Spiner v Estate of Spiner
2017 NY Slip Op 30538(U)
March 20, 2017
Supreme Court, New York County
Docket Number: 162670/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 2
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DAN SPINER,

Plaintiff,

-against-

ESTATE OF SUSAN SPINER, ANDY ROBSON, and JOHN DOE 1-3 being fictitious designations for three defendants who have not yet been identified,

Defendants.

DECISION, ORDER AND JUDGMENT

Index No. 162670/2015

Mot. Seq. 002

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Kathryn E. Freed, J.:

PURSUANT TO CPLR 2219 THE FOLLOWING PAPERS WERE CONSIDERED IN DETERMINING THE INSTANT MOTION:

NOTICE OF MOT. AND AFFS. IN SUPP.	1-3 (Exs. A-O)
WHITE AFF. IN OPP.	4
SPINER AFF. IN OPP.	5 (Ex. A)
ZAGORINA AFF. IN OPP.	6 (Ex. A)
NOT. OF CROSS-MOT. AND AFF. IN SUPP.	7-8
MEMO. OF LAW IN SUPP. OF CROSS-MOT.	9
AFF. IN OPP. TO CROSS-MOT.	10 (Exs. A-E)
DEF.'S MEMO. OF LAW	11

In this action for, among other things, a declaration that plaintiff has a one-half interest in a co-op apartment located at 119 Waverly Place, New York, New York, defendant Andy Robson moves for summary judgment dismissing the complaint, and plaintiff cross-moves for partial summary judgment against Robson on his fraudulent transfer claims. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, **defendant's Robson's motion for summary judgment is granted and plaintiff's cross motion for summary judgment is denied.**

Factual and Procedural Background

Plaintiff and Susan Spiner were married on June 16, 1985. During the marriage, they had two children: Trent, born November 29, 1985, and Wade, born March 14, 1989.

In 1995, plaintiff and Susan executed a separation agreement ("the Agreement") that had been drafted years earlier, and was dated February 1, 1992. The parties divorced on October 6, 1995.

Article III of the Agreement states, in relevant part:

> "1. The Wife is the record owner of a co-op apartment mutually acknowledged to be marital property and located at 119 Waverly Place, New York, N.Y. (hereinafter referred to as the "home"). The husband is the beneficial owner of one-half of the home.
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> 2. The parties agree that the Wife shall have exclusive occupancy of the home until the earliest of the following events: (1) the youngest child of the marriage reaches the age of twenty-one (21) years or twenty-two (22) years, if such a child is enrolled as a full-time, fully matriculated student in college; (2) the Wife's exercise of an option to TERMINATE her exclusive occupancy. Upon the occurrence of the earliest of the aforementioned events, the home is to be sold (unless option rights are exercised as hereinafter provided for) and the proceeds divided equally between the parties, subject to adjustments, if any, as more fully set forth hereinafter in this Separation Agreement.
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> * * *
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> 7. At such time as the home is to be sold pursuant to the terms of this Separation Agreement, the party having exclusive occupancy shall have the first option to purchase the non-occupying party's interest, and the non-occupying party the second option to purchase the occupying party's interest . . . [1]
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> * * *
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> 13. If either party does not exercise the aforesaid option, the purchase price is to be mutually agreed . . .
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> * * *

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[1]The Agreement also provided a mechanism and timing for which Susan and plaintiff were to provide notice to the other regarding the exercise of their option to purchase the co-op.

19. The parties shall share equally in the net proceeds of the sale . . . ."

(*See* complaint, Exhibit A)

In May 1992, defendant Andy Robson moved into the subject co-op with Susan. Robson and Susan married on February 1, 1997, and continued to reside together at the co-op. On September 8, 2003, Susan transferred ownership of the co-op from herself, as sole record owner, to herself and Robson as tenants by the entirety. Susan died suddenly at the age of 57 on October 21, 2015.

On November 17, 2015, upon learning that Robson intended to sell the co-op, plaintiff mailed to Robson, the president of the co-op board, and to the Emigrant Savings Bank's Mortgage Department, a mortgage holder, a document entitled "Notice of Intent to Enforce Beneficial Ownership Rights In and to a Certain Cooperative Apartment Located on the Fifth Floor of 119 Waverly Place, New York, New York 10016" ("the Notice"). The Notice stated, in relevant part, that since neither plaintiff nor Susan had exercised the option to purchase the co-op pursuant to the Agreement, it was to be sold immediately, and he was entitled to half the proceeds of the sale.

On December 13, 2015, plaintiff commenced this action against the Estate of Susan Spiner ("the Estate") and Andy Robson, asserting seven causes of action for: (1) a declaratory judgment voiding the 2003 transfer of the co-op on the ground that Susan lacked the authority to execute the transfer, and declaring that plaintiff and the Estate each own a one-half interest in the premises; (2) enforcement of the Judgment of Divorce; (3) conversion; (4) replevin; (5) injunctive relief enjoining Robson from selling the co-op; (6) unjust enrichment; and (7) to set aside the 2003 transfer as a fraudulent conveyance.

On December 14, 2015, plaintiff moved, by order to show cause (Mot. Seq. 001), seeking, among other things, to enjoin Robson from selling the co-op. NYSCEF Doc. No. 12. That day, this

Court signed the order to show cause, temporarily enjoining Robson from "selling, transferring, disposing, alienating or otherwise affecting the ownership of" the premises pending a hearing on plaintiff's application. Id. On May 18, 2016, Robson filed an answer in which he admitted, in paragraph 11, that "[p]laintiff is beneficial owner of one-half of the 'Spiner Marital Home' subject to the other terms and conditions of the Agreement and respectfully refers the Court to the Separation Agreement for its complete actual terms."

On May 24, 2016, plaintiff, Robson, and the Estate appeared before this Court, at which time the parties entered into a so-ordered stipulation resolving plaintiff's motion.[2] NYSCEF Doc. No. 22. The stipulation stated, in relevant part, that the co-op would be listed with a broker for the sales price of $2,400,000 and sold "FORTHWITH." Id. The stipulation also provided that the net proceeds of the sale be held in escrow by plaintiff's attorney pending an agreement of the parties or an order of this Court. Id.

On July 7, 2016, Robson entered into a contract of sale of the co-op for the purchase price of $2,420,000. The closing was scheduled to be held on or about September 15, 2016.[3]

On July 21, 2016, Robson filed the instant motion (Mot. Seq. 002) seeking summary judgment dismissing the complaint on the ground that plaintiff fails to state a cause of action. Robson argues that, since there is no dispute that plaintiff is entitled to one-half of the proceeds from the sale of the co-op, the complaint must be dismissed. Robson argues that plaintiff's first cause of action, seeking to void the 2003 transfer because Susan did not have the legal power to make it, is

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[2]Although Dana L. Marx signed the stipulation on behalf of the Estate, it was not until August 8, 2016, that Trent Spiner was appointed Administrator of his mother's estate.

[3]This Court has been advised by counsel for Robson that the premises have been sold.

without merit because the Agreement did not prevent Susan from transferring the property to herself and Robson as tenants by the entirety, subject to plaintiff's one-half beneficial interest.

With respect to plaintiff seeking to enforce the terms of the Judgement of Divorce, Robson argues that, because there is no dispute that the premises should be sold, and that plaintiff has a one-half interest in the proceeds from the sale in accordance with the Agreement and Judgment of Divorce, this claim must be dismissed.

Additionally, Robson argues that there can be no claim of conversion because he agrees that plaintiff is entitled to half of the proceeds from the sale of the co-op. He also maintains that, since the co-op is to be sold, plaintiff's claims seeking replevin and injunctive relief must be dismissed.

Robson further maintains that plaintiff's claim that he (Robson) was unjustly enriched "by his taking of [plaintiff's] children's share of the remaining half value of the Spiner Marital Home," is without merit because Robson concedes that plaintiff is entitled to an interest in the co-op. Additionally, Robson argues that plaintiff cannot assert a claim on behalf of his children or the Estate.

Finally, with respect to plaintiff's claim that the 2003 conveyance was fraudulent, and therefore void, Robson argues that there was no fraud, because there is no dispute that plaintiff is entitled to his one-half share of the proceeds from the sale of the co-op, and that Susan was free to transfer her interest in the co-op to Robson in 2003.

On August 19, 2016, after the filing of the instant motion, the Estate filed its answer in which it asserted cross claims for: (1) a declaratory judgment declaring that plaintiff and the Estate are each entitled to a one-half interest in the co-op, (2) a declaratory judgment declaring that the co-op is an estate asset, and (3) fraudulent conveyance.

The Estate also filed opposition to Robson's motion. In its opposition, the Estate argues that the 2003 conveyance was fraudulent, that further discovery is needed, and that Robson has refused to provide the demanded discovery. In his affidavit in opposition, Trent Spiner, the Administrator of the Estate, states that the 2003 transfer was invalid because Robson had "tricked" Susan into making the conveyance. Trent also states "[s]imilarly, [Susan] would never have knowingly agreed to stiff her creditors by giving everything she owned to Robson. Upon information and belief, she had very substantial credit card debt, more than $200,000, which will not get paid if Robson sells the apartment and absconds with all the apartment proceeds as he has apparently tried to do." Trent states further that, "I think she could not have known the legal effect of whatever papers Robson prepared and put in front of her to sign."

In his opposition to Robson's motion, plaintiff argues that Robson's motion to dismiss for failure to state a cause of action must be denied because his complaint properly alleges each cause of action. Plaintiff further argues that Robson has not met his burden of establishing entitlement to summary judgment as a matter of law, because there are issues of fact regarding whether plaintiff is entitled to buy out Susan's share of the co-op for the buy-out price of one-half of the value of the co-op as of October 8, 2003.[4]

On September 9, 2016, plaintiff filed a cross motion seeking partial summary judgment on his fraudulent conveyance claim. In support of his cross motion, plaintiff argues that, pursuant to New York's Debtor Creditor Law ("DCL"), he is a creditor of Susan; thus, the 2003 conveyance was

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[4]According to plaintiff, Susan's right to purchase the premises was triggered on September 8, 2003, the day Susan conveyed an ownership interest in the co-op to Robson. Therefore, since Susan did not exercise her right within 30 days of September 8, 2003, plaintiff's right to purchase the co-op was triggered on October 8, 2003. Accordingly, plaintiff argues that he has the right to purchase the co-op, at its appraised value as of October 8, 2003.

fraudulent and must be set aside. Plaintiff argues that, in 2003, Susan knew he had a one-half interest in the co-op, yet she conveyed the co-op to herself and Robson. Citing to DCL § 276, plaintiff argues that the 2003 conveyance was done "to hinder, delay, or defraud" him in enforcing his interest in the co-op.

The Estate does not oppose the cross motion.

In opposition to the cross motion, Robson argues that, to the extent plaintiff and the Estate claim that he tricked Susan into conveying an interest in the co-op to him, there is no evidentiary support for such conclusory statements. Further, with respect to the Estate's claim that Robson has not complied with its discovery demands, Robson notes that the Estate did not make an application to the Court for a discovery conference to resolve outstanding discovery issues.

Robson argues that plaintiff's claim that he has the right to purchase the premises at the October 8, 2003 value is without merit because plaintiff agreed to sell the premises on May 24, 2016. Moreover, Robson notes that, pursuant to the terms of the Agreement, the events that triggered the option to purchase the premises were limited to the following: "(1) the youngest child of the marriage reaches the age of twenty-one (21) or twenty-two (22) years, if such child is enrolled as a full-time, fully matriculated student in college; (2) the Wife's exercise of an option to TERMINATE her exclusive occupancy." Robson notes that there is no provision in the Agreement permitting plaintiff to purchase the co-op if Susan conveyed a partial interest to a third party. Robson further asserts that, by plaintiff's own admission in his Notice mailed on November 17, 2015, he is seeking to sell the co-op and to recover one-half of the proceeds.

Discussion

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor [CPLR 3212, subd. (b)], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' [CPLR 3212, subd. (b)]" (*Zuckerman v City of New York*, 49 NY2d 557 [1980] *citing Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

Here, Robson established prima facie entitlement to summary judgment dismissing all of plaintiff's claims, and plaintiff and the Estate fail to raise an issue of fact precluding summary judgment in his favor. Likewise, plaintiff's cross motion for partial summary judgment on the fraudulent transfer claim must be denied.

Declaratory Judgment Voiding Transfer and Fraudulent Conveyance

In his complaint, plaintiff argues that Susan "did not have the legal power or authority to convey the Marital Home to Robson as a Tenancy by the Entirety." Therefore, according to plaintiff, the conveyance is *void ab inito*. However, as Robson correctly notes, plaintiff submits no legal support for this contention. There is no dispute that Susan was the sole record owner of the co-op. Further, there are no terms in the Agreement preventing Susan from conveying the premises to herself and Robson as tenants by the entirety, subject to plaintiff's interest.

Alternatively, plaintiff argues that the conveyance must be voided because it was fraudulent as to him, a creditor of Susan. DCL § 270 defines a creditor as " a person having any claim, whether

matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (*id.*). There is no dispute that plaintiff has a one-half interest in the premises owned by Susan, and is a creditor with respect to Susan. However, in order for the 2003 conveyance to be deemed fraudulent, DCL § 273 requires that it be made by "a person who is or will be thereby rendered insolvent" (*id.*). If such a transfer renders the transferor insolvent, then it is "fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration" (*id.*). Here, there is no evidence that the 2003 conveyance rendered Susan insolvent. In fact, Susan retained an undivided one-half interest in the premises. Accordingly, the Court finds, as a matter of law, that the transfer did not render her insolvent, regardless of whether there was fair consideration.

In the absence of insolvency, plaintiff must establish that the conveyance was fraudulent pursuant to DCL § 276. DCL § 276 states that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors" (*id.*). The burden of proof for establishing the conveyor's "actual intent" is by clear and convincing evidence (*see Matter of U.S. Bancorp. Equip. Fin., Inc. v Rubashkin*, 98 AD3d 1057, 1060 [2 Dept 2012]). A plaintiff seeking to prove "actual intent" to hinder, delay, or defraud creditors may establish such intent by relying on "badges of fraud," i.e., circumstances so commonly associated with fraud that fraudulent intent may be inferred (*see Dempster v Overview Equities*, 4 AD3d 495, 498 [2 Dept 2004]). These "badges of fraud" include; a close relationship between the parties to the transaction, secrecy in making the transaction; the inadequacy of consideration; the transferor's knowledge of the creditor's claim, or a claim so likely to arise as to be certain, and the transferor's inability to pay it; and, the retention of control of the property by the transferor after the conveyance *(id.; see also*

Matter of Steinberg v Levine, 6 AD3d 620, 621 [2 Dept 2004]).

In opposition to Robson's motion, plaintiff argues that the 2003 transfer hindered, delayed, and frustrated him from exercising his right to buy the co-op in October 2003. However, the Agreement provides for only two events which trigger the option to purchase the co-op: (1) the youngest child of the marriage reaches the age of twenty-one (21) or twenty-two (22) years, if such child is enrolled as a full-time, fully matriculated student in college; (2) the Wife's exercise of an option to TERMINATE her exclusive occupancy. A conveyance of an undivided one-half interest in the co-op is not a trigger event. Moreover, Susan and plaintiff's youngest child attained the age of 22 in March 2011, and since Susan did not terminate her exclusive occupancy prior to that date, plaintiff's right to exercise his option to purchase the co-op was not triggered until 2011.

Nevertheless, despite the fact that plaintiff could have purchased Susan's share of the co-op in 2011, he elected not to exercise that right. Therefore, according to paragraphs 13 and 14 of the Agreement, if neither party exercises its option to purchase the co-op, the sale price is to be set by a broker and the co-op is to be listed for sale. Notably, plaintiff did not seek to have the co-op sold until after Susan died in 2015. Further, upon notification of plaintiff's interest in the co-op, Robson immediately acknowledged plaintiff's one-half interest, and the parties thereafter agreed to sell the co-op. Accordingly, there is simply no evidence that the 2003 transfer hindered, delayed or frustrated plaintiff's rights with regard to the subject co-op.

