

Rabinowitz v Rabinowitz
2015 NY Slip Op 30421(U)
March 24, 2015
Supreme Court, New York County
Docket Number: 156058/13
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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SONDRA RABINOWITZ,

Plaintiff,

Index No.

-against-

156058/13

BRUCE RABINOWITZ,

Defendant.
-----x

DONNA MILLS, J. :

Plaintiff Sondra Rabinowitz moves for summary judgment on her ejectment cause of action and for an order dismissing the affirmative defenses and counterclaims in the answer.

Plaintiff is the owner of 143 shares of stock in the cooperative known as 111 Third Avenue Realty Corp. (111 Third Ave.), which entitles her to ownership rights to the proprietary lease for apartment 8J, located at 111 Third Avenue, New York, New York (premises). From the day of the purchase of the apartment, January 1, 1996, defendant Bruce Rabinowitz, plaintiff's son, has occupied the premises. Plaintiff seeks an ejectment order, removing defendant from the premises, on the ground that he has unlawfully withheld possession of the premises from plaintiff.

Since the commencement of this action, defendant has served a verified answer containing affirmative defenses and counterclaims, including constructive trust and unjust enrichment. Plaintiff has served a verified reply alleging affirmative defenses to the counterclaims, including failure to state a cause of action. The parties have thereafter served notices of deposition and other discovery demands. To date, no depositions have been held.

Plaintiff moves for an order for summary judgment on her ejectment claim. It is her

position that there are no material issues of fact requiring a trial, since she has a legitimate right of ownership to the premises, and defendant has no legal right to possession and no legal right to prevent her from taking possession.

Plaintiff moves to dismiss defendant's affirmative defenses and counterclaims, arguing that none of them can preclude her from taking possession of the premises. Defendant's affirmative defenses are: (1) failure to state a cause of action; (2) plaintiff's lack of good conscience; (3) the 30-day notice served on defendant is invalid; (4) unjust enrichment; (5) statute of limitations; (6) waiver; (7) accord and satisfaction; (8) laches; (9) unclean hands; (10) fraudulent inducement; (11) waiver; (12) the purchase was a gift to defendant; and (13) this suit is a retaliatory act. The counterclaims are: (1) constructive trust; (2) unjust enrichment; and (3) legal fees and disbursements.

Plaintiff seeks dismissal of the counterclaims on the ground of failure to state a claim. Plaintiff states that defendant's constructive trust counterclaim is insufficient as there was no transfer of a title or interest in reliance on a promise. Plaintiff specifically contends that defendant never paid any money to her. She claims that this undermines the unjust enrichment counterclaim as well.

Defendant opposes the motion, alleging issues of fact. He argues that the premises was purchased by his parents and that he was informed by them at the time that the premises was intended as a gift to him. Defendant states that he was to eventually receive a transfer of title from them. Defendant acknowledges the absence of a written agreement, but claims that he had indulged in various financial activities, such as maintenance and repair work, improvements to the premises and other work, in anticipation of a transfer.

Defendant submits copies of documents indicating that he has dutifully made repairs and maintenance payments, improvements, utility and insurance payments on the premises since his occupation. Although he has been living in the premises for years, apparently plaintiff never indicated any disapproval of his occupancy until recently. Although she maintained title to the premises, she has never physically occupied the premises for any extended period. Her primary house was outside of New York City, in Bellmore, New York.

Defendant states that this action is the result of friction between the parties over the sale of the Bellmore property, which occurred after the death of his father. Plaintiff became the Administratrix of her husband's estate and agreed to the sale of the Bellmore property. Defendant opposed this sale and brought legal actions to prevent it. Since this event, defendant argues that plaintiff has sought "retaliation," which includes the commencement of this ejectment action against him.

Defendant seeks the deposition testimony of some of his relatives, contending that their testimony would provide relevant proof regarding the contention that the purchase of the premises was intended to be for defendant's use and that this suit is retaliatory in nature. He argues that these nonparty witnesses are intimately familiar with the circumstances involving the purchase.

Defendant claims that granting summary judgment to plaintiff would be premature and would ignore the alleged complexity of this case. Moreover, he claims that the counterclaims in unjust enrichment and constructive trust must be considered, as this matter requires a balancing of the equities. Defendant maintains that since he has allegedly expended large sums of money for the interest of the premises, it would be unfair to grant plaintiff's motion. Defendant states

that plaintiff has not paid anything towards the expenses of the premises.

In addition, defendant avers that, since he made these payments in anticipation of receiving title to the premises, plaintiff should be estopped from seeking ejectment, at least not in the absence of the establishment of a constructive trust or some form of reimbursement towards him.

In reply, plaintiff argues that none of defendant's arguments can prevent the granting of her motion because it is acknowledged that she has title to the premises and that title has never been transferred. According to plaintiff, there is no agreement to transfer title, and, if an oral one could be disclosed, it would violate the statute of frauds, and be invalid.

Plaintiff cites *Carnivale v Carnivale*, (25 Misc 3d 878 [Queens County, Sup Ct 2009]), which she alleges to be on point with this case. In that case, the court analyzed the question of gift shares of a cooperative. The defendant lived for 18 years in an apartment and was aware that his father, the plaintiff, owned the stock of the cooperative and the lease to the premises. The plaintiff sought to evict his son, who moved for a preliminary injunction and argued that the premises was an actual gift from the plaintiff. In denying injunctive relief, the court stated that there was no evidence of a manifest intent by the plaintiff, such as a delivery of a deed, which would indicate a gift transaction to defendant. Plaintiff contends that this court should grant her motion pursuant to this case.

Plaintiff argues that the counterclaim for a constructive trust should be dismissed because defendant has failed to provide evidence of a transfer of title by defendant. Plaintiff also questions the validity of defendant's maintenance payments, claiming that he lived on the premises rent-free and that his capital improvement payments are not substantiated. Plaintiff

argues that whatever payments were expended by defendant were solely for his own benefit and that she was not “enriched” as a result.

In a surreply, defendant disputes the similarity of this case with *Carnivale*. In the *Carnivale* case, it was established that the plaintiff had openly and unambiguously repudiated any intent to offer the premises to the defendant as a gift. Defendant argues that here, there is at least an issue of fact as to whether plaintiff had intended to pass title to him in acknowledging the gift nature of the transaction.

As for the motion dismissing defendant’s defenses and counterclaims, defendant states the following: defendant’s defense of failure to state a cause of action should not be dismissed, because plaintiff has not demonstrated that she was not in possession of the premises, or that there was an unlawful ouster or seizure by defendant, since plaintiff was never in possession of the premises.

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues.” *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007). “The substantive law governing a case dictates what facts are material, and ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted].’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008).

Plaintiff moves for summary judgment on her ejectment claim. ““In order to maintain a cause of action to recover possession of real property, [a] plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully

ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession (citation omitted).” *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 (2d Dept 2009). For an ejectment claim under New York law, “a claimant must show that she has legal title to the property and was ousted or deprived of possession of the property (citation omitted).” *Stickler v Halevy*, 794 F Supp 2d 385, 403 (ED NY 2011). Ejectment is a remedy applicable to cooperatives as well. See *Nestor v McDowell*, 81 NY2d 410 (1993).

Plaintiff has shown that she maintains title to the cooperative and the proprietary lease. There has been no transfer of title to defendant, and defendant remains in possession of the premises. Plaintiff, who was not ousted from the premises, avers instead that she was denied access when defendant failed to respond to the notice sent by her. In his answer, defendant alleges that the notice was invalid so that there can be no ejectment.

While plaintiff raised arguments in her motion to dismiss the affirmative defenses, including the defense of invalid notice, defendant failed to respond in his opposition papers to any of those arguments. He only responded to plaintiff’s argument to dismiss the defense of failure to state a cause of action. However, defendant chose to respond more thoroughly, for the first time in his surreply, on the other affirmative defenses.

“[T]he function of a reply ... is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of [its] motion.” See *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 (1st Dept 1992). Plaintiff raised a new argument in her reply affirmation, compelling defendant to request a surreply, which was granted. Defendant used the opportunity of his surreply to respond to plaintiff’s motion to dismiss his affirmative defenses. However, defendant, in making a surreply, is limited to

responding to those issues that were first raised in plaintiff's reply, not those issues already raised in the earlier motion papers, which should have been made in his opposition papers. Therefore, he is precluded from responding to plaintiff's motion for dismissal of the affirmative defenses in his surreply, except for the defense of failure to state a cause of action. In this case, plaintiff has made out a prima facie case for ejectment, so that defense shall be dismissed.

“[T]o defeat the motion for summary relief, the opposing party must demonstrate disputed issues of fact sufficient to require a trial.” *Silverman v Perlbinde*r, 307 AD2d 230, 231 (1st Dept 2003). Defendant properly defended two of his counterclaims in his opposition to plaintiff's motion to dismiss and the court shall analyze them here. It is from this analysis that a triable issue of fact can be discerned.

In an effort to enjoin ejectment, defendant alleges that because he was informed by plaintiff, at the time of the premises's purchase, that the purchase was a gift to him, and that title would inevitably be transferred to him, he made financial commitments in anticipation of the title transfer. He alleges that the failure of the transfer is an equitable wrong and plaintiff has been unjustly enriched therefor. Defendant seeks relief in the form of a constructive trust.

In order to obtain a constructive trust, defendant must establish ““(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment (citation omitted).”” *Wachovia Sec., LLC v Joseph*, 56 AD3d 269, 271 (1st Dept 2008). It may be imposed where “property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest (internal quotation marks and citation omitted).” *Majer v Schmidt*, 169 AD2d 501, 502 (1st Dept 1991).

Plaintiff states that there was no valid promise to transfer title of the premises and that no transfer of property was made by defendant in reliance on the promise. Defendant avers in his papers that a constructive trust was an equitable remedy and that a promise, if proven, would be a valid one, even if it violated the statute of frauds.

Defendant also avers that there is sufficient proof affirming that expending sums of one's own money on the maintenance and improvement of property is a substitute for a transfer, if such efforts are in reliance on a promise. If plaintiff's motion is granted, defendant contends that she will be in possession of much improved property, of which plaintiff had made no attempt to improve. Defendant argues that this would constitute unjust enrichment on her part, as she would be benefitting from his past efforts. Thus, he considers a constructive trust to be an appropriate remedy for this particular situation.

Defendant is correct in his arguments. The interest in a cooperative apartment is considered a hybrid, consisting in shares of stock and a proprietary lease. The shares of stock are personal property, but the lease is regarded as an interest in real property. See *Matter of State of Tax Commn. v Shor*, 43 NY2d 151, 156 (1977). The lease would be an interest in real property for statute of frauds purposes. A constructive trust over real property can be imposed even in the absence of an underlying written agreement. See *Thomas v Thomas* 70 AD3d 588, 591 (1st Dept 2010). Also, a constructive trust can be imposed where the proponent has expended funds or effort in reliance on a promise. See *Moak v Raymor*, 28 AD3d 900, 902 (3d Dept 2006); *Lester v Zimmer*, 147 AD2d 340, 342 (1st Dept 1989). The question is whether defendant has demonstrated that an issue of fact concerning a valid agreement between the parties, and defendant's reliance on said agreement, exists, precluding summary judgment.

Defendant has submitted his affidavit and those of two of his relatives, one of whom is the wife of plaintiff's cousin, and another the daughter-in-law of plaintiff. The affidavits assert that plaintiff and her husband purchased the premises for plaintiff with the intention of providing a home for him. They all contend that defendant's parents expressed an intention to pass title of the premises to defendant, though they do not specifically state the time of the proposed transfer. Although hearsay evidence alone is not sufficient to defeat summary judgment, (*GTF Mktg., Inc. v Colonial Aluminum Sales*, 66 NY2d 965, 968 [1985]), defendant's opposition is also supported by his own affidavit.

Defendant has submitted documents intended to demonstrate the various expenditures he provided over the years of his occupation of the premises, which are not insubstantial. It is undisputed that he was and is the sole occupant of the premises. Defendant has argued that he intends to have his sister and aunt available as deposition witnesses to testify on his behalf in this action.

Regarding *Carnivale*, the court finds a distinction in that decision. First, *Carnivale* was a decision rendered post hearing by a judge who assessed the credibility of the witnesses. After assessing the evidence, the *Carnivale* court concluded that there was no evidence that plaintiff had ever professed an intent or assent to transfer title to or to bestow a gift to defendant with respect to the subject premises. In this case, there has been no hearing or trial, and the evidence is less conclusive. Moreover, the circumstances of this case are different, whereas defendant was allowed to make maintenance payments for years without objection from plaintiff or the cooperative, which apparently accepted his payments despite his lacking legal title to the premises.

Defendant has made out the elements of a constructive trust. There is a confidential relationship, namely that of mother and son. There is an alleged promise, namely plaintiff's promise to transfer title to the premises to defendant. Defendant's claim of expending time and effort to make improvements on the premises for a lengthy period of time constitutes a reliance on a promise, and a legally permissible substitute for an actual transfer. The unjust enrichment consists of plaintiff's benefitting from whatever improvements were made on the premises once she has acquired possession of the premises. This also relates to the second counterclaim, unjust enrichment, as well.

In assessing the evidence, the court shall deny summary judgment and allow defendant to present his side of the case. There exist a sufficient issue as to the possibility of defendant being entitled to equitable relief even though plaintiff has legally stated a prima facie claim for ejectment. Further discovery would clarify this matter and the fact that a conveyance was contemplated and expressed between the parties may thereafter be confirmed.

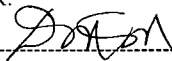
Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion for dismissal of the affirmative defenses and counterclaims in the answer is granted to the extent that the affirmative defenses are dismissed, and is otherwise denied.

DATED: 3-24-15

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.