Supreme Court of the County of Suffolk
State of New York - Part XL

COPY

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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MARGARET MCPADDEN, MARY MCPADDEN SIAO, MICHAEL MCPADDEN and CLARE BISULCA,

Plaintiff,

-against-

THOMAS MCPADDEN,

Defendant.

x----------x

INDEX NO.: 02096/2014

SEQ. NO.:001-Mot D

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Upon the following papers numbered 1-43; read on this Motion/Order to Show Cause for Summary Judgment Notice of Motion/ Order to Show Cause and supporting papers 1-17; ~~Notice of Cross Motion and supporting papers (~~ ; Answering Affidavits and supporting papers 18-36 ; Replying Affidavits and supporting papers 37-43; Other__; ~~(and after hearing counsel in support and opposed to the motion)~~,

"Let parents bequeath to their children not riches, but the spirit of reverence."

The Court cannot help but observe that Plato's immortal sentiment, if sincerely felt, would calm the discord in what should be a loving family.

The case at bar is a dispute between siblings over the disposition of their late parents home. The *locus in quo* was originally owned (presumably as tenants in the entirety), by James H. McPadden and Anna A. McPadden. Subsequently, Mr. McPadden transferred all right, title and interest in the property to his wife alone. In contemplation of declining health and possible expenses attending same, in 1997 the McPadden's gathered their eight children together and met with an attorney to discuss the preservation of their assets.

Two documents were produced as a result of this meeting: In 2001, Anna McPadden executed a deed (Plaintiffs'"C") transferring fee simple to Thomas McPadden, with her retaining a life estate for the premises. The second document (executed in January of 2002), is an agreement between Defendant Thomas McPadden and his mother

Anna A. McPadden. This provides, *inter alia*, that "Thomas McPadden further agree that in the event of a sale of the property during the lifetime of Anna A. McPadden, h will divide his share of the net proceeds into eight shares and shall retain one such equa share for himself and shall give one equal share to each of his siblings who surviv him.....Thomas McPadden further agrees that within two years from the date of death o Anna A. McPadden, he shall pay to his siblings the sum of money equal to 7/8ths (seven eighths) of seventy-five (75%) of the appraised value of the property." (Plaintiffs' "B").

Mrs. Anna McPadden passed away in September of 2011. Her husband ha predeceased her. Plaintiffs have made demand for their shares under the agreement Defendant has not complied with this request. Instead, he avers that he purchased th subject parcel from the decedent for the sum of $150,000.00 (one-hundred, and fift thousand dollars). Defendant filed a deed in 2008, which reflects that the life estate wa removed .

At his examination before trial, Defendant stated that the purported sale of th property for $150,000.00, was pursuant to an oral agreement. Plaintiffs move fo summary judgment. Defendant opposes same on the basis of outstanding disclosure an that "...there are material issues of fact with respect to whether the Plaintiffs were awar of the sale of the property..."(Affirmation dated January 21, 2015, para 3).

Prior to our analysis of the motion papers, the Court would like to commend Mr Vizzi, and Ms. Schechter, for the eloquence and scholarship in their respective briefs.

Summary judgment is a drastic remedy to be granted only when the Cour determines there is no clear triable issue of fact. Even the color of a triable issu forecloses the remedy (***Benincasa v. Garrubbo***, 141 A.D.2d 636 [2d Dept.1988]). Whe applied to an allegation of breach of contract, a *prima facie* case for summary judgment i satisfied when the movant shows: the existence of the contract, performance pursuant t its terms, and non-performance by the Defendant (***Carltun on Bay Kosher Caterers, Ltd. v. Makani***, 295 A.D.2d 464, 744 N.Y.S.2d 674 [2d Dept. 2002]). Once the burden ha been met, the respondent cannot escape summary judgment "unless [their] opposin papers [raise] genuine factual issues" ***Badische Bank v. Ronel Systems, Inc***. 36 A.D.2 763, 321 N.Y.S.2d 320 [2nd Dept.1971]; ***Leumi Fin. Corp. v. Richter***, 24 A.D.2d 855 264 N.Y.S.2d 707, affd. 17 N.Y.2d 166, 269 N.Y.S.2d 409, 216 N.E.2d 579; ***Stagg Too & Die Corp. v. Weisman***, 12 A.D.2d 99, 102, 208 N.Y.S.2d 585, 588)."

Initially, the Court notes that Plaintiffs were not signatories to the original contrac between Mr. Thomas McPadden and his deceased mother, so their standing to claim a benefit under its terms must be discussed. By way of historical background, th requirement for third-parties to claim contractual privity has long been dispensed wit under the rule in ***Lawrence v. Fox***, 20 N.Y. 268, 6 E.P. Smith 268 [1859]. A perso

