

Barile v Cruz

2015 NY Slip Op 31993(U)

September 28, 2015

Supreme Court, Suffolk County

Docket Number: 12-3451

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 12-3451
CAL. No. 14-001000T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-26-15 (#009)
MOTION DATE 4-2-15 (#010)
ADJ. DATE 4-23-15
Mot. Seq. # 009 - MotD
010 - MD

-----X	:	
VICTORIA A. BARILE,	:	SOMER, HELLER & CORWIN, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	2171 Jericho Turnpike, Suite 350
	:	Commack, New York 11725
- against -	:	
	:	SWEENY & SWEENY
GRACE CRUZ f/k/a, GRACE BARILE,	:	Attorney for Defendant
	:	510 Broad Hollow Road, Suite 110
Defendant.	:	Melville, New York 11747
-----X	:	

Upon the following papers numbered 1 to 54 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13, 36 - 42 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 14 - 19, 43 - 52 ; Replying Affidavits and supporting papers 20 - 35, 53 - 54 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 2221 granting leave to renew that portion of her prior cross motion which sought summary judgment dismissing the defendant's counterclaims, which was denied as academic by order of this Court dated November 24, 2014, 2011, is granted and, upon renewal, is granted to the extent of dismissing the defendant's third counterclaim, and is otherwise denied; and it is further

ORDERED that the motion by the defendant for an order pursuant to CPLR 3211(a)(5) dismissing the complaint, deemed a motion for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, is denied.

Barile v Cruz
Index No. 12-03451
Page No. 2

The dispute between the parties arises out of competing claims to real property located at 61 Eastfield Lane, Melville, New York (the premises). It is undisputed that the defendant originally purchased the premises, that a number of years later she executed a deed transferring the premises to her son and his wife, the plaintiff, and that the plaintiff moved to Florida with her second husband. Shortly thereafter, her son and the plaintiff executed a deed to themselves (Deed) which purports to reserve “a life estate in favor of GRACE CRUZ, formerly known as GRACE BARILE which shall be unassignable and which shall automatically terminate upon the death of GRACE CRUZ.” After the death of her second husband, the defendant moved into an “accessory apartment” at the premises, and made modest monthly payments to her son and the plaintiff until her son passed away on June 3, 2010. Shortly thereafter, disputes between the plaintiff and the defendant arose as to the rights of the respective parties which have escalated to the point that it appears that they are incapable of living together under any circumstances.

This action was commenced by the filing of a summons and complaint on February 1, 2012. The defendant joined issue by the service of an answer dated March 13, 2012, which included a number of affirmative defenses and three counterclaims. As of right, the plaintiff served an amended complaint which was filed with the Clerk of the Court on March 27, 2012 (amended complaint). In her amended complaint, the plaintiff sets forth four causes of action. In the first and second causes of action, the plaintiff respectively seeks a declaration that the Deed which purports to reserve a life estate for the defendant in the premises is invalid, and a permanent injunction preventing the defendant from claiming or asserting any rights in the premises. In the third cause of action, the plaintiff seeks a declaration that the defendant is a month to month tenant of the premises. In the event that the Court declares that the Deed is valid, in the fourth cause of action the plaintiff seeks a declaration that the defendant is chargeable with the payment of her obligations as a life tenant, and seeks a money judgment for those items paid for by the plaintiff and her husband. Thereafter, the defendant served an amended answer to the plaintiff’s amended complaint which included her affirmative defenses but did not assert any counterclaims against the plaintiff.

In May 2014, the defendant moved for summary judgment dismissing the plaintiff’s first and second causes of action. The plaintiff cross-moved for summary judgment in her favor and to dismiss the defendant’s counterclaims. By order dated November 24, 2014, the Court denied the defendant’s motion and the plaintiff’s cross motion for summary judgment in her favor and dismissing the defendant’s counterclaims. In its prior order, the Court did not consider the merits of the defendant’s counterclaims, or the plaintiff’s entitlement to summary judgment thereon, as the amended answer did not include said counterclaims and the matter was deemed academic.

On or about December 17, 2014, the defendant moved by order to show cause for leave to serve a second amended answer on the ground that the three counterclaims asserted in her original answer had been omitted from her amended answer due to “clerical error.” The plaintiff cross-moved for certain relief, including leave to renew her cross motion for summary judgment dismissing the defendant’s counterclaims. By order dated January 13, 2015, the Court (Baisley, J.) granted the defendant’s motion, deemed the second amended answer served, and denied the plaintiff’s application for leave to renew her cross motion without prejudice to submitting a motion to the undersigned. Based upon the order granting the defendant leave to serve a second amended complaint, and the undisputed fact that the

parties completed discovery in this action addressing the issues raised in said counterclaims, leave to renew is granted.

In the first counterclaim, the defendant alleges that the Deed granted her a life estate in the premises, and that she is entitled to the exclusive right of possession, control and enjoyment thereof during her life. In the order dated November 24, 2014, the undersigned set forth the deposition testimony of the parties, and determined that there are “triable issues whether the plaintiff paid full consideration for the “purchase” of the premises, whether the defendant “paid” any consideration for the purported life estate in the Deed, and what was the agreement regarding the defendant’s ability “to stay” in the premises. That is, what was the intended scope of her right to occupy and possess the premises, if any.” In addition, based on the undisputed fact that the plaintiff and her husband owned the property in fee simple prior to executing the Deed, the undersigned determined that there is a triable issue of fact whether the “stranger to the deed” doctrine “is applicable herein. Said doctrine holds that a grantor cannot create a life estate in a party who does not have an ownership interest in the property (citations omitted).”

Having previously reviewed the evidence submitted by the parties relative to the prior motion and cross motion, and the re-submission of said evidence to the extent included herein, it is deemed unnecessary to restate the extensive summary of the adduced evidence set forth in the order dated November 24, 2014. Regardless, it is determined that the defendant’s first counterclaim is the obverse of the plaintiff’s first and second causes of action and the same triable issues which precluded the granting of summary judgment to either party previously work to preclude the plaintiff’s application to dismiss the instant counterclaim.

In the second counterclaim, the defendant alleges that the plaintiff has engaged in a systematic course of conduct to prevent the defendant from the lawful possession and use of the premises, and she seeks treble damages pursuant to RPAPL 853. Said statute, entitled “Action for forcible or unlawful entry or detainer; treble damages” provides:

If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after ... put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action ... against the wrong-doer.

It has been held that this statute is directed at unlawful evictions of tenants or other lawful occupants of property who have been in “actual physical possession” of the premises (*Golonka v Plaza at Latham LLC*, 270 AD2d 667, 704 NYS2d 703 [3d Dept 2000]; *see also Massare v The District Nardo*, 35 AD3d 1157, 830 NYS2d 395 [4th Dept 2006]). In her third cause of action, the plaintiff demands judgment declaring the defendant a tenant of the premises in the event the Deed is determined to be invalid. It is undisputed that the defendant was in possession of a portion of the premises at the commencement of this action, and the plaintiff has not alleged that said possession was unlawful. Depending on the outcome of the trial of this action, the defendant may be deemed a tenant of the premises or in lawful possession of a portion thereof. In the latter case, conforming the pleadings to the proof, the defendant might be entitled to rely upon RPAPL 713(10), which pertains when a party who is

Barile v Cruz
Index No. 12-03451
Page No. 4

lawfully entitled to possession of the premises and who is put out of it or kept out of it by force or unlawful means may recover regardless of any landlord and tenant relationship between the parties (*Markun v Weckstein*, 100 Misc 668, 166 NYS 736 [App Term, 1st Dept 1917]; *see also Friends of Yelverton, Inc. v. 163rd St. Improvement Council*, 135 Misc2d 275, 514 NYS2d 841 [Civ Ct, Bronx County 1986]).

Here, there are issues of fact as to the legal status of the defendant in occupying the accessory apartment should the finder of fact find that the Deed purporting to grant the defendant a life estate is invalid. Accordingly, that branch of the plaintiff's motion for summary judgment dismissing the defendant's second counterclaim for treble damages is denied.

In the third counterclaim, the defendant alleges that she is entitled to recover punitive damages based on the plaintiff's actions "which were unlawful and designed solely for the purpose of illegally preventing [the defendant] from the lawful possession, use, access and enjoyment of [the premises]." In moving to dismiss the second counterclaim, the defendant contends that the New York courts do not recognize an independent cause of action for punitive damages. It is well settled that there is no separate cause of action recognized for punitive damages, rather punitive damages flow from or attach to a substantive underlying cause of action (*see Rocanova v Equitable Life Assur. Socy. of the U.S.*, 83 NY2d 603, 612 NYS2d 339 [1994]; *Muniz v Mount Sinai Hosp. of Queens*, 91 AD3d 612, 937 NYS2d 244 [2d Dept 2012]). The defendant fails to address this issue in the papers submitted in opposition to the plaintiff's motion. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see McNamee Constr. Corp. v City of New Rochelle*, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; *Welden v Rivera*, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003)). Accordingly, that branch of the plaintiff's motion which seeks to dismiss the defendant's third cause of action is granted.

The defendant now moves pursuant to CPLR 3211(a)(5) to dismiss the plaintiff's first and second causes of action on the ground that they are barred by the statute of limitations, and upon such a determination in her favor, dismissing the plaintiff's three remaining causes of action on the ground that they are predicated on the first two causes of action. Because issue has been joined, and the statute of limitations defense is not one of the permissible grounds for a post-answer motion to dismiss (*see* CPLR 3211[e]), this branch of the motion should have been brought under CPLR 3212, and is deemed such a motion herein. However, the defendant has previously moved for summary judgment in this action.

It is well established that there is a "general proscription against successive summary judgment motions" *Auffermann, v Distl*, 56 AD3d 502, 867 NYS2d 527 [2d Dept 2008]; *see also Central Equities Credit Corp. v B & Northerly The properties.*, 66 AD3d 943, 888 NYS2d 107 [2d Dept 2009]). However, a successive motion for summary judgment does not violate the general proscription when it is based on a showing of newly discovered evidence or sufficient cause (*see Sutter v Wakefern Food Corp.*, 69 AD3d 844, 892 NYS2d 764 [2d Dept 2010]; *Oppenheim v Village of Great Neck Plaza, Inc.*, 46 AD3d 527, 846 NYS2d 628 [2d Dept 2007]).

Here, the defendant seeks to re-litigate the issue whether the plaintiff's first and second causes of action are time-barred, but fails to show newly discovered evidence or other good cause for making a

Barile v Cruz
Index No. 12-03451
Page No. 5

second summary judgment motion. The defendant does not posit a reasonable excuse why her affirmative defense, which was properly pled and subject to review by the Court in her initial motion, was not addressed or briefed in said motion. The defendant's motion, therefore, violates the general proscription against filing successive motions for summary judgment motions (*see Ferguson v Shu Ham Lam*, 74 AD3d 870, 903 NYS2d 101 [2d Dept 2010]; *Tolpygina v Teper*, 63 AD3d 722, 880 NYS2d 326 [2d Dept 2009]). Accordingly, the defendant's motion for summary judgment is denied.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: SEP 28 2015



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION