

Freeman v Burt-Miller
2007 NY Slip Op 30714(U)
April 5, 2007
Supreme Court, Queens County
Docket Number: 0026655/2003
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

PAULLETT FREEMAN, etc.	x	Index Number <u>26655</u> 2003
- against -		Motion Date <u>September 19,</u> 2006
BASWICK BURT-MILLER, et al.		Motion Cal. Number <u>14</u>
_____	x	Motion Seq. Number <u>3</u>

The following papers numbered 1 to 15 read on this motion by Paullett Freeman, as Attorney in Fact for Emily Hicks, to restore the motion for summary judgment by defendants Baswick Burt-Miller and Carol Burt-Miller (hereinafter jointly referred to as "Burt-Millers") and, upon restoration, denying said motion. Defendant Bapaz Aderet Properties Corp. (hereinafter "Bapaz") cross-moves for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-3
Notice of Cross-Motion - Affidavits - Exhibits...	4-6
Answering Affidavits - Exhibits.....	7-12
Reply Affidavits.....	13-15

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

The motion to restore is granted, and upon restoration the prior motion by defendant Baswick Burt-Miller is denied. The cross-motion is denied as untimely.

On a motion or cross-motion for summary judgment, the court must consider the allegations raised by the opponents of said motions as true. If said allegations lead to factual issues among

the parties, as herein, the issues must be determined at a trial on the merits.

The factual allegations alleged by plaintiff herein are as follows: Sometime in 1990 Emily Hicks desired to purchase premises known as 174-10 125th Street, Jamaica, New York which was for sale at a price of \$140,000. Not having enough income to qualify for a mortgage, Ms. Hicks asked the Burt-Millers, life-long acquaintances, to co-sign the mortgage application and place their names on the deed as joint tenants with rights of survivorship as a favor to Ms. Hicks. Ms. Hicks claims that this was accomplished and that the Burt-Millers knew and agreed that they would have no interest in the property. Ms. Hicks moved into the premises soon after closing. Sometime thereafter, the Burt-Millers moved into the upstairs apartment and paid Ms. Hicks \$700 monthly for rent. The Burt-Millers moved from the apartment sometime in 1992. Ms. Hicks claims that only she paid the down payment to purchase the premises, that only she paid the mortgage since 1990, and that only she maintained the premises.

In 2003, Burt-Millers sold their "two-thirds interest" in the premises to defendant Bapaz for \$15,000. Plaintiff insists that her action herein did not arise until 2003 when the Burt-Millers sold their alleged interest in the premises.

In support of the motion the Burt-Millers claim that they paid the closing costs to purchase the property and their share of the maintenance of the property until they left in 1992. They claim further that, since Ms. Hicks asked them to remove their names from the deed in 1992, which request they refused, the statute of limitations to quiet title to the premises has expired. The Burt-Millers concede that they have made no payments towards the mortgage or maintenance of the premises since 1992.

As to the cross-motion, such is untimely as the note of issue was filed on October 28, 2005 and the cross-motion was not made until September 14, 2006. Brill v City of New York, 2 NY3d 648; Miceli v State Farm Mut. Auto Ins. Co., 3 NY3d 725. However, insofar as it can be considered opposition to the motion, it is argued that Bapaz was a good faith purchaser for value. As this action is founded in equity, there are factual issues which cannot be determined summarily. Such issues, include but are not limited to, whether Bapaz should have been on notice when a two-third interest in the premises was sold for \$15,000, whether the Burt-Millers had the "equitable" right to transfer their interest

as opposed to their "legal" interest and whether Ms. Hicks was taken advantage of by the Burt-Millers.

Dated: April 5 , 2007

J.S.C.