

Kosciuk v Risko

2008 NY Slip Op 31756(U)

June 4, 2008

Supreme Court, Suffolk County

Docket Number: 0011056/2005

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 4-19-07 (008 & 009)
MOTION DATE 6-15-07 (010)
MOTION DATE 11-04-07 (011)
CAL. DATE 12-17-07
MNEMONIC: # 008 - MD # 009 - XMD
010 - MG # 011 - MG

-----X
JEAN-PIERRE KOSCIUK and TRACY :
KOSCIUK, :
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 :
 Plaintiffs, :
 :
 - against - :
 :
 SIMONE J. RISKO, VALERIE M. :
 CARTWRIGHT and CANDICE McCONE, :
 :
 :
 Defendants. :
-----X

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-----X
VALERIE M. CARTWRIGHT and CANDICE :
McCONE, :
 :
 :
 :
 Third-Party Plaintiffs, :
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 - against - :
 :
 :
 COMMONWEALTH LAND TITLE :
INSURANCE COMPANY, :
 :
 :
 Third-Party Defendant. :
-----X

Upon the following papers numbered 1 to 105 read on this motion and cross motions for summary judgment, and to amend an answer; Notice of Motion/ Order to Show Cause and supporting papers (008) 1-31; Notice of Cross-Motion and supporting papers (009) 32-34; (010) 35-50; (011) 51-63; Answering Affidavits and supporting papers 64-80; 81-82; 83-91; 92-93; 94-5; Replying Affidavits and supporting papers 96-97; 98-102; 103-104; Other 105; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion (008) by the plaintiffs, Jean-Pierre Kosciuk and Tracy Kosciuk, pursuant to CPLR 3212 for summary judgment is denied.

ORDERED that this cross-motion (009) by the defendant, Simone J. Risko (hereinafter Risko), pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied without prejudice with leave to renew upon submission of proper papers within thirty days of the date of this order; and it is further

ORDERED that this cross-motion (010) by the defendants/third-party plaintiffs, Candice McCone and Valerie M. Cartwright (hereinafter Cartwright & McCone), pursuant to CPLR 3025(b) permitting them to amend their answer to assert defenses and counterclaims to the plaintiffs' claims asserted in the verified complaint, is granted, and it is further

ORDERED that this cross-motion (011) by the third-party defendant, Commonwealth Land Title Insurance Company (hereinafter Commonwealth), granting summary judgment dismissing the third-party complaint with prejudice is granted and the counterclaim asserted by the third-party defendant Commonwealth is dismissed with prejudice.

This action was commenced by the filing of the summons and complaint on May 3, 2005. A motion for summary judgment was returnable before this court on September 29, 2005, but Risko filed for bankruptcy protection and thus an automatic stay was imposed on this action. Upon said stay having been lifted by order, dated January 18, 2006, by the United States Bankruptcy Court Eastern District of New York (Cyganowski, USBJ), the plaintiffs were authorized to proceed in the instant action against Risko. A second motion seeking summary judgment was made against Risko, but before the decision was rendered Risko sold the property (subject to a Lis Pendens) to Cartwright & McCone. Thus the decision was denied without prejudice by an order, dated July 31, 2006, (Loughlin, J.) for the addition of the necessary parties. On or about December 6, 2006, the plaintiffs served a supplemental amended complaint naming the Cartwright & McCone defendants who then commenced a third-party action against Commonwealth. An answer to the supplemental amended complaint was served on or about February 1, 2007.

This is an action pursuant to Real Property Actions and Proceedings Law, Article 15, to compel the determination of a claim to real property known as Hart Street. The complaint of this action claims that the plaintiffs are the owners of real property located at 5 Hancock Street, Port Jefferson Station, New York, (hereinafter 5 Hancock), having acquired title by deed recorded in the office of the Suffolk County Clerk on July 28, 1994 in Liber 11687, p. 371, and dated July 14, 1994. Risko was the owner of real property located at 9 Hancock Street, Port Jefferson Station, New York (hereinafter 9 Hancock), having acquired title by deed recorded in the office of the Suffolk County Clerk on August 15, 1995 in Liber 1137, p. 536, and dated August 4, 1995. The plaintiffs' real property is bordered on its westerly side by Hart Street, a "paper street"¹ located in

¹ ie, streets that are mapped but are not physically improved (*In the Matter of the Application of the City of New York*, 14 Misc3d 1232(A), 836 NYS2d 497 [2007]).

the Town of Brookhaven, County of Suffolk, shown on the Map of Highland Park, Plate 1B, filed in the Suffolk County Clerk's Office on June 22, 1910 under file #397 (hereinafter Highland Park). The property conveyed by Risko to Cartwright & McCone, is bordered on the east side by Hart Street. Hart Street is described as being a 30 feet wide by 150 feet long buffer between the two above mentioned properties. The plaintiffs and the defendants were each entitled to access to Hart Street.

It is asserted that on August 4, 1995, a deed was made from Daniel L. Ulino and Susan J. Ulino (hereinafter Ulinos), to Risko wherein Risko acquired title to 9 Hancock and which deed refers to and includes the transfer of the "bed of Hart Street." The plaintiffs assert that the deed improperly, incorrectly and unlawfully purports to transfer the bed of Hart Street to Risko. They claim that Hart Street was not owned by the Ulinos grantors and that the Ulinos had no right to transfer it. The plaintiffs allege that Risko used Hart Street for her exclusive use and control by installing a driveway on Hart Street, thus impinging upon the plaintiffs' right to use it. The plaintiffs seek a judgment entitling them to the use and enjoyment of Hart Street, free and clear of any claim by the defendants and further the plaintiffs seek that the defendants be barred from all claim or interest to Hart Street except to any right to which they may be entitled for its use. They also request that the defendants remove any obstructions to Hart Street being used exclusively by the defendants to the exclusion of all others.

Risko has asserted in her answer that Amas & Associates Properties, Inc. (hereinafter Amas), delivered a Quit Claim Deed to the Ulinos, dated May 19, 1994, and that they in turn delivered to her a deed, dated August 4, 1995. Risko has also asserted a counterclaim for damages; a counterclaim asserting title by adverse possession for ten years before the commencement of this action; and also has alleged slander by the plaintiffs based upon the plaintiffs' assertions that Risko was not the exclusive owner of the property in this lawsuit.

Cartwright & McCone intervened in the original action pursuant to an order, dated July 31, 2006, (Loughlin, J.), and thereafter the supplemental amended complaint was served naming them as defendants and asserting that Cartwright & McCone are the owners of the real property located at 9 Hancock, by deed dated April 28, 2006. Cartwright & McCone then commenced a third-party action against Commonwealth wherein they seek contribution or full or partial common law or contractual indemnity from Commonwealth.

In motion (008), the plaintiffs seek summary judgment against the defendants and submit in support of their application, inter alia, a copy of the summons and complaint, answer of Risko, supplemental amended complaint, verified answer and third party complaint, the plaintiffs' verified reply to counterclaims; notice of pendency of action, dated April 27, 2005; and various deeds, surveys and photographs.

Cartwright & McCone have submitted an affirmation in opposition to the plaintiffs' motion for summary judgment, along with an attorneys affirmation, as well as copies of the various pleadings; an uncertified copy of a letter from the Town of Brookhaven (hereinafter Town) sent to the plaintiffs; and a copy of a deed. Valerie M. Cartwright, as attorney, has submitted supplemental opposition to the plaintiffs' motion for summary judgment, supported by

ner affirmation; Certificate of Abandonment from First American Title Insurance Company of New York; Certificate of Abandonment signed by Andrew Solano, Anthony Musumeci, and Andrew Solano as president of Amas.; an Approval by the Town Assessor for the Abandonment of Mapped Property within the Town; an uncertified letter, dated June 15, 1987, from the Town; a document from the Town Assessors Office, dated June 30, 1987; a copy of a Highland Park Abandonment approval, undated from the Town; a certificate of occupancy for the Port Woods Development Corp., Inc. (hereinafter Port Woods) for a two story residence including a two car garage and fireplace at 9 Hancock; a copy of an indenture dated June 4, 1992 from Amas & Port Woods; a copy of an indenture, dated October 16, 1992, from Port Woods to the Ulinos; a copy of an indenture, dated May 19, 1994, from Amas to the Ulinos; and a copy of an indenture (corrected deed), dated July 20, 1995, from Andrew Solano to the Ulinos, to correct the name of the grantor.

The plaintiffs contend that when they purchased the premises at 5 Hancock on July 14, 1994, it was bounded on the westerly side by a "paper street" known as Hart Street, which is shown on the plaintiffs' survey and copy of the tax map for their property, and that the survey of the defendants' property reveals that their "proposed" driveway encroaches onto the thirty feet wide Hart Street. The updated survey of the Cartwright & McCone property, prepared April 7, 2006, the plaintiffs assert, shows that same encroachment. The plaintiffs argue that since the time of the plaintiffs' purchase, the paper street on the easterly side of the plaintiffs' property, White Street, has been abandoned by the plaintiffs and the adjoining owners, and the plaintiffs' interest therein, to the center line of White Street, was ultimately purchased by the adjoining land owners. Plaintiffs further claim that the bed of Hart Street was initially shown as a paper street on the map of Highland Park. On December 13, 1972, a deed was transferred from Derson Woods, Inc. to Louise Schoenfeld, which deed did not include the bed of Hart Street, and specifically stated "with all right title and interest if any of the party of the first part in and to any streets and roads abutting the described premises to the centerline thereof." Louise Schoenfeld then transferred the property to Nat Soffer by deed, dated March 29, 1974, which deed, plaintiffs again argue, did not include any portion of Hart Street. Nat Soffer then transferred the property by deed, dated September 2, 1986, to Amas, which deed, the plaintiffs assert did not include any rights to Hart Street. Thereafter, Amas, by deed, dated June 4, 1992, transferred the property to Port Woods but, the plaintiffs state, for the first time in this series of transfers, this deed included the language "and bed of Hart Street" and, thereafter, the metes and bounds description in the deeds transferring the title included the bed of Hart Street. The plaintiffs claim, at the time of the transfer of this deed Amas did not own, have title to, or in any way control the bed of Hart Street and as such, the grantor had no authority to transfer Hart Street. Thereafter, the subsequent deed, dated October 16, 1992, from Port Woods to the Ulinos, contained the same metes and bounds description including the bed of Hart Street, as did the deed transferring the property to Risko and also the deed from Risko to Cartwright & McCone.

With reference to their own property at 5 Hancock, the plaintiffs contend that on March 29, 1974, a deed was transferred from Harold Lieberman to David Rutman, granting all right title and interest, if any, to any streets and roads abutting the property to the centerline

thereof. Also, on March 29, 1974, Derson Woods, Inc. transferred to Esther Rutman the remainder of the plaintiffs' property, Lots 454 to 459, inclusive, which property abuts Hart Street, "together with all rights, titles and interests if any on the part of the party of the first part in and to any streets and roads abutting the property to the centerline thereof." On July 8, 1982, Esther Rutman transferred that portion of the plaintiffs' property, inclusive of Lots 454-459 which lots abut Hart Street, to Nina Friedman, Leon Rutman and Helen Kaminsky, with all right title and interest, if any, on the part of the party of the first part in and to the centerline thereof. Simultaneously, another deed transferred lots 448-453 from Esther Rutman to Nina Friedman, Leon Rutman and Helen Kaminsky. The two deeds taken together, comprise the plaintiffs' property. Thereafter, on September 2, 1986, Nina Friedman, Helen Kaminsky and Leon Rutman transferred to Andrew R. Solano, lots 448-459 inclusive of the plaintiffs' entire property, with all right title and interest if any of the party of the first part in and to any streets and roads abutting the above described premises to the centerline thereof. On July 14, 1994, Andrew Solano transferred to Amas lots 448-459, the lots which comprise all of plaintiffs' property with the deed including the words "together with all right title and interest if any of the party of the first part in and to any streets and roads abutting the premises to the centerline thereof". On July 14, 1994, the plaintiffs thereafter purchased this property from Amas, thus acquiring lots 448-459 inclusive, which lots comprise all of plaintiff's property with the deed containing the words "together with all right title and interest if any of the party of the first part in and to any streets and roads abutting the premises to the centerline thereof".

The plaintiffs contend that when Amas transferred to Port Woods what would eventually become the defendants' property, it also purported to transfer the bed of Hart Street, which the plaintiffs claim was not owned by the grantor, nor did the grantor own both parcels adjoining Hart Street.

Upon review of all the submissions, it is determined that there are factual issues which preclude summary judgment. Although the defendants assert that Hart Street has been abandoned, no party has submitted a Certificate of Abandonment for this Court to determine the same as a matter of law. Application for a Certificate of Abandonment was made and a document sent to the Town Abandonment Committee from the Town Assessor Arthur Malaussena (hereinafter Town Assessor), which indicated that while the abandonment of Hart Street was reviewed by the Town Abandonment Committee at their meeting, on June 22, 1987, the Town Assessor had not received a formal written approval for the abandonment from the Town Superintendent of Highways. The third-party plaintiffs have submitted a copy of a Certificate of Abandonment issued by First American Title Insurance Company of New York. The Certificate of Abandonment of Anthony Musumeci, Andrew R. Solano, and Amas is incomplete and the annexed letter of the Town Assessor is unsigned. The approval by the Town Assessor, signed June 9, 1987, was for the abandonment of Highland Park. The letter from Derrick J. Robinson, Esq., Deputy Town Attorney, dated August 16, 2006, to the co-plaintiff Tracy Kosicuk indicates that the developer failed to complete abandonment of Hart Street and White Street. That letter further states that the Town makes no claim of ownership of Hart Street. Hart Street is not under Town jurisdiction since it was never abandoned, dedicated or maintained by the Town.

Based upon the foregoing, the plaintiffs have not demonstrated prima facie entitlement to summary judgment which is precluded due to the existence of factual issues concerning the status of the abandonment proceeding initiated in June, 1987.

Accordingly, motion (008) by the plaintiffs for summary judgment is denied.

In cross-motion (009), Risko seeks summary judgment pursuant to CPLR 3212 dismissing the complaint against her, and in support of the same has submitted an attorney's affirmation and copies of three letters from her counsel to counsel for the plaintiffs. This motion is opposed by the plaintiffs who have submitted an attorneys affirmation. Pursuant to CPLR 3212 (b) a motion for summary judgment "shall be supported by affidavit, a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." Risko has not submitted copies of the pleadings in support of cross-motion (009), and CPLR 3212 does not provide for the moving party to incorporate by reference. However, this Court has searched the record for them. In that Risko has not submitted an affidavit or copy of a transcript of her examination before trial in support of this application, it is determined that the cross-motion fails to comport with CPLR 3212(b).

Accordingly, the cross-motion (009) for summary judgment dismissing the complaint is denied without prejudice with leave to renew within thirty days of the date of this order.

In cross-motion (010), Cartwright & McCone seek to serve an amended answer pursuant to CPLR 3025 to assert defenses and counterclaims to the claims asserted in the plaintiffs' complaint. In support of this motion, the defendants have served, inter alia, an attorney's affirmation; the affidavit of Valerie M. Cartwright; a copy of a previous order to show cause to permit said defendants to intervene in this action; a copy of the decision and order, dated November 8, 2006 (Loughlin, J.); a copy of the supplemental amended verified complaint and the verified amended answer and third-party complaint; verified amended answer of Cartwright & McCone; a copy of the third-party complaint with a copy of the affidavit of service, dated April 24, 2007; and a copy of the proposed amended answer. The plaintiffs have responded to this application with an affidavit from plaintiffs' counsel advising that he informed the defendants' counsel that he would have consented to and accepted their amended answer with counterclaims without the necessity of a motion to the Court and he asked the defendants for a stipulation withdrawing their motion, but the same has not been received.

Accordingly, cross-motion (010) wherein Cartwright & McCone, seek leave to serve an amended answer with counterclaims as submitted in their moving papers is granted pursuant to CPLR 3025(b) and the proposed amended answer with counterclaims of Cartwright & McCone dated May 16, 2007 is deemed served with this motion.

In cross-motion (011), the third-party defendant Commonwealth seeks an order pursuant to CPLR 3215 granting summary judgment dismissing the third-party complaint with prejudice. Accordingly, this application is deemed an application pursuant to CPLR 3212 for summary judgment dismissing the complaint. The counsel for the third-party defendants also claims Cartwright & McCone have failed to serve an answer to Commonwealth's counterclaim asserted in its answer, and accordingly, the application is deemed as having been made pursuant to CPLR 3215 to grant summary judgment on Commonwealth's counterclaim.

