Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JOY H. MACK f/k/a JOY DINKO,
.
Plaintiff,

-against-

SUSAN IGWEGBE, ONEWEST BANK, THE BANK OF NEW YORK, as Collateral Agent and Custodian, DENISE WATERS, DOUGLAS WATERS, SEYNA DINKO, CATALINA FERNANDEZ and THE ENVIRONMENTAL CONTROL BOARD. JOHN DOE 1-10, the names of the last defendants being fictitious, the true names being unknown to plaintiff, the parties intended being tenants or persons in possession of the premises,

Defendants.

Index Number: 12993/ 2012

Motion Date: December 6, 2012

Motion Seq. No.: 1

The following papers numbered 1 to 15 read on this motion by plaintiff for summary judgment in her favor against defendants Susan Igwegbe and OneWest Bank (OneWest), and to dismiss the affirmative defenses of defendants Igwegbe and OneWest and/or strike their answer.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-11
Reply Affidavits	12-14
Copy of Order dated January 24, 2013	15

Upon the foregoing papers it is ordered that the motion is determined as follows:

Nonparty Roy D. Tyler allegedly owned the real property known as 187-09 Brinkerhoff Avenue, Jamaica, New York (the subject property), and in December 1975 he executed a last will and testament naming Dolly Tyler, his wife, and Chester R. Thomas, his attorney, as his executors and leaving the real property to plaintiff (then known as Joy Dinko), Seyna Dinko, Denise Waters and Douglas Waters, subject to a life estate in Dolly Tyler, and the remainder of his real and personal property to Dolly Tyler. Roy D. Tyler died on February 6, 1978, survived by Dolly his wife as his sole distributee. The will was not offered for probate at the time of Roy's death, and Dolly Tyler continued to live on the property.

In 2002, Roy Tyler's will was filed with the Surrogate's Court, Queens County and an index number was purchased. In 2006, Peter E. Torres, Esq. filed a petition on behalf of Dolly Tyler for probate of the will, indicating that Chester R. Thomas was deceased, and seeking the issuance of letters testamentary. The petition incorrectly stated that Dolly Tyler, the surviving spouse of Roy D. Tyler, had an interest in the subject property as a "100% residuary beneficiary," and there were no legatees, devisees and other beneficiaries named in the will. No objections were filed, bringing such incorrect statements to the attention of the Surrogate, and as a consequence, by decree dated July 11, 2006, the last will and testament of Roy D. Tyler was admitted to probate and Dolly Tyler was issued letters testamentary.

By deed dated August 2, 2006, and recorded on November 2, 2006, Dolly Tyler, as the executrix of the Estate of Roy Tyler, executed a deed (the executor's deed), purportedly transferring title to the property to defendant Catalina Fernandez. Fernandez thereafter purportedly transferred title to the property to GSN Corp. by deed dated August 17, 2006 and recorded on November 29, 2006 (the Fernandez deed). GSN Corp. subsequently transferred title to the property by deed dated June 29, 2007 and recorded on July 16, 2007 (the GSN deed) to defendant Susan Igwegbe, who financed the purchase with a mortgage loan from IndyMac Bank. Dolly Tyler died on November 21, 2007. The IndyMac mortgage dated June 29, 2007 and recorded on July 16, 2007 was assigned to defendant OneWest by assignment dated September 25, 2009 and recorded on December 2, 2009.

In June 2012, plaintiff commenced this action pursuant to RPAPL article 15 to quiet title to the subject property. Plaintiff alleges, in effect, that she is vested in a one-quarter ownership interest in the subject property, free and clear of any of the claim of defendants to any right, title or interest in it, and seeks to cancel the executor's deed, the Fernandez and GSN deeds, the OneWest mortgage and those liens appearing of record in the chain of title proceeding from the executor's deed. Defendants Igwegbe and OneWest served an answer

with affirmative defenses and asserted a counterclaim and cross claim to quiet title. Plaintiff executed a stipulation of discontinuance in favor of defendant Bank of New York dated October 16, 2012. The remaining defendants appear to be in default in appearing or answering the complaint.[1]

Plaintiff seeks summary judgment against defendants Igwegbe and OneWest. She asserts that upon the death of Roy Tyler, she and Seyna Dinko, Denise Waters and Douglas Waters each became vested with a one-quarter ownership interest in the real property as tenants-in-common, subject to the life estate of Dolly Tyler, and that upon the death of Dolly Tyler, plaintiff, in addition to her ownership interest as a remainderman, acquired the right to possess the property. Plaintiff also asserts the executor's deed was void inasmuch as Dolly Tyler was without authority to sell the property, and that defendants Igwegbe and OneWest are not bona fide purchasers because the existence of the executor's deed in the chain of title put defendants Igwegbe and OneWest on notice of facts which should have lead them to learn of her ownership interest in the subject property.

Defendants Igwegbe and OneWest oppose the motion. The other named defendants have not appeared in relation to the motion.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman*, 49 NY2d 557).

In support of the motion, plaintiff offers, among other things, a copy of the pleadings, the affirmation of her counsel, her own affidavit, and a copy of a title search and the last will and testament of Roy D. Tyler.

The last will and testament of Roy D. Tyler, in relevant part, provided:

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[1] Affidavits of service of process are on file for defendants Seyna Dinko, Environmental Control Board, Douglas Waters and Denise Waters. Defendants Douglas Waters and Denise Waters were served pursuant to an order of publication dated October 15, 2012.

> "I give, devise and bequeath a life time interest (life estate) in property owned by me located at 187-09 Brinkerhoff Avenue, Jamaica, New York to my dear wife, Dolly Tyler, and on her death to be equally divided among our grandchildren,[2] to wit: Denise Waters, Douglas Waters, Joy Dinko and Senya[3] Dinko, to be theirs absolutely, share and share alike."

Thus, under the terms of the will, plaintiff and Denise Waters, Douglas Waters, and Seyna Dinko were specific devisees of the subject property.

Title to the real property which is specifically devised, vests in those devisees at the moment of the testator's death (*see Waxson Realty Corp. v Rothschild*, 255 NY 332, 336 [1931]; *Matter of Ballesteros*, 20 AD3d 414 [2d Dept 2005]). Unless otherwise directed by the will, an executor takes no title to the property of the testator since title vests in the devisees subject to divestment pursuant to court order to pay estate debts *(see DiSanto v Wellcraft Mar. Corp.*, 149 AD2d 560 [2d Dept 1989]). In the absence of a court order, the fiduciary does not have authority to sell specifically devised real property (*see* EPTL 11-1.1[b][5][B]).

The last will and testament of Roy D. Tyler did not give the executor the power to sell the real property. It is undisputed that no court order was ever entered authorizing any sale of the subject property by Dolly Tyler as executor (*see DiSanto v Wellcraft Mar. Corp.*, 149 AD2d 560 [1989]; *see e.g. Matter of Payson*, 132 Misc 2d 949, 950 []). Under such circumstances, Dolly Tyler lacked authority to convey title to the premises to defendant Fernandez.

A prospective purchaser or encumbrancer is presumed to have investigated the title, and examined every deed or instrument properly recorded, and known every fact disclosed or to which an inquiry suggested by the record would have led (*see Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13 [1979]; *Astoria Fed. Sav. & Loan Assn. v June*, 190 AD2d 644 [2d Dept 1993]). Failure to use due diligence in examining the title, renders the purchaser or encumbrancer chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed (*see Congregation Beth Medrosh of Monsey, Inc. v Rolling*

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[2] It appears that the "grandchildren" are not blood relatives of Roy D. Tyler. Plaintiff and Seyna Dinko are sisters (who apparently are estranged), and they are the grandchildren of Dolly Tyler, not Roy D. Tyler. Denise Waters and Douglas Waters are siblings who are unrelated to the Dinkos.

[3] The correct spelling of her name is *Seyna* Dinko.

Acres Chestnut Ridge, LLC, 101 AD3d 797 [2d Dept 2012]; *Fairmont Funding v Stefansky*, 301 AD2d 562 [2d Dept 2003]).

To the extent the subject property was offered by sale by Dolly Tyler, in her capacity as executor for the Estate of Roy D. Tyler, defendant Fernandez was bound to know that which an inquiry suggested by such fact would have led (*see Andy Assoc.*, 49 NY2d 13; *Astoria Fed. Sav.*, 190 AD2d 644), i.e. plaintiff, along with Denise Waters, Douglas Waters and Seyna Dinko, were specific devisees of the subject property under the last will and testament of Roy D. Tyler and Dolly Tyler lacked the requisite authority to convey the property as executor. In addition, upon the recording of the executor's deed, defendants Igwegbe and OneWest also were chargeable with knowing those facts.

Because Fernandez had no title to the property, she could not convey, despite the deed provisions to the contrary, any interest therein to defendant Igwegbe, who in turn could not convey any mortgage interest in it to defendant OneWest. "A greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed" (Real Property Law § 245). Thus, conveyances of land to which the grantors had no title convey no interest to the grantees (*see Robbins v Whitesell*, 128 AD2d 764 [2d Dept 1987]; *Weeks v Dominy*, 161 AD 414 [2d Dept 1914], *affd* 221 NY 512 [1917]; *see also Miller v Long Is. R.R.*, 71 NY 380, 383 [1877]; *Cornick v Forever Wild Development*, 240 AD2d 980 [3d Dept 1997]).

By these submissions, plaintiff has established a prima facie case of summary judgment against defendants Igwegbe and OneWest. The burden shifts to defendants Igwegbe and OneWest to produce evidentiary proof in admissible form sufficient to raise a a material question of fact requiring a trial (*see* CPLR 3212[b]; *Zuckerman*, 49 NY2d at 562).

Defendants Igwegbe and OneWest make no claim that plaintiff was not vested in an ownership interest in the property as a specific devisee under the last will and testament of Roy D. Tyler or that Dolly Tyler obtained the consents of the specific devisees to the transfer of title to defendant Fernandez. Nor do defendants Igwegbe and OneWest claim that before they obtained their interests in the property, they made an inquiry into the authority of Dolly Tyler as executor of the Estate of Roy D. Tyler to convey the property, and such inquiry failed to reveal plaintiff's ownership interest therein.

To the extent defendants Igwegbe and OneWest argue that plaintiff's claims are barred under EPTL 3-3.8, they failed to raise such a defense in their answer. Furthermore, the statute is inapplicable herein. It applies where a bona fide buyer purchases real property from a distributee of the deceased owner of the property, paying good consideration, and does not know that the decedent had specifically devised the realty in his or her will (*see*

Margaret Valentine Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 3-3.8 at 478). The statute provides that the buyer is protected in title unless the will is admitted to probate within two years of the decedent's death. In this case, the executor deed reflected that the grantor was Dolly Tyler, the fiduciary, and thus defendant Fernandez, and those claiming under her by mesne conveyances, were on notice to inquire as to the authority of Dolly Tyler to sell the property. Again, defendants Igwegbe and OneWest have made no showing that they made such inquiry.

Likewise, the failure by plaintiff to file a notice of pendency upon her learning of the unauthorized sale of the property was not raised by defendants Igwegbe and OneWest as an affirmative defense in their answer. Even if they had asserted such defense, it would not preclude plaintiff from seeking to quiet title now. The purpose of a notice of pendency is to provide constructive notice from the time of filing so that subsequent purchasers or encumbrancers become bound by proceedings taken in the action (*see* CPLR 6501; *Mallick v Farfan*, 66 AD3d 649 [2009]). In this case, the executor's deed was recorded and provided constructive notice to prospective purchasers and encumbrancers that an inquiry needed to be made as to the authority of Dolly Tyler, as fiduciary, to convey the property.

Defendants Igwegbe and OneWest assert that plaintiff accepted a distribution from the Estate of Roy D. Tyler constituting a portion of the proceeds of the sale of the property to defendant Fernandez, and such acceptance constituted an election by plaintiff of a monetary distribution in lieu of her fee interest, as her remedy for the fiduciary's unauthorized sale of her ownership interest in the property. They argue plaintiff, therefore, has been fully paid for her ownership interest and cannot seek an equitable remedy herein. In addition, they argue plaintiff waived any claim to the property by her participation in the settlement in Surrogate's Court reached in connection with the controversies posed by her objections and the objections filed by the guardian ad litem on behalf of Denies Waters and Douglas Waters, to the accounting of Peter E. Torres, and released any claims against the Estate of Roy D. Tyler.

When an election is made between claims, with full knowledge of all the facts and a clear understanding of the nature of the remedies between which the election is made, an action may not thereafter be maintained upon the inconsistent claim *(see American Woolen Co. of New York v Samuelsohn*, 226 NY 61 [1919]; *Tate v Estate of Dickens*, 276 AD 94 [3d Dept 1949]). In this instance, defendants Igwegbe and OneWest have raised a triable issue of fact as to whether plaintiff, by accepting a portion of the property sale proceeds from the Estate rather than having the Surrogate Court set aside the sale, elected to forego any claim to quiet title to the property and have been fully or partially paid for the loss of her ownership interest.

Defendants Igwegbe and OneWest also have raised a triable issue of fact with respect to their defenses of waiver, release and unjust enrichment. They assert plaintiff has waived any claim of partial ownership of the property insofar as she participated in the settlement in Surrogate's Court of the questions raised by her objections, filed in her individual and representative capacities, and those objections filed by the guardian ad litem. Pursuant to the stipulation of settlement dated May 13, 2011, plaintiff and the guardian ad litem withdrew and discontinued their objections to the amended account of Peter E. Torres, and agreed to the release of all claims which the parties to the stipulation had against each other, including those claims relating to their objections, and any claims arising out of or related to the Estate of Roy D. Tyler and Peter Torres' handling thereof, in consideration for payment of $110,000.00 from Peter E. Torres and his errors and omissions insurers to the Estate of Roy D. Tyler. By order dated August 22, 2011, the Surrogate approved the stipulation of settlement, and directed settlement of a decree incorporating its terms. Although plaintiff asserts that she did not enter into any release with defendants Igwegbe and OneWest, she released her claim against the Estate of Roy D. Tyler with respect to her objections to the account, and all other claims arising out of the Estate, and defendants Igwegbe and OneWest base their claim of title on the chain of title emanating from a deed from Dolly Tyler, as executor of the Estate of Roy D. Tyler.

Defendants Igwegbe and OneWest also have raised a triable issue of fact with respect to their affirmative defenses based upon equitable estoppel and laches. They contend that plaintiff was aware of the specific devise of the property to her and Seyna Dinko, Denise Waters and Douglas Waters pursuant to the will of Roy D. Tyler as early as August 18, 2006 when she executed an affidavit, apparently in support of the petition by Dolly Tyler for the probating of the will, or no later than by March 19, 2007, when her counsel made certain written inquiries of Mr. Torres regarding the Estate of Roy D. Tyler.

The Appellate Division, Second Department recently explained:

> "The essence of the equitable defense of laches is prejudicial delay in the assertion of rights (*see Matter of Schulz v State of New York*, 81 NY2d 336, 348 [1993]; *Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 318 [1956]; *Wilds v Heckstall*, 93 AD3d 661, 663 [2d Dept 2012]). 'To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant' (*Cohen v Krantz*, 227 AD2d 581, 582 [2d Dept 1996]; *see Meding v Receptopharm, Inc.*, 84 AD3d 896, 897 [2d

> Dept 2011]; *Dwyer v Mazzola*, 171 AD2d 726, 727 [2d Dept 1991]). In order for laches to apply to the failure of an owner of real property to assert his or her interest, 'it must be shown that [the] plaintiff inexcusably failed to act when [he or] she knew, or should have known, that there was a problem with [his or] her title to the property. In other words, for there to be laches, there must be present elements to create an equitable estoppel' (*Kraker v Roll*, 100 AD2d 424, 432-433 [2d Dept 1984] [citations omitted]). 'Equitable estoppel arises when a property owner stands by without objection while an opposing party asserts an ownership interest in the property and incurs expense in reliance on that belief. The property owner must inexcusably delay in asserting a claim to the property, knowing that the opposing party has changed his position to his irreversible detriment' (*Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 750 [2d Dept 2010] [internal quotation marks and citation omitted]; *see Wilds v Heckstall*, 93 AD3d at 664). Moreover, as the effect of delay may be critical to an adverse party, delays of even less than one year have been sufficient to warrant the application of the defense (*see Matter of Schulz v State of New York*, 81 NY2d at 348)" (*Stein v Doukas*, 98 AD3d 1026, 1028 [2d Dept 2012]).

In the August 18, 2006 affidavit, plaintiff expresses an awareness on her part that the will of Roy D. Tyler mentioned Denise Waters, Douglas Waters and Seyna Dinko as inheriting thereunder. It also appears that plaintiff was aware of the transfer of the subject premises no later than March 19, 2007, when her counsel made certain written inquiries of Mr. Torres regarding the Estate of Roy D. Tyler. In the letter dated March 19, 2007, plaintiff's counsel referred to having obtained a title search, and inquired about, among other things, the means by which the transfer to Fernandez was made in the absence of the signatures of plaintiff and the other specific devisees, and whether Dolly Tyler had known anything about the "flip" of the property from Fernandez to GSN Corp. Counsel for plaintiff also sought an accounting of all the assets and distributions of the Estate. The sale of the property from defendant GSN Corp. to defendant Igwegbe, with mortgage financing from defendant OneWest, took place a few weeks later on June 29, 2007.

Under such circumstances, summary judgment against defendants Igwegbe and OneWest is unwarranted. That branch of the motion by plaintiff for summary judgment against defendants Igwegbe and OneWest is denied.

With respect to the first and third affirmative defenses raised by defendants Igwegbe and OneWest in their answer, the complaint states a cause of action to quiet title, and plaintiff has established defendants Igwegbe and OneWest were not bona fide purchasers for value. Such defenses are without merit as a matter of law.

The Surrogate Court proceedings resulted in a settlement of the filed objections, and not a final judgment which necessarily decided the cause of action to quiet title or the issue of whether plaintiff remains an owner of the property (*see Ott v Barash*, 109 AD2d 254 [2d Dept 1985]). Thus, the thirteenth and fourteenth affirmative defenses asserted by defendants Igwegbe and OneWest based upon res judicata, and collateral estoppel are also without merit as a matter of law.

The second and tenth affirmative defenses are based upon documentary evidence, and prior action pending. Such defenses are legal conclusions unsupported by any factual allegations (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]). The twelfth affirmative defense, furthermore, merely states that the court has the power to fashion an equitable remedy. Such statement is true but does not constitute an affirmative defense to a quiet title action.

That branch of the motion by plaintiff to dismiss the affirmative defenses is granted to the extent of dismissing the first, second, third, tenth and twelfth affirmative defenses.

Dated: April 12 , 2013
D#48

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J.S.C.