

**Bishop v Bell**

2022 NY Slip Op 33520(U)

September 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 94/2017

Judge: Carolyn E. Wade

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: HON. CAROLYN E. WADE

-----X  
CHARMAINE BISHOP,

Plaintiff,

Index No. 94/2017

- against -

JACKIE BELL and EOM 761 85th LLC,

Defendants.  
-----X

**DECISION AND ORDER**

*MS# 2, 3, 4, 5*

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Plaintiff's Order to Show Cause(s) and Defendant's Cross Motions:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	NYSCEF #'s 1, 16, 17, 18, 20, 31
Cross-Motion and Affidavits/Affirmations.....	1, 2, 3, 4, 32, 33, 34
Answering Affidavits/Affirmations.....	
Reply Affidavits/Affirmations.....	
Defendant's Memorandum of Law.....	

2022 OCT -7 AM 9:57  
KINGS COUNTY CLERK  
FILED

Upon the foregoing cited papers, and after virtual oral argument; 1) Defendant, Jackie Bell ("Bell" or "Defendant"), moves by way of an Order to Show Cause (Mot. Seq. 2) for an order: (i) to Dismiss this action pursuant to CPLR §§ 2004 and 3211(a)(4); (ii) Cancel all three Notices of Pendency pursuant to CPLR §§ 6512, 6516(c), and 6514(a)(b); (iii) Ordering damages to be paid to Defendant Jackie Bell pursuant to CPLR §§ 6514(c); and (iv) Declaring the Deed, dated March 6, 2018, and filed in ACRIS on May 20, 2018, as null and void; and

2) Plaintiff cross-moves (Mot. Seq. 3) for injunctive relief to enjoin and restrain defendants from selling, transferring, encumbering, or otherwise disposing of her interest in the real property, pursuant to CPLR § 6301; and

3) Defendant, Bell, moves by way of an Order to Show Cause (Mot. Seq. 4) for an order: (i) dismissing plaintiff, Charmaine Bishop's ("Bishop" or "Plaintiff") action pursuant to CPLR §§ 2004, 3211(a)(4), and 3217(c); (ii) cancelling the Notices of Pendency pursuant to CPLR §§ 6512, 6516(c), 6514(a); (iii) awarding damages to be paid to Defendant; and (iv) vacating the stay of the Landlord-Tenant proceeding (L&T Index No. 501179/2019), pursuant to CPLR § 6301; and

4) Plaintiff cross-moves (Mot. Seq 5) for an order granting her injunctive relief to enjoin and restrain the defendants from selling, transferring, encumbering, or otherwise disposing of Plaintiff's interest in the real property, pursuant to CPLR § 6301;

The motions are decided as follows:

Plaintiff, Charmaine Bishop ("Bishop" or "Plaintiff") commenced the underlying constructive trust action, alleging that on January 25, 2007, defendant, Jackie Bell ("Bell" or "Defendant") purchased real property, located at 761 East 85<sup>th</sup> Street, Brooklyn, New York ("Subject Premises") on her behalf. Plaintiff alleges in the complaint that Bell refuses to transfer title to the subject premises to her pursuant to their oral agreement. Plaintiff has resided at the subject premises since it was purchased by Defendant.

This is Plaintiff's third constructive trust action involving Bell and the Subject Premises. The first action entitled, *Charmaine Bishop v. Jackie Bell*, was commenced on June 13, 2011, in Kings County Supreme Court under Index #13395/2011 ("2011 Action"). Defendant did not Answer or otherwise appear in the 2011 Action. Plaintiff proceeding *pro se* then commenced a second constructive trust action Bell on November 12, 2014, Index #15880/2014 ("2014 Action"); however, Defendant was never served. Both the 2011 and 2014 actions were dormant, until Plaintiff voluntarily discontinued following the commencement of this action. All three actions have identical parties and causes of action.

During the pendency of this action, on or about February 22, 2018, Defendant allegedly transferred the property to EOM 761 East 85<sup>th</sup> LLC ("EOM") c/o Levkovich & Associates P.C., 1400 Avenue Z, Suite 303, Brooklyn, New York 11235 ("Defendant's Counsel") via a unrecorded deed (hereinafter "unrecorded deed"). Thereafter, on or about January 1, 2019, EOM commenced a summary holdover proceeding against Plaintiff in the Housing Part of the Civil Court of the City of New York, Kings County, under L&T Index No. 501179/19 ("Landlord-Tenant proceeding"). The predicate termination notice alleged that Bell is neither a licensee nor a tenant-at-will and sought her removal. This Court by Order dated October 9, 2019, amended the caption to include EOM 761 85th LLC as a named defendant herein; and removed and consolidated the Landlord-Tenant proceeding with the instant Supreme Court action.

**Defendant's Order to Show Cause (Mot. Seq. 2)**

Defendants' Motion to Dismiss Pursuant to CPLR §§ 2004 and 3211

Defendant moves by Order to Show Cause to dismiss the underlying action pursuant to CPLR §§ 2004 and 3211 (a)(4). The Court need not address the CPLR § 3211 (a)(4) branch of Defendant's Order to Show Cause. CPLR § 3211 (a)(4) allows a party to move to dismiss on the ground that there is another action pending between the same parties for the same cause of action. Here, Plaintiff has already discontinued the two prior actions (the 2011 and 2014 Actions). Additionally, CPLR § 2004 is inapplicable, as Defendant makes no request for an extension of time on any matter. Accordingly, Defendants' motion to dismiss pursuant to CPLR §§ 2004 and 3211 (a)(4) is **DENIED**.

Defendant's Motion to Cancel all Three Notices of Pendency

Defendant also moves pursuant to CPLR § 6516(c) to cancel all three Notices of Pendency filed against the Subject Premises. In support, Defendant argues that Plaintiff filed successive

Notices of Pendency, one for each action that she commenced concerning the subject premises. In written opposition, Plaintiff concedes that all Notices of Pendency filed against the subject property should be canceled pursuant to CPLR § 6516(c).<sup>1</sup>

Accordingly, that branch of Defendant's motion requesting cancellation is **GRANTED**, and all three Notices of Pendency regarding the Subject Premises are hereby **CANCELED**.

*Defendants' Motion to Declare the March 6, 2018 Deed Null and Void*

Defendants move pursuant to CPLR § 3001, for a declaratory judgment that the deed from Bell to Bishop, dated March 20, 2007, and recorded almost 10 years later, on March 6, 2018 ("March 2018 Recorded Deed"), is null and void.

Defendant contends that the March 2018 Recorded Deed is fraudulent. According to Bell, Bishop transferred title to herself by fraudulently using a Power of Attorney given to non-party Orville Bell, dated January 22, 2007 ("Power of Attorney"). Bell argues that the sole purpose of the Power of Attorney was to obtain mortgage financing to purchase the subject premises on her behalf, and not for Plaintiff to transfer title in her name. In support of this proposition, Bell asserts that this purpose is reflected in the language of the Power of Attorney which states that it be used for the "execution of all documents in connection with a purchase" of the subject premises (Defendant's Affirmation in Support of OSC #1, Ex. "D").

Bell also contends that a Declaration of Restriction recorded on March 2, 2018, and dated February 22, 2018 ("Declaration," Exhibit "E"), rendered the Power of Attorney null and void. The Declaration pertains to the unrecorded deed that transferred ownership of the property from

---

<sup>1</sup> "[A] notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been canceled or vacated or had expired or become ineffective" (CPLR § 6516 [c]). Here, Plaintiff filed a Notice of Pendency against the subject property for each of the three actions. The first Notice of Pendency was filed for the 2011 Action, and later expired. Plaintiff then filed a second Notice of Pendency for the 2014 Action; thus, in violation of CPLR § 6516 (c).

Bell to EOM. The Declaration stated that Bell agreed not to transfer the Premises without the written consent of Alexander Levkovich, Bell's counsel. Bell argues that this Declaration effectively nullified the Power of Attorney, which was used to transfer title from Defendant to Plaintiff in the March 2018 Recorded Deed. Therefore, Bell alleges that the March 2018 deed from Bell to Bishop is fraudulent and should be declared null and void.

In opposition, Plaintiff argues that Defendant's requested relief is procedurally defective. First, Defendant does not attach an affidavit from someone with personal knowledge of the facts. Secondly, Bell's Answer does not request any declaratory relief regarding the March 2018 Deed in the Answer.

