

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 23073/2013
Motion Calendar No. 22
Motion Date: 1/6/20

-----x
JOHN RANDAZZO

Plaintiff,

-against-

FRANCESCA KOVACEVIC and MANUEL MENA,
Defendants.

Decision/ Order
Present:
Hon. Wilma Guzman
Justice Supreme Court

-----x
Recitation as required by CPLR 2219(a), of the papers considered in the review of this Order to Show Cause:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affirmation in Support,	
Exhibits Thereto	1
Affirmation in Opposition	2

Upon deliberation of the applications duly made herein, by **ORDER TO SHOW CAUSE**, and all the papers in connection therewith, for an Order, (1) pursuant to CPLR §3025(b) and (c) granting Plaintiff leave to file his amended complaint to conform to the evidence (2) pursuant to CPLR §§6301 and 6311 for preliminary injunction enjoining Defendants from terminating the tenancy or Morell-Brown Corporation(hereinafter referred to as “MBC”); (3) Granting Plaintiff sole and exclusive possession of 723 East 140th Street, Bronx, New York (hereinafter referred to as the “Subject Property”) and (4) for such other relief as this Court deems just and proper, is heretofore granted in part and denied in part.

Leave to serve and file an Amended Verified Complaint

Plaintiff moves for leave to serve and file an amended answer pursuant to CPLR §3025(b)(c). Defendants specifically seeks to add a cause of action for Fraudulent Conveyance pursuant to NY Debtor and Creditor Law §§270 et. seq. and conform to new evidence of the Fraudulent Conveyance by intra-family gift without consideration. Plaintiff argues that they became aware that the transfer of the property located at 723 East 140th Street, Bronx, New York (hereinafter referred to as the “Subject Property”) was made without consideration after the filing of the summary judgment motion. In opposition, Defendant argues

that the statute of limitations has run on amending his answer pursuant to CPLR 213(8) barring Plaintiff from amending the complaint to add this cause of action.

CPLR 3025(b)(c) states:

(b)“Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

In the instant matter, the alleged fraudulent conveyance took place on August 17, 2008 and was recorded on September 4, 2008. Plaintiff filed a summons and complaint against defendants on August 21, 2013 to void the transfer of the Subject Property and expunge the Quitclaim deed due to a breach of the right of first refusal. Defendants filed a verified answer on December 2, 2013 and filed an amended answer on December 27, 2013 denying essentially all the allegations in the complaint. Subsequently on November 1, 2016, Plaintiff moved for summary judgment on the First, Second and Third causes of action. Defendants opposed the motion, arguing that the first right of refusal did not apply to the conveyance because the transfer of the Subject Property was an intra-family gift and not a sale for valuable consideration. As per the Order by Judge Briganti on March 5, 2017, Plaintiff’s summary judgment motion was denied. Plaintiff brought this motion on December 6, 2019. Plaintiff argues that this transference was made to defraud and appear judgment proof to potential creditors in a related proceeding. Plaintiff argues that Defendant Kovacevic transferred the property to her brother Co-defendant Manuel Mena upon being sued by a shareholder in MBC, in an attempt to hide assets. Defendants argue that Plaintiff was on notice of the transfer of the Subject Property since September 4, 2008 when the Quitclaim Deed was filed at the City Clerk’s office and that Plaintiff is not a creditor under the statute.

In general, “[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably

insufficient or patently devoid of merit”. Trataros Construction, Inc. v. New York City Construction Authority, 46 Ad3d 874 *citing* G.K. Alan Assoc., Inc. v. Lazzari, 44 A.D.3d 95, 99, 840 N.Y.S.2d 378. To establish prejudice “there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 [1981]; Valdes v Marbrose Realty, 289 AD2d 28, 29 (2001)).

Defendants have not demonstrated any significant prejudice in allowing Plaintiff to file and serve his Amended Verified Complaint, particularly pre-note of issue and in the light of the related pending litigation. There appears to be no surprise as defendants initiated the transfer contemporaneous with the impending lawsuit and could have reasonably anticipated Plaintiff would pursue this cause of action.

Under these circumstances, the Court finds that granting Plaintiff leave to file and serve an amended complaint would not prejudice or surprise Defendants. The Court grants Plaintiff’s motion for leave to file and serve an amended answer as it is a proper use of the Court’s discretion. The Court also grants Plaintiff discovery limited solely to the new cause of action based on the intra-family conveyance without valuable consideration under NY Creditors and Debtors Law §270.

Preliminary Injunction and Temporary Restraining Order

Plaintiff moves for an Order pursuant to CPLR §§6301 and 6311 for preliminary injunction enjoining Defendants, as well as their agents, representatives, employees and anyone acting for or in concert with them from terminating the tenancy of Morell-Brown Corporation (hereinafter referred to as “MBC”) is denied as moot. MBC has heretofore surrendered possession of the subject property. Therefore, the issue of eviction is now moot. However, any personal property belonging to MBC remaining at the Subject Property, subsequent to the surrender of the property is now deemed abandoned. The owners of the Subject Property to wit: John Randazzo and Manuel Mena as co-owners each of 50% of the Subject Property, may dispose of the remaining items belonging to MBC as may be deemed proper.

