

O'Brien v Town of Huntington

2005 NY Slip Op 30469(U)

March 28, 2005

Sup Ct, Suffolk County

Docket Number: 15166-1981

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

P R E S E N T :

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE December 1, 2004
ADJ. DATE March 4, 2005
Mot. Seq. # 007 MD
008 MG
009 MD

-----X
Thomas E. O'Brien et al, :
 :
 :
 Plaintiffs, :
 :
 - against - :
 :
 Town of Huntington and The Board of Trustees :
 Huntington, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 86 read on these motion to dismiss, to quash subpoenas , to compel and to vacate the note of issue ; Notice of Motion/Order to Show Cause and supporting papers 1-30; 40-51; 59-72 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 31-39;52-53;73-82 ; Replying Affidavits and supporting papers 54-56 ; Other 57-58; 82-86 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

Ordered that the three motions pending before this court are consolidated for purposes of this decision and decided as follows:

The first motion by the defendant Town of Huntington (# 007) seeks summary judgment dismissing the complaint based upon the statute of limitations, a failure to substitute fiduciaries and the alleged superior title of the defendants. It also seeks to quash certain trial subpoenas served by the plaintiffs and to prohibit certain proof at trial. The second motion by the plaintiffs Gerard (# 008) seeks to compel the defendants to accept the Gerard plaintiffs' late reply to counterclaims. The third motion (# 009) by the defendant Town of Huntington seeks to strike the note of issue.

This action has a long history, having been commenced in 1981. It is one of seven actions brought pursuant to Article 15 of the New York Real Property Actions and Proceedings Law to quiet title to a total of 23 parcels of unimproved real property aggregating approximately 124 acres, located in the Town of Huntington in an area known as "Pine Hills".

The note of issue was filed in this action on April 26, 2000. The matter has been on the trial calendar more than once, having most recently been scheduled for trial on January 24, 2005. At that time it was adjourned until March 28, 2005 pending determination of the instant motions. A motion for summary judgment must be made within 120 days of the filing of the note of issue unless otherwise ordered by the court. Here, defendant's motion for summary judgment is clearly untimely. Movant characterizes the motion as one to dismiss for lack of subject matter jurisdiction, alleging that the claims are time barred, title is vested in the state, and there has been a failure to substitute a representative for a party. Subject matter jurisdiction concerns the court's competence to entertain a particular type of case, and derives from the constitution and laws of the state. A court may have subject matter jurisdiction and yet the action is barred by the statute of limitations. Here, the court clearly has subject matter jurisdiction for a claim under the RPAPL. Furthermore, a motion made upon a defense set forth under CPLR 3211, when made after the filing of a note of issue, is properly treated as one for summary judgment (*Connell v. Hayden*, 83 A.D.2d 30, 443 N.Y.S.2d 383). Accordingly, this motion which sounds in summary judgment is untimely.

Not only is the motion untimely, but several of the issues raised therein and in the third motion by the defendant to vacate the note of issue, have previously been determined by the Honorable Justice Catterson in several decisions rendered in January and March of 2002, in preparation for the trial of this and the six related actions. Said orders were affirmed by the Second Department Appellate Division and, accordingly, constitute the law of the case.

Specifically, defendant seeks to strike the note of issue because it was filed at a time when it is alleged certain parties were dead and there had been no substitution. Defendant asks that an accounting be done as to the status of the various plaintiffs, since they are numerous and many are elderly. This was already done in 2000 when Justice Catterson appointed a referee to determine the status of the plaintiffs. As a result an order signed on March 6, 2002 amended the caption to add the new parties. This decision was also affirmed by the Second Department Appellate Division which held:

We perceive no reason to disturb the orders dated March 6, 2002, amending the captions of all seven actions to add new plaintiffs. The court is authorized, pursuant to RPAPL 1511(2), to, sua sponte, add parties to these actions if it appears to the court that such entities may have an estate or interest in the real property which may be affected by the judgment.

This matter will not be revisited by this court lest this action go on ad infinitum. In any event, the death of one of several parties does not stay the action. Where the right sought to be enforced survives only to the surviving plaintiffs the action does not abate. The death shall be noted on the record and the action shall proceed (CPLR §1015). The death of one of several parties voids orders as to the deceased party only (*Byrd v. Johnson*, 67 A.D.2d 992, 413 N.Y.S.2d 724). Accordingly, there are no grounds upon which to either strike the note of issue or permit discovery with regard to the additional successor plaintiffs. Accordingly, the motion to strike the note of issue is denied.

The second motion, by the plaintiffs Gerard (# 008) to compel the defendant to accept a late reply to counterclaims asserted by the defendant Board of Trustees in a verified answer to the amended complaint

which was served on February 23, 2004, is granted. Given the complexity of this litigation, the length of time it has been pending, the recent service of this new pleading, and the lack of prejudice to the defendant, this court finds the excuse to be reasonable, and the defense which goes to the heart of this litigation is best left for determination at trial (CPLR § 3012(d); Village of Parish v. Weichert, 291 A.D.2d 818, 737 N.Y.S.2d 575). Accordingly, defendant is directed to accept the reply to the counterclaims which is deemed timely served *nunc pro tunc*.

Finally, there remains the defendant Town's request to quash a trial subpoena and for relief in limine to prohibit the plaintiff from introducing proof of a claim of title by tax deed. Upon review of the trial subpoena duces tecum included in defendant's moving papers at exhibit "cc", the court finds same to be appropriate and directs that defendants comply. The relief in limine is referred to the trial justice for determination.

Dated: March 28, 2005

DENISE F. MOLIA

J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION