Simmons v Bell

2020 NY Slip Op 35545(U)

May 29, 2020

Supreme Court, Queens County

Docket Number: Index No. 703307/16

Judge: Darrell L. Gavrin

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COUNTY CLERK
QUEENS COUNTY

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

DERRICK SIMMONS, as Executor of the Estate of BESSIE A. ROGERS, deceased,

Plaintiff,

- against-

ALFRED BELL and RHONDA BELL,

Defendants.

Index No. 703307/16

Motion Date November 19, 2019

Motion Cal. No.

Motion Seq. No. 4

The following numbered papers were read on this motion by defendants seeking dismissal of the complaint, pursuant to CPLR 3211 (a) (1), (5), (7), and (10); and cross motion by plaintiff seeking, among other things, leave to reargue denial of a previous motion, pursuant to CPLR 2221 (d).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	E70-E90
Notice of Cross Motion - Affirmation - Exhibits..................	E91-E143
Affirmation in Opposition to Cross Motion - Exhibits..........	E144-E152
Reply Affirmations	E153-E154

Upon the foregoing papers, it is ordered that the instant motion to dismiss, pursuant to CPLR 3211, and cross motion for leave to reargue, pursuant to CPLR 2221 (d), are determined as follows:

This is an action seeking, among other things, declaratory relief with regard to ownership of real property. A previous action, under Index No. 28487/2008, was transferred to Civil Court, Queens County in 2010. A first motion for the relief requested herein, along with the ground that another action was pending, pursuant to CPLR 3211 (a) (4), was denied with leave to renew in the Civil, Queens action. Thereafter, upon application of plaintiff, seeking removal from Civil, Queens back to this court, and the extension of time to file a

second notice of pendency, this action was transferred back to this court, but the time to file a second notice of pendency was denied. After the physical transfer of the file was effectuated, defendants made the instant motion to dismiss, and plaintiff cross-moved for leave to reargue the denial of its motion to extend time to file a second notice of pendency.

Addressing plaintiff's cross motion first, "A motion for leave to ... reargue is addressed to the sound discretion of the Supreme Court" (*Kugler v Kugler*, 174 AD3d 876, 877 [2d Dept 2019], quoting *Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2d Dept 2014]). Cross-movant has failed to establish that the court overlooked or misapprehended the relevant facts, and/or misapplied any controlling principle of law, "or for some reason mistakenly arrived at its earlier decision," as required by CPLR 2221 (d) (*Schneider v. Solowey*, 141 AD2d 813, 813 [2d Dept 1988]; *see Deutsche Bank Natl. Trust Co. v Russo,* 170 AD3d 952 [2d Dept 2019]).

By resorting to a notice of pendency, the court must exercise its discretion because "[t]he powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its narrow application to those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property" (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 315-316 [1984]; *see PK Restaurant, LLC v Lifshutz*, 138 AD3d 434 [1st Dept 2016]). A plaintiff may cloud title merely by serving a summons and complaint and a notice of pendency "stating the names of the parties, the object of the action, and a description of the property affected" (CPLR 6511 [b]).

However, the real property "affected" must be "the subject of pending litigation" (*Kolel Damsek Eliezer, Inc. v Schlesinger*, 90 AD3d 851, 855 [2d Dept 2011]; *see Matter of Sakow*, 97 NY2d 436 [2002]; *Santopietro v Harrison*, 170 AD3d 764 [2d Dept 2019]). In the case at bar, the complaint refers its causes of action to only one property, *i.e.*, Bessie Rogers' former "home" at 130-16 Van Wyck Expressway. The property listed in the notice of pendency is not the subject of the litigation. Therefore, such listed property is "the wrong property" for notice of pendency purposes. As such, plaintiff has failed to demonstrate that the court "mistakenly arrived at its earlier decision."

Accordingly, plaintiff's cross motion for leave to reargue, is denied.

