

Lipschitz v Swaby

2007 NY Slip Op 31085(U)

May 4, 2007

Supreme Court, Kings County

Docket Number: 0027527/1999

Judge: David I. Schmidt

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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of May 2007.

P R E S E N T:

HON. DAVID SCHMIDT,

Justice.

-----X

CHAIM LIPSCHITZ,

Plaintiff,

- against -

Index No.27527/99

ROY SWABY, et al.,

Defendants.

-----X

The following papers numbered 1 to 12 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3 7-9
Opposing Affidavits (Affirmations) _____	10,11
Reply Affidavits (Affirmations) _____	4-6 12
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, the motion by defendant Roy Swaby for an order, pursuant to CPLR 5015, vacating this court's order of November 22, 1999 which granted plaintiff's motion for summary judgment and, upon such vacatur, for a further order dismissing the complaint against said defendant pursuant to CPLR 3211(a) (8) and the motion by Steve Kaufman for leave to intervene in this action pursuant to CPLR 1012 and 1013 are consolidated for disposition herein and, upon consolidation:

1. the motion by Steve Kaufman is granted only to the extent of substituting him, as assignee of Chaim Lipschitz, as plaintiff herein and

2. the motion by defendant Roy Swaby is granted only to the extent of directing the parties to appear for a hearing before a Judicial Hearing Officer pursuant to Part 122 of the Rules of the Chief Administrator of the Courts. Upon the payment of the requisite fees and the approval of the Administrative Judge, the date will be fixed by the Clerk of the Part.

In his complaint, plaintiff Chaim Lipschitz alleges, among other things, that in February 1999 he entered into a written contract with defendants Roy Swaby (Swaby), Mervyn Jackson and Peter Suchragh pursuant to which they agreed to sell to him the real property at 193 Chauncey Street in Brooklyn. When defendants allegedly refused to convey the property to plaintiff, he commenced this action seeking specific performance of the contract.¹ In an answer which was purportedly served on behalf of all three defendants, defendants asserted that plaintiff canceled the subject contract on May 4, 1999.² Plaintiff subsequently moved for summary judgment on his claim for specific performance. By order dated November 22, 1999, the motion was granted after the court found that defendants never canceled the contract in compliance with its terms.

In his motion, Swaby asserts that he was never served with the summons and complaint herein and only recently learned of the instant action. Swaby points out that, according to

¹The complaint demands that plaintiff be awarded a judgment directing that “defendant[s] be prevented from conveying said premises and property to anyone but plaintiff.”

² It appears that, in 2003, Anthony Agard, the attorney who submitted the answer on behalf of defendants, was suspended from the practice of law on the ground that he was mentally incapacitated.

plaintiff's affidavit of service, a copy of the summons and complaint was left with his "co-tenant", Clara Suchragh (the wife of Peter Suchragh), at Swaby's "usual place of abode" at 551 East 81st Street in Brooklyn. In his affidavit, Swaby avers that he never lived or worked at that address; rather, since 1977 he has lived at 710 East 102nd Street. Swaby further states that he never retained an attorney, Anthony Agard, to appear on his behalf in this action, nor did Swaby sign an affidavit which was submitted in support of defendants' prior motion to dismiss this action. With respect to a defense to plaintiff's claims, Swaby insists that he never signed the contract of sale involving plaintiff and he points to Peter Suchragh, his "lodge brother," as the culprit.

In opposition to the motion, Steve Kaufman (Kaufman) points out that, on November 16, 1999, plaintiff assigned his rights under the contract of sale to Kaufman. According to Kaufman, "[t]here are 4 major issues that have been raised by Swaby" and disputed by Kaufman:

1. whether Swaby signed the contract of sale and the affidavit submitted to the court in 1999;
2. whether service of process was properly effected since it was made at an address used by Swaby on four occasions;
3. whether service of process was proper since the summons and complaint were served at the address of Swabys' partner and
4. whether the actions of Swabys' partner (Peter Suchragh) bound Swaby.

In particular, Kaufman contends that Swaby signed the affidavit and contract of sale

and Kaufman submits the affirmation of Jane Farley, an attorney who notarized the documents, to that effect. Kaufman notes that, on four deeds recorded by Swaby, Swaby indicated that his address was 551 East 81st Street, the address where service of process was made. Because the relationship of Peter Suchragh, Swaby and Mervyn Jackson was that of partners, Kaufman further maintains that service upon one partner, Peter Suchragh, bound Swaby.

In his motion, Kaufman asserts that “[t]his case does not belong to ...[plaintiff] any more since Chaim Lipschitz assigned the contract which is the underlying cause of action to [me] 7 years ago.” Because plaintiff and his attorney “have clearly indicated that they will not defend the position and contract of sale that Lipschitz assigned to Steve Kaufman”, Kaufman seeks to intervene in this action as a matter of right. Kaufman is concerned that, if the order directing specific performance is vacated, he will be directly affected by the outcome. Kaufman also indicates that plaintiff authorized Kaufman’s attorney (Samuel Halberg, Esq.) to be substituted as counsel for plaintiff herein. In an affidavit, Kaufman avers that he gave plaintiff’s attorney a check for \$50,000 to be held in escrow until a closing occurred, but none has yet been held.

In opposition to Kaufman’s motion, Swaby points out that the contract of sale contains a provision which prohibits the assignment of the contract without the consent of all three of the defendants herein and, obviously, Swaby has not given such consent. With respect to Kaufman’s “final, desperate attempt to interfere with this litigation”- - - the alleged consent to change attorney which was executed by plaintiff - - - Swaby notes that the form was not acknowledged, as is required by CPLR 321 (b), nor did it refer to the instant action.

In an affirmation, plaintiffs' attorney maintains that his signature on the consent to change attorney form is a forgery and denies that he is holding \$ 50,000 in escrow.

In further support of the motion to intervene, Kaufman accuses plaintiff and plaintiff's attorney of failing to provide any defense to Swaby's motion, which failure allegedly demonstrates that Kaufman would be the only person to be prejudiced if such relief is granted. Kaufman also questions the comments of plaintiff's attorney regarding the escrow money since the canceled check has the attorney's name endorsed on the back and Kaufman suggests that the court order an accounting of the money that was allegedly deposited. With respect to the issue of the non-assignability of the contract, Kaufman points out that Swaby has not brought an action to void the subject assignment, that a seven-page rider (which may address the issue of assignments) has never been submitted by Swaby and that Swaby could not have objected to Kaufman as a purchaser because "he signed a contract with Kaufman on August 6, 1999."

Defendants hold the subject property as tenants in common. Partners are co-owners of partnership property as tenants in partnership (Partnership Law § 51 [1], which is not, contrary to Kaufman's contention, equivalent to a tenancy in common (*see Bogoni v Friedlander*, 197 AD2d 281, 290 [1994])). As Partnership Law § 11 (2) provides, ownership by tenancy in common "does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property." Accordingly, Kaufman's argument that service of process upon Peter Suchragh, a "partner", was equivalent to service upon Swaby is without merit.

CPLR 308 provides, in part, that personal service upon a natural person shall be made by delivering the summons within the state to a person of suitable age and discretion " at the

actual place of business, dwelling place or usual place of abode and by either mailing the summons...to the person to be served at his or her actual place of business . . .” (see CPLR 308 [2]). Although there can be a difference between one’s “actual dwelling place” and “usual place of abode” (see *Federal Home Loan Mtge. Corp. v Venticinqu*, 230 AD2d 412 [1997]), in this case, the affidavit of Swaby has sufficiently rebutted the presumption of proper service by the process server so as to warrant a hearing regarding Swaby’s relationship to 551 East 81st Street (see *Johnson v Deas*, 32 AD3d 253 [2006]). At the hearing to be scheduled, the Judicial Hearing Officer shall also consider the issue of whether the attorney who allegedly appeared for Swaby had the authority to do so (see *Skyline Agency, v Ambrose Coppotelli, Inc.*, 117 AD2d 135 [1986]) and whether Swaby signed the contract of sale herein.³

Intervention is a procedural device whereby a person not a party to the action can present a claim or defense in a pending action and become a party for the purposes of protecting his or her interests (see *State ex rel. Field on Behalf of Field v Cronshaw*, 139 Misc 2d 470 [1988]). In this case, Kaufman alleges that Chaim Lipschitz transferred his interest in the subject matter of the action after it was commenced, an allegation which is undisputed. Since Kaufman, as assignee, will be bound by the judgment, rather than permitting him to inetrvene in this action as an additional party plaintiff, it would be more appropriate for him to be substituted as plaintiff in order that he may exercise direct control of the litigation (see CPLR 1018). Therefore, the motion by Kaufman is granted to the extent of directing that he be substituted as plaintiff in the

³ If Swaby’s position is sustained after the hearing, it would appear that the judgment would still remain valid as to Mervyn Jackson and Peter Suchragh. What effect the judgment would have on the sale of the property need not be resolved or even considered by this court, especially in light of the court’s unfamiliarity with collateral transactions which have apparently taken place.

place and stead of Chaim Lipschitz and that all papers and pleadings herein be amended accordingly.

The foregoing constitutes the decision and order of this court.

E N T E R,



J. S. C.

FROM CLERK OF COURT

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