

**Supreme Court of the State of New York  
Appellate Division: Second Judicial Department**

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Argued - March 13, 2012

PETER B. SKELOS, J.P.  
MARK C. DILLON  
RANDALL T. ENG  
LEONARD B. AUSTIN, JJ.

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2011-06257

DECISION & ORDER

Linda Saline, etc., appellant, v Richard Saline,  
respondent.

(Index No. 16652/07)

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Michael J. Ferlisi, Brooklyn, N.Y. (Maurice A. Reichman of counsel), for appellant.

Ginsburg & Misk, Queens Village, N.Y. (Hal R. Ginsburg of counsel), for  
respondent.

In an action, inter alia, to quiet title to real property pursuant to RPAPL 1501, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Geller, J.H.O.), entered May 26, 2011, which, upon a decision of the same court dated March 7, 2011, made after a nonjury trial, is in favor of the defendant and against her dismissing the complaint with prejudice and vacating a notice of pendency filed in connection with the subject real property.

ORDERED that the judgment is reversed, on the law and the facts, with costs, it is declared that the estate of Philip R. Saline is the rightful owner of the subject real property, and the defendant is directed to tender a deed to the subject real property dated January 12, 1996, to the plaintiff.

This action involves title to real property located in Woodhaven (hereinafter the subject property). Pursuant to a bargain and sale deed dated December 3, 1986, the plaintiff's decedent, Philip R. Saline (hereinafter the decedent), transferred the subject property to his brother, the defendant.

In 2007 the decedent commenced this action against the defendant to quiet title to the

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subject property. The decedent alleged that, on January 12, 1996, he exercised an option to purchase the subject property back from the defendant, that the defendant executed a deed (hereinafter 1996 deed) transferring the subject property back to the decedent, and that the decedent delivered the executed 1996 deed to an attorney who represented both parties in connection with the transaction. The decedent further alleged that, in December 2006, by means of fraud and deceit, the defendant nonetheless took possession of the 1996 deed, which had never been recorded, from the attorney who had represented both of the parties.

During the pendency of this action, the decedent served a notice to admit upon the defendant, annexing, inter alia, copies of the option to purchase, dated December 3, 1986, and signed by the defendant, giving the decedent the option to purchase the subject property for the sum of \$75,000, within 20 years of December 3, 1986, and the 1996 deed, signed by the defendant, transferring the subject property back to the decedent. The defendant did not timely serve a response to this notice to admit and, thus, the authenticity of the attached documents was deemed admitted.

Before trial, the decedent died and his wife, Linda A. Saline, as executor of his estate, was substituted in his place as the plaintiff. After a nonjury trial, the Supreme Court ruled in favor of the defendant, and entered judgment in favor of the defendant, among other things, dismissing the complaint. The plaintiff appeals, and we reverse.

Since this matter was decided after a nonjury trial, “the power of this Court is as broad as that of the trial court, and we may render a judgment warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses” (*Marini v Lombardo*, 79 AD3d 932, 933; *see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499). The Supreme Court improperly found in favor of the defendant since the plaintiff submitted evidence sufficient to make a prima facie showing that the defendant transferred title to the subject property to the decedent in 1996, and a conclusion that the plaintiff is the rightful owner of the subject real property is warranted by the facts (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499). It is presumed that a deed is delivered and accepted as of its date (*see Ten Eyck v Whitbeck*, 156 NY 341; *Whalen v Harvey*, 235 AD2d 792, 793-794). Here, the trial court found that the decedent had an option to buy the subject property from the defendant and that he exercised this option, which resulted in the delivery of a deed to the mutual attorney for the parties. Contrary to the defendant’s contentions, the trial court properly admitted into evidence certain documents admitted by him to be authentic and upon which it based its findings of fact (*see CPLR 3123; Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103; *Ocampo v Pagan*, 68 AD3d 1077).

Although the presumption of delivery and acceptance of a deed as of its date “must yield to opposing evidence” (*Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d 370, 372), here, no admissible evidence which would have overcome the presumption was presented in opposition to the evidence showing that the 1996 deed was delivered to the parties’ mutual attorney (*compare Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d at 372). The fact that the deed was not recorded was not sufficient evidence to overcome the presumption of delivery of the deed to the attorney, the mutual agent of both parties, since recording is not required in order to transfer title to real property (*see Real Property Law* § 291). No evidence was presented that the delivery of the deed on the date of its execution was conditional.

The parties' remaining contentions are without merit.

Since this action is, in part, a declaratory judgment action, it must be declared that the decedent's estate is the rightful owner of the subject property (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901), and that the defendant must tender the 1996 deed to the plaintiff.

SKELOS, J.P., DILLON, ENG and AUSTIN, JJ., concur.

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2011-06257

DECISION & ORDER ON MOTION

Linda Saline, etc., appellant, v Richard Saline,  
respondent.

(Index No. 16652/07)

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Motion by the respondent, on an appeal from a judgment of the Supreme Court, Queens County, entered May 26, 2001, inter alia, to strike the appellant's appendix and brief on the ground that they contain or refer to matter dehors the record. By decision and order on motion of this Court dated November 1, 2011, that branch of the motion which was to strike the appellant's appendix and brief on the ground that they contain or refer to matter dehors the record was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the branch of the motion which was to strike the appellant's appendix and brief on the ground that they contain or refer to matter dehors the record is denied.

SKELOS, J.P., DILLON, ENG and AUSTIN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court