Bennett v Bennett
2022 NY Slip Op 35245(U)
May 12, 2022
Supreme Court, Chemung County
Docket Number: Index No. 2022-5012
Judge: Elizabeth Aherne

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District on submission on the 18th day of March 2022.

PRESENT: HON. ELIZABETH AHERNE
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: CHEMUNG COUNTY
STEVEN G. BENNETT,

Plaintiff,

-vs-

ROBERT H. BENNETT & LINDA J. BENNETT,

Defendants.

DECISION AND ORDER

Index No. 2022-5012

APPEARANCES:

COUNSEL FOR PLAINTIFF: RYDER LAW FIRM
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HON. ELIZABETH AHERNE, J.S.C.

BACKGROUND

On January 6, 2022, Plaintiff Steven G. Bennett (hereinafter "Plaintiff") filed a Summons and Complaint seeking a declaratory judgment and demanding specific performance against Defendant Robert H. Bennett and Defendant Linda J. Bennett (hereinafter, collectively, "Defendants") requiring them to convey the subject real property to Plaintiff. (NYSECF Doc. Nos. 1 & 2). The parties entered into an agreement for Plaintiff and his ex-wife to purchase the subject real property from the Defendants on August 25, 2007 (hereinafter the "the 2007 agreement"). (NYSCEF Doc. No. 2). Based on the 2007 agreement, Defendants deeded the land to Plaintiff and his ex-wife in a deed recorded on April 18, 2008. (NYSCEF Doc. No. 3).

On February 8, 2012, the Plaintiff and his ex-wife signed and recorded a Purchase Money Mortgage and a companion Promissory Note promising to pay $77,721.00 with interest to Defendants via $450 monthly payments against the subject real property. (NYSCEF Doc. No. 18). On March 15, 2012, the Plaintiff and his ex-wife signed an Affidavit in Lieu of Foreclosure and a deed conveying the subject property back to the Defendants. (NYSCEF Doc. Nos. 5 & 20).

On February 14, 2022, Defendants filed a motion to dismiss, affirmation in support of said motion and various exhibits. Said motion to dismiss requested a dismissal of Plaintiff's claims pursuant to CPLR § 3211 (a) (1); (5); and (7). (NYSCEF Doc. Nos. 16-21). Plaintiff filed an amended complaint on February 28, 2022 which alleged fraud as an additional cause of action upon learning of a Discharge of the 2012 Purchase Money Mortgage recorded by Defendants on February 10, 2016 (attached as an exhibit to Defendants' motion to dismiss). Defendants responded with an amended motion to dismiss filed on March 7, 2022. (NYSCEF Doc. Nos. 25-34 & 37-39). Plaintiff filed an affirmation in opposition to the motion to dismiss with exhibits on March 8, 2022, and Defendants filed an affirmation in reply with exhibits on March 16, 2022. (NYSCEF Doc. Nos. 40-47 & 51-58).

Plaintiff's Version of Events

The Plaintiff contends the 2012 Affidavit in Lieu of Foreclosure and Deed were presented to him as a legal mechanism for conveying the property back to Defendants in order to avoid his ex-wife having any claim to the property in their impending divorce. Plaintiff alleges that there continued to be an agreement that he would independently purchase the subject real property. Plaintiff continued paying his $450 monthly payments pursuant to the terms of the 2012 Purchase Money Mortgage in reliance on his belief that it would be reconveyed to him once paid off. In support of this argument, Plaintiff submits an Amortization Schedule detailing ongoing payments of $450 beginning in March of 2012 and concluding with the payment of approximately $77,000 in February of 2025. (NYSCEF Doc. No. 6). Plaintiff alleges that he not only continued the $450 monthly payments, but also added significant improvements to the subject property (detailed in a provided summary of capital improvements). (NYSCEF Doc. No. 10). Plaintiff alleges he had no knowledge of the 2016 mortgage discharge until the Defendants filed their motion to dismiss. He further argues that he has been paying toward a reconveyance of title since 2012. Last, he alleges that said discharge is a fraudulent seizure of the past payments he made toward actual ownership of the property.

