

Al-Ahwas v Elfgeeh

2022 NY Slip Op 32903(U)

August 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 529778/2021

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24TH day of August 2022

HONORABLE FRANCOIS A. RIVERA
..... X

ABDULLAH QAID AL-AHWAS and
ABDUL-GHANI QAID AL-AHWAS

Plaintiffs.

DECISION & ORDER

Index No. 529778/2021

-against-

Oral Argument: 4-20-22

NASSER ELFGEEH, a/k/a NASIR AL-
FAQIH, and AHMED QAID AL-AHWAS,
a/k/a AHMAD QATABI, a/k/a MOHSEN
QATABI

Defendants.

..... X
Defendants Nasser Elfgeeh and Ahmed Qaid Al-Ahwas (collectively, "Defendants"), by the Law Offices of Gary Greenberg, Esq. (Gary Greenberg, Esq.) filed their Order to Show Cause seeking dismissal of Plaintiffs' Verified Complaint ("Defendants' Motion") (NYSCEF Nos. 23-35);

Plaintiffs Abdullah Qaid Al-Ahwas and Abdul-Ghani Qaid Al-Ahwas (collectively, "Plaintiffs"), by Blum Law Group (Matthew S. Blum, Esq.) filed opposition to Defendants' Motion (NYSCEF Nos. 39-48);

Defendants filed a reply in further support of Defendants' Motion (NYSCEF Nos. 49-50);

Plaintiffs filed a superseding opposition to Defendants' Motion, supplementing NYSCEF Nos. 39 & 48 with NYSCEF Nos. 51 & 52, respectively;

Defendants filed a superseding reply in further support of Defendants' Motion, supplementing NYSCEF Nos. 49 & 50 with NYSCEF Nos. 53 & 54, respectively;

In consideration of the foregoing submissions, and oral arguments presented on March 15, 2022, April 19, 2022, and April 20, 2022, Defendants' Motion is granted in part and denied in part in accordance with this Court's order:

BACKGROUND

This action concerns certain real property, located at 340 8th Street, Brooklyn, New York 11215 (“Premises”), and remittance of certain Premises rental proceeds by and between Defendants and Plaintiffs.

On or about November 23, 1984, Defendants Ahmed Qaid Alahwas and Nasser Elfgeeh Alahwas entered into contract to purchase the Premises. Upon transfer of title, Defendants’ names were placed on the Premises deed, filed with the New York City Register and dated November 23, 1984. NYSCEF No. 30.

Plaintiffs’ claims

Plaintiffs allege Defendants purchased the Premises on behalf of a “conjoint” – a cultural, but also contractual, arrangement whereby conjoint members share equally in the profits, losses, equity, liabilities, and ownership of property, including conjoint real property. NYSCEF No. 1 (“Complaint”) ¶¶9-13. Plaintiffs allege that Defendants purchased the Premises on behalf of the conjoint to which Plaintiffs and Defendant Ahmed Qaid Al-Ahwas are members. *Id.*; Affidavit of Abdullah Qaid Alahwas, NYSCEF No. 51 (“Abdullah”).

Plaintiffs allege that Defendants purchased the Premises with “pooled” conjoint funds (*id.*) and that the parties agreed the Premises was to be owned, in part, by Plaintiffs. Plaintiffs claim ownership of the Premises in the amount of a one-sixth ownership interest each Plaintiff, totaling a one-third ownership interest of the Premises between both Plaintiffs. Complaint ¶ 12.

Plaintiffs further allege that the parties entered into a joint venture (Complaint ¶¶ 9-12) which included purchase of the Premises; Defendant Ahmed Qaid Al-Ahwas is the eldest brother of both Plaintiffs (*id.*); and that Defendants are fiduciaries to the Plaintiffs, Defendants charged with the responsibility of preserving and maintaining the Premises, *inter alia*, for the benefit of Plaintiffs.

Defendants’ claims

Defendants claim Plaintiffs have never owned any portion of the Premises, nor received any portion of rental proceeds. Affidavit of Ahmed Qatabi, NYSCEF No. 25, ¶¶2-6.

Procedural posture

Plaintiffs filed their Verified Complaint on November 19, 2021 (NYSCEF No. 1), pleading causes of action for (1) breach of fiduciary duty, (2) imposition of a constructive trust, (3) quiet title pursuant to RPAPL Art. 15, and (4) injunctive relief.

On November 24, 2021, Plaintiffs filed a proposed order to show cause seeking injunctive relief. Plaintiffs did not notice the order to show cause to be heard and confirmed withdrawal of their application on the record.

On December 20, 2021, Defendants filed Defendants’ Motion to dismiss (NYSCEF Nos. 23-34). Though Defendants’ Motion identified CPLR 3211(a) (7) as the basis for seeking dismissal, Defendants’ Motion argued for dismissal pursuant to CPLR 3211(a) (5), on the basis of statute of limitations. Defendants’ Motion did not argue dismissal for failing to plead a cause of action pursuant to CPLR 3211(a)(7). Defendants’ Motion further sought dismissal pursuant to CPLR 3211(a) (8) and requested an order to vacate and cancel Plaintiffs’ notice of pendency (NYSCEF No. 2).

The parties appeared for oral argument on March 15, 2022. On the record, Defendants argued grounds to dismiss Plaintiffs' Complaint pursuant to CPLR3211(a) (5) and withdrew any request for dismissal pursuant to CPLR3211(a) (8). Defendants further argued grounds to dismiss Plaintiffs' Complaint pursuant to CPLR3211(a) (7), for failure to state a cause of action. Since such arguments were not included in Defendants' Motion, the matter was adjourned to April 19, 2022, for the parties to submit superseding briefings on the grounds to dismiss Plaintiffs' Complaint pursuant to CPLR3211(a) (7).

The parties submitted their respective superseding briefings, Plaintiffs supplementing their opposition at NYSCEF Nos. 39 & 48 with NYSCEF Nos. 51 & 52, Defendants supplementing their reply at NYSCEF Nos. 49 & 50 with NYSCEF Nos. 53 & 54.

The parties appeared for oral argument on April 19, 2022, and again on April 20, 2022.

Evidence in the record

In addition to the pleadings (NYSCEF No. 1, Complaint), this court reviewed and considered all evidence submitted by the parties.

In support of Defendants' Motion, Defendants submitted Plaintiffs' Complaint (NYSCEF No. 28), Plaintiffs' Notice of Pendency (NYSCEF No. 29), the Premises deed (NYSCEF No. 30), a contract of sale for the Premises, dated November 1, 2021 (NYSCEF No. 31), a purported agreement presented by Plaintiffs as evidence but alleged by Defendants to be a forgery of an agreement between Plaintiffs and Defendant Alahwas (NYSCEF No. 32), Defendants' tax forms (NYSCEF No. 33), and signature exemplars of Defendant Alahwas (NYSCEF No. 34). Defendants further submitted affidavits at NYSCEF Nos. 25-26.

In opposition, Plaintiffs submitted documents purporting to be written agreements or acknowledgments by and between Plaintiffs and Defendant Alahwas (NYSCEF Nos. 42-45). Plaintiffs submit a trial transcript of a trial conducted in United States District Court, Eastern District of New York (NYSCEF No. 46), and affidavit of service of process (NYSCEF No. 47). Plaintiffs submitted affidavits at NYSCEF Nos. 39, 40, and 41.

DISCUSSION

"When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action" (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 682 [2nd Dept 2012]). "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*).

"However, '[a] court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 [a] [7]'" (*Id.*, at 682-683). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one,'" in which such circumstances require that "a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it'" (*Id.*, at 683).

"To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, 'the defendant bears the initial burden of establishing, prima facie, that the time within which to sue has expired, whereupon the burden shifts to the plaintiff to raise a question of fact as to whether the limitations period has been tolled or should not apply'"

(*Creative Rest., Inc. v Dyckman Plumbing and Heating, Inc.*, 184 AD3d 803, 804-05 [2nd Dept 2020]).

Breach of Fiduciary Duty

This court finds that plaintiffs' first cause of action for breach of fiduciary duty is sufficiently pleaded. Further, this court finds defendants, neither meet their burdens to establish grounds for dismissal upon documentary evidence pursuant to CPLR3211(a)(1), nor for dismissal based on the statute of limitations pursuant to CPLR3211(a)(5).

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777, [2nd Dept 2010]).

In their pleadings and submissions on motion, Plaintiffs plead the existence of a fiduciary relationship. To wit, Plaintiffs identify Defendant Ahmed Qaid Al-Ahwas as a brother of both Plaintiffs, and both Defendants as joint venturers with Plaintiffs. Complaint ¶¶ 8-11; Abdullah ¶¶ 46-54. Plaintiffs further plead that Defendants were in positions of trust, and responsible for preserving and maintaining the Premises, in part, for the benefit of Plaintiffs. (*id.*).

"The elements of a joint venture are an agreement of the parties manifesting their intent to associate as joint venturers, mutual contributions to the joint undertaking, some degree of joint control over the enterprise, and a mechanism for the sharing of profits and losses" (*Clarke v Sky Exp., Inc.*, 118 AD3d 935 [2nd Dept 2014]). Here, Plaintiffs allege the predicates to establish the existence of a joint venture. To wit, Plaintiffs allege an agreement between the parties to associate as joint venturers (Complaint ¶¶ 9-11), a degree of joint control over the venture, and a distribution of the profits and losses from the joint venture. (*id.*; Complaint ¶ 21).

Deeming the alleged fact as true, the foregoing pleadings and statements in the record indeed create fiduciary relationships and impose fiduciary obligations upon the Defendants which inure to the benefit of Plaintiffs (*see A.G. Homes, LLC v Gerstein*, 52 AD3d 546 [2nd Dept 2008]).

Plaintiffs further plead that Defendants repudiated their fiduciary obligations by denying Plaintiffs' ownership interests in the Premises, which first occurred in early 2021. Complaint ¶ 21; Abdullah ¶¶ 55-58. It is undisputed that Defendants are seeking to sell the Premises, which Plaintiffs allege is beyond the scope of Defendants' authority as fiduciaries and runs antagonistic to Plaintiffs' ownership interests. *Id.*

In its consideration of the pleadings and evidence submitted on motion, this court finds that Plaintiffs sufficiently plead, and have, a cause of action for breach of fiduciary duty against Defendants. Further, Defendants do not meet their burden to establish, *prima facie*, that the prescriptive period for Plaintiffs' claim for breach of fiduciary duty has expired.

That branch of Defendants Motion seeking dismissal of Plaintiffs' first cause of action is denied.

Imposition of constructive trust

This court finds that plaintiffs' second cause of action for imposition of a constructive trust is sufficiently pleaded. Further, this court finds defendants neither meet their burdens to establish grounds for dismissal upon documentary evidence pursuant to CPLR 3211(a)(1), nor for dismissal based on the statute of limitations pursuant to CPLR3211(a)(5).

“Generally, there are four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment [omitted]. However, these requirements are not rigidly applied [omitted]. The purpose of a constructive trust is to prevent unjust enrichment” (*A.G. Homes, LLC v Gerstein*, 52 AD3d 546, 547 [2nd Dept 2008]).

Here, Plaintiffs plead a fiduciary relationship. Plaintiffs further claim that an agreement was made between the parties for the Defendants to maintain and preserve the Premises (Complaint ¶¶ 31-33; Abdullah ¶¶ 55-58). Plaintiffs allege the Premises was purchased with conjoint or pooled funds, belonging in part to Plaintiffs (Abdullah ¶ 12) and that Defendants would and do serve as fiduciaries, inuring to the benefit of Plaintiffs, among others, upon the promises of preserving and maintaining the Premises (*id.*). Lastly, Plaintiffs allege Defendants have repudiated Defendants’ fiduciary obligations and have denied Plaintiffs’ ownership interest in the Premises.

Considering the pleadings, evidence, and arguments presented, this court finds that Plaintiffs sufficiently pleaded the elements of, and have, a cause of action to impose a constructive trust as against Defendants. Further, Defendants do not meet their burden to establish, *prima facie*, that the prescriptive period for Plaintiffs’ claim for imposition of a constructive trust has expired.

That branch of Defendants Motion seeking dismissal of Plaintiffs’ second cause of action is denied.

Quiet title pursuant to RPAPL Art. 15

This court finds that plaintiffs’ third cause of action for determination of Plaintiffs’ ownership interest pursuant to RPAPL Art. 15 is sufficiently pleaded. This court finds defendants, neither meet their burdens to establish grounds for dismissal upon documentary evidence pursuant to CPLR 3211(a)(1), nor for dismissal based on the statute of limitations pursuant to CPLR 3211(a)(5).

To maintain a cause of action pursuant to RPAPL Art. 15, a party must “claim an estate or interest in real property” (RPAPL 1501). Plaintiffs’ pleadings allege that Plaintiffs are, each, 1/6 owners of the Premises, comprising 1/3 of the total ownership of the Premises. Complaint ¶ 12. Plaintiffs have further alleged that Plaintiffs have been in possession, have acted as Premises owners, and further serviced the Premises as owners within the last 10 years. Abdullah ¶¶ 32-37, 99.

In consideration of the pleadings, evidence, and arguments presented, this court finds that Plaintiffs sufficiently plead, and have, a cause of action to determine ownership under RPAPL Art. 15, and that Defendants have not met their burden to dismiss Plaintiffs’ claim based on an expired prescriptive period.

That branch of Defendants Motion seeking dismissal of Plaintiffs’ third cause of action is denied.

Injunction

Plaintiffs pleaded a fourth cause of action for injunctive relief. At oral argument, Plaintiffs acknowledge that injunction is not a cause of action in New York, but a remedy. Accordingly, this court grants Defendants’ Motion to the extent that Plaintiffs’ fourth cause of

action for injunction is dismissed, without prejudice to Plaintiff's ability to seek injunctive relief as a remedy.

Notice of Pendency

Defendants argue that Plaintiffs' notice of pendency should be vacated in the event Plaintiffs' Complaint was dismissed as a result of Defendants' Motion. Alternatively, Defendants argue that Plaintiffs have filed the notice of pendency for an improper purpose and, as a result, seek to vacate the notice of pendency.

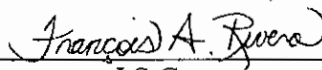
In consideration of the evidence and arguments presented, this Court does not find that Plaintiffs have engaged in bad faith. In addition to the foregoing decisions set forth in this order, Defendants' request to vacate the notice of pendency is denied.

Conclusion

ORDERED, that branch of Defendants' Motion seeking dismissal of Plaintiffs' fourth cause of action for injunctive relief is GRANTED, without prejudice to Plaintiffs to seek injunctive relief as a remedy,

ORDERED, that Defendants' Motion is DENIED in all other respects, as set forth in this order.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.