"Pursuant to CPLR § 3001, '[t]he supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy" (*Peters v Smolian*, 154 AD3d 980, 983 [2d Dept 2017] [internal citations omitted]). To obtain declaratory relief, "[t]he dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination" (*Matter of Enlarged City Sch. Dist. of Middletown v City of Middletown*, 96 AD3d 840, 841 [2d Dept 2012]). Here, Defendant's request to nullify the March 2018 Deed is not sufficiently ripe for judicial determination. First, the alleged fraudulently recorded deed was recorded nearly ten years after it was executed, and no explanation is provided for the gap (Defendant's Mot. Seq. 2, Exhibit "D"). Moreover, it was recorded after Defendant had recorded the Declaration on March 2, 2018, which arises from a related unrecorded deed that transferred ownership of the property from Bell to EOM. Lastly, Defendant does not raise the issue of a fraudulent Deed or transfer in her Answer. At this juncture, it would be premature for the Court to issue a declaratory judgment voiding and nullifying the deed, as the evidence presented by

Defendant is insufficient to support this requested relief. Therefore, Defendants' Order to Show Cause for declaratory relief is **DENIED**.

Accordingly, Defendants' Order to Show Cause (Mot. Seq. #2) is **GRANTED** to the extent that the three Notices of Pendency are **CANCELED**. All other relief sought is **DENIED**.

**Bell's Second Order to Show Cause (Motion Seq. 4)**

Motion to Dismiss Pursuant to CPLR § § 2004, CPLR 3211(a)(4), and CPLR 3217(c)

Defendant moves by way of Order to Show Cause to dismiss the underlying action pursuant to CPLR §§ 2004, CPLR 3211 (a)(4), and CPLR § 3217 (c) (Mot Seq. 4). The CPLR §§ 2004 and 3211 (a)(4) branches of the motion are **DENIED** as moot, pursuant to the Court's ruling on Defendant's first Order to Show Cause (Mot. Seq. 2).

Bell contends that this action should be dismissed pursuant to CPLR § 3217 (c) because Plaintiff's discontinuance of the 2014 Action is deemed an adjudication on the merits. In opposition, Plaintiff argues that the discontinuance of the two prior actions were for purposes of "cleaning up."

CPLR § 3217 (c) provides that unless otherwise stated, *inter alia*, a notice of discontinuance is "without prejudice, except that a discontinuance by means of notice operates as an adjudication on the merits if the party has once before discontinued by any method an action based on or including the same cause of action in a court of any state or the United States." The "underlying purpose of CPLR 3217 (c) is to curb the use of the discontinuance device as a means of harassment and a source of unnecessary repetitive litigation" (*Rodrigues v Samaras*, 117 AD3d 1022, 1024 [2d Dept 2014]).

Here, Plaintiff voluntarily discontinued the 2011 and 2014 Actions on March 5, 2020. Both actions named Bell as the Defendant and involved similar allegations concerning the subject

premises. However, the actions were abandoned when this instant action was commenced. Plaintiff alleges that the purpose of discontinuing the prior actions, was to “clean up.” In the 2011 Action, Bell did not answer, and in the 2014 Action, she was never served with the summons and complaint. However, in the instant action, the Defendant interposed an Answer. Additionally, both parties are now represented by counsel and are engaged in motion practice. If “plaintiff’s purpose for discontinuing the second action ... was for good cause and clearly not for harassment purposes, the second discontinuance by notice is not an effective adjudication on the merits” (*Tortorello v Carlin*, 162 AD2d 291, 292 [1990]). This Court finds that the discontinuance of the prior actions was not for harassment purposes, as they were discontinued after joinder in the instant action. Accordingly, that branch of Defendant’s motion to dismiss pursuant to CPLR § 3217 (c) is **DENIED**.

*Bell’s Motion to Vacate the Stay of the Landlord-Tenant Proceeding*

Defendant moves to vacate the Order dated, October 9, 2019, and lift the stay of the Landlord-Tenant proceeding pursuant to CPLR § 6301. The Court’s Order granted Plaintiff’s motion to consolidate the Landlord-Tenant proceeding and “removed [it] to the Supreme Court, Kings County, and upon removal...consolidated for all purposes with the instant action[,] (Court’s Order, Plaintiff’s Exhibit “F”). As Plaintiff correctly states, the Order did not stay the Landlord-Tenant proceeding.

Accordingly, that branch of Defendant’s motion to vacate the October 9, 2019, Order is **DENIED**.