seeking to enforce their rights as a "third-party beneficiary must [however] establish '(1) the existence of a valid and binding contract between other parties, (2) that the contrac was intended for [their] benefit and (3) that the benefit to [them] is sufficientl immediate, rather than incidental, to indicate the assumption by the contracting parties o a duty to compensate [them] if the benefit is lost'" (***Nanomedicon, LLC v. Researcl Foundation of State University of New York***,112 A.D.3d 594, 596, 976 N.Y.S.2d 191[2n Dept.2013] quoting ***State of Cal. Pub. Employees' Retirement Sys. v. Shearman & Sterling***, 95 N.Y.2d 427, 434–435, 718 N.Y.S.2d 256, 741 N.E.2d 101, *quoting,* ***Burns Jackson Miller Summit & Spitzer v. Lindner***, 59 N.Y.2d 314, 336, 464 N.Y.S.2d 712 451 N.E.2d 459). "Absent such an intent, the third party is merely an incidenta beneficiary with no right to enforce the contract." (***Strauss v. Belle Realty Co.***, 98 A.D.2(424, 426, 469 N.Y.S.2d 948 (2nd Dept.1983).

Applying this standard, Plaintiffs were clearly intended (as opposed to incidental beneficiaries of the contract provisions. As such they have standing to enforce its term: (***Burns Jackson Miller Summit & Spitzer v. Lindner***, *supra*; ***Grunewald v. Metropolitar Museum of Art***, 125 A.D.3d 438, 3 N.Y.S.3d 23 [1st Dept.2015]).

Not withstanding Plaintiffs' status as intended third party beneficiaries, the original promissor and promissee had the power to rescind a contract without the consen of the third party beneficiaries (***Miller v. Miller***, 82 A.D.3d 469, 918 N.Y.S.2d 417 [1s Dept.2011]; ***In re Gross' Estate***, 35 A.D.2d 830, 317 N.Y.S.2d 45 [2nd Dept.1970]). The question becomes "did the Defendant and decedent rescind or modify the 2002 contract?' For the reasons discussed below, this query must be answered in the negative.

Even though a contract pertaining to the sale of realty must be in writing to be enforceable, the law in New York is equally emphatic that such a contract may be rescinded by the parties *via* a parol agreement (***Rodgers v. Rodgers***, 235 N.Y. 408, mod on rearg. on other grnds., 236 N.Y. 577; ***Schwartzreich v. Bauman-Basch***, 231 N.Y. 196; ***Strychalski v. Mekus***, 54 A.D.2d 1068, 388 N.Y.S.2d 969 [4th Dept.1976]). This genera rule, however, brooks the following exception "A written agreement or other writter instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."(G.O.L § 15-301 [1]).

Defendant cites to the case of ***Jones v. Trice***, 202 A.D.2d 394, 608 N.Y.S.2d 688 [2nd Dept.1994] for the proposition that a written contract pertaining to an interest in land can be rescinded by the mutual consent of the obligor and obligee. Indeed, that is the principle, broadly stated, in ***Jones*** (as well as the other cases cited by defense counsel).

What distinguishes the holding of the learned Court from the matter at hand, however, is that the parties in the ***Jones*** case had executed a written contract to supercede the earlier one (Id. at 395). The remaining cases relied upon by the defense are similarly inapposite.

We draw Defendant's attention to the written contract between Anna McPadden and Thomas McPadden, specifically, paragraph 11: "This agreement constitutes the entire agreement between the parties hereto and may be altered or changed, if such changes are in writing, signed by the parties hereto." [emphasis ours] (Plaintiffs "B").

Defendant contends that the 2008 Deed constitutes the written agreement required for purposes of G.O.L. § 15-301 [1]. We disagree. As correctly asserted by Plaintiffs, the 2008 deed merely conveyed the decedent's life estate to the Defendant. It did not disturb the conveyance of fee simple from the 2002 deed executed in conjunction with the contract. (Plaintiffs' "B") ***(Ubriaco v. Martino***, 36 A.D.3d 793, 828 N.Y.S.2d 490 [2nd Dept.2007]).

The sole issue worthy of discussion is whether the doctrine of *laches* creates a triable issue of fact, precluding summary judgment (***Schirano v. Paggioli***, 99 A.D.2d 802, 472 N.Y.S.2d 391 [2nd Dept.1984]). If a party entitled to relief "sleeps on their rights" they will be precluded from enforcing same if the other party has suffered a detriment in reliance thereon (***Dwyer by Dwyer v. Mazzola***, 171 A.D.2d 726, 567 N.Y.S.2d 281 [2nd Dept.1991] citing 75 NYJur2d, Limitations and Laches, § 330):

> "The four basic elements of laches are, (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant." (Id. 727 *citing,* 75 NYJur2d, Limitations and Laches, § 333).

Plaintiffs contend that they were unaware of any attempted rescission of the 2002 agreement until 2013. (Affidavit of Mary McPadden Siao dated 2/4/2015, para. 12). Defendant has submitted an affidavit from a Ms. Lucia Cepriano which relates "It was impossible for the siblings not to have known that Mrs. McPadden sold the house to Tom as I was there numerous times when it was discussed. Specifically, I remember one conversation that took place at Therese's house. Clare was there and was present during the planning stages..." (Affidavit dated 1/20/2015, para. 24). The Defendant has also submitted an affidavit from Monsignor Brendan Riordan stating "Anna made it well known to me that Tommy owned the house." (Affidavit dated 1/21/15 para. 15).

