, 117 A.D.3d 998, 1001, 986 N.Y.S.2d 539). “The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695; see *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012). To date the defendant has not been enriched. The Court adjudicating the current divorce action between Irina and Rudy has not deemed the real property owned by RAM Realty Corp. part of the marital estate nor has judgment been entered distributing a portion of that property to Irina. More importantly, plaintiff has no plausible argument that it is against equity and good conscience to permit Irina to retain an interest in the real property since it has been judicially determined that property was fraudulently conveyed from Rudy Gleizer to Michael Gleizer and Michael Gleizer is collaterally

estopped from arguing to the contrary. Contrary to plaintiff's contention, if the plaintiff believes that of the rulings in the fraudulent conveyance actions were erroneous, such is a matter for appeal and not a matter for a separate action. Plaintiff failed to raise a triable issue of fact.

The fact that Rudy, as plaintiff contends, never transferred back to Michael Gleizer or this Estate his 50% shares of 516 Realty Corp. does not render any of plaintiff's causes of action viable. This decision and order should be construed as a finding that those shares are worthless, as Irina's counsel maintains, or that Michael sold the only asset of 516 Realty Corp. and kept the proceeds for himself.

Accordingly, it is hereby

ORDERED that defendant Irina Gleizer is awarded summary judgment dismissing the complaint in its entirety and the Lis Pendens filed by the plaintiff on the real property located at 394 Kings Highway, Brooklyn, New York is hereby vacated. Defendant's motion is in all other respects denied.

This constitutes the decision and order of the Court.

Dated: May 11, 2020



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020