

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

NATALIA Y. POPOVA and LARISSA
YURIEVNA CHTCHELKANOVA,

INDEX NO. 15727/2006

Plaintiffs,

MOTION

DATE February 26, 2008

- against -

MOTION

CAL. NO. 25

PLAZA HOMES, LLC, ROYAL HOLDING, LLC
and CHASE MANHATTAN MORTGAGE CORP.,

MOT. SEQ.

NUMBER 2

Defendants.

The following papers numbered 1 to 21 read on this motion by the defendants Plaza Homes, LLC and Royal Holding, LLC for, inter alia, summary judgment dismissing the plaintiffs' complaint and on its counterclaims. The defendant Chase Manhattan Mortgage Corp. cross-moves for, inter alia, summary judgment dismissing the plaintiffs' complaint and on its counterclaims. The plaintiffs cross-move to compel disclosure.

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Upon the foregoing papers the motion and cross-motions are determined as follows:

In this action, the plaintiffs seek to set aside a referee's deed and enforce a contract for sale of the premises allegedly entered into between the plaintiffs and the defendant Chase Manhattan Mortgage Corp. ("Chase") or for a judgment of partition. The real property at issue is located at 171-12 91st Avenue, Jamaica, New York. Insofar as is pertinent in this action, the original record owners of this property were George Harky ("Harky") and his wife who acquired title on February 27, 1969. When Harky died on January 14, 1987, having been predeceased

by his wife, title passed to his two sons, Andrew Harkuscha ("Andrew") and George Harkuscha who represented themselves as defendants sole distributees and who jointly recorded a deed, on February 27, 1991, memorializing their intestate succession. After George Harkuscha died on December 17, 1991, Andrew became the sole record owner of the property.

On March 31, 1995, Andrew took out a home equity line of credit with the defendant Chase which was secured by a mortgage on the subject premises. On July 17, 1997, an action to foreclose on this mortgage was commenced by the defendant Chase under the title of Chase Manhattan Mortgage Corp. v Andrew Harkuscha, George Harkuscha, et al., Index No.: 17094/1997.

A judgment of foreclosure and sale was initially issued on October 16, 1998 by Justice Joseph G. Golia. However, that judgment was vacated via a second order of reference signed by Justice Golia on February 5, 1999. Vacatur of the judgment was necessitated since a stay of the proceeding had automatically come into effect when a petition in bankruptcy was filed by Andrew prior to the issuance of the first order of reference. A new judgment of foreclosure and sale was signed by Justice Golia on September 17, 1999 and the property was eventually sold at a public auction, conducted on November 2, 2001, to Plaza Homes, LLC and Universal Development. That bid was later assigned to the defendants Plaza Homes, LLC ("Plaza") and Royal Holding, LLC ("Royal").

The approximate two-year delay from the issuance of the judgment to the sale was caused primarily by Andrew's filing of some five petitions in bankruptcy, the final one of which was filed in violation of an order of the Bankruptcy Court prohibiting Andrew from making further filings. Subsequently, in a remarkable display of dead hand control, George Harkuscha reached out from beyond the grave and filed, though to no avail, his own bankruptcy petition on the very day of the foreclosure sale.

Less than a month after the sale, the plaintiff Natalia Y. Popova ("Popova"), a lifetime resident of Russia and Andrew's purported half-sister, whom he now alleges he had been aware of since approximately 1995, filed an order to show cause seeking leave to intervene in the foreclosure proceeding. By order dated January 29, 2002, Justice Golia granted Popova's motion to the extent of allowing her "to intervene in [the] action to establish her right of ownership of a certain percentage of the property in question". While Justice Golia gave Popova 40 days from the date of filing of the order to serve and file an answer, he did not vacate the judgment of foreclosure and sale but instead actually lifted the ex parte stay on the transfer of title he had previously issued on Popova's order to show cause.

When Popova failed to file and serve an answer as directed, Chase moved for a default judgment. In his decision dated June 10, 2002, Justice Golia decried the "tortured history" of Andrew's attempts to

stave off foreclosure but also held that he would "not deny [Popova] every opportunity to intervene in this action and to protect her interest in the property". As such, Justice Golia granted Popova an extension of 60 days to serve and file an answer. Justice Golia also noted that he would "upon application. . . issue a Writ of Assistance to remove Mr. Harkuscha from the premises".

After issue was joined by Popova, Chase moved for summary judgment on the basis that Popova's "alleged ownership rights to the Subject Premises are extinguished under the doctrine of adverse possession, equitable estoppel, deed by estoppel and laches". In a memorandum decision incorporated into a short form order dated December 18, 2002, Justice Golia denied Chase's motion finding the basis for Chase's motion was not established as a matter of law.

In letters exchanged between counsel for Popova and Chase's counsel some three years after the sale, dated October 17, 2004 and November 11, 2004, respectively, an agreement was memorialized that Popova would purchase the property at issue for the sum of \$100,000.00 plus specified interest. The plaintiffs in this action claim in the complaint that Chase reneged on this contract. It is undisputed that on or about January 26, 2006, the referee, in accordance with the terms of sale and the judgment, executed and delivered to the defendants Plaza and Royal a referee's deed to the premises.

On June 5, 2006, instead of seeking the writ of assistance that Justice Golia expressly stated he would issue, Plaza commenced a summary holdover proceeding in the New York City Civil Court, Queens County entitled Plaza Homes, LLC v Andrew Harkuscha, et al., Index No.: 64889/2006. The plaintiffs in this action were not named as respondents in the holdover proceeding. However, Plaza, apparently concerned by George Harkuscha's post-death appearance five years earlier at the clerk's office in the Bankruptcy Court, took no chances and named him as a respondent.

In yet another coincidence, Popova somehow connected with a Larissa Yurievna Chtchelkanova ("Chtchelkanova"), another purported half-sister of Andrew's who was also residing in Russia. Chtchelkanova claims that she is also a daughter of Harky, but of a mother different from both Popova and Andrew. Popova, rather than proceeding in the foreclosure action to "establish her right of ownership", as granted by Justice Golia, commenced this action in conjunction with Chtchelkanova on July 18, 2006 with the filing of the summons and complaint.

Soon thereafter, the plaintiffs in this case filed an order to show cause seeking to have the holdover proceeding pending against Andrew stayed and consolidated with the present action. By order of this court, dated November 21, 2006, both branches of that motion were denied.

A trial of the holdover proceeding was held before Housing Court Judge John Lansden. Luckily for Judge Lansden, the decedent George Harkuscha apparently defaulted, and the only respondent who appeared to testify was the still breathing Andrew who asserted two defenses. As recounted by Judge Lansden in his decision after trial, dated June 21, 2008, Andrew argued that the petitioner's holdover proceeding "must fail because Natalia Popova and Larissa Chtchelkanova have an ownership interest in the property and have given him a life estate, or in the alternative, that Petitioner can not maintain this proceeding as the foreclosure was void due to Petitioner's failure to name all interested parties, namely Natalia Popova and Larissa Yurievna Chtchelkanova".

At the trial, Andrew and Popova testified and submitted documentary evidence in an attempt to establish kinship between Popova, Chtchelkanova and their alleged father, George Harky, as well as with Andrew. Judge Lansden determined that Andrew failed to establish by a preponderance of evidence the alleged kinship between the parties and awarded a judgment of possession to Plaza. A motion made pursuant to CPLR §4404[b] to set aside the decision after trial was denied.

Turning to this matter, Plaza and Royal argue that, although not parties to the underlying proceeding, the plaintiffs were in privity with Andrew and are collaterally estopped in this action from contravening the determination made by Judge Lansden in the holdover proceeding regarding the kinship between Harky, Harkuscha, Popova and Chtchelkanova. As a result, defendants postulate, that since the plaintiffs are barred from establishing kinship they have no standing to set aside the referee's deed or to bring a partition action.

The doctrine of collateral estoppel prevents a party, or one in privity with a party, from relitigating an issue that was "raised, necessarily decided and material in the first action", provided the party had a full and fair opportunity to litigate the issue (See, Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 349; Ryan v New York Tel Co., 62 NY2d 494, 500; Sclafani v Story Book Homes, Inc., 294 AD2d 559). The doctrine is an equitable defense "grounded in the facts and realities of a particular litigation, rather than rigid rules" (Buechel v Bain, 97 NY2d 295, 303). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests on the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (Ryan v New York Tel Co., supra at 501).

Whether a party has had a full and fair opportunity to contest the prior decision "requires consideration of the realities of the litigation' . . . [and] the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance

depending on the nature of the proceedings" (Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147, 153, quoting Gilberg v Barbieri, 53 NY2d 285, 292; see also, Altegra Credit Co. v Tin Chu, 29 AD3d 718; Chambers v City of New York, 309 AD2d 81).

It is not required that the party to be estopped was actually a party to an underlying litigation so long as both parties were in privity with one another (See, Buechel v Bain, supra). "[A] nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation" (D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664). In other words, "the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding" (Green v Santa Fe Industries, Inc., 70 NY2d 244, 253). However, like the element of "full and fair opportunity", "privity does not have a single well-defined meaning" and "courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances" (Buechel v Bain, supra at 303-04).

Applying these tenets to the facts at bar, it is clear that the issue of the plaintiffs' kinship with Harkuscha and Harky, critical to all the causes of action in this case, was necessarily addressed by the housing court when it was affirmatively raised by Andrew as a component of his defenses in the holdover proceeding. Without question, Andrew had a full and fair opportunity to litigate the kinship issue in the housing court as he affirmatively raised the issue, tried the defense before a judge and received a decision after trial and a decision on his motion to set that decision aside.

With respect to the plaintiffs in this case, the court is persuaded that, although not respondents in the holdover proceeding, they were in privity with Andrew in that case and should be collaterally estopped in this action from asserting the issue of their kinship with Harkuscha and Harky (See, Nobel v Nobel, 31 AD3d 643; Janitschek v Trustees of Friends World College, 249 AD2d 368; Slocum on behalf of Nathan "A" v Joseph "B", 183 AD2d 102).

Both plaintiffs injected themselves into the holdover proceeding when, by order to show cause, they sought to have that proceeding stayed and consolidated with this matter. Popova went further and actually testified at the trial of the holdover proceeding in an attempt to judicially establish her familial relationship with Andrew. It is also of particular note that the same attorney, Anthony F. LeCrichia, has, at one point or another, represented Andrew and the plaintiffs in this and all the related proceedings. Mr. LeCrichia served opposition papers on behalf of Popova in the foreclosure action, has been the attorney of

record for the plaintiffs throughout this action and served as the attorney of record for Andrew through the entirety of the holdover proceeding. This certainly raises a very strong indication that the parties are in mutual control of the actions involved (See, Watts v Swiss bank Corporation, 27 NY2d 270, 278) and it has been held that privity "includes . . . those who control an action although not formal parties to it" (Matter of Juan C. v Cortines, 89 NY2d 659, 667).

The parties' interests in the two proceedings also do not conflict but rather coincide (Cf., Tuper v Tuper, 34 AD3d 1280). A favorable finding for Andrew in the holdover proceeding might not only have staved off his eviction, but also would have necessarily carried with it a finding by the housing court that the plaintiffs here were related to Harkuscha and possessed of an interest in the property. Had Andrew prevailed in the holdover proceeding, the court is convinced that this identical claim for relief would have been submitted only bearing plaintiffs' names as movants seeking collateral estoppel against Royal and Plaza.

As a general observation, the plaintiffs' interjection in these related actions and proceedings to the benefit of Andrew is most curious. Specifically, the timing and circumstances surrounding the plaintiffs' appearances in courts of this state have been of unique benefit to Mr. Harkuscha to say the least. Despite being a lifetime domiciliary of Russia, Popova moves to intervene in the foreclosure action less than a month after the sale which had been long delayed by the scheming of Andrew. Similarly, just five weeks after the commencement of the holdover proceeding, Chtchelkanova, also a lifetime domiciliary of Russia, makes her first appearance to claim her long lost "birthright". And all of these claims are based upon documents showing the plaintiffs' father to be an individual with a different name than George Harky/Harkuscha, with a different date of birth and who was declared dead in 1948 during a judicial proceeding in Russia.

The court also finds that plaintiffs' cause of action to set aside the referee's deed is even more fundamentally flawed than that asserted by the defendants. The plaintiffs, in their complaint, do not seek to vacate the judgment of foreclosure nor to even vacate the sale. Nor have the plaintiffs included in their complaint a cause of action pursuant to Article 15 of the Real Property Actions and Proceedings Law to compel a determination of their claim to ownership of the subject property. Therefore, absent vacatur of the judgment or the sale, the referee, as an agent of the court or ministerial officer, was compelled to convey title to the property in accordance with the requisites of the judgment and pursuant to the terms of sale (See, RPAPL §1353 ["*After the property has been sold, the officer conducting the sale shall execute a deed to the purchaser*"]; Greenwood Packing Profit Sharing Plan Trust v Fournier, 181 AD2d 861; Strianese v Paradiso, 128 AD2d 696; Mullins v Franz, 162 AD 316).

Accordingly, the branch of Plaza and Royal's motion for summary judgment dismissing the plaintiffs' cause of action to set aside the referee's deed conveying the premises to the defendants is granted. Moreover, the defendants Plaza and Royal are granted summary judgment on their counter-claim to quiet title to the premises in their favor pursuant to Article 15 of the Real Property Actions and Proceedings Law.

Insofar as co-defendant Chase's cross-motion is concerned the plaintiffs' claim for breach of contract against it is also dismissed. At the time the alleged contract came into existence, November 11, 2004, (the date of the letter from Chase's counsel wherein Chase accepted the offer to purchase the property relayed by Popova's counsel), the property had already been sold and the only party with authority to convey title to the premises was the referee who, as the court stated above, was obligated to act in conformity with the judgment and terms of sale. More importantly, Chase has never, at any time, held title to the property at issue. At most, Chase held an encumbrance on the property in the form of a mortgage. Since, as a general matter, a party may only convey whatever ownership interest in real property it actually possesses (See, 238 E. 9th Street Corp. v Bernick, 17 AD2d 399; Horowitz v Welt, 224 AD 37; Schwartz v Rehfuss, 129 AD 630) and Chase's ownership interest was undisputably nonexistent, any agreement by Chase to convey title to the real property was void from its inception.

Accordingly, the branch of the defendant Chase's cross-motion for summary judgment dismissing the plaintiffs' cause of action for breach of contract is granted.

The plaintiffs' cause of action for partition is also dismissed. Since the court has determined that they are collaterally estopped from asserting their kinship with Andrew, they lack the requisite standing to seek partition (See, RPAPL §901[1] and [3]).

The plaintiffs' cross-motion to compel disclosure is denied as moot.

Dated: April 24, 2008

Peter J. Kelly, J.S.C.