

Walters v O'Quinn

2021 NY Slip Op 34291(U)

October 4, 2021

Supreme Court, Kings County

Docket Number: Index No. 506720/15

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of October, 2021.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X
HYERGEENE F. WALTERS as EXECUTRIX of the
ESTATE OF GLOVERN MONICA BLAIR,

Plaintiff(s),

- against -

Index No. 506720/15

NICOLE C. O'QUINN as Administrator d.b.n. of THE
ESTATE OF RUEL V. BALCARRA a/k/a RUEL
BALCARRAN, DION I. BALCARRAN, ALNISA
DAMPEER, ALNISA DAMPEER as Administrator
d.b.n. of THE ESTATE OF ANTOINETTE Q. ZAIRE
a/k/a ANTOINETTE R. BALCARRAN, JAMIE
DOYLE a/k/a JAME DEON DOYLE, SYROYAH
BALCARRAN SIMMONS, BRENDA GOVIAS,
MICHAEL BALCARRAN, RICHARD BALCARRAN,
MALIK SHAKUR, ESTATE OF GLORIA JEAN
DOYLE a/k/a ESTATE OF GLORIA JEAN
BALCARRAN, ESTATE OF CAROLE
BALCARRAN, and EMIGRANT BANK, as assignee
of EMIGRANT MORTGAGE COMPANY, INC., as
INTERVENOR,

Defendant(s).

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The following e-filed papers read herein:

NYSCERS Doc:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

299-300, 351-353

Opposing Affidavits (Affirmations) _____

337, 367-368, 376

Reply Affidavits (Affirmations) _____

348

In this matter, defendants Dion I. Balcarran (Dion), Malik Shakur (Shakur), Jamie Doyle (Doyle), and Alnisa Dampeer (Dampeer), individually and as Administrator d.b.n. of the Estate of Antoinette Q. Zaire a/k/a Antoinette R. Balcarran, move (Motion Seq. 10) for an order, pursuant to CPLR § 2221, granting leave to reargue prior motions sequences 6, 7, and 9, and upon reargument, vacatur of the prior orders issued by predecessor justice, Hon. Johnny Lee Baynes, dated October 25, 2018 and November 8, 2018. Dampeer, Dion, Shakur and Doyle further move (Motion Seq. 11) for an order granting summary judgment against co-defendant, Emigrant Bank, as assignee of Emigrant Mortgage Company, Inc. (Emigrant), and plaintiff, Hyergene F. Walters, as Executrix of the Estate of Glovern Monica Blair (referred to interchangeably as “plaintiff” and “Walters”), on their cause of action against plaintiff to quiet title and counterclaim against Emigrant for a declaration that Dampeer, Dion, Shakur and Doyle’s ownership interest in the property known as 777 Prospect Place, Brooklyn, New York (Block 1226, Lot 52) is unencumbered by Emigrant’s mortgage lien.

This dispute originates from events that occurred over the course of five decades. On December 14, 1971, spouses, Robert E. Hogarth (Robert) and Rebecca Hogarth (Rebecca), and Rebecca’s daughter, Dorothea Balcarran (also known as “Dion Balcarran”), executed a deed that provided for an ownership structure, among the three individuals, as joint tenants with right of survivorship in 777 Prospect Place. Rebecca, Robert and Dorothea executed another deed, on July 13, 1974, wherein Robert and Dorothea conveyed their ownership interest in the premises to Rebecca alone. The 1974 deed, by handwritten inscription, further provides that such “[d]eed was given pursuant ... to an understanding [among the three individuals] that [Rebecca], being [the] true and equitable owner, would get title from Robert E. Hogarth and Dion Balcarran upon

her demand.” Rebecca, on September 27, 1977, executed a Last Will and Testament, wherein she bequeathed a life estate and a one-third remainder interest in the property to her husband, Robert, and two-thirds ownership interest to her daughter, Dorothy Balcarran. Rebecca further designated Robert as the Executor of her estate. After Rebecca’s death (on February 18, 1978), Robert filed a petition to probate her will in Kings County Surrogate’s Court (on March 11, 1978) but ultimately failed to pursue the proceeding. Consequently, Letters Administration were never issued, and Rebecca’s estate remained unsettled. Moreover, Rebecca’s daughter, Dorothea, never received the two-thirds ownership interest that Rebecca bequeathed to her. According to the Affidavit in Lieu of Administration in Surrogate Court, Morris County New York on August 21, 1990, Dorothea, who died intestate in June 1988, was survived by her husband, Ruel Balcarran and some of her children. Dorothea and Ruel had five children, namely, Dion Balcarran, Ruel Balcarran, Jr. (died intestate 2009, leaving one issue: Nicole O’Quinn), Gloria Doyle (died intestate July 2008, leaving two issue: Malik Shakur and Jamie Doyle), Antoinette Zaire (died intestate April 2010, leaving two issue: Alnisa Dampeer and David Zaire), and Carole Balcarran (died intestate September 1982, leaving one issue: Syroyah Simmons). Ruel, who died October 1998, had two other sons: Richard Balcarran and Michael Balcarran. In this matter, the two-thirds ownership interest that Dorothea was entitled to receive under Rebecca’s will is claimed herein under intestate succession law by Dion, Shakur, Doyle, and Dampeer, individually and as Administrator d.b.n. of the Estate of Antoinette Q. Zaire a/k/a Antoinette R. Balcarran,

In or around 1983, Robert invited Glovern Monica Blair (Blair), to move into the subject premises to serve as his home health aide. This arrangement endured until Robert’s death on January 28, 1991. However, five days before he died, Robert executed a deed (on January 23,

1991), wherein he conveyed his ownership interest to himself and Blair as joint tenants with right of survivorship. It is alleged that Blair had no knowledge of Rebecca's un-probated Estate, nor the fact that Robert's interest in the premises, at the time of the conveyance, consisted of his remaining life estate and the one-third interest that Rebecca devised to him. Nevertheless, Blair remained in the premises until her death on November 29, 2012. Over the intervening years, Blair also encumbered the property. On December 9, 2004, Blair executed a mortgage lien in the amount of \$200,000 in favor of Emigrant's predecessor-in-interest, Emigrant Mortgage Company, Inc. Blair also refinanced the premises on March 9, 2007 for \$100,000, which increased the total mortgage liens against the property to \$300,000. According to the Complaint filed in a foreclosure action initiated by Emigrant Bank in or around May 2012, the mortgage installment due on July 1, 2011 and each mortgage installment due thereafter, is outstanding.

Blair's estate was probated and her daughters, Hyergene F. Walters and Michelle Walters, each inherited one-half ownership interest in the premises. It was later revealed that there existed a break in the chain of title when the Walters sisters attempted to sell the premises for \$800,000 to prospective buyer, Brooklyn Re Inv LLC. Hyergene Walters, as Executor of Blair's estate, commenced this action on June 2, 2015 to quiet title in favor of Blair's estate. Specifically, plaintiff seeks to quiet title against all of the individuals who may have a claimed interest in the property.

The heirs of Dorothea previously filed motions for summary, all of which were denied by orders dated March 17, 2016 and June 16, 2016 (Hon. Debra Silber, J.). Justice Silber also issued another order, which granted Emigrant leave to intervene in this action. In its pleadings, Emigrant asserted a cross-claim against the co-defendants, and a counterclaim against plaintiff, to

quiet title, as well as causes of action sounding in breach of contract, breach of warranty, misrepresentation, contribution and indemnification. The Dorothea heirs interposed an amended answer, wherein they also asserted certain affirmative defenses and a "counterclaim" against Emigrant for negligently issuing a mortgage lien, without properly searching the public records to ensure that there was no break in the chain of title.

The instant motion to reargue concerns underlying motion sequences 6, 7 and 9. In Motion Sequence 6, the Dorothea heirs sought a default judgment against Emigrant based upon their contention that Emigrant failed to answer their counterclaim for negligence. In Motion Sequence 7, Emigrant moved for summary judgment against the Dorothea heirs on its cross claim for a declaration that the Dorothea heirs have no ownership interest in the property and further, that Emigrant has a first priority mortgage lien against 100% of the subject premises. In Motion Sequence 9, the Dorothea heirs sought to strike the affidavits relied upon by Emigrant in its motion for summary judgment. These motions were addressed by predecessor justice, Hon. Johnny Lee Baynes, who granted Emigrant's motion for summary judgment, and denied as moot, both motions filed by the Dorothea heirs.

This court is guided by CPLR § 2221a (a)(1) in addressing the Dorothea heirs' motion for leave to renew and/or reargue. That section provides that such motions, for leave to vacate or modify an order, shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it (see CPLR § 2221(a)(1)). Motions for leave to renew/reargue are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended facts or law, or for some other reason, mistakenly arrived at its earlier decision (*E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2d Dept 2007]),

quoting *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]; see *Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654, 655 [2d Dept 2007]). Courts are also empowered to vacate orders or judgments on the grounds codified under Section 5015 (a) of the CPLR, as well as for sufficient reason and in the interest of substantial justice (*State of New York Mtge. Agency v Braun*, 182 AD3d 63, 78 [2d Dept 2020]; see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Katz v Marra*, 74 AD3d 888 [2d Dept 2010]).

The instant motion was administratively transferred to this court because the former justice is not available. It is undisputed that counsel for the Dorothea heirs failed to appear on the scheduled court date for oral argument before the prior judge. The following exchange occurred in court that day:

MR. SACKOOR [Emigrant's counsel]: All right. This is Emigrant Bank's motion for summary judgment against the answering defendants and default judgment against the non-answering defendants for Emigrant's - request for relief under Emigrant's cross-claims. The cross-claims basically seek the relief that the plaintiff is the sole owner of the subject premises pursuant to adverse possession and that Emigrant Bank has a first lien mortgage upon the premises.

THE COURT: Well, let me ask this question. What type of opposition do we have for this?

MS. SCHWITZER [plaintiff's counsel]: We have -- I have no opposition.

MR. SACKOOR: There was written opposition to that by the answering co-defendants, but they're not here and this motion, as you know, was marked final for today.

THE COURT: Motion granted. (NYSCEF Doc. No. 327 at 4-5).

Based on the above excerpt, it appears that the Dorothea heirs' written opposition to Emigrant's motion for summary judgment was not considered. Counsel for the Dorothy heirs explained that he did not appear on the day scheduled for oral argument due to an unavoidable conflict in another case. Moreover, it appears that the prior court's decision in favor of Emigrant may have been a consequence of counsel's absence and upon minimal review of the documents submitted. Thus, this court, in the interest of justice and judicial economy, hereby grants that branch of the Dorothea heirs' motion for leave to reargue (Mot. Seq. #10) each motion (Motion Seq. 6, 7 and 9) that was presented before the previous justice.

Emigrant, in support of its motion (Mot. Seq. 7), maintained that the Dorothea heirs' interest in the subject premises was extinguished by virtue of Blair's adverse possession for a period exceeding twenty (20) years and further, that under the doctrine of laches, the Dorothea heirs were estopped from claiming an ownership interest in the property based upon Rebecca's will.

As proponents of the motion for summary judgment, Emigrant was required to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Emigrants "[f]ailure to make such showing required denial of the motion, regardless of the sufficiency of the Dorothea heirs' opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Emigrant's proof should be scrutinized carefully in the light most favorable to the Dorothea heirs (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Under New York law, title to real property that is devised under the will of a decedent vests in the beneficiaries at the moment of the testator's death (*Matter of Seviroli*, 31 AD3d 452, 454 [2d Dept 2006]; see *Corley v McElmeel*, 149 NY 228, 235 [1896]; *DiSanto v Wellcraft Mar. Corp.*, 149 AD2d 560, 562 [2d Dept 1989]). Therefore, Dorothea's two-thirds ownership interest in the property vested when Rebecca expired on February 18, 1978, despite Robert's failure to fulfill his duties as executor of her estate. In 1978, Robert, by virtue of his life estate and one-third ownership interest, and Dorothea, by virtue of her two-thirds remainder interest, held title to 777 Prospect Place as tenants in common (see *Matter of Kimberly*, 150 NY 90 [1896]). It is understood that Robert did not hold the property adversely to Dorothea during his life, since he remained in possession of the premises pursuant to the life estate that was devised to him in Rebecca's will. Dorothea, who died intestate in June 1988, predeceased Robert, who died in January 1991. However, Dorothea's two-thirds interest did not lapse; rather, it vested in her heirs that existed at the time of her death. Therefore, the deed in which Robert attempted to convey full ownership interest in the property to Blair was effective only to the extent of conveying his one-third interest to her (*Bayview Loan Servicing, LLC v White*, 134 AD3d 755, 756 [2d Dept 2015]). Thus, upon Robert's death (on January 28, 1991), Blair and the Dorothea heirs held the property as tenants in common.

During the period that Blair and the Dorothea heirs were tenants in common, both had equal right to possess and enjoy all or any portion of the property as if either was the sole owner (*Myers v Bartholomew*, 91 NY2d 630, 632-633 [1998]). Initially, the Dorothea heirs, as the nonpossessory cotenants, did not relinquish any of their rights as tenants in common when Blair occupied and possessed the premises (*Myers v Bartholomew*, 91 NY2d at 632-633 [1998]).

However, Blair's exclusive possession opened the door for the instant adverse possession claim (*Myers v Bartholomew*, at 630, 632-633 [1998]). This is because, under Section 541 of the RPAPL, the presumption that Blair held the property for the benefit of the Dorothea heirs ceases after ten years, if it is shown that Blair continuously and exclusively occupied the premises during that ten-year period (RPAPL § 541). Emigrant, through the affidavits of Hyergene F. Walters and Michelle Walters, established that Blair alone held the property for both herself and the Dorothea heirs for the requisite period of time, from January 28, 1991 through January 28, 2001, and the Dorothea heirs failed to proffer any evidence to the contrary.

Since RPAPL 541 requires 20 years, or two consecutive 10-year periods, to establish adverse possession, Emigrant was required to establish that Blair's possession was hostile and under a claim of right, actual, open and notorious, exclusive and continuous for an additional 10 years (from January 28, 2001 through January 28, 2011) to establish adverse possession (*Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 649 [2d Dept 2014]; see *Ram v Dann*, 84 AD3d 1204, 1205 [2d Dept 2011]; *Corigliano v Sunick*, 56 AD3d 1121 [4th Dept 2008]). The court finds that Emigrant produced sufficient evidence to establish this fact, to wit: Blair's rented out the remaining available units to tenants and collected monthly rent payments throughout her occupancy; Blair made public exterior repairs and alterations to the property, including replacement of the exterior metal gate in the front of the property; Blair replaced the roof, changed the locks on the exterior doors, and replaced all doors and windows to the property; Blair made interior repairs and alterations, including, but not limited to, painting, replacing the carpet and boiler; Blair also mortgaged the premises to Emigrants predecessor in interest, tendered monthly installments on the

mortgage, and paid all of the carrying costs, such as real estate taxes, homeowner's insurance, and utilities.

Based upon this evidence, the court finds that Blair alone cared for, and improved, 777 Prospect Place, as if it were her own (*see Estate of Becker v Murtagh*, 19 NY3d 75 [2012]). Blair's actions also constituted an actual invasion of, and infringement upon, the Dorothea heirs' two-thirds interest (*Greenberg v Sutter*, 257 AD2d 646, 646 [2d Dept 1999]). The claim of right requirement is also satisfied, because Blair had a reasonable basis for the belief that the property belonged to her since Robert conveyed it to her by deed (*see 5262 Kings Hwy., LLC v Nadia Dev., LLC*, 121 AD3d 748, 748-749 [2d Dept 2014]; *Pakula v Podell*, 103 AD3d 864 [2d Dept 2013]; and *Hogan v Kelly*, 86 AD3d 590, 592 [2d Dept 2011]). Further, the element of "open and notorious" is satisfied, because there is evidence that Blair's possession of the property was sufficiently visible, such that a casual inspection by the Dorothea heirs would have revealed Blair's occupation and use of the property (*Weinstein Enters. v Pessa*, 231 AD2d 516, 517 [2d Dept 1996]; *Shinnecock Hills & Peconic Bay Realty Co. v Aldrich*, 132 App Div 118 [2d Dept 1909], *affd* 200 NY 533 [1909]). Thus, the court finds that the second ten years required for adverse possession is satisfied, and Blair owned the property through adverse possession on January 28, 2011.

