

Fortunato v Fortunato
2013 NY Slip Op 32674(U)
October 24, 2013
Sup Ct, Kings County
Docket Number: 501568/2013
Judge: Karen B. Rothenberg
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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18nd day of October, 2013

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

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RALPH FORTUNATO,
Plaintiff,

- against -

Index No. 501568/13

GEORGE FORTUNATO and JACQUELINE FORTUNATO,
Defendants.

-----X

The following papers numbered 1 to 13 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-6, 7-8 _____
Opposing Affidavits (Affirmations) _____	9-12 _____
Reply Affidavits (Affirmations) _____	13 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Ralph Fortunato (plaintiff) moves, by order to show cause, for an order: (1) pursuant CPLR 6311, to stay the holdover proceeding, entitled *George Fortunato et al. v Ralph Fortunato et al.* (Index No. 98699/13), currently

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pending in the Civil Court of the City of New York, Kings County, and enjoining defendant George Fortunato (Mr. Fortunato) and defendant Jacqueline Fortunato, as well as anyone acting on their behalf, from prosecuting the holdover proceeding or taking any steps to terminate plaintiff's tenancy, and (2) pursuant to CPLR 602 (b), consolidating the holdover proceeding with the instant action. Defendants cross-move, pursuant to CPLR 3211 (a) (1), (2) and (7), to dismiss plaintiff's complaint. Defendants also move, pursuant to 22 NYCRR 130-1.1, CPLR 8303-a (a), and Judiciary Law § 487 (1), for sanctions against plaintiff and/or his attorney for instituting, continuing and declining to withdraw the underlying "frivolous action."

Plaintiff, who is the biological son of defendants, commenced this action for a constructive trust on the property located at 2378 National Drive in Brooklyn, New York (the Property). Defendants are the owners of the Property. According to his affidavit in support of the order to show cause, plaintiff alleges that in or around 1985, defendants purchased three properties in the Mill Basin section of Brooklyn, with the plan that each of the three Fortunato children would have his or her own property in the future. Plaintiff maintains that defendants held the houses "in trust" for each of the children.

Plaintiff states that he has lived in the Property with his wife since 2009. Plaintiff also maintains that Mr. Fortunato repeatedly informed him that: "this house is yours," and "I bought this house for you." According to plaintiff, Mr. Fortunato repeatedly told plaintiff that the Property could not "legally" be put into plaintiff's name because plaintiff had a money judgment entered against him stemming from a civil action in 1999, and if

the Property were transferred to plaintiff, the judgment creditor would be able to enforce the judgment and take the Property away.

Plaintiff alleges that pursuant to a financial arrangement that he had with Mr. Fortunato, he made numerous home equity and mortgage payments on the Property. Specifically, plaintiff states that from January 2011 through May 2012, he and his wife made regular monthly payments toward a Signature Bank home equity line which defendants took out on the Property, as well as toward a subsequent mortgage defendants took on the property with Bank of America (BOA).¹ In this regard, plaintiff states that he made payments directly to Signature Bank, BOA, and that he also made payments via check or cash directly to Mr. Fortunato. With respect to plaintiff's payments to Mr. Fortunato, plaintiff alleges that he did not receive or request any form of a receipt based on their close relationship. In support, plaintiff attaches copies of checks purportedly made toward repayment of the mortgage.

In addition to making mortgage payments, plaintiff alleges that he paid for substantial renovations to the Property, and also engaged the help of a real estate broker to list the Property for sale. In support, plaintiff submits receipts for renovation of the property in 2009 and 2010. According to plaintiff, he was also responsible for all repairs to the Property, and for renting a portion of the Property to tenants. Plaintiff also alleges that in March 2012, pursuant to Mr. Fortunato's instructions, he listed the Property for

¹According to his affidavit, the equity line was originally in the name of defendants. However, sometime thereafter the names on the account included plaintiff's name so as to permit access to the home equity account.

sale with a real estate broker. According to plaintiff, Mr. Fortunato informed plaintiff that once the Property sold, Mr. Fortunato would give plaintiff one million dollars toward repayment of plaintiff's interest in the Property.

According to plaintiff's affidavit, since the beginning of 2012, plaintiff and Mr. Fortunato have had an increasingly strained relationship. Specifically, plaintiff avers that the relationship deteriorated over Mr. Fortunato's alleged adulterous behavior towards Jacqueline Fortunato after she was diagnosed with cancer.

Plaintiff further alleges that during the summer of 2012, defendants' attorney, Michael O'Rourke, contacted plaintiff and offered money to buy plaintiff "out of his interest" in the Property (defendants' proposal). In support, plaintiff attaches the affidavit of his wife, Rosalee Favuzza, wherein she attests to receiving a phone call from Mr. O'Rourke making this offer, and attaches two letters from Mr. O'Rourke to plaintiff, dated August 7, 2012, and August 19, 2012,² offering to buy plaintiff's interest in the Property.

