

**Mottley v Walker**

2013 NY Slip Op 33942(U)

August 26, 2013

Supreme Court, Kings County

Docket Number: 4444/11

Judge: Larry D. Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26<sup>th</sup> day of August, 2013

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

-----X

PIERCE E. MOTTLEY, JR., as sole heir-at-law of  
PETER E. MOTTLEY,

Plaintiff,

- against -

KEVIN WALKER, SR., et al.,

Defendants.

-----X

Index No. 4444/11

2013 AUG 26 AM 7:50

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

1 - 2

Opposing Affidavits (Affirmations) \_\_\_\_\_

3, 4, 5

Reply Affidavits (Affirmations) \_\_\_\_\_

\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_

Other Papers \_\_\_\_\_

Upon the foregoing papers, plaintiff moves for an order, pursuant to CPLR 2221, 1) granting plaintiff Pierce E. Mottley, Jr., as sole heir-at-law of Peter (Percy) E. Mottley, leave to renew and reargue that part of this court's order dated December 10, 2012 which denied plaintiff's motion for an order, pursuant to CPLR 3215, granting plaintiff a default judgment against defendant, Kevin Walker, Sr. (Walker) and declaring that the purported deed from

Percy E. Mottley (Percy) to Walker dated January 11, 1996 is void or, alternatively, scheduling a framed issue hearing with respect to plaintiff's claim against Walker 2) granting leave to reargue that part of the order which granted the cross motions of defendants Elizabeth L. Calvin (Calvin), Wells Fargo Bank, N.A (WF) and Sovereign Bank (Sovereign) for summary judgment dismissing plaintiff's complaint or, alternatively, staying the motion pending a determination as to whether the deed is void and 3) granting leave to reargue that part of the order granting summary judgment to Calvin on her counterclaim for adverse possession.

Plaintiff commenced this action to void a certain deed to Walker on the ground of forgery and, pursuant to article 15 of the Real Property Actions and Proceedings Law (RPAPL), to compel determination of claims of the other parties to the real property located at 20 Lefferts Place in Brooklyn. Plaintiff alleges he is the sole heir of Percy, the deceased former owner of the subject property. According to a deed dated January 11, 1996 and recorded January 29, 1996, Percy conveyed title to the property to Walker. According to a deed dated February 20, 1998 and recorded April 10, 1998, Walker conveyed title to the property to Jam Properties, LLC (Jam). According to a deed dated March 22, 1999 and recorded August 17, 1999, Jam conveyed title to the property to Progress Equities, Inc. (Progress). According to a deed dated June 22, 1999 and recorded September 30, 1999, Progress conveyed the property to Calvin. Since receiving the deed from Progress, Calvin

encumbered the property with mortgages which are currently being held by WF and Sovereign.

In August 2000, Walker was arrested and charged with filing false deeds to eleven properties, including the subject property, and selling them or using them to procure mortgage loans. On September 15, 2000, the City of New York (City) recorded a declaration against the property stating that the City was made aware of the recording of the deed from Percy to Walker and “has been advised that the signature of the grantor may be forged.” The declaration stated that “[u]ntil such time as the alleged fraudulent conveyance is nullified, this affidavit shall serve as a notice to the public of a possible defect in the chain of title.” On March 5, 2001, Walker withdrew his plea of not guilty to Indictment 7150/2000 in Supreme Court, Kings County and entered a guilty plea.

On February 24, 2011, plaintiff commenced the instant action seeking to nullify the deed from Percy to Walker on grounds that it was a forgery, nullify all subsequent conveyances of the property and extinguish the WF and Sovereign mortgages. In her answer, Calvin interposed seventeen affirmative defenses, including adverse possession and statute of limitations, and two counterclaims against plaintiff to quiet title to the premises based on her deed and on the ground of adverse possession and for the imposition of an equitable lien.

By order dated December 10, 2012, this court denied plaintiff’s motion for a default judgment against Walker, granted the summary judgment motions of WF and Sovereign

dismissing plaintiff's complaint and further granted Calvin summary judgment on her counterclaim for adverse possession. With respect to that part of the order denying plaintiff a default judgment, this court determined that plaintiff failed to establish proof of the facts constituting his claim. The court noted that there was no affidavit of merit submitted by plaintiff himself and the complaint was verified only by plaintiff's attorney.

A motion for leave to renew must be based upon "new facts not offered on the prior motion that would change the prior determination" and must also contain "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; see *Bd. of Mgrs. of Anchorage Condominium v Haynia*, 103 AD3d 826, 827 [2013]).

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]; see *Matter of American Alternative Ins. Corp. v Pelszynski*, 85 AD3d 1157, 1158 [2011]). "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (*Mudgett v Long Is. R.R.*, 81 AD3d 614, 614 [2011] [internal quotation marks omitted]; see *E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2007]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues

previously decided, or to present arguments different from those originally presented (*see Haque v Daddazio*, 84 AD3d 940, 942 [2011]; *Mazinov v Rella*, 79 AD3d 979, 980 [2010]).

In its prior decision, this court denied granting a default judgment against Walker based on the absence of an affidavit of merit. The court noted that while a verified complaint may serve as an affidavit of merit for purposes of a motion for a default judgment, the complaint in this action was verified by plaintiff's attorney. A "complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215" (*Hazim v Winter*, 234 422 [1996]). Plaintiff seeks renewal of his prior motion for a default judgment against Walker based on the submission of a copy of a verified complaint in a prior action brought by Percy against Walker and Jam seeking a determination of rights to real property. Plaintiff argues that the compliant, which is verified individually by Percy, was not submitted on the prior motion because plaintiff was unaware of the action and had no reason to search the court records. Plaintiff states that he first became aware of the prior action when it was referred to in WF's reply papers.

However, even if the verified complaint by Percy can be considered "new facts," such cannot change the determination of the prior motion. CPLR 3215(f) provides that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit "*made by the party*" (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2009])(emphasis added). Insofar as plaintiff is seeking to

have Percy's verified complaint deemed an affidavit of merit, such cannot support a default judgment as Percy is not a party to the instant action.

Nonetheless, upon further review of the arguments and evidence submitted by plaintiff, including the documents pertaining to Walker's conviction stemming from his forging deeds to properties, including the subject property, this court believes that it mistakenly held plaintiff to an excessive standard of proof under the circumstances. "Some proof of liability is . . . required to satisfy the court as to the prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Joosten v Gale*, 129 AD2d 531, 535 [1987]). The court finds that the undisputed indictment, which references the subject property, to which Walker ultimately pleaded guilty is sufficient to establish proof of the facts constituting plaintiff's forgery claim and thus entitlement to a default judgment.

As a result, plaintiff's motion for reargument of that part of this court's order denying a default judgment against Walker is granted. Upon reargument, plaintiff's motion for a default judgment against Walker is granted.

Turning to that portion of plaintiff's motion to reargue the prior summary judgment motions of WF, Sovereign and Calvin, which were granted upon a finding that Calvin had established title to the subject property through adverse possession as a matter of law, this court finds that plaintiff has failed to make a sufficient showing that this court overlooked

or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision.

While plaintiff correctly argues that the mere recording of Calvin's deed is not sufficient to put plaintiff on notice of Calvin's hostile possession, Calvin specifically averred in her affidavit that she had a house sitter occupy the premises from the time of purchase, while renovations were being performed to the property, and that after six or seven weeks following her purchase of the property she moved into the building. Calvin further averred that when renovations were completed in September 1999 (more than ten years prior to the commencement of this action), she rented the top two floors to tenants. Thus, Calvin is not simply alleging that her hostile and exclusive possession is proven simply because she purchased the property and recorded a deed in her favor. The facts attested to by Calvin in her affidavit, which occurred more than ten years prior to the commencement of this action, should have put Percy and/or plaintiff on notice that the property was being possessed adversely.

The court does not find that overlooked or misapprehended facts or law with respect to its determination that Calvin occupied the property under a claim of right (i.e. reasonable belief that the property belonged to her). The declaration by the City of New York notifying of a possible forgery by Walker was not recorded by the City Register until after Calvin recorded her deed to the property. Significantly, whereas Calvin averred that she had no knowledge of any competing claim to title, there is no allegation or evidence offered by

plaintiff that Percy, plaintiff or anyone acting on there behalf took any steps to notify Calvin of their claim to the property in the ten years prior to the commencement of this action.

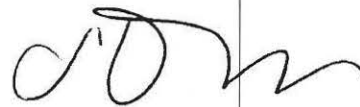
CPLR 212(a) provides that “[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action.” This section must be read together with RPAPL 311, which states that the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the legal title for ten years before the commencement of the action.

Since this court has found that Calvin established title to the property through adverse possession for the requisite statutory period, plaintiff’s RPAPL article 15 claims against Calvin, WF and Sovereign were time barred under CPLR 212(a) and RPAPL 311.

As a result, that part of plaintiff’s motion for reargument of this court’s decision granting summary judgment to WF, Sovereign and Calvin is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT

AUG 26 2013

2013 SEP - 5 AM 7:50

FILED

SEP - 5 2013



KINGS COUNTY CLERK'S OFFICE