Based on this chronology, Blair lacked the authority to encumber the entire premises on December 9, 2004 and March 9, 2007 when she executed a note and mortgage in favor of Emigrant's predecessor in interest. Thus, the court finds that the prior court misapprehended or overlooked applicable law and facts when it granted Emigrant's motion (Motion Seq. 7) for summary judgment in the October 25, 2018 decision and order. Further, the court finds that any

claim or defense based upon the doctrine of laches is moot, since this court has determined that Emigrant's mortgage is limited to Blair's one-third ownership interest.

The Dorothea heirs' motion (Motion Seq. 6) for a default judgment against Emigrant on their "counterclaim" was denied by the prior justice on default. The motion is also subject to denial on the merits. The Dorothea heirs couched their cause of action against Emigrant as a counterclaim; however, their cause of action against Emigrant is actually a cross claim, because Emigrant is a co-defendant (CPLR § 3019 [b])). A counterclaim may only be asserted against a plaintiff (CPLR § 3019 [a]), and the mischaracterization creates a procedural issue that compromises the Dorothea heirs' application for a default judgment. CPLR § 3011 provides that "[t]here shall be ... an answer to a cross-claim," when such cross claim contains *a demand for an answer*. If the party asserting the cross claim fails to demand an answer, as did the Dorothea heirs in this case, the cross-claim is deemed "denied or avoided" by the party against whom the cross claim is made (CPLR § 3011; *see Green Point Sav. Bank v Pagano*, 103 AD2d 735 [2d Dept 1984]). Therefore, the "denial" or "avoidance" deemed to have been made by law occurs at the time that an answer to the cross claim would otherwise be due. In instances where an answer is not demanded, the denial or avoidance pursuant to CPLR § 3011 will foreclose any motion for a default judgment on the cross claim (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 310 [2d Dept 2011]). Thus, the Dorothea heirs' motion for a default judgment (Mot. Seq. 6) is denied.

The Dorothea heirs' motion to strike (Mot. Seq. 9) the affidavits submitted by Blair's daughters in support of Emigrant's motion is denied. Aside from vague reference to the rule against successive motions, the Dorothea heirs failed to set forth any persuasive legal authority to

support their contention that Emigrant is precluded from utilizing the affidavits of Blair's daughters in support of its motion for summary judgment.

Finally, the Dorothea heir's motion for summary judgment (Mot. Seq. 11) is duplicative of prior motions that have been denied. However, this court finds that the Dorothea heirs' request for summary judgment is substantively valid; however, based upon the above findings, their ownership interest in the subject premises pursuant to Rebecca's will was extinguished on January 28, 2011, based upon Blair's adverse possession of the premises.

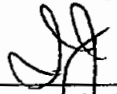
Accordingly, it is hereby

ORDERED that defendants Dion I. Balcarran, Malik Shakur, Jamie Doyle, and Alnisa Dampeer, individually and as Administrator d.b.n. of the Estate of Antoinette Q. Zaire a/k/a Antoinette R. Balcarran motion for leave to reargue (Mot. Seq. 10) is granted and upon reargument, the orders dated October 25, 2018 and November 8, 2018 are hereby vacated and substituted with the decision herein as it pertains to Motion Sequences 6, 7 and 9, all of which are denied, and it is further

ORDERED that defendants Dion I. Balcarran, Malik Shakur, Jamie Doyle, and Alnisa Dampeer, individually and as Administrator d.b.n. of the Estate of Antoinette Q. Zaire a/k/a Antoinette R. Balcarran motion for summary judgment (Mot. Seq. 11) is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,


HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

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