

Fleischmann v Mittelman
2020 NY Slip Op 30834(U)
February 3, 2020
Supreme Court, Kings County
Docket Number: 523532/2018
Judge: Devin P. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Kings

Index Number 523532/2018
SEQ #004

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

DAVID FLEISCHMANN, AS NOMINEE, 1965 JK REALTY LLC AND MENDEL FISCHER,

Plaintiffs,

against

MARTIN MITTELMAN, MARTIN MITTELMAN LLC, FALLVIEW CAPITAL LLC AND MARK J. NUSSBAUM,

Defendants.

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	_____
Order to Show Cause and Affidavits Annexed...	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	_____
Other	_____

Upon the foregoing papers, defendants' motion to cancel a certain notice of pendency and for fees and expenses¹ is decided as follows:

Factual and Procedural Background

Plaintiff David Fleischman commenced this action as "nominee" against defendants Martin Mittelman, Martin Mittelman LLC and Mark Nussbaum for judgment declaring void a deed conveying property located at 1965 59th Street, Brooklyn, New York, Block 5506, Lot 53 (the "subject property") from 1965 JK Realty LLC ("JK Realty") to Mr. Mittelman, and for damages. In the original complaint, Mr. Fleischman describes himself as "an attorney with an office in Brooklyn, New York who acts as nominee for a client concerning the transactions relevant to this action". At the time plaintiff commenced this action, he also filed a notice of

3
2020 MAR 11 10:07:40
KINGS COUNTY CLERK
FILED

¹ Plaintiff filed a cross-motion for injunctive relief, but the clerk returned the cross-motion for correction. Plaintiff did not correct the cross-motion prior to the return date, and so it was not calendared for argument on the return date of the main motion. Accordingly, the court accepts the portion of plaintiff's papers only that opposes defendants' motion and disregards the portion that relates to the cross-motion.

pendency against the subject property.

As alleged in the original complaint, on August 17, 2017, JK Realty acquired title to the subject property. On August 22, 2018, Joel Klein assigned to plaintiff all of his rights and interest in JK Realty. Thereafter, on October 12, 2018, a deed was recorded that conveyed the subject property from JK Realty to Mittelman LLC. Not long after, on October 26, 2018, Mr. Mittelman and Mr. Nussbaum filed documents on ACRIS that purport to require Mr. Nussbaum's written consent to transactions affecting the subject property's chain of title. The complaint further alleges that JK Realty was dissolved on November 8, 2018. Plaintiff alleges that he did not authorize the dissolution of JK Realty, nor did he convey any interest in JK Realty to Mittelman LLC. Based on these allegations, plaintiff asserted causes of action for judgment declaring void the deed to Mittelman LLC and the restrictive document requiring Mr. Nussbaum's consent, and for constructive trust.

On February 26, 2019, plaintiff filed an amended complaint, in which he added JK Realty as a plaintiff and Fallview Capital LLC as a defendant. In the amended complaint, plaintiff further alleged that, on October 11, 2018, Joel Klein purported to assign his interest in JK Realty to Fallview, a company that Mr. Mittelman owns. Plaintiff further alleged that, following its supposed dissolution by Mr. Mittelman, JK Realty was reorganized on February 15, 2019, by filing articles of organization with the New York Secretary of State. In addition, plaintiff asserted new causes of action for conversion and for judgment declaring the transfer to Fallview void. At the same time plaintiff filed the amended complaint, he filed an amended notice of pendency with the new caption.

Defendant moved to dismiss the claims for conversion and constructive trust, and for an

order directing plaintiff to identify his client and join the client as a plaintiff. By order, dated July 10, 2019, this court granted defendants' motion. As directed by the court, plaintiff filed a second amended complaint identifying Mendel Fischer is an individual who is "the beneficial owner of 100% of the membership interests in JK Realty".

Analysis

Pursuant to CPLR §§ 6501 and 6514(b), defendants move to cancel the original and amended notices of pendency filed in this action. A notice of pendency may be filed only when "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). In determining whether the judgment demanded affects title, the court must examine the complaint "in its entirety" and analyze the "true" nature of the action (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 323 [1984]). For this analysis, the court reviews only the original complaint, and not any amended complaint (*5303 Realty*, 64 NY2d at 320; *Makan Land Dev.--Three, LLC v Prokopov*, 42 AD3d 439, 439-40 [2d Dept 2007]).

When viewed in its entirety, the original complaint does not make clear whether the true nature of this action is plaintiff's effort to establish his interest in JK Realty, which owns the subject property, or whether plaintiff seeks to recover title to the subject property directly. As explained more fully, below, this lack of clarity arises from the legal consequences of the purported dissolution of JK Realty by defendants.

Thus, the complaint begins with the allegations that Joel Klein assigned JK Realty to plaintiff, but that the subject property was assigned from JK Realty to Mittelman LLC without plaintiff's authority. In that regard, plaintiff would ordinarily seek to establish his ownership interest in JK Realty, which owns the subject property. In such situations, the judgment

demanded would only indirectly affect title to the property, and the notice of pendency would be improper (*5303 Realty*, 64 NY2d at 322-23; *see also Sealy v Clifton, LLC*, 68 AD3d 846 [2d Dept 2009] [holding that a notice of pendency was not properly filed in a partition action because a limited liability company, and not the plaintiff, owned the subject property]; *Ostad v Nehmadi*, 31 Misc 3d 1211[A], 2011 NY Slip Op 50565[U] [Sup Ct, NY County 2011]).

Here, the complaint alleges that JK Realty was dissolved on November 8, 2018, prior to the date plaintiff commenced this action. If JK Realty was dissolved, then its assets should have been distributed in accordance with NY Limited Liability Company Law § 704: (1) first to creditors of the company; (2) then, unless otherwise provided in the operating agreement, to members and former members to satisfy liabilities for distributions; and (3) then, unless otherwise provided in the operating agreement, “to members first for the return of their contributions . . . and second respecting their membership interests, in the proportions in which the members share in distributions”. The operating agreement is not provided, nor is any information about creditors or liabilities provided. In the absence of such circumstances, the property would return to plaintiff’s sole possession. In such an event, plaintiff would have a direct relationship with the subject property.

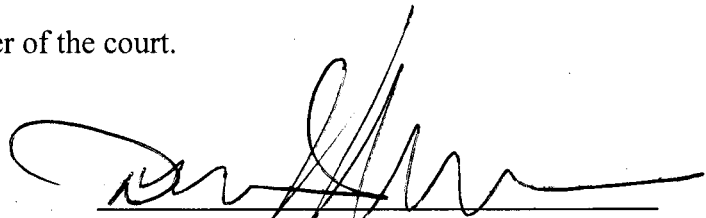
Conclusion

Under the circumstances, the better course here is to allow the notice of pendency to remain in effect. Clearly, there is a dispute concerning the proper owner of the property, due in part to the purported dissolution of the original owner, and the public should be on notice that an action exists affecting title to the property. Accordingly, defendants’ motion is denied.

This constitutes the decision and order of the court.

February 3, 2020

DATE



DEVIN P. COHEN

Justice of the Supreme Court

KINGS COUNTY CLERK
FILED
2020 MAR 11 AM 7:00