

**Sanchez v Rivera**

2018 NY Slip Op 33734(U)

January 19, 2018

Supreme Court, Westchester County

Docket Number: Index No. 61004/2017

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for 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  
WILFREDO SANCHEZ and W.R. HOLDING CORP.,

Plaintiffs,

-against-

DECISION AND ORDER  
Sequence No. 1  
Index No. 61004/2017

RAFAEL RIVERA a/k/a RALPH RIVERA,  
BUSTAR CORP., and TERESA C. RIVERA,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with defendants' pre-answer motion pursuant to CPLR 3211 to dismiss six out of plaintiffs' seven causes of action on the ground that they do not make out claims upon which relief may be granted either because they have been inadequately pleaded or because documentary evidence demonstrates that there is no viable claim; they also seek to vacate the filed notice of pendency pursuant to CPLR 6514(b):

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Rivera Affidavit, Exhibits A - O	
Nazarian Affidavit, Exhibits A - C, and Memorandum of Law	1
Affidavit in Opposition, Exhibits 1 - 2, and Memorandum of Law	2
Reply Affirmation and Memorandum of Law	3

Plaintiffs Wilfredo Sanchez and his wholly-owned company, W.R. Holding Corp., commenced this action to overturn a conveyance of a parcel of property located at 900 South Street, Peekskill, New York, which Sanchez asserts is both his home and the source of his livelihood. The complaint sets forth a series of events and facts that resulted in

the property being conveyed, allegedly through fraud and deceit, to defendants.

Specifically, plaintiffs claim the following: Sanchez acquired the property in approximately 1995, and in 2003 formed WR Holding and conveyed the property to it. The property consists of four residential units, one of which is the residence of Sanchez and his wife, as well as three commercial stores on the first floor and two offices on the second floor. The total income produced by the property is approximately \$90,000.00 per year. The property has a value of approximately \$1,200,000.00, according to a real estate broker that listed the property in September 2016. Sanchez states that he had run a grocery business from the property for many years, until he sold the business while continuing to maintain the property and collect rents, which rents thereafter remained Sanchez's only source of income.

The property was encumbered by a mortgage WR Holding obtained in 2006, that had a balloon payment due in or about April 2017. In September 2016, Sanchez was diagnosed with prostate cancer and started treatment for the disease that left him debilitated and unable to attend to his financial affairs. Sanchez turned to his nephew, defendant Rafael Rivera, for assistance. Sanchez says he brought Rivera to New York from Puerto Rico when Rivera was five, and that Rivera lived with Sanchez and Sanchez's mother until he went to college. Sanchez supported Rivera financially, bought Rivera his first car and paid for Rivera's education. In other words, Sanchez asserts that he treated Rivera like a son and trusted him as a father would trust his own grown child.

Sanchez asked Rivera to help him refinance the mortgage coming due. Rivera agreed to help his uncle, but instead of helping Sanchez obtain a new mortgage from an institutional lender, Rivera told Sanchez that he had money to invest and would lend Sanchez the

funds sufficient to satisfy the mortgage plus all expenses associated with the transaction, which would be secured by a new mortgage loan with interest at the prevailing rate that would be repaid upon sale of the property. Rivera told Sanchez he would arrange everything and let him know when he should come to sign the new documents. On February 17, 2017 Rivera called Sanchez and told him that he and his wife should come to the local Chase branch in Peekskill to sign some papers in connection with the new mortgage. Sanchez and his wife came to the bank and were greeted by Rivera and a bank employee, Marli Ramirez, who was also a Notary Public. Rivera had Sanchez and his wife sign a document labeled "Letter of Intent" and had the signatures notarized by Ms. Ramirez. Sanchez says he and his wife were not given the opportunity to review the "Letter of Intent" or to consult with an attorney. In any event, Sanchez and his wife totally trusted Rivera and did not read the document that was put before them to sign, believing it to be related to paying off the mortgage and the new loan being given by Rivera. As it turns out, instead of laying out the terms of a new mortgage, the Letter of Intent describes a transaction whereby Sanchez and his corporation, WR Holding, would convey the property to Rivera, or an entity controlled by him. In fact, Rivera did not arrange for a new mortgage, but had his uncle Sanchez execute a deed transferring the property to Rivera's wholly-owned and -controlled company, defendant Bustar Corp., for a sales price of \$400,000.00.

Sanchez asserts that Rivera retained the law firm of D'Agastino, Levine, Landersman & Lederman, LLP ("D'Agastino") to represent himself and Bustar. Thereafter, either Rivera or D'Agastino retained Zimmet Law Group, P.C. ("Zimmet") and/or Michael C. Posner ("Posner") to purportedly represent Sanchez and WR in the transaction. Sanchez was never contacted by phone, mail, or by any other means by Zimmet, Posner or D'Agastino at any time prior to the

closing. All documents were prepared without ever consulting with Sanchez.

Rivera called Sanchez and told him to come his lawyer's office on March 31, 2017. Rivera met Sanchez and his wife at Grand Central Terminal and took them to the offices of D'Agastino. This was the first time Sanchez met Posner. At the closing, Sanchez was presented a number of documents and was directed to execute them. None of the documents were reviewed by Sanchez and none were explained to him by Posner or anyone else. Among the documents were: a contract of sale and rider dated March 31, 2017; a payoff letter from Flushing Bank; a deed transferring the Property to Bustar; a TP-584 NYS Transfer Tax Return; a RP-5217 Real Property Transfer Report; a title report; various title company affidavits; an assignment of rents and leases; and a closing statement from each of D'Agastino and Posner. The application for the title insurance was made by D'Agastino and it indicates that the transaction was to be a loan transaction and listed Posner as lender's counsel, with amount of the loan to be determined (see Exhibit 1 to the affidavit in opposition). Sanchez signed whatever he was told to sign, believing that he was signing the closing documents giving Rivera and Bustar a new mortgage on the property.

During the closing, Sanchez alleges, he was not given the opportunity to review the documents that were presented for signature, was not informed and did not fully comprehend what each document was or its purpose. He relied on his relationship with his nephew Rivera and their agreement that Rivera would use his own funds to pay off the existing mortgage and provide the funds necessary to cover all expenses associated with the transaction. Sanchez did not receive any funds personally, or on behalf of WR Holding, at the closing.

After the closing, on or about April 1, 2017, Rivera told Sanchez he wanted to establish a

reserve fund for the maintenance and repair of the property, and would therefore collect rent from the tenants other than Sanchez, which he then did for April and May 2017. No rent was or has been demanded of Sanchez, which further supported his understanding that he was entering into a mortgage transaction and not conveying the property.

Sanchez discovered the truth regarding the March 31, 2017 transaction only after he collected June's rent and Rivera came to the property with the police, telling Sanchez that Rivera, not Sanchez, was now the owner of the property.

That incident prompted Sanchez to contact Posner to demand copies of all closing documents. After several demands, on June 20, 2017 Posner sent Sanchez a copy of the documents. Review of the documents disclosed that in addition to the payoff of the mortgage in the sum of \$237,374.93, Rivera paid himself \$100,000.00 claiming that it was the repayment of loan from either Sanchez or WR Holding; D'Agastino received \$19,330.80 for legal fees, Zimmet received \$2,500.00 as the fee for representing Sanchez and WR Holding; the title closer was paid \$250.00; the title company received \$15,085.12 for its charges and taxes; finally, a check to WR Holding for \$25,409.17 was purportedly issued. All checks, other than the check to All New York Title Agency, were drawn on the account of Bustar. Sanchez states that the check to WR Holding was never delivered to WR or Sanchez, and that therefore those funds presumably remain in the account of Bustar.

Sanchez and WR Holding commenced this action by filing a summons and complaint and a notice of pendency on July 27, 2017. The complaint contains seven causes of action: for declaratory relief (first cause of action), a constructive trust (second cause of action), fraud (third cause of action), rescission (fourth cause of action), recovery of rents and escrow (fifth cause of

action), conversion (sixth cause of action), and punitive damages (seventh cause of action).

Defendants then made the present motion for an order dismissing the first, second, third, fourth, fifth and seventh causes of action and canceling the notice of pendency pursuant to CPLR 6514(b). They argue that the complaint fails to parse out which allegations apply to Rivera personally and which to his company, Bustar Corp. They further contend that the cause of action for punitive damages must be dismissed because the complaint fails to allege extreme moral turpitude. Plaintiffs oppose.

#### Analysis

Defendants' motion is brought pursuant to CPLR 3211(a)(1), based on documentary evidence, and CPLR 3211(a)(7) for failure to state a cause of action. While the court must "accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference" (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]), dismissal may be warranted under CPLR 3211(a)(1) "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*).

