

Nabil v Tamim Intl. USA, Inc.
2021 NY Slip Op 33142(U)
December 2, 2021
Supreme Court, Queens County
Docket Number: Index No. 716464/21
Judge: Robert I. Caloras
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS PART 36

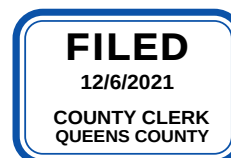
Justice

-----X
ADEL NABIL,

Plaintiff,

Index No. 716464/21

Seq. No. 1



-against-

Tamim International USA, Inc., SH Chanchal Ahmed,

Defendants.

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The following papers numbered E4-E45, E47-E49 read on this Order to Show Cause by Defendants for an order for the following: 1) pursuant to CPLR Rule 3211(a)(1), (5) and/or (7), dismissing the Fourth and Fifth Causes of Action; 2) pursuant to CPLR 6514 (a) or (b), directing the Clerk of the County of Queens to cancel the Notice of Pendency filed in this case against the Subject Real Property and against the Defendants; 3) pursuant to CPLR 6514(c), awarding Defendants \$7,500 in attorneys' fees, costs, and expenses; and 4) pursuant to NYCRR 130-1.1, sanctioning Plaintiff for filing a frivolous action and related Notice of Pendency based upon fiction.

PAPERS

NUMBERED

Order to Show Cause-Affirmation-Affidavit-Exhibits-Memo of Law.....	E4-E23, E25-E27
Letter.....	E24
Affirmation in Opposition-Affidavit-Exhibits.....	E28-E42
Reply Affirmation.....	E47-E49
Order.....	E43-E45

Upon the foregoing papers, it is ordered that the OSC by Defendants is granted in part and denied in part for the following reasons:

Plaintiff commenced this action by filing a Summons and Verified Complaint on July 20, 2021, wherein he asserted the following causes of action: breach of contract, conversion, unjust enrichment, constructive trust and equitable lien. In the Complaint, Plaintiff alleged, *inter alia*, the following: On or about June 26, 2018, Defendant Tamim International USA, Inc. ("Tamim") acquired the property located at 104-46 165th Street, Jamaica NY 11433, Block: 10163, Lot: 70 ("subject property"). Prior to the closing date, Defendant SH Chanchal Ahmed ("Ahmed") entered into an agreement with Plaintiff, whereby Plaintiff would acquire a fifty (50%) ownership and possessory interest in the subject property, including disbursements to Plaintiff of fifty (50%) of profits generated and derived from the subject property (hereinafter "agreement"). In reliance upon the agreement and representations made by Defendant Ahmad, Plaintiff expended monies toward the subject property, including but not limited to, renovation costs of the subject property. Despite Plaintiff's performance pursuant to the agreement, Defendants have materially breached the agreement by, among other things, failing to share profits and monies derived from the subject property. Defendant Ahmed incurred building code violations on the subject property by failing to address material and necessary repairs. Despite demands for accounting, proofs of payment, or compliance with the aforementioned defaults, Defendants stonewalled Plaintiff, and refused access. Defendants misappropriated proceeds generated from the closing date, as well as income derived from the subject property for themselves in direct contravention of the Agreement. Plaintiff never received profits from the initial investments pursuant to the agreement.

In the first branch of this pre-answer OSC, Defendants move for an order, pursuant to CPLR 3211(a)(1), (5) and (7), dismissing Plaintiff's fourth cause of action seeking to impose a constructive

trust on the subject property, wherein Plaintiff alleges that in reliance upon Defendants' promises, he conveyed and expended sums of monies to Defendants and the Subject Property, and that Defendants' have been unjustly enriched at his expense and detriment. Defendants have submitted, *inter alia*, the following: Ahmed's affidavit; Summons and Complaint; Notice of Pendency; deed to the subject property; mortgage and assignment for the subject property; and the Summons and Complaint for the mechanic's lien action for the subject property, entitled *Nabil v Tamim International USA INC. et al.*, filed in Supreme Court, Queens County, along with the Notice of Pendency and Stipulation of Discontinuance. Based upon these submissions, Defendants claim that, unlike the 121st Street property, the parties did not have any agreement for the subject property. Defendants further claim that Plaintiff did not make any contribution with the purchase and ownership of the subject property, nor has Plaintiff been involved or participated in the subject property.

In opposition, Plaintiff submitted the following: his affidavit; text log between Plaintiff and Defendant Ahmed; text log between Plaintiff and Asha Ashraf, Department of Building's Expeditor; text log between Plaintiff and Ashraf Ali, Licensed Engineer; text log between Plaintiff and Basil Thompson, Licensed Plumber; text log between Plaintiff and Michelle Zang, Architect Associates Chief Engineer; text log between Winston Cummins, Licensed Engineer and Plaintiff; Account sheet for the subject property; correspondence with Tamim; correspondence with ARC-HI-TECT ASSOCIATE INC; correspondence for the subject property; and an email from the NYC DOB to Winston Cummins and Jamie Rios for a pending parts fee for the subject property. Based upon these submissions, Plaintiff claims that Defendants consented and authorized him to perform certain acts in furtherance and reliance of the parties' agreement.

When a party moves under CPLR 3211(a)(7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]). A Court must determine whether, accepting the facts as alleged in the pleading as true and according to the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (Leon v Martinez, 84 NY2d 83 [1994]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633 [1976]; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159 [2d Dept. 1997]). Nevertheless, while typically the pleaded facts will be presumed to be true and accorded a favorable inference, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence [will] not [be] entitled to such consideration" (Roberts v Pollack, 92 AD2d 440 [1st Dept. 1983]).

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him [or her] into a trustee" (Bekas v Valiotis, 191 AD3d 937 [2d Dept. 2021] [internal quotations omitted]). "The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment" (*id.*, [internal quotations omitted]).

Here, based upon the facts alleged by the Plaintiff, the Court finds he cannot establish grounds to impose a constructive trust. Although Plaintiff contends the parties entered into an agreement with respect to the subject property, he failed to allege sufficient facts or submit admissible evidence establishing the existence of a fiduciary or confidential relationship (Sokol v Addison, 293 AD2d 600, 601 [2d Dept. 2002]). Accordingly, the branch of the OSC seeking to

dismiss the fourth cause of action to impose a constructive trust pursuant to CPLR 3211(a)(7) is granted. In light thereof, the Defendants' request to dismiss the fourth cause of action pursuant to CPLR 3211(a)(1) and/or (5) is denied as academic.

In the next branch of the OSC, Defendants move to dismiss the fifth cause of action for an equitable lien, wherein Plaintiff alleged that he and Defendant Ahmed "had a clear agreement regarding the subject property wherein (Ahmed) intended to give (him) a fifty (50%) ownership and possessory interest in the Subject Property in exchange for releasing a lien held by Plaintiff on 20-17 121st Street, Flushing NY 11356". In support thereof, Defendants submitted the following: Summons and Complaint for the 121st Street property in the action entitled *Tamim International USA Inc. v NYC 11508 Property Holding Inc.*, ("NYC 11508") Index Number 5326/18 in Supreme Court, Queens County, as well as a Notice of Pendency for the 121st Street property and the deed for the 121st Street property. Based upon these submissions, Defendants claim the following: Tamim had a lien on the 121st Street property, not Plaintiff. Tamim commenced an action to recover monies owed to them against NYC 11508 pursuant to an agreement, dated on or about October 25, 2018, for the 121st Street property, and filed a Notice of Pendency against said property. On April 1, 2019, NYC 11508 sold the 121st Street property to Fausto Martin Gonzalez Lara. At the closing, NYC 11508, Plaintiff's company, settled Tamim's claim from the net sale proceeds at the sale. Based therein, Defendants argue the documentary evidence refutes Plaintiff's claim for an equitable lien. Plaintiff opposes, and argues Defendants have failed to proffer any evidence establishing that he has no ownership interest in the 121st Street property.

"To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim" (Sciadone v Stepping Stones Associates, L.P., 148 AD3d 953, 954 [2017]; see Pacella v RSA Consultants, Inc., 164 AD3d 806 [2d Dept 2018]; Philips v Taco Bell Corp., 152 AD3d 806 [2017]). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable" (Granada Condominium III Assn. v Palomino, 78 AD3d 996, 996-997 [2d Dept. 2010]; see Fontanetta v John Doe 1, 73 AD3d 78, 84-86 [2d Dept. 2010]).

New York law permits the imposition of an equitable lien if there is an express or implied agreement "that there shall be a lien on specific property" (Teichman v. Community Hosp. of W. Suffolk, 87 NY2d 514, 520 [1996] [internal quotation marks and citation omitted]). Such an agreement must evince a sufficiently clear intent that the property is to be "held, given or transferred as security for the obligation" (*id.* [internal quotation marks and citation omitted]). A party's "mere expectation, however sincere, is insufficient to establish an equitable lien" (Scivoletti v Marsala, 61 NY2d 806, 809 [1984]). "While [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances" (Deutsche Bank Tr. Co. Americas v Cox, 110 AD3d 760, 761 [2d Dept. 2013]).

Here, the Court finds Defendants' submissions demonstrated their entitlement to dismissal of the fifth cause of action for an equitable lien pursuant to 3211(a)(1). Specifically, the deed for the sale of the 121st Street property established that NYC 11508, the seller, sold said property on April 1, 2019. Plaintiff's claim that he co-owned NYC 11508 does not establish he had an ownership interest in the 121st Street property. Rather, it merely established that NYC 11508 was the owner of the 121st Street property. Thereby, Plaintiff's claim that he tendered \$100,000.00 to Tamim to settle the dispute regarding the 121st Street property is without merit, and insufficient to support a cause of

action for an equitable lien. Accordingly, the branch of the OSC seeking to dismiss the fifth cause of action for an equitable lien pursuant to CPLR 3211(a)(1) is granted. In light thereof, the Defendants' request to dismiss the fourth cause of action pursuant to CPLR 3211(a)(5) and/or (7) is denied as academic.

In the next branch of the OSC, Defendants move for an order pursuant to CPLR 6514 (a) or (b), directing the Clerk of the County of Queens to cancel the Notice of Pendency. Plaintiff opposes. After a hearing on August 26, 2021, this Court issued an order directing the Clerk of the Court, Queens County to cancel and void the Notice of Pendency filed in this action upon the subject property pending the hearing and determination of this OSC (see E-43-E45). CPLR 6514(b) provides that "The court, upon motion of any person aggrieved and upon such motion as it may require, may direct any county clerk to cancel a notice of pendency, if plaintiff has not commenced or prosecuted this action in good faith". Here, only the fourth and fifth causes of action affect title to, or the possession, use or enjoyment, of real property. As set forth above, Defendants have established their entitlement to dismissal of these causes of action. Accordingly, the branch of the OSC seeking to cancel the Notice of Pendency is granted.

The remaining branches of the OSC requesting Defendants be awarded \$7,500.00 in attorneys' fees, costs and expenses pursuant to CPLR 6514(c), and pursuant to NYCRR 130-1.1, sanctioning Plaintiff for filing a frivolous conduct are denied. While the Defendants' request to cancel the Notice of Pendency has been granted, the Court finds an award of costs would be inappropriate under the circumstances of this case (see Shkolnik v Krutoy, 65 AD3d 1214, 1216 [2d Dept 2009]).

Accordingly, Defendants are directed to file serve and file an Answer within thirty days after entry of this order, and it is

ORDERED, that the County Clerk of Queens County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action on July 20, 2021 known as 104-46 165th Street, Jamaica, NY, and identified on the tax map of Queens County as BLOCK 10163, LOT 70, and said Clerk is directed to enter upon the margin of the record of the same a Notice of Cancellation referring to this Order.

Dated: December 2, 2021


ROBERT I. CALORAS, J.S.C.