In moving for a preliminary injunction, plaintiff maintains that: (1) he has a likelihood of success of the merits; (2) he faces the prospect of possible injury if the injunction is withheld; and (3) a balance of the equities are in his favor. First, plaintiff argues that he will succeed on his cause of action for a constructive trust because, as

²As a threshold matter, the letters are inadmissible because the statements made therein constitute an offer to compromise by defendants' attorney (CPLR 4547). CPLR 4547 provides, in pertinent part, that "[e]vidence of . . . furnishing, or offering or promising to furnish . . . any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages."

defendants' son, he had a confidential and fiduciary relationship with defendants. Plaintiff also maintains that Mr. Fortunato repeatedly promised him that the Property "was his" and that defendants' proposal to "buy plaintiff out" of his interest in the Property demonstrates defendants' recognition that he is the true beneficial owner of the house.

Defendants' Cross Motion

As a threshold issue, defendants move to dismiss the complaint for lack of personal jurisdiction.³ Defendants contend that service was deficient because plaintiff's process server failed to make any significant attempts to serve them personally, and instead attempted service upon them by "nail and mail" under CPLR 308 (4).

On the merits, defendants argue that plaintiff's complaint must be dismissed based upon documentary evidence. In support, defendants attach a copy of the deed to the Property, recorded in 1985, listing only defendants as the Property owners. Defendants also maintain that they were solely responsible for the Signature Bank Home Equity loan and subsequent BOA mortgage. Defendants attach copies of loan documents from Signature Bank and BOA to demonstrate that plaintiff's name is conspicuously absent on both documents, and contend that plaintiff's allegation that he and defendants jointly took a home equity line and a second mortgage is patently false. Further, defendants attach the affidavit of Sal Monaco, Senior Vice President of the Signature Bank Branch in question.

³The Court notes that defendants erroneously cite to CPLR 3211 (a) (2) rather than the appropriate section, CPLR 3211 (a) (8).

Mr. Monaco states that plaintiff never made any loan payments, or had any obligation to pay the home equity loan. Defendants also attach copies of checks and wire transfers as evidence that they made the loan payments. Defendants state that they satisfied the \$50,000 Signature Bank home equity loan, and have paid \$95,065.60 toward the \$135,000 BOA loan, without any contribution from plaintiff.

Defendants further state that they held a separate Signature Bank checking account to which plaintiff had access. Defendants refer to Mr. Monaco's affidavit wherein he states that plaintiff did not deposit any money into the checking account. In addition, defendants contend that the court should disregard copies of the checks attached to plaintiff's order to show cause, which allegedly show that plaintiff and his wife made payments with respect to the Property, because: (1) they are not authenticated and (2) several copies of the checks are attached without endorsement on the back, offering no proof that the checks were deposited or cashed.

Defendants also argue that they have always paid, and continue to pay, real estate taxes, insurance, water and sewer bills in connection with the Property. In support, they attach New York City Department of Finance statements, along with cancelled checks for payments of real estate taxes on the premises. Defendants also submit rent receipts from former tenants they had removed from the Property (who had paid \$3,000 in rental income), in order to encourage their son to seek gainful employment.

Defendants also refute plaintiff's assertion that they purchased and kept "in trust" three houses for each of their three children. Defendants argue that they actually purchased

four, rather than three properties in the Mill Basin area for investment purposes. In support, defendants attach a copy of the deeds to the four properties. Defendants state that plaintiff's contention is further contradicted by the fact that they sold three of the properties in 1987, 1997 and 1998, respectively.

In addition to seeking dismissal of the complaint based on documentary evidence, defendants argue that plaintiff fails to set forth a prima facie case for the imposition of a constructive trust. According to defendants, plaintiff has failed to establish that there was a transfer in reliance upon Mr. Fortunato's promise. Moreover, defendants argue that plaintiff has failed to demonstrate that they were unjustly enriched. Defendants contend that plaintiff's alleged expenditures with regard to the Property are insufficient to establish an equitable interest in the Property. Moreover, they state that plaintiff only made a minimal investment in the Property, which could be considered rent for his personal use of the Property. Defendants also point out that any investment made by plaintiff was significantly less than the rental income defendants would have received for the Property over the time period that plaintiff and his wife lived there.

Defendants also argue that the complaint should be dismissed because plaintiff's affidavit in support of the order to show cause demonstrates unclean hands. Specifically, defendants note that plaintiff's affidavit states that: (1) Mr. Fortunato repeatedly informed plaintiff that the Property could not be legally transferred to plaintiff because of the money judgment that had been entered against him, and that (2) plaintiff never questioned Mr. Fortunato's reasoning for wanting to keep the Property in defendants' name. Defendants

also point out that plaintiff admitted to renting a portion of the one-family Property to tenants while plaintiff resided in the remainder of the Property. According to defendants, plaintiff failed to report any rental income to any local, state or federal authorities during this time period, which is further indicia of unclean hands.

Finally, defendants seek to impose sanctions and costs against plaintiff and/or plaintiff's counsel for filing a frivolous action. Specifically, defendants argue that plaintiff and his counsel refuse to withdraw the action despite several letters from plaintiff's attorney which demonstrate that this action is without merit.

Discussion

Defendants' Cross Motion⁴

Lack of Jurisdiction

When a defendant moves to dismiss a complaint for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8), a plaintiff need only present a prima facie showing that such jurisdiction exists (*Lang v Wycoff Hgts Med. Ctr.*, 55 AD3d 793 [2008]). "Nail and mail" service under CPLR 308 (4) may be used only where personal service cannot be effected by the use of "due diligence" (*see generally Steltzer v Easton*, 131 AD2d 833 [1987]). What constitutes "due diligence" is determined on a case by case basis, with a focus on the quality of the attempts (*McSorley v Spear*, 50 AD3d 652, 653 [2008], *lv denied*, 10 NY3d 715 [2008]).

⁴Defendants previously submitted a motion to dismiss in lieu of an answer to plaintiff's complaint. The court considers the arguments set forth in both the motion to dismiss and the cross-motion to dismiss the complaint.

The court finds that plaintiff made significant attempts to serve defendants personally before serving defendants by “nail and mail.” Due diligence was established on the basis of three attempts, on three different weekdays, when the process server attempted to serve defendants at their residence. According to the affidavits of the licensed process server, he unsuccessfully attempted personal service on defendants at their home address on April 5, 2013 at 7:05 P.M., April 11, 2013 at 3:16 P.M. and on April 12, 2013 at 9:47 A.M. With respect to attempted service on April 11, the affidavit indicates that the process server “spoke with Jane Doe who was in the garage at the aforementioned address, she confirmed that defendant resides at address, but closed garage and refused to accept service.” Subsequently, the process server served upon defendants the “Summons & Verified Complaint” and the “Notice Regarding Availability of Electronic Filing” by affixing the documents to the main entrance door of the Property on April 12, 2013.

The affidavits of the process server reflect that a genuine inquiry about defendants’ whereabouts was made. Indeed, the process server ascertained Mr. Fortunato’s place of business and attempted service of the summons and complaint was also made there (*cf. Serraro v Staropoli*, 94 AD3d 1083 [2012]). Specifically, the process server attempted service at Mr. Fortunato’s place of employ on April 16, 2013 at 1:22 P.M. where he served the documents to Helen Doe, “who refused to state her surname, as Co-Worker.”

Failure to State a Cause of Action/ Documentary Evidence

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the sole criterion is whether the pleading states a cause of action (*Weiner v Lenox*

Hill Hospital, 193 AD2d 380 [1993]. The pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference . . ." (*Jacobs v Macy's East, Inc.*, 262 AD2d 607 [2005]). However, bare legal conclusions as well as factual claims flatly contradicted by the records are not entitled to any such consideration (see *Morone v Morone*, 50 NY2d 481 [1980]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginsburg*, 43 NY2d 268, 275 [1977]). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (see *Guggenheimer v Ginsburg*, *supra*; Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C 3211:25 at 39).

A party may move to dismiss an action if "a defense is founded upon documentary evidence." (CPLR 3211[a] [1]). To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence submitted by defendant must be such that it resolves all factual issues as matter of law, and conclusively disposes of plaintiff's claim (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; see also *Vitarelle v Vitarelle*, 65 AD3d 1034 [2009]).

With respect to constructive trusts, it is well settled that "[a] constructive trust is an equitable remedy, and 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" (*Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688, 691 [2012] [internal quotation marks and citations omitted]; see also *Kilkenny v Kilkenny*, 54 AD3d 816 [2008]). To establish a

constructive trust upon real property, a plaintiff must prove (1) a confidential or fiduciary relationship; (2) a promise; (3) transfer in reliance thereon; and (4) unjust enrichment (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]). Where the party has no actual prior interest in the property, he or she will be "required to show that an equitable interest developed through the expenditure of money, labor and time in the property" (*Marini v Lombardo*, 79 AD3d 932, 934 [2010])⁵.

Here, while plaintiff, as defendants' son, makes out a confidential relationship (see *Guarino v North Country Mtge. Banking Corp.*, 79 AD3d 805 [2010]), he fails to show a "legally cognizable transfer in reliance" on any promise by defendants or unjust enrichment by the defendants (*Doxey v Glen Cove Community Dev. Agency*, 28 AD3d 511 [2d Dept 2005]). Plaintiff, in his affidavit, states that he and his wife made mortgage payments, paid homeowners' insurance and utility bills and spent significant money for renovations. As to the cost of renovations, plaintiff alleges that he spent over \$63,000 to renovate and remodel the home. Plaintiff admits, however, that the funds for the renovation came from the home equity loan, taken out by defendants. And, while he asserts in his affidavit that he had a financial arrangement with the defendants to make payments towards that home equity loan, he does not state whether he actually made any such payments and does not submit any canceled checks or other documents in regard

⁵ Although plaintiff alleges that the Property was purchased by the defendants and held in trust for him, the deed to the Property, annexed to defendant's cross-motion, is in defendants' names alone. Plaintiff does not allege the existence of any trust agreement or other documents purporting to demonstrate his ownership interest.

thereto. Furthermore, although plaintiff alleges that his name was later added on to the home equity line of credit, defendants' evidence demonstrates that the loan was always solely in their names. The affidavit of Sal Monaco, Senior Vice President of the Signature Bank branch where the home equity loan originated states that the application for the home equity loan was made on October 27, 2009 by George and Jacqueline Fortunato and that the loan was later satisfied by them on or about May 24, 2012. Mr. Monaco further states that plaintiff was never a party to the loan, had no obligation on the loan, and did not make any payments to the bank in regard to this loan.

Plaintiff also asserts that in 2011, defendants took out a mortgage on the Property with BOA for the purpose of paying off the home equity loan and for additional repairs needed on the house. And, that from January, 2011 through May, 2012 he and his wife made regular payments towards repayment of that mortgage. Plaintiff submits copies of a number of checks, some of which do not include the backs, totaling approximately \$24,000. Plaintiff also claims that he made a number of cash payments to defendants towards repayment of the mortgage but did not request receipts due to the familial relationship. In addition to the mortgage payments, plaintiff submits copies of checks made out for utilities and insurance from 2009 through 2012, totaling a little over \$19,000. These expenditures, alone, however, do not demonstrate that an equitable interest developed necessary for the imposition of a constructive trust (see *Rock v Rock*, 100 AD3d 614 [2d Dept 2012]). Proof of payments for the mortgage, utilities, upkeep, etc., have been held to constitute rent for use of the premises (see *Marini v Lombardo*, 79

AD3d 932 [2010]). And, even if plaintiff incurred some expenses for the renovation and remodeling of the property, such improvements, made for the benefit of plaintiff and his wife, do not satisfy the requirement of “a transfer in reliance on a promise”. (see *Henning v Henning*, 103 AD3d 778 [2d Dept. 2013]).

Lastly, the Court finds that plaintiff has failed to sufficiently allege unjust enrichment. To establish unjust enrichment, a party must demonstrate 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” (*Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]). Unjust enrichment occurs when in “equity and good conscience[,]” a party obtains or possesses value that rightfully belongs, to another (see *Parsa v State of New York*, 64 NY2d 143, 148 [1984]). The court does not find that defendants were unjustly enriched by plaintiff improving the Property. The improvements made benefitted the plaintiff and his wife who have lived there for the past five years ((see *Marini v Lombardo*, supra). Furthermore, the defendants’ documentary evidence demonstrates that the home equity loan, which funded the renovations, was repaid by defendants.

Thus, defendants’ motion to dismiss plaintiff’s complaint is granted.

Plaintiff’s Order to Show Cause

Preliminary Injunction

In light of the court’s dismissal of plaintiff’s action, the plaintiff’s request for a preliminary injunction is denied.

Consolidation

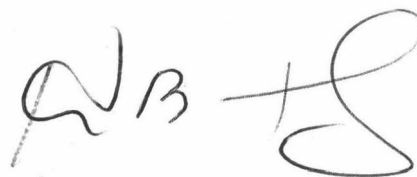
Further, as the plaintiff's complaint is dismissed, the plaintiff's motion for consolidation is denied as moot.

Defendants' Request for Sanctions

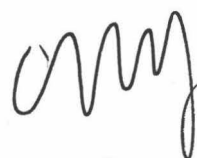
Lastly, defendants' request for sanctions and costs is denied. Defendants have not alleged sufficient facts showing that plaintiff or his attorney engaged in frivolous conduct within the meaning of 22 NYCRR § 130-1.1 (c) (1-3).

This constitutes the decision and order of the Court.

E N T E R,



Karen B. Rothenberg
J. S. Justice, Supreme Court



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