

Cooke v Siljkovic

2009 NY Slip Op 32562(U)

October 28, 2009

Supreme Court, Queens County

Docket Number: 15108/2007

Judge: Timothy J. Flaherty

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE TIMOTHY J. FLAHERTY IA Part 35
Justice

	x	Index Number <u>15108</u> 2007
LUCY COOKE, et al.		Motion Date <u>July 30,</u> 2009
-against-		Motion Cal. Number <u>3</u>
HAMLET SILIJKOVIC, et al.		Motion Seq. No. <u>3</u>
	x	

The following papers numbered 1 to 28 read on this motion by plaintiffs pursuant to CPLR 3212 for summary judgment granting the relief requested in the first two causes of action in plaintiffs' complaint (quiet title and ejectment) and dismissing the answer, the affirmative defenses and the counterclaim of the defendant Hamlet Silijkovic, amending the caption nunc pro tunc to change the name Hamlet Silijkovic to Hamlet Silijkovic a/k/a Hamlet Siljkovic pursuant to CPLR 2001, granting leave to plaintiffs to serve an amended complaint pursuant to CPLR 3025(b) and (c) adding a demand for punitive damages, and directing that the purported option recorded in the Office of The City Register in Queens County, New York on February 14, 2007 at CRFN 2007000088342 be cancelled and stricken of record; and on the cross motion by the defendant Aurel Rosu a/k/a Rosu Aurel pursuant to CPLR 3211 dismissing the action against the defendant Aurel Rosu and for attorneys' fees.

	<u>Papers Numbered</u>
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Answering Affidavits - Exhibits.....	13-21
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

The plaintiffs brought this action, pursuant to Article 15 of the Real Property and Proceedings Law for the purpose of determining ownership of property located at 66-03 Myrtle Avenue, Glendale, Queens, New York (the Premises). The Premises were previously owned by Frank Leggio and Mattia Leggio as tenants by the entirety pursuant to a deed dated November 29, 1982, that was duly recorded in the Office of The City Register in Queens County on December 6, 1982 at reel 1482, page 517. Frank Leggio died on April 21, 2003, survived by his wife Mattia Leggio. Plaintiffs, as trustees, claim ownership pursuant to a deed conveyed to them on March 24, 2004, by Mattia Leggio, individually and as surviving tenant by the entirety of Frank Leggio. The plaintiffs' deed was duly recorded in the Office of The City Register in Queens County on August 9, 2004 at CRFN 2004000489223. The defendant Silijkovic claims rights to the property pursuant to an option executed by Frank Leggio, dated August 9, 2001, but not recorded until it was filed in the Office of The City Register in Queens County on February 14, 2007. The defendant Silijkovic alleges that the defendant Rosu notarized the option. The suit alleges, in pertinent part, that the option dated August 9, 2001, was forged and backdated and was not recorded until years after the plaintiffs' deed to the Premises was recorded. The gist of the plaintiffs' claim against Rosu is that the option is the product of forgery and fraud and that the defendant Rosu was a knowing participant in the fraud. The plaintiffs' complaint asserts four causes of action: (i) to quiet title pursuant to Real Property Action and Proceedings Law, Article 15; (ii) for ejectment of Silijkovic; (iii) pursuant to Executive Law §§ 135 and 135-a, and common-law negligence; and (iv) for fraud.

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The plaintiffs established their prima facie entitlement to summary judgment. First, the plaintiffs' deed was recorded first and is entitled to priority (*see Avila v Arsada Corp.*, 34 AD3d 609 [2006]). Second, the purchase option that was recorded with the City Register by the defendant Silijkovic was an uncertified copy and should not have been recorded. Third, the plaintiffs submitted the affidavit of an expert in the field of forensic document analysis. The expert stated in his affidavit and his report that the signatures of Frank Leggio on the lease and option were put onto the lease and option by photocopy or digital manipulation and that the signatures which were cut and pasted onto said documents were obtained from endorsement signatures on defendant Silijkovic's rent checks payable to Frank Leggio that were returned to Silijkovic by Silijkovic's bank. Such forged documents are void (*see Kraker v Roll*, 100 AD2d 424 [1984]). Finally, when a property is held by a husband and wife as tenants in the entirety, a purchase option and lease are ineffective unless it is shown that the non-signing spouse had complete knowledge of and

actively participated in the transaction or that he or she ratified the purchase option and lease after the fact or that one spouse was authorized to act as the other spouse's agent in the matter, or that the absence of the signature was a product of fraud or misrepresentation (*see Lelekakis v Kamamis*, 41 AD3d 662 [2007]; *Stojowski v D'Sa*, 28 AD3d 645 [2006]). Inasmuch as the lease and option to purchase allegedly given to the defendant Silijkovic was only signed by Frank Leggio and not Mattia Leggio and none of the relevant exceptions apply, the option and lease are unenforceable.

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Here, the defendant Silijkovic failed to raise a triable issue of fact. In opposition, the defendant submitted an affidavit in which he claimed that he signed the option and lease agreement on August 9, 2001, in the presence of a notary. The defendant Silijkovic's argument that under *Son Fong Lum v Antonelli* (102 AD2d 258 [1984]), since the option was an instrument acknowledged before a notary, it gives to a presumption of due execution that the plaintiffs failed to overcome, is without merit. The defendant Silijkovic does not have an original option, and, thus, no presumption of due execution should be given to an uncertified copy of a document. In fact, the defendant Silijkovic does not contest the fact that he does not have any original documents and that what was recorded with the City Register was a photocopy. The defendant Silijkovic's attempt to overcome the fact that Frank Leggio as a tenant in entirety with his wife did not have the authority to grant a purchase option on his own also fails. While the defendant Silijkovic claims that Mattia Leggio signed a power of attorney, he only provided the court with a copy of the power of attorney. A power of attorney that is presented to the court must be either an original or a copy certified pursuant to CPLR 2105. Here, the defendant Silijkovic's counsel failed to certify that the power of attorney had been compared with the original document and found to be a true and complete copy pursuant to CPLR 2105. Finally, the argument that *Wells Fargo Bank, NA v Perry* (23 Misc 3d 827 [2009]), authorizes the recording of a copy of a document is misplaced. In that case, the court only allowed the recording of a copy of a mortgage after receiving a court order (*Wells Fargo Bank, N.A.* at 829-830).

The plaintiffs also move to dismiss the affirmative defenses and counterclaims of the defendant Silijkovic. The defendant Silijkovic's first affirmative defense of being a residential tenant is dismissed in the absence of any legal or factual claims in support of the defendant's opposition to the motion. No lease was ever recorded and the only lease in the possession of the defendant Silijkovic is the lease signed by Frank Leggio, which would have expired upon his death. The defendant Silijkovic's second affirmative defense of possessing an option is dismissed in light of the discussion above discussing the lack of merit of the purchase option. The defendant Silijkovic's third affirmative defense that Mattia Leggio gave Frank Leggio power of attorney is dismissed as no such power of attorney was ever recorded and the defendant Silijkovic only presented the court with an uncertified copy. The

defendant Silijkovic's fourth affirmative defense that Frank Leggio executed the purchase option on behalf of Mattia Leggio is dismissed in the absence of any admissible evidence to support this claim. The defendant Silijkovic's fifth affirmative defense that Mattia Leggio was present is dismissed as it is devoid of merit as there is no admissible evidence that Mattia Leggio is bound by the purchase option. The defendant Silijkovic's sixth affirmative defense is dismissed in the absence of any legal or factual claims in support of the defendant's opposition to the motion. In light of granting of summary judgment to the plaintiffs, the defendant Silijkovic's counterclaim to quiet title is dismissed.

Leave to amend the caption to correct the spelling of the defendant Silijkovic's last name is granted without opposition. CPLR 305(c) gives the court the authority to allow a summons to be amended, as long as no substantial rights of a party against whom the summons is issued are prejudiced (*see Willoughby v Yu Fashion Deli*, 278 AD2d 316 [2000]). Inasmuch as a mere correction of a spelling error will not substantially prejudice the defendant Silijkovic, it must be granted (*see Ober v Rye Town Hilton*, 159 AD2d 16 [1990]).

Turning next to the branch of the motion to amend the complaint, leave to amend a pleading should be freely given absent prejudice to the other party, provided the amendment is not palpably insufficient (CPLR 3025[b]; *Ruddock v Boland Rentals*, 5 AD3d 368 [2004]; *Holchender v We Transport*, 292 AD2d 568 [2002]). Here, as there has been no showing of prejudice and the addition of the demand for punitive damages is not palpably insufficient, the plaintiffs' branch of the motion to amend the complaint is granted.

The cross motion by the defendant Rosu to dismiss the action is denied. While the defendant Rosu purportedly moved to dismiss under CPLR 3211, he actually moved pursuant to CPLR 3212 for summary judgment dismissing the causes of action against him. First, the cross motion is denied as untimely. The cross motion was not made within 120 days of the filing of the note of issue and the defendant Rosu did not seek leave of court or give a reasonable excuse for the delay in making the cross motion (*see Miceli v State Farm Mut. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]). Furthermore, the cross motion by the defendant Rosu was not made on grounds that were nearly identical to those of the plaintiffs (*see Podlaski v Long Is. Paneling Ctr. of Centereach*, 58 AD3d 825 [2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2008]). In any event, the defendant Rosu failed to make a prima facie case of entitlement to judgment as a matter of law and, therefore, the summary judgment motion must be denied.

Accordingly, the branch of the motion by the plaintiffs for summary judgment on their first cause of action to quiet title pursuant to Real Property Action and Proceedings Law, Article 15 and their second cause of action for ejectment is granted. The branches of the plaintiffs' motion to dismiss the affirmative defenses and counterclaim of the defendant

Siljkovic are granted. The branch of the motion to strike the option is granted and the purchase option recorded in the Office of The City Register in Queens County, New York on February 14, 2007 at CRFN 2007000088342 is hereby cancelled and stricken of record.

The branch of the plaintiffs' motion to amend the caption is granted. The caption of the complaint is hereby amended to reflect the correction as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
LUCY COOKE AND JOSEPHINE KRALY AS
TRUSTEES OF THE MATTIA LEGGIO
IRREVOCABLE TRUST DATED MARCH 24, 2004

Plaintiffs,

-against-

HAMLET SILJKOVIC A/K/A HAMLET SILJKOVIC
AND AUREL ROSU A/K/A ROSU AUREL,

Defendants.

-----X

The branch of the plaintiffs' motion for leave to amend the complaint to add a demand of punitive damages is granted. The plaintiffs are directed to serve a copy of this order with notice of entry within 30 days upon all parties and the Clerk of the Court of Queens County. The plaintiffs are also directed to file and serve an amended third-party complaint in conformance with this order within 20 days after service of a copy of this order with notice of entry. The defendants are directed to serve an answer within 20 days after receipt of the amended third-party summons and complaint.

The cross motion by the defendant Rosu is denied in its entirety.

Dated: October 28, 2009

J.S.C.