1526 52nd LLC v Lefkowitz
2021 NY Slip Op 31029(U)
March 23, 2021
Supreme Court, Kings County
Docket Number: 515379/18
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of March, 2021.

PRESENT:

HON. DAWN JIMENEZ-SALTA,
Justice.

1526 52ND LLC,

Plaintiff,

Index No. 515379/18

- against -

DECISION AND ORDER
MOT. SEQ. 5

BLUMA LEFKOWITZ A/K/A BLUMA LEFKOWTIZ,

Defendant.

The following e-filed papers read herein:	NYSCEF Doc. No.[1]
Notice of Motion, Affidavit + Affirmation and Annexed Exhibits	113-131
Opposing Affirmations and Annexed Exhibits	134-135, 161
Reply	162-167

Upon the foregoing papers in this quiet title and declaratory relief action to strike a deed from plaintiff, 1526 52nd LLC (plaintiff or 1526), now dissolved, to defendant Bluma Lefkowitz (defendant), defendant moves (in motion sequence [mot. seq.] five) for an order, pursuant to CPLR 3212, granting her summary judgment dismissing the complaint.

Factual Background and Procedural History

Nonparty Rivka Ashkenazi (Ms. Ashkenazi), the sole purported member of 1526, has derivatively acted on its behalf and commenced the present action through the filing of a summons with notice and then a complaint herein. The action presents three causes of

[1] New York State Courts Electronic Filing Document Numbers

action: (1) to quiet title to the premises at 1526 52nd Street in Brooklyn by invalidating the alleged fraudulent deed transfer from 1526 to defendant, individually; (2) for fraud and (3) for conversion. Defendant answered the complaint, denied the material allegations therein and asserted several affirmative defenses, including lack of standing and lack of capacity. Defendant also asserted several counterclaims which are not the subject of this motion.

This case most fundamentally concerns the nature of transactions involving the premises. It arises from disputes between, collectively, defendant and her husband, Jack (Yitzchok) Lefkowitz (Mr. Lefkowitz) and Ms. Ashkenazi and her husband, Sender (Alexander) Ashkenazi (Mr. Ashkenazi). These disputes concern (1) who owns the two-family premises at 1526 52nd Street in Brooklyn (premises) with each couple claiming an interest in the premises; (2) who is the sole member of 1526; (3) whether the premises were sold to 1526; and (4) were the premises used as collateral for a $1,000,000 loan from Mr. Ashkenazi to Vetcare Health, Inc. (Vetcare),[2] a company in which Mr. Lefkowitz was the managing member. Defendant acquired title to the premises on June 28, 2001 through a bargain and sale deed with covenant against grantor's acts, and, on September 10, 2006, granted, without consideration, a joint interest to her relative, Tova Greenbaum (Ms. Greenbaum).

Articles of Organization were filed in behalf of 1526, pursuant to Limited Liability Company Law § 203, with the New York State Department of State on July 9, 2014. Defendant and Ms. Greenbaum subsequently deeded the subject premises to 1526 on or about August 1, 2014.

[2] Vetcare Health, Inc. is a domestic corporation, first registered in 2013, engaged in providing health insurance for domestic animals.

Thereafter, defendant utilized 1526 to convey a deed to the premises to herself, individually on June 26, 2018.[3] Ms. Ashkenazi, upon discovering this situation, acted derivatively on behalf of 1526 and subsequently commenced the present action on July 27, 2018 by filing a summons and then a complaint on July 31, 2018. That same day, July 31, 2018, defendant acted and 1526 was dissolved. Two weeks later, on August 14, 2018, a deed that defendant purportedly executed was recorded on forms that her counsel believes were apparently completed and notarized by Norman Seidenfeld, Esq., who also filed 1526's Articles of Organization and served as Ms. Ashkanazi's attorney on the contested purchase of the premises.

Supporting Arguments

Defendant argues that Ms. Ashkenazi has failed to establish that she is a member of 1526 and can proceed in its name, that 1526, as a limited liability company, itself lacks standing to proceed, that 1526 cannot quiet title as it has no rights to the premises, that the deed delivered to Mr. Ashkenazi should be treated as a mortgage; that 1526 and Ms. Ashkenazi have failed to demonstrate any fraud on defendant's part; and that the Ashkenazis have no property rights capable of conversion. Defendant claims that she and Ms. Greenbaum "executed a contract of sale and rider in blank as well as a deed in blank and related documents" as to the premises on or about April 1, 2014 in furtherance of a pledge that the premises would serve as collateral for the aforementioned loan from Mr. Ashkenazi to Mr. Lefkowitz's company.[4] Defendant concurrently claims that 1526 was

[3] An August 2018 correction deed rectified a typographical error (*see* NYSCEF Doc No. 33).

[4] NYSCEF Doc No. 115, Ms. Lefkowitz's affirmation at 3-4, ¶¶ 14-15, annexed to defendant's moving papers.

formed for her benefit, and that she was 1526's initial and sole member. Defendant's counsel alleges that defendant and Ms. Greenbaum had voted in or about July 2014 to dissolve 1526 and liquidate its sole asset by transferring title to the premises to defendant.

Defendant's counsel acknowledges that the loan agreement directly and expressly required Mr. Lefkowitz to "arrange for the deed owners of the property 1526 52nd Street, Brooklyn, New York to sign a blank purchase agreement, blank deed and necessary closing documents needed to collateralize . . . the note."[5] This deed was purportedly delivered as additional security for the loan made to Vetcare, and the supporting affirmations of defendant and Mr. Lefkowitz allege that, upon agreement with Mr. Ashkenazi, none of the documents were to be recorded except in the event of default, which did not occur. Both defendant and Mr. Lefkowitz further argue that even if a default had occurred, there was no right for Mr. Ashkenazi to record the deed, as it was given solely as security, and thus, the document should be considered as a mortgage. They each maintain that the loan to Vetcare was fully satisfied.

Furthermore, defendant affirms that

> "I never signed anything before [Norman] Seidenfeld [Ms. Ashkenzai's attorney for the purchase of the premises]. I specifically know that I did not sign anything on July 28, 2018 or on August 1, 2014, the date that appears on the deed, as those Dates correspond to dates in the first nine days of the Hebrew month of Av[*] when my religious beliefs mandate that I not transact new business."
>
> [*]"Jews believe that no unnecessary contracts, agreements or Court proceedings are to be engaged in during these nine days."[6]

[5] NYSCEF Doc Nos. 114, affirmation of defendant's counsel at 11, ¶ 40 and NYSCEF Doc Nos. 64 and 129, Vet Care Health, Inc. Loan and Stock and Warrant Purchase Agreement at 5, § 4 [h], annexed to defendant's moving papers).

[6] NYSCEF Doc No. 115, defendant's affirmation at 4, ¶ 18, annexed to defendant's moving papers.

Defendant maintains that the deed was executed only as security for the loan which was fully paid and that all collateral documents should have been surrendered or destroyed on or about April 2015. She further contends that "the contract and forms I provided were completed and modified [b]y the Ashkenazi[]s or persons acting on their behalf to indicate a transfer [of] the property to Ashkenazi individually."[7] Defendant claims that there was never any intention to transfer ownership of the property as evinced by her name remaining on all taxes and utilities. Mr. Lefkowitz, in his supporting affirmation, contends that the contract and forms were altered to indicate that a right to title to the property was transferred to Ms. Ashkenazi individually, which is contrary to the language in the contract that he, Vetcare and Mr. Ashkenazi executed.

Opposing Arguments

Procedurally, 1526 notes that defendant's failure to include the pleadings provides a basis to deny the motion. Ms. Ashkenazi's affirmation opposing the motion alleges that she is the sole member of 1526 and stresses that the action in question involves a simple purchase of residential property. She recounts that on April 1, 2014 she entered into a contract of sale for the premises with defendant and her tenant in common, Ms. Greenbaum. Ms. Ashkenazi and Mr. Seidenfeld, her counsel for the purchase of the premises, collectively assert that the signed documents were simply for purchasing the residential premises, not for securing an unrelated loan. Ms. Ashkenazi asserts that 1526 was formed for her to purchase the premises. She highlights that this contract was initialed

[7] *id.* at 2, ¶ 9.

and signed by defendant and contained various riders relating to both terms of the closing upon sale of the premises and assumption of a mortgage.

Ms. Ashkenazi also states that a $560,000 down payment was released per the contract of sale by Mr. Seidenfeld. Furthermore, she submits that upon the closing, defendant was paid $4,025,000.00, part of which includes assuming an existing $1,469,477.15 mortgage. Mr. Ashkenazi, in his opposing affirmation, also asserts that the purchase of the premises, which closed on August 1, 2014, was with full payment of $4,025,000.00 (which includes assumption of the mortgage) and that a separate and unrelated one million dollar loan was made to Vetcare.

Ms. Ashkenazi maintains that the assumed mortgage is the basis of the dispute herein, that defendant, approximately three years after the closing, requested that the mortgage be refinanced so that it would no longer be under defendant's name, and that shortly after that request, defendant deeded the premises back to herself, purporting to be a member of 1526. Ms. Ashkenazi also explains that, after discovering this allegedly improper transfer, 1526 filed this action seeking to quiet title as well as damages for fraud and conversion of the premises. She claims that she is ready to pay off the entire mortgage in defendant's name but was prevented by 1526's transfer of the deed to defendant.

Ms. Ashkenazi, in response to defendant's claim that 1526 does not have standing to bring this action because it is a dissolved company, references defendant's request to the Department of State to dissolve 1526, and states that she is in the process of having 1526 reinstated by the Department of State. In addition, counsel for 1526 separately notes that, as Ms. Lefkowitz's counsel acknowledges, a dissolved corporation may sue.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005]). The party moving for summary judgment has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by demonstrating, through admissible evidence, the absence of any material factual issues (*see Ayotte v* Gervasio, 81 NY2d 1062, 1063 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008] quoting *Alvarez*, 68 NY2d at 324 [italics removed]).

Once that prima facie showing has been made, the burden then shifts to the opponent to come forward with some proof in admissible form that genuine issues of material fact exist, which preclude granting summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]) [internal citations omitted]; *see also Mayland v. Craighead*, 144 AD2d 344, 346 [2d Dept 1988]). "The court's function on a motion for summary judgment is 'to determine whether

material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; see also *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

CPLR 3212 (b) provides that "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." The Second Department has repeatedly held that failure, as here, to include a set of the pleadings requires denying a summary judgment motion (*see Rivera v City of New York*, 173 AD3d 790, 791 [2d Dept 2019]; *Deer Park Wider v Heller*, 24 AD3d 433, 434 [2d Dept 2005]); *Assoc. v Robbins Store*, 243 AD2d 443 [2d Dept 1997]).

Defendant and Ms. Ashkenazi both acknowledge that 1526 is a limited liability company, but each one claims to be 1526's sole member and to personally own the premises herein. Mr. Lefkowitz handled all negotiations with Mr. Ashkenazi, and it appears that neither defendant nor Ms. Ashkenazi personally conducted any transactions. Thoroughly reviewing the exhibits presented by both parties, specifically emails and handwritten notes indicating accountings exchanged between Mr. Lefkowitz and Mr. Ashkenazi, shows the transactional nature of these negotiations as a sale/purchase of the premises. However, numerous material factual issues precluding summary judgment exist regarding the alleged purchase as well as concerning the loan to Vetcare, such as who are 1526's actual members and who owns the premises.

These issues of fact, separate and apart from the failure to attach the pleadings, necessitate denial of the instant summary judgment motion. Accordingly, it is

ORDERED that defendant's summary judgment motion (mot. seq. five) is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Dawn Jimenez-Salta, J. S. C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court