

Miles v Rhoda

2007 NY Slip Op 31207(U)

April 30, 2007

Supreme Court, Queens County

Docket Number: 0020913/2006

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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ROBERT MILES, FRANCES MILES No. 20913/06
ANDREA MILES,

Plaintiffs, Motion
-against- Date April 3, 2007

AUSTIN O. RHODA, Motion
Cal. No. 14

Defendant.

----- Motion
Seq. No. 1

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This is an action brought pursuant to Article 15 of the Real Property Action and Proceedings Law for an order declaring a copy of a deed dated May 8, 1991 an original for the purpose of having it recorded.

The action was commenced by the filing of a summons and complaint which was verified by the attorney, not a party to the action. The complaint alleges that on or about May 8, 1991 the plaintiffs purchased certain real property located at 111-03 179th Street in the County of Queens; on that date the defendant Austin O. Rhoda executed and delivered a deed to the plaintiffs; and the deed was thereafter lost, misplaced or inadvertently destroyed.

In support of the motion, plaintiffs present a copy of the deed in question, together with the affidavit of Timothy W. McLeron. Mr. McLeron states that he is an employee of Stewart Title Insurance Company, Inc., which insured the fee interest in connection with the subject property. He states upon information and belief, without setting forth the basis for such information and belief, that the defendant executed and acknowledged the deed for the purpose of conveying the premises. No documentation is provided to the court, other than the copy of the deed. The

court is not informed of the position that the affiant holds with Stewart Title Insurance Company, Inc. Although he states that inquiry was made to the defendant, as well as Stewart Title's agent who handled the closing, he does not inform the court as to who made such inquiry or the nature of the inquiry.

As set forth by the Appellate Division Second Department in LaCapria v. Bonazza, 153 AD2d 551: "The failure to record a deed does not deprive a person of the opportunity to assert a claim of legal title to property [citations omitted]. A lost deed may be established in order to prove title. However, it must be done by clear and certain evidence showing its contents and that the deed was properly executed with all the formalities required by law [citations omitted]."

Here, what is said to be a copy of the deed is presented to the court. However, the pertinent facts are not properly before the court. The affidavit of the title company employee is made upon information and belief, without any indication as to its basis nor as to the source of the photocopy of the deed. Absolutely no supporting documentation is provided to the court.

Further, although CPLR 3215(f) provides that a verified complaint may be used as the affidavit of facts, the courts have held that a complaint verified by counsel, such as the one submitted in this case, "amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215." Feffer v. Malpeso, 210 AD2d 60, Mullins v. DiLorenzo, 199 AD2d 218.

Finally, the only defendant named in the action is Austin O. Rhoda, the individual grantee in the unrecorded deed of some sixteen years ago. RPAPL § 1511 requires that the person in possession shall be made a party to the action, as should any person who claims an interest in the real property. That section goes on to provide that "where it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgment, the court, upon application of such person, or of any party to the action, or on its own motion, may direct that such person be made a party."

No title search is provided to the court. There is no way, from the papers submitted, for the court to determine

whether notice must be given to others that may be affected by a judgment as prayed for herein. The court cannot determine from these papers who is in possession of the property. As the complaint is not verified by a party and given the insufficiency of the affidavit in support of the application, the plaintiffs have not sustained their burden.

Accordingly, the motion is denied, without prejudice and with leave to renew upon proper papers which shall address the issues raised herein.

Dated: April 30, 2007

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HON. DAVID ELLIOT