Davis v Davis
2020 NY Slip Op 32309(U)
July 13, 2020
Supreme Court, New York County
Docket Number: 160905/2019
Judge: Kelly O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 31

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CAROL DAVIS and BERNARD DAVIS, **Index No. 160905/2019**

Plaintiff,

DECISION & ORDER

-against-

PETER DAVIS and ANASTASIA NATASHA AUGOUSTOPOULOS,

Defendant.

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Kelly O'Neill Levy, J.S.C.:

Plaintiffs Carol Davis and Bernard Davis move pursuant to CPLR § 2221 for Leave to Reargue this Court's February 28, 2020 Decision & Order, which granted Defendants' motion to dismiss. A motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR § 2221(d). Whether to grant a motion for reargument is within the discretion of the court. *See, e.g., Central Amusement Int'l, LLC. V. Lexington Ins. Co.*, 162 A.D.3d 452 (1st Dep't 2018).

Plaintiffs argue that the court was obligated by CPLR § 3211(c) to give notice to the parties before issuing a summary judgment decision. This issue was argued in the papers underlying Defendants' Motion to Dismiss. Plaintiffs' arguments were considered at the time, however notice pursuant to CPLR § 3211(c) is not always required and was not required here:

> The discretion conferred by CPLR 3211(c) to review the merits of a poorly pleaded case at an early stage of the proceedings should be freely exercised by the court and exploited as an effective calendar control device, a poorly pleaded case, not unlike an abandoned one, being suspect on the merits. Such discretion may be exercised even in the absence of a request for CPLR 3211(c) treatment by a party. It is the making of a motion pursuant to CPLR 3211(a), not the making of a request pursuant to CPLR 3211(c), that opens the

> door to the possibility of summary judgment treatment prior to joinder of issue... If the action involves no issues of fact, but only issues of law fully appreciated and argued by both sides, it is proper for the court to grant summary judgment to either side without first giving notice of its intention to do so.

See, e.g., Four Seasons Hotel v. Vinnik, 127 A.D.2d 310,320 (1st Dep't 1987) (citations omitted); *see also Braithwaithe v. Frankel*, 98 A.D.3d 444 (1st Dep't 2012) (noting that notice would not be required pursuant to CPLR § 3211(c) where case "involves purely legal question without any disputed issues of fact."). As explained in this Court's February 28, 2020 Decision & Order, there are no issues of material fact in dispute. The court then properly considered whether the undisputed facts qualify as an RPAPL Art. 15 action, which is a purely legal question. *See id* (further noting that "evidence, proved or conceded to be authentic, may be considered by the court for fact finding purposes prior to joinder of issue without CPLR 3211(c) notice first being given.").

There can also be no question that Plaintiffs "fully appreciated and argued" both the question of whether CPLR 3211(c) required notice first and whether the action, based only on uncontested facts, qualified as an RPAPL Art. 15 action. The arguments in Plaintiff's Affirmation in Opposition to Defendants' Motion to Dismiss are nearly identical to the arguments they now make in their Motion for Reargument. For example, on Pages 11 and 12 of Plaintiff's Affirmation in Opposition to the Defendants' Motion to Dismiss, it was argued that:

> Natasha's request for the Court to convert the Motion to one for summary judgment pursuant to CPLR 3211(c), which does not appear in her Order to Show Cause, should be denied as procedurally improper and premature. CPLR 3211(c) provides that "either party may submit any evidence that could properly be considered on a motion for summary judgment," and allows "the court, after adequate notice to the parties, [to]... treat the motion as a motion for summary judgment." CPLR 3211(c).
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> For all the reasons set forth above, Natasha's statute of limitations argument should be rejected on the merits. In addition, the Court should reject Natasha's request to treat the Motion as one for summary judgment because Carol and Bernard have not yet had the opportunity to take discovery on their well-pled causes of action, the Court has not

> provided the parties with notice of any intention to convert the present Motion to one for summary judgment, Natasha has not even properly moved for such relief and there are disputed issues of fact. *See Brathwaite v. Frankel*, 98 A.D.3d 444, 444–45 (1st Dep't 2012) (lower court erred in treating defendants' CPLR 3211 motion as a motion for summary judgment "without providing the parties with notice" and where the case is not one that "involve[s] a purely legal question without any disputed issues of fact").

The court considered Plaintiffs' legal arguments at that time for the same reason the court is adhering to the original decision. *See supra* pp. 1-2. Plaintiffs' assertion that their papers did not argue the merits of whether the undisputed facts qualified as an RPAPL Art. 15 action is inaccurate.[1] To the extent that Plaintiffs' argument is that Plaintiffs would have devoted *more* of their papers to the merits if they had known their action would be dismissed, that does not

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[1] For example, on pages 7 and 8 of Plaintiffs' Affirmation in Opposition to the Defendants' Motion to Dismiss, Plaintiffs argued:

> Carol and Bernard do not allege that Peter breached the Agreement by failing to convey to them a 25% ownership interest in the Property. Instead, they allege that the ownership interest *was* conveyed – by virtue of the parties' Agreement and their reliance thereon and performance thereunder – and that Carol and Bernard are in fact equitable owners of 25% of the Property. They seek to establish and protect that ownership interest, not withstanding the terms of the present Deed, and to extinguish adverse claims, such as the one asserted by Natasha in the Divorce action. **Their declaratory judgment claim, in other words, is a quintessential quiet title claim pursuant to RPAPL Art. 15.** *See Nurse v. Rios*, 160 A.D.3d 888, 888 (2d Dep't 2018) ("To maintain a cause of action to quiet title to real property, 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.").

(emphasis added). Plaintiffs continued their arguments on the merits on page 10, 11 and 12:

> Natasha's Motion also improperly seeks a declaration that "Carol and Bernard Davis have no actual legal ownership in the [Property.]" Natasha's request for the Court to issue a judgment declaring that Carol and Bernard do not own an interest in the Property should be denied as procedurally improper **and contrary to the allegations of the Complaint, which must be accepted as true…even if the court were to consider the merits of such request, it would find them to be completely lacking.** On the present Motion, the Complaint's allegations must be accepted as true, and such allegations are directly at odds with the declaration requested by Natasha. (See, e.g., Compl. ¶ 21 ("Plaintiffs are the rightful and equitable fee owners of a 25% interest in the Property."); ¶ 24 (In exchange for the consideration Plaintiffs paid to Peter Davis, Plaintiffs became the actual and equitable fee owners of 25% of the Property and do in fact enjoy exclusive use and possession of the ground level apartment within the Property as their secondary home.").).

(emphasis added). Plaintiffs' "allegation" that they have a 25% interest in the Property is a textbook example of the sorts of "[b]are legal conclusions" that a court should not accept as true in a Motion to Dismiss. *See, e.g., Rios v. Tiny Giants Daycare, Inc.*, 135 A.D.3d 845 (2d Dep't 2016).

qualify as "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR § 2221(d). Plaintiffs' Motion for Reargument is denied.

This constitutes the Decision and Order of the court.

Dated: July 13, 2020

New York, New York

Kelly O'Neill Levy

KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC