

Sam v Philadelphi

2021 NY Slip Op 30088(U)

January 11, 2021

Supreme Court, Kings County

Docket Number: 507822/2018

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 507822/2018
Motion Date: 12-14-20
Mot. Seq. No.: 4-5

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MARIE SAM,

Plaintiff,

-against-

DECISION/ORDER

DOREEN PHILADELPHI,

Defendant.

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The following e-filed documents, listed by NYSCEF as item numbers 103-128 were read on this motion:

Plaintiff moves for an order granting her leave to renew her opposition to defendant's motion to dismiss the plaintiff s verified complaint upon the ground of judicial estoppel, which was granted by Order of the undersigned on August 19, 2019 and restoring the Notice of Pendency that was filed upon the real property located at 1844 Troy Avenue, Brooklyn, New York (**Mot. Seq. No. 4**).

The defendant cross-moves for an order granting renewal of that part of defendant's prior motion to dismiss and/or for summary judgment dismissing plaintiff's constructive trust claim as being barred under the doctrine of lack of capacity, (2) granting reargument of that part of defendant's prior motion to dismiss and/or for summary judgment dismissing plaintiff's constructive trust claim as being barred by the defenses of statute of limitations, laches, and the failure to establish the elements of a constructive trust claim, and, upon such renewal and reargument, dismissing plaintiff's claim on the these grounds (**Mot. Seq. No. 5**).

The motion and cross-motion are consolidated for disposition.

Background:

Plaintiff commenced this action to impose a constructive trust on real property located at 1844 Troy Avenue, Brooklyn, New York. Plaintiff maintains that she is entitled to an interest in the property by virtue of certain promises and representations that were made to her by various persons back in 1987.

In 2012, the plaintiff filed a voluntary petition for bankruptcy in which she represented that she did not have any legal, equitable or future interest in any real property, including the real property at issue. On August 22, 2012, the United States Bankruptcy Court granted her petition and discharged her from her debts. Significantly, the plaintiff was represented by counsel in the Bankruptcy proceeding.

By order of the undersigned dated August 19, 2019, the action was dismissed for the following reasons:

Under the doctrine of judicial estoppel, also known as estoppel against inconsistent positions, a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed (see *Festinger v. Edrich*, 32 A.D.3d 412, 413, 820 N.Y.S.2d 302; *McCaffrey v. Schaefer*, 251 A.D.2d 300, 301, 673 N.Y.S.2d 717; *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 436, 626 N.Y.S.2d 527). The doctrine applies only where the party secured a judgment in his or her favor in the prior proceeding (see *State Farm Mut. Auto. Ins. Co. v. Allston*, 300 A.D.2d 669, 670, 751 N.Y.S.2d 795 ; *Tilles Inv. Co. v. Town of Oyster Bay*, 207 A.D.2d 393, 394, 615 N.Y.S.2d 895). This doctrine "rests upon the principle that a litigant 'should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise' " (*Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d at 436, 626 N.Y.S.2d 527, quoting *Environmental Concern v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593, 476 N.Y.S.2d 175). "The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts" (*Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d at 436, 626 N.Y.S.2d 527 [internal quotation marks omitted]).

Here, the plaintiff's contention that she had an interest in the Troy Street property based on promises made to her in 1987 is contrary to her representation made to the United States Bankruptcy Court in 2012 that she had no interest in any real property. Based upon the plaintiff's representations to the Bankruptcy Court, her debts were discharged. For the above reasons, the Court agrees that this action is barred by the doctrine of judicial estoppel (see *Bihn v. Connelly*, 162 A.D.3d 626, 626-28, 78 N.Y.S.3d 243, 243-45 ; see also *Festinger v. Edrich*, 32 A.D.3d at 413, 820 N.Y.S.2d 302; *McCaffrey v. Schaefer*, 251 A.D.2d at 301, 673 N.Y.S.2d 717; *Perkins v. Perkins*, 226 A.D.2d 610, 641 N.Y.S.2d 396; *Ford*

Motor Credit Co. v. Colonial Funding Corp., 215 A.D.2d at 436, 626 N.Y.S.2d 527).

Plaintiff seeks renewal on the following grounds: Plaintiff states in an affidavit that following the dismissal of the action, she contacted the attorneys who represented her in the Bankruptcy proceeding to ascertain why deponent's interest in the real property located at 1844 Troy Avenue had not been scheduled as an asset of your deponent. She did not, however, explain why such was not scheduled as an asset. She simply stated that in due course, her bankruptcy attorney made application to the United States Bankruptcy Court for the Eastern District of New York (Case # 12-43584) for an order reopening the case for the purpose of amending her petition to add a possible interest in the real property located at 1844 Troy Avenue, Brooklyn, New York as an asset. The Bankruptcy granted the application, re-opened the case for the purpose of adding deponent's possible interest in the Troy Avenue real property and directed the filing of amended schedules and any possible exemptions by November 6, 2019. A new trustee was subsequently appointed.

Plaintiff then filed such amended schedules listing the property at 1844 Troy Avenue, Brooklyn, New York. Plaintiff contends that by reason of the foregoing, her claim is this action that she has an interest in the real property located at 1844 Troy Avenue, Brooklyn, New York is no longer inconsistent with her present representations to the Bankruptcy Court and that for this reason, renewal should be granted and upon renewal, defendant's motion to dismiss should be denied.

In opposition to the motion, defendant pointed out that while the plaintiff has reopened her bankruptcy case, her discharge from debt remains in place. Defendant also contends that since the plaintiff failed to timely advise the Bankruptcy Court of her interest in the subject property, the doctrine of judicially estoppel still applies.

In a reply, plaintiff points out that there is a pending motion in the Bankruptcy Court to vacate the discharge that is now in place which is scheduled to be heard in February of 2021.

Discussion:

“A motion for leave to renew must be ‘based upon new facts not offered on the prior motion that would change the prior determination’ and the movant must state a ‘reasonable justification for the failure to present such facts on the prior motion’ ” (*Zarecki & Assoc., LLC v.*

Ross, 50 A.D.3d 679, 680, 854 N.Y.S.2d 527, quoting CPLR 2221[e]). The new facts offered on plaintiff's motion would not change the prior determination. While the plaintiff amended her bankruptcy schedules to list her interest in the subject property, her discharge remains in place. Thus, she still received a benefit in the Bankruptcy Court by asserting a position that is inconsistent with the position she has taken in this case, the very reason the Court applied the doctrine of judicial estoppel.

More importantly, plaintiff did not get around to amending her schedules in the Bankruptcy Court until after this action was dismissed. Notwithstanding that plaintiff has now amended her schedules in the Bankruptcy Court proceedings, her prolonged failure to do so still renders her judicially estopped from pursuing her claims in this case (see *Horvath v. Gumley Haft Kleier, Inc.*, 148 A.D.3d 437, 437, 48 N.Y.S.3d 661, 661–62; see also, *Kleinplatz v. Nathan*, 148 A.D.3d 431, 48 N.Y.S.3d 659, 2017 WL 888358; *Etten, LLP*, 2014 WL 3974584, *2, 2014 U.S. Dist. LEXIS 112291, *5 [S.D.N.Y., Aug. 13, 2014, No. 13 civ. 2747(GBD)(FM)]).

Accordingly, is here by

ORDRED that plaintiff's motion is **DENIED**; and it is further

ORDRED that defendant's cross-motion is **DENIED** as moot.

This constitutes the decision and order of the Court.

Dated: January 11, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020