

Suter v Ross

2018 NY Slip Op 31858(U)

June 19, 2018

Supreme Court, Kings County

Docket Number: 515977/2017

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 515977/2017

SEQ# 001

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

MARION P. SUTER AND RANDOLPH A. HUDSON III,

Plaintiffs,

against

BRANDON K. ROSS AND NANCY LINCOLN OWNERS
CORP., F/K/A 400 LINCOLN OWNERS CORP.,

Defendants.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	_____
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	_____
Other	_____

Upon review of the foregoing papers, defendants' motion to dismiss pursuant to CPLR 3211, is decided as follows:

Plaintiffs commenced this action for judgment declaring their ownership interest in a certain apartment and for sale and partition of that apartment. Plaintiffs allege that defendant Nancy Lincoln Owners Corp. ("Owners") own the property located at 400 Lincoln Place, Brooklyn, New York, and that they issued shares and a proprietary lease for Unit 1E in the building. Plaintiffs allege that they and defendant Ross are the owners of the stock and holders of the proprietary lease, in which plaintiffs and Ross each own a 1/3 interest in the unit.

Defendants seek dismissal of the complaint on the grounds that: (1) this action is barred by res judicata and collateral estoppel; (2) plaintiff has failed to join a necessary party; (3) documentary evidence establishes a complete defense to the action; (4) the court lack personal jurisdiction over defendant Ross; and (5) the complaint fails to make the requisite allegations and join the required parties pursuant to RPAPL Articles 6 and 9. Defendants also seek sanctions.

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Addressing defendants' personal jurisdiction argument first, defendants argue that plaintiffs' claims against defendant Ross should be dismissed because he was not served in compliance with CPLR 308(4). Plaintiffs filed two affidavits of service for Ross. The first affidavit, sworn to September 22, 2017, shows that the process server mailed a copy of the summons and complaint 31 days after the process server affixed it to Ross's residence. CPLR 308(4) requires that those two acts occur within 20 days of each other. The second affidavit of service, sworn to October 25, 2017, shows that the process server affixed and mailed the summons and complaint on the same day, September 21, 2017. Plaintiff filed the affidavit of service on October 25, 2017, 34 days after mailing. CPLR 308(4) requires that the filing occur within 20 days of affixing or mailing, whichever occurs later. However, this irregularity in service does not deprive this court of jurisdiction, but rather delays the completion of service (*Weininger v Sassower*, 204 AD2d 715 [2d Dept 1994]).

Defendants also argue that this action should be dismissed on res judicata and collateral estoppel grounds because the court (Partnow, J.) previously dismissed a similar action by plaintiff Suter. In 2013, Suter brought an action against defendants seeking declaratory judgment and partition and sale, among other claims. Suter alleged that she, Ross and Lisa Martizia entered into an agreement in which Suter purchased a unit in defendant Owner's building, and Martizia and Ross occupied the unit and made a monthly payments towards their use of the unit. Martizia died in 1998 and passed her assets to her only child Osciana Ablack, who transferred her interest in the unit to Suter. By order, dated March 11, 2014, Justice Partnow dismissed the action without prejudice because plaintiff did not sue all necessary parties. The order permitted

plaintiff to commence a new action “provided all necessary parties are named including, but limited to, the estate of the deceased shareholder.”

“Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding” (*Blue Sky, LLC v Jerry's Self Stor., LLC*, 145 AD3d 945, 946 [2d Dept 2016]). Similarly, collateral estoppel bars relitigation of an identical and material issue that was decided against a party, or a party in privity, in a prior proceeding, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action” (*London Leasing Ltd. Partnership v Div. of Hous. and Community Renewal*, 153 AD3d 709, 712 [2d Dept 2017]).

Plaintiff Suter and defendants are the same in both actions. Furthermore, plaintiff Hudson is in privity with Suter because, as Suter explains in her affidavit, she transferred a portion of her interest in the unit to Hudson (*Juan C. v Cortines*, 89 NY2d 659, 667–68 [1997]). Both actions seek to establish plaintiffs’ ownership interests in the unit following the death of Martizia, and seek partition and sale of the unit. Plaintiff Suter had a full and fair opportunity to litigate the necessity of naming Martizia’s estate in the prior action. In its March 2014 order, the court determined that Martizia’s estate was a necessary party, which must be named in order to properly adjudicate the various interests in the property. While plaintiffs argue that circumstances have now changed to make the prior order irrelevant, the material facts remain the same. Namely, Suter and/or Hudson purportedly derive a portion of their interest from Maritzia, who they claim passed along her interest to her daughter when she (Maritzia) passed away, and the daughter allegedly transferred her interest to Suter.

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For the foregoing reasons, defendants' motion is granted to the extent that this action is dismissed. Defendants' request for sanctions is denied.

This constitutes the decision and order of the court.

June 19, 2018
DATE



DEVIN P. COHEN
Acting Justice, Supreme Court

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