

Pope v Saget

2006 NY Slip Op 30058(U)

February 14, 2006

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: SHERRY KLEIN HEITLER
Justice

PART 30

Kendall Pope, as Executrix of the Estate of Maud Atkins and Kevin Smith,

INDEX NO. 119884/02

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 008

Allx Saget, Allx 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.

MOTION CAL. NO. _____

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

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 2-14-06.

PAVERS NUMBERED
FILED
FEB 23 2006
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2-14-06

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
KENDALLE POPE, as Executrix 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
FEB 23 2006
NEW YORK
COUNTY CLERK'S OFFICE

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

By decision and order dated September 23, 2005, this court directed plaintiff to submit, on or before October 14, 2005, an affidavit describing plaintiff's theory of damages. On October 7, 2005, plaintiff submitted an affirmation of counsel, along with a one-page, notarized letter from a real estate broker containing the broker's estimate of the fair rental value of the property at issue. This letter was submitted previously by plaintiff in its reply to defendants' summary judgment motion.

Defendants now move to preclude plaintiff from introducing evidence as to damages in the form of lost rental income for the property, asserting that plaintiff's response was inadequate and failed to satisfy the court's order. First, defendants claim that, because plaintiff has proffered no evidence as to any attempt to rent the property, defendant has failed to meet the court's

requirements in this regard.

What is now clear, however, is that plaintiff's theory of the case, espoused in counsel's affirmation, is that it would have been fraudulent for plaintiff to attempt to rent the property out under a clouded title and, therefore, plaintiff did not make such an attempt at least until this court determined, by decision and order dated January 5, 2005, that title to the property properly rested with plaintiff. Accordingly, plaintiff seeks to prove damages in the form of lost rental income by asserting that defendants, by their actions, prevented plaintiff from even attempting to rent out the property. Without passing on the viability of this claim, the court finds that plaintiff did, in fact, meet its obligation to tender to defendants its theory of the case.

Additionally, the court finds that counsel's affirmation was adequate to satisfy the court's requirement that plaintiff submit an affidavit pertaining to the alleged lost rental income. See Slavenburg Corp. v. Opus Apparel, 53 N.Y.2d 799, 801 (1981). Moreover, the court notes that, as Kendall Pope was not asked at the deposition about lost rental income specifically, but only about her personal out-of-pocket expenses arising from this lawsuit, nothing in her deposition testimony provides a basis for limiting plaintiff's proof on the question of damages in the form of lost rental income.

The court notes, however, that plaintiff's affidavit was unduly vague with regard to such details surrounding its damages claim as the number of rental units available for rental, the condition of those units, and whether the real estate broker actually inspected the premises before issuing his letter opining as to the fair rental value of the property. Therefore, the court will grant defendants an opportunity to depose the expert real estate broker prior to trial.

Accordingly, it is hereby

ORDERED that defendants' motion to preclude plaintiff's submission of evidence in

* 4]
support of a claim of damages in the form of lost rental income is denied; and it is further

ORDERED that plaintiff's request for counsel fees, costs and disbursements and sanctions is denied; and it is further

ORDERED that the deposition of the expert real estate broker, Edward Myers, Jr., shall take place at the office of Helmut Borchert, at 19-02 Whitestone Expressway, Whitestone, New York 11357, at 9:30 a.m. on March 7, 2006; and it is further

ORDERED that the parties and their counsel shall report for trial to Part 40, Room 242, at 9:30 a.m. on March 27, 2006.

This shall constitute the decision and order of this court.

DATED: February 14, 2006



SHERRY KLEIN HEITLER
J.S.C.

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FEB 23 2006
NEW YORK
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