

McBean v Clarke
2012 NY Slip Op 32269(U)
August 17, 2012
Sup Ct, Queens County
Docket Number: 19444/11
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

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JOYCE McBEAN a/k/a JOYCE McBEAN	Motion
WILLIAMS,	Date May 22, 2012
Plaintiff,	
-against-	Motion
	Cal. No. 15
TYRONE McBEAN CLARKE,	Motion
Defendant.	Sequence No. 1

	<u>Papers</u>
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Upon the foregoing papers it is ordered that this motion That branch of defendant's motion for an order dismissing plaintiff's action for failure to name a necessary party pursuant to CPLR 3211(a)(10), or alternatively, ordering that Derrick C. Clarke be made a party to this action is hereby denied.

The underlying action is one for the imposition of a constructive trust on the premises known as 186-23 Margin Avenue, Queens, NY 11412. The record reflects that plaintiff Joyce McBean a/k/a Joyce McBean Williams and non-party, Derrick C. Clarke conveyed the premises by deed to defendant Tyrone McBean Clarke and non-party Derrick C. Clarke as tenants in common. Defendant asserts that a necessary party is missing because the plaintiff failed to name Derrick C. Clarke, a co-owner of the property, as a defendant in the action. Plaintiff maintains that Derrick C. Clarke is not a necessary party because if plaintiff prevails in establishing the constructive trust on the defendant's interest, she will be substituted as tenant in common with Derrick C. Clarke in place and instead of the defendant, and that the imposition of a constructive trust on the defendant's interest in the property has no impact upon the interest of Derrick C. Clarke.

Pursuant to CPLR 1001:

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

Pursuant to CPLR 3211(a)(10), the Court may dismiss one or more causes of action on the grounds that "the Court should not proceed in the absence of a person who should be a party."

The Court finds that the party sought to be added, Derrick C. Clarke has not been demonstrated to be necessary or indispensable parties pursuant to the CPLR. The underlying action is one for the imposition of a constructive trust. Defendant has failed to demonstrate that any prejudice that will accrue if the lawsuit continues without the party defendant feels is a necessary party. The Court finds that an effective judgment resolving this controversy can be rendered in the absence of such party.

As the Court stated in *Johnson v. Johnson*, 2011 NY Slip Op 32288U, citing *Anonymous v. Anonymous*, 2 Misc 3d 1002[A], 784 NYS2d 918, 2004 NY Slip Op 50080[U], 2004 WL 396492 (NY County Sup Ct 2004), quoting, 5A Warren's *Weed New York Real Property*,

Tenancy in Common, § 7.04:

"A tenant in common, although owner of an undivided share only in the land, differs from a joint tenant in having a several and distinct estate therein. And, except for the fact that he has not the exclusive possession, he has the same rights in respect to his share as a tenant in severalty. Each tenant in common holds his title and interest independently of the other tenants in common. Thus, a tenant in common may transfer, devise, convey, lease, mortgage or otherwise encumber his interest in the land without seeking the consent or joinder of his co-tenants to the transaction. A tenant in common, therefore, can convey his interest to another person or persons, and, upon that conveyance one tenancy in common is terminated and a new one arises among the new tenants in common." (Id.).

Accordingly, as the Complaint alleges that it is defendant's ½ interest that is in dispute, Derrick C. Clarke is not a necessary party.

That branch of the defendant's motion seeking to vacate the Note of Issue is hereby denied. Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e) sets forth specific procedures for vacating a note of issue. Within 20 days after service of a Note of Issue/Certificate of Readiness a party can move to vacate the Note of Issue upon a showing that a material fact in the Certificate of Readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. In the instant case, defendant has failed to show how any part of the Certificate of Readiness is materially incorrect, and defendant does not dispute that he has made no discovery demands to date. As such, no prima facie case has been established in support of this branch of the motion.

That branch of the motion seeking to grant leave to the defendant to amend his Answer to include causes of action for wrongful conversion and accounting and allow defendant to conduct discovery if he deems it necessary is hereby denied. It is well settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025[b]; *Wirhouski v. Armoured Car &*

Courier Serv., 221 AD2d 523 [2d Dept 1995])). However, "[i]t is incumbent upon one seeking leave to amend a pleading to make an evidentiary showing that the claim can be supported" (*Farrell v. K.J.D.E. Corp.*, 244 AD2d 905 [4th Dept 1997][internal citations omitted]). Defendant has failed to make such an evidentiary showing, as no affidavit of merit or proposed amended verified answer has been submitted with the papers (see, *Id*). As such, this branch of the motion is denied.

That branch of defendant's attorney's motion seeking to disqualify Salzman & Salzman as plaintiff's attorneys in this proceeding is denied.

As the Appellate Division, Second Department held in *Falk v. Gallo*, 73 AD3d 685 (2d Dept 2010):

The disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court. A party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted. Thus, the party seeking to disqualify an attorney bears the burden on the motion. . . . The advocate-witness rules contained in the Code of Professional Responsibility, which have been superseded by the Rules of Professional Conduct, provide guidance, but are not binding authority, for the courts in determining whether a party's attorney should be disqualified during litigation. Rule 3.7 of the Rules of Professional Conduct provides that unless certain exceptions apply, "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7). [internal citations omitted].

Defendant's attorney maintains that: the deed for the subject property was recorded by plaintiff's attorneys, the circumstances surrounding the transfer of the property as well as plaintiff's allegations that there was a mutual trust is at issue, it is likely that the crucial elements of the constructive

trust claim are only known to plaintiff and plaintiff's attorney, Salzman & Salzman's name appears on the deed as the party to receive the recorded deed after mailing, Salzman & Salzman was privy to the circumstances surrounding the transfer and recording of the deed, and defendant will require a deposition of plaintiff's attorney.

The Court finds that defendant has failed to establish a prima facie case in support of this requested relief as defendant has failed to submit sufficient admissible proof that plaintiff's attorney is likely to be a witness on a significant issue of fact.

Accordingly, this branch of the motion is denied.

This constitutes the decision and order of the Court.

Dated: August 17, 2012

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Howard G. Lane, J.S.C.