

Weiss v Roggiero

2008 NY Slip Op 30552(U)

February 22, 2008

Supreme Court, New York County

Docket Number: 0106405/2002

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE

PART 10

Justice

Weiss et al

- v -

Rozziero et al

INDEX NO. 106405/02

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*C/C: 5/2/08
NO I: 5/3/08*

Dated: 2/22/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

Marian Weiss as Executrix of the
Estate of Alois Weiss,
Plaintiff,

- against -

Dino Roggerio a/k/a
Dino Roggerio,

Defendants.

DECISION/ORDER

Index No.: 106405/02
Seq. No.: 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Number
Pltf n/m [3212 etc.] w/ MK affirm, exhs	1
Def x/m [3212 etc] LB & JAA affirm, DR affid, exhs	2
Pltf repl/ opp w/MW affid, MK affirm, exhs	3
Def reply/ support w/DR affid, JAA affirm	4

FILED
FEB 29 2008
NEW YORK
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Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.;

This is an action to foreclose a mortgage. Issue has been joined, but the note of issue has not yet been filed. The court has before it an omnibus motion for a variety of relief in favor of the substituted plaintiff, who is the widow and executor of the estate of Mr. Weiss. Among the relief sought by her is summary judgment on all of the plaintiff's claims against the defendant. The defendant has cross moved for, among other relief, summary judgment in his favor. Since the motion and cross motion are timely, they will

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can be considered and will be decided. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004),

Arguments

Plaintiff's motion sets forth several, alternative, grounds for relief. They are as follows: (1) summary judgment, (2) striking defendant's answer as a sanction for failing to appear for his examination before trial, or (3) an order that he appear for his deposition, (4) the modification of this court's order dated June 7, 2007 extending the note of issue so that instead it can be immediately filed by plaintiff, and (5) permission to serve an amended summons and complaint to add another defendant. Defendant's cross motion also sets forth alternative relief: 1) summary judgment, or 2) discovery sanctions pursuant to CPLR § 3126 and 3) an extension of time to respond to plaintiff's notice to admit.

The court first considers whether either side is entitled to summary judgment. If granted it would either moot out the other relief sought, or sharply curtail it. Moreover, the overall arguments go to the issue of whether each side has proved its case, or been unable to do so because discovery is incomplete.

Plaintiff has failed to include the pleadings, and this alone would warrant the denial of her motion because the pleadings set forth the material elements of her case, and also allow the court to examine the defenses thereto. This point, however, is not raised by the defendant, who has himself provided the pleadings on his cross motion. Therefore, the court moves to the substance of the motions.

The court also denies the plaintiff's motion to add a new defendant, but without prejudice. Plaintiff has not included a copy of the proposed pleading. Moreover, the

reason plaintiff seeks to add Orah Israel, LLC is because defendant sold the premises at issue in this action. There is no dispute, however, that the notice of pendency filed at the time this case was commenced in 2002 has expired by operation of law. CPLR § 6513. Plaintiff did not move to extend it before it expired. Matter of Sakow, 97 N.Y.2d 436 (2002). Defendant sold the property to Orah Israel, LLC, after the *lis pendens* expired. Consequently, the new purchaser bought the property without actual notice of this dispute, or any cloud on title. Plaintiff has not presented any argument, let alone a colorable one, as to why this non-party must be made a party, and/or what legal claim it now has on the premises, other than money damages.

Plaintiff's argument is that she is entitled to summary judgment because defendant's answer should be stricken. This collapses two arguments, however. One, that she has proved her *prima facie* case; and two, that she has proved it because defendant's defenses should be dismissed, therefore there would be no factual disputes for trial. These arguments are rejected, and her motion for summary judgment denied for the reasons that follow.

An Order pursuant to CPLR § 3126 can provide for any one or more penalties as follows: (1) an order resolving for the purposes of the action, the claims in favor of the moving party, (2) prohibiting the disobedient party from supporting or opposing certain claims or defenses in the case, and (3) striking the disobedient party's pleadings altogether, staying further proceedings, or rendering a judgment by default against that party. Striking the pleadings is the most extreme of these penalties. Corsini v. U-Haul Intern., Inc., 212 AD2d 288 *Lv App Dism in part Denied in part* Corsini v. U-Haul Intern., Inc., 87 NY2d 964 *Lv App Dism* Corsini v. U-Haul Intern., Inc., 87 NY2d 965 (1996). To

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warrant the dismissal of the complaint, the moving party has to establish that "the frustration of discovery was willful, contumacious, or due to bad faith . . ." Corsini v. U-Haul Intern., Inc., 212 A.D.2d 288 at 291 (1st Dept 1995) (internal citations omitted). Plaintiff has not met this very heavy burden.

It is undisputed that defendant was scheduled to be deposed on August 22, 2007. Sarah Utendahl, a non-attorney with defendant's attorney's law office, contacted plaintiff and arranged for the date to be adjourned to September 10, 2007. Plaintiff's deposition was also scheduled for the same day. Plaintiff's counsel contends, and Ms. Utendahl denies, that she agreed that defendant would be deposed before plaintiff that day. When defendant's attorney appeared with her client that day, expecting to depose plaintiff, the attorney refused to let her client be deposed first. This resulted in a heated exchange between the attorneys. Though defendant was physically present, plaintiff's counsel declared the defendant in default.

Just as a non-lawyer cannot enter into a stipulation that would bind a client, or decide on her own to send out discovery demands, a non-lawyer cannot make an independent decision to waive priority in depositions. Nor should a client be punished because of a mis-communication between law offices. Therefore, plaintiff's motion, to strike the answer with defenses is denied. The court will instead require that the deposition be rescheduled and be held no later than **MARCH 17, 2008 at 10:00 a.m.**, with plaintiff being deposed first and defendant's deposition to immediately follow, and to continue day by day until completed. Although plaintiff is a school teacher, she will need to accommodate her schedule, if she wants to proceed with this case.

Plaintiff also seeks an order deeming defendant to have admitted those items

contained in the Notice to Admit she served on him, dated August 23, 2007. Defendant concedes a delay in responding to the Notice to Admit, but he has now done so. His responses underscore how polarized the parties are about the underlying facts of this case. Since there are clearly factual disputes (addressed later in this decision), defendant's motion, to have the late responses either deemed timely, or an order that plaintiff accept them, although delayed, is granted. Plaintiff is hereby ordered to accept the late responses to her Notice to Admit, which are now deemed served *nunc pro tunc* as of the date of defendant's cross motion.

Turning to the motions for summary judgment. Neither proponent has met its burden on their respective motions, which is to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). In event, each opposing party has demonstrated the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

This case abounds with factual disputes. Some of these disputes will inform the law to be applied by the court. Plaintiff contends that her husband (the deceased) and defendant agreed that plaintiff would have a mortgage on the property that is being foreclosed. The mortgage was equal to the commission that plaintiff was entitled to, but defendant could not pay. According to plaintiff, the purchase price of the property was reduced by the amount of commission, so that the sale could proceed. Plaintiff contends that the mortgage made May 23, 1996, in the amount of \$32,490.75 is evidence of this agreement. Moreover, she contends that it is a "note/ mortgage" since

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the repayment terms are included. Alternatively, she contends that she cannot locate the note.

Defendant denies this arrangement. He contends the document is a forgery. Alternatively, he contends if it is not a forgery, his signature was obtained fraudulently. He points out inconsistencies in the document, including that it was not recorded for more than four years after it was made and witnessed/ notarized in 2000. Defendant argues that a mortgage without a note is unenforceable, as a matter of law.

Without the benefit of discovery, neither party can prove its claims/ defenses. Moreover, the claims/ defenses presented do not present pure issues of law, but issues of credibility as well. Therefore, the motion and cross motion for summary judgment are denied.

Defendant contends that the discovery responses plaintiff has provided to date are incomplete, or evasive. Plaintiff contends that she has no further information, or has provided the best information she has. Since she is the substituted plaintiff, this may accurate, and it may ultimately affect her claims. Defendant shall proceed with plaintiff's deposition (as ordered herein) so that he can make inquiries to further develop his case.

Conclusion

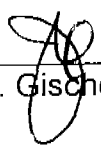
Each motion is granted in part and denied in part, for the reasons stated. A compliance conference is scheduled **for MAY 2, 2008 at 9:30 a.m.** and the Note of Issue is hereby extended to **MAY 3, 2008**. At that time parties are expected to be ready to certify for trial

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 22, 2008

So Ordered;



Hon. Judith J. Gische, J.S.C.

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