

Myers v Myers

2010 NY Slip Op 31965(U)

July 20, 2010

Sup Ct, Queens County

Docket Number: 29675/07

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

MARIE MYERS,

Plaintiff,

-against-

CLAY F. MYERS, JR., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
(MERS) and REAL ESTATE MORTGAGE
NETWORK, INC.,

Defendants.

Index No. 29675/07

Motion
Date April 13, 2010

Motion
Cal. No. 24 and 25

Motion
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Upon the foregoing papers it is ordered that the motions by defendants, Wells Fargo and Clay F. Myers, Jr. for summary judgment are hereby joined for purposes of disposition.

Defendant, Wells Fargo Bank (NA), assignee of defendants Mortgage Electronic Registration Systems, Inc. and Real Estate Mortgage Network, Inc.'s (hereinafter defendants collectively referred to as "Wells Fargo") motion for an order pursuant to CPLR 3212(b) directing that summary judgment be entered in favor of Wells Fargo dismissing plaintiff's Complaint is hereby granted.

The Summons and Complaint in the instant action seeks judgment vacating, of record, a mortgage encumbering the real property known as 109-25 Guy Brewer Boulevard, Jamaica, New York (the Subject Premises) made by plaintiff, Clay F. Myers, Jr. to Mortgage Electronic Registration Systems, Inc. as Nominee of Real Estate Mortgage Network, Inc. dated June 22, 2007 and recorded on July 12, 2007. The Complaint alleges as follows: Plaintiff is the wife and surviving spouse of Clay F. Meyers (deceased); on or about September 24, 1970, Clay F. Myers (deceased), the father of defendant Clay F. Meyers, Jr., purchased the Subject Premises; on or about November 6, 1970, decedent Clay F. Meyers executed a deed transferring title to the Subject Premises to himself and his son, Clay F. Meyers, Jr., as tenants in common; no consideration passed for this transaction; defendant Clay F. Myers, Jr. agreed to transfer the premises to the deceased Clay F. Meyers, at any time Clay F. Meyers requested; on or about September 26, 2005, defendant Clay F. Meyers, Jr. placed a mortgage against the Subject Premises; said defendant lacked both the capacity and the authority to place a mortgage against the Subject Premises; on or about June 22, 2007, defendant Clay F. Myers, Jr. Placed a mortgage against the Subject Premises in the sum of \$219,000.00 which mortgage is held by defendants Mortgage Electronic Registration Systems, Inc. and Real Estate Mortgage Network, Inc.; the mortgage is void since defendant Clay F. Myers, Jr. lacked the capacity and authority to execute any such mortgage or note; at the death of Clay F. Myers on April 7, 1984, the Subject Premises "devolved" upon plaintiff who had a right of election and was the surviving spouse of the decedent.

Defendant Wells Fargo, presented a prima facie case that there are no triable issues of fact. In support of the motion, defendant Wells Fargo submits, inter alia, an affidavit of Toma McClary, a Process Specialist of Wells Fargo Bank, N.A. As an initial matter, defendant Wells Fargo established that the Complaint is barred by the Statute of Frauds. General Obligations Law § 5-703 provides:

"An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereto authorized by writing..."

"It is long settled under New York's Statute of Frauds that an oral agreement to convey an estate or interest in real property, other than a lease for a term not exceeding one year, is 'nugatory and unenforceable.'" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group, PLC*, 93 NY2d 229 [1999]). In the instant action, it is undisputed that there was no written agreement between defendant Clay F. Myers, Jr. and Clay F. Myers (deceased) pursuant to which defendant Clay F. Myers agreed to transfer the subject premises to anyone, and that Clay F. Myers, Jr. had no legal capacity and authority to execute any mortgage or note.

Additionally, defendant Wells Fargo established a prima facie case that plaintiff's Complaint should be dismissed because the mortgage made by Clay F. Myers, Jr. to Real Estate Mortgage Network, Inc. was extended to the record owner of the Subject Premises for valuable consideration and without notice of plaintiff's claims. Real Property Law § 266 entitled "Rights of purchaser or incumbrancer for valuable consideration protected" states that:

"This Article does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title in such grantor."

Additionally, defendant established a prima facie case that no proof or evidence has been submitted by plaintiff that MERS, Real Estate Mortgage Electronic Registration Systems, Inc. or Wells Fargo had any knowledge of the plaintiff's claims or was aware of the allegations set forth in the Complaint prior to the commencement of the instant action in November 2007. As set forth in the affidavit of Toma McClary, Process Specialist of Wells Fargo Bank, N.A., "At all times, Mortgage Electronic Registration Systems, Inc., as nominee for Real Estate Mortgage Network, Inc., Real Estate Mortgage Network, Inc. and Wells Fargo have acted in good faith in connection with the mortgage loan covering the Subject Premises, and are innocent third parties.

Furthermore, defendant established a prima facie case that the Complaint is barred by reason of Estate Powers and Trusts Law § 5-1.1-A(d) (1) entitled "Procedure for right of election", which section states:

"An election under this section must be made within six months from the date of issuance

of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent's death. Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters but in no event later than two years from the date of decedent's death."

Plaintiff alleges in the Complaint that Clay F. Myers died on April 7, 1984. Accordingly, the plaintiff's time for plaintiff to exercise any right of election expired on April 7, 1986. It is not alleged by plaintiff, and no proof has been produced, that plaintiff exercised any right of election at any time.

Finally, defendant Wells Fargo establishes that even if the oral agreement alleged by plaintiff was admissible and proven, its enforcement is barred by the Statute of Limitations since this action was commenced more than 23 years after the latest date, April 7, 1984 (the date of Clay Myers' death), on which Clay F. Myers deceased, could have made a demand for the return of the Subject Premises. The action is thus time barred by the Statute of Limitations which requires that an action based upon an alleged breach of contract be commenced within 6 years of the breach.

In opposition, plaintiff fails to present a triable issue of fact. Plaintiff submits inter alia: an affidavit of two of plaintiff, Marie Myers and decedent Clay F. Myers' children, Kirk Meyers and Arlene F. Myers., and an attorney's affirmation. The children aver that they heard defendant Clay F. Myers, Jr. repeat several times during their father's lifetime that he would transfer his interest in the Subject Premises to their father at any time he was requested to do so. However, there is no evidence in the record which indicates that Clay F. Myers ever requested that his son, Clay F. Myers, Jr. transfer back his interest in the Subject Premises. Additionally, plaintiff fails to address defendant's defenses of Statute of Frauds and Statute of Limitations. Accordingly, there are no triable issues of fact. As there are no triable issues of fact, summary judgment is warranted.

Defendant Clay F. Myers, Jr.'s cross motion for an order pursuant to CPLR 3212(b) granting the defendant Myers summary judgment dismissing the plaintiff's Complaint on the basis that the plaintiff has failed to state a cause of action against this defendant, that the plaintiff's claim is barred by the Statute of Frauds and that the plaintiff's claim is barred by the Statute of Limitations is hereby granted. The court notes that as defendant Clay F. Myers, Jr. has made a separate motion for the identical relief sought in the instant cross motion, said motion is denied as duplicative.

Defendant Clay F. Myers, Jr. established a prima facie case that there are no triable issues of fact. In support of the cross motion, said defendant submits, inter alia, his own affidavit, the examination before trial transcript testimony of plaintiff herself, as well as the examination before trial transcript testimony of defendant Carl F. Myers, Jr. himself.

As an initial matter, defendant Clay F. Myers, Jr. established that the plaintiff has not pleaded a case against him in the Verified Complaint and seeks no relief from him. The plaintiff's complaint only seeks a declaratory judgment that a mortgage placed against the Subject Premises on or about June 22, 2007 is void ab initio, in that plaintiff as the alleged owner of the property did not execute it. The defendant established that the plaintiff's complaint is based upon an agreement between the plaintiff's son, defendant Clay F. Myers, Jr., and plaintiff's now deceased husband whereby the son purportedly agreed to transfer the premises back to the husband upon request and that she, as the surviving spouse pursuant to her right of election is the third-party beneficiary of that agreement; however, defendant Clay F. Myers established that the evidence in the record indicates that if any such agreement existed, it was oral and thus unenforceable pursuant to the Statute of Frauds. Defendant Carl F. Myers, Jr. established that the agreements plaintiff claims to have existed between her husband and son for the transfer of the son's interest back to the husband anytime he demanded it, was oral and therefore enforcement of that agreement is barred by the statute of frauds, which requires a writing of any agreement affecting title to real property (see, General Obligations Law § 5-701, cited *supra*). The plaintiff's cause of action is grounded upon her allegations, that her husband and son had an oral agreement whereby the son would transfer the premises back to the father, if requested; that the father made that oral request to the son, and that the premises reverted to the father, and thereafter to the plaintiff, as the surviving spouse. The Statute of Frauds bars the enforcement of those agreements, and as such a prima facie case is made that the plaintiff's complaint must be dismissed as against Clay F. Myers, Jr. (see, *Messner Vetere*

Berger McNamee Schmetterer Euro RSCG Inc., supra).

Defendant Clay F. Myers, Jr. also established that the Complaint against him is barred by the Statute of Limitations. The plaintiff claims that her husband's demand to her son, the defendant Clay F. Meyers, Jr., for the return of the son's interest in the property was made commencing on November 6, 1970, and continuing thereafter until the death of her husband on April 7, 1984. The plaintiff's claim must be dismissed as against Clay F. Myers, Jr. because the last date that a breach of the agreement could have occurred is the last date that the request could have been made and defendant Carl F. Myers, Jr. failed to comply with the request, pursuant to the plaintiff's own allegations was April 7, 1984 (the date that Clay F. Myers died), more than twenty-three (23) years prior to the commencement of the lawsuit on November 30, 2007. The action is barred by CPLR 213, which imposes a six (6) year statute for the commencement of an action based upon an alleged breach of contract.

In opposition, plaintiff fails to present a triable issue of fact. Plaintiff submits, inter alia: an affidavit of two of plaintiff, Marie Myers and decedent Clay F. Myers' children, Kirk Meyers and Arlene F. Myers. The children state that they heard defendant Clay F. Myers, Jr. repeat several times during their father's lifetime that he would transfer his interest in the Subject Premises to their father at any time he was requested to do so. However, as aforesaid, there is no evidence in the record which indicates that Clay F. Myers ever requested that his son, Clay F. Myers, Jr. transfer back his interest in the Subject Premises. Additionally, the court finds the arguments in the attorney's affirmation that the statute of frauds and statute of limitations do not apply unavailing. Accordingly, there are no triable issues of fact. As there are no triable issues of fact, summary judgment is warranted.

Moreover, the court notes that while plaintiff's attorney argues in his affirmation in opposition, that all of the elements of a constructive trust are present, the plaintiff fails to allege in her complaint any cause of action for imposition of a constructive trust or declaration that defendant Clay F. Myers, Jr. holds title to one-half of the interest of the Subject Premises as a constructive trustee for the benefit of the plaintiff and therefore, without an amendment of the complaint such claims cannot be considered nor now be raised for the first time in an affirmation in opposition to a motion for summary judgment.

Finally, the court notes that the cross motion by defendant Wells Fargo for an award of costs and sanctions against

plaintiff was not considered by the court as the main motion for summary judgment by plaintiff was withdrawn pursuant to the affirmation of attorney, Bruce S. Reznick, Esq., affirmed on March 15, 2010.

This constitutes the decision and order of the court.

Dated: July 20, 2010

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Howard G. Lane, J.S.C.