**Plaintiff’s Cross-Motion Pursuant to CPLR § 6301 (Mot. Seq. 3)**

Plaintiff cross-moves, pursuant to CPLR § 6301, requesting injunctive relief to enjoin and restrain defendants, Bell and EOM, from selling, transferring, encumbering, or otherwise

disposing of her interest in the real property. Plaintiff contends that the cancellation of the Notices of Pendency in the instant action will leave her without any means to protect her interest in the Subject Premises.

Defendant submits no written opposition to the instant motion (Seq. 5). However, during virtual oral argument, Defendant's counsel referred the Court to its written opposition to Plaintiff's cross-motion (seq. 3). Upon review, Defendant's papers do not oppose Plaintiff's request for injunctive relief.

"A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor" (*Hairman v Jhawarer*, 122 AD3d 570, 571-572 [2d Dept 2014]).

"The elements of a cause of action for a constructive trust are: (1) the existence of a confidential or fiduciary relationship between the parties; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment." *Id.*

Here, the Plaintiff established her entitlement to a preliminary injunction. First, Plaintiff demonstrates a likelihood of success on the merits in this constructive trust cause of action. The existence of a confidential relationship is undisputed. Plaintiff alleges that she maintained a close personal relationship with the Defendant; they worshipped together, worked together, exchanged confidential information, and previously lived together at Defendant's Florida residence.

As for the second element, a promise, Plaintiff sufficiently alleges that the Defendant orally agreed to help her purchase a residence. Defendant would then transfer title of the premises to Plaintiff, who would assume responsibility for the mortgage. In reliance on that promise, Plaintiff alleges that she made all monthly mortgage payments, and other economic contributions to the

Subject Premises. Thus, Plaintiff has sufficiently alleged the third element of a constructive trust action. Finally, Plaintiff alleges that she made mortgage and property tax payments and provided substantial funds for maintenance and improvement. Accordingly, the Plaintiff has established a likelihood of success on the merits.

The Plaintiff also established the likelihood of irreparable injury, as she represents that she would be unable to protect any interest she has in the Subject Premises as a result of the cancelled Notices of Pendency. Lastly, the balancing of the equities weighs in Plaintiff's favor, and the status quo should be maintained.

Thus, Plaintiff's cross-motion is **GRANTED to the extent** that it is **ORDERED** that defendants Bell and EOM are enjoined and restrained from selling, transferring, encumbering or otherwise disposing of Plaintiff's interest in the Subject Premises during the pendency of this action.

Accordingly, based upon the above, Defendant's Order to Show Cause (Mot. Seq. 2) for an Order for an order: 1) dismissing the action pursuant to CPLR §§ 2004 and 3211(a)(4); 2) cancelling the Notices of Pendency pursuant to CPLR §§ 6512, 6516(c), 6514(a); 3) awarding damages to be paid to Defendant; and 4) Declaring the Deed, dated March 6, 2018, and filed in ACRIS on May 20, 2018, as null and void, is **GRANTED to the extent** that all three Notices of Pendency regarding the Subject Premises are hereby **CANCELED**; all other relief sought is **DENIED**.


Defendant's Order to Show Cause (Mot. Seq. 4) for an order dismissing Plaintiff's action pursuant to CPLR §§ 2004, 3211(a)(4), and 3217(c); and 2) canceling the Notices of Pendency pursuant to CPLR §§ 6512, 6516(c), 6514(a) is **DENIED** as moot; the branches of Defendant's

motion seeking an order 3) awarding damages to be paid to Defendant; and 4) vacating the stay of the Landlord-Tenant Action pursuant to CPLR § 6301 is **DENIED**.

Plaintiff's cross-motion for injunctive relief (Seq. 3) is **GRANTED** to the extent that it is **ORDERED** that defendants, Bell and EOM are enjoined and restrained from selling, transferring, encumbering, or otherwise disposing of Plaintiff's interest in the Subject Premises during the pendency of this action. Plaintiff's cross-motion for similar injunctive relief (Seq. 5) is **DENIED** as moot since the relief requested was granted in the ruling for mot. seq. 3.

This constitutes the Decision and Order of the Court.

DATED: 9/22, 2022

  
\_\_\_\_\_  
HON. CAROLYN E. WADE, J.S.C.

2022 OCT -7 AM 9:57  
KINGS COUNTY CLERK  
FILED