

Campbell v Cross

2022 NY Slip Op 32812(U)

August 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 517618/2020

Judge: Francois A. Rivera

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At an IAS Term, Part 52 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 8th day of August 2022

HONORABLE FRANCOIS A. RIVERA

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LOWELL ANTHONY CAMPBELL, DWRIGHT
WESLEY CAMPBELL, ALRIC CHARLES REID
and ANN MARIE CROSS

DECISION & ORDER

Plaintiff,

Index No. 517618/2020

- against -

MS # 3

SAMUEL WEBSTER CROSS, YAMA COPNEY,
IAN MAURICE REID and FIRSTKEY MORTGAGE

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion jointly filed on July 27, 2021, under motion sequence number three, by plaintiffs Lowell Anthony Campbell, Dwright Wesley Campbell, Alric Charles Reid, and Ann Marie Cross (hereinafter the movants) for an order pursuant to CPLR 3212 granting summary judgment in their favor on the verified complaint for, inter alia, a partition of a specific property. The motion is unopposed.

- Notice of Motion
- Affirmation in Support
- Exhibits A- I
- Statement of Facts
- Affidavit in Support

BACKGROUND

On September 18, 2020, the movants commenced the instant action for, inter alia, partition of a specific property by electronically filing a summons and verified complaint with the Kings County Clerk’s office. The verified complaint contains twenty-one

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allegations of fact in support of three denominated causes of action. The first cause of action is pursuant to Article 15 of the Real Property Actions and Proceedings Law to quiet title to a specific property (the subject property). The second cause of action is for partition of the subject property. The third cause of action is for an accounting.

The verified complaint alleges the following salient facts. The movants and the defendants each own an undivided one-seventh interest in certain real property located at 524 East 29th Street, Brooklyn, New York, in Kings County, in the State of New York (Block 5230, Lot 38) (hereinafter the subject property) as tenants in common. That relations between the plaintiffs and defendants irretrievably broke down when the defendants failed to live up to their promise to have the property sold or alternatively to buy out the interest of the plaintiffs. Additionally, defendants have failed to maintain the costs attendant to the premises such as the mortgage and water usage. This despite having sole control and occupancy of the subject property. In 2017, the plaintiffs had agreed upon a buyout price for each of the above-named defendants undivided interest in the subject premises. However, despite this agreement being reached there has been no concrete steps to complete the buyout.

On October 13, 2020, a document denominated as an affidavit was filed with the Kings County Clerk's office. The single document was purportedly signed by defendants Samuel Webster Cross, Yama Copney and Ian Maurice Reid (hereinafter collectively "the individual defendants") before a notary public.

On October 30, 2020, defendant Firstkey Mortgage electronically filed a notice of appearance with the Kings County Clerk's office.

LAW AND APPLICATION

CPLR 320 (a) provides in pertinent part as follows: “Requirement of appearance. The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer.”

The individual defendants have not appeared in the action. They have not served an answer, or a notice of appearance and they have not made a motion which has the effect of extending the time to answer.

CPLR 3018 provides as follows: “Responsive pleadings. (a) Denials. A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial.”

There is a document filed under NYSCEF number four which indicate that the e-filed document is an answer. Indeed, the plaintiff’s instant motion has attempted to treat this document as the answer of the individual defendants. An examination of the e-filed document, however, reveals that it is not an answer or any other type of pleading within the intendment of CPLR 3011. Nor does it comply with the mandatory requirements of CPLR 3018. In fact, the single document is denominated as an affidavit purportedly signed by all the individual defendants before a notary public.

The plaintiffs have jointly moved, in effect, for summary judgment determining that it is entitled to partition of the subject property, for an accounting, and to appoint a referee, inter alia, to determine whether physical partition or sale is the appropriate remedy.

A person holding and in possession of real property as joint tenant or tenant in common ... may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners” (RPAPL 901[1]). The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties (*Arlo 67, LLC v Doyle*, 201 AD3d 689, 690 [2nd Dept 2022], citing *Goldberger v Rudnicki*, 94 AD3d 1048, 1050 [2nd Dept 2012]).

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*Giuffrida v Citibank*, 100 NY2d 72 [2003]). A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 923 [1993]). If a prima facie showing has been made the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

A party opposing a motion for summary judgment is obligated to lay bare his proofs to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist (*Friends of Animals, Inc. v Associated for Manufacturers, Inc.*, 46 NY2d 1065 [1979]). A genuine issue of fact may not be demonstrated by using mere conclusions,

expressions of hope or unsubstantiated allegations or assertions (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 [1991]).

It has been held that the motion does not lie before joinder of issue although the papers present no triable issue (*Milk v Gottschalk*, 29 AD2d 698 [3rd Dept 1968]). The requirement that issue be joined before a motion for summary judgment is granted is intended to show the court precisely what the plaintiff's claims and the defendant's position as to them, and his defenses, are (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:11 at 431) and has been strictly adhered to (*Perla v Real Property Holdings, LLC.*, 23 Misc3d 697 [NY Sup 2009]). It has also been held that the Supreme Court is powerless to grant summary judgment prior to joinder of issue (*see* CPLR 3212 [a]; *Union Turnpike Associates, LLC v Getty Realty Corp.*, 27 AD3d 725, 728 [2nd Dept 2006]). Accordingly, as movants have not joined issue the plaintiffs' motion must be denied as premature. However, the denial is without prejudice.

CONCLUSION

The notice of motion jointly filed by plaintiffs Lowell Anthony Campbell, Dwright Wesley Campbell, Alric Charles Reid, and Ann Marie Cross for an order pursuant to CPLR 3212 granting summary judgment in their favor on the verified complaint is denied without prejudice.

ENTER:

Francois A. Rivera

J.S.C.

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Page 5 of 5

2022 AUG 15 AM 9:32

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