

Rockaway Atlantic Holdings LLC v Sepulveda
2021 NY Slip Op 30092(U)
January 11, 2021
Supreme Court, Kings County
Docket Number: 514016/2017
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 514016/2017
Motion Date: 11-9-20
Mot. Seq. No.: 4-5

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ROCKAWAY ATLANTIC HOLDINGS LLC
CHAIM SOBEL,

Plaintiffs,

-against-

DECISION/ORDER

ROBERTO SEPULVEDA, JR., MARI A. SEPULVEDA,
DAVID SEPULVEDA & CHRISTIAN SEPULVEDA,
being all the heirs of ROBERT SEPULVEDA, a/k/a
ROBERT SEPULVEDA SR., deceased.

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 64-91, the motion and cross motion are decided as follows:

Ibrahim Mohammed moves pursuant to CPLR 1012 for an order granting him leave to intervene in this action, and if leave is granted, for a declaration that the purported recording of the Contract Assignment by the plaintiffs was insufficient to give notice to the proposed intervenor as said recording did not comply with the provisions of RPL 294; granting summary judgment declaring that the alleged contract of sale is void as against the proposed intervenor, or in the alternative, an order staying further proceeding and granting the proposed intervenor leave to conduct discovery (**Motion Seq. No. 4**).

Plaintiffs Rockaway Atlantic Holdings LLC (“Rockaway”) and Chaim Sobel cross-move for an order pursuant to CPLR § 2221(f), granting Plaintiffs leave to renew and reargue its motion for summary judgment filed on February 8, 2019, and upon granting such relief, for an order granting the motion (**Motion Seq. No. 5**). The two motions are consolidated for disposition.

Background:

Plaintiff Chaim Sobel alleges that he and Robert Sepulveda (“Sepulveda” or “Decedent”), executed a contract of sale dated December 10, 2014 pursuant to which Sobel agreed to buy and Sepulveda agreed to sell certain real property located at 193 Rockaway Avenue, Brooklyn, New York for the sum of \$290,000. Plaintiff Sobel claims that pursuant to the terms of the contract, he paid Sepulveda a deposit of \$14,500, which Sepulveda’s attorney, Lorraine Dunfee, currently holds in escrow. Sobel claims that on April 21, 2015, he assigned his rights to the contract to Rockaway.

Before the closing, Sepulveda died. Sobel claims that Sepulveda’s heirs, the defendants in this action, subsequently entered into a contract to sell the same real property to Ibrahim Mohammed for the sum of \$375,000. The contract for sale between proposed intervenor Mohammed and Sepulveda is dated November 21, 2016.

Discussion:

CPLR §1012(a), which governs intervention as of right, provides that upon timely motion, any person shall be permitted to intervene in any action when the action involves the disposition of or title to property and the person may be affected adversely by the judgment. Permissive intervention pursuant to CPLR §1013 also requires a timely motion. Here, the main action involves the disposition of property and although the proposed intervenor may be affected adversely by a judgment in plaintiff's favor, he will not be bound by the judgment as he is not a party to the action. The pivotal issue is therefore whether the application to intervene was timely.

The proposed intervenor did not seek leave to intervene until almost three years after the commencement of this action. While intervention may occur at any time, a motion to intervene should be denied where it would unduly delay the action (*see Poblocki v. Todoro*, 55 A.D.3d 1346, 1347, 865 N.Y.S.2d 448; *Matter of Romeo v. New York State Dept. of Educ.*, 39 A.D.3d 916, 917, 833 N.Y.S.2d 298; *see also* Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C1012:5). Here, plaintiff has already filed as Note of Issue and since the proposed intervenor is seeking discovery, granting the motion would undoubtedly delay the action.

The proposed intervenor contention that he just recently learned of plaintiff's claimed rights in the property is of no moment. In this regard, the proposed intervenor offers no reasonable explanation as to why the Notice of Pendency did not put him on notice of plaintiff's claims. Further, assuming the proposed intervenor's is correct that the recording of the assignment of the contract in June of 2015 did not comply with RPL 294, and that such did not constitute notice for purposes of whether the proposed intervenor is a good faith purchaser, there is no authority that the recording should be disregarded for purposes of determining whether a motion to intervene is timely. Lastly, the Court notes that the contract in which the proposed intervenor is a party is dated November 21, 2016 and it is somewhat difficult to believe that the proposed intervenor did not know of this action until just recently. In sum, the motion for intervention is untimely and therefore denied.

