

Pope v Saget

2005 NY Slip Op 30053(U)

September 23, 2005

Supreme Court, New York County

Docket Number: 0119884/9884

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

0119884/2002

POPE, KENDALLE
VS
SAGET, ALIX

INDEX NO. 119884/02

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

SEQ 7

RENEWAL

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated 9-23-05

FILED

SEP 27 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9-23-05

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

-----X
KENDALLE POPE, as Exccutrix of the Estate of
Maud Atkins and KEVIN SMITH,

Plaintiffs,

Index No. 119884/02

-against-

DECISION AND ORDER

ALIX SAGET, ALIX SAGET, JR.,
DAVID CARTER, ALEW MANAGEMENT
& DEVELOPMENT, LLC, EQUITY SETTLEMENT
SERVICES, INC., MERCURY HOMES REHAB, LLC,
ELIEZER ELIAS, SUN TRUST MORTGAGE, INC.,
Et al.

Defendants.

FILED
SEP 27 2005
NEW YORK
COUNTY CLERKS OFFICE

-----X
SHERRY KLEIN HEITLER, J.:

Motion Sequence Nos. 005, 006 and 007 are consolidated for disposition.

In Motion Sequence No. 005, Defendant Equity Settlement Services (“Equity”) moves, pursuant to CPLR §§ 3013 and 3016, for an order dismissing the complaint, as against it.

In Motion Sequence No. 006, defendants Alew Management & Development LLC (“Alew”), Sun Trust Mortgage, Inc. (“Sun Trust”) and Eliezer Elias (“Elias”) cross-move for an order precluding plaintiffs from offering the testimony of Kevin Smith at trial, and precluding plaintiff from offering any testimony on rental values, or in the alternative, allowing defendants to retain their own expert or to depose plaintiff’s expert. Additionally, Sun Trust, Elias and Alew move for an order granting renewal of a prior motion which sought to dismiss plaintiffs’ claims for damages, and upon renewal, for an order dismissing the damages claims.

In Motion Sequence No. 007, defendants Equity, Alix Saget and Alix Saget, Jr. cross-move for an order striking the plaintiff's complaint pursuant to CPLR § 3126, precluding plaintiffs from producing Smith at trial, and precluding plaintiffs from introducing any testimony on the issue of damages.

Plaintiff Kendall Pope holds the property as executrix of the Estate of Maud Atkins, and plaintiff Kevin Smith, Pope's brother, claims the subject property as a devisee under the will of Atkins. Atkins owned the property from 1979 until the time of her death. Defendant Alix Saget allegedly forged a deed bearing Atkins' signature. A deed purporting to have been executed on July 16, 2002 by Saget to Mercury was recorded on August 14, 2002 (Saget-Mercury Deed). A deed purportedly executed on August 7, 2002, from Mercury to Elias was recorded on October 10, 2002 (Mercury-Elias Deed). A \$465,200 mortgage, purportedly executed on August 7, 2002 by Elias in favor of Sun Trust, was recorded on October 2, 2002. Elias then transferred the property to Alew, a corporation owned by him.

Plaintiffs' complaint contains three causes of action. The first seeks to quiet title, i.e., seeks a judgment determining that the Atkins-Saget deed was a forgery and that the subsequent deeds and mortgage are void. The second and third causes of action allege that the defendants' filing of the various deeds and the mortgage with the New York City Register of Deeds constituted a misrepresentation or fraud upon plaintiffs, resulting in damages.

On October 18, 2004, plaintiffs moved for summary judgment, and certain defendants cross-moved for a dismissal of that portion of the action which sought damages. On January 5, 2005, this court issued an order granting plaintiff summary judgment on the title claim, but denying summary judgment to any party on the damages claims.

Plaintiff's counsel has indicated that he does not intend to produce Kevin Smith for a deposition. At her deposition, Pope indicated that her brother has resided at the premises during the entire course of this litigation. If defendants believe that Smith has relevant knowledge which would help their defense, they can subpoena him for trial. However, by reason of Smith's failure to appear at a deposition, plaintiffs are precluded from introducing Smith's testimony as part of their case at trial. Laurin Maritime AB v Imperial Chemical Indus., PLC, 301 A.D.2d 367, 368 (1st Dept 2003), leave denied, 100 N.Y.2d 501 (2003).

Plaintiffs maintain that Equity is precluded from moving for dismissal, in that, in its opposition to plaintiffs' prior summary judgment motion, it did not raise the arguments relating to the dismissal of the fraud claim. However, although it might have been the better practice for Equity to have cross-moved for summary judgment in response to plaintiffs' motion, it was not required to do so. Accordingly, this court can consider Equity's motion on the merits.

As this court previously stated in its prior decision, the elements of fraud include (1) a false representation of fact; (2) made with knowledge of falsity; (3) reliance on the part of plaintiffs; and (4) damages. Channel Master Corp. v Aluminum Ltd. Sales, 4 N.Y.2d 403, 407 (1958). As to Saget, the fraud consists of his alleged role in taking a deed from Atkins. Although Saget denies that he took a deed from Atkins, the report of Chicago Title Company indicates otherwise. As to Sun Trust, Alew, Elias and Equity, their liability stems not from any statement made directly to plaintiffs (or to Atkins, before her death), but from their roles in bringing about the title transfers now found to be invalid. The theory of the case is that defendants made a material misrepresentation to plaintiffs when they forged and/or relied upon Atkins' forged signature on the Atkins-Saget deed and filed it with the City Register, and that

plaintiffs relied, to their financial detriment, upon the misrepresentation that was reflected in the public record of the City Register. If plaintiffs' allegation, that Equity knew or had reason to know of the forgery, is assumed to be true, plaintiffs have a viable claim for fraud against Equity.

To the extent that defendants attack the sufficiency of the first three elements of the fraud claim, this in effect is a motion for reargument rather than a motion for renewal. Plaintiffs contend that Sun's present motion is untimely, in that it did not move for reargument within 30 days of being served with the order denying summary judgment (CPLR § 2221). In any event, even if it is assumed that the motion is timely, defendants have not shown that this court overlooked any controlling facts, misapprehended the law, or otherwise mistakenly arrived at its determination. Marini v Lombardo, 17 A.D.3d 545, 546 (2d Dept 2005).

At her deposition, Pope was asked about her damages. The only damages mentioned by her consisted of her travel to the depositions and the payment of one utility bill. In the papers submitted in support of their motion for summary judgment, plaintiffs, for the first time, specified that loss of rental income constituted the major item of damages, and submitted an expert report by Edward Myers, Jr., a real estate broker who is supposedly familiar with Central Harlem real estate.

At a conference held after the decision was rendered on the prior summary judgment motions, this court orally directed plaintiffs to produce an affidavit indicating the nature of their efforts, if any, to rent the premises to others. Plaintiffs have not done so. Unless this court intervenes, defendants would be forced to proceed to trial without knowing the basis for plaintiffs' damages. Plaintiffs are entitled to their day in court, but cannot be permitted to ignore the orders of this court.

Accordingly, it is hereby

ORDERED that all applications to dismiss the fraud claims are denied; and it is further

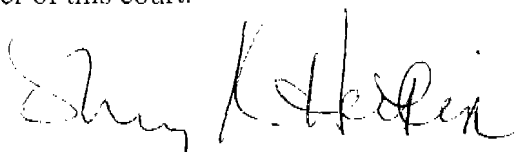
ORDERED that plaintiffs are precluded from introducing the testimony of Kevin Smith at trial; and it is further

ORDERED that plaintiff shall submit to defendants, on or before Friday, October 14, 2005, the aforesaid affidavit describing their theory of damages and a deposition of plaintiff's damages expert shall take place in plaintiff's office on Thursday, October 26, 2005, or plaintiff shall be precluded from offering evidence of such damages at trial; and it is further

ORDERED that the parties are directed to appear for trial on November 28, 2005 in Part 40, Room 242, 60 Centre Street, New York, New York 10007.

This shall constitute the decision and order of this court.

DATED: September 23 2005



SHERRY KLEIN HEITLER
J.S.C.

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