

Glover v Ashman
2023 NY Slip Op 34204(U)
November 1, 2023
Supreme Court, Kings County
Docket Number: Index No. 518655/2017
Judge: Lisa S. Ottley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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BERNICE GLOVER as ADMINISTRATOR OF THE ESTATE
OF STEPHEN GLOVER,

Plaintiff,

Index No.: 518655/2017

-against-

BENCH TRIAL DECISION

DAVID ASHMAN,

Defendant.

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HON. LISA S. OTTLEY, J.S.C.

Plaintiff commenced this action pursuant to Article 15 of the Real Property Action and Proceedings Law for declaratory relief against the defendant, David Ashman who is alleged to have transferred the subject property known as 1976 Bergen Street located in Brooklyn, New York by knowingly filing and recording false documents with the New York City Register.

A bench trial of this matter was held on October 31 and November 1, 2022. Plaintiff alleges that the defendant obtained plaintiff's signature on relevant documents through misrepresentation and seeks to have the deed, which is dated December 8, 2005, and recorded by defendant on July 13, 2006, deemed void; and award plaintiff damages due to the alleged improper taking of title of the subject property.

Plaintiff's Case

The administrator of the estate of Stephen Glover, Jennie Glover, was called to testify on behalf of the plaintiff's case. Jennie Glover is the sister of the decedent, Stephen Glover who was the owner of the subject property known 1976 Bergen Street. The case was commenced by Stephen Glover's mother, Bernice Glover, who was the previous administrator of the estate of Stephen Glover. Upon Bernice Glover's passing, Jennie Glover became the administrator of Stephen Glover's estate.

Jennie Glover testified that Stephen Glover purchased 1976 Bergen Street in 2005. She further testified that to date, monthly mortgage statements from the servicing company are received indicating that mortgage payments are due, owing and have not been paid for the subject property. Ms. Glover also testified that the statements also show that the bank is willing to assist with bringing the mortgage up to date. In addition to receiving mortgage statements there was testimony that insurance notices received via mail are addressed to the

estate of Stephen Glover, and neither the mortgage nor insurance statements were addressed to the defendant, David Ashman.

On cross-examination, Ms. Glover testified that while she has never physically visited the subject property, she has driven by the property and seen it on-line. She further testified that from the time the property was conveyed in 2005, that she was unaware of any action her brother, Stephen Glover took to get the property back from the defendant, David Ashman, nor did she know who was personally living at the subject premises from 2005 to the present time.

On re-direct, Jennie Glover testified that Stephen Glover, while sick was unable to care for himself and was on medication and being taken care of by his mother, who he eventually moved in with before his passing. Thereafter, the plaintiff rested, and the defendant moved to dismiss the complaint on the grounds that the plaintiff failed to establish its prima facie case.¹

Defendant's Case

Defendant called Cynthia Francis to testify on his behalf. Ms. Francis testified that she met Stephen Glover in or about 2001 or 2002, who she employed at her place of business, a restaurant, for approximately two years. Ms. Francis further testified that Stephen Glover told her he had property on Bergen Street that he wanted to sell. She testified that she knew customers from her business who she asked if they were interested in purchasing the property, but only one had the money, "Roy," also known as David Ashman, who said he would buy the property. Cynthia Francis testified that she introduced Stephen Glover to the defendant, David Ashman. Ms. Francis also testified that she was present when David Ashman met with Stephen Glover at her restaurant and gave Mr. Glover a folder with \$11,000.00 cash that she personally counted. She further testified that she acted as a middleman for the transaction and that David Ashman came with the prepared paperwork for the sale of the property.

On cross-examination, Ms. Francis testified about the real estate transactions that she was involved in which related to various properties, including the subject property, and the relationship she had with those parties who she deemed were interested in the "American Dream" of home ownership. As to the subject property, Ms. Francis testified that neither Stephen Glover nor David Ashman trusted one another, and that her involvement as the middleman only resulted in her receiving a bottle of Moet that Stephen Glover did not want and gave to her. She further testified that she wanted to receive but did not receive \$1,000 as the middleman who did the introduction. Ms. Francis also testified that no monies were received to pay off the outstanding mortgages. She testified that the only money received was the \$11,000 in cash which was given to Stephen Glover. When asked whether there was a contract between Glover and Ashman, Ms. Francis testified that no contract existed.

Next, defendant, David Ashman testified. He testified that he was introduced to Stephen Glover by Ms. Cynthia Francis which was the extent of his involvement with Ms.

¹. The motion was denied with leave to renew at the close of the trial.

Francis. On cross-examination, Mr. Ashman testified that he owns four properties, one of which is the subject of this lawsuit and described as a legal two-family home with five units and a basement. He further testified that all five units have leases and are occupied with a total rent roll of \$6,750.00 collected per month. Mr. Ashman testified that two of the tenants are not paying rent, which brings the rent collected to \$5,800.00 per month. He also testified that he stayed at the subject property for a year when the property was vacant in 2009, in addition to family members who stayed at the subject premises in or about 2008. Mr. Ashman further testified that before being introduced to Stephen Glover, he would see him around the block and when Glover asked for two or five dollars, he would give it to him to buy a beer or single cigarettes. He testified that Ms. Francis told him that Stephen Glover was interested in selling his property and learned that Mr. Glover was employed by Cynthia Francis. David Ashman further testified that he was not aware of the mortgages on the subject property because Mr. Glover did not mention anything about the mortgages. However, Mr. Ashman testified that he learned Mr. Glover wanted to sell the property because he could not afford the mortgages. He further testified that he "got both mortgages after the deed was transferred to me." He testified that the first mortgage on the property was for \$460,000.00, which was secured by Stephen Glover and that he is not liable for any debts associated with the mortgage, and he did not know the terms of the mortgage.

Mr. Ashman further testified that the mortgages on the subject property have not been satisfied and he has never paid taxes associated with the first mortgage. He also testified he was not a party of the second mortgage with Credit Suisse, First Boston Financial Corporation; never signed any documents concerning the second mortgage, is not liable for the second mortgage, nor subject to a personal judgment if the property is lost due to foreclosure. When asked what the monthly mortgage payments were, Mr. Ashman testified that he made quite a few monthly payments on the second mortgage in the amount of \$1,200. He could not recall who currently services the mortgage and testified that the second mortgage has not been satisfied and he has not paid recorded taxes associated with the second mortgage for the purchase of 1976 Bergen Street. Mr. Ashman further testified that the documents that were in the folder concerning 1976 Bergen Street when he met with Mr. Glover for the purchase of the property, included the note for the mortgage, pages with Stephen Glover's social security and identification and other documents that he could not recall. He testified that he did not know who prepared the deed for the sale of the property and that he did not know Bruce Feinstein, and that the documents he and Glover signed on December 8, 2005, were notarized by a gentleman, named Hubert Ray, and only could recall signing one or two documents, one of which was the deed. David Ashman further testified that the documents in the folder were already prepared and signed by Stephen Glover before they were brought to him, except what was signed when they went to the notary, Mr. Hubert Ray.

When asked about the sale price for the subject property and referred to Exhibit 5, page 5, line 12, Mr. Ashman testified that no amount for the full sale price was stated. He further testified that no sale price was filled in on the document signed for the transfer of the subject property on December 8, 2005, nor was a title company or representative from a title company at Ms. Francis' restaurant when the documents were given to him in the folder. Mr. Ashman also testified that he did not know if Mr. Glover was represented by an attorney or who prepared the documents. Mr. Ashman testified that Stephen Glover was selling the deed to the subject property for \$11,000.00. He further testified that he tried to assume the mortgage and paid about two years of mortgage payments, but it became a burden in or around 2007. He testified that when he purchased the property no payments were being made on the property and believe it to be in foreclosure. In addition, he testified that he continues to collect rents for the subject property and has owned the property for thirteen (13) years without paying on the mortgages. Mr. Ashman testified that a foreclosure action was commenced on or about September 21, 2009, against both himself and Stephen Glover.

Discussion

In reviewing the causes of action pleaded, relief sought by plaintiff, defendant's affirmative defenses, documentary evidence, trial testimony and post-trial memoranda of law, the court finds as follows:

There is no dispute as to the initial ownership of the property, which was held by Stephen Glover, who was the person who secured the first and second mortgages on 1976 Bergen Street, Brooklyn, New York. The dispute arises due to the transfer of the property from Stephen Glover to David Ashman. Plaintiff alleges that defendant deceived Stephen Glover by making misrepresentations to Glover concerning Mr. Glover being relieved of his mortgage obligations, which did not occur, causing the property mortgage to go into default and a foreclosure proceeding being commenced against Stephen Glover in 2009. Plaintiff contends that defendant's unlawful receipt of title was accomplished by offering a false instrument for filing, i.e., the Real Property Transfer Report which states the purported deed transfer was zero dollars as opposed to the \$11,000 defendant alleges to have given in consideration for the subject property. Plaintiff argues that the Real Property Transfer document is evidence that conclusively proves, as a matter of law, that the defendant did not actually pay any lawful consideration when taking title to the property. This court disagrees. The document alone does not conclusively establish that defendant did not pay consideration for the property. In fact, the defendant's testimony, as well as the testimony of Cynthia Francis, the person who introduced Stephen Glover to the defendant, David Ashman, established that Mr. Glover was given \$11,000 which was counted, held, and later given to Mr. Glover when the

two returned from getting the transfer documents signed. The court finds the testimony of both witnesses' as to the consideration paid credible. Ms. Gennie Glover, the only witness called to testify in plaintiff's case had no knowledge as to the transaction between her brother, Stephen Glover, and David Ashman.

Plaintiff raises the issue of the documents bearing a signature purporting to have authenticated Mr. Glover's signature, which plaintiff claims is illegible and unknown and therefore invalidates the deed and related transfer documents. In an action to determine title pursuant to Real Property Actions Proceedings Law Article 15, the plaintiff has an affirmative duty to show that title lies in it, which is not satisfied merely by pointing out weaknesses in defendant's title. *See, LaSala v. Terstiege*, 276 A.D.2d 529, 713 N.Y.S.2d 767 (2nd Dept., 2000). More importantly, a conveyance of real estate, as between parties themselves, is effective even if the instrument is improperly acknowledged or unacknowledged. *See, Bernard v. Citibank, N.A.*, 195 A.D.3d 783, 151 N.Y.S.3d 87 (2nd Dept., 2021). Plaintiff fails to meet the burden of proof under the standard of clear and convincing evidence as to the falsity of the transfer documents filed by the defendant. *See, 80 P2L LLC v. U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust*, 194 A.D.3d 593, 150 N.Y.S.3d 23 (2nd Dept., 2021).

Next, this court will address the issue of whether the plaintiff established the existence of a constructive trust for plaintiff's benefit regarding the subject property. First, the court notes that a constructive trust over real property can be imposed even where an underlying agreement is not in writing. *See, Thomas v. Thomas*, 70 A.D.3d 588, 89 N.Y.S.3d (1st Dept., 2010). The complaint alleges that the defendant, David Ashman promised that he would assist Stephen Glover with the mortgages which would be to Mr. Glover's benefit, and those misrepresentations were relied upon by Mr. Glover, to his detriment resulting in David Ashman's unjust enrichment. A constructive trust has been defined as "the formula through which the conscience of equity finds expression," and as a remedy to be erected whenever necessary to satisfy the demands of justice. *See, CoCo v. CoCo*, 107 A.D.2d 21, 485 N.Y.S.2d 286 (2nd Dept., 1985), *citing Latham v. Father Divine*, 299 N.Y. 22, 286 N.Y.S.2d 72 (1949). The essential purpose of a constructive trust is to prevent unjust enrichment. *See, Sharp v. Kasmalski*, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976). Where the property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *See, CoCo v. CoCo, supra*.

The testimony provided on plaintiff's case was limited and the witness, Jennie Glover, as indicated earlier, had no knowledge as to the transfer of the subject property between Glover and Ashman. However, on cross-examination of the defendant, although the court finds defendant's testimony as to the amount given to the plaintiff for the transfer of the property credible, the court did not find the testimony credible as to the defendant's knowledge or lack of knowledge concerning the existing mortgages. Defendant testified that he was unaware of the amounts of the existing mortgages when he signed off on the documents, and that he discovered the amount when he opened the folder with the documents. He also testified that he learned that Mr. Glover wanted to sell the property because he could not afford the mortgage. Defendant testified that he "got both mortgages after the deed was transferred to

me.” Mr. Ashman’s testimony concerning his knowledge as to the mortgages was inconsistent and not credible. In addition, Mr. Ashman testified that he purchased the deed subject to the mortgages that were on the property. (*See November 1, 2022, Trial Transcript, p.51, lines 17-20*).

In ascertaining whether a constructive trust should be imposed upon a property interest, four factors are considered: (1) the existence of a fiduciary or confidential relationship, (2) promise, express or implied, (3) a transfer in reliance on the promise, and (4) unjust enrichment. *See, Kissane v. Cashman*, 217 A.D.3d 932, 191 N.Y.S.3d 727 (2nd Dept., 2023). However, these factors merely serve as a useful guide. If a party holds property “under circumstances that in equity and good conscience he ought not retain it,” a constructive trust will be imposed. *See, CoCo v. CoCo*, 107 A.D.2d 21, 485 N.Y.S.2d 286 (2nd Dept., 1985), *citing Miller v. Schloss*, 218 N.Y. 400, *Ptachewich v. Ptachewich*, 96 A.D.2d 582, 45 N.Y.S.2d 277 (2nd Dept., 1983).

In the case at bar, while no fiduciary or confidential relationship existed between Stephen Glover and David Ashman, the court finds, based upon the defendant’s testimony, that there was an implied promise and a transfer in reliance on the promise to purchase the property subject to the mortgages, as well as unjust enrichment. For the defendant to claim that he did not promise to make payments on the mortgage and at the same time testify that he made mortgage payments, lived in the subject property, as well as his family for at least a year, if not more, collected and continues to collect rents from the subject property, stopped making mortgage payments, and the subject property going into foreclosure is sufficient evidence to impose a constructive trust. A constructive trust will be imposed whenever necessary to satisfy the demands of justice and its applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them. *See, Latham v. Father Divine*, 299 N.Y. 22, 286 N.Y.S.2d 72 (1949).

Moreover, “in determining whether a conveyance was fraudulent, the court will consider “badges of fraud” which are circumstances that accompany fraudulent transfers that their presence gives rise to an inference of intent. *See, Stout Street Fund I, L.P., v. Halifax Group, LLC*, 148 A.D.3d 744, 48 N.Y.S.3d 438 (2nd Dept., 2017). Here, the lack of fair consideration can be considered a “badge of fraud.” Fair consideration exists when in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied or when such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained. *See, Stout Street Fund I, L.P., v. Halifax Group, LLC., supra*. Plaintiff alleged that the transfer documents state a zero amount for consideration of the subject property, and testimony from defendant and his witness state that \$11,000 was paid in cash for consideration of the deed to the subject property. Based upon the testimony and proofs, the court finds that the plaintiff was not paid fair consideration for the subject property.

The problem here, is in finding in favor of plaintiff, that a constructive trust be imposed, the defendant's affirmative defense is that plaintiff's cause of action for a constructive trust is time barred. A cause of action for the imposition of a constructive trust is governed by the six-year statute of limitations of CPLR 213[1], which starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution. See, Statharos v. Statharos, 219 A.D.3d 651, 194 N.Y.S.3d 530 (2nd Dept., 2023). A determination of when the wrongful act triggering the running of the statute of limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition, or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property. See, Statharos v. Statharos, 219 A.D.3d 651, 194 N.Y.S.3d 530 (2nd Dept., 2023). In the case at bar, the gravamen of the cause of action for the imposition of a constructive trust occurred when the deed transfer took place in 2005. Plaintiff did not commence this action until 2017, twelve years after the property was acquired by the defendant. Even taking into consideration when the subject property went into foreclosure, and a case was commenced against Stephen Glover, the statute of limitations would have begun to run when the breach of the promise to make mortgage payments occurred. Therefore, plaintiff's cause of action for the imposition of a constructive trust is time barred.

As to the plaintiff's cause of action for a declaratory judgment, the court must examine the substance of the action to determine the applicable statute of limitations to the cause of action for a declaratory judgment. Where it is determined that the parties' dispute can be or could have been resolved in an action or proceeding for which a specific limitation period is statutorily required, that limitation period governs. See, Statharos v. Statharos, *supra*. Here, the statute of limitations is governed by a six-year limitation and therefore, it applies to the declaratory judgment cause of action and having accrued in 2005, this cause of action is time barred.

Plaintiff's fourth cause of action alleged a conversion of the subject property. A cause of action alleging conversion is subject to a three-year statute of limitation. See, CLR 214[3],[4]; Seidenfeld v. Zaltz, 162 A.D.3d 929, 80 N.Y.S.3d 311 (2nd Dept., 2018). Plaintiff's cause of action in this case would have accrued in 2005, upon the transfer of the property or the latest, in 2009 when defendant resided in the subject property. Thus, plaintiff's cause of action, which was asserted in 2017, is time barred.

Plaintiff's fifth cause of action is for fraud. The elements of a cause of action to recover damages for fraud are material misrepresentations of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. The plaintiff's case relies on the allegation that Mr. Glover transferred the subject property to David Ashman in 2005 due to Mr. Ashman's misrepresentation of facts concerning what could be referred to as a "mortgage rescue." Since the alleged fraudulent statements were made in 2005, the cause of action asserted in a 2017 complaint would be time barred. Similarly, the sixth and seventh causes of action for unjust enrichment and promissory estoppel are time barred.

Plaintiff's eight cause of action for slander of title is also dismissed as time barred. The statute of limitations for slander of title is one year. See, CPLR 215[3]. It has generally been held that the cause of action to recover damages for slander of title based upon the recording of an unfounded claim to property of another does not rise until damages actually result, so the period of limitations begins to run, not from the date of the initial recording, but from the time the prospective sale is lost because of the cloud on plaintiff's title. See, Hanbidge v. Hunt, 183 A.D.2d 700, 583 N.Y.S.2d 288 (2nd Dept., 1992). Therefore, the 2006 date of the recording is not the starting date of accrual. However, the latest date of accrual would be 2009, when the foreclosure action was filed against Stephen Glover, long after the expiration of the statute of limitations for a cause of action sounding in slander of title.

Based upon the foregoing, the plaintiff's complaint is dismissed in the entirety.

Defendant's request for legal fees is denied.

This constitutes the decision of this court.

Dated: November 1, 2023
Brooklyn, New York



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

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