Abakporo v Abakporo
2018 NY Slip Op 30494(U)
March 29, 2018
Supreme Court, Queens County
Docket Number: 9161/17
Judge: Allan B. Weiss

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

ROSEMARY ABAKPORO,

Plaintiff,

-against-

THEOPHINE ABAKPORO, ERIC ABAKPORO and TUTHILL FINANCE,

Defendants.

Index Number: 9161/17

Motion Date: 3/5/18

Motion Seq. No. 1

The following papers numbered 1 to 7 read on this motion by defendant Tuthill Finance for an order, inter alia, dismissing the complaints against it and on this cross motion by plaintiff Rosemary Abakporo for, inter alia, a nunc pro tunc order deeming her second amended complaint properly served.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits	2
Answering Affidavits - Exhibits.....	3-6
Reply Affidavits.....	7
Memoranda of Law	

Upon the foregoing papers it is ordered that the the motion by defendant Tuthill Finance is granted.

The Clerk of Queens County is directed to cancel all notices of pendency filed by plaintiff Rosemary Abakporo against premises known as 179-15 Grand Central Parkway, Jamaica, New York.

The cross motion by plaintiff Rosemary Abakporo is denied.

I. The Plaintiff's Allegations

Plaintiff Rosemary Abkaporo alleges the following:

Plaintiff Rosemary Abakporo (Rosemary), the wife of defendant Eric Abakporo (Eric) and the sister-in-law of defendant Theophine Abakporo (Theophine) , is the equitable owner of premises known as 179-15 Grand Central Parkway, Jamaica, New York (the subject property).

In the winter of 1997, Eric and Rosemary decided to purchase the subject property, and, because they needed someone with better credit than theirs, they asked Theophine, a medical doctor, to apply for the mortgage and to take a deed in his name. Rosemary used her funds and loans from family and friends to pay the part of the purchase price not covered by the mortgage. After purchasing the property, Rosemary and Eric moved into it, where Rosemary and her two daughters still reside (Eric, a former attorney, also lived there until he was sent to prison).Theophine has resided elsewhere. Rosemary and Eric made the monthly mortgage payments.

Without Rosemary's knowledge, Eric and Theophine mortgaged the subject property to defendant Tuthill Finance (Tuthill) in December, 2007. After a default occurred on the mortgage payments due Tuthill, the mortgagee began an action to foreclose on the subject property without providing notice to Rosemary. She subsequently acquired information about the Tuthill mortgage..

In the twenty years that Rosemary and Eric resided at the subject property, they spent over one million dollars ro renovate their home which was built in 1900. They installed a new roof, new stucco walls, new gutters, new chimney systems, new cement balusters, new cement support beams, one hundred fifteen double insulated windows, three new entrance doors, new electric garage doors, renovated four and one half bathrooms, and made many other improvements to the property.

II. Theophine's Allegations

In his verified answer with a counterclaim and in an affidavit dated November 9, 2017, Theophine alleges the following: He acquired the subject property in September, 1997 and allowed Eric and Rosemary and Rosemary's sister and family to reside there. Rosemary and Eric obligated themselves to make the mortgage payments due Tuthill in lieu of paying rent, but they defaulted on their obligation. Tuthill began an action to foreclose on the mortgage, but Theophine and Tuthill entered into a stipulation dated September 8, 2017 whereby the latter agreed to forebear on the foreclosure if Theophine paid $450,000 to

pay it off. Theophine gave a nonrefundable deposit of $50,000, leaving a balance due of $400,000 to be paid on or before November 22, 2017. Theophine is unable to obtain financing for the balance due because of the notices of pendency filed by Rosemary.

III. Procedural Background

On March 9, 2010, Tuthill began an action to foreclose on the mortgage against Theophine in the Supreme Court of the State of New York, County of Queens (Index No. 5920/10). On November 26, 2012, Tuthill entered a judgment of foreclosure and sale. On June 16, 2017 an order amending the judgment of foreclosure and sale was entered in the County Clerk's Office. A foreclosure sale was scheduled for September 22, 2017, but the parties entered into a stipulation whereby Tuthill agreed to forebear on the foreclosure provided Theophine made a payment of $450,000.

On September 19, 2017, Rosemary filed an order to show cause, seeking, inter alia, an order permitting her to intervene in the mortgage foreclosure action "to protect her property rights." On September 25, 2 017, the court denied Theophine's order to show cause, writing by hand tersely: " Denied. [illegible] no legal basis to grant this relief. Based on the history of this case, plaintiff would clearly be prejudiced by staying the sale."

Rosemary, acting pro se, began the instant action by the filing of a summons, complaint, and notice of pendency on September 11, 2017. She seeks, inter alia, a judgment declaring that Theophine only holds the subject property in trust and cannot mortgage the property without her consent.

The plaintiff filed and served her first amended complaint on or about October 10, 2017 , adding further demands for relief such as a judgment requiring Theophine to convey the subject property to her. The plaintiff filed a second amended complaint adding a cause of action for adverse possession, on October 11, 2017 without a stipulation or court order.

IV. Discussion

A. Collateral Estoppel

The denial of a motion to intervene may have a collateral estoppel effect barring a subsequent action. (*See, Solow v. Manhattan Sch. of Music*, 106 AD2d 624.) Although Rosemary made an unsuccessful motion to intervene in the mortgage foreclosure action, defendant Tuthill's sketchy papers on this point do not adequately demonstrate that

the doctrine of collateral estoppel bars the instant action. "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action ***." (*Parker v. Blauvelt Volunteer Fire Co., Inc*., 93 NY2d 343, 349; *Sam v. Metro-North Commuter Railroad*, 287 AD2d 378.) The defendant failed to adequately demonstrate an identity of issues, and the matter is not clear from the court's terse, handwritten notation. However, it appears that the instant action is an attempt to collaterally attack an order issued in another action without a showing of fraud (*see, DeMartino v. Lomonaco*, 155 AD3d 686), and a proper remedy for Rosemary would have been to take an appeal.

B. A Nunc Pro Tunc Order for the Second Amended Complaint

The plaintiff's service of the second amended complaint was a nullity since she served these papers without leave of court or a stipulation of the parties in accordance with CPLR 3025(b) (*See, Nikolic v. Fed'n Employment & Guidance Serv., Inc*., 18 AD3d 522.) The court cannot issue a nunc pro tunc order validating the service of the second amended complaint. (*See, Merchants Bank of New York v. Rosenberg*, 31 AD3d 507; *Nikolic v. Fed'n Employment & Guidance Serv., Inc*, *supra*.)

An order permitting the service of the second amended complaint is also not warranted because the plaintiff failed to show that the proposed amendment has merit. In determining whether to permit a party to amend a complaint to add a cause of action, the court must examine the merits of the proposed cause of action. (*See, Butt v. New York Med. Coll.,* 7 AD3d 744*; Morgan v. Prospect Park Associates Holdings, LP*, 251 AD2d 306; *McKiernan v. McKiernan*, 207 AD2d 825.) The amendment will not be permitted where the proposed cause of action is patently lacking in merit.(*See, McKiernan v. McKiernan, supra.*)

The plaintiff's proposed cause of action based on adverse possession plainly lacks merit.

" [T]here must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Brand v. Prince*, 35 NY2d 634, 636; *Stroem v. Plackis*, 96 AD3d 1040.) "In order to maintain a cause of action to recover possession of real property, a plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in

present possession ***" (*Jannace v. Nelson, L.P.*, 256 AD2d 385, 385–386; *Merkos L'Inyonei Chinuch, Inc. v. Sharf*, 59 AD3d 408.) In the case at bar, there was a consensual arrangement whereby Theophine, though holding title to the subject property, allowed Rosemary and Eric to live in the home provided they made the mortgage payments. There was no unlawful ouster or disseisment.

Moreover, "[t]o establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period ***." (*Walling v. Przybylo*, 7 NY3d 228, 232; *Ray v. Beacon Hudson Mountain Corp*., 88 NY2d 154; *Beyer v. Patierno*, 29 AD3d 613; *Ropitzky v. Hungerford*, 27 AD3d 1031.) The statutory period is ten years. (*See*, *Ray v. Beacon Hudson Mountain Corporation, supra; Beyer v. Patierno, supra; Ropitzky v. Hungerford, supra.)* In the case at bar, as to the first element, Rosemary and Eric occupied the subject property with Theophine's permission, and possession by permission is not hostile. (*See, Oppedisano v. Arnold*, 143 AD3d 873.) "[H]ostility is negated by [s]eeking permission for use from the record owner ***." (*Estate of Becker v. Murtagh*, 19 NY3d 75, 82 [internal quotation marks and citation omitted].) Moreover, Rosemary knew that Theophine held legal title to the subject property, and an "awareness that others own the property within the statutory year 10-year period will defeat any claim of right ***."(*D'Argenio III v. Ashland Building, LLC*, 78 AD3d 758.) As to the third element, RPAPL § 522, " Essentials of adverse possession not under written instrument or judgment," provides in relevant part: "For the purpose of constituting an adverse possession not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others: 1. Where there have been acts sufficiently open to put a reasonably diligent owner on notice ***." In the case at bar, Rosemary, Eric, and Theophine entered into a consensual arrangement, and the occupation of the subject property by the plaintiff and her husband did not give Theophine notice that they were claiming an interest in the property adverse to his. (*See*, *2 N. St. Corp. v. Getty Saugerties Corp*., 68 AD3d 1392; *Robinson v. Robinson*, 34 AD3d 975,977 ["we agree with plaintiffs that this use was open, notorious and hostile and, therefore, sufficient to convey notice of their adverse claim to the record owner of the property during the disputed time period].")

C. Statute of Limitations

CPLR 213(1) provides a six-year statute of limitations for a cause of action to impose a constructive trust. (*In re Courant*, 142 AD3d 614; *Kohan v. Nehmadi*, 130 AD3d 429.) A cause of action for a constructive trust " accrues when the acts occur upon which the claim of constructive trust is predicated ***." (*Kohan v. Nehmadi*, *supra*, 430 [internal

quotations marks and citation omitted].) The limitations period "commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution ***." (*Morando v. Morando*, 41 AD3d 559, 561 [internal quotation marks and citation omitted].) Theophine executed and delivered the mortgage to Tuthill on or about December 28, 2007, and the mortgage was recorded on January 14, 2008. The cause of action to impose a constructive trust is time-barred.

D. A Declaration of a Failure to Serve Rosemary in the Foreclosure Action

The pro se plaintiff seeks by way of her cross motion, inter alia, a judgment pursuant to CPLR 3001 declaring that " defendant Tuthill failed or neglected to serve plaintiff Rosemary Abakporo with the summons and complaint motions, orders or judgment of this court relative to index No. 5920/2010." However, the plaintiff did not show that Tuthill has disputed whether or not it made service upon her in the action to foreclose on the mortgage, and, inferring from her motion to intervene in that action, Tuthill did not do so. "An action for a declaratory judgment must be supported by the existence of a justiciable controversy ***,. There must be a genuine, concrete dispute between adverse parties, not merely the possibility of hypothetical, contingent, or remote prejudice to the plaintiff ***." (*Premier Restorations of New York Corp. v. New York State Dep't of Motor Vehicles*, 127 AD3d 1049.) The court notes that in all likelihood, Rosemary raised the issue concerning the lack of service upon her when she made the motion to intervene, but without success. In all likelihood, she has already been heard on this issue.

E. The Notices of Pendency

The attorney for Theopine, who submitted affirmations in support of Tuthill's motion and in opposition to Rosemary's cross motion, made a showing that Rosemary did not properly serve the summons and complaint upon Theophine in compliance with CPLR 308(b). Theophine has also executed an affidavit dated November 9, 2017 swearing that he has lived at 108-30 Flatlands 8 Street, Brooklyn, New York for the past 21 months, which is not the address where the plaintiff made substitute service.

If a plaintiff has not served the summons and complaint or the notice of pendency as required by CPLR 6512, the notice of pendency must be cancelled pursuant to CPLR 6514(a). (*See,Knopf v. Sanford,* 132 AD3d 416*; Mastronardi v. Countywide Const. Corp.,* 2 AD3d 416*; Gargano v. Rubin*, 130 AD2d 709.) Moreover, the plaintiff's filing of the second notice of pendency had the effect of extending the duration of this provisional remedy, and an extension could only be obtained by an application to the court with a

showing of good cause. (*See*, CPLR 6513; *Aames Funding Corp. v. Houston*, 57 AD3d 808.)

Dated: March 29, 2018

J.S.C.