

Hibbert v Gallegos
2014 NY Slip Op 33426(U)
November 20, 2014
Supreme Court, Kings County
Docket Number: 501428/14
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

RYAN W. HIBBERT, an individual,

Plaintiff,

-against-

MICHAEL GALLEGOS and "Jane Doe Gallegos,"
LEONARD BURNS and "Jane Doe Burns," "John
Does I-V" Fictitious defendants); "Jane Does I-V"
(fictitious defendants); "ABC Corporation I-V"
(fictitious defendants); and "XYZ Partnership I-V"
(Fictitious defendants),

Defendants.

DECISION / ORDER

Index No. 501428/14
Motion Seq. No. 2
Date Submitted: 11/6/14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for a default judgment against defendant Michael Gallegos.

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1-5</u>
Supplemental Attorney Affirmation Annexed	<u>6-10</u>
Answering Affidavits	_____
Reply Affidavits	_____
Other: _____	_____

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff moves for a default judgment against defendant Michael Gallegos, and either a judgment for \$200,000 or an order permitting plaintiff to proceed to inquest for the assessment of damages. For the reasons set forth herein, the motion is denied despite the absence of opposition for failing to make out a prima facie case. *See Vega v Restani Constr. Corp.* 18 NY 3d 499 (2012).

In this action, defendants are alleged to have taken plaintiff's money pursuant to an

oral partnership agreement to purchase a parcel of real estate, but did not put his name on the title as orally promised.

The complaint alleges that plaintiff tendered \$200,000 in April of 2007, but that unbeknownst to him, defendants had already purchased the property and they never amended the deed to add his name to it. There are six causes of action set forth in the complaint: to quiet title (RPL § 1515); for his share of a tenancy in common (RPAPL § 1201); breach of contract; declaratory judgment; unjust enrichment; and fraud in the inducement. There is no claim for a constructive trust, or for conversion. A Notice of Pendency was filed against the property by plaintiff when this action was commenced.

In support of the motion, plaintiff's counsel submits an affirmation which is solely with regard to the defendant's default, and does not specify which cause of action the motion is addressed to.

The exhibits annexed to the motion are: 1) a copy of the affidavit of service on defendant Gallegos, which was made on March 21, 2014 by service on a person of suitable age and discretion, followed by a mailing; 2) the summons and complaint; 3) the notice of pendency as regards the property, 921 Gates Avenue, Brooklyn, New York, 4) an affidavit from plaintiff, notarized in Arizona, where plaintiff resides. Annexed to plaintiff's affidavit is a redacted bank statement from Wells Fargo Bank, for a period ending February 28, 2007, for a customer named "Scottsdale Land Aquisitions, LLC." Plaintiff's name is not on this statement. It does state, however, "Scottsdale Land Aquisitions LLC doing business as Choice Mortgage Lenders." The only entry which was not redacted seems to reflect an electronic transfer of \$200,000 to an account held by "Mikael A. Gallegos" at JP Morgan Chase.

In plaintiff's affidavit, he does not explain his relationship to Scottsdale Land

Aquisitions, LLC. He asserts that the oral agreement was made on or about December 14, 2006, between himself, defendant Gallegos and someone named Gerald Burns, who he states is now deceased. They agreed to purchase the property, renovate it and resell it. He references the bank statement as evidence of his contribution. He alleges that he was not aware that Gallegos and someone named Leonard Burns already owned the property, and did not learn of this until January 8, 2014. Finally, he claims Leonard Burns has refused to return his money to him.

The records on ACRIS indicate that Michael Gallegos and Leonard Burns took title to the property, a 4-family house, on December 14, 2006. The deed was recorded in August of 2007. The ACRIS records also reflect that the seller gave the buyers a purchase money mortgage for \$520,000 of the \$580,000 purchase price. They still own this property and the mortgage has not been refinanced.

Plaintiff's attorney received an e-mail from the e-file clerk inquiring why the motion was not served on co-defendant Leonard Burns, who had not recorded a consent to service by e-filing. He responded with a Supplemental Attorney Affirmation, dated August 28, 2014, which wasn't served on either defendant, but was requested by the clerk in the e-mail annexed thereto as Exhibit A.

The response to the clerk's inquiry is that defendant Burns was served by publication pursuant to an ex parte order, and, as he is in default, he is not entitled to notice of the motion.

Plaintiff has failed to establish all of the necessary elements of any of the six causes of action in the complaint. If in fact the transfer of funds to defendant Gallegos in 2007 was related to an agreement between plaintiff and Mr. Gallegos, the party who tendered the funds was an entity named "Scottsdale Land Acquisitions, LLC", and not plaintiff, and thus

plaintiff has failed to establish that he has standing to sue as the aggrieved party.

This shall constitute the Decision and Order of the Court.

Dated: November 20, 2014

ENTER:



Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

FILED
KANSAS COUNTY CLERK
2014 DEC 24 AM 8:02