In support of this motion, the third-party defendants have served, inter alia, an attorney's affirmation; a copy of the summons and complaint; verified answer of Risko; a copy of the plaintiffs' verified reply to Risko's counterclaims; a copy of the summons and complaint, verified amended answer and third-party complaint; the third-party defendant's answer to the third-party complaint and counterclaim; and the affidavit of Alyssa J. Esteves, Esq. dated, October 4, 2007, with the attendant "Owners Policy of Commonwealth Land Title Insurance Company". Cartwright & McCone oppose this application, submitting the affirmation of Valerie M. Cartwright.

The third party plaintiffs seek contribution or full or partial common law or contractual indemnity from Commonwealth for negligence arising from title insurance issued to them by Commonwealth relative to their purchase of real property at 9 Hancock. The third-party defendant Commonwealth seeks dismissal of the third-party complaint claiming the title insurance policy issued by them for 9 Hancock excepted Hart Street.

A defect arising from the rights of a person whose interest appears in the chain of title must be covered under a title insurance policy unless specifically excepted (***Scaglione et al v Commonwealth Land Title Insurance, Company***, 303 AD2d 671, 757 NYS2d 84 [2nd Dept 2003]). Alyssa J. Esteves, Esqs., in her affidavit, states that she is an Associate Claims Counsel of Commonwealth and at the time Cartwright & McCone purchased the 9 Hancock property, the underlying action had already been commenced. She states that the title policy issued to Cartwright & McCone does not insure any portion of the paper street known as Hart Street, as any right of others, as set forth in paragraph 2 of the policy, is excepted, and any easement rights of others, other than the insured as to said area, are also excepted as set forth in paragraph 6. A review of the policy indicates that the policy states, as Alyssa J. Esteves, Esq., avers in her affidavit, that the policy excepts Hart Street. Thus, Commonwealth has demonstrated prima facie entitlement to summary judgment dismissing the third party complaint.

The third-party plaintiffs oppose this cross-motion asserting no pre-trial discovery has been conducted. However, they have failed to raise a factual issue to preclude summary judgment and have further failed to set forth the additional discovery they seek or state how it would raise a factual issue. The claims that the third party defendant Commonwealth's motion for summary judgment is premature because discovery has not been completed is unavailing. A party opposing a summary judgment motion may not complain of a lack of discovery without demonstrating some evidentiary basis or fact pattern to suggest that additional discovery might


lead to some relevant evidence or facts to defeat the motion. **Lambert v. Bracco**, 18 AD3d 619, 795 NYS2d662l (2nd Dept. 2005); **Romeo v. City of New York**, 261, AD2d 379, 689 NYS2d 517 (2nd Dept. 1999). There has been no showing, other than mere conjecture, surmise and speculation, that the roadway or paper street has been abandoned. It is therefore determined, as a matter of law, that the third party defendant Commonwealth has demonstrated entitlement to summary judgment as the third party plaintiffs are not entitled to contribution or indemnification relative to the status of Hart Street.

Accordingly, that part of motion (011) which seeks summary judgment dismissing the third-party complaint is granted.

The third-party defendant also seeks summary judgment on its counterclaim which asserts the third-party plaintiffs have commenced a frivolous action against it. However, the third-party plaintiffs further oppose cross-motion (011) because subsequent to the purchase of the property located at 9 Hancock they refinanced the original mortgage with Columbia Home Loans, LLC d/b/a Brokers Funding Services and, as part of the refinancing process, they were required to hire an abstract company i.e. Imperial Abstract Corporation, a subsidiary and agent of Commonwealth, to conduct a title search. At the closing on December 5, 2006, the title closer from Imperial Abstract Corporation advised them that as a condition of the new loan, they (third-party plaintiffs) were required to file a suit against Commonwealth, or bring Commonwealth into the pending action. The third-party defendant Commonwealth does not dispute this. Based upon the foregoing, Commonwealth has not demonstrated prima facie entitlement to summary judgment relative to bad faith or frivolous conduct by the third-party plaintiffs who alleged they were acting in response to the advice of the title closer from Imperial Abstract Corporation, a subsidiary and agent of Commonwealth. Thus in searching the record, summary judgment is granted dismissing the counterclaim asserted by the third party defendant against the non-moving third-party plaintiffs (**Vinder v Showbran Leasing & Management, Inc.** 298 AD2d 325, 749 NYS2d 240 [1st Dept 2007]).

Accordingly, the third party action is dismissed in its entirety.

Dated: June 4, 2008



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION