

Malul v Azulay

2013 NY Slip Op 31749(U)

June 4, 2013

Supreme Court, Queens County

Docket Number: 5280/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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CHARLES MALUL, Index No.: 5280/2010
Plaintiff, Motion Date: 03/22/13
- against - Motion No.: 112
MAIMON ZIV AZULAY, ZIV COMPLEX, INC., Motion Seq.: 4
and MATANAH M.H., LLC

Defendants.

- - - - - x

The following papers numbered 1 to 26 were read on this motion by plaintiff, Charles Malul, for an order pursuant to CPLR 6513 extending the duration of the notices of pendency filed in this action on March 3, 2010; and the cross-motion of defendants Azulay and Ziv Complex, LLC for an order denying the motion seeking to extend the notices of pendency and for an order cancelling said notices of pendency pursuant to CPLR Article 65:

Papers Numbered

Plaintiff's Order to Show Cause-Affidavits-Exhibits.. ...1 - 5
Azulay Notice of Cross-Motion-Exhibits.....6 - 10
Matanah Affirmation in Opposition.....11 - 14
Plaintiff's Affirmation in Opposition to Cross-Motion.. 15 - 19
Azulay Reply Affirmation.....20 - 23
Plaintiff's Reply Affirmation.....24 - 26

In this action for a constructive trust, unjust enrichment, breach of fiduciary duty, and fraud, related to the sale of certain properties in Rosedale, Queens, plaintiff moves for an order pursuant to CPLR 6513 extending the duration of the notices of pendency filed in this action.

Plaintiff commenced the instant action by filing a summons and complaint and lis pendens on fourteen properties on March 3, 2010. The notices were filed by the Clerk against the names of the defendants Maimon Ziv Azulay and Matanah M.H. LLC. A note of issue was filed by the plaintiff on March 15 2012. As discovery had not been completed the parties entered into a stipulation dated January 21, 2013 vacating the note of issue and removing the case from the trial calendar on condition that discovery be completed, the note of issue be reinstated, and the action restored to the trial calendar no later than May 22, 2013.

However, as the initial notices of pendency were effective only until March 3, 2013, plaintiff moved by order to show cause dated February 15, 2013, for an order pursuant to CPLR 6513 extending the notices pending the resolution of the action. Counsel asserts that good cause exists to extend the notices as the Supreme Court may lose its ability to effect justice in the pending action should the notices be allowed to expire pending the resolution of the action. Counsel also asserts that much of the delay has been occasioned by defendant Matanah's pre-discovery motion for summary judgment which were denied by this court by decision and order dated January 4, 2013 and by delays in the completion of discovery. Counsel also asserts that allowing the notices of pendency to expire would likely render ineffectual any judgment on plaintiffs claims rendered after the trial.

Defendants, Maimon Ziv Azulay and Ziv Complex LLC, who own four of the affected properties, cross-move for an order denying the motion seeking to extend the notices of pendency and for an order canceling the notices of pendency. Defendants assert that at one time Ziv Complex held title to fourteen houses located in a construction project in Queens County. According to the complaint plaintiff Malul and defendant Azulay established a limited liability company known as Ziv Complex LLC (ZCL), for the purpose of acquiring and developing vacant land located on Hook Creek Boulevard in Rosedale, Queens. Pursuant to the agreement, each party owned 50% of the LLC and the partners agreed to equally share the profits or losses of the venture. Defendant states that four of the houses were purchased by Mr. Azulay from Ziv Complex pursuant to mortgage financing and the other ten houses were sold by Ziv Complex to Matanah for \$3,500,000. Plaintiff claims that all of the sales were made without his knowledge and consent and he seeks to set aside the sales as fraudulent and has filed the subject Notices of Pendency on the properties that are the subject of this action. AZulay argues that the properties were never owned by the plaintiff in his individual capacity but only as a member of a

limited liability company. Counsel argues that even if the plaintiff is a member of the LLC he only has a membership interest in the LLC and does not have a personal interest in the specific property. Counsel contends, therefore, that as the judgment would not affect title to or the possession, use, or enjoyment of the real property, that the notices of pendency should not be extended.

Counsel for co-defendant Matanah M.H. LLC, also argues in opposition to the motion to extend the duration of the 14 notices of pendency filed herein. Counsel asserts that plaintiff claims originate from his relationship with Azulay and Ziv Complex and as such he never maintained an ownership interest in the subject premises. Counsel argues that the dispute between plaintiff and the defendants has no basis in the real estate itself but rather in the proceeds that Azulay and Ziv may have realized in the sale of the real estate.

In opposition to the cross-motion plaintiff asserts that defendants made a prior identical application to cancel the lis pendens that was denied in this court's order dated January 4, 2013.

Upon review and consideration of the plaintiff's motion to extend the notices of pendency, defendant's cross-motion and affirmation in opposition and plaintiff's reply thereto, this court finds as follows:

In a prior motion for summary judgment made by defendant Matanah M.H., LLC, said defendant argued that as Malul has no personal interest or valid claim against the properties, he had no standing to file a lis pendens. However, this court addressed the issue in its decision dated January 4, 2013 holding that:

"the pleadings sufficiently plead a cause of action for breach of fiduciary duty, constructive trust, unjust enrichment and fraud. Further, as the alleged fraudulent conveyance is based upon the improper transfer of real property to Matanah, in breach of a fiduciary relationship, and as the sale affects the title to the properties, the cause of action for unjust enrichment and constructive trust are also sustained and defendant's motion for an order cancelling the notices of pendency is denied"

Thus, the issue of the validity of the notices of pendency issue has been previously raised before this Court and this court has previously determined that the notices of pendency were validly imposed (see Lehman v North Greenwich Landscaping, LLC, 65 AD3d 1293[2d Dept. 2009]; Hampton Val. Farms, Inc. v Flower &

Medalie, 40 AD3d 699 [2d Dept. 2007][the doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding and applies to determinations which were necessarily resolved on the merits in the prior order]).

Accordingly, for all of the above stated reasons it is hereby,

ORDERED, that the defendant's cross-motion to cancel the notices of pendency filed on March 3, 2010 is denied and it is further,

ORDERED, that as the plaintiff as shown good cause, the plaintiff's motion to extend the notices of pendency dated March 2, 2010 and filed March 3, 2010 against Maimon Ziv Azulay and against Matanah M.H., LLC on the 14 properties at Block 13693 Lots 1,3, 4-5 in the block index for the County of Queens, City of New York (also known as 147-25, - 27, -29, and -31 Hook Creek Boulevard, Queens, New York 11432) and against Matanah M.H., LLC and the premises at Block 13693, Lots 7-9, 11-12 and 14-18 (also known as 147-35, -37, -39, -41, - 43, -45, -47, -49, -51 and -53 Hook Creek Boulevard, Queens County New York 11432), shall be extended pursuant to CPLR 6513 for an additional period commencing March 3, 2013 and the Clerk is directed to file this order against said block and lots.

Dated: June 4, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.