Hersko v Hersko
2023 NY Slip Op 31150(U)
April 10, 2023
Supreme Court, Kings County
Docket Number: Index No. 519449/2021
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
BARRY HERSKO,

Plaintiff(s), Index No: 519449/21

-against-

MORRIS HERSKO and SARA G. HERSKO,

Defendant(s)
x

Recitation as required by CPLR 2219(a), of the papers considered in the moving defendants' motion to dismiss the complaint pursuant to CPLR 3211 and plaintiff's cross-motion for leave to serve a second amended complaint.

Papers	NYSCEF DOC NO.
Order to Show Cause/Motion and Affidavits Annexed.	38-55
Cross-motion and supporting papers…………………	59-62
Answering Affidavits..	
Reply Papers..	65
Memoranda of Law..…………………………………	56, 63, 64, 66

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action alleging causes of action for breach of contract, the imposition of a constructive trust, and unjust enrichment, the defendants Morris Hersko and Sara G. Hersko [Hersko defendants] move [seq. no. 3] for an order (i) dismissing the plaintiff Barry Hersko's [Barry] amended complaint pursuant to CPLR 3211(a)(1), (5) and (7); (ii) cancelling the Notices of Pendency for the premises located at 2039 57th Street, Brooklyn, and 1963 63rd Street, Brooklyn, pursuant to CPLR 6501; and (iii) sanctioning Barry for engaging in frivolous conduct pursuant to 22 NYCRR 130-1.1. Barry opposes the motion and cross-moves [seq. no. 4] for leave to serve a second amended complaint pursuant to CPLR 3025(b).

In the amended complaint dated December 13, 2021, it is alleged that Barry made a series of loans in the total sum of $450,000 to his nephew and his nephew's wife, the Hersko defendants, to help with their financing and mortgage repayments relating to two properties: a condominium located at 2039 57th Street, Brooklyn [the Condo] and a house located at 1963 63rd Street, Brooklyn [the House]. It is asserted that Barry made the loans in reliance on the relationship of trust and confidence between the parties in this close-knit family and based on the Hersko defendants' promises to repay the full amount of the loan or, in the alternative, to convey title in the Condo to Barry in partial satisfaction of the loans.

It is alleged that the Hersko defendants first obtained a loan from Barry on or about November 28, 2011, in the amount of $190,000, to facilitate the purchase of the House. That the Hersko defendants then purchased the House in or around February 2012, which they encumbered with a mortgage through Grand Bank, N.A., in the amount of $450,000. It is also alleged that prior to buying the House, the Hersko defendants purchased the Condo in 2008, and later obtained a $300,000 credit line mortgage with TD Bank, N.A. in 2010, secured by the Condo. That by March 2012, the Hersko defendants were over-leveraged, having drawn over $260,000 on their TD mortgage line of credit, and were unable to finance both of their mortgages. It is further alleged that the Hersko defendants then obtained two loans from Barry in March 2012, in the amounts of $169,834.45 and $90,163.55, to pay down the balance of their TD mortgage.

It is asserted that because the value of the Condo was significantly less that the total amount of the loans, the Hersko defendants promised to pay Barry $100,000 in 24 monthly installments of $5000 beginning on or about March 2014, and then either pay the balance of the loans by the maturity date in 2017 or convey their title in the Condo to Barry. It is further asserted that after making certain infrequent payments towards the principal balance of the loans, the last payment being made in or around March 2017, the Hersko defendants repudiated their promise and refused to repay the total amount of the loans or to convey title to the Condo.

The proposed second amended complaint include additional allegations that Barry made a fourth loan to the Hersko defendants in March 2014, in the amount of $250,000, so they could pay down further debt on the TD mortgage, such that the total sum of the loans from Barry was $700,000. The additional allegations also include that the first loan to the Hersko defendants in November 2011, in the sum of $190,000, was made in reliance on the Hersko defendants' representation that they were going to sell the Condo and use the proceeds to repay the loan. That these funds were initiated by a wire transfer from Barry's attorney's escrow account to Sara Hersko's bank account and then used toward the House purchase.

Further allegations include that the two loans in March 2012, in the sums of $169,834.45 and $90,163.55, were paid directly to TD Bank from Barry's attorney's escrow account, to pay down the mortgage on the Condo, and were made based on the Hersko defendants' further representations that once the Condo was free of encumbrances it would be sold and the proceeds would be used to pay back the loans. With respect to the final loan in March 2014, in the amount of $250,000, it is alleged that because the Hersko defendants had not yet repaid the $450,000 in previous loans, Barry agreed to provide these additional funds based upon the Hersko defendants' promise that the Condo would be used as security for the loan, and that if the loan was not timely repaid then title to the Condo would be transferred to him.

The proposed second amended complaint includes the first three causes of action set forth in the amended complaint i.e. breach of contract, imposition of a constructive trust, and unjust enrichment, and also sets forth a fourth cause of action for promissory fraud and a fifth cause of action for negligent misrepresentation.

The Hersko defendants move to dismiss Barry's first cause of action for breach of contract on the ground that the alleged oral loan agreements, which purportedly involve a transfer of an interest in real property, is governed by the statute of frauds (*see* CPLR 3211 [a][5]). The statute of frauds prohibits conveyances and contracts concerning real property unless there is a writing subscribed by the person to be charged (*see* General Obligations Law [GOL] § 5-703). An agreement which violates the statute of frauds may nonetheless be enforceable where there has been part performance 'unequivocally referable' to the contract by the party seeking to enforce the agreement" (*Barretti v Detore*, 95 AD3d 803, 806 [2d Dept 2012] quoting *Luft v. Luft*, 52 AD3d 479, 481 [2d Dept 2008]). "It is not sufficient that the oral agreement gives significance to the plaintiff's actions. Rather, the actions alone must be 'unintelligible or at least extraordinary,' [and] explainable only with reference to the oral agreement (*Pinkava v Yurkiw*, 64 AD3d 690, 692 [2d Dept 2009] [internal quotation marks omitted] quoting *Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]).

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) based on the statute of frauds, a court must take the allegations as true and resolve all inferences which reasonably flow therefrom in favor of the pleader" (*Makris v Boylan*, 175 AD3d 1400, 1401 [2d Dept 2019] [internal quotations and citations omitted]). Here, while the amended complaint fails to allege the existence of an agreement meeting the statutory requirements of the statute of frauds or of part performance sufficient to excuse the absence of a writing (*see Lake Overlook Partners, LLC v Sosa*, 163 AD3d 945 [2d Dept 2018]), the allegations set forth in the proposed second amended complaint cures the deficiencies. The proposed complaint includes additional allegation that each of the loans, which were made by wire transfer or check from Barry's attorney's escrow account, included written notations referencing the loan agreements and that each were memorialized in the attorney's escrow transfer ledgers. These allegations are sufficient to fall within the partial performance exception to the statute of frauds and survive dismissal (*Baron v Suiza*, 167 AD3d 685 [2d Dept 2018]).

Moreover, even assuming the loan agreements only involved the repayment of money, they do not otherwise fall within the statute of frauds. Pursuant to GOL § 5–701(a)(1), an agreement which cannot be performed within one year is void and therefore unenforceable, by its terms, unless it is in writing and subscribed by the party to be charged. "Only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year will fall within the statute of frauds (*Micena v. Katz*, 68 AD.3d 826, 827 [2d Dept 2009] [internal quotation marks omitted]). If it can fairly and reasonably interpreted that an oral agreement "may be performed

within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame" (*Cron v Hargro Fabrics, Inc*., 91 NY2d 362, 366 [1998]. Here, the oral agreements between the parties, by their alleged terms, were capable of being fully performed within one year of their making, and therefore, the statute of frauds would not be implicated (*see JNG Const., Ltd. v Rousopoulos*, 135 AD3d 709 [2d Dept 2016]).

The Hersko defendants also move to dismiss the second cause of action seeking the imposition of a constructive trust for failure to state a cause of action pursuant to CPLR 3211(a)(7). On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see JDI Display America, Inc. v Jaco Electronics Inc*, [2d Dept 2020]. "Whether a plaintiff can ultimately establish its allegation is not part of the calculus" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]).

The equitable remedy of a constructive trust may be imposed " '[w]hen a property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Rowe v Kingston*, 94 AD3d 852, 853 [citations and internal quotation marks omitted]. There are four requirements for the imposition of a constructive trust: "(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]). Where a party has no actual prior interest in the property, the third requirement may be satisfied where it is shown that an equitable interest developed through the contribution of funds, time or effort in the property (see *Rock v. Rock*, 100 AD3d 614, 616 [2d Dept 2012]). It is noted that the statute of frauds is not a defense to a properly pleaded cause of action to impose a constructive trust on real property (*see Hernandez v Florian*, 173 AD3d 1144 [2d Dept 2019]).

Here, the amended complaint, and the proposed second amended complaint, state a cause of action for the imposition of a constructive trust as they sufficiently plead that a confidential relationship between family members and a transfer of funds in reliance on a promise of an interest in the Condo as a consequence of the loans (*see Henness v Hunt*, 272 AD2d 756 [3d Dept 2000]; *cf. Liselli v Liselli*, 263 AD2d 468 [2d Dept 1999]; *cf. Fodiman v Zoberg*, 182 AD2d 493 [1st Dept 1992]). The element of unjust enrichment is also sufficiently pleaded as it is alleged that the Hersko defendants were enriched at Barry's expense, and that it is against equity and good conscience to permit them to retain what is sought to be recovered (*see Delidimitropoulos v Karantinidis*, 186 AD3d 1489 [2d Dept 2020]). Accordingly, dismissal of the causes of action for the imposition of a constructive trust pursuant to CPLR 3211(a)(7) is not warranted.

Alternatively, the Hersko defendants move to dismiss the cause of action for the imposition of a constructive trust based on 'documentary evidence' pursuant to CPLR 3211(a)(1). A motion pursuant to CPLR 3211(a)(1) to dismiss a cause of action on the ground that a defense is founded on documentary evidence may be granted only when the documentary evidence submitted by the defendant "utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]. Here, the Hersko defendants' submissions of a TD loan statement indicating that their credit line mortgage was paid in full as of March 26, 2014, together with a satisfaction of mortgage dated March 6, 2019, do not "utterly refute" Barry's allegations that the Hersko defendants borrowed the funds to pay down the credit line mortgage, "conclusively establishing a defense as a matter of law" (*id.* at 326; *see also Rodolico v Rubin & Licatesi*, 224 AD3d 923 [2d Dept 2014]). Accordingly, dismissal of the constructive pursuant to CPLR 3211(a)(1) is similarly unwarranted.

Dismissal of the third cause of action for unjust enrichment pursuant to CPLR 3211(a)(7), however, is appropriate. This cause of action is duplicative of the second cause of action for the imposition of a constructive trust since the claim is premised on the same facts and does not seek distinct and different relief (*see generally Ofman v Katz*, 89 AD3d 909 [2d Dept 2011]).

The Hersko defendants also seek cancellation of the two notices of pendency filed in this action. Pursuant to CPLR 6501, "[a] notice of pendency may be filed in any action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property." An action for the imposition of a constructive seeks a judgment within the purview of CPLR 6501 (*Peterson v Kelly*, 173 AD2d 688, 689 [2d Dept 1991]). Therefore, the filing of a notice of pendency in this action with respect to the Condo was proper, and the arguments asserted by the Hersko defendants in support of the portion of their motion seeking cancellation of same are without merit (*id.*). However, the Hersko defendants are entitled to cancellation of the notice of pendency filed with respect to the House. Such notice of pendency was improperly filed as none of the causes of action asserted in either the amended complaint or the proposed second amended complaint seek a judgment directly "affecting title to, or the possession, use or enjoyment" of this real property (*see Distinctive Custom Homes Bldg. Corp v Esteves*, 12 AD3d 559 [2d Dept 2004]).

Turning to the cross-motion, "[l]eave [to amend a pleading] should be granted, in the absence of prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Vargas v Town of Huntington*, 206 AD3d 1034, 1036 [2d Dept 2022]). Here, the Hersko defendants cannot claim surprise or prejudice to the proposed second amended complaint to the extent it includes allegations as to the fourth loan and further expounds the facts and circumstances surrounding the making of the three other loans. The allegations are

premised on the same underlying facts, transactions or occurrences, and cure certain deficiencies and/or omissions existing in the amended complaint (*see Janssen v Incorporated Village of Rockville Centre*, 59 AD3d 15 [2d Dept 2008]. Furthermore, it cannot be said that those proposed amendments are palpably insufficient as a matter of law or totally devoid of merit (*id.*).

However, the Hersko defendants demonstrate that both the fourth cause of action for promissory fraud and fifth cause of action for negligent misrepresentation set forth in the proposed second amended complaint are palpably insufficient and/or patently devoid of merit. Each of these proposed causes of action are not actionable as the allegations merely describe promissory statements of future acts rather than allegations of misrepresentations as to an "existing material fact" or "promises with a present intent not to perform" (*see Zwicker v Emigrant Mortg. Co., Inc.,* 91 AD3d 443 [1st Dept 2012]; *Venables v Sagona*, 85 AD3d 904 [2d Dept 2011]).

In view of the foregoing, the Hersko defendants' motion is granted to the extent of dismissing the second cause of action for unjust enrichment and cancelling the notice of pendency filed against the House. The remaining relief sought in the motion, including that for sanctions and costs, is denied. Barry's cross-motion for leave to serve a second amend complaint is granted to the extent indicated above, and is otherwise denied.

This constitutes the decision/order of the Court

Dated: April 10, 2023

Enter,

Karen B. Rothenberg, J.S.C.