

Clark v Clark

2011 NY Slip Op 33516(U)

December 19, 2011

Supreme Court, Nassau County

Docket Number: 005514/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

WINIFRED CLARK, Individually, and on behalf of
Trust u/w/o WILLIAM P. CLARKE,

Action No. 1

Plaintiff,

INDEX NO.: 005514/2008
MOTION DATE: 11/16/2011
SEQUENCE NO.: 010, 012

- against -

JAMES CLARK, JR.,

Defendant.

WINIFRED CLARK,

Action No. 2

Plaintiff,

INDEX NO.: 019481/2009

- against -

JAMES CLARK, JR.,

Defendant.

JAMES P. CLARK, JR.,

Action No. 3

Plaintiff,

INDEX NO.: 005941/2010

- against -

WINIFRED Q. CLARK and RICHARD QUINN,

Defendants.

The following documents were read on this Motion:

- Motion by James P. Clark for Summary Judgment on First and Second Causes of Action in Complaint in Action No: 3, declaring him a 100% owner of three properties in Queens County; granting him judgment on Third Cause of Action in Action No. 3 on basis of documentary evidence; awarding sanctions and counsel fees; and severing all damage issues for trial 1.
- Exhibit "F" to Motion under separate cover 2.
- Memorandum of Law of James P. Clark in Support of Motion 3.
- Memorandum of Law in Opposition to Motion 4.
- Affirmation of David K. Fiveson in Opposition to Motion 5.
- Cross-motion opposing Motion of James P. Clark for partial summary judgment; and seeking partial summary judgment in favor of Winifred Q. Clark and Richard Quinn in Action No. 3.; and dismissing the Second, Third, and Fourth Causes of Action in Action No. 3. 6.
- Memorandum of Law in Opposition to Motion and in Support of Cross-motion 7.
- Reply Affidavit in Support of Motion and Opposition to Cross-motion 8.
- James P. Clark Reply Memorandum of Law in Further Support of Motion and Opposition to Cross-motion 9.

PRELIMINARY STATEMENT

James P. Clark, Jr. moves for summary judgment on the First and Second Causes of Action in Action No. 3. The First Cause of Action is to Quiet Title to three Queens County premises known as 10-32 47th Road; 59-05 56th Street; and 58-32 57th Drive. Movant points to three deeds for these premises as substantiating his claim to title:

10-32 47th Road

Deed Date: April 9, 1963
 Grantor: Sol Chalek and Sol Katz as surviving partners of PAX Trading Co.
 Grantee: James P. Clark, residing at 211 W. 141st Street, New York City

59-05 56th Street

Deed Date: September 28, 1951
 Grantor: Eleanor B. Zipser
 Grantee: James P. Clark, residing at 149-28 Hawthorne Avenue, Flushing, NY

58-29 57th Drive

Deed Date: January 4, 1967

Grantor: Gertrude Lynch

Grantee: James P. Clark, residing at 149-28 Hawthorne Avenue, Flushing, NY

Movant contends that he is the Grantee in each of those deeds, that title has never been vested in James P. Clark, Sr. or Frank Clark, and that title never devolved to William, and therefore never passed to Winifred Q. Clark on his death. He challenges the following deeds from Estate of William P. Clark to Winifred Clark:

Premises	Block/Lot	Date of Deed	Transaction Identifier
58-29 57 th Drive	2763/58	2/11/09	20090000040825
59-05 56 th Street	2631/12	1/20/09	20090000016520
10-32 47 th Road	00045/0036	1/20/09	20090000016520

Winifred Clark is represented by Rosenberg, Calica & Birney, LLP generally, and by Butler, Fitzgerald, Fiveson & McCarthy, P.C. with respect to the three properties involved in this motion. They have been retained by Chicago Title Insurance Company, which insured title to a 50% interest in each of the properties in Winifred Clark, as Executrix of the Estate of William P. Clark. The source of title was James P. Clark, Jr. and William P. Clark, as devisees under the Last Will and Testament of James P. Clark, who died on December 14, 1971.

Defendant in Action No. 3 moves for denial of the plaintiff's motion for summary judgment and for dismissal of the Second, Third, and Fourth Causes of Action. The Second Cause of Action of the Verified Complaint in Action No. 3 alleges that deeds filed by Winifred Clark, aided and abetted by Richard, constituted Slander of Title. The Third asserts that Winifred Clark fraudulently executed and filed a change of address form with the United States Postal Service, for which plaintiff seeks monetary and punitive damages. In the Fourth Cause of Action, plaintiff alleges that during the period 1994 — 2009, defendant Winifred Clark, aided and abetted by Richard Quinn, trespassed on the premises

127 Nassau Street, and converted business records, for which plaintiff is entitled to monetary and punitive damages.

DISCUSSION

What should be a simple question is burdened by the fact that the three deeds in question, are to James P. Clark, without designating whether or not it is to Jr. or Sr. With respect to 10-32 47th Road, James P. Clark is identified as residing at 211 W. 41st Street, New York, New York. This is a parish house at which Rev. James P. Clark, Jr. resided while serving as a curate in the parish at that location. James P. Clark, Sr., of course, never resided in the rectory in Harlem, and the Court concludes that plaintiff in Action No. 3 is entitled to summary judgment quieting title and declaring the owner of 100% interest in this property.

The identity of the James P. Clark as grantee in the other deeds is not as clear. The residence of the grantee in the deeds to the 56th Street and 57th Drive properties is listed as 149-28 Hawthorne Road, Flushing, the address of the parents of James P. Clark, Jr. and William Clark. These deeds were in 1951, and 1967. As to the 1951 deed to 59-05 56th Street, James, Jr. was a student at St. Joseph's Seminary, and his legal address was likely that of his parents, in Flushing. He was ordained in 1952, and it while it is unlikely that he resided at the home address of his parents, it is not impossible that he used that address for the purpose of acquiring title; or, that his father arranged for title to the premises to vest in James, Jr., and used his own residence address as a matter of convenience.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404

[1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be “material issue of fact” it “must be genuine, bona fide and substantial to require a trial”. (*Leumi Financial Corp. v. Richter*, 24 A.D.2d 855 [1st Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The issue before the Court, then, is whether or not plaintiff, James P. Clark, Jr., has sustained this burden of establishing that no triable issue of fact exists with respect to the properties located at 59-05 56th Street and 58-32 57th Drive. Certified copies of the deeds to these parcels are annexed as Exh. “F” and “G” to the Affirmation of James P. Fiveson.

In support of his claim to be the James P. Clark referred to in the deeds, James, Jr. points to the fact that, with respect to 59-05 56th Street, the 1951 deed predated his ordination as a priest, and his legal address would have been that of his parents. He also

claims that neither of the contested properties were scheduled in the Probate proceedings of either his father, or Frank J. Clark, as belonging to them at the time of their death; that he paid all of the expenses relating to these and the other five properties which he owned individually; and that even William acknowledged his position as "owner" of the 56th Street property in a notarization. Furthermore, a lease from James P. Clark, Jr., with an address at 127 Nassau Street, as landlord, and Kingsley Specialties, Co. dated October 1971 is consistent with the claim of title in James, Jr.

These are certainly a significant indications that the property was never owned by James P. Clark, Sr. or Frank J. Clark, and that, therefore, William Clark was never in the chain of title. Under such circumstances, the conveyance by Winifred of a 50% interest to herself, as Executrix of the Estate of William, was null and void.

It may well be that a finder of fact, considering evidence on behalf of both parties, would conclude that the preponderance of evidence leads to the conclusion that James P. Clark, Jr. was, and continues to be, the 100% owner in fee of all three properties. But, the Court concludes that as to the properties located at 59-05 56th Street, and 58-32 57th Street, the evidence is insufficient to conclude that there is no issue of material fact so as to warrant the grant of summary judgment.

The motion by plaintiff for summary judgment determining that title to premises 10-32 47th Road is vested in James P. Clark, Jr. is granted. The motion for the same relief as to premises 59-05 56th Street and 58-32 57th Street is denied.

Plaintiff in Action No. 3 also seeks a determination of liability against defendants for slander of title. One who falsely and maliciously publishes matter which questions or disparages the title to property, causing special damage to the owner may be held liable for damages. " ' The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages' ". (*Fink v. Shawangunk Conservancy*, 15 A.D.3d 754, 756 [3d Dept. 2005])(internal citations omitted). In that case the Court determined that the

filing of a quitclaim deed, and publication in newspaper and articles, in the face of a deficient deed into the true owners, did not evince the degree of malicious intent necessary to support a claim for slander of title.

In this case defendants proceeded on their interpretation of the deed to the 47th Road property as vesting title in James Clark, Sr., despite the fact that the address of the grantee was the location of the rectory in which James Clark, Jr. served as a curate. Their claim, however, is seemingly buttressed by a policy of title insurance, with an effective date of December 31, 2008, insuring title in Winifred Clark as to a 50% interest in the premises. (Exh. "E" to Motion). Under these circumstances, the Court does not assign to defendants the degree of malicious intent to cause injury.

The motion for summary judgment on the issue of liability for slander of title is denied.

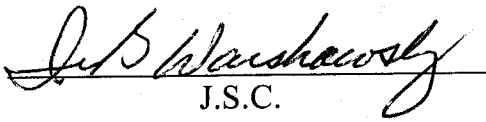
Defendants' motion to dismiss the Second Cause of Action for Slander of Title is granted. The motion to dismiss the Third Cause of action asserting an unlawful filing of a change of address form with the United States Post Office is also granted. In order to constitute a "prima facie tort", the actions undertaken must be motivated solely by "disinterested malice". (*Dalton v. Union Bank of Switzerland*, 134 A.D.2d 174, 177 [1st Dept. 1987]), quoting Justice Holmes in *American Bank & Trust Co. v. Federal Bank*, 256 U.S., 350, 358 (1921). In this instance, the conduct of defendants was, at least in part, motivated by a suspicion that plaintiff was not making full payment of the proceeds from the operation of the real estate, and their interest in reviewing the records of the business was a motivating factor. The conduct was shameful, but not actionable.

The Fourth Cause of action alleges that defendants trespassed upon the property of the plaintiff between 1994 and 2009, and in the process, removed business records, thereby damaging the plaintiff. As the successor of her husband, William Clark, who died in 1994, Winifred Clark was entitled to review the records of J P Clark & Co., which are, maintained at 127 Nassau Avenue, Brooklyn, New York. As such, her presence, or that of

her brother with her consent, would hardly constitute a cognizable trespass. Nevertheless, even if her presence was lawful, she would not be authorized to remove records to the detriment of the business of the company. To the extent that the complaint alleges an improper removal of documents from the offices at 127 Nassau Avenue, there are questions of fact which preclude the dismissal of the complaint. The motion to dismiss the Fourth Cause of Action is denied.

This constitutes the Decision and Order of the Court.

Dated: December 19, 2011


J.S.C.

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