Bryant v Brown
2020 NY Slip Op 30863(U)
March 9, 2020
Supreme Court, Kings County
Docket Number: 520263/2017
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 9th day of March 2020.

P R E S E N T:
HON. LARA J. GENOVESI,
J.S.C.

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GERALDINE BRYANT,

Plaintiff,

-against-

WALTER BROWN, FELICIA BROWN, THELMA CORBETT, DIANE HAWKINS, SHARON A. MCLETCHIE, SHANE SOLOMON, and KOOBA PROPERTIES, LLC,

Defendants.

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Index No.: 520263/2017

DECISION & ORDER

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1, 2, 5
Opposing Affidavits (Affirmations)	3, 4, 6
Reply Affidavits (Affirmations)	

Introduction

Self-represented plaintiff, Geraldine Bryant, moves by notice of motion, sequence number five, pursuant to the New York State Uniform Trial Rules § 202.27(a) for default judgment against the non-answering parties. Plaintiff moves by notice of motion, sequence number seven to compel defendants to respond to her demand dated August 15,

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2019. Defendants Felicia Brown and Kooba Properties oppose this application. Plaintiff moves by notice of motion, sequence number eight, for summary judgment. Defendant Felicia Brown opposes this application.

Background and Procedural History

This action was commenced by e-filing of a summons and verified complaint on October 19, 2017 (*see* NYSCEF Doc. # 1), pertaining to ownership of the property located at 485 Hegeman Avenue, Brooklyn, New York 11207. According to the verified complaint, plaintiff shared joint ownership of the property with defendant Walter Brown, by deed dated August 8, 1983. On or about November 15, 2015, plaintiff became aware of a 1993 deed, wherein Walter Brown purportedly conveyed the property to defendants Thelma Corbett and Felicia Brown as joint tenants with right of survivorship. Plaintiff alleges that she never signed a deed conveying her ownership interest in the property (*see id.* at ¶¶ 1-15).[1] Based on the foregoing, plaintiff commenced this action for (1) fraud; (2) declaratory judgment; and (3) to quiet title (*see id.*).

Defendant Kooba Properties LLC joined issue by e-filing an answer on December 19, 2017 (*see* NYSCEF Doc. # 8). On January 25, 2018, defendant Felicia Brown appeared by filing an answer with counter claims (*see* NYSCEF Doc. # 11). On February 2, 2018, plaintiff filed a notice of rejection of Brown's answer and notice of appearance pursuant to CPLR § 2101 as untimely filed (*see* NYSEF Doc. # 13). Thereafter, plaintiff

[1] Paragraphs 14 and 15 of the verified complaint, refer to "defendant" discovering the deed that she never signed. This Court notes that this appears to be a typographical error which refers to plaintiff Geraldine Bryant.

moved (sequence number one) to strike Brown's answer and notice of appearance and for default judgment. Brown cross-moved (sequence number two) for leave to file a late answer. On April 12, 2018, the Hon. Andrew Borrok, granted Brown's motion (sequence number two) and deemed her answer dated January 25, 2018, timely filed. Plaintiff's motion (sequence number one) was adjourned to July 5, 2018.

On June 25, 2018, defendant Thelma Corbett moved by order to show cause (sequence number three) to vacate her default and to dismiss the action. On July 26, 2018, Marzec Law Firm, P.C. moved (sequence number four) to be relieved as counsel for plaintiff. On July 30, 2018, the Hon. Lawrence Knipel granted plaintiff's motion to be relieved, and the matter was stayed for 45 days. Plaintiff's motion (sequence number one) and Corbett's order to show cause (sequence number three) were adjourned to September 25, 2018. On October 1, 2018, defendant Thelma Corbett filed an answer.

A preliminary conference was held on October 23, 2018. A compliance conference was held on March 27, 2019. Plaintiff filed the instant motion (sequence number five) for default against Walter Brown, Diane Hawkins, Shane Solomon and Sharon A. McLetchie on May 8, 2019.[2] The parties appeared for a final pre-note conference on July 31, 2019 wherein the parties entered into the following order: "No discovery outstanding from defendants. [Plaintiff] to serve any demand on or before 8/16/19. [Defendant]s to respond on or before 8/30/19. No discovery outstanding from

[2] Plaintiff filed motion sequence six to extend time to file the note of issue which was granted by the Hon. Lisette Colon on November 15, 2019.

defendants" (NYSCEF Doc. # 68). Plaintiff filed motion sequence seven to compel discovery on or about September 6, 2019.[3]

This action, along with all motions open at the time (sequence five and seven), were transferred to this Court on or about September 12, 2019. Thereafter, on October 1, 2019, plaintiff filed motion sequence eight for summary judgment. On October 25, 2019 plaintiff filed motion sequence nine for "Question about service to attorney firm Jay S. Markowitz" and motions sequenced ten and eleven, for default judgment. All motions were calendared for November 27, 2019, to meet the open motions. On November 27, 2019, oral argument was held, on the record, for those motions which were fully briefed. Motions sequence five and seven were marked fully submitted.

On December 17, 2019, defendant moved to be relieved as counsel for Thelma Corbett. This Court granted counsel's motion on January 8, 2020. The matter was stayed for 30 days from January 10, 2020, the date of service of the order (*see* NYSCEF Doc. # 104). All open motions (sequence numbers five, and seven through eleven) were adjourned to this Court's next available date, February 26, 2020. On February 26, 2020, after oral argument, on the record, all parties agreed that the discovery demand in question was exchanged by plaintiff and responded to by defendant and motion sequence nine was deemed moot. Further, plaintiff withdrew motions, sequence ten and eleven for

[3] Although this action was commenced as an e-filed action, plaintiff is now self-represented. In accordance with section (A)(2) of the Supreme Court Civil Term Kings County Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, unrepresented litigants are exempt from mandatory participation in e-filing (http://ww2.nycourts.gov/courts/2jd/kings/civil/efile.shtml). This Court notes that plaintiff has filed motions sequence five, seven, eight, nine, ten and eleven, in person in the Kings County Motion Support Office.

default judgment, on the record. After oral argument, motion sequence eight for summary judgment was marked fully submitted. Accordingly, the only motions at issue herein are motions sequence five, seven and eight.

Discussion

The court must frame its decision with the recognition that plaintiff, as a *pro se* litigant, must be given some latitude due to his lack of formal legal training and unfamiliarity with court procedures and that his pleadings and papers should be given every favorable interpretation which can be drawn (*see Mosso v. Mosso*, 6 A.D.3d 827, 776 N.Y.S.2d 599 [3 Dept., 2004]; *Sabatino v. Albany Med. Center Hosp.*, 187 A.D.2d 777, 589 N.Y.S.2d 654 [3 Dept., 1992]). However, a *pro se* litigant who represents himself proceeds at his own risk, is not entitled to any greater rights than any other party, and cannot be given concessions at the expense of another party's rights (*see Mirzoeff v. Nagar*, 52 A.D.3d 789, 861 N.Y.S.2d 740 [2 Dept., 2008]; *see also Strujan v. Glencord Bldg. Corp.*, 137 A.D.3d 1252, 29 N.Y.S.3d 398 [2 Dept., 2016]).

Motion for Default - 202.27(a) (Seq. No. 5)

Plaintiff moves herein pursuant to the New York State Trial Court Rule 202.27(a) for default judgment against the following defendants: (1) Diane Hawkins; (2) Walter Brown; (3) Shane Solomon; and (4) Sharon A. McLetchie for their failure to appear at two conferences (*see* Affidavit in Support at ¶ 1).

"A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215" (*U.S. Bank, N.A. v. Razon*, 115 A.D.3d 739, 981 N.Y.S.2d 571

[2 Dept., 2014], quoting *Beaton v. Transit Facility Corp.*, 14 A.D.3d 637, 789 N.Y.S.2d 314 [2 Dept., 2005]). New York State Trial Court Rule 202.27 provides,

> At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:
> **(a)** If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.

"However, by including the word 'may', the drafters of the foregoing rule undoubtedly intended to place, *e.g.*, the entry of a default judgment within the sound discretion of the court, which can withhold such relief upon the showing of a reasonable excuse for the non-appearance and a meritorious claim or defense" (*U.S. Bank, Nat. Ass'n v. Calvanico*, 47 Misc. 3d 1229(A), 18 N.Y.S.3d 581 [Sup. Ct., 2015], citing *Siculan v. Koukos*, 74 A.D.3d 946, 902 N.Y.S.2d 627 [2 Dept., 2010]).

However, where the record does not contain evidence that defendants received notice of the conferences, there can be no default (*see Tragni v. Tragni*, 21 A.D.3d 1084, 803 N.Y.S.2d 617 [2 Dept., 2005]; *see also M.S. Hi-Tech, Inc., v. Thompson*, 23 A.D.3d 442, 808 N.Y.S.2d 122 [2 Dept., 2005]). "In the absence of actual notice of the ... conference date, the defendant's failure to appear at that conference 'could not qualify as a failure to perform a legal duty, the very definition of a default'" (*Foley Inc. v. Metropolis Superstructures, Inc.*, 130 A.D.3d 680, 11 N.Y.S.3d 873 [2 Dept., 2015], quoting *Pelaez v. Westchester Med. Ctr.*, 15 A.D.3d 375, 789 N.Y.S.2d 533 [2 Dept., 2005]). Further, "dismissal of an action for a default pursuant to 22 NYCRR 202.27 does

not constitute a determination on the merits, the dismissal should [be] without prejudice" (*GMAC Mortg. LLC v. Guccione*, 127 A.D.3d 1136, 9 N.Y.S.3d 83 [2 Dept., 2015]).

In the instant case, while plaintiff provided proof of service of the instant motion on defendants, she did not provide proof that defendants were given notice of the conference dates. Further, a search of the court record also reveals no evidence that non-answering defendants were ever notified of the conference dates. Accordingly, plaintiff's motion for default judgment against the non-appearing defendants is denied.

Motion to Compel (Seq. # 7)

Plaintiff moves by notice of motion dated September 23, 2019, to compel compliance with the final conference order dated July 31, 2019, for defendants to respond to plaintiff's demand letter dated August 16, 2019. Defendant Felicia Brown served a response to plaintiffs demands on September 17, 2019 and e-filed it on September 18, 2019. Defendant Kooba Properties served a response to plaintiff's demand dated November 12, 2019. Accordingly, this motion is denied as moot.

Motion for Summary Judgment (Seq. # 8)

Plaintiff moves for summary judgment. CPLR § 3212[b] provides,

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.... The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any

party".

"To make a prima facie showing, the moving party must demonstrate its entitlement to summary judgment by submission of proof in admissible form…Admissible evidence may include affidavits by persons having knowledge of the facts [and] reciting the material facts [internal citations and quotation marks omitted]" (*Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 [2 Dept., 2019]; *see Viviane Etienne Med. Care, P.C. v. Country–Wide Ins. Co.*, 25 N.Y.3d 498, 14 N.Y.S.3d 283 [2015]). "A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden" (*JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 828 N.E.2d 604 [2005]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]).

Plaintiff commenced the instant action for fraud, to quiet title and for declaratory judgment. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Prompt Mortg. Providers of N. Am., LLC v. Zarour*, 155 A.D.3d 912, 64 N.Y.S.3d 106 [2 Dept., 2017], quoting *JP Morgan Chase Bank, N.A. v. Hall*, 122 A.D.3d 576, 996 N.Y.S.2d 309 [2 Dept., 2014]). "To maintain a cause of action to quiet title, a plaintiff

must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title to the property, such as in a deed or other instrument, that is actually invalid or inoperative" (*Cudjoe v. Boriskin*, 157 A.D.3d 654, 68 N.Y.S.3d 524 [2 Dept., 2018], *Zuniga v. BAC Home Loans Servicing, L.P.*, 147 A.D.3d 882, 47 N.Y.S.3d 374 [2 Dept., 2017]; *see also* RPAPL § 1515).

Here, plaintiff failed to meet her prima facie burden and establish entitlement to summary judgment as a matter of law. In support of her motion, plaintiff provided only her own affidavit. She failed to annex the pleadings. Plaintiff's affidavit, without more, fails to establish the elements of fraud and is insufficient to maintain an action to quiet title. Accordingly, plaintiff's motion for summary judgment is denied. Inasmuch as plaintiff failed to meet her burden, this Court need not consider the sufficiency of defendant's opposition papers (*see Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, *supra*).

Conclusion

Accordingly, for the above stated reasons, the plaintiff's motions, sequence numbers five, seven and eight, are denied. The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

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