

Clark v Clark

2010 NY Slip Op 30515(U)

February 23, 2010

Supreme Court, Nassau County

Docket Number: 019481/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

WINIFRED Q. CLARK,

Plaintiff,

INDEX NO.: 019481/2009
MOTION DATE: 01/28/2010
MOTION SEQUENCE: 001 and 002

-against-

JAMES CLARK, JR.

Defendant.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Defendant's Memorandum in Support of Motion	2
Notice of Cross Motion, Affirmation, Affidavit & Exhibits Annexed	3
Affidavit in Support of Adjournment, and, Alternatively, in Opposition to Cross Motion of Ronald J. Offenkrantz & Exhibits Annexed	4
Defendant's Memorandum of Law in Opposition to Cross Motion	5
Reply Affirmation of Ronald J. Rosenberg	6

PRELIMINARY STATEMENT

Defendant moves for an order dismissing the action pursuant to CPLR § 3211 (a) (4) on the ground that there is a prior action pending for the same cause of action between the same parties. This action was commenced on September 23, 2009 and contains nine causes of action: breach of joint venture agreement; partition; injunction as to trust properties; conversion; fraud; faithless agent; attorneys fees; injunction; and constructive trust.¹ Another action, under Index

¹ Exh. "B" to Cross-motion.

No. 005514/2008, filed March 24, 2008, is also by Winifred Clark, individually and on behalf of the trust of William P. Clark, contains three causes of action: accounting; and breach of fiduciary duty; and unjust enrichment.²

Plaintiff cross-moves that the aforementioned two actions and a third action, pending in Queens County under Index No. 22734/2009 be consolidated with venue in Nassau County. Defendant's position is that this is an inappropriate duplication of the proceeding under Index No. 005514/2008, in which there is a motion sub judice for leave to amend the complaint to include the causes of action now claimed in this action. The claim is that because a note of issue has already been filed in that case, plaintiff is simply seeking to avoid the potential consequence of a denial of the motion to amend the complaint and vacate the note of issue so as to permit additional discovery.

The third action in this trilogy, pending in Queens, is on behalf of James P. Clark as plaintiff, and names Winifred Clark and her brother, Richard Quinn, as defendants. The complaint alleges four causes of action: quiet title to three properties; slander of title; punitive damages for an attempt to divert business records by falsifying U.S. Postal forms; and, trespass on real property of James P. Clark and conversion of business records.³ It was commenced in the latter part of October, 2009, and is the last-filed of the three.

The current motions require a determination as to whether or not the two causes of action are duplicative, and whether or not all or some of the relief requested in the Queens action can be properly venued in Nassau, as opposed to Queens, where the real property in issue is primarily located.

BACKGROUND

William P. Clark and James Clark, Jr. were the owners of approximately 40 parcels of real estate located in Kings and Queens Counties. These properties were inherited from their father, James P. Clark, and his cousin Frank J. Clark. They died in 1971 and 1974 respectively. When William Clark died in 1994, he left two of his properties to a trust for the benefit of his wife and children. Thereafter James Clark, William's brother, managed all of the buildings,

² Exh. "A" to Cross-motion.

³ Exh. "C" to Cross-motion.

including 19 buildings owned by William, and now acquired by Winifred Q. Clark, the plaintiff, as well as his own properties. The management continued under the name of JP Clark & Co., as it had previously been operated.

According to the original Nassau County complaint, plaintiff relied upon James Clark, Jr. to advise her as to the properties which she inherited. It alleges that in 2007 she discovered that there were 14 additional pieces of property and that over \$5 million in revenue had been collected from those properties up to that time, and defendant had failed to provide any income from those properties, or account for them in any way. This action is assigned to Hon. Thomas Feinman, J.S.C.

The present action was commenced on September 24, 2009. It is by Winifred Q. Clark, individually and under the trust of William P. Clark, and names James Clark as defendant. As previously noted it contains nine causes of action, none of which are presently contained in the earlier proceeding. According for counsel for defendant, there is pending before Justice Feinman a motion to amend the complaint in that action to include additional causes of action. According to the document entitled "Amended Complaint", there are ten causes of action: breach of fiduciary duty, unjust enrichment, breach of joint venture agreement, partition, injunction as to trust properties; conversion; fraud; faithless agent; claim for attorneys' fees; and injunctive relief. While not identical, the claims in the proposed amended complaint and the complaint in the second Nassau County action are at least overlapping.

Plaintiff's counsel were substituted in July 2009 and the matter was certified for trial, over their objection, in August. They moved for leave to amend the complaint and, in their own word, have commenced this action "prophylactically" in the event the motion to amend is denied.

DISCUSSION

The parties have created a procedural melange, and ask this Court's intervention in undoing it.

Defendant's motion is for dismissal of the newly instituted Nassau action (Action 2), in deference to the action which has been pending before Justice Feinman for approximately two years (Action 1). Plaintiff's response is an acknowledgment of the pending actions between the same parties in two separate Parts in Nassau County, as well as in Queens County (Action 3), and suggests as a solution the consolidation of all of them in the Commercial Part.

With respect to the motion to dismiss based on a “prior action pending”, plaintiff points out that CPLR § 3211 (a) (4) authorizes dismissal when “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires;”, and contends that the actions are not for the same causes of action, and that justice requires that they, along with the matter pending in Queens County, be consolidated in a Commercial Part in Nassau County, where all parties reside.

It is notable that the action commenced by James Clark, defendant in this action, requests partition of the properties in question. CPLR § 507 provides that “(t)he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property shall be the county in which any part of the subject is situated”. No part of the real property is located in Nassau County; the various properties are in Kings and Queens County. CPLR § 502 provides that “(w)here, because of joinder of claims or parties, there is a conflict of provisions under this article, the court, upon motion, shall order as the place of trial one proper under this article as to at least one of the parties or claims”.

Relying on *Railroad Federal Savings and Loan Association v. Rosemont Holding Corporation*, 248 A.D. 909 (2d Dept. 1936), plaintiff contends that the rendering of a judgment affecting title to real property in a county other than the county in which the property is located, is not jurisdictional, since the jurisdiction of the Supreme Court is statewide. The Court stated that “(i)f the defendant does not avail himself of the provisions of the Civil Practice Act to have the cause moved to the proper county for trial, a judgment in an action affecting real property brought in a county other than that designated as the proper county is valid”. *Id.*

Defendant’s motion does not request transfer of the Nassau County actions to Queens County, where his action as plaintiff is venued. Rather, he asks for dismissal of the second Nassau County action, or, alternatively, a stay of it pending the resolution of the motions in the original Nassau action.

Plaintiff acknowledges that Action 2 is “prophylactic” in nature, that is, to preserve the claims which she seeks to include in the amended complaint, the motion for which is sub judice with Justice Feinman. Her contention is that her current counsel, who were substituted in only in July 2009, were confronted with certification in August, 2009, based upon the standards

applicable to Differentiated Case Management cases, despite their claim that discovery was incomplete. There is little question but that the substance of Action 1 qualifies it for assignment to the Commercial Part, in which there is appreciably less adherence to mandatory goals and standards, but, rather, greater reliance on mediation and conferences to isolate issues and promote resolution.

In reality, it appears that the resolution of this matter may require a qualified referee to investigate the source of title for each property, a determination of net operating income generated by each property, and an apportionment of the income from each property to the legal owners, in proportion to their ownership interests. These are the types of activity with which Commercial Parts are expected to be more familiar.

Without committing to a determination with respect to partition, raised in Action 2 and Action 3 in Queens, the majority of properties to which Plaintiff Winifred Clark claims title are not owned jointly with others, and are therefore not appropriate subjects for partition. Real Property Actions and Proceedings Law § 901. For example, Exh. "H" to the Cross-motion, is a letter identifying 19 commercial properties to be included in the Estate of William Clark, only four of which reflect fractional ownership. Thus, the issue of partition, and its venue constraints, actually constitute a minimal issue in the overall picture.

Presiding Justice Marano's recent determination to assign Action 2 to the Commercial Part, highlights the fact that the proceeding would probably have been best served if it had initially been assigned there from the inception. The alternatives are to grant the motion to dismiss based on a prior action pending, deny the motion and stay the proceeding pending the determination of the motion to amend the complaint pending before Justice Feinman, or deny the motion and grant the cross-motion to either consolidate or order a joint trial of the three actions.

Because the causes of action in the two Nassau County cases are not the same, there is no prior action pending within the meaning of CPLR § 3211 (a) (4). Staying the motion pending a determination by Justice Feinman does not resolve plaintiff's claim that the matter is one which qualifies for the Commercial Part and should be placed there. If the motion sub judice before Justice Feinman is denied, plaintiff is likely to pursue the action for the relief requested in this action. This would not only be a waste of judicial resources, but could result in contradictory decisions.

Under these circumstances, the Court finds that the matter should be tried jointly in a Commercial Part, leaving open the issue of the venue for claims of partition. The properties are in Queens and Kings Counties. The action in Queens would of necessity involve decisions as to the partition of property which is not in Queens County. Noting that the Supreme Court has jurisdiction to grant partition anywhere in the State, the logical conclusion is a joint trial in this Commercial Part of Supreme Court, Nassau County.

Because of the inherent confusion which would be generated by plaintiff in this action also appearing as a defendant in a single caption, consolidation is denied, but a joint trial is directed. The parties are to appear for a scheduling conference on March 30, 2010, at 9:30 A.M..

The Court directs that the matter of Winifred Clark, individually and on behalf of Trust U/W/O William P. Clark, Index No. 005514/2008, be reassigned to this Part, and that the Clerk of the Court of Queens County transfer the file in the matter entitled James P. Clark, Jr. v. Winifred Q. Clark and Richard Quinn to the Nassau County Clerk, 240 Old Country Road., Mineola, New York 11501, and that upon its receipt, it be joined for trial with the previously mentioned two actions presently pending in Nassau County.

To recap, the motion to dismiss, Motion Sequence No. 1, is denied. The cross motion for consolidation, Motion Sequence No. 2, is denied. However, the Court grants joinder of the two Nassau County cases and directs the transfer of Index No. 005514/2008 to this Part, and directs a change of venue of the Queens County cases to join with the two Nassau County cases before the undersigned.

This constitutes the Decision and Order of the Court.

Dated: February 23, 2010

[Handwritten Signature]
J.S.C.

ENTERED
MAR 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE