

**Minzer v Minzer**

2024 NY Slip Op 34114(U)

November 21, 2024

Supreme Court, Kings County

Docket Number: Index No. 507094/2020

Judge: Joy F. Campanelli

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SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: IAS PART 6

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RUCHEL MINZER and 4701 FT. HAMILTON PARKWAY, LLC,

Plaintiffs,

-against-

Index No.: 507094/2020

DEBORAH RAUCH MINZER a/k/a DEBBIE NOBLE, SHLOMO NOBLE, PHYLLIS RUSSEK a/k/a/ FRUMA NOBLE

**DECISION AND ORDER**

Hon. Joy F. Campanelli, J.S.C.

Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and

Affidavits (Affirmations) Annexed \_\_\_\_\_ 247-257, 286-288, 336-340

Opposing Affidavits (Affirmations) \_\_\_\_\_ 292-301,341-356

Affidavits/ Affirmations in Reply \_\_\_\_\_ 357-359

Other Papers: \_\_\_\_\_ 302

Defendant SHLOMO NOBLE moves by notice of motion seq. no. 17, for an Order pursuant to C.P.L.R. § 6514, cancelling the notice of pendency filed against 4701 Ft. Hamilton Parkway. In response, Plaintiffs RUCHEL MINZER, and 4701 FT. HAMILTON PARKWAY, LLC cross-move by notice of motion seq. no. 18, for an Order pursuant to C.P.L.R. § 5015(a) and C.P.L.R. § 2005 to vacate this Court’s Order dated September 20, 2023, which granted Defendant Noble’s motion for partial summary judgment without opposition. Upon vacating the underling default, Plaintiff seeks the denial of Defendant’s summary judgment motion.

On April 4, 2023, Defendant Noble moved by notice of motion seq. no. 13, for partial summary judgment, dismissing Plaintiff’s causes of action sounding in constructive trust and unjust enrichment. On September 20, 2023, Defendant’s motion was granted without Plaintiff’s

opposition papers being considered as they were not in compliance with the court ordered briefing schedule for the motion. On October 21, 2023, Plaintiff filed a motion to renew and/or reargue Defendant's partial summary judgment motion. This Court denied Plaintiff's motion as it was a procedurally improper means of curing their default. On July 8, 2024, Defendant Noble moved by notice of motion to cancel the lingering notice of pendency filed against 4701 Ft. Hamilton Parkway, arguing that it is no longer needed as Plaintiffs' causes of action alleging constructive trust and unjust enrichment have been dismissed. As such, there are no pending causes of action against Defendant which would affect title to the subject property. On July 18, 2024, Plaintiff filed the present cross-motion to vacate their default, revive their unjust enrichment and constructive trust claims, oppose Defendant's motion for partial summary judgment, and thereby maintain the notice of pendency clouding title to 4701 Ft. Hamilton Parkway.

**I. Plaintiff's Cross-Motion Seq. No. 18 to Vacate their Default and the Court's Order dated September 20, 2023**

Pursuant to C.P.L.R. § 5015(a)(1), "[a] party seeking to vacate an order entered upon his or her failure to oppose a motion is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion[.]" *Bhuiyan v. New York City Health & Hosps. Corp.*, 120 A.D.3d 1284, 1284, 993 N.Y.S.2d 62, 63 (2014). The Supreme Court has discretion to accept law office failure as a reasonable excuse where such a claim is bolstered by a detailed and credible explanation for the default. *Swensen v. MV Transp., Inc.*, 89 A.D.3d 924, 925, 933 N.Y.S.2d 96, 98 (2011). Factors to consider in determining motions to vacate include "potential prejudice to the opposing party, whether the default was willful or evinced an intent to abandon

the litigation, and whether vacating the default would serve the public policy of resolving actions on their merits[.]” *Needleman v. Tornheim*, 106 A.D.3d 707, 708, 964 N.Y.S.2d 231, 232 (2013). Additionally, the defaulting party is not required to establish the validity of their defense as a matter of law in order to obtain vacatur, all that is required is to establish that their defense is potentially meritorious. *Corvera v. Prime Source Dev., LLC*, 172 A.D.3d 1161, 1163, 101 N.Y.S.3d 395, 397 (2019).

Plaintiff’s law office failure takes the form of inadvertently mis-calendaring the date opposition papers were due. The underlying default was the first instance Plaintiff’s papers were untimely filed in this litigation and their explanation for their failure was sufficiently detailed and credible to be considered a reasonable excuse. Additionally, vacating this default would serve this state’s public policy of resolving actions on the merits.

Plaintiff’s potentially meritorious defense is that triable issues of fact exist which would require the denial of Defendant’s partial summary judgment motion. Plaintiff points to alleged inconsistencies in Defendant Noble’s deposition to argue that triable issues of fact exist with regards to their unjust enrichment and constructive trust claims. Under the circumstances of this case, including the absence of serious prejudice against the Defendant, the lack of a willful default, and the strong public policy which favors resolving cases on the merits, Plaintiff’s motion to vacate their default and this Court’s Order dated September 20, 2023, is granted.

## **II. Defendant’s Motion Seq. No. 13 for Partial Summary Judgment**

Pursuant to C.P.L.R. § 3212, to succeed on a motion for summary judgment, the movant’s burden is to establish their prima facie entitlement to judgment as a matter of law. Once this burden has been met, the opposing party is required to demonstrate the existence of a

triable issue of fact or an acceptable excuse for their failure to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 404 N.E.2d 718, 718 (1980).

To succeed on a claim of unjust enrichment, the plaintiff must prove that (1) “defendant was enriched, (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *Mobarak v. Mowad*, 117 A.D.3d 998, 1001, 986 N.Y.S.2d 539, 542 (2014). This quasi-contract theory “contemplates an ‘obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties’” *Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 A.D.3d 1003, 1006–07, 53 N.Y.S.3d 99, 104 (2017)(quoting *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 907 N.E.2d 268, 274 (2009)). “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter[.]” *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388, 516 N.E.2d 190, 193 (1987).

To succeed on a cause of action for constructive trust, the movant must establish “(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance on that promise, and (4) unjust enrichment[.]” *Levy v. Moran*, 270 A.D.2d 314, 315, 704 N.Y.S.2d 609 (2000).

In support of their motion for partial summary judgment to dismiss Plaintiff’s second cause of action to impose a constructive trust and their third cause of action claiming unjust enrichment, Defendant offers a valid and enforceable written contract governing the sale of the subject property, 4701 Ft. Hamilton Parkway, from Plaintiff 4701 Ft. Hamilton Parkway, LLC, to Defendant Noble. Additionally, the contract contains a merger and integration clause.

Plaintiff argues that a separate agreement between Defendant Noble and Israel Minzer is the basis of their unjust enrichment and constructive trust causes of action, but this argument is unavailing. Plaintiff's purported "sham" agreement directly involves the sale of the subject property from Plaintiff 4701 Ft. Hamilton Parkway LLC to Defendant Noble. Additionally, even if such a "sham" agreement took place as Plaintiff alleges, it would be subject to the written contract of sale's merger and integration clause.

Unjust enrichment is a quasi-contract theory intended to prevent injustice in the absence of an actual agreement between the parties. Here, the parties have an actual agreement governing the sale of the 4701 Ft. Hamilton Parkway with a merger and integration clause barring evidence of prior agreements in disputes concerning the contract. Plaintiff's second and third causes of action are premised on events arising out of the same subject matter as the contract of sale. Therefore, Plaintiff cannot recover for unjust enrichment or constructive trust and Defendant has met their prima facie burden of proving entitlement to judgment as a matter of law.

The merger and integration clause in the contract precludes Plaintiff from introducing evidence of alleged prior agreements to contradict the written word of the contract of sale. Consequently, Plaintiff has offered no evidence in admissible form that raises triable issues of fact with regards to their unjust enrichment or constructive trust claims. Therefore, Defendant's motion for partial summary judgment is granted.

### **III. Defendant's Motion Seq. No. 17 to Cancel the Notice of Pendency**

Pursuant to C.P.L.R. § 6501(a), a notice of pendency may be filed in any action "in which the judgment demanded would affect the title to, incumbrance of, or the possession, use, or enjoyment of, real property...." N.Y. C.P.L.R. 6501 (McKinney). "Cancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where the filing of the

notice fails to comply with CPLR 6501[.]” *Ewart v. Ewart*, 78 A.D.3d 992, 992, 912 N.Y.S.2d 265, 266 (2010). In determining whether the filing of the notice of pendency no longer complies with CPLR § 6501, the Court “neither assesses the likelihood of success on the merits nor considers material beyond the pleading itself[.]” *Nastasi v. Nastasi*, 26 A.D.3d 32, 36, 805 N.Y.S.2d 585, 589 (2005).

The sole causes of action that remain pending against Defendant Noble seek relief in the form of money damages and do not affect title to 4701 Ft. Hamilton Parkway. As such, the notice of pendency no longer complies with C.P.L.R. § 6501 and must be canceled.

Accordingly, it is

**ORDERED** that Plaintiffs RUCHEL MINZER and 4701 FT. HAMILTON PARKWAY, LLC’s cross motion seq. no. 18, pursuant to C.P.L.R. § 5015(a) and C.P.L.R. § 2005, to vacate their default and this Court’s September 20, 2023, Order is GRANTED; it is further

**ORDERED** Defendant NOBLE’s motion seq. no. 13, for partial summary judgment is GRANTED with respect to Plaintiff’s second and third causes of action; it is further

**ORDERED** that Defendant NOBLE’s motion seq. no. 17, pursuant to C.P.L.R. § 6514, to cancel the notice of pendency filed against 4701 Ft. Hamilton Parkway is GRANTED.

This constitutes the decision and order of the Court.

Dated: November 21, 2024,  
Brooklyn, NY

  
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Hon. Joy F. Campanelli, J.S.C.