

Valenzano v Valenzano
2011 NY Slip Op 30228(U)
January 14, 2011
Sup Ct, Nassau County
Docket Number: 020557/08
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

CHRISTINA VALENZANO,

X

Plaintiff,

-against-

Index No.: 020557/08
Motion Sequence...06, 07
Motion Date...11/03/10
XXX

DONATO VALENZANO, GIUSEPPE
VALENZANO and ADDOLORATA
VALENZANO,

Defendants.

X

Papers Submitted:

- Notice of Motion.....X
- Memorandum of Law.....X
- Affirmation in Opposition.....X
- Affidavit in Opposition.....X
- Supplemental Affirmation in Opposition.....X
- Affidavit in Reply.....X
- Reply Memorandum of Law.....X
- Order to Show Cause.....X
- Memorandum of Law.....X

The Defendants move, by Order to Show Cause, (Mot. Seq. 07) for an Order, *inter alia*, excusing, for good cause shown, the two (2) day lateness of the service of a motion for summary judgment and compelling the Plaintiff's counsel to accept service of said motion *nunc pro tunc*. Additionally, the Defendants move (Mot. Seq. 06), for an Order, pursuant to CPLR § 3212, granting them summary judgment dismissing the Plaintiff's complaint. The

motions are determined as hereinafter provided.

This action concerns a Bargain and Sale deed, dated February 23, 2007 (hereinafter referred to as “the deed”), pursuant to which property in Bethpage, New York, owned by the Plaintiff and her husband, the Defendant Donato Valenzano, was conveyed to Donato Valenzano’s parents, the Defendants Giuseppe Valenzano and Addolorata Valenzano. Donato Valenzano and the Plaintiff were husband and wife at that time and full-time residents of the State of Florida. The deed was signed in Florida. Based upon the papers submitted herein however, there is no evidence that the deed has been recorded in the County Clerk’s office. In this action, the Plaintiff alleges that her signature on the deed is a forgery, and she seeks, *inter alia* the return of the subject premises.

Procedurally, this suit was brought in November 2008 and issue was joined in December 2008. In September 2009, the Plaintiff’s prior counsel moved to be relieved and his motion was granted. Subsequently, the Plaintiff’s current attorney was retained. Depositions were scheduled and held in January and February of 2010 and a Certification Order was signed by all parties on March 1, 2010. The Plaintiff filed a Note of Issue on May 27, 2010 and pursuant to the Certification Order, the Defendants had 60 days to serve their motions for summary judgment. The Defendants served said motion on July 29, 2010, two days late.

Notably, the Defendant’s application by Order to Show Cause as to why an Order should not be made excusing, for good cause shown, the two day lateness of service of a motion for summary judgment and compelling the Plaintiff’s counsel to accept service of

said motion *nunc pro tunc*, is unopposed by counsel for the Plaintiff. As CPLR § 3212 (a) provides, a motion for summary judgment must be made after joinder of issue and before the expiration of either the court prescribed or statutory period. In this case, this Court gave the Defendants 60 days from May 27, 2010, the date of the Plaintiff's filing of her Note of Issue, to serve their motion for summary judgment. The Defendants served their motion on July 29, 2010, two days after the initial deadline, and months before a possible trial date. In *Brill v. City of New York*, 2 N.Y.3d 648, the Court of Appeals ruled that "good cause" in CPLR § 3212 (a) requires a showing of good cause for the delay in making the motion; a satisfactory explanation for the untimeliness, rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill v. City of New York*, supra at 652). Good cause is rarely granted without extenuating circumstances. In this case, however, both attorneys for the Defendants submitted their sworn affirmations explaining that they each had family emergencies. Nonetheless, the Defendants' motion was served only two days late. As this motion is unopposed by the Plaintiff and thus as there is no allegation that the Plaintiff has been prejudiced by the two day delay, this Court herewith **GRANTS** the Defendant's Order to Show Cause (Mot. Seq. 07) seeking an Order excusing the two day lateness of service and compelling the Plaintiff's counsel to accept service of said motion *nunc pro tunc* (*Stimson v. E.M. Cahill Co., Inc.*, 8 A.D.3d 1004 [4th Dept. 2004]; *Centeno v. Metro. Transp. Auth.*, 193 Misc.2d 617 [Sup. Ct. Nassau 2002]).

Having excused the late service of the motion for summary judgment, this Court need not address the merits of the Defendants' alternative application to vacate the Plaintiff's

Note of Issue.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 A.D.2d 626 [2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, supra). However, once this initial burden has been met by the movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id.*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The crux of the Plaintiff's claim in this case is that her signature on the deed dated February 23, 2007 is a forgery.

CPLR Rule 4538 states, in pertinent part, as follows:

Rule 4538. Acknowledged, proved or certified writing; conveyance of real property without the state

Certification of the acknowledgment or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so. A conveyance of real property, situated within another state, territory or jurisdiction of the United States, which has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, is admissible in evidence in the state.

Thus, CPLR Rule 4538 creates a hearsay exception for any certification of an acknowledgment performed “in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state.” The proof typically consists of a notary’s written certificate, attached to the document in question, stating that the person who executed the document personally appeared before the notary and acknowledged, i.e., orally declared, that he or she executed it (*see, e.g., Matisoff v. Dobi*, 90 N.Y.2d 127, 137-38 [1997]; *Garguilio v. Garguilio*, 122 A.D.2d 105, 106 [2nd Dept. 1986]). The certificate must indicate that the notary knows the person who executed the document or has obtained satisfactory evidence of his or her identity (New York Real Property Law §§ 303, 309-a). The certification of acknowledgment becomes “prima facie evidence” that the writing was executed by the person who acknowledged having done so. Prima facie evidence creates a rebuttable presumption. The presumption of authenticity that accompanies an acknowledged document is so strong that it can be rebutted only by clear and convincing evidence. The court in *Osborne v. Zornberg*, 16 A.D.3d 643 (2nd Dept. 2005), summarized the relevant evidentiary burdens as follows:

“A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption ... can be rebutted only after being weighed against any evidence adduced to show that the subject

instrument was not duly executed.” ... “[A] certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty”.... (*Id.* at 644 [internal citations omitted]).

Further, pursuant to New York’s Real Property Law § 299:

The acknowledgment or proof of a conveyance of real property situate in this state, if made (a) without the state but within the United States . . . may be made before any of the following officers acting within his territorial jurisdiction or within that of the court of which he is an officer: . . .

* * *

3. A notary public.

* * *

In support of their motion for summary judgment, the Defendants submit the following: the Plaintiff’s deposition testimony; their own sworn affidavits wherein Giuseppe Valenzano and Addolorata Valenzano both aver that as Donato Valenzano’s parents they loaned the Plaintiff and Donato Valenzano money toward the construction of their Florida house and signed a promissory note in the amount of \$292,000.00 before a notary public memorializing the transaction. Giuseppe Valenzano and Addolorata Valenzano also state in their respective affidavits that both the Plaintiff and Donato Valenzano also agreed to transfer their Bethpage house to them in satisfaction of the loan. In support of their motion, the Defendants also submit a copy of the sworn and notarized promissory note for \$292,000.00 together with the sworn affidavits of Vito Fericola, Gustavo Gonzalez and Walter Vivieros, family friends of the Plaintiff and Donato Valenzano, who each state, in their respective affidavits, that they each had a conversation with the Plaintiff and Donato Valenzano in Florida where the Plaintiff stated that Donato Valenzano’s parents would loan them the money to build

their Florida house because they were unable to sell their Bethpage home and that the Plaintiff agreed to the transfer of the Bethpage home to Donato Valenzano's parents in satisfaction of the loan. In support of their motion, the Defendants also submit a copy of the unrecorded but signed Bargain and Sale Deed dated February 23, 2007; the sworn affidavit of Joseph Weston, the notary public on the subject deed; the deposition testimony of Joseph Weston; the sworn affidavit of Elizabeth Lakatos who was a witness to the signatures of Christina Valenzano and Donato Valenzano on the subject deed as well as her deposition testimony.

In this case, while the Defendants have submitted ample admissible evidence that the Plaintiff, in fact, signed the subject deed, the Plaintiff, in turn, has failed to submit any evidence whatsoever except for her self-serving testimony that it is not her signature on the subject deed. The Plaintiff's self-serving testimony clearly does not meet the high standard of proof spelled out by the Second Department that requires clear and convincing evidence that "amount[s] to a moral certainty." Her self-serving allegation that she did not sign the subject deed directly contradicts the witness testimony and documentary evidence in this case, including the sworn affidavits of Joseph Weston, the Florida notary public and Elizabeth Lakatos. Joseph Weston also testified in this matter that on February 23, 2007 both Donato Valenzano and the Plaintiff came to his office to have the deed notarized. Further, the affidavit of Ms. Lakatos also confirms that she was a witness to the signatures of Christina Valenzano and Donato Valenzano to the deed.

In light of the Defendants' showing of entitlement to judgment as a matter of law, the burden shifts to the Plaintiff as the party opposing the motion to produce evidentiary

proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, supra). The Plaintiff has failed in that regard.

In opposition, the Plaintiff submits her own affidavit wherein she does not refute, dispute or even address any of the statements contained in the affidavits of Weston or Lakatos. The Plaintiff simply refers to her own self-serving testimony and repeatedly states that she did not sign the subject deed. The conclusory affidavit and testimony, however, are clearly insufficient to defeat the Defendant's motion for summary judgment (*Spilky v. Bernard H. La Lone Jr., P.C.*, 227 A.D.2d 741 [3rd Dept. 1996]; *Chand v. Steuben Hill Mgmt. Corp.*, 20 A.D.3d 443 [2nd Dept. 2005]). The Plaintiff's allegation alone that she did not sign the subject deed does not amount to clear and convincing evidence to rebut the presumption of due execution (*Wash. Mut. Home Loans, Inc. v. Rueda*, 12 A.D.3d 438 [2nd Dept. 2004]; *Elder v. Elder*, 2 A.D.3d 671 [2nd Dept. 2003]; *Moezinia v. Baroukhiam*, 247 A.D.2d 425 [2nd Dept. 1998]).

Moreover, inasmuch as the Plaintiff attempts to allege a cause of action for fraud, she has failed to adequately plead any of the elements necessary for a fraud claim, which require, a "material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]).

Therefore, in response to the Defendants' prima facie showing, the Plaintiff's averments are insufficient to create a triable issue of fact. Thus, the Defendants' motion for summary judgment (Mot. Seq. 06) is **GRANTED** and the Plaintiff's complaint is

DISMISSED.

All applications not specifically addressed herein are deemed **DENIED.**

This shall constitute the decision and order of this Court.

DATED: Mineola, New York
January 14, 2011



Hon. Randy Sue Marber, J.S.C.
XXX

ENTERED

JAN 19 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**