

Russell v Adams
2012 NY Slip Op 30243(U)
February 1, 2012
Sup Ct, Greene County
Docket Number: 10-1707
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

STACEY RUSSELL and SUSAN RUSSELL,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 10-1707
RJI NO. 19-10-5395

MARK R. ADAMS; RAYMOND E. ADAMS;
VINCENT MELAPIONI; ANNA MELAPIONI;
SANTO ASSOCIATES LAND SURVEYING AND
ENGINEERING, P.C.; ALTON P. MACDONALD, JR.;

Defendants.

Supreme Court Greene County All Purpose Term, January 26, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

In October 2010 Plaintiffs commenced this action, grounded in their claim of unencumbered ownership of a parcel of real property, against Defendants. Issue was joined by all Defendants, discovery is complete, a Note of Issue was filed, demanding a jury, and a trial date certain is set for March 26, 2012.

Defendants Anna and Vincent Melapioni (hereinafter “the Melapionis”) now move for

summary judgment pursuant CPLR §3212 and to strike Plaintiffs' jury demand. Plaintiffs oppose the motion. Because the Melapionis' summary judgment motion was untimely and they failed to demonstrate that Plaintiffs are not entitled to a jury, their motion is denied.

Considering first the Melapionis' summary judgment motion, CPLR §3212(a) states, in pertinent part, that "the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing¹ of the note of issue, except with leave of court on good cause shown." Failure to comply with CPLR §3212(a)'s requirements requires denial of the motion. (Brill v City of New York, 2 NY3d 648, 652 [2004]; Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Coty v County of Clinton, 42 AD3d 612 [3d Dept. 2007]; Town of Kinderhook v Slovak, 47 AD3d 1093 [3d Dept. 2008]; Harrington v Palmer Mobile Homes, Inc., 71 AD3d 1274 [3d Dept. 2010]).

This Court's Preliminary Conference Stipulation and Order, dated February 9, 2011 (hereinafter "PCSO"), set forth no CPLR §3212(a) "earlier date." Instead, it specifically deferred to the CPLR's provisions. Thus, as is applicable here, the Melapionis were required to make their summary judgment motion "no later than one hundred twenty days after the filing of the note of issue." This, they did not do.

The Note of Issue in this action is stamped as received by the Greene County Clerk's Office on August 3, 2011, which constitutes "the date it was considered filed for purpose of time

¹ 22 NYCRR 202.21(a) requires "the original note of issue... [to] be filed in duplicate with the county clerk."

computation under CPLR 3212(a).” (Coty v. County of Clinton, supra at 614, quoting Castro v. Homsun Corp., 34 AD3d 616 [2d Dept. 2006][internal quotation marks omitted]; 22 NYCRR 202.21[a]). The Melapionis did not “make” this motion, however, until they served it on January 9, 2012. (CPLR §2211). As such, this motion was made well after CPLR §3212(a)’s one hundred and twenty days had past.

In reply, the Melapionis neither sought leave for their late filing nor demonstrated “good cause” for their delay. Contrary to the Melapionis’ contention, this Court’s Letter Decision and Order, dated April 8, 2011, did not modify the date they were required to make their summary judgment motion. While the Letter Decision and Order modified portions of the PCSO, it did not address the date within which to make dispositive motions. Instead, it specifically stated that “[a]ll other unaffected portions of this Court’s [PCSO] shall continue to apply.” Similarly, the Melapionis’ reliance upon this Court’s prior denial of their premature summary judgment motion is unavailing. Additionally, the Melapionis’ discovery extension rationale is neither relevant to a CPLR §3212(a) analysis based upon the filing of the note of issue nor establishes “good cause” for their delay.

Accordingly, the Melapionis’ summary judgment motion is denied.

Turning next to the Melapionis’ motion to strike Plaintiffs’ jury demand, CPLR §4101(2) states that “issues of fact shall be tried by a jury... for [the] determination of a claim to real property under article fifteen of the real property actions and proceedings law.” (Cilwick v. Camelo, 55 AD2d 782 [3d Dept. 1976]). Moreover, an RPAPL article 15 plaintiff does not waive their right to a jury by including a claim for injunctive relief that is incidental to its RPAPL article 15 demand. (Decana Inc. v. Contogouris, 45 AD3d 363 [1st Dept. 2007]; Lillianfeld v.

Lichtenstein, 181 Misc2d 571 [Sup Court, Kings County 1999]).

Here, it is uncontested that Plaintiffs' are entitled to a jury trial on their RPAPL article 15 claim. Instead, the Melapionis wrongly assert that Plaintiffs have waived their right to a jury trial by including in their complaint injunctive and declaratory causes of action. Such claims, however, are wholly incidental to Plaintiffs' RPAPL article 15 cause of action. Specifically, the injunction Plaintiffs seek merely carries out their RPAPL article 15 demand. (Decana Inc. v Contogouris, supra; Lillianfeld v Lichtenstein, supra). Similarly, because an RPAPL article 15 final judgment must include declaratory relief (RPAPL §1521[1]), Plaintiffs' declaratory judgment cause of action does not waive CPLR §4101(2)'s specific grant of a jury trial to RPAPL article 15 actions.

Accordingly, the Melapionis' motion to strike Plaintiffs' jury demand is denied.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
February / , 2012


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 9, 2012; Affidavit of Vincent Melapioni, dated January 6, 2012, with attached Exhibits 1-4.
2. Affirmation of Sarah Schneider, dated January 16, 2012, with attached Exhibits A-E.
3. Affirmation of Richard Gray, dated January 23, 2012, with attached Exhibits 5-6.