

Criollo v Criollo

2012 NY Slip Op 32880(U)

December 4, 2012

Supreme Court, Queens County

Docket Number: 15066/12

Judge: Allan B. Weiss

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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

ROSA ISABEL CRIOLLO and JUAN SALTO,

Plaintiffs,

-against-

SIXTO CRIOLLO,

Defendant.

HON. ALLAN B. WEISS

Index No: 15066/12

Motion Date: 10/17/12

Motion Cal. No.: 3

Motion Seq. No.: 1

In this action for, inter alia, a determination of rights to the real property located at 34-20 102nd Street, Corona, N.Y., plaintiffs move for an preliminary injunction during the pendency of this action (1) restraining the sum of \$20,000.00 in the defendant's bank account, (2) directing the defendant to pay his proportional share of the mortgage and maintenance of the premises, and (3) restraining the defendant from further mortgaging and/or encumbering the property without leave of court.

To prevail on a motion for a preliminary injunction, the plaintiffs must demonstrate (1) likelihood of success on the merits, (2) irreparable injury if the requested relief is not granted; and (3) a balance of the equities in their favor (see Aetna Ins. Co. v. Capasso, 75 NY2d 860, 862 [1990]; W.T. Grant v. Srogi, 52 NY2d 496, 517 [1981]; Zanqi v. New York State, 204 AD2d 313 [1994]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property

that could render a judgment ineffectual (see CPLR § 6301; Putter v. Singer, 73 AD3d 1147, 1148 [2010]; Dixon v. Malouf, 61 AD3d 630 [2009]; Ruiz v. Meloney, 26 AD3d 485, 486 [2006]).

In support of the motion, plaintiffs submitted the affidavit of Crillo asserting the following. Plaintiffs are husband and wife, and, in September, 2000, they found the subject property which was for sale. They contacted a real estate broker whose name was displayed on the "For Sale" sign who informed them that they would not be able to obtain a mortgage since they did not have green card. To facilitate the purchase, she asked her brother, the defendant, who had a green card, to help with the purchase, however, the deed would be in the name of the plaintiffs. The real estate broker also told her that the bank would more likely approve a mortgage if her name and defendant's name would be on the deed. She agreed with the condition that the deed would reflect that her interest is 2/3 and defendant's interest is 1/3. The contract of sale, dated September, 2000 was prepared in which she and the defendant were named as the buyers. At the closing, the broker told her that the Bank would not complete the closing if her name appeared on the deed, however, her brother could later add her name and her husband's to the deed as originally agreed. Carillo further maintains that she and her husband contributed \$88,500.00 toward the purchase price, her other brother, Sergio lent plaintiffs \$11,000.00 and defendant

contributed \$15,000.00 for closing cost. At closing the deed named the defendant as the sole owner and, he later refused to add the plaintiffs to the deed as was agreed. Criollo further claims that the defendant obtained a second mortgage in the amount of \$20,000.00 and kept all of the money and that the defendant has not contributed anything toward the mortgage or maintenance of the property.

In opposition, defendant asserts that there was never an arrangement or promise between the parties that plaintiffs would have any ownership interest in the property. He maintains that he has been the sole owner of the property since November 6, 2000, which he purchased using his own money from his own accounts. He further claims that he has allowed the plaintiffs and their family to live in one of the apartments at the subject premises, rent free, in exchange for their promise to pay the utilities for the apartment. He uses the rent collected from the other two apartments to pay the mortgage. In 2003 he refinanced the mortgage to obtain a lower interest rate. Defendant further asserts, that for the last two years only, he allowed the plaintiffs to collect the rent from the two other apartments from which they paid the mortgage. He claims that the payment of utilities and maintenance was always their responsibility in lieu of rent.

In reply plaintiffs have submitted documentary evidence of

their financial contribution to the purchase of the premises as well as the copy of the contract of sale which raise significant issues as to the veracity and accuracy of the defendant's claims and documentary evidence.

The mere existence of an issue of fact will not itself be grounds for the denial of the motion (see Reichman v. Reichman, 88 AD3d 680, 681 [2011]; Ruiz v. Meloney, 26 AD3d 485, 486 [2006]) where, as here, the action sought to be enjoined would cause irreparable injury and threaten to render ineffectual any judgment which plaintiffs might receive (CPLR 6301; First Franklin Square Associates, LLC v. Franklin Square Property Account, 15 AD3d 529, 533[2005]; Poling Transportation Corp. v. A & P Tanker Corp., 84 AD2d 796, 797 [1981]) and where the party to be enjoined would suffer no great hardship as a result of its issuance (see Melvin v. Union College, 195 AD2d 447 [1993]; Mr. Natural, Inc. v. Unadulterated Food Prods., 152 AD2d 729, 730 [1989]; US Ice Cream Corp., v. Carvel Corp., 136 AD2d 626, 628 [1988]).

Despite the disputed facts, the plaintiffs have made a sufficient showing of the likelihood of success on the merits, irreparable injury and a balance of the equities in their favor, warranting granting a preliminary injunction (see Perpignan v. Persaud, 91 AD3d 622 [2012]; Ying Fung Moy v. Hohi Umeki, 10 AD3d 604[2004]).

Accordingly, the plaintiffs are granted a preliminary injunction enjoining the defendant, his agents, assigns or anyone acting on his behalf from, in any way, mortgaging, encumbering, hypothecating and/or impairing the value of the subject premises during the pendency of this action without further Order of this Court. The plaintiffs shall continue to collect the rent from the other two apartments in the property which rents they shall use to pay the existing mortgage. In all other respects the motion is denied.

The injunction is conditioned upon the plaintiffs filing an undertaking pursuant to CPLR 6312, the amount of such undertaking, in compliance with CPLR Article 25, is to be fixed in the order to be entered hereon. Upon the settlement of the Order, the parties may submit proof and recommendations as to the amount of the undertaking.

Settle order.

Dated: December 4, 2012
D# 47

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J.S.C.