

Nelkenbaum v Nelkenbaum

2022 NY Slip Op 33252(U)

September 19, 2022

Supreme Court, Kings County

Docket Number: Index No. 509849/18

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of September, 2022.

P R E S E N T:

HON. CAROLYN E. WADE,

Justice.

-----X
CHAVA NELKENBAUM a/k/a CHAVA MEZEI

Index No. 509849/18

Plaintiff,

(Mot. Seq. 4)

- against -

YEHUDA NELKENBAUM and HTV 18 INC

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

77-86
90-107
110-114

Upon the foregoing papers, defendants HTV 18 Inc. (HTV) moves (in motion sequence [mot. seq.] four) for orders: (1) pursuant to CPLR § 3215, granting HTV a default judgment against plaintiff Chava Nelkenbaum a/k/a Chava Mezei (Chava or Plaintiff) for the relief demanded in HTV's counterclaim on the ground that Chava has defaulted in answering the counterclaim; (2) pursuant to CPLR § 3212, granting HTV summary judgment and dismissing plaintiff's complaint; and (3) pursuant to CPLR § 6514, canceling the notice of pendency filed by Chava against the real property located at 970 East 18th Street, Brooklyn, New York (the Property).

Background

Plaintiff's Complaint

Chava commenced this action to quiet title to the Property on May 11, 2018 by filing a summons, verified complaint and notice of pendency (complaint ¶ 1). The complaint alleges that Chava's spouse, defendant Yehuda Nelkenbaum (Yehuda), "fraudulently and unlawfully caused ownership in the . . . Property to be transferred from Plaintiff to . . . HTV . . . in which Plaintiff has no interest, and therefore, HTV does not have lawful ownership" (*id.* ¶ 3).

The complaint alleges that on September 19, 2003, Relbog, Inc. (Relbog) purchased the Property from Diana Goodman, and that on November 1, 2003, Relbog sold or otherwise conveyed the property to Yehuda (*id.* ¶ 10). On February 27, 2004, Yehuda in turn executed a deed and transferred title of the Property to Chava (*id.* ¶¶ 11-12). The complaint alleges that on October 17, 2013, "Yehuda allegedly had the Plaintiff execute a Deed to Defendant HTV," a corporation allegedly controlled by Yehuda (*id.* ¶¶ 13, 16). However, the deed was allegedly not recorded with the Kings County Register until December 12, 2017 (*id.* ¶ 14). The complaint also alleges that as HTV was dissolved by proclamation by New York State on October 26, 2016, HTV could not have been the true title holder of the Property as of December 12, 2017, and had no right, title or lien to the Property at the time of the deed was recorded (*id.* ¶ 15). The complaint further alleges that at the time of the alleged execution of the deed from Chava to HTV, Yehuda never

informed Chava that the Property was being conveyed and otherwise being taken out of her name, and that Chava had no reason to believe she no longer owned the Property (*id.* ¶¶ 17, 29). The complaint further alleges that both Chava and Yehuda, along with their five children, continue to reside at the Property, although an action for divorce between Chava and Yehuda is also being filed (*id.* ¶¶ 2, 18, 20-21).

The complaint asserts the following causes of action: (1) constructive trust, (2) rescission of deed due to fraud, (3) declaratory relief, (4) quiet title, (5) fraudulent concealment and conspiracy, (6) fraudulent concealment, forgery and conspiracy, (7) breach of fiduciary duty, and (8) injunction.

HTV's Answer and Counterclaims

On June 12, 2020, HTV filed an answer with one counterclaim for damages due to Chava's alleged "improperly and unlawfully" obtained injunction and notice of pendency against the Property, which HTV contends it owns (HTV's answer ¶¶ 24-25).

HTV's Motion

On November 3, 2021, HTV filed the instant motion for a default judgment on its counterclaim, for summary judgment dismissing the complaint, and to cancel the notice of pendency. Initially, HTV contends that nearly all of the allegations in the complaint are unrelated to it and relate solely to Yehuda. HTV contends that Chava filed the instant action as a "harassment tactic" and as leverage in a simultaneously filed divorce proceeding against Yehuda, which HTV believes that Chava has since discontinued.

With respect to the motion for a default judgment, HTV contends that Chava has failed to file an answer to the counterclaim, that over 15 months has passed since the deadline to do so expired, and that Chava is therefore in default.

