

Femia v Femia

2007 NY Slip Op 32261(U)

June 29, 2007

Supreme Court, Queens County

Docket Number: 0027166/2006

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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FRANK J. FEMIA,

Plaintiff,

-against-

Index No. 27166/06
Motion Date: 6/27/07
Motion Cal. No. 33

MICHAEL T. FEMIA, MICHAEL A. FEMIA,
and RICHARD FEMIA

Defendants.

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The following papers numbered 1 to 10 read on this application by Patricia Healy and Patricia Femia, for an order granting them permission to intervene in this action as party plaintiffs and staying all proceedings in the summary proceeding in Housing Court under L & T Index Number 80669/06.

	<u>PAPERS NUMBERED</u>
Order to Show Cause -Affirmation-Exhibits.....	1-3
Affidavit of Service.....	4
Affirmation.....	5-7
Affidavit-Exhibits.....	6-8
Memorandum of Law.....	9
Proof of Service.....	10

Upon the foregoing papers, it is ordered that this application by Patricia Healy and Patricia Femia, for an order granting them permission to intervene in this action as party plaintiffs and staying all proceedings in the summary proceeding in Housing Court under L & T Index Number 80669/06. is denied, for following reasons:

The Order to Show Cause, dated June 11, 2007, required the proposed intervenors to serve a copy of the order with the support papers upon the Michael T. Femia and Michael A. Femia’s Housing Court attorney by personal delivery, by June 18, 2007 and upon Richard Femia and the Marshall, by certified or overnight mail, and upon plaintiff’s attorney by personal delivery, by June 18, 2007. The proposed intervenors have failed to show that they made service in accordance with the Order to Show Cause.

The affirmation of service by the attorney for the proposed intervenors, indicates that

he personally served a true copy of the Order to Show Cause upon David Hernandez, 26 Court Street, 22 Floor, Brooklyn New York. Through the process of elimination the court has assumed that Mr. Hernandez is the plaintiff's attorney; this assumption being required since there is no indication regarding Mr. Hernandez' connection with the case. As such, service upon him was to be by personal delivery. Thus, the indication that Mr. Hernandez was personally served fails to satisfy the Order, since personal delivery, which requires placing process directly in the hands of the person to be served, is merely one of four specific methods of accomplishing personal service. Without more information, this Court cannot presume Mr. Hernandez received the Order to Show Cause by personal delivery.

The affirmation of service by the attorney for the proposed intervenors, indicates that he served a copy of the Order to Show Cause upon Anthony F. LeCrichia, defendants Michael T. Femia's and Michael A. Femia's Housing Court Attorney, by bringing it personally to his office and there being no person to personally serve, leaving it on the front desk in his office at 245 E. 33 Street, New York, N.Y. 10016 and later that day serving a second copy by Federal Express next day service. Since this indicates the Order to Show Cause was not placed into Anthony F. LeCrichia's hands, service upon him did not satisfy the Court's Order of service.

Based upon the failure to serve Michael T. Femia and Michael A. Femia's Housing Court attorney and Mr. Hernandez, plaintiff's attorney, by personal delivery, by June 18, 2007, the application is not properly before this court and is denied.

In any event, if this Court was to review this application, it would be denied. This action is brought pursuant to Article 15 of the Real Property Actions and Proceedings Laws and CPLR 3001 for a judgment determining conflicting claims to title to certain real property located in Kings County, New York. The proposed intervenors seek the imposition of a Constructive Trust on the subject property for the benefit of Frank J. Femia, Michael T. Femia, Richard Femia, Patricia Healy and Patricia Femia. They also seek an order deeming Michael T. Femia and Michael A. Femia Trustees of the subject property. The proposed intervenors claim that they live on the second floor of the subject house and that if the order of eviction by Judge Pinckney, dated January 30, 2007, is executed, the wishes of the property's grantee, Margaret Femia, will not be carried out. According to the proposed intervenors, Margaret Femia is the mother of plaintiff and defendants Richard and Michael T. Femia and she conveyed the property to Michael T. Femia, by deed on February 3, 2003. Proposed intervenors claim that they have been living in the house for many years and Patricia Healy was married to plaintiff (now divorced) and Patricia Femia is one of their children. Patricia Femia was the granddaughter of Margaret Femia and she was very close to her grandmother. So close was this

relationship that the proposed intervenors claim that “Margaret Femia did not convey her property to her son so that he could evict and make homeless one of her most cherished grandchildren.” Based upon this, they claim an equitable right to remain in the property and seek the imposition of a constructive trust.

Initially, the court notes that the proposed intervenors have failed to indicate which section of the CPLR they are seeking the instant relief. However, based upon a review of the papers it seems they are moving pursuant to CPLR 1003. This section states that:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Generally, intervention should be permitted where the proposed intervenor has a real and substantial interest in the outcome of the proceeding. Plantech Housing v Conlan, 74 AD2d 920 (2d Dept 1980.) “However, it should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute.” Osman v. Sternberg, 168 A.D.2d 490 (2d Dept 1990.)

The proposed intervenors claim a right to intervene based upon their right to the imposition of a constructive trust. To state a cause of action to impose a constructive trust, they must allege "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment", Sharp v Kosmalski, 40 N.Y.2d 119 (1976.) See, Nastasi v Nastasi, 26 AD3d 32 (2005.) Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein. Although there is no unyielding formula that limits a court's freedom to fashion this equitable remedy, absent circumstances that otherwise call for equitable relief, the above are essential elements that must be shown to establish a constructive trust. Bontecou v. Goldman, 103 A.D.2d 732 (2d Dept 1984.)

Here, the proposed intervenors have failed to state a cause of action to impress a constructive trust since there is no allegation in the proposed complaint that the property in question has been the subject of a transfer from them or the other plaintiff to the defendants. Nor is there any allegation that they received a promise from the deceased grandmother or any

active party that the proposed intervenors were to receive an ownership or other interest in the property. These nebulous claims that Margaret Femia would not have wanted Patricia Femia evicted from the subject premises cannot serve as an enforceable promise. As such, there has been no showing that the proposed intervenors have standing to intervene in this action and to allow them to intervene would confuse the issues and would not result in benefit to the parties already in the litigation. It is clear that the inclusion of the proposed intervenors in this action would contribute nothing to the resolution of this controversy and would only serve to delay the outcome of the matter. Consequently, the equitable remedy of a constructive trust is unavailable since the proposed intervenors have failed to set forth the elements for such. Goraya v. Ali, 194 A.D.2d 712 (2d Dept 1993.) Accordingly, the application seeking permission to intervene in this action is denied. Consequently, the stay on the proceedings in the summary proceeding in Housing Court under L & T Index Number 80669/06, contained in the Order to Show Cause, dated June 11, 2007, is lifted and the eviction may proceed.

Dated: June 29, 2007

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ORIN R. KITZES, J.S.C.