Defendants argue that the complaint is insufficient for a claim of fraud or breach of trust. For a recitation of the applicable law, they rely on the recent case of *Saul v Cahan* (153 AD3d 947 [2d Dept 2017]):

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b). A fiduciary relationship arises when one is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. It is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. [A] conventional business relationship, without more, is insufficient to create a

fiduciary relationship. Rather, a plaintiff must make a showing of special circumstances that could have transformed the parties' business relationship to a fiduciary one, such as control by one party of the other for the good of the other. A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but not in an arm's-length business transaction involving sophisticated business people"

(*Saul v Cahan*, 153 AD3d at 948-949 ).

Review of the allegations, which must be accepted as true for these purposes, reveals that plaintiff has sufficiently pleaded, with sufficient particularity to satisfy CPLR 3016(b), the existence of a fiduciary relationship, misconduct by defendant Rivera and, by extension, the company he controls and used to accomplish his plan, and damages directly caused by the defendant's misconduct. In particular, Sanchez's allegations support the assertion that he reasonably reposed confidence in Rivera and reasonably relied on Rivera's expertise or knowledge, and that this was not an arm's-length business transaction but a transaction in which one side purported to be helping a person to whom he owed a fiduciary duty (*see Loevner v Loevner*, 81 AD3d 791 [2d Dept 2011]). There is no legal basis for defendants' suggestion that the only confidential relationship that could arise out of Sanchez's allegations would consist of the younger placing his trust in the elder, even where the younger relative is grown and the elder is suffering from a debilitating condition and difficult circumstances.

Plaintiffs' claim is not that defendants concealed the wording or contents of the closing documents. It is that, under the circumstances, defendants were aware that plaintiffs did not believe there was a need to independently ensure that the documents were what they believed them to be, because they placed their trust in Rivera based on Sanchez's relationship to him.

Executed documents such as those that document an arms-length transaction normally



speak for themselves, and establish the facts of the transaction as a matter of law, creating a defense based on documentary evidence. However, the claim that Rivera owed Sanchez a heightened duty, and that he obtained plaintiffs' signatures on the documents by knowingly abusing the trust that Sanchez reasonably placed in him, precludes reliance on the contents of the documents to establish defendants' rights with regard to the property as a matter of law.

Because the assertions against Bustar are based on the claim that it is controlled by Rivera and therefore acting on his behalf and in his interest, its inclusion as a defendant in the fraud-based claims is not improper.

Defendants' assertions that the property was properly valued at \$400,000, and that plaintiffs were properly represented by independent counsel, are fact-based and not amenable to determination as a matter of law in the context of this CPLR 3211 motion.

There is no merit to defendants' second legal argument, that plaintiffs may not seek a constructive trust since an equitable remedy is only warranted if plaintiff can demonstrate that a legal remedy is inadequate. The relief sought in the complaint properly goes beyond a money judgment; plaintiffs seek to vacate the transaction, and/or to regain the right to receive the rents on the property, along with a money judgment. The various forms of equitable relief of the complaint, including rescission and a constructive trust, may be pleaded in the alternative, and whether any particular one is ultimately appropriate may depend on whether plaintiff prevails on any of the causes of action. Similarly, defendants' challenge to the propriety of plaintiff's claim for declaratory relief is rejected in this context. While there may ultimately be no need for that relief, if other forms of relief, such as rescission or a constructive trust, are awarded, this Court need not determine in the context of this motion whether declaratory relief would be viable or

useful.

Defendants' remaining contentions are without merit. The Court need not address, in denying defendant's dismissal motion, the argument raised by plaintiffs in opposition concerning whether the deed became a mortgage by operation of law.

The seventh cause of action, for punitive damages, is dismissed, because even accepting as true all the allegations, they do not meet the applicable standard, which requires that "defendant's wrongdoing is not simply intentional but 'evinced a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations'" (*see Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 [2007]).

Since defendants have not established that plaintiffs have commenced or prosecuted this action in bad faith, there is no basis to cancel the notice of pendency under CPLR 6514(b).

Accordingly, it is hereby

ORDERED that defendants' motion for dismissal is granted only to the extent of dismissing plaintiffs' seventh cause of action, and is otherwise denied, and it is further

ORDERED that all parties are directed to appear in the Preliminary Conference Part on Monday, March 12, 2018 at 9:30 a.m., at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
January 19, 2018

  
HON. TERRY JANE RUDERMAN, J.S.C.