The Plaintiff alleges that he asked the Defendants about an early pay-off of the mortgage in August of 2021. The Plaintiff then submitted documentation wherein the Defendant allegedly tried to alter the purchase price and/or requested payment of back taxes with increased purchase prices ranging from approximately $93,000 to $450,000. (NYSCEF Doc. Nos. 7-9). Plaintiff then initiated this legal proceeding to seek specific performance and a declaratory judgment requiring the Defendants to convey the property to him in accordance with the terms of the 2012 Amortization Schedule and 2012 Purchase Money Mortgage. Plaintiff submits affidavits of various family members endorsing his version of events. (NYSCEF Doc. Nos 45-49).

Defendants' Version of Events

Defendants agree that they entered into the 2007 agreement to sell the subject property to the Plaintiff and his ex-wife as memorialized by the 2008 deed. (NYSCEF Doc. No. 16). Defendants allege that Plaintiff and his ex-wife were in default under the 2007 agreement, and this motivated the 2012 Purchase Money Mortgage and Promissory Note. Defendants contend that the Plaintiff also defaulted on the 2012 Purchase Money Mortgage and Promissory Note, causing them to accept the Affidavit of Title in Lieu of Foreclosure and 2012 deed. The Defendants allege that the Affidavit of Title in Lieu of Foreclosure and 2012 deed discharged the Purchase Money Mortgage and Promissory Notes as a matter of law in 2012 when they were merged with the 2012 deed. The Defendants allege they recorded a formal discharge in 2016 to clarify chain of title. (NYSCEF Doc. No. 21).

Defendants stated that they have never told the Plaintiff there was a plan to reconvey the land to him, and thus all $450 payments made subsequent to the 2012 deed were rent paid by a holdover tenant. As evidence of this argument, the Defendants submitted a purchase offer from Plaintiff's attorney from October 2021 wherein it states the subject property has been owned by the Defendants, rented to the Plaintiff, and that Plaintiff offered to purchase the subject real property for $182,000. (NYSCEF Doc. No. 54). Defendants also submitted copies of some of the $450 monthly checks from Plaintiff to Defendants marked as "rent" in the memo lines by Plaintiff. (NYSCEF Doc. No. 55).

DISCUSSION

The portions of CPLR § 3211 (a) relevant to the instant motion provide:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> 1. a defense is founded upon documentary evidence…
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; [or]
> 7. the pleading fails to state a cause of action.

When evaluating a motion to dismiss pursuant to CPLR § 3211, the pleadings are to be given a liberal construction; the allegations contained within the pleadings are assumed to be true and the plaintiff is to be afforded every favorable inference. (see Vestal v Pontillo, 158 AD3d 1036, 1038 [2018]). Allegations contained in an affidavit submitted by the plaintiff may likewise be used to remedy any defects in the complaint that would otherwise fail to state a claim. (see id.).

I. Motion to Dismiss: Documentary Evidence

A motion to dismiss premised upon documentary evidence is appropriately granted only where the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law."(see Crepin v Fogarty, 59 AD3d 837, 838 [2009]). Documentary evidence is not to be in the form of a party affidavit, but rather some document whose authenticity is not questioned and which conclusively establishes a defense to a claim. (see id.).

Defendants rely upon a series of documents as establishing that the Plaintiff has no right to his claim. The documents, in chronological order, are as follows:

(1) Deed dated October 30, 2017, recorded on April 18, 2008, conveying subject land from Defendants to Plaintiff and his ex-wife;
(2) Purchase Money Mortgage and Promissory Note recorded February 29, 2012;
(3) Affidavit of Title in Lieu of Foreclosure dated March 15, 2012;
(4) Deed conveying subject land from Plaintiff and his ex-wife to Defendants dated March 15, 2012;
(5) Discharge of Mortgage recorded February 10, 2016; and
(6) Purchase Offer Letter dated October 19, 2021.

Defendants argue the 2012 Affidavit of Title in Lieu of Foreclosure and 2012 deed voided any right to the land the Plaintiffs held from any previously recorded document. Defendants assert the 2016 Discharge of Mortgage was recorded to clarify that the title was free from the 2012 Purchase Money Mortgage and Promissory Note merely as a ministerial act given it was already freed as a matter of law. Defendants point to particular sections of the Affidavit in Lieu of Foreclosure which state that the Plaintiff was released "from certain obligations pursuant to certain terms of a Promissory Note dated February 28, 2012 in the principal sum of $77,721.00" and "there is no agreement, either written or oral, wherein it may be understood or agreed that said Premises are to be, within any specified time or on or before any specified date, re-conveyed" by Defendants to Plaintiff. (NYSCEF Doc. No. 52, paragraphs 13 & 16). The Defendants also submit a letter from Plaintiff's attorney dated October 19, 2021 wherein counsel states "I have been retained to represent [Plaintiff] in the purchase…of real property currently owned by you and rented by [Plaintiff]" which provides further details of an offer to purchase the subject property. Defendants argue said documents are documentary evidence entitling it to dismissal of Plaintiff's claims.

Plaintiff responds that Defendants should not be permitted to rely on the 2016 Discharge of Mortgage as documentary evidence as it is fraudulent and was recorded without notice to him. Plaintiff alleges that the Defendants were required to provide notice of any intent to discharge or foreclose pursuant to the terms of the 2012 Purchase Money Mortgage. Plaintiff also contends that the documentary evidence he has submitted including the Amortization Schedule and negotiations regarding a final purchase price are conflicting documentary evidence proving there was an agreement between the parties for Plaintiff to purchase the subject real property.

There are factual issues that remain in dispute between the two parties and this Court cannot hold that the evidence submitted by the Defendants "utterly refutes" the Plaintiff's allegations based on the documentary evidence alone. New York Mun. Power Agency v Town of Massena, 188 AD3d 1517, 1519 [2020]. It is not clear that the Plaintiff was ever advised that his mortgage was discharged or why the 2012 Affidavit in Lieu of Foreclosure was executed in such close proximity in time to the 2012 Purchase Money Mortgage and Promissory Note. It is also not clear that Plaintiff was not misled by Defendants' alleged misfeasance or malfeasance to believe that he was continuing a rent-to-own type of agreement common amongst family members. The aforementioned is especially not clear in light of the capital improvements made to the subject property by the Plaintiff as well as the documentary evidence submitted to this Court by the Plaintiff. (see Vanderminden v Vanderminden, 226 AD2d 1037, 1039 [1996] (finding dismissal inappropriate where a factual issue underlying a family dispute seeking specific performance pursuant to a written agreement remained unresolved)). As this Court finds that the documents do not resolve all factual issues as a matter of law and do not conclusively dispose of Plaintiff's claims, the Defendants' motion to dismiss based upon documentary evidence is denied. (see State Workers' Comp. Bd. v Madden, 119 AD3d 1022, 1026 [2014] (finding conflicting documentary evidence from each party presenting different versions of events was not proper basis for dismissal pursuant to CPLR 3211 (a) (1)); Schooley v Mannion, 241 AD2d 677, 678 [1997] (overturning dismissal based on documentary evidence where factual issue of whether fraudulent misrepresentation was made to induce signing of documentary evidence remained in dispute)).

II. Motion to Dismiss: Failure to State a Claim

A court deciding a motion to dismiss pursuant to CPLR §3211 (a) (7) must "afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." Tomhannock, LLC v Roustabout Resources, LLC, 115 AD3d 1074, 1075-1076 [2014]).

To state a cause of action for a claim for specific performance, a plaintiff is required to plead sufficient facts to demonstrate that: (i) it had substantially performed its contractual obligations under the agreement and was ready, willing and able to fulfill its remaining obligations with respect thereto; (ii) the defendants were able but unwilling to convey the land; and (iii) that plaintiff had no adequate remedy at law. (see Tomhannock, LLC v Roustabout Resources, LLC, 115 AD3d 1074, 1076 [2014]). Plaintiff alleges he has been: (i) paying $450 per month as agreed upon to purchase the subject property and is ready, willing and able to purchase the subject property for the agreed upon purchase price (approximately $77,000); (ii) that the Defendants can convey the subject property to the Plaintiff for the purchase price, but are now unwilling; and (iii) the Defendants' fraudulent discharge of the mortgage without his knowledge leaves him no remedy unless the court orders specific performance. Accepting the Plaintiff's allegations as true, the Plaintiff has stated a cause of action for specific performance. (see Town of Austerlitz v Dugwest Assocs., LLC, 24 AD3d 847, 849 [2005] (ruling dismissal at early stage not appropriate when not dispositively shown whether specific performance will be an appropriate remedy)).

