

**Burns v Burns**

2016 NY Slip Op 32756(U)

November 17, 2016

Supreme Court, Kings County

Docket Number: 37327/07

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of November, 2016

P R E S E N T:  
HON. RICHARD VELASQUEZ  
Justice.

-----X  
LOUIS BURNS,  
Plaintiff,

-against-

STEPHANIE BURNS, GAIL DAVIS, a/k/a GALE DAVIS,  
MORTGAGE ELECTRONIC REGISTRATION SYSTEM,  
AND BANK OF AMERICA,  
Defendants.

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The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>
Plaintiff's Notice of Motion, Defendant's Notice of Cross-Motion Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5-6
Reply Affidavits (Affirmations)	7-8
Transcript of Defendant Stephanie Burns Depositions of April 16, 2015 and February 23, 2016	9, 10
Transcript of Plaintiff Louis Burns' Deposition, March 3, 2016	11
Transcript of Gail a/k/a/ Gayle Davis Deposition, January 20, 2016	12

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After oral argument and a review of the submissions in this matter, the Court finds as follows:

Defendant Stephanie Burns moves the Court for an Order dismissing the within proceeding in its entirety pursuant to CPLR §3211 (a)(7), CPLR §3016(b) and CPLR §3212(a).

Plaintiff cross-moves the Court for partial summary judgment granting judgment to the plaintiff and against defendant for Breach of Contract and for a hearing to assess damages; granting to the Plaintiff Louis Burns, a judgment against the Defendant Stephanie Burns, directing defendant to provide an accounting, and for a hearing to assess damages; granting to the Plaintiff partial summary judgment on the Plaintiff's action for constructive trust of premises known as 256 Decatur Street, Brooklyn, New York, and directing the defendant to execute a deed in favor of Plaintiff; and granting to the Plaintiff partial summary judgment on the Plaintiff's action for constructive trust of premises known as 198 Clarkson Avenue, and Directing the defendant to execute a deed in favor of the Plaintiff. Plaintiff also seeks attorneys' fees, costs and disbursement and punitive damages to the Plaintiff.

## Discussion

### *Defendants' Motion to Dismiss*

For reasons which will be set forth below, Defendant's motion for dismissal of the entirety of Plaintiff's complaint is hereby denied in its entirety. Dismissal of Plaintiff's complaint requires that Plaintiff has set forth no facts or claims which constitute a cause of action in its complaint. It is well settled that, as a general rule, "on a motion to dismiss the complaint for failure to state a cause of action under CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff." *Gruen v. County of Suffolk*, 187 A.D. 2d 560 (2<sup>nd</sup> Dept. 1992); see also *Rosen v. Watermill Dev. Corp.*, 1 AD3d 424, 425 (2<sup>nd</sup> Dept. 2003). "The Court must also accept the facts as alleged in the complaint and submissions in opposition to the motion as true and accord plaintiff the benefit of every possible favorable inference." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (NY 2001). The court, in accepting the facts alleged in the complaint to be true, must "determine only whether the facts alleged fit within any cognizable legal theory" *Ruffino v. New York City Tr. Auth.*, 55 AD3d 817, 818 (2<sup>nd</sup> Dept. 2008), quoting *Morris v. Morris*, 306 A.D.2d 449, 451 (2<sup>nd</sup> Dept. 2003). "[I]f from the four corners [of the complaint] factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (NY, 1977).

Thus, when evaluating whether a complaint is sufficient to survive a motion to dismiss pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Ruffino*, 55 AD3d at 818, quoting *Morris*, 306 A.D.2d at 451). Further, Defendant has moved pursuant to CPLR 3016(b) to dismiss Plaintiff's action for fraud:

CPLR 3016 (b) provides: Fraud or Mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail. The Court finds that in Plaintiff's Complaint its thirteen (13) causes of action provide sufficient detail for causes of action under "fraud or mistake" as well as other cognizable actions.

After a review of Plaintiff's complaint, the Court finds that the Plaintiff has set forth facts that constitute causes of action sufficient pursuant to CPLR 3211 (a)(7). Defendants' reply affirmation to Defendants' motion to dismiss Plaintiff's complaint cites to cases where the moving party is seeking summary judgment, not dismissal. Thus, the cited cases beginning with Paragraph "5" of Defendants' reply are not applicable to Defendants' Motion to Dismiss.

Defendant also states that he is seeking summary judgment pursuant to CPLR 3212(a) which provides as follows:

**CPLR 3212(a) Time: kind of action. Any party may move for summary judgment in any action after issue has been joined, provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.**

The Court finds that Defendant's Motion to Dismiss was timely but, as shown above, the Court denied Defendant's Motion to Dismiss for the reasons set forth. As Defendant moved only pursuant to CPLR 3212(a) for Summary Judgment, the Defendant has failed to declare upon what grounds Defendant moves for Summary Judgment. The Court having read in their entirety four depositions - Deposition of Stephanie Burns, dated April 16, 2015; Deposition of Stephanie Burns, dated February 23, 2016; Deposition of Louis Burns, March 3, 2016; and the Deposition of Gayle Davis, dated January 20, 2016 - finds that there are numerous questions of fact and credibility raised in these depositions, that the depositions of Stephanie Burns are contradictory to the depositions of Louis Burns and Gayle Davis, attorney for Louis Burns in many material respects, and that the need for discovery in this matter is preeminent. As Defendant Burns has admitted in her depositions that she destroyed documents that are vital to determine many issues in this matter, alternate sources of discovery are clearly needed to locate the originals of these mortgage documents which apparently must be in possession of the mortgagee.

#### *Plaintiff's Motion for Partial Summary Judgment*

As for Plaintiff's Motion for Partial Summary Judgment, as stated above, the depositions referred to above contain many issues of material fact as well as numerous issues of credibility which can only be resolved by a trier of fact. Further, Plaintiff's motion papers are insufficient to demonstrate an entitlement to summary judgment as documents such as the "agreement" between Louis Burns and Stephanie Burns has not been

provided, as well as other documents necessary for a summary judgment determination.

Accordingly, Plaintiff's motion for partial summary judgment is hereby denied in its entirety.

This constitutes the decision and order of the Court.

ENTER:



RICHARD VELASQUEZ, J.S.C.

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So Ordered  
Hon. Richard Velasquez

  
2016 DEC 16 AM 8:13  
JAMES COUNTY CLERK  
FILED