

Cato v Sheriff

2011 NY Slip Op 30775(U)

April 1, 2011

Sup Ct, NY County

Docket Number: 103966/10

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE

PART 10

Justice

George Cato

INDEX NO.

103966)10

MOTION DATE

- v -

MOTION SEQ. NO.

002

CAROL SHERRIFF

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

**motion(s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 4/1/11

[Signature]
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
George Cato,

Plaintiff (s),

-against-

Carol Sheriff, Individually and as Executor of
the estate of Dorothy McIntosh,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 103966/10
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this
(these) motion(s):

FILED
APR 04 2011

Papers

Defs' n/m (3211 and 3212) w/CS affid, exhs	NEW YORK	Numbered	1
Pltf's opp w/ GC affid, exhs	COUNTY CLERK'S OFFICE		2
Defs' reply			3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment. Issue has been joined. Defendants now move for an order granting them dismissal of this action and summary judgment. The note of issue has not yet been filed. Since summary judgment relief is available once issue has been joined, this motion will be decided on the merits (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]).

Arguments Presented

George Cato is the nephew of the deceased, Dorothy McIntosh, who died in 2001. Although she left a will and made no devise of the real property located at 31 West 138th Street, New York, New York ("building"), Cato claims that he is entitled to a declaratory judgment that his the owner of the building and the real property it was built

on. He claims he obtained title through adverse possession because he occupied the building openly and notoriously since 1991. He also claims his deceased aunt orally transferred the building to him and, in reliance of that oral conveyance of title, he paid all the expenses for the property, including taxes, etc. As evidence of this, Cato provides a number of money orders and a Department of Building document identifying himself as the "owner" of the building. The document is an application for repairs made in 2007. As his second cause of action, Cato contends he expended considerable sums of money, without being reimbursed therefore, and that the court should impose an equitable lien on the building and lot.

The executrix denies there is any record of a transfer to Cato and points out that she commenced an eviction action against him in Civil Court. That action (L&T Index No. 86959/08) was resolved with a written agreement dated March 9, 2009. The parties agreed to the issuance of a Final Judgment of Possession in favor of the executrix. Cato also agreed that he would "conclude the purchase of the premises ... or vacate [them]" It was also stipulated that the parties would have the property appraised, and once appraised, a contract of sale would be forwarded to Cato. The stipulation also provides that in the event of a default, the warrant would be executed.

Discussion

Defendants have moved to dismiss this action on the basis that Cato has failed to state a cause of action and for summary judgment. The standard applicable to each of these motions is different, but if either motion is granted, the result is the same, which is the dismissal of the complaint.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a

liberal construction, the facts as alleged in the complaint as true, and plaintiff is accorded the benefit of every possible favorable inference (Leon v. Martinez, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are insufficient to defeat a motion to dismiss (Sud v. Sud, 211 AD2d 423, 424 [1st Dept 1995]).

On the other hand, on a motion for summary judgment the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (see Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept. 2003]).

Under either standard, defendants prevail and this complaint must be dismissed for the reasons that follow:

There is absolutely no evidence to show that Cato's deceased aunt conveyed the building to him. She did not do so in her will, she did not provide him with a deed and an oral agreement to convey real property is unenforceable pursuant to the Statute of Frauds (GOL § 5-703; Mohamed v. Defrin, 45 A.D.3d 252 [1st Dept 2007] lv den 11 NY2d 783 [2008]).

Defendants deny that Cato moved into the building in 1991 and, in any event, he was eventually evicted in housing court. In opposition, Cato has also failed to come forward with any fact that would support the elements of a claim for adverse possession. To establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period (Walling v. Przybylo, 7 N.Y.3d 228 [2006]).

Cato's occupancy was with the approval of his aunt since, according to him, she wanted him to maintain the place for her. Yet, he claims he occupied the building in a hostile manner and under claim of right. However, if he lived in the building with her permission and knowledge, the "hostile" prong of his claim for adverse possession is missing. Furthermore, if Cato lived with his aunt in the building, then his occupancy was not exclusive. Finally, the "[p]ayment of taxes is no evidence of possession, either actual or constructive" (Ray v. Beacon Hudson Mountain Corp., 88 N.Y.2d 154 [1996] citing Archibald v. New York Cent. & Hudson Riv. R.R. Co., 157 N.Y. 574 [1899]). Although payment of taxes maybe evidence of ownership, as will be seen Cato has failed to come forward with support for his claim that he made these payments.

According to Cato, he paid more than \$275,000 towards the maintenance of the building. He provides, however, money orders each in the name of his deceased uncle Hugh Cato. The building department application with his name on it is not proof in admissible form that Cato has an ownership interest in the building. It merely shows that this is the information someone provided on an application form.

Defendants have established that Cato's facts do not support either of his claims.

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They have also proved (and he admits) that the building was never conveyed to Cato. Thus, they have met their burden and are entitled to the relief sought, which is dismissal of this action. In opposition, Cato has not come forward with triable issues of fact. Even if he is correct, that he was a doting nephew, beloved by his lonely and now deceased aunt, the issue is not whether Cato was a thoughtful or attentive nephew, but whether he acquired legal title to the building. It is of no moment that the deceased has laughing heirs. Therefore, defendants' motion is granted and the complaint is dismissed.

Conclusion

IT IS HEREBY

ORDERED that defendants' motion is granted and this case is dismissed; and it is further

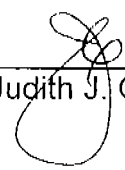
ORDERED that the clerk shall enter judgment in favor of defendants Carol Sheriff, individually and as Executrix of the Estate of Dorothy McIntosh, against plaintiff George Cato; and it is further

ORDERED that that no one visited his aunt, or that the executrix took advantage of her, do not defeat plaintiff's motion.

Dated: New York, New York
April 1, 2011

So Ordered:

FILED



Hon. Judith J. Gische, JSC

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