

Hennelly v Retained Realty, Inc.
2018 NY Slip Op 30792(U)
April 30, 2018
Supreme Court, Westchester County
Docket Number: 55633/14
Judge: Robert M. DiBella
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
TERESA HENNELLY,

Plaintiff,

-against-

**DECISION AND ORDER
Motion Seq. No. 001-002**

**RETAINED REALTY, INC. and EMIGRANT
MORTGAGE COMPANY INC.,**

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Defendants.

-----X
DIBELLA, J.

The following papers have been read and considered on this motion by plaintiff for a preliminary injunction and cross motion by defendants to dismiss the complaint:

- 1) Order to Show Cause (seq. 001); Affirmation in Support of Andrew D. Brodnick, Esq.; Affidavit in Support of Teresa Hennelly; Affidavit in Support of Mark Hennelly; Exhibits A–M; Affirmation Re: Compliance with Trial Court Rule 202.7(f) of Andrew D. Brodnick, Esq.;
- 2) Notice of Cross Motion (seq. 002); Affirmation of Ronald P. Labeck, Esq.; Affirmation of M. Theresa Giacomo, Esq.; Affidavit in Opposition of Neil Rouse; Exhibits A–F;
- 3) Reply Affirmation in Support of Order to Show Cause and in Opposition to Defendants' Cross Motion to Dismiss of Andrew D. Brodnick, Esq.; Reply Affidavit in Further Support of Plaintiff's Order to Show Cause and in Opposition to Defendants' Motion to Dismiss of Teresa Hennelly; Affidavit in Further Support of Order to Show Cause and in Opposition to Motion to Dismiss of Mark Hennelly; Reply Affirmation of Andrew M. Romano, Esq.; Exhibits A–B; and
- 4) Reply Affirmation in Support of Defendants' Cross Motion to Dismiss of Ronald P. Labeck, Esq.

In this action, plaintiff moves, by Order to Show Cause, for a preliminary injunction barring defendants from transferring or encumbering the subject property located at 79 Lewis Parkway, Yonkers, New York and restraining defendants from seeking to evict the current occupants from the property. At the time the Order to Show Cause was made,

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plaintiff also sought a temporary restraining order for the same relief, pending the hearing and determination of the motion, which was granted¹. Defendants oppose the motion and cross-move to dismiss the complaint. For the reasons set forth below, the motion is denied, the temporary restraining order is vacated, and the cross motion is granted in part and denied in part.

This action stems from a loan made by defendant Emigrant Mortgage to plaintiff Teresa Hennelly's son, Mark Hennelly, whereby Mark Hennelly was loaned the amount of \$160,000 and the subject property was mortgaged as collateral to secure the loan. The property had been purchased by Mark Hennelly and his mother Teresa Hennelly² from Jay Sulzberger in 2000 for the sum of \$75,000³. Subsequently, Mark Hennelly repaired the home and in 2006 he moved into the property with his wife and two children.

In 2009, Mark Hennelly submitted a bid to the City of Yonkers to construct and maintain moorings on the Hudson River. Upon the bid being accepted, Mark Hennelly sought a loan to finance the startup costs in order to perform the contract with the City of Yonkers. Mark Hennelly obtained a loan commitment from defendant Emigrant Mortgage

¹ In lieu of a bond, the Court directed that plaintiff pay to defendants the prorated monthly interest on the Foreclosure Judgment and the monthly prorated real estate taxes accruing with respect to the subject property.

² Mark Hennelly asked his mother to pay for the purchase of the property, which he would be responsible for repairing, and the two of them owned the property as joint tenants with right of survivorship.

³ The low price was a result of outstanding tax liens on the property and based on the state of disrepair of the property.

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for a loan in the amount of \$160,000, with the property being mortgaged as collateral to secure the loan.

Plaintiff alleges that in July of 2009, she attended the closing of the loan with her son. She alleges that she and her son were not represented by independent counsel and that, at that time, she signed certain documents to effectuate the loan. Plaintiff alleges that one of the documents she was required to sign by the lender was a deed transferring the jointly owned subject property from her and her son Mark Hennelly to Mark Hennelly solely.

