

Freed v Best

2016 NY Slip Op 30171(U)

January 15, 2016

Supreme Court, Suffolk County

Docket Number: 14-01247

Judge: Jr., Andrew G. Tarantino

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ORIGINAL
WHEN BLUF

INDEX No. 14-01247

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

Mot. Seq. # 010 - MD
011 - MD
012 - MD
013 - MD
014 - MG

-----X
TODD E. FREED and EDITH WEBSTER-FREED,

Plaintiffs,

- against -

BARBARA BEST and ZARKO SVATOVIC,

Defendants.
-----X

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The following motions are before this Court:

- 1) Seq. 010, by Defendant Svatovic to reconsider the Court's Order dated December 2, 2014, dismiss the July 5, 2014, Temporary Restraining Order, and his request for damages;
- 2) Seq. 011, which is actually a clerical mistake and merely a second recordation of motion seq. 010;
- 3) Seq. 012, by Defendant Best to compel Patricia Moore Esq. to answer certain questions at an examination before trial;
- 4) Seq. 013, by Defendant Best to compel Plaintiffs to serve necessary parties, and for an advisory decision as to whether Defendant is entitled to a trial by jury; and
- 5) Seq. 014, by Plaintiffs seeking to dismiss Defendant Best's first counterclaim.

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ORDERED that Defendant Svatovic's motions (seq. 010 & 011) to reconsider the prior Orders are denied; and it is further

ORDERED that Defendant Best's motion (seq. 012) to compel Patricia Moore Esq. to answer certain questions at an examination before trial is denied; and it is further

ORDERED that Defendant Best's motion (seq. 013) to compel Plaintiffs to join necessary parties pursuant to Real Property Actions and Proceedings Law (RPAPL) §1511 is denied; and it is further

ORDERED and ADJUDGED that Defendant Best's motion (seq. 013) for an advisory opinion regarding her right to a trial by jury is reserved by the Court until such time the final issues to be tried have been determined; and it is further

ORDERED and ADJUDGED that Plaintiffs' cross motion (seq. 014) for an Order dismissing the first counterclaim is granted upon the grounds that Defendants do not have standing to challenge the validity of the deed granting Plaintiff ownership of the subject parcel; and it is further

ORDERED that all parties are directed to appear for a Conference before the Court on **FEBRUARY 3, 2016 at 11:00AM.**

THE MOTIONS

Best seeks an Order (seq. 012) compelling Patricia Moore Esq. to answer certain questions at an examination before trial. According to Best, when the Freeds purchased the subject parcel in 2013, the Freeds were represented by Patricia Moore, Esq. Best alleges that prior to the Freeds signing the contract, the Freeds knew that there was an easement on what is referred to as Lot 12.2. Best also argues that the Freeds knew that their sellers did not own Lot 12.2. Best argues that the Freeds' attorney, Patricia Moore Esq., had communications with the sellers after which the sellers executed affidavits regarding the sellers' historical use and possession of Lot 12.2. Because those affidavits seem to have been relied upon by the Freeds in accepting a quit claim deed from the sellers for Lot 12.2, Best wants to inquire into the nature of those discussions. When Moore was asked at her deposition about her communications with attorney Loomie and the sellers, the Freeds' attorney objected to the line of questions asserting attorney-client privilege.

The Freeds opposed Best's motion. The Freeds relied upon the position that there is a common interest privilege that was created when the Freeds and the sellers joined together in the real estate transaction to support a common legal issue in anticipation of litigation. That common issue, apparently, was reliance upon the sellers' historical use and possession of Lot 12.2 to support a legal argument of adverse possession of Lot 12.2. The sellers then quitclaimed Lot 12.2 to the Freeds.

Next, Best moves (seq. 013) for an order compelling the Freeds to join necessary parties pursuant to RPAPL §1511, and also for an advisory opinion that a jury trial is mandated under CPLR §4101. Relying upon the Freeds' verified complaint which states "this action seeks a declaration that the Defendants have no interest in a certain parcel of real property" and that the Freeds are seeking to bar Defendants "and anyone acting under them and with them" from interfering with Plaintiffs' rights in the subject property, Best argues that the Freeds must name and serve each and every person who may benefit from the purported easement. In total, Best is seeking an Order directing the Freeds to name, locate and serve more than 20 additional persons. Best also points to the Freeds' second cause of action which alleges "Defendants have no interest or rights in the subject property".

The Freeds opposed Best's motion and cross moved (seq. 014) to dismiss Best's first counterclaim for failing to state a cause of action. The Freeds alleged that when they commenced this action they intentionally narrowed the claims against Best and Svatovic, specifically. The Freeds argued that it was Best's first counterclaim that represents a "vast expansion of the scope of this action beyond the limited claims and parties as the" Freeds have defined them. The Freeds pointed out that Best was seeking to settle the rights of all parties who may have an interest in the subject property "though she has done nothing to date to name and join these additional parties". The Freeds posited that Best should be the party to name and serve those additional persons. The Freeds pointed out that in their verified reply to Best's Answer and Counterclaim they asserted the defense that Best failed to then name necessary parties thereby placing Best on notice.

PRIOR PLEADINGS

This action was commenced by filing a summons and complaint on January 17, 2014. The Freeds asserted three (3) causes of action, summarized as follows:

FIRST: Best and Svatovic have harassed the Freeds and therefore seek injunctive relief enjoining Best and Svatovic from interfering with the Freeds' rights in the property;

SECOND: Best and Svatovic claim a right to use a "private road" and that Best and Svatovic have no interest or rights in the property;

THIRD: Best and Svatovic have intentionally and wrongfully entered onto the Freeds' property and have interfered with the Freeds' rights of possession.

Best served and filed a verified answer with counterclaims. First, Best alleged the following affirmative defenses:

- 1) the complaint fails to state a claim upon which relief may be granted,
- 2) the claims are barred by the doctrine of laches,
- 3) the claims are barred by the doctrine of statute of limitations,
- 4) the claims are barred by the doctrine of unclean hands,
- 5) the [Freeds] do not have standing to bring the action because they have no ownership interest in Lot 12.2,
- 6) the claims are barred by the doctrine of estoppel,

- 7) the claims are barred because the deeds to the Plaintiffs do not convey any ownership interest in Lot 12.2,
- 8) the claims are barred pursuant to a written easement, and
- 9) the claims are barred by virtue of an easement by prescription.

As her first counterclaim, Best sought a declaratory judgment declaring void the deeds conveying Lot 12.2 to the Freeds and that the Freeds and all persons claiming under them are forever barred from all claims to an interest in Lot 12.2. Best also counterclaimed for prima facie tort, abuse of process, sanctions, slander, and easement by prescription. Those additional counterclaims are not raised in the motions.

Plaintiff filed a verified reply raising, among many other issues, that the Defendant lacks standing to bring her claims.

ANALYSIS

Clearly, this case has become one which has mushroomed. What began as a complaint by the Freeds seeking to prevent Svatovic from harassing them on their property has expanded to Best attempting to set aside deeds to real property against which she was never an abutting property owner. It is the Court's intention to limit the issues in this action by deciding these motions.

Real Property Actions and Proceedings Law (RPAPL) §1501 defines who may maintain an action. It states, in pertinent part that

Where a person claims an estate or interest in real property [...] such person [...] may maintain an action against any other person [...] to compel the determination of any claim adverse to that of the plaintiff which the defendant makes or which it appears from the public records, or allegations of the complaint, the defendant might make [...]

RPAPL §1511 describes serving additional parties, as follows:

In an action brought under this article, the person in possession shall be made a party to the action, and when such person claims the right of possession, or an interest in the real property, under another, such other person shall also be made a party.

