

**Villatoro v All Phase Prop. Dev., Inc.**

2014 NY Slip Op 33374(U)

December 23, 2014

Supreme Court, Suffolk County

Docket Number: 12-33222

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY

**PRESENT:**

Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme Court

MOTION DATE 8-7-13 (003)  
MOTION DATE 11-6-13 (004)  
ADJ. DATE 6-11-14  
Mot. Seq. # 003 - MD  
# 004 - MD

-----X  
DIANA VILLATORO and 1976  
MANAGEMENT CORP.,

Plaintiffs,

- against -

ALL PHASE PROPERTY DEVELOPMENT,  
INC., RANK TORRES, MOSES KHOURY and  
ANDREW NEAL, ESQ.,

Defendants.  
-----X

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Upon the following papers numbered 1 to 39 read on this motion to dismiss and order to show cause for preliminary injunction; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12, 24 - 30; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 13 - 16, 17 - 19, 31 - 35; Replying Affidavits and supporting papers 22 - 23, 36 - 39; Other memorandum of law 20 - 21; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by the defendants All Phase Property Development, Inc., Frank Torres and Moses Khoury for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against them, and pursuant to CPLR 6514(a) cancelling the notice of pendency filed in connection with this action, is denied; and it is further

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**ORDERED** that the motion brought on by order to show cause by the plaintiffs for a preliminary injunction restraining the defendants All Phase Property Development, Inc. and Moses Khoury from maintaining a certain holdover proceeding now pending in the Fifth District Court, Suffolk County, is denied as academic.

This is an action to impose a constructive trust and to recover damages regarding a real estate transaction between the parties. In their amended complaint the plaintiffs allege that the plaintiff Diana Villatoro (Villatoro) had a confidential relationship with the individual movants herein, that said defendants agreed to reconvey certain real property back to her after it was transferred to said defendants' corporation, and that the defendant Andrew Neal, Esq. acted in concert with the movants to defraud the plaintiffs and deprive them of the net proceeds of the transaction. In their amended complaint, the plaintiffs set forth causes of action for constructive trust, unjust enrichment, and fraud.

The defendants All Phase Property Development, Inc., Frank Torres (Torres) and Moses Khoury (Khoury) (collectively APPD) now move for an order dismissing the amended complaint against them pursuant to CPLR 3211(a)(1) and (a)(7). Pursuant to CPLR 3211(a)(1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Peter Williams Enterprises, Inc. v New York State Urban Dev. Corp.*, 90 AD3d 1007, 935 NYS2d 624 [2d Dept 2011]). In support of the motion, APPD submits the affirmation of their attorney, the contract of sale and other documents relating to the subject real estate transaction, the original and amended complaint, and a copy of an earlier cross motion filed by APPD.

When considering a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are to be accepted as true and accorded the benefit of every possible favorable inference (*see Leon v Martinez, supra; Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]). The Court finds that the documents do not conclusively resolve all factual issues, neither do they establish a defense as a matter of law.

In their complaint, the plaintiffs allege that the defendant Andrew Neal, Esq. (Neal) acted as their attorney in the sale of certain real property to APPD, that the proceeds of the sale were delivered to Neal, and that Neal paid said proceeds over to APPD. They further allege that the closing statement produced by Neal indicates the payoff at closing of a mortgage in the amount of \$73,319.00 when there were no mortgages or liens on the property.

The documents do not negate Villatoro's allegations that this transaction was based on an oral promise to reconvey title to the plaintiffs. In addition, the documents reveal that there are factual issues regarding the plaintiffs allegations that the defendants engaged in fraud and were unjustly enriched herein. By way of example only, the undated contract of sale between the parties (Contract) indicates that the purchaser placed the sum of \$29,000 in escrow with the seller's attorney. However, the Contract requires the seller's attorney to sign the Contract indicating his or her receipt of the down payment and acceptance of the obligation to act as escrowee. The place for such a signature is blank. It is unclear if anyone actually deposited a down payment in this transaction. The bank attorney's loan settlement

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statement submitted by APPD indicates payment of \$53,524.25 to Neal, as attorney, and various other payments which are unexplained. APPD fails to submit any documentation which would indicate which payments were for the seller's credit in the transaction and which payments were for APPD's credit herein. Accordingly, that branch of APPD's motion which seeks to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied.