Due to the foregoing, the Court grants preliminary injunction and a temporary restraining order in favor of Plaintiff solely to the extent of temporarily restraining Defendants as well as their agents, representatives, employees and anyone acting for or in concert with them from selling, reletting or otherwise transacting with the Subject Property without Plaintiff’s consent.

The Court further orders that any monies collected from any future tenants or transactions be placed in escrow pending the resolution of the current proceedings.

Sole and Exclusive Possession of the Subject Property

Plaintiff seeks an order granting Plaintiff sole and exclusive possession of the Property to prevent waste. This request is premature in that it seeks the ultimate relief and determination of one of the causes of action. Plaintiff has not sufficiently displayed why this relief is necessary at this stage of the proceeding given Plaintiff and Defendants ownership of equal shares of the property, a currently valid Quitclaim Deed and no evidence that Defendants are causing harm to the property. Due to the foregoing, the Court denies Plaintiff's request for an order granting him exclusive and sole possession of the Subject Property.

Taxes, Water and Insurance

Upon further oral argument with the parties at a conference held on May 15, 2020 and May 18, 2020, the issue of taxes, water and insurance having been raised and heard by the Court, and having been provided with the following breakdown:

Taxes: (Exclusive Occupancy by Mena Corporations, Not apportioned)

May 6, 2019	\$1,764.95
May 8, 2019	\$6,366.57
June 27, 2019	<u>\$56,935.00</u>
	\$65,066.64

Taxes: (Apportionment Period)

September 20, 2019	\$5,473.76
December 28, 2019	\$5498.00
March 27, 2020	<u>\$5498.00</u>
	\$16,469.76

NYC DEP: (to be apportioned)

November 10, 2019	\$116.79
April 25, 2020	<u>\$234.20</u>
	\$830.95

Insurance: (to be apportioned)

2018 through and including 2020	\$7657.00
---------------------------------	-----------

The Court *sua sponte determines* as follows:

Defendant Mena is responsible for the full amount of taxes owed for the period of May 6, 2019 through June 27, 2019 in the amount of \$65, 066.64 plus 50% of the taxes from September 20, 2019, December 28, 2019 and March 27, 2020 in the amount of \$8234.88($16469.76 \div 2 = \8234.88), plus 50% of the water bill for November 10, 2019 and April 25, 2020 in the amount of \$415.48($830.95 \div 2 = \415.475), plus 50% of the Insurance from 2018 through 2020 in the amount of \$3828.50($7657 \div 2 = 3828.50$) for a total of \$77545.50.

Due to the foregoing, the Court the grants Plaintiff's application and finds that payment is due and owing by the Defendant MENA of the above itemized costs and disbursements, in the amount of \$77, 545.50. Said payments is to be made within 120 days after service of a copy of this order with notice of entry. The Court further finds that Plaintiff and Defendant Mena, each responsible for 50% of payment of the taxes, water and insurance costs going forward for the pendency of this case.

Accordingly, it is hereby,

ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for leave to serve and file an amended verified Complaint is granted. It is further,

ORDERED, ADJUDGED AND DECREED that Plaintiff file and serve the amended Verified Complaint within 30 Days of the service of this Order with of Notice of Entry. It is further,

ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for preliminary injunction and temporary restraining order enjoining Defendants as well as their agents, representatives, employees, and anyone acting for or in concert with them from terminating the tenancy of Morell-Brown Corporation is moot. It is further,

ORDERED, ADJUDGED AND DECREED that any property belonging to MORELL-BROWN CORPORATION which remains at 723 East 140th Street is hereby deemed abandoned and maybe be disposed of as may be deemed proper by Plaintiff and/or Defendant MENA, jointly/or severally as co-owners of the subject premises. It is further,

ORDERED, ADJUDGED AND DECREED that Defendant MENA is enjoined from selling or re-letting the Subject Property without Plaintiff's permission and consent. It is further,

ORDERED, ADJUDGED AND DECREED that any monies collected from any future tenants be placed in escrow pending the resolution of the current proceedings. It is further,

ORDERED. ADJUDGED AND DECREED that Plaintiff's application for the sole and exclusive possession of the Subject Property located at 723 East 140th Street, Bronx, New York is denied. It is further,

ORDERED, ADJUDGED AND DECREED that Defendant MENA is directed to pay the sum of \$77,545.50 in tax, water and insurance costs, the 50% sum due and owing by the Defendant MENA of the itemized costs and disbursements, within 120 days of the service of this Order with Notice of Entry. It is further,

ORDERED, ADJUDGED AND DECREED that Plaintiff and Defendant MENA each pay 50% of the taxes, water and insurance bills going forward during the pendency of this proceeding or until said property is re-let or otherwise disposed of or until the ultimate determination of this matter. It is further,

ORDERED, ADJUDGED AND DECREED that Plaintiff serve a copy of this Order with Notice of Entry, within 30 days of the date of entry.

This constitutes the Decision and Order of the Court.

Date: May 18, 2020



Hon. Wilma Guzman, J.S.C.