A claim of laches (or equitable estoppel for that matter) cannot be founded upon non-specific promises or understandings. (*see*, ***Sanyo Elec., Inc. v. Pinros & Gar Corp.*** 174 A.D.2d 452, 453, 571 N.Y.S.2d 237 [1st Dept.1991]). In the case at bar these vague assertions of a *modus vivendi*, do not create a viable argument for laches when compared with the certitude of the 2002 deed and contract. Moreover, although the defense has tendered proof that his other siblings were made aware that he had conveyed approximately $150,000.00 for the home in 2004, this action preceded Plaintiffs becoming aware of the conveyance. Thus, Defendant cannot show any detriment inuring against him in reliance of Plaintiffs refraining from commencing a lawsuit at an earlier time. In short, with the exception of the passage of time, none of the elements of laches have been shown to be present in this matter.

Defendant argues that summary judgment is inappropriate because the depositions of the parties has not been completed. In support of this argument, counsel draws the Court's attention to CPLR § 3212[f], as well as the cases of ***Estate of Fasciglione***, 73 A.D.2d 769, 899 NYS 2d 645 [2nd Dept.2010); ***Juseinoski v. New York Medical Center of Queens***, 29 A.D.3d 636, 815 N.Y.S.2d 183 [2nd Dept. 2006]; and, ***Urcan v. Cocarelli*** 234 A.D.2d 537, 651 N.Y.S.2d 611 [2nd 1996]).

In ***Fasciglione***, there is no discussion of the underlying fact pattern. ***Juseinoski*** involved the performance of an unauthorized autopsy and the decision to proceed with the procedure, which had a direct bearing on liability, was uniquely within the possession of one party (*supra*, at 638). ***Urcan*** was a negligence action.

In contrast to the readily distinguishable authority cited by the defense, the Court is guided by the holding in ***Westport Ins. Co. v. Altertec Energy Conservation, LLC***, 82 A.D.3d 1207, 921 N.Y.S.2d 90 [2nd Dept.2011]. The lower Court denied summary judgment with leave to renew after discovery was completed. In explaining its reversal of the lower Court, the Appellate Division stated that the respondent had:

> "...failed to submit any affidavits establishing that facts existed which were essential to justify opposition to the motion but were not in its possession in light of the fact that discovery had yet to be completed (*see,* CPLR § 3212 [f]; ***Rodriguez v. DeStefano***, 72 A.D.3d 926, 898 N.Y.S.2d 495; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, [cite omitted]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." (***Arpi v. New York City Tr. Auth.***, 42 A.D.3d 478, 479, 840 N.Y.S.2d 107; *see*, ***Orange County–Poughkeepsie Ltd. Partnership v. Bonte***, 37 A.D.3d 684, 687, 830 N.Y.S.2d 571.)" (Id. at 1212).

The case law discussed above demonstrates that although summary judgment i appropriately rare, it finds proper application more in instances of breach of contract thai in negligence (*e.g.*, ***Essex Ins. Co. v. Carpentry***,74 A.D.3d 733, 904 N.Y.S.2d 78 [2n Dept.,2010]; ***Pancake v. Franzoni***, 149 A.D.2d 575, 540 N.Y.S.2d 674 [2nd Dept.1989])

Based on the forgoing, we find that Plaintiffs have sustained their *prima faci* burden of demonstrating their entitlement to summary judgment. In response, th Defendant has failed to bring forth evidence which reveals the existence of a triable issu of fact on the issue of liability (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 508 N.Y.S.2 923 [1986]).

The issue of damages, however, does not lend itself so readily to summary relief Defendant states that he paid the sum of $150,000.00 to the decedent Mrs. McPadden fo the purchase of the home. This was in the form of a check to the James H. McPadde Irrevocable Trust (Plaintiff's exhibit "H"). Defendant has averred that this sum is th subject of a claim before the Surrogate (***In the Matter of the McPadden Trust***, Fil #2013-1/A), and that the Plaintiffs in this case "...will be receiving a refund of th Property proceeding." (Affidavit of Thomas McPadden dated 1/21/2015, [para. 49]) Additionally, the Court is unwilling to accept the appraisal submitted by Plaintiffs as t the value of the *locus in quo* without affording the Defendant to opportunity to challeng same. We find that this mandates an immediate trial as to the issue of damages and se off (CPLR § 3212[c]); ***Horizon Asset Management, LLC v. Duffy***, 106 A.D.3d 594, 96 N.Y.S.2d 17 [1st Dept.,2013]).

We have considered the remaining contentions of the defense and althoug presented with skill, they fail to persuade the Court. Therefore, Plaintiffs' motion will b granted to the extent provided herein. It is

ORDERED, that the Court judgment be entered in favor of Plaintiffs and agains the Defendant on the issue of liability. It is further

ORDERED, that the Defendant's answer is hereby stricken. It is further

ORDERED, that upon the filing of a note of issue and certificate of readiness, thi matter will be referred to the Calendar Control Part for a trial on the issue of damages an set off.

The foregoing constitutes the decision and order of the Court.

DATED: JULY 6, 2015
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.