

Estate of Whipple v Lopez

2010 NY Slip Op 30766(U)

April 1, 2010

Supreme Court, New York County

Docket Number: 114852/09

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

ESTATE OF WHIPPLE,

INDEX NO. 114852/09

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

LOPEZ,

Defendants.

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

PAPERS NUMBERED

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

1 - 8

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes

FILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1019).

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

J.S.C.

DATED:

Dated: April 1, 2010


HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
THE ESTATE OF CHARLES EVERETT WHIPPLE,
By RICHARD A. FENN AS EXECUTOR,

Index No.
114852/09

Plaintiff,

- against -

**DECISION
and ORDER**

WILFREDO LOPEZ,

Mot. Seq.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, the Estate of Charles Everett Whipple ("Estate") brings this action against Defendant Wilfredo Lopez ("Lopez") seeking a judgment awarding the Estate possession of all rooms and areas of the second floor ("the Premises") of 8 Perry Street ("the Building"), in New York, New York; and an order directing that a warrant issue to remove Lopez from possession of the Premises.

The Estate alleges in its complaint that, until his death on February 20, 2009, Charles Everett Whipple ("Decedent") was the owner of the Building, and an occupant therein. The complaint further alleges that Lopez entered into occupancy of the Premises prior to Decedent's death pursuant to a license granted by Decedent. Taking the position that Lopez's license to remain in the premises expired upon Decedent's death, or alternatively, was terminated by the Estate, the Estate served a Ten [10] Day Notice to Quit the Premises on October 1, 2009, The Notice to Quit directed Lopez to quit the Premises by October 19, 2009. The Estate subsequently commenced this action.

Lopez moved to dismiss the action pursuant to CPLR §3211(a)(3) on the grounds that the Estate lacks standing to bring the action. According to Lopez's affirmation in support, "a reasonable question of standing exists warranting dismissal of this action should Plaintiff fail to tender a copy of the deed in an admissible form in opposition to this motion." Lopez asserts that this is the case because he was unable to ascertain whether Decedent owned the Building, or any part thereof, by way of a

[* 3] 1
search on New York City's ACRIS system. Lopez annexes printouts of his ACRIS search as an exhibit.

The Estate cross-moves for an order converting Lopez's motion to dismiss to a motion for summary judgment pursuant to CPLR §3211(c), and awarding summary judgment to the Estate; granting a judgment of possession of the Premises in favor of the Estate and against Lopez, and issuing a warrant of eviction; and awarding costs and sanctions to the Estate pursuant to 22 NYCRR §130-1.1 based upon Lopez's motion to dismiss, which the Estate claims is frivolous. The Estate submits an attorney's affirmation, as well as the affidavit of Executor Richard A. Fenn.

As evidenced by certified deed submitted by the Estate, Decedent purchased the Building in 1960. He remained owner of the building until his death, as evidenced by a August 11, 2009 letter from First American Title Insurance Company of New York confirming Decedent's continued ownership of the Building after conducting a title search. The Estate also submits the Last Will and Testament of Charles Everett Whipple dated February 5, 2008 and a Codicil dated July 8, 2008 ("Will"). Decedent's Will names Richard A. Fenn Executor of the Estate. The Estate also annexes Letters Testamentary issued to Fenn by the Surrogate's Court on August 4, 2009.

Paragraph 44 of the Will provides that the Executor

shall, without regard to any statutory or judicial restrictions otherwise applying to Executors, have the following powers and discretions in addition to any conferred by law:

....

C. To sell, at public or private sale, mortgage, lease for any period, alter, improve or otherwise dispose of any real property or interest in real property at any time forming part of my estate or any trust fund hereunder....

While both the extent of the relationship between Decedent and Lopez and the amount of time Lopez spent in the Premises is disputed¹, it is uncontested that Lopez

¹The Estate refers to Lopez as a "friend and caretaker of the Decedent," while Lopez maintains that the two were "life partners." Further, the Estate claims that Lopez "began at times staying at the premises... approximately five years before the Decedent died in order to help care for the Decedent." Lopez, on the other hand, states that he has "continuously resided at 8 Perry

* 4]
stayed at the Premises with Decedent and provided care for Decedent prior to his death. It is also undisputed that Lopez paid no rent or use and occupancy to Decedent or the Estate for use of the Premises.