Defendants move to dismiss plaintiff's complaint, based upon CPLR 3211 (a) (1), (5), (7), and (10), and for sanctions pursuant to 22 NYCRR 130-1.1 for commencing and continuing a frivolous action. The branch of the motion seeking dismissal pursuant to CPLR 3211 (a) (1), is denied. The evidence submitted in support, in the form of the note, dated September 1, 1998, and the deed and closing papers, dated June 1, 2007, were not "documentary" within the

meaning of CPLR 3211 (a) (1), as they did not conclusively establish defenses to plaintiff's claims as a matter of law (*see Greenberg v Spitzer*, 155 AD3d 27 [2d Dept 2017]; *Shofel v DaGrossa*, 133 AD3d 649 [2d Dept 2015]). Such evidence, taken alone, failed to undeniably support movant's claims or utterly refute plaintiff's factual allegations (*see Goshen v Mutual Life Ins. Co. of NY,* 98 NY2d 314, 326 [2002]; *Emanuel Mizrahi, DDS, P.C. v Angela Andretta, DMD, P.C.*, 170 AD3d 1120 [2d Dept 2019]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (*see Bulbin v O'Carroll*, 173 AD3d 825 [2d Dept 2019]; *Anderson v Armento*, 139 AD3d 769 [2d Dept 2016]). "To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim" (*Sciadone v Stepping Stones Associates, L.P.*, 148 AD3d 953, 954 [2d Dept 2017]; *see Pacella v RSA Consultants, Inc.*, 164 AD3d 806 [2d Dept 2018]). The evidence proffered herein did not have the required effect. Additionally, decedent's deposition testimony demonstrated that defendants' "documentary" evidence failed to conclusively resolve the action (*see Rovello v Orofino Realty Co.*, 40 NY2d 633 [1996]; *Matter of Koegel*, 160 AD3d 11 [2d Dept 2018]).

The motion also contends that dismissal of the complaint was required pursuant to CPLR 3211 (a) (5), on the basis of the running of the statute of limitations. However, the complaint herein contains a Second Cause of Action based on an alleged forgery of decedent's signature to a deed. A forged deed that contains a fraudulent signature is void *ab initio*, whereas a deed where the signature and authority to convey are acquired by fraudulent means, is merely voidable (*see Matter of Shua Chung Hu v Lowbet Realty Corp.*, 161 AD3d 986 [2d Dept 2018]). Movant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired (*see Bank of N.Y. Mellon v Bissessar*, 172 AD3d 983 [2d Dept 2019]; *JP Morgan Chase Bank, N.A. v Mbanefo*, 166 AD3d 742 [2d Dept 2018]).

Just as "a statute of limitations cannot validate what is void at its inception" (*Faison v Lewis*, 25 NY3d 220, 230 [2015]), a "statute of limitations cannot act as a bar to this action" (*OneWest Bank v Schiffman*, 175 AD3d 1543, 1545-1546 [2d Dept 2019]), based, as it is, on an alleged forgery. Therefore, defendants have failed to, *prima facie*, establish a right to dismissal based on the ground of statute of limitations, and such branch of their motion is denied.

Defendants further move to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. In such a case, the court must afford the pleading a liberal construction, accept as true all the facts alleged therein, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.,* 21 NY3d 324 [2013]; *Webster v Sherman,* 165 AD3d 738 [2d Dept 2018]). A motion to dismiss merely addresses the adequacy of a pleading,

and does not reach the substantive merits of plaintiff's cause of action (*see Kaplan v New York City Dep't. of Health and Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (*see Tooma v Grossbarth*, 121 AD3d 1093 [2d Dept 2014]).

A CPLR 3211 (a) (7) motion may be employed to dispose of actions in which the plaintiff has failed to state a claim cognizable at law, or an action in which plaintiff has identified a cognizable cause of action, but failed to assert a material allegation necessary to support the cause of action. However, "[a] court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" (*Gugliotta v Wilson*, 168 AD3d 817, 818 [2d Dept 2019], quoting *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]; *see* CPLR 3211 [c]). When evidentiary submissions are considered on this type of motion, "and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Belling v City of Long Beach*, 168 AD3d 900, 901 [2d Dept 2019]; see *Guggenheimer v Ginzburg*, 43 NY2d 268; *Cukoviq v Iftikhar*, 169 AD3d 766 [2d Dept 2019]). The alleged "facts" presented herein by the evidentiary submissions in support of this branch of the motion are all disputed.

In the case at bar, plaintiff has sufficiently asserted causes of action for declaratory relief, forgery, and actual and constructive fraud against defendants. Construing the pleadings liberally, and giving the nonmoving plaintiff the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Benjamin v Yeroushalmi*, 178 AD3d 650 [2d Dept 2019]), plaintiff has established, *prima facie*, the necessary elements of the included causes of action.

In opposition, defendants have failed to raise a factual issue warranting the dismissal of such causes of action. Defendants' contention that plaintiff was guilty of laches, and was thereby precluded from commencing a quiet title claim, is without merit. "The essence of the equitable defense of laches is prejudicial delay in the assertion of rights" (*Jean v Joseph*, 117 AD3d 989, 990 [2d Dept 2014]). "In order for laches to apply to the failure of an owner of real property to assert his or her interest, 'it must be shown that [the] plaintiff inexcusably failed to act when she knew, or should have known, that there was a problem with her title to the property. In other words, for there to be laches, there must be present elements to create an equitable estoppel' " (*Stein v Doukas*, 98 AD3d 1026, 1028 [2d Dept 2012], quoting *Kraker v Roll*, 100 AD2d 424, 432-433 [2d Dept 1984]; *see Strough v Incorporated Vil. of W. Hampton Dunes*, 167 AD3d 800 [2d Dept 2018]). Defendants have failed to demonstrate that plaintiff's decedent did not timely voice her complaints when she became aware of the perceived

difficulties arising from the deposit of the sales proceeds. Consequently, such causes of action have been sufficiently stated herein against defendants, and the branch of defendants' motion to dismiss, based upon CPLR 3211 (a) (7), is denied.

Additionally, defendants move to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (10), for failure to join a necessary party, *i.e.*, Monica Krynska, the purchaser of the subject property, and/or her mortgage lending bank. In deciding a motion under that statute, the court must first determine whether such individual is a necessary, or indispensable, party to the action, pursuant to CPLR 1001 (a). Compulsory joinder rules seek to avoid prejudice, multiple litigations, and inconsistent judgments that may attend the failure to join necessary parties to an action (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801 [2003]). A necessary party is one whose nonjoinder will jeopardize the outcome of the action by either, denying complete relief to the parties in the action, or where the absentee may be inequitably affected by a judgment without his participation (*see generally, Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452 [2005]; *Leak v Live Well Financial, Inc.*, 145 AD3d 992 [2d Dept 2016]). If prejudice may result because a nonparty has a practical interest that could be disadvantaged by the outcome of the action that was litigated without such nonparty, such nonparty would be a necessary party to the action (*see Martin v Ronan*, 47 NY2d 486 [1979]; *Caltagirone v Zoning Bd. of Appeals*, 49 AD3d 729 [2d Dept 2008]).

The basis for the action at bar is to quiet title between plaintiff's decedent and the defendants. There is no disagreement between the parties that the subject property was purchased by Monica Krynska in 2007. The issue to be resolved is which party is entitled to the proceeds of that sale. To be a "necessary, or even proper party, it must be one against whom plaintiff can assert a right to relief" (*Stevens v Eaton*, 267 AD2d 450 [2d Dept 1999]). In the *Stevens v Eaton,* factually akin to the instant case, the court determined that the purchaser of decedent's former property was not a necessary party to an action by decedent's heirs, who alleged that they were defrauded out of the proceeds of the sale, when such action did not seek to set aside the conveyance, but only to decide which party was entitled to such sale proceeds. Therefore, contrary to defendants' contention, said purchaser at the sale in 2007, and her mortgage bank, are not necessary parties to this action under CPLR 1001 (a), and this branch of defendants' motion is denied.

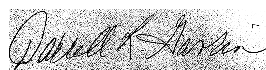
The branch of defendants' motion seeking sanctions, pursuant to 22 NYCRR 130-1.1 (a), for frivolous conduct, is denied. Such statute permits the court "in its discretion" to award costs and attorney's fees "resulting from frivolous conduct," which is defined, in (c), as including conduct "completely without merit in law ... undertaken primarily to delay or ... to harass or maliciously injure ... or (which) asserts material factual statements that are false." In determining whether conduct is "frivolous," the statute exhorts the court to consider the

"circumstances under which the conduct took place ... and whether or not the conduct was continued when its lack of legal or factual basis ... was brought to the attention of counsel." In the case at bar, although plaintiff's filing may not, ultimately, be meritorious, defendants have failed to demonstrate that, at the time of the filing of the instant action, plaintiff's conduct rose to the level of "frivolous," as interpreted by the statute (*see generally Cram v Keller*, 166 AD3d 846 [2d Dept 2018]).

The parties' remaining contentions and arguments either are without merit, or need not be addressed, in light of the foregoing determinations.

Accordingly, defendants' motion, seeking dismissal of plaintiff's complaint, and sanctions for frivolous conduct, is denied in its entirety.

Dated: May 29, 2020



DARRELL L. GAVRIN, J.S.C.

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