

Baharestani v Baharestani

2022 NY Slip Op 30898(U)

March 15, 2022

Supreme Court, New York County

Docket Number: Index No. 650614/2020

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHY J. KING PART 06

Justice

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STEVEN BAHARESTANI,

Plaintiff,

- v -

GEORGE BAHARESTANI, 110-06 72ND AVE., LLC,
FOREST HILLS TOWER LLC, 98-02 PARTNERS LLC, VB
PARTNERS LLC, 1180 NORTHERN BLVD. LLC, 54 COW
NECK LLC, and XYZ LLCS 1-20,

Defendants.

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INDEX NO. 650614/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION and ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for VACATE LIS-PENDIS.

Defendant George Baharestani (“George”), moves by order to show cause, pursuant to CPLR 6501 and 6514, for an order vacating or cancelling various notices of pendency in Queens and Nassau Counties. Plaintiff opposes the requested relief.

BACKGROUND

Plaintiff is defendant George Baharestani’s son. George is the managing member and 60% owner of 110-06 72nd Ave., LLC (110-06 LLC), Forest Hills Tower LLC (Forest LLC), 1180 Northern Blvd. LLC (1180 LLC), 54 Cow Neck LLC (54 Cow LLC) (collectively, “the LLC Defendants”) which own the following parcels of real property:

- 110-06 LLC, a domestic limited liability company, owns an elevator building with 16 residential rental units and 2 commercial units located at 110-06 72nd Avenue, Forest Hills, New York

- Forest LLC, a New York limited liability company, owns a nine-story elevator building with 31 residential rental units located at 101-24 Queens Boulevard, Forest Hills, New York.
- 54 Cow LLC is the owner of 54 Cow Neck Road, Sands Point, New York
- 1180 LLC, a New York limited company, owns a two-story retail/medical building located at 1180 Northern Boulevard, Manhasset, New York.

Plaintiff alleges that he owns a 15% membership interest in each of the LLC Defendants. Based on said interest, plaintiff alleges that he is entitled to receive monthly distributions from each of the LLC Defendants as provided for in the LLC Defendants' operating agreements. Plaintiff further alleges that George has failed or refused to pay any distributions to plaintiff even though other members have received distributions and that George has concealed the income and the sale of assets owned and the income generated by the LLC Defendants.

On January 27, 2020, plaintiff commenced the within action, which includes causes of action for: (1) breach of contract; (2) breach of fiduciary duty; (3) unjust enrichment; (4) the appointment of a temporary receiver pursuant to CPLR 6401; (5) the imposition of a constructive trust on defendants' assets; (6) a judgment declaring that plaintiff has a valid contract with, and has a continuing interest in, each of the LLC Defendants and that he is entitled to distributions and an order of specific performance; and, (7) an accounting under the common-law and Business Corporation Law 720. In connection with this action, plaintiff filed notices of pendency in Queens and Nassau Counties on the following properties: 110-06 72nd Avenue, Forest Hills, New York (Block 2236, Lot 10); 101-24 Queens Boulevard, Queens, New York (Block 3171, Lot 36); 1180 Northern Boulevard, Manhasset, New York (Section 3, Block J, Lot

6-11); and, 54 Cow Neck Road, Sands Point, New York (Section 4, Block 108, Lot 18) (collectively, “the Subject Properties”).

Defendants interposed an answer and now moves to vacate or cancel the notices of pendency on the ground that the underlying action does not affect the title, possession, use or enjoyment of the Subject Properties.

DISCUSSION

CPLR 6501 provides, in relevant part, that “[a] notice of pendency may be filed in any action in a court of the state in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.” The purpose of the notice of pendency is ‘to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action’” (*2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 161 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009] [citation omitted]). “[T]he drastic impact of the notice of pendency authorized by CPLR 6501 requires a strict application of that statute” (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 323 [1984]). Thus, “[a] notice of pendency may be filed only when ‘the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property’” (*Delidimitropoulos v Karantinidis*, 142 AD3d 1038, 1039 [2d Dept 2016]

While plaintiff seeks monetary damages on the causes of action for breach of contract, breach of fiduciary duty, and unjust enrichment, the case law is well settled that “[a]n action to impose a constructive trust upon real property qualifies as one in which the filing of a notice of pendency is allowed” (*Ewart v Ewart*, 78 AD3d 992, 992 [2d Dept 2010]).

To state a cause of action for a constructive trust, the plaintiff must plead “(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment” (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). To satisfy the third element, “it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed, and that this interest was parted with in reliance on the promise” (*Bontecou v Goldman*, 103 AD2d 732, 733 [2d Dept 1984]). The court may impose a constructive trust “[w]hen property has been acquired in such circumstances that the holder of the legal title may not in equity and good conscience retain the beneficial interest” (*Simonds v Simonds*, 45 NY2d 233, 241 [1978] [internal quotation marks and citation omitted]).

Although denominated as a cause of action for constructive trust, the Court finds plaintiff is seeking to enforce his membership interests in the LLC Defendants, which has no bearing on title, possession, or use of the Subject Properties (*21/23 Ave. B Realty LLC v 21&23 Ave B, LLC*, 191 AD3d 456 [1st Dept 2021]). Further, the Court finds that the complaint fails to adequately plead a cause of action for constructive trust, since plaintiff failed to allege that he transferred his right, title, or interest to the Subject Properties in reliance on a promise from defendant. Thus, the filing of the notices of pendency was improper (*see 21/23 Ave. B Realty LLC*, 191 AD3d 456 [1st Dept 2021]; see also *Yonaty v Glauber*, 40 AD3d 1193, 1195 [3d Dept 2007]), and mandatory cancellation of said notices is warranted. CPLR 6514(a) and (b) provides, in relevant part, that a notice of pendency is subject to mandatory cancellation ...[if] the plaintiff has not commenced or prosecuted the action in good faith. In this regard, defendant is directed to pay costs associated with the action pursuant to CPLR 6514 (c) which provides that “[t]he court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any

costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.”

Additionally, the Court finds that defendant George Baharestani is entitled to recover costs and attorneys’ fees as a result of the improper filing and the cancellation of the four notices of pendency on the Subject Properties. Section 22 NYCRR 130-1.1 (a) of the Rules of the Chief Administrator of the Courts provides that “[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct.” Said conduct includes taking action that is “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” ([22 NYCRR] § 130-1.1 [c] [1]). The Court finds that although defendant George Baharestani had repeatedly advised plaintiff that the notices of pendency were a legal nullity and should be cancelled, plaintiff failed to cancel the notices of pendency and instead commenced the within action.

Based on the foregoing, it is hereby:

ORDERED that defendants’ motion to cancel the notices of pendency filed in Queens and Nassau Counties is granted; and it is further,

ORDERED that the office of the County Clerk of Queens County is directed to cancel the notices of pendency on the real property located at:

- 1) 110-06 72nd Avenue, Queens, New York (Block 2236, Lot 10); and
- 2) 101-24 Queens Boulevard, Queens, New York (Block 3171, Lot 1103 and Block 3171, Lot 36); and it is further,

ORDERED that the office of the County Clerk of Nassau County is directed to cancel the notices of pendency on the real property located at:

- 1) 54 Cow Neck Road, Sands Point, New York (Section 4, Block 108, Lot 18); and
 - 2) 1180 Northern Boulevard, Manhasset, New York (Section 3, Block J, Lots 6-11);
- and it is further,

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further,

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the issue of the costs and reasonable attorneys’ fees incurred by defendants related to the filing and cancellation of the notices of pendency, as set forth above; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and counsel for defendants shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical

thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part.

3/15/2022

DATE

/s/

Kathy J King

KATHY KING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE