

Coney Realty LLC v Kings Hwy. Printers Inc.
2017 NY Slip Op 31523(U)
July 18, 2017
Supreme Court, Kings County
Docket Number: 502375/13
Judge: Larry D. Martin
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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 30th day of June 2017.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

-----X
CONEY REALTY LLC,

Plaintiff,

- against -

Index No. 502375/13

KINGS HIGHWAY PRINTERS INC., 2209 CONEY
ISLAND AVE, LLC, SS2209 LLC, and JB2209, LLC,

Defendants.
-----X

The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

1-3, 4-7

Opposing Affidavits (Affirmations)_____

8 9

Reply Affidavits (Affirmations)_____

_____Affidavit (Affirmation)_____

Other Papers_____

Plaintiff Coney Realty LLC (Coney Realty) moves for an order, pursuant to CPLR – 2221 (d), granting Coney Realty leave to reargue the Decision and Order, dated September 22, 2016 (September 22, 2016 Order), which, among other things, (1) granted defendants Kings Highway Printers, Inc. (Kings Highway Printers), SS 2209 LLC (SS2209) and JB 2209, LLC (JB2209)'s cross motion to dismiss the amended complaint against Kings Highway Printers, SS2209 and co-defendant 2209 Coney Island Avenue, LLC (2209 Coney

Island Ave)¹, and (2) granted JB2209's request for leave to serve an amended answer to the amended complaint in order to assert a counterclaim for adverse possession; and upon reargument, modifying the September 22, 2016 Order and denying the relief previously granted with respect to defendants Kings Highway Printers, SS2209, JB 2209 and 2209 Coney Island Ave. Lastly, plaintiff also moves, pursuant to CPLR 2004, to extend the time to file the note of issue to sixty (60) days after entry of a decision and order regarding the pending motion.

Defendants Kings Highway Printers, SS2209 and JB2209 (herein the defendants) oppose plaintiff's motion, and cross-move for an order (1) pursuant to CPLR 3107 and 3124, compelling Florence Edelstein, a member of plaintiff, to appear and give testimony at an oral deposition, and upon her failure to do so, for sanctions pursuant to CPLR 3126, including precluding Florence Edelstein, Michael Edelstein or Gamliel Oziel from testifying in this case and/or dismissing the complaint, and (2) for an award of costs in the sum of \$2,250.00 to reimburse defendants for costs incurred in taking the deposition of David Edelstein, a person produced by plaintiff in response to the notice to take oral deposition who was neither a member of plaintiff nor a person in possession of knowledge of the relevant facts in this case.

On March 29, 2017, the Court issued an order indicating that plaintiff's motion was taken on submission. With respect to defendants' cross motion, the Court denied defendants'

¹Defendant 2209 Coney Realty Ave, LLC, is pro se, and has not appeared in this action.

request for reimbursement of all costs attendant to David Edelstein's depositions and for sanctions in its entirety, and the Court ordered plaintiff to (1) produce Florence Edelstein for deposition within 60 days following service of the Notice of Entry of the Court's decision of plaintiff's pending motion for leave to reargue, and (2) provide defendants' counsel with Gamliel Oziel's address, to the extent known, within 20 days of service of the Notice of Entry of the Court's decision of plaintiff's pending motion. The Court now turns to plaintiff's motion for leave to reargue and for an extension of time to file the note of issue.

Discussion²

Plaintiff's Motion to Reargue

Plaintiff seeks leave to reargue that aspect of the Court's September 22, 2016 Order which granted defendants' cross motion to (1) dismiss the complaint as asserted against Kings Highway Printers, SS2209, and 2209 Coney Island Ave., and (2) amend defendants' answer to add a counterclaim for a declaratory judgment declaring the 2207 Rear Space to belong to defendant JB2209 based upon adverse possession on the grounds that the Court overlooked and failed to address plaintiff's arguments in opposition to defendants' cross motion. Specifically, plaintiff cites to page 12 of the September 22, 2016 Order, wherein the Court states, "[P]laintiff does not oppose defendants' request for dismissal and concedes that there is no surprise directly resulting from defendants' delay in serving such an amendment. Plaintiff also concedes that the amended complaint does not seek any relief against these

²The Court refers to its prior decisions and orders for a full recitation of the facts underlying this action.

defendants.” In addition, in regards to defendant JB2209's request for leave to serve an amended answer, plaintiff cites to the September 22, 2016 Order where it states that “Plaintiff does not oppose defendants’ request [to serve an amended answer].” Accordingly, plaintiff requests that the Court grants plaintiff’s motion for leave to reargue the September 22, 2016 Order, and upon reargument, modify the September 22, 2016 Order and deny both (1) defendants’ request for dismissal of the amended complaint against Kings Highway Printers, SS2209 and 2209 Coney Island Avenue, and (2) defendants’ request for leave to serve an amended answer.

Defendants oppose plaintiff’s motion, arguing that the Court considered plaintiff’s papers. In support, defendants refer to recitation of papers “read herein” listed on page one of the September 22, 2016 Order, which includes plaintiffs’ respective papers. In the alternative, in the event the Court grants reargument, defendants argue that the September 22, 2016 Order should be adhered to on the ground that the Order dismissing the complaint as to all of the defendants other than JB2209, and granting leave for defendants to amend the answer for JB2209 was correct.

A motion for reargument, pursuant to CPLR 2221 (d)(2), is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision (*see Carrillo v PM Realty Group*, 16 AD3d 611 [2005]). It is well settled that motions for reargument are addressed to the sound discretion of the court which decided the prior motion (*see e.g. Weiss*

v Fire Extinguisher Svcs. Co., 83 AD3d 822.[2011]; *Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654 [2007]; *Howell Co. v S.A.F. La Sala*, 36 AD3d 653, 654 [2007]; *McGill v Goldman*, 261 AD2d 593, 594 [1999]).

The Court, upon review of the papers, grants reargument of the September 22, 2016 Order, and a discussion of the merits of plaintiff's arguments in opposition to defendants' cross motion is set forth below.

Defendants' Prior Cross Motion

Defendants moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint against Kings Highway Printers, SS2209, and 2209 Coney Island Ave. As set forth in the September 22, 2016 Order, defendants argue that the amended complaint should be dismissed against SS2209 because: (1) it no longer has any interest in the 2209 Building as it has conveyed title to JB2209; (2) it defaulted in this action and no default was taken against it within one (1) year of the commencement of this action; and (3) the amended complaint does not seek any relief against SS2209. Defendants also assert that 2209 Coney Island Ave no longer has any interest in the subject premises, having lost the property in the Foreclosure Action.

Likewise, defendants argue that the amended complaint against Kings Highway Printers must be dismissed as it no longer has any interest in the 2209 Building as it has turned over and surrendered possession of the premises to JB2209 in January 2016.

At the outset, plaintiff argues that defendants' cross motion seeking dismissal pursuant to CPLR 3211(a)(1) and (7) should be denied based upon the Court's December 19, 2013 decision and order, which denied defendant SS2209's previous application for dismissal. Plaintiff points out that the December 19, 2013 Order stated that "SS2209 [did] not proffer any documentary evidence to utterly refute Coney Realty's factual allegations, [] among other things, that the 2207 Rear Space is part of the 2207 Building and accordingly belongs to Coney Realty." Plaintiff also refers to the Court's denial of defendant SS2209's request for dismissal under CPLR 3211(a)(7) on the grounds that "the allegations set forth in the complaint state valid causes of action for declaratory relief." According to plaintiff, defendant SS2209's present application for dismissal of the amended complaint is nothing more than a second attempt to obtain identical relief which the Court previously denied.

In addition, plaintiff contends that defendants' request for dismissal pursuant to CPLR 3211(a)(1) must be denied because they have failed to submit any documentary evidence to warrant such dismissal. In this regard, plaintiff states that defendants' mere submission of the respective deeds for the 2207 and 2209 Buildings, as well as a survey of same, is wholly inadequate, as the documents do not resolve any of the factual issues in this action.

With respect to defendants' request for dismissal of the amended complaint pursuant to CPLR 3211(a)(7), plaintiff asserts that it has sufficiently pled causes of action against Kings Highway Printers, SS2209 and 2209 Coney Island Ave. First, plaintiff argues that merely because SS2209 purportedly no longer has "any interest in 2209 Coney" does not

necessarily warrant dismissal of the complaint. According to plaintiff, SS2209 previously had an interest in the 2207 Rear Space and may ultimately be liable to plaintiff for use and occupancy (and other damages) in regard to its prior interest in same.

Similarly, plaintiff maintains that it has sufficiently pled causes of action against Kings Highway Printers as it relates to Kings Highway Printers' prior interest and prior unlawful occupancy of the 2207 Rear Space. Plaintiff contends that the fact that Kings Highway Printers purportedly no longer has any interest in the 2209 Building, and the 2207 Rear Space, "having turned over and surrendered possession to its premises" to JB2209, is not a sufficient basis to warrant dismissal of the amended complaint. Plaintiff points out that Kings Highway Printers previously rented out and occupied the 2207 Rear Space during a relevant time period, i.e., subsequent to the purported revocation of an oral license in July 2012, until January 2016, and may be ultimately liable to plaintiff for use and occupancy (and other damages) due to its prior occupancy of the 2207 Rear Space.

Lastly, plaintiff argues that it has sufficiently pled causes of action against 2209 Coney Island Ave. According to plaintiff, merely because 2209 Coney Island Ave. relinquished title or possession of the 2209 Building is not a sufficient basis to warrant the dismissal of the amended complaint. In this regard, plaintiff reiterates it's position that 2209 Coney Island Ave. maintained an interest in the 2207 Rear Space during a relevant time period., i.e., subsequent to purported revocation of a license in July 2012, and therefore may

ultimately be liable to plaintiff for use and occupancy (and other damages) due to its prior occupancy of the 2207 Rear Space.

Moreover, plaintiff argues that counsel for the moving defendants has not appeared on behalf of defendant 2209 Coney Island Ave. in this action, and it is improper for counsel of the defendants to seek the dismissal of the amended complaint against co-defendant 2209 Coney Island Ave. Specifically, plaintiff asserts that counsel for the moving defendants is not authorized to act on 2209 Coney Island Ave.'s behalf, and thus the Court should deny the request for dismissal against it.

In reply, defendants assert that plaintiff concedes that the amended complaint does not seek any relief against these defendants. Defendants also reiterate their position that the relief sought by plaintiff - a declaration that defendants do not possess the 2207 Rear Space, and that it is the lawful owner of said space - can only be obtained against the party in title or occupancy, i.e., JB2209.

A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint based on documentary evidence is granted when the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively disposing of plaintiff's claim (*see Ader v Guzman*, 135 AD3d 669 [2016]; *Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724 [2016], *citing 25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.* 127 AD3d 850 [2015]). The documentary evidence by the movant must be "unambiguous, authentic, and undeniable"

(*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713 [2012], quoting *Grandada Condominium III Assn. v Palomino*, 78 AD3d 996 [2010]).

Here, the documentary evidence submitted by the moving defendants, in the form of respective deeds of 2207 and 2209 Buildings, along with a survey of the Buildings, does not utterly refute the plaintiffs' allegations, and thus, fails to conclusively establish a defense as a matter of law.

A motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action is granted when, affording the pleading a liberal construction and accepting all facts as alleged in the pleading to be true, the movant establishes that plaintiff's claim fails to fit within any cognizable legal theory (*see Sinagra v. City of New York*, 127 AD3d 729 [2015] citing *Breytman v. Olinville Realty, LLC*, 54 AD3d 703 [2008]). With respect to declaratory judgment actions, where the "material allegations of the complaint" are effectively "admitted," resulting in "no questions of fact [regarding the controversy]" (*Hoffman v. City of Syracuse*, 2 NY2d 484, 487 [1957]), then a motion to dismiss for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (*Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2011], quoting Siegel, N.Y. Prac. § 440, at 745 [4th ed. 2005]; *see German Masonic Temple Assn. v. City of New York*, 279 NY 452 [1939]; *Washington County Sewer Dist. No. 2 v. White*, 177 AD2d 204 [1992]). In contrast, "if the record before the motion court is insufficient to resolve all factual issues such that the rights of the parties

cannot be determined as a matter of law, a declaration upon a motion to dismiss is not permissible” (*Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 AD3d 1148 [2011]; *see also Nadel v. Costa*, 91 AD2d 976 [1983]; *Verity v. Larkin*, 18 AD2d 842 [1963]). However, on a motion to dismiss the complaint for failure to state a cause of action, the primary question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment (*Law Research Service, Inc. v Honeywell, Inc.*, 31 AD2d 900 [1969]).

CPLR 3001 expressly provides that a court may render a declaratory judgment “as to the rights and other legal relations of the parties to a justiciable controversy” for the primary purpose of “stabiliz [ing] an uncertain or disputed jural relationship with respect to present or prospective obligations” (*Chanos v. MADAC, LLC*, 74 AD3d 1007 [2010]). To constitute a justiciable controversy, there must be an actual dispute “involving substantial legal interest for which a declaration of rights will have some practical effect” (*Chanos*, 74 AD3d at 1008; *see also Premier Restorations of New York Corp. v New York State Dept. Of Motor Vehicles*, 127 AD3d 1049 [2015]).

The court was correct in granting that branch of the moving defendants’ motion seeking dismissal of the causes of action for declaratory relief against defendants SS2209 and Kings Highway Printers. There is no justiciable controversy to resolve between plaintiff and these defendants. Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (see CPLR 3001). Here, both

defendants respectively no longer have any legal interest in the present dispute for which a declaration of rights will have a practical effect. Defendant SS2209, who was prior owner of the 2209 Building pursuant to a Referee's Deed issued at the conclusion of the Foreclosure Action, transferred all of its fee interest in the 2209 Building to JB2209 pursuant to a bargain and sale deed, dated December 27, 2013, and recorded on February 4, 2014. Similarly, defendant Kings Highway Printers is no longer in possession of the 2207 Rear Space, as it has turned over and surrendered possession of the 2207 Rear Space in January 2016 to JB2209. As plaintiff's complaint seeks a declaration that plaintiff is the lawful owner of the 2207 Rear Space, the relief requested by plaintiff can only be obtained against a party in possession of said space, namely, JB2209. As SS2209 and Kings Highway Printers no longer have any legal interest in the 2207 Rear Space, they no longer have a stake in the outcome of this dispute (*see Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 AD3d 253 [2006]). Accordingly, there is no longer a "justiciable controversy" within the meaning of CPLR 3001 (*see Matter of Ideal Mut. Ins. Co.*, 174 AD2d 420 [1991]).

Plaintiff's contention that both SS2209 and Kings Highway Printers are necessary, interested and indispensable parties to the action because they "may ultimately be liable to plaintiff for use and occupancy (and other damages)" for their respective prior interest in the 2207 Rear Space is without merit. Plaintiff's amended complaint seeks a declaration that defendants have not obtained possession over the 2207 Rear Space via adverse possession, and a declaration that it is the lawful owner of the 2207 Rear Space. Plaintiff does not assert

causes of action against SS2209 and Kings Highway Printers for monetary damages stemming from their previous use and occupancy of said space. The Court is not empowered to “determine abstract, moot, hypothetical, remote or academic questions.” (3 Weinstein-Korn-Miller, NY Civ. Prac., para. 2001.03). “There must be a genuine, concrete dispute between adverse parties, not merely the possibility of hypothetic, contingent, or remote prejudice to the plaintiff (*Premier Restorations of New York Corp. v New York State Dept of Motor Vehicles*, 127 AD3d 1049 [2015]; *see also Fragoso v Romano*, 268 AD2d 457 [2000]). Accordingly, defendants’ cross motion to dismiss the complaint against SS2209 and Kings Highway Printers is granted.

The court, however, erred in granting that portion of the September 22, 2016 Order granting defendants’ request to dismiss the complaint against 2209 Coney Island Ave. 2209 Coney Island Ave. no longer has any legal interest in the 2207 Rear Space, and therefore no longer has any stake in the outcome of this dispute. However, counsel for the moving defendants seeks relief on behalf of a defendant that it is not authorized to represent. Accordingly, the September 22, 2016 Order must be amended so as to deny that aspect of defendants’ cross motion seeking an order dismissing the amended complaint against co-defendant 2209 Coney Island Ave.

Defendants’ Request to Amend the Answer

Defendants also cross-moved for leave to serve an amended answer to the amended complaint, and annexes the amended answer to their papers. Specifically, defendants seek

to amend their answer to add a counterclaim for a declaratory judgment declaring the 2207 Rear Space belongs to defendant JB2209 based upon adverse possession.

In opposition, plaintiff contends that defendants should not be permitted to file an amended answer on behalf of JB2209 to assert a counterclaim for adverse possession because it would be unduly prejudicial to plaintiff. According to plaintiff, defendants have repeatedly prevented plaintiff from prosecuting this matter in a timely manner. Plaintiff asserts that defendants' request to file an amended answer approximately a year and half after the filing of the amended complaint is merely another attempt to further delay a resolution of this action. Plaintiff also argues that defendants have failed to assert any reasonable basis to justify the necessity of filing an amended answer with a counterclaim for adverse possession. In this regard, plaintiff states that defendants' request does not contain any newly-obtained documentation or evidence to support their request to file an amended answer at this late juncture of the litigation. Lastly, plaintiff claims that defendant JB2209 would not be able to satisfy all of the necessary elements to establish a claim for adverse possession. Specifically, plaintiff argues that JB2209 cannot demonstrate that defendants' use and occupancy of the 2207 Rear Space was "hostile and under a claim of right." According to plaintiff, at no time prior to plaintiff's revocation of a license in July 2012 did any of the defendants occupy the 2207 Rear Space in a "hostile" manner under a "claim of right."

In reply, defendants argue that plaintiff does not plead surprise, as a claim for adverse possession has already been asserted as an affirmative defense, but that plaintiff merely

claims delay. According to defendants, all discovery, including depositions, has not yet been completed, and the statute of limitations to assert a claim of adverse possession has not run. Defendants also maintain that they could commence a separate action for adverse possession and subsequently seek to consolidate said action with this action; however, it would be in the interest of judicial economy to allow for the amendment of the answer at this juncture. With respect to plaintiff's contention that defendants' request to amend their answer was not raised earlier, defendants point out that SS2209 purchased the 2209 Building at auction and SS2209 only became aware of the issue with respect to the 2207 Rear Space during the course of these proceedings. Defendants state that JB2209 only recently discovered an action to foreclose upon a mechanic's lien in 1980 for work done at the 2207 Building, and they claim that defendants reviewed the court file, which contained information relevant to the history of these buildings and the claims being asserted herein, indicating that the 2207 Rear Space may possibly have been added to the 2209 Building even earlier than 1988.

The Court was correct in its September 22, 2016 Order granting defendants leave to serve an amended answer. Leave to serve an amended answer should be freely granted unless the amendment sought is palpably improper, insufficient as a matter of law, or unless surprise directly results from delay in serving such amendment (*Hunt v Godesky*, 189 AD2d 854 [1993]; *Degradi v Coney Island Medical Group*, 172 AD2d 582 [1991]). Here, the Court finds that there is no prejudice to plaintiff because it was well aware of the facts underlying the requested amendment. Indeed, plaintiff's amended complaint (par. 13)

specifically refers to JB2209's intention to bring an adverse possession claim in an attempt to gain legal ownership of the 2207 Rear Space. Mere lateness is not a barrier to amendment, and must be coupled with significant prejudice to plaintiff (*see Hunt v Godesky*, 189 AD3d 854 [1993]; *Edenwald Contracting Corp. v City of New York*, 60 NY2d 957 [1983]). The additional cause of action has not resulted in any surprise or prejudice to plaintiff, and plaintiff has failed to demonstrate that the proposed amendment is palpably insufficient or patently devoid of merit (*see, e.g., Giunta's Meat Farms, Inc. v. Pina Constr. Corp.*, 80 AD3d 558 [2011]; *see also Degradi v Coney Island Medical Group*, 172 AD2d 582 [1991]).

The court has considered the respective parties' remaining contentions and finds them to be without merit. Accordingly, the September 22, 2016 is modified only to the extent that defendant's request to dismiss the amended complaint as to 2209 Coney Island Ave. is denied.

Plaintiff's Request for an Note of Issue Extension

In light of discovery that is outstanding, including non-party depositions, plaintiff's request for an extension of time to file the note of issue in accordance with CPLR 2004 is granted. Plaintiff's time to file the note of issue is extended to September 4, 2017.

In conclusion, plaintiff's motion for leave to reargue is granted and, upon reargument, the Court's September 22, 2016 is modified only to the extent that it is

ORDERED that defendants' request for dismissal of the complaint against 2209 Coney Island Ave. is denied; and it is further

ORDERED that plaintiff's time to file the note of issue is extended to September 5, 2017.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

JUN 30 2017

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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