In any event, APPD fails to submit an affidavit from someone with personal knowledge who denies the allegation that APPD received the net proceeds of the transaction, and the plaintiffs have submitted documents in opposition to this branch of APPD's motion which show that there are factual issues to be resolved herein. The agreement retaining Neal as seller's attorney is dated the same day as the closing of title under the Contract, and the closing statement produced by Neal indicates the down payment paid by the purchaser to be \$19,000, not the \$29,000 set forth in the Contract. Said closing statement also indicates that the seller paid the purchaser's title charges, and that the total title charges paid equals \$16,373.15. A review of the closing checks submitted by APPD reveals that the check actually issued to the title company was for \$12,510. More importantly, said closing statement indicates that Neal issued a "payoff of mortgage" in the amount of \$73,319.01, without indicating to whom said "payoff" was issued.

The Court now turns to the second branch of APPD's motion. Pursuant to CPLR 3211(a)(7), the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez*, *supra*; *Thomas v Lasalle Bank N. A.*, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; *Scoyni v Chabowski*, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*Chan Ming v Chui Pak Hoi*, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

A review of the complaint reveals that the plaintiffs have adequately pled causes of action for constructive trust, unjust enrichment, and fraud. To obtain the equitable remedy of a constructive trust, a plaintiff must establish the following elements: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance of such promise, and (4) unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119, 386 NYS2d 72 [1976]; *Rowe v Kingston*, 94 AD3d 852, 942 NYS2d 161 [2d Dept 2012]; *Watson v Pascal*, 65 AD3d 1333, 886 NYS2d 440 [2d Dept 2009]). These elements, however, are not to be applied rigidly, as the purpose of a constructive trust is to prevent unjust enrichment (*Simonds v Simonds*, 45 NY2d 233, 241, 408 NYS2d 359 [1978]; *see Rowe v Kingston*, *supra*; *Nastasi v Nastasi*, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial

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interest equity converts him to a trustee” (*Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386, 122 NE 378 [1919]).

The gravamen of APPD’s contentions that the complaint should be dismissed is that the alleged promise to reconvey violates the statute of frauds, and that the plaintiffs have not sufficiently set forth the details of the alleged confidential relationships with Torres and Khoury. It is well settled that the statute of frauds was not a defense to a cause of action to impose a constructive trust on real property (*Mackenzie v Croce*, 54 AD3d 825, 864 NYS2d 474 [2d Dept 2008]; *Vanasco v Angiolelli*, 97 AD2d 462, 467 NYS2d 434 [2d Dept 1983]). In addition, the plaintiffs have set forth sufficient factual information to apprise APPD of the alleged nature of the relationships of the parties. Here, the plaintiffs have sufficiently pled a cause of action for constructive trust alleging a confidential relationship, a promise, transfer in reliance and unjust enrichment.

Further, to succeed on a claim for unjust enrichment, a plaintiff must establish that the defendant was enriched at the plaintiff’s expense, and that “it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, 334 NYS2d 388 [1972]; see *Whitman Realty Group v Galano*, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]). Recovery for unjust enrichment is barred if there is a valid and enforceable contract between the parties (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 521 NYS2d 653 [1987]; *Whitman Realty Group v Galano*, *supra*). However, a party to a contract may be liable in tort when it has “breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations” (*New York Univ. v Continental Ins. Co.*, 87 NY2d at 316, 639 NYS2d at 287; see *North Shore Bottling Co. v C. Schmidt & Sons*, 22 NY2d 171, 292 NYS2d 86 [1968]). The legal duty must arise from circumstances “extraneous to, and not constituting the elements of, the contract, although it may be connected with and dependant on the contract” (*Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d at 389, 521 NYS2d at 657; see *Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382 [1882]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 683 NYS2d 24 [1st Dept 1998]).

Here, APPD seeks to dismiss the plaintiffs’ causes of action for fraud on the grounds that they are, in essence, causes of action for breach of contract, and that the plaintiffs have not adequately pled fraud. Bare allegations of fraud without any allegation of the details constituting the wrong are not sufficient to sustain such a cause of action (CPLR 3016[b]; see *Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 754 NYS2d 899 [2d Dept 2003]; *Gill v Caribbean Home Remodeling*, 73 AD2d 609, 422 NYS2d 448 [2d Dept 1979]; *Biggar v Buteau*, 51 AD2d 601, 377 NYS2d 788 [3d Dept 1976]).

In opposition to the motion, the plaintiffs have submitted Villatoro’s affidavit, and the retainer agreement and closing statement prepared by Neal. In her affidavit, Villatoro swears that Neal was “provided to me as my attorney at the closing” of this transfer, that she believes that Neal transferred the proceeds of the transfer to APPD, and that Neal acted in concert with Torres and Khoury to deprive her of the proceeds of the transfer. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (see *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *DaCosta v Trade-Winds Envtl. Restoration, Inc.*, 61 AD3d 627, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support

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of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Thomas v Lasalle Bank N. A.*, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]). Dismissal under CPLR 3211 is not warranted unless it is established “conclusively that the plaintiff has no cause of action” (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010] quoting *Lawrence v Graubard Miller*, 11 NY3d 588, 873 NYS2d 517 [2008]; *Rovello v Orofino Realty Co.*, *supra*).

Here, APPD has failed to submit an affidavit from someone with personal knowledge as to the allegations set forth in the complaint and Villatoro’s affidavit. In fact, APPD’s submission and reply do not address the issues regarding the distribution of the proceeds of the transfer, the amount actually paid for the transfer, or the allegation that Neal was provided to Villatoro on the day of the closing of title in this transaction. APPD has failed to conclusively establish that the plaintiffs do not have causes of action for fraud in this matter. In addition, the plaintiffs have set forth sufficient factual allegations to place APPD on notice as to the allegations of fraud against them, and to indicate that the allegations of fraud against APPD, though connected to the Contract, are extraneous thereto. Accordingly, that branch of APPD’s motion which seeks to dismiss the complaint is denied.

The Court now turns to that branch of APPD’s motion which seeks to cancel the notice of pendency filed in connection with this action on October 25, 2012 pursuant to CPLR 6514(a). A notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (CPLR 6501; *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320, 486 NYS2d 877 [1984]; *Nastasi v Nastasi*, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). Cancellation is mandatory where the action has been “settled, discontinued or abated” (CPLR 6514[a]). Inasmuch as the judgment demanded in the plaintiffs’ action would affect the title to APPD’s real property, a notice of pendency was properly filed (CPLR 6501; *Amev Capital Corp. v Kirk*, 172 AD2d 714, 570 NYS2d 970 [2d Dept 1991]). As the matter has not been settled, discontinued or abated, mandatory cancellation pursuant to CPLR 6514 (a) is inapplicable. Accordingly, that branch of APPD’s motion which seeks to cancel the notice of pendency filed in this action is denied, and the motion in its entirety is denied.

The plaintiffs now move by order to show cause for a preliminary injunction restraining the defendants All Phase Property Development, Inc. and Moses Khoury from maintaining a holdover proceeding against them now pending in the Landlord/Tenant Part, Fifth District Court, Suffolk County, under Index No. LT-2273-13/IS. The Court takes judicial notice that said action was marked discontinued on October 2, 2014. Accordingly, the motion is denied as academic.

Dated: December 23, 2014

  
HON. JEFFREY ARLEN SPINNER

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION