

Brown v Powell

2012 NY Slip Op 30908(U)

April 4, 2012

Supreme Court, Queens County

Docket Number: 24776 /2011

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DOUGLAS BROWN, SR., et ano.,
Plaintiffs,

Index
No. 24776 2011

-against-

Motion
Date January 31, 2012

CLARENCE POWELL, etc., et ano.,
Defendants.

Motion
Cal. No. 10

Motion
Seq. No. 1

The following papers numbered 1 to 15 read on this motion by plaintiffs for an order: (1) deeming the deed dated May 17, 2011, transferring property known as 143-38 Ferndale Avenue, Jamaica, New York, to defendant 143-38 Ferndale Realty, LLC, void and discharged and cancelled of record; (2) enjoining the further sale and transfer of said real property; and (3) staying the proceeding in Civil Court Landlord/Tenant Part from evicting or removing plaintiffs from the subject premises; and on this cross motion by defendants for an order dismissing the complaint pursuant to CPLR 3211 (a) (1), (2), (3), (7), and (8), and for an award of sanctions pursuant to 22 NYCRR 130-1.1.

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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiffs Douglas Brown Sr., and Frank Brown are the brothers of Ernest Brown, deceased. Plaintiffs allege that, on November 5, 1962, Ernest Brown purchased the real property known as 143-38 Ferndale Avenue, Jamaica, New York. The deed to the real property named Ernest Brown as the sole owner.

Plaintiffs allege that Ernest Brown purchased the subject premises for his parents, Taft (incorrectly referred to in the complaint as Taff) and Rose Brown, and that his parents paid the mortgage, taxes, and maintenance from 1962 until Taft's death in November 1975. It is alleged that, from 1975 to 1978, Rose remained in the property, during which time she paid the mortgage, taxes and maintenance for the property. Plaintiffs allege that it was always the intention of Ernest Brown to transfer the real property to his parents Taft and Rose Brown. Taft and Rose Brown both died intestate.

Ernest Brown died in November 1977, and was survived by his wife Elsie Brown, (incorrectly referred to in the complaint as Elise) and there were no children of the marriage. Elsie Brown died intestate on May 7, 2008 (it is noted that the complaint incorrectly alleges that she died in May 2006). Defendant Clarence Powell, Elsie Brown's brother, was appointed the Administrator of his sister's Estate on December 30, 2010. Mr. Powell, in his capacity as Administrator of the Estate of Elsie Brown, sold the subject real property to defendant 143-38 Ferndale Realty, LLC (Ferndale Realty), on May 17, 2011, pursuant to an administrator's deed which was recorded on June 3, 2011.

Douglas Brown alleges that he has resided in the subject real property since 1982, and that he has paid taxes on the property. In July 2011, Douglas Brown received a ten-day notice to quit from Ferndale Realty, and a holdover proceeding has been commenced in Civil Court Landlord Tenant Part by Ferndale Realty against him (under Index No. 71108/2011).

Plaintiffs commenced this action on October 31, 2011, pursuant to Article 15 of the Real Property and Proceedings Law (RPAPL). Plaintiffs allege causes of action for the imposition of a constructive trust, adverse possession, fraud, negligence, and unjust enrichment. The complaint's wherefore clause demands that: "1. Plaintiffs Douglas Brown and Frank Brown and their siblings be declared the owners of the property . . . 2. That in the alternative, the last deed of record dated May 17, 2011 be claimed [sic] null and void; 3. Plaintiffs be entitled to the immediate possession and one hundred percent fee interest in the property; 4. In the event that defendant is [sic] not required to relinquish their interest in the property, the plaintiff [sic] requests a money judgment in the sum of \$500,000.00 to compensate plaintiffs for the lost sale and the loss of the use of the property; 5. Costs, disbursements, and interests from November 1, 1962 be reimbursed."

Plaintiffs, in their order to show cause, seek: (1) to have the May 17, 2011 deed

deemed void, discharged and cancelled of record; (2) an injunction enjoining the further sale or transfer of the property; and (3) a stay of the Civil Court holdover proceeding and the enforcement of a warrant of eviction. Defendants cross move for an order dismissing the complaint, with prejudice, on the grounds of documentary evidence, lack of personal jurisdiction, statute of limitations and failure to state a cause of action, pursuant to CPLR 3211(a) (1), (2), (3), (7) and (8), and seek the imposition of sanctions pursuant to 22 NYCRR 130-1.1. Defendants also seek to have the within motion treated as one for summary judgment and assert that the evidence supporting plaintiffs' claims are barred by CPLR 4519, the Dead Man's Statute.

The parties appeared for oral argument on January 31, 2012, at which time the defendants waived their jurisdictional defense.

That branch of plaintiffs' motion which seeks an order an order deeming the May 17, 2011, deed to be void, discharged and cancelled, as well as the request for the relief demanded in the complaint's wherefore clause, is denied. These requests seek the same and ultimate relief sought in the complaint and are, therefore, premature, as issue has not been joined. To the extent that plaintiffs seek a declaration pursuant to Article 15 of the Real Property Actions and Proceeding Law, declaring the plaintiff to be the owner in fee simple absolute, it is noted that declaratory judgment is not a provisional remedy and may not be obtained in a motion prior to the joinder of issue (*see* CPLR 3001, 3211, 3212; *McHugh v Weissman*, 46 AD3d 369 [2007]; *Elec. Data Sys. Corp. v Xerox Corp.*, 273 AD2d 28 [2000]; *Durkin v Durkin Fuel Acquisition Corp.*, 224 AD2d 574 [1996]).

To be entitled to a preliminary injunction, the movant must establish: (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Ruiz v Meloney*, 26 AD3d 485, 485-486 [2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2004]; *Hightower v Reid*, 5 AD3d 440 [2004]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see Ying Fung Moy v Hohi Umeki, supra*). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Ruiz v Meloney, supra*; *Ying Fung Moy v Hohi Umeki, supra*). The branch of plaintiffs' motion which seeks a preliminary injunction is denied, as plaintiffs have failed to establish the likelihood of success on the merits and the balancing of the equities in their favor, which is further discussed *infra*, with respect to the merits of defendants' cross motion.

It is well established that on a motion to dismiss pursuant to CPLR 3211(a) (7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint

as true and provide plaintiff the benefit of every possible favorable inference” (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. Of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court’s “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail” (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.* 70 AD3d 928 [2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703[2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]).

“When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see id.*; *accord*, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)” (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *see Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996], *lv. to appeal denied*, 89 NY2d 811 [1997]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

“A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where ‘the documentary evidence that forms the basis of the defense [is] such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claims’ ” (*HSBC Bank USA, N.A. v Decaudin*, 49 AD3d 694, 695 [2008], quoting *Saxony Ice Co., Div. of Springfield Ice Co., Inc. v Ultimate Energy Rest. Corp.*, 27 AD3d 445, 446 [2006]; *see Leon v Martinez*, 84 NY2d at 88; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, *supra*; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646 [2008]; *Sullivan v State of New York*, 34 AD3d 443, 445 [2006]; *Museum Trading Co. v Bantry*, 281 AD2d 524, 525 [2001]; *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]).

Plaintiffs' first cause of action seeks the imposition of a constructive trust. To state a legally sufficient cause of action for the imposition of a constructive trust, it is well established that a plaintiff must plead and prove four essential elements: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment caused by breach of the promise (*Sharp v Kosmalski*, 40 NY2d 119; [1976]; *Gaentner v Benkovich*, 18 AD3d 424, 426-427 [2005]; *Satler v Merlis*, 252 AD2d 551 [1998]). In particular, "it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed" (*Eickler v Pecora*, 12 AD3d 635, 636 [2004], quoting *Bontecou v Goldman*, 103 AD2d 732, 733 [1984]; see *Ladone v Ladone*, 121 AD2d 512, 513 [1986]). A constructive trust may be imposed when "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Sharp v Kosmalski*, 40 NY2d at 121 [1976]). In such cases, equity converts the legal holder into a trustee (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]).

Accepting plaintiffs' factual allegations as true and according them the benefit of every favorable inference (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1998]), plaintiffs have failed to show a "legally cognizable transfer in reliance" on any promise made by Ernest Brown during his lifetime, or unjust enrichment by the defendants (*Doxey v Glen Cove Community Dev. Agency*, 28 AD3d 511, 512 [2006]; *Gaentner v Benkovich*, *supra* at 427; *Satler v Merlis*, *supra*). Where, as here, neither the plaintiffs nor their parents had an actual prior interest in the subject property during this time, plaintiffs are required to show that an equitable interest developed through the expenditure of money, labor, and time in the property" (see *Marini v Lombardo*, 79 AD3d 932, 934 [2010], leave to appeal denied 17 NY3d 705 [2011]). However, merely showing that funds were transferred or expended by the plaintiffs or their parents does not necessarily satisfy the requirement of proving a transfer in reliance on a promise. In this regard, courts have rejected claimants' attempts to establish the "transfer" element based on their improvements to property inasmuch as the improvements also benefitted the claimants (see *Marini v Lombardo*, *supra*). Proof of payments being made by the claimants for the mortgage, operating expenses and real estate taxes have likewise been held insufficient given that such payments could be considered rent (see *Wilson v La Van*, 22 NY2d 131 [1968]; *Marini v Lombardo*, *supra*; *Matter of Lefton [Bedell]*, 160 AD2d 702 [1990]; *Onorato v Lupoli*, 135 AD2d 693 [1987]).

In any event, the statute of limitations expired long before plaintiffs commenced the action to impose a constructive trust. An action to impose a constructive trust is equitable in nature (*Sharp v Kosmalski*, *supra*), and is governed by the six-year Statute of Limitations. The cause of action accrues, in circumstances when there has been a breach or repudiation of the trust agreement (CPLR 213 [1]; *Schwerin v Podgily*, 99 AD2d 802, 803 [1984]; *Walsh v Walsh*, 91 AD2d 1198 [1983]; *Augustine v Szwed*, 77 AD2d 298, 300 [1980]). Here,

plaintiffs allege that their interest in the subject property is derived from their status as intestate distributees of their parents' estates. Ernest Brown purchased the subject property in 1962, and Taft Brown resided in said property until his death in 1975. Taft Brown, during his lifetime, did not commence an action to impose a constructive trust on the subject property, and after his death, no representative of his estate commenced an action to impose a constructive trust. Therefore, as to Taft Brown, the statute of limitations expired no later than 1981.

Rose Brown resided in the subject property from 1962 until 1978. Plaintiffs do not allege that Rose Brown made any payments or expenditures in connection with the subject property after 1978. Defendants have submitted a copy of a letter dated April 18, 1984 addressed to Elsie Brown, from an attorney retained by Rose Brown, "relative to the estate of her deceased son, Mr. Ernest Brown." Counsel stated that Rose Brown had informed him that: "the property in question was initially purchased under Ernest Brown's G.I. Benefits for his father, Taft Brown, who undertook to make all subsequent mortgage payment on the aforementioned property. If that information is accurate, then it would appear that Mrs Rose Watson Brown, is the party who should rightfully inherit this property." Counsel acknowledged that Elsie Brown was the wife of the decedent Ernest Brown, and stated that, in order to transfer the property "we would be in need of your consent," and requested that she execute a quit claim deed.

Elsie Brown took no steps to transfer the property to Rose Brown. Rose Brown died in 1994. Rose Brown, during her lifetime, did not commence an action to impose a constructive trust and, after her death, no representative of her estate commenced an action to impose a constructive trust. Since Rose Brown was aware that the transfer had not taken place in 1984, the statute of limitations as to any claim she may have had expired no later than 1992. As it is not alleged that the subject real property was never part of the Estate of Taft Brown or the Estate of Rose Brown, plaintiffs have not been deprived of any property as intestate distributees.

The documentary evidence submitted herein establishes that in 2000, plaintiff Douglas Brown retained counsel with respect to the subject property. Said counsel, in a letter dated June 22, 2000 and addressed to Elsie Brown, Douglas Brown, Frank Brown, Taft Brown, Jr., James Brown, and Evelyn Brown, stated as follows:

"As you are aware, the property is owned by ELSIE POWELL BROWN, your sister-in-law. However, I have been advised that title is in her name for convenience only, and that it is desired that title be transferred from her name into the names of TAFT BROWN, JR., JAMES BROWN, FRANK BROWN, EVELYN DANIELS and DOUGLAS BROWN.

“In order for this to be done, it will be necessary for all of the parties to sign documents before a Notary Public so that the new deed can be properly filed.”

Elsie Brown, however, did not transfer title to these in-laws. Therefore, to the extent that plaintiffs seek to impose a constructive trust in their own right, the statute of limitations expired no later than 2006.

In view of the foregoing, that branch of defendants’ cross motion which seeks to dismiss the first cause of action to impose a constructive trust is granted.

Plaintiffs, in their second cause of action for adverse possession, allege that, since 1982, Douglas Brown has resided “on the property openly and notoriously and paid taxes on the property” and that “the property was held openly and notoriously by plaintiffs and their parents for over ten (10) years.” Thus, the 2008 amendments to the adverse possession statutes contained in RPAPL article 5 (*see* L 2008, ch 269, § 5) are not applicable here because the plaintiffs’ property right, as alleged, vested prior to the enactment of those amendments (*see Shilkoff v Longhitano*, 90 AD3d 891, 892 [2011]; *Hogan v Kelly*, 86 AD3d 590, 592 [2011]).

To claim title to real property by adverse possession, in accordance with the law as applicable here, the party seeking title must demonstrate that the parcel was “usually cultivated or improved” or “protected by a substantial inclosure” (RPAPL former 522 [1], [2]; *see BTJ Realty v Caradonna*, 65 AD3d 657, 658 [2009]; *Walsh v Ellis*, 64 AD3d 702 [2009]). In addition, the party claiming title must demonstrate, by clear and convincing evidence, satisfaction of the following five common-law elements of the claim over the course of the applicable statutory period: (1) the possession must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous for the statutory period of 10 years (*see Shilkoff v Longhitano, supra; Skyview Motel, LLC v Wald*, 82 AD3d 1081 [2011]; *see BTJ Realty, Inc. v Caradonna, supra; Goldschmidt v Ford St., LLC*, 58 AD3d 803, 804 [2009]). “‘Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period’” (*Hall v Sinclair*, 35 AD3d 660, 662[2006]; quoting *Brand v Prince*, 35 NY2d 634, 636 [1974]; *see also Kelly v Bastianic*, __ AD3d __, 2012 NY Slip Op 1798, 2012 NY App. Div. LEXIS 1772 [March 13, 2012]).

Mere license to use the property from a prior owner does not ripen into title by adverse possession (*Joseph v Whitcombe*, 279 AD2d 122, 125-126 [2001]), and an “[a]wareness that others own the property upon entry on the property or within the 10-year statutory period will defeat any claim of right” (*Oak Ponds v Willumsen*, 295 AD2d 587, 588 [2002]; *see also*

Bockowski v Malak, 280 AD2d 572 [2001]).

Plaintiffs' allegations do not support a claim for adverse possession. With respect to Taft and Rose Brown, plaintiffs allege that their parents resided in the premises with the express consent of their brother Ernest Brown, the owner of the subject real property. Taft and Rose Brown both resided in the premises from 1962 until 1975, when Taft died. Rose Brown continued to reside in the premises until 1978. Plaintiffs do not allege that after Ernest's death, Rose Brown's continued occupancy of the premises was hostile. Moreover, as the documentary evidence submitted herein suggests that Rose Brown was aware that Elsie Brown had an ownership interest in the property following Ernest's death, her occupancy in 1978 was not as of right. Plaintiffs, therefore, cannot "tack on" their parents' occupancy of the premises in order to establish that their occupancy was hostile and continuous for the statutory period.

The complaint does not allege that the plaintiffs occupied the premises during the period of 1978 and 1982. As to Frank Brown, the complaint does not allege that he resided in the property as to any time. As to Douglas Brown, the complaint does not allege that he occupied the premises as of right and that said occupancy was of right. Furthermore, Douglas Brown cannot establish a claim of right, as his attorney's letter of June 22, 2000 expressly acknowledges that the subject property was owned by Elsie Brown. To the extent that plaintiffs allege that they occupied the property as of right based upon an alleged constructive trust, this claim is rejected for the reasons stated above. As plaintiffs' allegations are insufficient to state a claim for adverse possession, that branch of defendants' cross motion which seeks to dismiss the second cause of action is granted.

Plaintiffs' third cause of action for fraud alleges that the Administrator of the Estate of Elsie Brown sold the subject real property to Ferndale Realty without their authorization, "with the knowledge of plaintiff's [sic] occupancy and claim of right," and that "said transfer was done with material misrepresentations as to plaintiff's [sic] interest in the property." In order to plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury (*Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). Plaintiffs' vague allegations are insufficient to state a claim for fraud (CPLR 3016). Furthermore, plaintiffs acknowledge that the subject property was owned by Elsie Brown. Elsie Brown died intestate and plaintiffs, her brothers-in-law, are not intestate distributees of her Estate. To the extent that plaintiffs' claim to the property is based on either a constructive trust or adverse possession, these claims are rejected for the reasons stated above, and do not give rise to a cause of action for fraud. Therefore, that branch of

defendants' cross motion which seeks to dismiss the third cause of action is granted.

Plaintiffs' fourth cause of action alleges that the Administrator sold the property without their authorization, "with the knowledge of the plaintiff's [sic] occupancy and claim of right of a legal and equitable interest," and that the transfer was made negligently without concern or consideration for the plaintiffs' claim of right through adverse possession, or by a constructive trust. In order to plead a cause of action for negligence, a plaintiff must show that a defendant owed a duty to the plaintiff, that defendant breached the duty, and that plaintiff was injured as a proximate result of defendant's breach (*see Friedman v Anderson*, 23 AD3d 163, 165 [2005]). Plaintiffs' allegations are insufficient to state a claim for negligence, as they do not allege that the Administrator owed them a duty. Furthermore, to the extent that plaintiffs' claim to the real property is based on either a constructive trust or adverse possession, these claims are rejected for the reasons stated above. Therefore, that branch of defendants' cross motion which seeks to dismiss the fourth cause of action is granted.

Plaintiffs' fifth cause of action against Ferndale Realty (improperly denominated as a second fourth cause of action) alleges that the sale of the property was "without authorization of the plaintiff [sic] and with knowledge of plaintiffs' interest in said property"; that "said transfer was done with the intent to defraud plaintiffs' claim of right through adverse possession, or the constructive trust"; that Ferndale Realty was aware of plaintiffs' interest; that Ferndale Realty "has prevented the sale of the property thus causing all of the plaintiffs [sic] economic harm"; that the "deed dated May 17, 2011 is invalid as it was based on fraud and against plaintiffs' right of adverse possession"; and that Ferndale Realty "has been unjustly enriched through said fraud and deception." Plaintiffs' allegations are insufficient to state a claim against Ferndale Realty for fraud, for the reasons stated above.

To the extent that the fifth cause of action also states a claim for unjust enrichment, they are required to show that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff (*Marini v Lombardo*, *supra* at 934 ; *Whitman Realty Group v Galano*, 41 AD3d 590 [2007]; *Cruz v McAneney*, 31 AD3d 54 [2006]; *Clifford R. Gray, Inc. v LeChase Construction Services, LLC*, 31 AD3d 983 [2006]). The essence of an unjust enrichment cause of action is that one party is in possession of money or property that rightly belongs to another (*Clifford R. Gray, Inc. v LeChase Construction Services, LLC*, 31 AD3d at 983). Plaintiffs' allegations are insufficient to state a claim for unjust enrichment, as they acknowledge that Elsie owned the property. To the extent that plaintiffs' claims are based on the alleged constructive trust or adverse possession, these claims are rejected for the reasons stated above. That branch of defendants' cross motion which seeks to dismiss plaintiffs' cause of action against Ferndale Realty, therefore, is granted.

Notwithstanding the above discussion – which demonstrates that plaintiffs’ causes of action cannot withstand defendants’ cross motion to dismiss – the court recognizes that there is still an issue as to which parties have an interest in the property (and the extent of their respective interests), though it cannot be determined on the papers submitted to the court.¹ As noted above, it has been alleged herein that Ernest, who was survived by his wife Elsie and his mother Rose, died intestate. As such, when Ernest died in 1977, the rules governing intestate succession were as follows: “The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows . . . (4) A spouse and one parent, and no issue, twenty-five thousand dollars and one-half of the residue to the spouse, and the balance thereof to the parent.” Accordingly, a portion of Ernest’s estate would have passed to Rose. Further, when Rose died intestate in 1994, based on the laws of intestacy at that time, her estate would have been distributed to her issue by representation, which includes plaintiffs herein. Plaintiffs’ claim, then – though not alleged anywhere in the pleadings – essentially challenges the fiduciaries which were appointed to administer both the estate of Ernest and the estate of Rose, for distributing property that may not have been owned outright by the respective estates. It would therefore appear that the appropriate forum to challenge these alleged improper distributions is the Surrogate’s Court.

Accordingly, plaintiffs’ motion is denied in its entirety and defendants’ cross motion to dismiss the complaint is granted in its entirety. Defendants’ request for sanctions is denied. However, the stay imposed in the December 9, 2011 order to show cause is hereby continued until 30 days after the entry date of this order so that plaintiffs, if they be so advised, may seek the appropriate relief in Surrogate’s Court.

Dated: April 4, 2012

J.S.C.

1. It is further noted that this issue was not raised by the parties in their papers.