

Ross v Willis

2010 NY Slip Op 31942(U)

June 30, 2010

Supreme Court, Nassau County

Docket Number: 4054/09

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. F. DANA WINSLOW,
Justice**

SANDRA HUFFMAN ROSS and O.C. ROSS,

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiffs,

-against-

INDEX NO.: 4054/09

EDITH WILLIS a/k/a EDITH ROSS,

Defendant.

The Court is in receipt of the Affidavit of O.C. Ross dated December 10, 2009 (the "Affidavit"), which was submitted in response to the prior order of this Court, dated July 30, 2009 (the "Prior Order"). The Prior Order denied plaintiffs' application for a default judgment pursuant to CPLR §3215 for lack of *prima facie* proof. The instant Affidavit attempts to cure the deficiencies noted in the Prior Order. There is no motion currently pending before this Court, however, and the Court has not heard from any of the parties since receiving the Affidavit in December 2009. Insofar as it is necessary to move this case forward or to dispose of it, the Court has reviewed the proof submitted thus far, and issues this Decision and Order in response to the submission of plaintiffs and its implicit request for reconsideration of their motion.

This is an action in which plaintiffs seek, in the alternative, (i) to rescind or reform the deed dated October 18, 1976 conveying the premises known as 101 Belmont Parkway, Hempstead NY (the "Premises") to "O.C. ROSS and EDITH ROSS, his wife," to reflect ownership of the Premises in fee simple by O.C. ROSS; or (ii) to impose a constructive trust on defendant's interest in the Premises for the benefit of O.C. ROSS; or (iii) directing defendant to execute a deed conveying title to plaintiffs or their designee, or awarding monetary damages to plaintiffs; or (iv) directing partition and sale of the Premises, and division of the proceeds among the owners according to their respective rights therein.

Plaintiffs claim that O.C. ROSS named EDITH ROSS as his wife on the 1976 deed in anticipation of marriage. However they never married and she abandoned him in 1980. According to plaintiffs, EDITH WILLIS a/k/a EDITH ROSS paid no consideration for the Premises, nor any taxes or maintenance costs. Plaintiffs allege that SANDRA

HUFFMAN ROSS married O.C. ROSS on April 24, 1999 and that, on January 2, 2007, O.C. ROSS transferred his interest in the Premises to SANDRA HUFFMAN ROSS. Plaintiffs claim that they currently reside at the Premises as husband and wife. Essentially, plaintiffs seek to quiet title to the Premises, either by divesting EDITH WILLIS of her legal interest in the Premises, or by partition and sale of the Premises and division of the proceeds.

The Court finds that plaintiffs' submissions to date are tainted by a lack of candor, if not outright dishonesty. Plaintiffs' counsel states in her Affirmation in Support of the initial motion for a default judgment that there has been no previous application for the relief requested. [Affidavit of Regina A. Matejka, May 13, 2009, ¶7.] There is no mention in plaintiffs' papers of any prior proceedings concerning the parties' respective interests in the Premises.

The Court has learned however, that a previous partition action was commenced in 1999, entitled *O.C. Ross v. Edith Ross a/k/a Edith Willis and Union Planters Bank, N.A.*, Index No. 025343/99 (the "Partition Action"). Counsel cannot claim to have been ignorant of the Partition Action, since she signed an Affirmation in that action, in support of the Order to Show Cause dated April 14, 2008.

In addition, an action was commenced against plaintiffs, entitled *Legal Servicing, LLC v. O.C. Ross, Sandra Ross a/k/a Sandra Huffman*, Index No. 019195-07 (the "Fraudulent Conveyance Action"), which sought to set aside the conveyance of O.C. ROSS's interest in the Premises to SANDRA HUFFMAN ROSS, on the basis that the conveyance was motivated by an intent to defraud and hinder the plaintiff creditor. The Fraudulent Conveyance Action resulted in a Judgment, entered October 3, 2008, declaring said conveyance to be null and void, and awarding monetary damages to Legal Servicing, LLC in the amount of \$164,000.00 plus costs and attorneys fees. The Complaint in the case at bar, dated February 27, 2009, and verified by SANDRA HUFFMAN ROSS on the same date, alleges that "O.C. ROSS executed a Bargain and Sale Deed transferring his interest in the Premises to his wife, plaintiff SANDRA HUFFMAN ROSS," but fails to disclose that said conveyance had been set aside.

The existence of undisclosed prior actions is troubling in itself, but also raises concerns regarding the legal effect of the prior actions on the case at bar. As a threshold matter, the Court finds that SANDRA HUFFMAN ROSS has no standing as a plaintiff in this action, insofar as her purported interest in the Premises has been judicially nullified. As a substantive matter, the Court believes that the Partition Action may bar O.C. ROSS, in whole or in part, from obtaining the relief sought herein.

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The Partition Action resulted in an inquest, which in turn resulted in a Short Form Order dated July 13, 2000, issued by Referee Marston C.D. Gibson (the "July 2000 Order"). The July 2000 Order stated that, although O.C. ROSS and EDITH ROSS were never married, O.C. ROSS "conceded at the hearing that each was entitled to a half share in the property." The July 2000 Order directed the sale of the Premises and the division of the proceeds of sale (after deduction of the balance due on a mortgage held by Union Planters Bank) into two equal shares, with a credit of \$26,427.80 to O.C. ROSS for moneys spent in repairs. Finally, the July 2000 Order stated "[s]ettle judgment." No judgment was submitted. On or about April 14, 2008, seven years and ten months later, SANDRA HUFFMAN applied to reopen the inquest to establish additional credits due to O.C. ROSS. On May 9, 2008, this Court, by the Hon. Daniel Palmieri, denied the application and dismissed the action as abandoned, pursuant to **Rule 202.48** of the **Uniform Rules For Trial Courts. 22 NYCRR §202.48.**

The above proceedings provoke several questions: to what extent is O.C. ROSS now estopped from maintaining a position inconsistent with his admission at the inquest in the Partition Action, or from obtaining relief in excess of what he was awarded previously? Is the present action barred by collateral estoppel or the statute of limitations? Should O.C. ROSS be allowed to benefit from his own failure to timely settle judgment, and his lengthy period of inaction?

The Court's concerns are compounded by the fact that the Court has not heard from EDITH WILLIS, and is unable to determine whether her present silence is intentional or based upon a lack of actual notice. The Summons and Complaint were purportedly served pursuant to **CPLR §308(1)**, but the original motion for a default judgment was served by regular mail, the Prior Order and Notice of Conference was served pursuant to the "nail and mail" provisions of **CPLR §308(4)**, and the subsequent Affidavit was served by regular mail, without any Notice of Motion or other notice indicating an opportunity to respond. Although she is a defaulting defendant, technically not entitled to notice of the instant proceedings, the special circumstances of this case, including the equitable nature of the relief sought, call for an extension of the opportunity to be heard. The Court's interest in her version of the facts is particularly compelling, insofar as plaintiffs' omissions cast doubt upon the veracity of their claims generally.

The Court can take no action affecting the title to the Premises or the legal or equitable interests therein, without: (i) evidence that all necessary parties have been joined in this proceeding; (ii) a hearing (or proper motion), upon notice to all necessary parties; (iii) evidence that EDITH WILLIS has actually received a copy of this decision and any subsequent notice of conference, hearing or motion; and (iii) an explanation or legal memorandum outlining plaintiff's position regarding the legal ramifications of the

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Partition Action (and all other proceedings involving the parties, if any) on the case at bar.

The parties or their counsel, if any, are directed to appear for a conference on **Wednesday, August 4, 2010** to discuss how this matter shall proceed. Plaintiff shall serve a copy of this Order upon defendant and shall file proof of such service (and evidence of actual receipt, if any) on or before the date of the conference or any duly authorized adjournment thereof. The failure to appear at this conference or any duly authorized adjournment thereof shall be treated as a default pursuant to **Rule 202.27** of the **Uniform Rules For Trial Courts. 22 NYCRR 202.27**. The parties or their counsel are directed to telephone the Court after 3:00 p.m. on the business day immediately preceding the scheduled conference date in order to confirm their appearance and the Court's availability.

This constitutes the decision and order of the Court.

Dated:

June 30, 2010

J. A. ...
J.S.C.

ENTERED

JUL 19 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**