

**VanDyke v Dunbar**

2007 NY Slip Op 30045(U)

March 9, 2007

Supreme Court, Schuyler County

Docket Number: 0000337

Judge: Elizabeth A. Garry

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**SHANE VANDYKE,**

Plaintiff,

-against-

**VANCE DUNBAR, PAULA DUNBAR, and  
PATRICIA MOSHER,**

Defendants.

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**DECISION AND ORDER**

Index No.: 06-337

RJI No.: 2007-0016-M

### **Factual and Procedural History**

This real property action comes before the court on Plaintiff's motion seeking default judgment, pursuant to CPLR Article 32. The Summons and Complaint, sworn to on November 2, 2006, includes causes of action against Defendants to quiet title to disputed real property in Plaintiff under RPAPL Article 15 and for summary proceedings under RPAPL Article 7 restoring possession of the disputed premises to him. In a third cause of action, Plaintiff seeks compensatory and punitive damages for fraud in the inducement.

In Affidavit testimony Plaintiff asserts that on December 5, 2004, he and Defendant Patricia Mosher entered into an Agreement for Deed for the purpose of transferring to Defendant Mosher title to Plaintiff's real property located in Alpine, New York. The Agreement requires Defendant Mosher to pay a specified sum for the premises through a combination of a down payment and monthly payments over a specified period. It further provides that, in case of the purchaser's failure to make the specified payments or to comply with other provisions, the Agreement may be forfeited at the seller's option, and the seller shall have the right to retain the purchaser's prior payments as liquidated damages and to reenter and take possession of the

premises. (Motion Exhibit 1).

Plaintiff alleges that Defendant Mosher granted licenses for use and possession of the premises to various individuals, including Defendants Vance Dunbar and Paula Dunbar. He alleges that Defendant Mosher fell behind on the contractual monthly payments and breached other covenants in the Agreement. After about November 1, 2005, Plaintiff alleges that he received no payments under the Agreement from any of the Defendants.

On June 8, 2006, Plaintiff and Defendant Mosher allegedly signed a Note of Release that purports to release Defendant Mosher from any contract between Plaintiff and herself for the disputed premises. Plaintiff alleges that Defendant Mosher herself drafted the Note of Release. As a result of the execution of this document, Plaintiff asserts that the Agreement between himself and Defendant Mosher is no longer of any force or effect. He asserts that he is the sole holder of title to the premises in fee simple, that Defendant Mosher surrendered her license to possess the premises by virtue of the Note of Release, that any licenses she granted to the other Defendants have necessarily also expired, and that no Defendant has a license to use, possess or occupy the premises. Plaintiff further asserts that under the terms of the Agreement, even if it is still in effect, he has the right to repossess the premises because of Defendant Mosher's alleged breaches of its covenants and conditions.

Plaintiff alleges that he served notices of non-payment and demands to surrender possession upon Defendants on or about July 5, 2005, and at other various times since November 1, 2005, but that Defendants have not vacated the premises. He claims that they have committed voluntary and permissive waste by failing to maintain the property, removing siding, permitting junk and trash to accumulate, and otherwise damaging the premises to such an extent that they have been rendered uninhabitable. In addition to damages, he seeks Orders quieting title to the premises in himself, directing Defendants to surrender possession of the premises to the Plaintiff,

and directing the Sheriff of Schuyler County, New York, to eject Defendants and their personal property from the premises.

Plaintiff furnishes Certificates of Service showing personal service upon each of the defendants on various dates in November, 2006. Plaintiff's Counsel, Charles Oliver Wolff, Esq., submits an Affirmation stating that none of the Defendants appeared or answered in the action before their time to do so expired.

Oral argument on the Motion for Judgment on Default was held in the Schuyler County Courthouse on March 2, 2007. Plaintiff appeared through his Counsel. Neither Defendant Paula Dunbar nor Defendant Patricia Mosher appeared, but Defendant Vance Dunbar appeared pro se, with his daughter, identifying himself as a tenant of the premises. Mr. Dunbar alleges that he has made cash payments under the Agreement amounting to about \$2400 and that he stands ready to pay the remainder of what is owed. He challenges the validity of the Note of Release dated June 8, 2006, claiming essentially that the Agreement between Plaintiff and Defendant Mosher is still in effect. Mr. Dunbar bases this claim on an assertion that, when Plaintiff obtained the Note of Release from Defendant Mosher, he also made a verbal agreement that a new contract would be drawn up that would transfer the property to Mr. Dunbar. Defendant Dunbar further claims that on the day after the release was signed, instead of entering into this purported new agreement, Plaintiff posted a note on the door advising Defendants that they had a month-to-month tenancy in the premises.

### **Discussion**

On this application for default judgment, CPLR 3215(f) requires proof of service of the Summons and Complaint, proof of the claim, and proof of the default. Plaintiff's proof meets these requirements. Plaintiff is clearly entitled to the default judgment, at least as to Defendants

Paula Dunbar and Patricia Mosher.

As Mr. Dunbar appeared pro se for oral argument, however, the Court has scrutinized his claims with particular care to determine whether they present any meritorious defense. No such defense appears. Mr. Dunbar's claims, taken as true and construed in the most positive light, merely establish that the Plaintiff verbally agreed to make a new contract that would have conveyed the disputed premises to Mr. Dunbar. Such an arrangement merely constitutes an agreement to agree, in which material terms are left for future negotiations. It is well-settled that such agreements are unenforceable in New York, particularly when they pertain to the sale or lease of real property. Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109-110 (1981). In addition, the described agreement would be vulnerable to challenge under the Statute of Frauds, since it pertains to the conveyance of real property and no writing memorializes either Plaintiff's purported agreement to agree or any conveyance of the premises to Mr. Dunbar. N.Y. Gen. Oblig. Law § 5-703(2).

Furthermore, even if the circumstances surrounding the execution of the Note of Release were found to render it ineffective to invalidate the Agreement for Deed between Plaintiff and Defendant Mosher, the continued existence of that Agreement would provide Mr. Dunbar with no defense. Although he claims to stand ready to bring the outstanding payments up to date, he is not a party to the Agreement. Neither he nor Defendant Mosher, who is a party to the Agreement, have disputed Plaintiff's claim that arrearages exist and that other covenants in the Agreement have been breached. Under such circumstances, the terms of the Agreement give Plaintiff the option to declare Defendant Mosher's rights under the Agreement forfeited, as Plaintiff asserts that he has done.

## Conclusion

As set forth above, Plaintiff has demonstrated that he is entitled to default judgment against all three Defendants in this action. Therefore, it is hereby

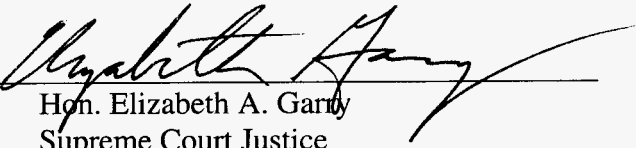
**ORDERED** that quiet title in fee simple to the subject property, described as 1635 Swan Hill Rd., Alpine, New York 14805, be restored to Plaintiff, Shane VanDyke, and that any other party whose claim to an estate or interest in the property has been adjudged invalid, and every person claiming under him or her, by title accruing after the filing of the judgment-roll, or of the notice of the pendency of the action, as prescribed by law, be forever barred from asserting such claim to an estate or interest the invalidity of which is established in this action; and it is further

**ORDERED** that delivery of the possession of the said property be awarded to Plaintiff, Shane VanDyke, and that a warrant shall separately issue to immediately put him in possession of the same; and it is further

**ORDERED** that Plaintiff may separately apply, on notice to Defendants, for the scheduling of an Inquest or the appointment of a referee to determine the total amount of damages, if any, caused by Defendants to the aforementioned property and for the determination of fees and costs.

This constitutes the Decision and Order of the Court.

Norwich, New York  
Dated: March 9, 2007

  
Hon. Elizabeth A. Garity  
Supreme Court Justice

### Supporting Papers:

- Notice of Motion for Judgment on Default
- Affidavit of the Facts Constituting the Claim and the Amount Due, sworn to on February 5, 2007
- Affirmation of Attorney, undated with Exhibits 1-6 appended thereto