

Carlo v 310 W. 88th St. LLC

2013 NY Slip Op 30268(U)

January 31, 2013

Supreme Court, New York County

Docket Number: 106706/11

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JOAN M. KENNEY

PRESENT: _____
CARLO, Justice

PART 8

MIRA GARAFALO,

-v-

310 W 88th ST. et al

INDEX NO. 106706/11

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion tofor _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____

Answering Affidavits — Exhibits _____ | No(s) _____

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

FILED

FEB 07 2013

NEW YORK
COUNTY CLERK'S OFFICE

JAM
JOAN M. KENNEY, J.S.C.
J.S.C.

Dated: 1/31/13

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

-----X

LAURA GARAFALO CARLO, As the Executrix
of The Estate of PHILIP CARLO, and
LAURA GARAFALO CARLO, individually,

Index # 106706/11

Plaintiff,

DECISION & ORDER

-against-

310 WEST 88th STREET LLC, ROBERT GANER,
DOREEN MANNANICE, JOSEPH MANNANICE
GANER, GROSSBACK & GANER, LLC,

Defendants.

-----X

Kenney, J., M., J.

Aboulafia Law Firm, P.C.
Counsel for Plaintiff
60 East 42nd Street, Suite 2231
New York, NY 10165
(212) 684-1422

Michelman & Robinson, LLP
Counsel for Defendants - 310 West 88th
Street, LLC, Doreen & Joseph Mannanice
800 Third Avenue, 24th Floor
New York, New York 10022
(212) 730-7700

Papers considered in review of these motions:

- Papers:**
- Notice of Motion, Affirmation,
 - Affidavit, Exhibits,
 - Notice of Cross-Motion, Affirmation in
 - Support and Opposition, Affidavit in Support
 - and Opposition, Exhibits
 - Affidavit in Opposition to Cross Motion with Exhibits

Numbered:
1-15

16-39
40-6

FILED

FEB 07 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

Defendants seek an Order, (1) appointing a temporary receiver
for the property located at 310 West 88th Street, New York, New York
10024; (2) granting defendants an accounting; and (3) directing the
individual plaintiff to pay *pendente lite* use and occupancy.
Plaintiff cross-moves for and Order granting her dispositive
relief.

FACTUAL BACKGROUND

This contentious familial dispute involves the use, occupancy
and ownership of a multiple dwelling, located within the City,

County and State of New York, known as 310 West 88th Street (the premises). The parties not only dispute who has proper title to the premises but, whether or not Philip Carlo (Carlo) and his Estate (the Estate), were allegedly defrauded by defendants, prior to his death.¹ Carlo died on November 8, 2010.

Philip Carlo's widow and Executrix (Garafolo-Carlo), alleges that defendants, Doreen Mannanice, Joseph Mannanice, Robert Ganer and his firm Ganer, Grossbach, & Ganer LLC², exercised undue influence over Carlo while his health was deteriorating, and "conspired" with each other "to defraud [plaintiffs] of 50% of the ownership of the premises." Garafolo-Carlo states that the Estate's interest in the premises was compromised and allegedly transferred "illegally," so as to dilute the Estate's 100% ownership interest.

The premises was originally purchased by Carlo, and his father Frank Carlo in 1976. During the intervening years, the premises was transferred between Carlo and his father to a corporation owned by Carlo. Thereafter, Carlo transferred his ownership of the property to his father, sister and her husband for reasons that are unclear from the papers before the Court. On February 17, 2010,

¹Plaintiffs' pleading alleges a cause of action sounding in fraudulent conveyance of the premises.

²Doreen Mannanice, was Carlo's sister and Joseph Mannanice was his brother-in-law. Robert Ganer was Carlo's attorney for approximately 40 years and was represented by the firm Ganer, Grossbach, & Ganer LLC,

Doreen and Joseph Mannanice executed yet another deed, transferring title to the premises to Carlo and his sister. Finally, the last deed, dated August 18, 2010, transferred the premises from Doreen Mannanice and Carlo, to a limited liability company, known as 310 West 88th Street LLC (the LLC).

Notably, this last deed and the LLC's operating agreement (the operating agreement) were both signed by Robert Ganer as attorney-in-fact for Carlo, pursuant to a power of attorney that was recorded simultaneously with the last deed. It is curious that Doreen Mannanice's acknowledgment and signature were notarized by Robert Ganer and Carlo's acknowledgment and signature, as signed by Robert Ganer, as attorney-in-fact, was notarized by a "Casey Ganer."

The LLC was equally owned by Carlo and his sister, as evidenced by the operating agreement, identifying the members' equal ownership of the entity. It is unclear from the papers, why the premises was repeatedly deeded from and to Carlo and various members of his family. Defendants imply that Carlo repeatedly transferred the premises because he was not credit worthy, and/or because he was trying to insulate the premises from his creditors.

ARGUMENTS

Garafolo-Carlo argues that she and the Estate are entitled to summary judgment because the transfers were merely accommodations, thereby creating a constructive trust for the benefit of Carlo. In

reply, defendants state that the transfers were made with minimal consideration in order to minimize the tax consequences of the transfers.

The motion-in-chief seeks, *inter alia*, the immediate appointment of a receiver, an accounting, and an award of *pendente lite* use and occupation payments from Garafolo-Carlo. The movants argue that the basis for the instant application is grounded in the fact that the mortgage payments and real estate taxes are allegedly not being paid, which if true, may put the property in danger.³

Defendants contend that Garafolo-Carlo is jeopardizing the property by collecting the rents from the tenants of the premises, without distributing them to the LLC, which would presumably make the requisite payments necessary to protect the premises.

Finally, defendants seek an award of *pendente lite*, fair market use and occupation (U&O) payments from Garafolo-Carlo. The basis for this portion of the application suggests that because Garafolo-Carlo is "living rent free." Defendants contend that they are entitled to U&O because Garafolo-Carlo is occupying the apartment she shared with Carlo prior to his death, in violation of the terms of the operating agreement. Specifically, defendants argue that the premises were supposed to have been listed for sale and/or sold within six months of Carlo's death. According to

³Defendants also make reference to the fact that one of the tenants of the building obtained a judgment due to the LLC's failure to return a security deposit.

defendants, Garafolo-Carlo does not have legal possession of the apartment she occupies.

Plaintiffs oppose the motion-in-chief by arguing that the application is legally defective, and cross move for summary judgment to impose a constructive trust on the premises.

DISCUSSION

The parties' arguments in support of their respective motions will be addressed *seriatim*.

The first branch of the motion-in-chief seeks the appointment of a temporary receiver and an accounting. The party moving for appointment of temporary receiver must submit clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect the moving party's interests. See, CPLR 6401, which states in pertinent part:

Appointment and powers of temporary receiver

“(a) Appointment of temporary receiver.

Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme . . . court, a temporary receiver of the property may be appointed, before or after service of summons . . . , where there is danger that the property will be . . . materially injured or destroyed.

Orders of receivership are appropriate only in certain circumstances e.g., (1) where there is a danger the property will be lost, removed or materially altered; or (2) mortgaged property

where mortgagor is in default (see CPLR 6401[a]; *Hoffman v Hoffman*, 81 AD3d 601 [2nd Dept 2011]). However, even where these conditions are shown to exist, the court still has discretion as to whether a receiver should be appointed in a particular case (*infra*).

Defendants contend that the mortgagee of the premises has sent default notices to the LLC because the real estate taxes have not been paid. It is undisputed that plaintiffs attempted to make the mortgage payments, but the bank refused to negotiate Garafolo-Carlo's checks because her name did not match the name of the account assigned to the premises. Notably, the parties do not contest that Garafolo-Carlo has made good faith attempts to pay the mortgage, among other things. It is unclear that Garafolo-Carlo has manifested a "predisposition to take unilateral action in disregard of defendants' rights, thereby demonstrating a danger of material injury to the property" at issue. *Chaline Estates, Inc. v Furcraft Assoc.*, 278 AD2d 141, 142 (1st Dept 2000).

Defendants have not clearly established that they would be irreparably harmed in the absence of an appointment of a temporary receiver (see CPLR 6301; 6401). Moreover, in the event Doreen Mannanice seriously believed that the premises was in danger of being foreclosed upon, she could have made the delinquent payments through the LLC, without prejudice to the counterclaims interposed in the instant lawsuit.

Because receivership is such a drastic remedy, this Court

cannot ignore the complexities attendant to such a decision. Simply put, the less intrusive way of preventing any injury to the property can be accomplished, by merely having plaintiffs transfer the rental income generated from the premises, into defendants' attorneys' IOLA and/or escrow account, in accordance with this decision and Order. This shall include any rent collections made by Garafolo-Carlo since the commencement of this action. Immediately after the deposit of the rental payments into the escrow account, defendants' counsel shall cause all the outstanding amounts due to the mortgagee, the City of New York and the premises' vendors to be paid forthwith, by forwarding said funds to the LLC's bank account, or by remitting said amount directly to the premises' creditors.

Defendants also seek an accounting from plaintiffs for the rents allegedly collected by Garafolo-Carlo. This branch of the motion-in-chief is denied without prejudice. The parties have not engaged in discovery in earnest. Defendants may seek this relief after discovery has been completed.

The last branch of the motion seeks fair market *pendente lite* U&O payments from Garafolo-Carlo. The bases for this portion of the application are: (1) Garafolo-Carlo has failed to pay any rent since Carlo died and (2) Garafolo-Carlo is liable for rent because she has failed to cooperate in the sale of the premises, in breach of the operating agreement. The papers before the Court are silent

with regard to whether or not a dispossess proceeding has been commenced against Garafolo-Carlo. Defendants contend that Carlo and his wife had a lease for their apartment, with the LLC, but that lease expired. The alleged lease has not been produced.

"In a holdover proceeding (emphasis added), the landlord is entitled to seek use and occupation for the fair and reasonable value of the premises during the period of such use and occupation" (RPL §220; RPAPL § 749[3]; see, *Beacway Operating Corp. v Concert Arts Society, Inc.*, 123 Misc2d 452 [Civ Ct NY Co 1984]; 1400 Broadway Associates, v Henry Lee & Co. of NY, Inc., 161 Misc2d 497, 499 [Civ Ct NY Co 1994]). (Lease amount probative but not conclusive).

"Reasonable value is fair market rental and may be established by appraisal testimony based on comparable rentals or by reference to the rental history of the subject [premises] itself" (*Beacway Operating Corp. v Concert Arts Society, Inc.*, *supra*, at 454; *New York Connecting R.R. Co. v Queens Used Auto Parts*, 298 NY 830 [1949]; see also, *Merman v The Surrey*, 106 Misc2d 941 [1981]). In addition, an award for use and occupancy should reflect the current fair market rental value of the space (*Rock-Time, Inc. v The Lutin Central Services Company, Inc.*, NYLJ, November 25, 1985, p. 13, col. 1 [App Term 1st Dept]). Defendants have not provided any expert appraisal testimony for this Court to consider to make a determination that an award of U&O is appropriate. Further, the

only competent evidence before this court is an alleged rent roll for the premises that does not indicate any specific rent for the apartment at issue. Consequently, this branch of the motion-in-chief is denied without prejudice, to be renewed in the event defendants can prove Garafolo-Carlo is holding over. Prior to making such an application, defendants may want to consider that "fair market rent has been defined as what a tenant desiring, but not compelled to rent, would pay to a landlord who desires, but is not compelled to lease (*Beacway Operating Corp. v Concert Arts Socy., supra*, at 454).

The cross motion seeks summary judgment pursuant to CPLR 3212. In essence, Garafolo-Carlo argues that she is entitled to the imposition of a constructive trust as a matter of law, because defendants have been unjustly enriched due to their own malfeasance.

"The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment (citation omitted). Garafolo-Carlo has not demonstrated the existence of a confidential or fiduciary relationship between herself and the LLC. Without further discovery, it cannot be determined at this juncture whether or not a confidential/fiduciary relationship existed between Carlo and Doreen Mannanice. The failure to establish the existence of such a fiduciary relationship also precludes summary

judgment for an accounting (see *Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616, [2nd Dept 2007]).

The ultimate purpose of a constructive trust is to prevent unjust enrichment and, thus, a constructive trust may be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" *Abacus Federal Savings Bank v Lim*, 75 AD3d 472, 474 (1st Dept 2010). Similarly, to prevail on a claim of unjust enrichment, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Cruz v McAneney*, 31 AD3d 54 [2nd Dept 2006]). The plethora of disputed issues of fact concerning, *inter alia*, whether or not defendants have been unjustly enriched are numerous, and to recite them again would be redundant.

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the

burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the above guidance, the courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974) (because entry of summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-25.

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). *Garafolo-Carlo* has failed to do so. *Forrest v Jewish Guild for the Blind*, 3 NY2d 295, 315 [2004]).

Once the moving party has set forth its proof, the burden is on the opposing party to demonstrate "evidentiary facts in

admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman*, 49 NY2d at 560). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp., Inc.*, 298 AD2d 224, 226 [1st Dept 2002]). Defendants have satisfied their burden of showing that contested factual issues exist, thus precluding dispositive relief at this time.

Garafolo-Carlo has failed to address or refute the negative implications raised by the affirmation of Robert Ganer, which, along with other documents annexed as exhibits to defendants' affidavits, raise factual issues with respect to the veracity or accuracy of the statements made by Garafolo-Carlo.

Further, there has not been any meaningful discovery conducted by the parties prior to the filing of this summary judgment motion. Because discovery may assist the parties (and this Court) in narrowing or resolving disputed issues of fact, the summary judgment motion is denied without prejudice. *Magee v County of Suffolk*, 14 AD3d 664 (2d Dept 2005); *Perroto Dev. Corp. v Sear-Brown Group*, 269 AD2d 749 (4th Dept 2000) (denying summary judgment motion without prejudice to renew, after completion of discovery). Accordingly, the cross motion is denied. It is therefore,


ORDERED that the motion-in-chief is denied; and it is further
ORDERED that the cross motion is denied; and it is further

ORDERED that plaintiffs transfer the rental income generated from the premises, into defendants' attorneys' IOLA and/or escrow account, in accordance with this decision and Order. This shall include any rent collections made by Garafolo-Carlo since the commencement of this action; and it is further

ORDERED that immediately following the deposit of the rental payments into the escrow account, defendants' counsel shall cause all the outstanding amounts due to the mortgagee, the City of New York and the premises' vendors to be paid forthwith, by forwarding said funds to the LLC's bank account, or by remitting said amount directly to the premises' creditors.

Dated: January 31, 2013

E N T E R:



Hon. Joan M. Kenney
J.S.C.

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