At some point thereafter, Mark Hennelly failed to make the required payments under the loan and defendant Emigrant Mortgage Company, Inc. filed a foreclosure action against Mark Hennelly, who defaulted in appearing in that action. By Judgment of Foreclosure and Sale (Smith, J.) dated March 11, 2013, Emigrant Mortgage Company, Inc. was granted a judgment directing the property to be sold at auction pursuant to the terms set forth therein. The property was thereafter sold on June 12, 2013. Mark Hennelly attempted to vacate his default in appearing in that action, which was denied by Decision and Order (Smith, J.) dated April 9, 2014.

Plaintiff commenced this action against Emigrant Mortgage Company, Inc., the company which loaned her son the funds, and Retained Realty, Inc., the company which was assigned the bid to purchase the property. Plaintiff alleges the following claims against defendants: fraud; violation of General Business Law § 349; constructive trust; equitable lien; and unjust enrichment. Her claims against defendants stem from her contentions that she was improperly and fraudulently required to transfer her share of joint

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ownership of the subject property to Mark Hennelly's name alone and that, due to such transfer, she was unable to protect her interest in the property, and that she is entitled to the value of the property above the foreclosure judgment amount. In other words, she contends that, since the property is apparently worth \$750,000 in her estimation, defendants should not be able to retain the benefit of the amount over and above the foreclosure judgment.

Plaintiff's application currently before the court is a motion for preliminary injunction seeking to enjoin and bar defendants from further transferring the property and from evicting plaintiff's son and his family from the premises, during the pendency of this action. In order for a party to obtain preliminary relief, the movant must demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) that the balancing of the equities favors the movant. *W.T. Grant Co. v. Srogi*, 52 NY2d 496 (1981); *Nassau Soda Fountain Equip. Corp. v. Mason*, 118 AD2d 764 (2d Dep't 1986). A preliminary injunction is a drastic remedy which should be issued cautiously and sparingly. *Related Props., Inc. v. Town Bd. of Town/Village of Harrison*, 22 AD3d 587 (2d Dep't 2005). In order for plaintiff to sustain her burden of establishing a likelihood of success on the merits, she must demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 AD3d 587 (2d Dep't 2005); *Digestive Liver Disease, PC v. Patel*, 18 AD3d 423 (2d Dep't 2005).

Plaintiff is not entitled to the drastic remedy of a preliminary injunction under the

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facts and circumstances presented herein. At this stage, plaintiff has not sufficiently demonstrated a likelihood of success on the merits. The facts as alleged by the parties herein are sharply in dispute and, thus, a clear right to relief has not been demonstrated by plaintiff. "Where the facts are in sharp dispute, a temporary injunction will not be granted." *Related Properties, Inc.*, 22 AD3d at 590.

Plaintiff has also not demonstrated irreparable harm if a preliminary injunction is not granted, that is, that money damages will be insufficient to make the plaintiff whole. See *Stanklus v. County of Montgomery*, 86 AD2d 908 (3d Dep't 1982).

The subject property has already been sold at auction pursuant to a valid Judgment of Foreclosure and Sale, in which the borrower, plaintiff's son, was found to have defaulted in appearing. Although Mark Hennelly sought to vacate his default in that action, that request was denied. Accordingly, as Mark Hennelly's attempt to vacate his default was unsuccessful, and plaintiff does not seek, nor has she demonstrated any other basis to vacate that judgment, the foreclosure sale stands. What plaintiff is really seeking in this action, as confirmed by her counsel in his papers, is the recovery of money damages above and beyond the foreclosure judgment, as plaintiff alleges the subject property is worth approximately \$750,000. Thus, what plaintiff is seeking to recover in this action is precisely money. Her counsel states:

Plaintiff does not seek to set aside the transfer of the property to Defendant Retained Realty; nor does Plaintiff seek to set aside or challenge the Foreclosure Judgment. . . . The crux of the action is that Defendants have no "legitimate right" to enjoy the hundreds of thousands of dollars of equity above that necessary to secure Defendants' Foreclosure Judgment and

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that Defendants would be unjustly enriched in the event that they were not required to hold that excess equity in a constructive trust.