With respect to its motion for summary judgment, HTV submits a Land Trust Agreement, dated and executed on February 27, 2004 (Trust), and argues that the Trust demonstrates that Chava never had any equitable or beneficial interest in the Property, but that her sole interest in the Property was as trustee/nominee for the benefit of Relbog as beneficiary. HTV also submits the 2004 deed executed at the closing, at which both Chava and Yehuda were represented by counsel, and argues that the deed demonstrates Chava's capacity as trustee pursuant to the Trust. HTV contends that Chava continued to own the Property solely as trustee from 2004 until the closing in 2013, when the Property was sold to HTV at the direction of the beneficiary. HTV further argues that all the expenses for the Property from 2004 to 2013 were paid by the Trust and not by Chava.

HTV contends that since Chava was merely a trustee, she cannot seek to impose a constructive trust. HTV further contends that the duly acknowledged deed raises a presumption of due execution, and the fact that the deed was recorded creates a presumption of delivery. HTV also submits an October 17, 2013 New York State Real Property Transfer Report executed by Chava, which it alleges demonstrates Chava's knowledge that fee ownership of the Property was unconditionally HTV. HTV further argues that since Chava was represented by an attorney at the closing, she is bound by the

acts and/or omissions of her attorney. In support of these contentions, HTV submits an affidavit from Yehuda, in which Yehuda attests that he was also a trustee of the Trust, was present with Chava at the closing, that she was represented by counsel, that she did not pay for any of the expenses for the Property from 2004 to 2013, and that she had no interest in the Property other than that as a trustee.

In addition, HTV argues that even if the court declines to grant summary judgment, the court should nevertheless cancel the notice of pendency on separate grounds. First, HTV contends that the notice of pendency expired on May 11, 2021, three years after the initial filing. Second, HTV contends that plaintiff failed to timely serve the summons and complaint on HTV as required by CPLR § 6512. In that regard, HTV contends that the summons was served on it more than 30 days after filing, in contravention of CPLR 6512 - on February 3, 2020 - and that mandatory cancellation of the notice of pendency is required pursuant to CPLR 6514.

Chava's Opposition

In opposition, filed on March 9, 2022, Chava disputes HTV's allegations, claiming that HTV's motion is "fraught with fraud and deceit" (Chava's attorney affirmation ¶ 3). Chava's counsel contends that HTV never informed the court that it was placed into Chapter 11 bankruptcy on October 10, 2019 in the United States Bankruptcy Court for the Eastern District of New York under Case Number 1-19-46161. Chava's counsel argues that pursuant to 11 USC § 362, an automatic stay was in effect, and that therefore HTV's answer

must be vacated and Chava was not required to file an answer to HTV's counterclaim. Chava's counsel argues that although HTV's bankruptcy was involuntary, i.e. filed by one of its creditors, HTV cannot claim that they were unaware of the filing when they filed their answer with counterclaim as they appeared by counsel in the bankruptcy on January 15, 2020, and entered into a stipulation extending their time to answer or move with respect to the summons. In addition, Chava's counsel contends that HTV never made an application in Bankruptcy Court to seek relief from the automatic stay. Chava's counsel further argues that he recently discovered that Yehuda filed a voluntary petition for bankruptcy in the Southern District of New York under Case Number 22-35049, which renders this proceeding subject to the automatic stay as of February 2, 2022.

Chava's counsel argues that Chava has every intention of pursuing her claim in the Property. To that end, Chava's counsel states that a reply to HTV's counterclaim is attached to his affidavit as Exhibit M (*id.* ¶ 15). However, counsel has attached the Trust as Exhibit M, not the reply to counterclaim (*see* NYSCEF doc No. 104).¹

With respect to HTV's motion for summary judgment, Chava's counsel contends that HTV has not met its burden of proof. Chava's counsel points to Chava's own affidavit, in which she asserts that the Trust is fraudulent and disputes signing it. Chava claims that her signature was forged by cutting and pasting it from a 2004 transfer document with

¹ Chava's counsel filed the reply to counterclaim on March 9, 2022, several days after filing Chava's opposition to the motion (*see* NYSCEF doc No. 108). On March 14, 2022, HTV filed a notice of rejection of Chava's reply to counterclaim (*see* NYSCEF doc No. 109).

respect to the Property entitled “Affidavit of Compliance with Smoke Detector Requirement for One- and Two- Family Dwellings.” Chava states that she does not know and has never met “Abraham Laks,” the person who purportedly represented her at the 2004 closing of the Property. Chava also states that the existence of the Trust was not raised when HTV previously opposed her motion for a default judgment, and that it is therefore newly created fraud. Chava’s counsel points out that according to documents from the New York State Department of State, the alleged beneficiary of the Trust, Relbog, was dissolved by proclamation on October 27, 2010, three years before the Trust was allegedly executed.

Chava asserts that she would never sign a deed and corresponding transfer documents to a company, HTV, that she had no knowledge of, and that she would not sign over rights to a house that she resided in with her five children. Chava states that Yehuda never said anything to her about conveying or “selling” her home to anyone, including HTV, and that the only discussions held between them in 2012 and 2013 were about family friends lending them funds for the mortgage payoffs that Yehuda was negotiating with banks. Chava also states that she never attended a closing in October of 2013, and that the closing documents submitted by HTV, including those on which her notarized signature appears, are fraudulent. Chava further disputes that all expenses for the Property were paid by the Trust, and asserts that HTV has not submitted any evidence in support of this contention. To that end, Chava’s counsel notes that HTV has not appeared in tax

foreclosure proceedings against the Property pending in this court nor has it paid off a \$32,000 tax debt to prevent forced sale of the Property.

In addition, Chava states that HTV has not offered any explanation as to why the deed was not filed until 2017, one year after HTV was allegedly dissolved according to New York State Department of State records. Chava speculates that Yehuda only filed the deed in 2017 when it became clear to him that she was going to divorce him, and that a divorce proceeding was filed under *Nelkenbaum v Nelkenbaum*, index No. 52462/2018.

HTV's Reply

In reply, filed on March 14, 2022, with respect to its motion for a default judgment, HTV states that the bankruptcy petition related to it was dismissed, and that that petition as well as Yehuda's bankruptcy petition are irrelevant to the pending motion (*see Reply ¶ 4*). HTV contends that the automatic stay provision only stays actions and proceedings "against the debtor" and does not stay claims of and actions taken by the debtor. HTV argues that the pending motion for summary judgment and default judgment and the previously filed answer with counterclaim are actions filed by HTV, which are not stayed as a matter of law.

With respect to its summary judgment motion, HTV contends that Chava has failed to present any evidence to refute the validity of the 2013 recorded deed and the 2004 Trust. HTV contends that it raised the existence of the Trust in the eighteenth affirmative defense in its answer. HTV argues that Chava's and her attorney's allegations that her signature

was forged cannot defeat summary judgment as a matter of law because they are not handwriting experts. HTV also argues that Chava cannot claim that she unequivocally knows that she did not execute the Trust since she previously claimed that she did not know what she signed in connection with multiple properties. HTV further asserts that Chava cannot feign ignorance as to Relbog being the beneficiary of the Trust, as gas bills sent to the Property state that the account was in the name of "Relbog Inc." and that Chava's handwriting is on the gas bills.

HTV further contends that Chava has failed to address the legal presumption that the duly executed deed to HTV in 2013 raises a presumption of due execution which can only be rebutted by clear and convincing evidence. HTV also annexes an affidavit of Curt Baggett, a forensic handwriting analysis expert, who opines that Chava's signatures were genuine, not cut and pasted onto documents, but were each signed separately.

In addition, HTV reiterates that the court should cancel the notice of pendency because it expired on May 11, 2021, three years after initial filing.

Chava's Supplemental Affirmation in Opposition

On March 15, 2022, Chava filed a supplemental affirmation with exhibits (see NYSCEF document nos. 115-117). However, the court will not read or consider these documents as they were not expressly authorized (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.8-c).

Discussion

(1)

HTV's Motion for Default Judgment on Its Counterclaims

“When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him” (CPLR § 3215 [a]). “On a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant’s default” (*L & Z Masonry Corp. v Mose*, 167 AD3d 728, 729 [2d Dept 2018]; *see also* CPLR § 3215 [f]). “To successfully oppose the facially adequate motion for leave to enter a default judgment based on their failure to appear or timely serve an answer, [a defendant is] required to demonstrate a reasonable excuse for their default and the existence of a potentially meritorious defense to the action” (*id.*). “If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed” (CPLR § 3215 [c]).

Here, HTV filed its answer with counterclaim on June 10, 2020, but filed the instant motion for a default judgment over one year thereafter, on November 3, 2021. Pursuant to

CPLR § 3215 (c), the court may, upon its own initiative, deem the counterclaim as abandoned unless sufficient cause is shown why it should not be dismissed. However, Chava has not moved to dismiss the counterclaim, therefore, the court will not sua sponte dismiss the counterclaim since HTV has submitted proof that it served the answer with counterclaim on Chava, and submitted a deed and Trust which purportedly demonstrates that HTV owns the Property and that Chava has no rights with respect thereto. HTV, therefore, has shown sufficient cause why the counterclaim should not be dismissed.

In opposition to HTV's motion, Chava has presented a reasonable excuse for default in answering HTV's counterclaims and the existence of a potentially meritorious defense. Specifically, Chava's counsel stated that he believed that an automatic stay was in effect due to the bankruptcy proceeding involving HTV which would have precluded both, HTV from filing the answer with counterclaim and Chava from filing an answer to the counterclaim. A bankruptcy case involving HTV, as debtor, would have triggered an automatic stay of "commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement" of the bankruptcy case (11 USC § 362 [a] [1]). HTV asserts that the bankruptcy case involving it has been dismissed, and therefore, there is currently no stay in effect with respect to HTV. Chava has also set forth a potentially meritorious defense, as she alleges that she did not sign the Trust and did not agree to transfer the Property to HTV.

Since Chava has demonstrated a reasonable excuse for not responding to the counterclaim as well as a meritorious defense, HTV's motion for a default judgment is **denied**, and Chava's Reply to Counterclaim, filed on March 9, 2022 (NYSCEF doc No. 108) is deemed accepted, nunc pro tunc.

(2)

HTV's Motion for Summary Judgment

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party

the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a “drastic remedy” that “should not be granted where there is any doubt as to the existence of such issues or where the issue is ‘arguable’; issue-finding, rather than issue-determination, is the key to the procedure” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). “The court’s function on a motion for summary judgment is ‘to determine whether material factual issues exist, not resolve such issues’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Here, HTV has met its burden of proof with respect to its cause of action on the counterclaim. In that regard, HTV has submitted copies of the 2004 deed and Trust, purportedly signed by Chava, which shows that the Property was transferred to her, that she was the trustee of the Property and that the Property was held in favor of Relbog, the beneficiary. HTV has also submitted the 2013 deed, purportedly signed by Chava, transferring the Property to HTV. HTV has further submitted a copy of the notice of pendency filed by Chava, which it alleges was illegally filed.

In opposition, however, Chava has raised issues of material fact requiring a trial. To that end, Chava has submitted her own affidavit, in which she denies signing the deed and transfer documents transferring the Property to HTV. Chava also denies signing the

Trust agreement, and denies ever seeing it. She also denies that she was represented by counsel at the 2004 closing.

Chava's affidavit, in and of itself, may not be sufficient to rebut the presumption of due execution of the deed where there is a certificate of acknowledgement attached to the deed (*see Osborne v Zornberg*, 16 AD3d 643, 644 [2d Dept 2005]). However, here, the court is not only in possession of Chava's affidavit but also of a copy of the deed and the Trust. While the court is not the ultimate trier of fact, to the court's untrained eye, it appears as though Chava's signatures on the documents are identical, which may suggest to a trier of fact that the signatures were copied and pasted from one document to another. "[A]n expert opinion is not necessarily required in order to establish that a document is a forgery" (*Kanterakis v Minos Realty I, LLC*, 151 AD3d 950, 952 [2d Dept 2017]). It is for a trier of fact to either credit Chava or HTV's handwriting expert.

In addition, Chava has raised questions about the nature of the Property transfers and the recording of the deed. Specifically, the New York State Department of State documents that Relbog was dissolved on October 27, 2010, three years before the Property was allegedly transferred to HTV. The court queries how, for over three years, Chava could have been a trustee for an entity that had been dissolved and was not in existence for those three years? The court also queries why the 2013 deed was not filed until 2017 well after the point when HTV became inactive during October of 2016?

In sum, there are multiple issues of fact with regard to the transfers of the Property that preclude granting summary judgment to HTV, and HTV's motion for summary judgment is denied.

(3)

HTV's Motion to Cancel the Notice of Pendency

Chava does not dispute that the notice of pendency is over three years old, has not moved for an extension, and makes no specific legal argument as to why the notice of pendency should be extended. Accordingly, the notice of pendency with respect to the Property is expired and no longer effective, and HTV's motion to cancel it is granted (*see* CPLR § 6513; *Thompson Bros. Pile Corp. v Rosenblum*, 134 AD3d 1022 [2d Dept 2015]).

The court has considered the parties' remaining contentions and finds them to be unavailing.

Conclusion

Accordingly, it is hereby

ORDERED that HTV's motion for a default judgment against plaintiff on its counterclaim is **denied**; and it is further

ORDERED that HTV's motion for summary judgment dismissing plaintiff's complaint is **denied**; and it is further

ORDERED that HTV's motion to cancel the Notice of Pendency against the real property located at 970 East 18th Street, Brooklyn, New York 11230 (Block: 6710, Lot: 25)

is granted. The Notice of Pendency is hereby canceled and discharged of record. The Clerk is directed to make a note to that effect on the margin of the record of the Notice of Pendency and refer to this Order.

All relief not explicitly granted is denied.

This constitutes the Decision and Order of the court.

E N T E R



HON. CAROLYN E. WADE, J. S. C.

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KINGS COUNTY CLERK
FILED