

Toobian v Golzad
2018 NY Slip Op 30068(U)
January 11, 2018
Supreme Court, Kings County
Docket Number: 504238/15
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 4 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 11th day of January, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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PAYAM TOOBIAN,
Plaintiff,

- against -

MEHRDAD GOLZAD and BK 2102 LLC,
Defendants.

-----X

DECISION AND ORDER

Index No. 504238/15

Mot. Seq. No. 4

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion, Affirmation (Affidavit), Memorandum of Law,
Statement of Material Facts, and Exhibits Annexed _____
Affirmation (Affidavit) in Opposition, Memorandum of Law,
and Exhibits Annexed _____
Reply Affirmation, Memorandum of Law, and Exhibits Annexed _____

89-106
111-112, 113-130, 131, 132
133, 134-137

In this action, inter alia, to impose a constructive trust on certain real property, the defendants Mehrdad Golzad (the defendant) and BK 2102 LLC (the LLC; collectively, the defendants) move in Seq. No. 4 for an order pursuant to CPLR 3212 granting them summary judgment (1) dismissing all of causes of action of the plaintiff Payam Toobian (the plaintiff) against them, and (2) declaring on their third counterclaim that the LLC is the sole owner of the commercial property located at 2102 Ralph Avenue, Brooklyn, New York (the property), that the defendant is the sole member of the LLC, that the plaintiff has no right to or interest in the property or in the LLC, and that the plaintiff may not interfere with the property or hold himself out as an owner of the property or of the LLC.

Discussion

The defendant, through his wholly owned LLC, purchased the property in April 2010. The plaintiff claims that he is the true owner of the property (or the LLC), that the defendant has been holding title to the property as an accommodation to him, and that the defendant verbally agreed to convey title to the property (or the LLC) to him when the plaintiff was able to refinance the underlying mortgage on the property. It is undisputed that the alleged oral agreement was never reduced to writing.

In response to the defendants' prima facie showing that enforcement of the alleged oral agreement is barred by the statute of frauds (*see* General Obligations Law § 5-703 [1]), the plaintiff raised triable issues of fact as to whether he partially performed in a manner unequivocally referable to its terms. The plaintiff points out that he contributed one-half of the down payment for the property (the other half was contributed by the defendant), contributed toward the balance of the purchase price at closing (the remainder was contributed by the defendant), assumed sole management responsibility of the property, collected and deposited rents in a bank account under his control, paid property expenses (mortgage and insurance) most of the time, caused a defaulting tenant to be evicted from the property, and had the resulting vacant space rented to another commercial tenant. Thus, there is evidence from which a trier of fact might conclude that the plaintiff's conduct was extraordinary and explainable only by a reference to the oral agreement (*see Anostario v Vicinanza*, 59 NY2d 662, 664 [1983]; *Burns v McCormick*, 233 NY 230, 232-233 [1922]). This evidence, when viewed in the light most favorable to the plaintiff as the non-movant, raises a triable issue of fact as to part performance which precludes an award of summary

judgment dismissing the first (declaratory judgment – the property) and the second (declaratory judgment – the LLC) causes of action, as well as precludes an award to the defendants of summary judgment on their third counterclaim for declaratory judgment and injunctive relief (*see Pinkava v Yurkiw*, 64 AD3d 690, 692-693 [2d Dept 2009]).

It is well established that the statute of frauds does not preclude “the recognition of a constructive trust affecting an interest in land where a confidential relationship would be abused if there were repudiation, without redress, of trust orally declared” (*Forman v Forman*, 251 NY 237, 240 [1929]). In an action to impress a constructive trust on real property, the statute of frauds is not a defense because “[s]uch a trust, by its very nature, does not require a writing” (*Vanasco v Angiolelli*, 97 AD2d 462, 462 [2d Dept 1983]). “A constructive trust will be impressed when an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment” (*Spodek v Riskin*, 150 AD2d 358, 361 [2d Dept 1989]).

There is an issue of fact whether a constructive trust may be imposed under the circumstances presented here. The plaintiff and the defendant were long-term friends; they are each practicing medicine in their respective fields; they are each high net worth individuals; and they each speak the same foreign language (Farsi). The plaintiff served as a mentor to the defendant in financial matters. Each of them regularly transferred to the other substantial sums in the hundreds of thousands of dollars: the defendant transferred funds to the plaintiff by way of equipment leases and consulting agreements, as well as allowed the

plaintiff to use his (the defendant's) American Express card; concurrently, the plaintiff paid the defendant's expenses (tuition for his son's private school, child support, mortgage on one of the defendant's Florida homes, among others), as well as contributed funds toward the purchase of the property. In sum, they did favors for each other, and one of those favors was the placement of the title to the property in the defendant's owned LLC. Their friendship came to an end – and the dispute over the ownership of the property arose – when the equipment-lease and consulting deductions proposed by the plaintiff and implemented by the defendant and his former accountant without hesitation, failed to withstand the scrutiny of the defendant's successor accountant, resulting in the defendant's filing of the amended tax returns and the ensuing tax liabilities. Contrary to the defendants' contention, the parties' course of conduct furnished consideration for the parties' oral agreement to re-vest title in the property in the plaintiff (either directly or through the LLC).

The trier of fact may infer that the absence of a written agreement was a consequence of the parties' relationship (*see Sinclair v Purdy*, 235 NY 245, 253 [1923]). Summary judgment is inappropriate where, as here, triable issues of fact and credibility are raised that require a trial (*see Brown v Kass*, 91 AD3d 894, 895 [2d Dept 2012]). Hence, the plaintiff's third (breach of fiduciary duty), fourth (constructive trust – the property), fifth (constructive trust – the LLC), and sixth (unjust enrichment) causes of action survive the defendants' motion and shall proceed to trial (*see Berger v Berger*, 81 AD3d 765 [2d Dept 2011]; *Tampa v Delacruz*, 77 AD3d 910, 912 [2d Dept 2010]; *A.G. Homes, LLC v Gerstein*, 52 AD3d 546, 548 [2d Dept 2008]).

The plaintiff's remaining causes of action for fraudulent and negligent misrepresentation (the seventh and eighth causes of action, respectively) are dismissed without opposition from the plaintiff.

Conclusion

The defendants' motion for summary judgment is denied in light of the existence of triable issues of fact as to partial performance and constructive trust, with the exception of the plaintiff's seventh and eighth causes of action for fraudulent and negligent misrepresentation, respectively, which are hereby dismissed.

The plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry and shall electronically file an affidavit of said service with the County Clerk.

The parties are reminded of their next scheduled appearance in Commercial Part Trial 4 on January 19, 2018.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,


J.S.C.

HON. LAWRENCE KNIPL