The elements of fraud required to be adequately alleged by Plaintiff are: (i) that the Defendants knowingly misrepresented a material fact with the intent to deceive Plaintiff; (ii) Plaintiff justifiably relied upon such misrepresentation, and (iii) Plaintiff experienced pecuniary loss. (see Clearmont Prop., LLC v Eisner, 58 AD3d 1052, 1056 [2009]). The Plaintiff has alleged that: (i) the Defendants misrepresented to him that he was paying toward the purchase of the subject property pursuant to an amortization schedule for approximately $77,000; (ii) that the Plaintiff justifiably relied upon this misrepresentation given the familial relationship, length of time of monthly payments, and general facts and timing of events including his divorce; and (iii) the Plaintiff will suffer pecuniary loss including the costs of capital improvements if he is not able to purchase the subject property. Accepting the Plaintiff's allegations as true, the Plaintiff has stated a cause of action for fraud. (see Young v Keith, 112 AD2d 625, 627 [1985] (finding allegations of superior knowledge and concealment to be sufficient to withstand motion to dismiss claim of fraud)). If this court accepts the Plaintiff's allegations as true, the Plaintiff has alleged the elements of both causes of action, and thus the Defendants' motion to dismiss for failure to state a cause of action is denied.

III. Motion to Dismiss: Statute of Limitations

Dismissal may be warranted under CPLR § 3211 (a) (5) where a defendant establishes that a cause of action is time-barred by the expiration of the applicable statute of limitations. (see State of NY Workers' Compensation Bd. v Wang, 147 AD3d 104, 110 [2017]). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or is otherwise inapplicable, or whether the action was actually commenced within the requisite time period. (see id.).

The Plaintiff's amended complaint alleges a claim of fraud. CPLR § 213 (8) provides:

> an action based upon fraud, the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could, with reasonable diligence, have discovered it.

The Plaintiff points to the Discharge of Mortgage filed on February 10, 2016 as the basis for the fraud claim which would have had the statute of limitations expire on February 10, 2022 (this matter was initially filed on January 6, 2022). Additionally, the statute of limitations in fraud only begins to run once a party has access to the facts underlying the alleged fraud. Here, Plaintiff argues he could not possibly have known about the mortgage discharge prior to its recent discovery. (see Craven v Rigas, 85 AD3d 1524, 1526 [2011]).

The Plaintiff's amended complaint also seeks an award of specific performance wherein the Defendants would be compelled to convey the subject property as allegedly promised in the Purchase Money Mortgage and Promissory Note executed in 2012. CPLR § 213 (4) provides:

> an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein, must be commenced within six years.

The Defendants argue that the statute of limitations began to run when the Purchase Money Mortgage and Promissory Note merged with the deed transferring the property back to the Defendants in March 2012. Further, Defendants argue that the statute of limitations prevented said claims after 2018. Similarly, more than six years has passed since the execution of the Affidavit of Deed in Lieu of Foreclosure, and thus any claim of fraud related to this document is also time barred. The Plaintiff points to the Discharge of Mortgage filed on February 10, 2016 as the basis for the fraud claim and the specific performance claim which would have extended the statute of limitations until February 10, 2022 (this matter was initially filed on January 6, 2022). The Defendants respond that the Discharge of Mortgage was a ministerial act and had no actual significance because any right or interest the Plaintiff had in the property ended when he executed the 2012 Affidavit in Lieu of Foreclosure and the 2012 deed. Conversely, an argument can be made that the statute of limitations only began to run when Defendants wrongfully refused to convey title to Plaintiff on the date Plaintiff approached Defendants about an early buy-out in August of 2021. Given six years has not yet passed, the statute of limitations has not yet run its course. (see Leonard v Cummins, 196 AD3d 886, 889 [2021]). Given the Plaintiff's evidence of a question of fact as to when the statute of limitations began to run, the Defendants' motion to dismiss based on the expiration of the statute of limitations is denied.

CONCLUSION

And the Court having read the aforementioned pleadings delineated herein;

Based upon the foregoing, the court finds as follows:

I. The Defendants' motion to dismiss is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Digitally signed by Elizabeth Aherne, Supreme Court Justice
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Dated: May 12, 2022
Ithaca, New York

ELIZABETH AHERNE
Supreme Court Justice

All papers submitted in connection with this motion and the Decision and Order have been electronically filed with the Chemung County Clerk's Office through the NYSCEF System.