Turning to plaintiff's motion, in denying plaintiff's prior motion for summary judgment, the Court stated that "although plaintiffs correctly state that title to real property automatically vests in the heirs of a decedent who dies intestate ... Plaintiff's claim in this case is against the decedent for breach of contract, not his heirs. Since the plaintiff did not sue the personal representative of the decedent's estate, the action is procedurally defective and for this reason[], the court will not entertain the merits of Plaintiff's motion."

In support of plaintiffs' motion, which is in actuality a motion to reargue, plaintiffs argue that the court overlooked the fact that paragraph 28(b) of the contract for sale states: "This contract shall also apply to and bind the heirs, distributees, legal representatives, successors and permitted assigns of the respective parties." Plaintiffs contend that for this reason, even though the action was commenced against the decedent's heirs and not his estate, the contract is enforceable. Plaintiff states:

Courts have held that where a party to a contract of sale dies prior to the closing and the contract's terms explicitly bound the contracting parties' heirs or distributees, as is the case here, the heirs and/or distributees are bound by the terms of contract and are themselves in breach of the contract if they fail to abide by its terms (*see Warner v. Kaplan*, 2008 NY Slip Op 28444, ¶ 1 (Sup. Ct. N.Y. Cty., Oct. 28, 2008) (holding the heirs of a woman who had entered into a contract to purchase a cooperative apartment but had died prior to closing, were not entitled to the return of the contract deposit when the heirs refused to close on the sale as the express provisions in the contract stated it was binding on the decedent's heirs and legal representatives.); *Carr v. Hoshyla*, 2015 NY Slip Op 30676(U), ¶ 4 (Sup. Ct. Sfflk. Cty, April 21, 2015) (holding the plaintiffs were bound by the terms of a contract of sale entered into by their deceased mother as the contract explicitly bound her heirs).

A motion for leave 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][2]; *see Matter of American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158, 926 N.Y.S.2d 640). "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (*Mudgett v. Long Is. R.R.*, 81 A.D.3d 614, 614, 915 N.Y.S.2d 649 [internal quotation marks omitted]; *see E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654, 828 N.Y.S.2d 212).

While it may be true that there are circumstances where a decedent's estate may be required to comply the decedent's contractual obligations, it does not follow that to enforce a contract with a decedent, a party is permitted to sue the decedent's heirs as opposed to his or her estate. Indeed, in *Warner v. Kaplan*, one of the two cases plaintiff's cites in support of its motion, which is cited with approval in *Carr v. Hoshyla*, the other case cited by the plaintiff, the Appellate Division stated:

While a contract for personal services is terminated by the death of the servant (*see Minevitch v. Puleo*, 9 A.D.2d 285, 287, 193 N.Y.S.2d 833 [1959]), a contract of sale is not terminated by the death of the purchaser. On the contrary, as a general rule, "[w]here the proposed purchaser dies before the closing of title, **his executor or administrator** may pay the balance of the purchase price and take the deed in his own name holding it in trust for the heirs at law or devisees. **It is the duty of the fiduciary for a deceased vendee to complete payments under a contract entered into by such vendee for the purchase of real property**" (4-35 Warren's Weed New York Real Property § 35.24 [2009])

[footnote omitted]; *see Di Scipio v. Sullivan*, 30 A.D.3d 660, 816 N.Y.S.2d 576 [2006]).

Warner v. Kaplan, 71 A.D.3d 1, 4–5, 892 N.Y.S.2d 311, 313–14 (emphasis added). Clearly, *Warner* does not stand for the proposition that a party can sue the heirs of a decedent to enforce a contract for the sale of real property to which a decedent was a party. Indeed, the court made it clear it is the fiduciary of the estate who must be sued. The fact that this case involves a deceased seller as opposed to a deceased purchaser is irrelevant.

For the above reasons, the plaintiff has not demonstrated that the Court overlooked any matters of fact or mistakenly arrived at its earlier determination.

Accordingly, it is hereby

ORDRED that the motion of Ibrahim Mohammed is **DENIED** in all respects; and it is further

ORDERED that plaintiff's cross-motion to reargue is **DENIED**.

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