In the Estate's opposition to Robson's motion seeking dismissal the fraudulent conveyance claims, it argues that there are issues of fact regarding whether Robson "tricked" Susan into conveying an undivided one-half interest to him in 2003. However, other than speculative assertions, the Estate raises no issues of fact regarding the validity of the 2003 conveyance. Moreover, in order

to have standing to assert a claim of fraudulent conveyance, the claimant must be a creditor and, here, the Estate was not a creditor of Susan's in 2003 (*see* DCL § 270).

Accordingly, Robson's motion to dismiss plaintiff's fraudulent conveyance and declaratory judgment claims must be granted, and plaintiff's cross motion for partial summary judgment must be denied.

Enforcement of the Judgment of Divorce

In his complaint, plaintiff alleges that "[t]o the full extent necessary to enforce the terms of the Judgment, the Spiner Marital Home should be sold and the proceeds partitioned one-half to plaintiff and one-half to the estate." In view of the fact that Robson acknowledges plaintiff's interest in the co-op as set forth in the Agreement, this claim must be dismissed.

Conversion

Plaintiff's claim sounding in conversion also must be dismissed. "In order to establish a cause of action to recover damages for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*Scott v Fields*, 85 AD3d 756, 757 [2 Dept 2011] [internal quotation marks omitted]). Here, Robson acknowledges plaintiff's rights with respect to the co-op; thus, there has been no conversion. Further, even if there had been a conversion, this claim is time barred. The three-year statute of limitations for a claim of conversion runs from the date of the conversion, i.e., September 2003, and not from the date of discovery of the conversion (*see* CPLR 214 [3]; *see also*

Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex., 87 NY2d 36, 44 [1995]).

Replevin

A cause of action sounding in replevin must establish that the defendant is in possession of certain property to which the plaintiff claims to have a superior right (*see Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2 Dept 2012]). "In replevin, the successful party can recover the possession of the property, with interest on its value, and the amount of the depreciation thereof as damages for detention" (*Crossley v Hojer*, 11 Misc 57, 59 [NY Superior Ct 1895]). In his complaint plaintiff seeks the right to "repurchase the apartment." However, on May 24, 2016, he agreed that the apartment was to be sold. Accordingly, plaintiff's claim of a right of replevin must be dismissed.

Enjoining the Sale of the Co-op

In view of the fact that plaintiff agreed to the sale of the co-op, this claim must be dismissed.

Unjust Enrichment

Plaintiff's claim against Robson for unjust enrichment must be dismissed. Plaintiff claims that Robson has been unjustly enriched by taking his, and his children's share, of the co-op. However, as stated above, Robson acknowledges plaintiff's interest in the co-op. Further, plaintiff does not have standing to assert a claim of unjust enrichment on behalf of either his children or the Estate (*see generally Caprer v Nussbaum*, 36 AD3d 176 [2 Dept 2006]).

Given the above, this Court concludes that the proceeds of the sale of the co-op should be divided equally between Spiner and Robson.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by Andy Robson for summary judgment dismissing the complaint against him is granted, with costs and disbursements to defendant Andy Robson as taxed by the Clerk upon the submission of the appropriate bill of costs; and it is further

ORDERED that the cross motion by plaintiff Dan Spiner seeking partial summary judgment on his fraudulent conveyance claims is denied; and it is further

ORDERED that the proceeds of the sale of the premises are to be equally distributed to Dan Spiner and Andy Robson, and that the amount of such proceeds, as well as the determination of any expenses or obligations to be paid by Dan Spiner and Andy Robson from those proceeds, is referred to a Special Referee to hear and report; and it is further

ORDERED that, within 30 days from the date of this order, counsel for Andy Robson shall serve a copy of this order with notice of entry, together with a completed Information Sheet,[5] upon the Special Referee Clerk in the General Clerk's Office (Room 119M at 60 Centre Street), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

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[5] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at http://www.nycourts.gov/courts/1jd/supctmanh/ under the "References" section.

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: MARCH 20, 2017 ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF THE SUPREME COURT