Andrew D. Brodnick Reply Affirmation in Support of Order to Show Cause and in Opposition to Defendants' Cross Motion to Dismiss at ¶¶ 12–13. Therefore, money damages, if plaintiff succeeds on her claims, will certainly be sufficient to provide plaintiff relief. Accordingly, plaintiff's request for a preliminary injunction is denied.

The Court next turns to defendants' cross motion to dismiss the Complaint, pursuant to CPLR 3211. As to plaintiff's first and second causes of action for fraud and violation of General Business Law § 349 respectively, plaintiff has indicated that she is withdrawing those causes of action (see Brodnick Reply Affirmation in Support of Order to Show Cause and in Opposition to Defendants' Cross Motion to Dismiss at ¶ 27). What remains are her claims for constructive trust, equitable lien, and unjust enrichment.

It is well-settled that on a motion to dismiss a complaint, the Court must initially accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and then determine whether those facts fit within any cognizable legal theory. See *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994); *People v. New York City Transit Auth.*, 59 NY2d 343, 348 (1983); *Klondike Gold, Inc. v. Richmond Assocs.*, 103 AD2d 821 (2d Dep't 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by "fair and reasonable intendment". See *Shields v. School of Law of Hofstra Univ.*, 77 AD2d 867 (2d Dep't 1980). The court's function is to determine if a cause of action was stated, and

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not to determine whether plaintiff should ultimately prevail. *Supreme Assoc, LLC v. Suozzi*, 65 AD3d 1219 (2d Dep't 2009).

"The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Paramount Film Distribution Corp. v. State of New York*, 30 NY2d 415, 421 (1972). The elements of an unjust enrichment claim are that defendants were enriched, at the plaintiff's expense, and that it is against equity and good conscience to allow the defendants to retain what is sought to be recovered. *County of Nassau v. Expedia, Inc.*, 120 AD3d 1178 (2d Dep't 2014). In giving the complaint a liberal construction and accepting the allegations as true, plaintiff has alleged a cause of action for unjust enrichment. From a review of the parties' papers, it is clear there are many disputed factual issues. Although defendants contend that they were not responsible for plaintiff transferring her interest in the subject property to her son and that it was not a requirement for the loan, it is unclear how the deed transfer came to be, especially since the Hennellys were not represented by counsel at the closing for the loan, at which time the deed was presented to them to transfer plaintiff's interest. Although defendants challenge whether there is any proof of plaintiff's claims, plaintiff is only required to allege facts to support her claims at this stage, and not submit proof or evidence to conclusively demonstrate her cause of action.

As for plaintiff's claim that a constructive trust be imposed, plaintiff must allege the following four elements: (1) a confidential or fiduciary relation; (2) an express or implied

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promise; (3) a transfer made in reliance on that promise; and (4) unjust enrichment. *Rocchio v. Biondi*, 40 AD3d 615 (2d Dep't 2007). This claim fails because plaintiff has not adequately alleged the first element. Although plaintiff alleges that a confidential relationship existed between her and her son, who is not a party in this action, she has not sufficiently alleged a confidential or fiduciary relationship between herself and defendants. Even though she alleges defendants required her to sign the deed transfer in order to provide her son with the loan, she cannot claim that defendants acted in a confidential or fiduciary manner by giving her advice because she acknowledged that she was not represented at the closing. Thus, this claim must be dismissed.

As to plaintiff's claim for an equitable lien, it is also dismissed as plaintiff has not sufficiently alleged an express or implied agreement that she would have a lien on the premises. See *M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 12 NY3d 798, 800 (2009).

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order put into effect by the Order to Show Cause is hereby vacated; and it is further

ORDERED that defendants' cross motion to dismiss the complaint is granted in part solely to the extent that the causes of action for equitable lien and constructive trust are dismissed, the claims for fraud and violation of General Business Law § 349 are deemed

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withdrawn, and the sole remaining claim is for unjust enrichment; and it is further

ORDERED that counsel shall appear for a preliminary conference in Courtroom 811 of the Westchester County Courthouse on May 18, 2015 at 9:30 AM.

This is the Decision and Order of the Court.

Dated: April 30, 2015
White Plains, New York


Hon. Robert DiBella, JSC

To: Andrew D. Brodnick, Esq.
Via e-filing

Stagg, Terenzi, Confusione & Wabnik, LLP
Via e-filing