Where it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgment, the court, upon application of such person, or of any party to the action, or on its own motion, may direct that such person be made a party.

RPAPL §1521 defines the judgment to be issued in such an action. It states, in pertinent part, that

Final judgment in the action shall declare the validity of any claim to any estate or interest established by any party to the action. That judgment shall also declare that any party's

claim to an estate or interest in the property has been judged invalid, and every person claiming under him, by title accruing after the filing of the judgment-roll, [...] be forever barred from asserting such claim to an estate or interest the invalidity of which is established in the action [...]

The execution and recording of a deed raises a presumption that the deed was validly delivered. *Williams v. Ross*, 277 A.D.2d 776, 716 N.Y.S.2d 756 (3d Dep't 2000). Where standing is put into issue by a party against the other, the other must prove its standing in order to be entitled to relief. *YMJ Meserole, LLC v 98 Meserole Street, LLC*, 133 A.D.3d 848, 20 N.Y.S.3d 407 (2d Dep't 2015). A party has standing where it has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request. *Government Employees Ins. Co. v. RLI Ins. Co.*, 133 A.D.3d 819, 20 N.Y.S.3d 411 (2d Dep't 2015). An argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived. *Onewest, F.S.B. v. Goddard*, 131 A.D.3d 102, 817 N.Y.S.3d 142 (2d Dep't 2015).

The court first addresses the issue of Best's standing in her first counterclaim. The counterclaim seeks to declare invalid certain *deeds* filed in favor of the Freeds. First, there is no dispute that neither Best, nor Svatovic, appear in the chains of title of the subject parcels, neither owning, nor ever having owned, a fee interest in the parcels, either individually or through another. Best's only argument is that there might exist an easement over Lot 12.2 through which she has a right to traverse Lot 12.2. The Court finds a distinct difference between whether an easement exists and whether a deed should be declared invalid. The law is clear that where Best's standing was placed in issue, Best had an obligation to establish her standing to challenge the validity of those deeds. The validity of the quitclaim deed is an issue between the Freeds and any owners of land abutting the quitclaimed parcel. Best neither has, nor had, privity in that transaction. Stated another way, if the owner of the abutting parcel quitclaimed Lot 12.2 to the Freeds, Best still would not be in privity with that transaction to challenge the transfer of the fee title. The Court explored further what harm Best may suffer if she were not permitted to litigate the issue of the validity of the subject deeds. Again, frankly, the court could find none. The right-of-way/easement, according to the parties, may or may not exist on the subject parcel through the established chain of title, whether the parcel would have continued to have been owned by the prior owner, or by the Freeds. There is a line of cases alluding to the confusion between "lack of standing" and "failing to state a cause of action". Where an application was made under one theory, the courts have ruled in reliance upon the other. However, whether it was under the theory of "lack of standing" or "failing to state a cause of action", the result was the same. This Court would hold the same under the Plaintiffs' theory of "failing to state a cause of action" and would dismiss the first counterclaim. Best never was a titled fee owner of Lot 12.2, nor of any real property abutting Lot 12.2, and Best failed to demonstrate any privity giving her a right to challenge the validity of the deeds to the Freeds.

Having dismissed the first counterclaim, Best's motion to compel Patricia Moore Esq. to answer questions at an examination before trial can be resolved without addressing the issue of privilege, or the doctrine of common interest. Moore's testimony only goes to the execution of affidavits that purportedly support the Freeds' claims for adverse possession of Lot 12.2, not whether an easement exists on Lot 12.2. And the Freeds have made no claim in this action to

quiet title by adverse possession, but base their ownership upon a written instrument. Accordingly, Moore's further testimony on that issue is immaterial. Additionally, the Court would deny Best's application upon the grounds that once the subject affidavits by the sellers were signed, what may or may not have been discussed prior to those affidavits became immaterial.

The third component of the subject motions is to determine whether the Freeds or Best should be directed to serve "necessary" parties. The Court holds that all necessary parties have been named in the current litigation. First, the complaint did not seek to render the easement void; the complaint was narrowly tailored against Best and Svatovic, specifically, and sought an injunction against only them. Next, it was Best who expanded the scope of this action by asserting claims as though she had a fee interest in Lot 12.2 which undisputedly she did not own, and her demanded relief would affect rights of other persons. Had the Court not dismissed Best's first counterclaim, it would have been Best's counterclaim that would have required additionally named parties.

The Court holds similarly under RPAPL §1521. That statute clearly states that the final judgment would only pertain to the current Defendants, the determination of which could not be used against anyone not a party. Here again, the Freeds carefully sought injunctive relief against only Best and Svatovic which have no impact on any other person. The issue here does not require additional named parties.

Best's case law was inapposite to the instant action. In *Sorbello v Birchez Assoc., LLC*, 61 A.D.3d 1225, 876 N.Y.S.2d 789 (3d Dep't 2009), abutting property owners were directed by the Court to be added because those individuals could be adversely affected by the outcome of the action. However, that case involved an action to quiet title by adverse possession which could have changed other abutting owners of their right to use the private road. There is no claim for adverse possession in this action. Similarly, in *Dunkin Donuts of N.Y., Inc. v Mid-Valley Oil Co., Inc.*, 14 A.D.3d 590, 789 N.Y.S.2d 204 (2d Dep't 2005), that action was to quiet title through adverse possession wherein Plaintiff failed to name the current owner of the parcel in dispute. Again, the Freeds claim ownership by virtue of a written instrument. Lastly, *Mykoff v Rubenfeld*, 149 A.D.2d 574, 540 N.Y.S.2d 266 (2d Dep't 1989) is factually dissimilar in that the litigant was attempting to alter the nature of an easement to which the co-owners of the easement might object. The instant action is not seeking a declaratory judgment to alter the easement, but a declaratory judgment enjoining Best and Svatovic from interfering with the Freeds property rights. A fine line though it may be, but one that shall be kept based upon the current pleadings.

Svatovic's motion to reconsider the Court's prior Orders is denied. Svatovic has appeared self represented in this action, the Court has taken every step to ensure that Svatovic has had an opportunity to be heard. Since August 2014, every conference has been on the record in open court where Svatovic has begged the Court to accept his documentary evidence to prove the Plaintiffs are wrong. The Court has repeatedly explained to Svatovic that a trial is required to determine the facts, and that his arguments will best be heard at the trial. In his motion to reconsider, Svatovic again puts forward "his" true and accurate records and demands the Court rule in his favor. In as much as there are temporary Orders in place maintaining the *status quo* until trial, the Court is not persuaded to grant Svatovic's application on reargument.

Accordingly, it is hereby

ORDERED that Defendant Svatovic's motions (seq. 010 & 011) to reargue the prior Orders are denied; and it is further

ORDERED that Defendant Best's motion (seq. 012) to compel Patricia Moore Esq. to answer certain questions at an examination before trial is denied; and it is further

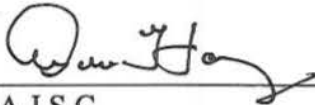
ORDERED that Defendant Best's motion (seq. 013) to compel Plaintiffs to join necessary parties pursuant to RPAPL §1511 is denied; and it is further

ORDERED and ADJUDGED that Defendant Best's motion (seq. 013) for an advisory opinion regarding her right to a trial by jury is reserved by the Court until such time as the final issues to be tried have been determined; and it is further

ORDERED and ADJUDGED that Plaintiffs' cross motion (seq. 014) for an Order dismissing the first counterclaim is granted upon the grounds that Defendants do not have standing to challenge the validity of the deeds executed in favor of the Plaintiffs; and it is further

ORDERED that all parties are directed to appear for a Conference before the Court on **FEBRUARY 3, 2016 at 11:00AM.**

Dated January 15, 2016



A.J.S.C.