

Falco v Maxwell

2007 NY Slip Op 34163(U)

December 18, 2007

Supreme Court, Suffolk County

Docket Number: 0004136/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 4136/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 BERNADETTE FALCO,

Plaintiff,

-against-

GAIL MAXWELL,

Defendant.

ORIG. RETURN DATE: JUNE 28, 2007
 FINAL SUBMISSION DATE: SEPTEMBER 20, 2007
 MTN. SEQ. #: 001
 MOTION: MD

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 5 read on this motion _____
TO AMEND PLEADINGS AND TO CANCEL DEED

Order to Show Cause and supporting papers 1-3; Affidavit in Opposition and supporting papers 4, 5; it is,

ORDERED that this motion by defendant for an Order: (1) granting leave to amend the pleadings herein to add the CLERK OF THE COUNTY OF SUFFOLK as a party defendant; (2) immediately canceling the deed recorded by plaintiff on or about October 23, 2006; and (3) ordering the CLERK OF THE COUNTY OF SUFFOLK to cancel the deed recorded by plaintiff on or about October 23, 2006, is hereby **DENIED** for the reasons set forth herein.

This is an action for the partition of certain real property located at 19 Nicoll Avenue, Amityville, New York. Pursuant to a deed dated January 30, 2002 and recorded in the Office of the Clerk of the County of Suffolk on or about October 23, 2006, the property is owned by plaintiff and defendant as joint tenants. Defendant alleges that she purchased the property in or about August of 2001, as the sole owner thereof. Defendant further alleges that she met plaintiff in or about September of 2001; that plaintiff moved into defendant's residence in

or about that same month; and that plaintiff resided there until September 23, 2006. Defendant alleges that plaintiff made monetary contributions towards the expenses of the household, but did not contribute towards the mortgage or real estate taxes.

On or about January 30, 2002, defendant alleges that she executed various documents, including a power of attorney in favor of plaintiff, and a deed transferring the property from herself to herself and plaintiff as joint tenants. Defendant contends that she placed the deed in her "strong box," as she did not intend to deliver or record the deed. When the relationship encountered difficulty in September of 2006, defendant alleges that unbeknownst to her, plaintiff removed the power of attorney and deed from the strong box, and recorded the deed on or about October 23, 2006, along with the ancillary documents, using the power of attorney defendant had executed. Defendant alleges that she was unaware the documents were taken until she received a letter from an attorney on plaintiff's behalf, dated November 17, 2006, demanding half the market value of the property. When defendant refused plaintiff's demand, plaintiff commenced the within action for partition. Defendant interposed an answer with two counterclaims, the second of which seeks to declare the deed in question null and void.

Defendant has now filed the instant application to amend the pleadings to add the CLERK OF THE COUNTY OF SUFFOLK as a party defendant, and to immediately cancel the deed recorded by plaintiff on or about October 23, 2006. Defendant has, in essence, moved for summary judgment on her second counterclaim.

In opposition, plaintiff contests many of defendant's allegations. Specifically, plaintiff alleges that in addition to contributing to household expenses, she gave defendant cash to use towards the mortgage, and also made "substantial capital improvements" on the property. Moreover, plaintiff alleges that the parties agreed that the property should be titled in both names as joint tenants, and therefore the deed was executed on January 30, 2002 and placed in the strong box. Plaintiff contends that both parties utilized and exercised control over the strong box, as it contained the parties' important documents. Further, plaintiff alleges that the deed was never recorded because the parties were advised they might incur a substantial transfer tax. However, when the relationship began to sour, plaintiff "took it upon herself" to record the deed using the power of attorney from defendant.

Initially, with respect to that branch of defendant's application to add the CLERK OF THE COUNTY OF SUFFOLK as a party defendant, the Court finds that the Clerk is not a necessary party herein, as the Clerk will not be "inequitably affected by a judgment" in this action (see CPLR 1001[a]). The Clerk, in her ministerial capacity, will merely carry out any direction or Order issued by the Court. Accordingly, this branch of defendant's application is **DENIED**.

With respect to that branch of defendant's application to immediately cancel the deed recorded by plaintiff on or about October 23, 2006, as discussed, defendant has, in essence, moved for summary judgment on her second counterclaim. On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; see also *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Comms. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

Here, the Court finds that questions of fact exist that preclude the granting of summary judgment to defendant. It is well-settled that to effectuate a transfer of property there must be a delivery of the executed deed and an acceptance by the grantee (Real Property Law § 244; *Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d 370 [1974]; *Ten Eyck v Whitbeck*, 156 NY 341 [1898]; *D'Urso v Scuotto*, 111 AD2d 305 [1985]). While there is a presumption that the date of the deed is the date that it was delivered and accepted, this

“presumption . . . must yield to opposing evidence” in that the intention of the grantor to deliver the deed is a question of fact (*Ten Eyck v Whitbeck*, 156 NY 341, *supra*, at 352; *Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d 370, *supra*; *Saltzsieder v Saltzsieder*, 219 NY 523 [1916]). In the instant action, questions of fact exist with regard to whether the deed executed on January 30, 2002 ever became effective, i.e., whether the deed was ever delivered by defendant and accepted by plaintiff. While the execution and recording of a deed may give rise to a presumption of delivery and acceptance, that presumption is not conclusive and may be repelled by proof of facts inconsistent with the transfer of title; it is the intention of the parties that governs (*Vanasco v Angiolelli*, 97 AD2d 462 [1983]; *Winick v Winick*, 26 AD2d 663 [1966]; *In re Estate of Romano*, 8 Misc 3d 1010[A] [Sur Ct, Nassau County 2005]). In view of the foregoing, this branch of defendant’s application to immediately cancel the deed recorded by plaintiff on or about October 23, 2006, is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: December 18, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court