As noted above, the Estate served Lopez with a Notice to Quit on October 1, 2009. Lopez, through counsel, responded to the Notice to Quit by letter dated October 6, 2009. In the letter, counsel directed the Estate's attention to a handwritten letter dated August 13, 2007 from Decedent to Fenn (who would be named Executor in the 2008 Will) which read as follows:

Dear Richard,

Life is so uncertain, Thank you for your friendship and so many helpful things. Bless you.

I want especially to ask you to be kind to Wilfredo [Lopez]. He has been a special sort of friend and very helpful in many ways. For me, help him, please.

Who knows the season. But if he should need help with the expenses of the cottage, taxes, etc., please advance him the necessary funds and they can be returned to the estate when it is settled. Thank you. Be kind.

Also, I would consider it a great favor if you would allow him to continue to have the use of the flat at 8 Perry until the house is sold. It has been one of his homes and important to both of us.

With appreciation, affection and all best wishes.

Gratefully,
Charles Whipple

The Notice to Quit and Lopez's response with the attached handwritten letter are annexed as exhibits to the Estate's cross-motion.

Street since 1987...."

* 5]

On December 9, 2009, in response to Lopez's motion to dismiss, counsel for the Estate sent a letter to Lopez's counsel demanding that Lopez's motion to dismiss be withdrawn or it would seek sanctions for a frivolous motion. Counsel for the Estate provided Lopez's attorney with the deed to the Building and FAQs to the ACRIS system (which indicates that documents filed before January 1, 1966 are not available online). The Estate's cross-motion followed.

Lopez submits an affidavit and a memorandum of law in opposition to the Estate's cross-motion. Plaintiff first contends that summary judgment is inappropriate for a variety of procedural reasons. Substantively, Lopez claims that the Estate lacks the authority to terminate his license to stay in the Premises prior to the sale of the building, based upon the purported 2007 letter from Decedent to Fenn.

The Estate submits a reply affidavit from the Executor and a memorandum of law in further support of its cross-motion.

CPLR §3211(c) provides, in pertinent part,

Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment.

By Interim Order dated March 1, 2010, the Court gave the parties proper notice that it was treating Lopez's motion and the Estate's cross-motion as a motion for summary judgment, and allowed the parties to submit additional documents. Lopez has submitted a memorandum of law in opposition to the Estate's cross-motion. The Estate has submitted a memorandum of law in further support of its cross-motion.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are

not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

After reviewing the record, the Court finds that the Estate is entitled to judgment as a matter of law. It is undisputed that the Executor is empowered under the Will to sell, lease, or otherwise dispose of the Building, or any portion thereof. Lopez has no right, under the Will or otherwise, to continued occupancy of the Premises. Even assuming *arguendo* that the August 2007 letter from Decedent to Fenn can be authenticated, this unattested document has no legal effect and cannot be used to impose additional directives to the Executor in administering Decedent's 2008 Will (*see Matter of Philip*, 192 A.D.2d 610 [2nd Dept. 1993]).²

Wherefore it is hereby

ORDERED that Lopez's motion for summary judgment is denied; and it is further

ORDERED and ADJUDGED that the Estate's cross-motion for summary judgment is granted and the Court hereby awards possession of the Premises to the Estate; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the warrant of eviction shall issue forthwith, with execution stayed twenty-one (21) days.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: April 1, 2010.



EILEEN A. RAKOWER, J.S.C.

²The Court notes that the Will specifically provides, *inter alia*, that Lopez take the remaining balance of a JP Morgan Chase Bank account belonging to Decedent. Decedent also bequeaths to Lopez certain real property belonging to Decedent in Fire Island, New York.

~~Under the provisions of the~~
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).