Luce v Warner
2008 NY Slip Op 32837(U)
October 10, 2008
Supreme Court, New York County
Docket Number: 105610/07
Judge: Walter B. Tolub
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[* 1]
SCANNED ON 10/17/2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
---------------------------------------x

H. CHRISTOPHER LUCE and MINER WARNER, as
Executors of the Estate of
Henry Luce III, and
the ESTATE OF HENRY LUCE III,

Plaintiffs,

Index No. 105610/07
Mtn Seq. 001

-against-

ELIZABETH WARNER,

Defendant.

---------------------------------------x

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This action arises out of a Manhattan apartment and a claimed *inter vivos* gift of certain shares of that apartment.

Plaintiffs H. Christopher Luce (Mr. Luce) and Miner Warner (Mr. Warner) are the executors of the estate of Henry Luce, III. (the decedent). Defendant Elizabeth Warner (Ms. Warner or defendant) is the decedent's first cousin once removed. The decedent however, in defining his relationship with Ms. Warner always referred to himself as "Uncle Hank".

According to Ms. Warner, following the 1987 death of the decedent's stepmother, Clare Booth Luce, defendant, who had just graduated from college, was invited to stay with the decedent at his Sutton Place apartment. After residing in the decedent's apartment for more than a year and a half, Ms. Warner moved to an

apartment in Murray Hill which she shared with a roommate. Shortly after her move in late 1989 or early 1990, Ms. Warner and the decedent discussed the benefits of apartment ownership, at which time the decedent suggested to Ms. Warner that she should purchase an apartment. Ms. Warner claims that she told decedent that she did not have enough money to purchase an apartment, but, suggested that if decedent purchased the apartment for her to live in, she would pay the maintenance and related apartment assessments.

Ms. Warner claims that following this conversation with her Uncle, she began to look at one-bedroom apartment units in New York City. She ultimately selected apartment 12-N at 245 East 54th Street (the apartment). Ms. Warner further claims that both she and her Uncle attended a co-op board interview at which point the board was informed that although the decedent intended to purchase the apartment, Ms. Warner would be the apartment's tenant. Approved by the co-op board, decedent purchased the shares and proprietary lease appurtenant to the apartment, and Ms. Warner moved into the unit shortly thereafter. Ms. Warner has since paid all maintenance and special assessments assigned to the apartment directly to the co-op.

In 1990 decedent married his fourth wife, Leila Hadley Luce.

In April 2002, Ms. Warner claims that her Uncle verbally informed her that he and his wife, Leila, wished to give Ms.

Warner the apartment. Decedent further explained that for tax reasons, the conveyance of the apartment would be made annually to Ms. Warner in one-sixth increments. By letter dated May 7, 2002, decedent informed Ms. Warner that he was conveying to her a one-sixth interest in the apartment (Answer, Exhibit A). This letter, which was copied to decedent's account Joe Guariglia (id.), was followed by similar letters dated January 23, 2003, January 12, 2004, and February 2005. Each of these letters informed defendant of the gift of an additional 1/6 interest in the apartment (Answer, Exhibits B, C), with the exception of the January 2004 letter, which informed defendant of the gift of an additional 1/3 interest in the subject apartment (Answer, Exhibit D).

Decedent died on September 7, 2005. Although Ms. Warner had in her possession four letters collectively gifting her a 5/6 interest in the apartment in which she was still residing, it appears that decedent never transferred the related apartment shares and proprietary lease to Ms. Warner. It also appears that decedent's will contained a clause giving the apartment to decedent's surviving spouse, Leila.[1]

On May 2006, counsel for plaintiffs sent defendant a letter demanding that Ms. Warner vacate the apartment by September 1,

[1] Although plaintiffs' complaint contains an excerpt of the will directing conveyance of the subject apartment to Leila, the will itself is not annexed.

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2006. The demand was grounded in two claims: (1) that decedent's will contained a provision giving the apartment to decedent's wife, Leila; and (2) since the shares of stock and proprietary lease were never conveyed to Ms. Warner, Ms. Warner had no legal interest in the apartment. In response, Ms. Warner produced copies of the letters sent to her by her Uncle which she claims gifted her a total of 5/6 of the interest in the apartment. These letters were dismissed by plaintiffs, who offered to sell Ms. Warner the apartment at its then fair market value (Answer, Exhibit F). In pertinent part, the letter from H. Christopher Luce reads:

> Now, despite the letters you faxed me that show my father's intent, it appears that he did not follow through by going to the Brevard's Board of Directors and ask them to assign over to you his Stock Certificate in the Corporation and his Proprietary Lease permitting tenancy. The Managing Agent still lists my father as the owner of both of these and does not have you listed even as a partial co-owner. If only we could ask him now why he did not follow through.
>
> Therefore, despite the letters and despite your understandably firm conviction that you own the property, in the eyes of the law, you do not. And despite by being a co-Executor of the Estate, I cannot simply ignore what is written in the Will.

(id.). This action, which seeks a declaration that defendant Elizabeth Warner has no ownership interest in the Shares of the Apartment, was commenced in April of 2007.

In response to the instant complaint, Ms. Warner, in her

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answer asserts three affirmative defenses: failure to state a cause of action, laches, and unclean hands/equitable estoppel. Ms. Warner additionally asserts two counterclaims, one for a declaratory judgment that she is the owner of 5/6 interest in the apartment, and a second counterclaim asserting promissory estoppel. By this motion, plaintiffs move for an order striking defendant's asserted affirmative defenses and counterclaims.

Discussion

Much like a traditional motion to dismiss, a motion to dismiss affirmative defenses and counterclaims limit the court's inquiry to whether the defendant's facts, as alleged, raise an issue to be resolved by the trier of fact (American Mortgage Banking, Ltd. v. Canestro, 201 AD2d 407 [1994]; see generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2008] §36:530-541). The burden of producing sufficient evidence with respect to the challenged defense is generally borne by the defendant (Becker v. Elm Air Conditioning Corp, 143 AD2d 965 [1st Dept 1988]). However, where the motion to dismiss is based upon the claim that the asserted defenses have no merit, it is the movant who is first required to present admissible evidence that the proffered defense is either inapplicable or improper (see, Gonenhauser v. Central Trust Co., 51 AD2d 664 [4th Dept 1976]). Only after this showing is the

defendant required to demonstrate that a factual dispute exists (Palais Partners v. Vollenwieder, 173 Misc 2d 9 [Civ Ct. NY Co. 1997]). Stated differently, a motion to dismiss an affirmative defense is treated much like a motion for summary judgment (see, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2008] §36:541), and the success or failure of the motion turns on the evidence presented.

Plaintiffs, who submitted no affidavits and no evidentiary proof with the instant motion, failed to properly challenge all three of the affirmative defenses sought to be dismissed (Becker, 143 AD2d 965 [1st Dept 1988]). As such, the portion of the motion seeking to dismiss defendant's affirmative defenses is denied. Moreover, even if the asserted affirmative defenses were properly challenged, their dismissal is unwarranted.

As a preliminary matter, defendant's inclusion of a first affirmative defense for "failure to state a cause of action" while improper and more appropriately brought via a motion to dismiss (see, CPLR 3018(b), 3211(a)(7)), does not automatically warrant dismissal (see, Salerno v. Leica, 258 AD2d 896 [4th Dept 1999]; Riland v Frederick S. Todman & Co., 56 AD2d 350 [1st Dept 1977]; Pump v. Anchor Motor Freight, Inc., 138 Ad2d 849 [3rd Dept 1988]. Cf. Torres v. Southside Hospital, 84 AD2d 836 [2nd Dept 1981; Propoco, Inc. v. Birnbaum, 157 AD2d 774, 775 [2nd Dept 1990]).

Secondly, although plaintiffs claim that they are unable to understand defendant's "ramblings" and are surprised by the introduction of the "factually unsupported affirmative defenses of laches and unclean hands/promissory estoppel", these claims are severely undermined by the allegations contained within defendant's answer. Viewed in a most favorable light and assuming the allegations as true (see, 182 Fifth Avenue, LLC v. Design Development Concepts, 300 AD2d 198 [1st Dept 2002]), defendant's answer, while clearly not in conformity with the format suggested by the CPLR, indicates that notwithstanding the fact that her Uncle was the purchaser of the apartment, defendant had been the sole tenant of the apartment for sixteen years. Defendant's answer further suggests that during this time period, it was defendant who paid all of the apartment's assessed maintenance and other charges, and these fees were paid directly to the Co-op. Of most significance however, is that defendant possesses four letters presented to her by her Uncle which plaintiffs concede indicate decedent's intent to give her a significant interest in the subject apartment (see, Answer, Exhibit F). In other words, while perhaps inartfully pled, defendant's answer is not as "devoid of facts" or "surprising" as plaintiffs would like this court to believe.

Plaintiffs' attack on defendant's counterclaims similarly fails. Defendant's failure to include an allegation of "no

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adequate remedy at law" in her first counterclaim does not automatically require the dismissal of her asserted cause of action for a declaration as to her rights with respect to the subject property (see, Town of Austerlitz v. Dugwest Associates LLC, 24 AD3d 847 [3rd Dept 2005]). Furthermore, since this action involves a parcel of clearly valuable Manhattan real estate, an allegation that there exists no adequate remedy of law would be mere surplusage (see, EMF General Contracting Corp. v. Bisbee, 6 AD3d 45, 44-45 [1st Dept 2004]("There is no adequate remedy of law in this case, in light of the fluctuating market values and the unique nature of this real estate [***]" (id.)).

Defendant's second counterclaim also does not warrant dismissal at this juncture. A motion to dismiss focuses not on whether a party can succeed in proving their claim, but whether they have pled a "cognizable legal theory" upon which they may succeed (see, Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2008] §36.01 *et seq.*).

However, this is not to say that defendant should be, or is, allowed to circumvent the pleading requirements set forth in the CPLR. As such, within thirty days of service of a copy of this order with notice of entry, defendant is directed to replead her

answer so that it is in conformity with the CPLR.

Lastly, the court notes that in their reply papers, plaintiffs attempted to invalidate plaintiffs' counterclaims by raising new arguments as to whether or not decedent made a valid inter-vivos gift to defendant under New York law. This was an improper introduction of an argument and as such, this court need not address this issue at this juncture (see, Wal-Mart Stores, Inc. v. United States Fidelity and Guaranty Company, 11 AD3d 300 [1st Dept 2004]).[2]

Accordingly, it is

ORDERED that plaintiffs' motion for an order striking defendant's affirmative defenses and counterclaims is denied; and it is further

ORDERED that defendant shall replead and serve her answer in conformity with the requirements of the CPLR within 30 days of service of a copy of this order with notice of entry.

Counsel for the parties shall appear for a Preliminary Conference in IA Part 15, Room 335, 60 Centre Street New York, New York, at

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[2] The court does however note that contrary to plaintiffs' assertions, in this State, and following on the heels of the cases cited in plaintiff's reply memorandum of law, a valid *inter vivos* gift does not always require delivery of the actual property to the donee. The delivery may symbolic, and in fact, may be made by letter (see, Pell Street Nineteen Corporation v. Mah, 243 AD2d 121 [1st Dept 1998]; Chiaro v. Chiaro, 213 AD2d 369 [2nd Dept 1995]).

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11:00 a.m. on December 19, 2008.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/16/08

HON. WALTER B. TOLUB, J.S.C.

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