

Bacchi v Feng Duan Lin
2022 NY Slip Op 33299(U)
September 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 517807/21
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of September, 2022.

P R E S E N T:

KAREN B. ROTHENBERG,
Justice.

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MARIA R. BACCHI,

Plaintiff/Counterclaim
Defendant,

-against-

Index No. 517807/21

FENG DUAN LIN,

Defendant/Counterclaim
Plaintiff/Cross-Claimant,

and

ANNA PATERNO, DONNA LIKA,
ROSEANNE GUARNERI-POIDOMANI,
ESTELLE CARVELAS and GRACE V.
MATTEI, ESQ.,

Defendants/ Cross-Claim
Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>10-11, 30-31, 48-50</u>
Opposing Affidavits (Affirmations) _____	<u>31, 36, 61, 65</u>
Affidavits/ Affirmations in Reply _____	<u>65, 70</u>
Other Papers: Affidavits/Affirmations in Support _____	<u>14, 36</u>

Upon the foregoing papers, defendant/counterclaim plaintiff/cross-claimant Feng Duan Lin (Lin) moves for (1) an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing

the complaint of plaintiff/counterclaim defendant Maria R. Bacchi (plaintiff), and (2) a judgment declaring that Lin is the title holder of the subject property. Plaintiff cross-moves for an order, pursuant to CPLR 3025 (b), granting her leave to serve an amended complaint. Defendants Anna Paterno (Anna), Donna Lika (Donna), Roseanne Guarneri-Poidomani (Roseanne) and Estelle Carvelas (Estelle) cross-move for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint.

Plaintiff commenced this action pursuant to Real Property Actions & Proceedings Law [RPAPL] article 15 for a determination of interests in the subject property at 1704 West 12th Street in Brooklyn, in addition to partition of the property and other relief. Title to the property was formerly held by Rosina Paterno (Rosina), as the surviving spouse of Francesco Paterno. Rosina and Francesco had nine children, including Frank Paterno (Frank), Mary Guarneri (Mary), Helen Paterno (Helen) and Michael Paterno (Michael). In her Last Will and Testament, Rosina bequeathed the subject property as follows:

I give, devise and bequeath the real estate I own known and designated as 1704 West 12th Street, Brooklyn, New York, to my beloved children MICHAEL PATERNO, FRANK PATERNO, HELEN PATERNO and MARY GUARNERI, to share equally during their lifetime. Upon the death of each child, or upon my death if any child shall predecease me, the share of such child shall go [to] his or her surviving spouse, if then living, for her or his life. Upon the death of the last to die of each child, his or her spouse or myself, the share of each child shall go to his or her then living children. If any child of mine shall not have any children living at that time, then such child's share shall, upon his or her death or the death of his or her spouse, be divided equally per stirpes among my then living children named in this paragraph and the then living

children of any deceased child of mine named in this paragraph.

Following Rosina's death in 1985, Philip Paterno, as Executor of the Last Will and Testament of Rosina Paterno, executed and delivered an Executor's Deed conveying life estates in the subject property to Michael, Frank, Helen and Mary. The Executor's Deed provided that Michael, Frank, Helen and Mary shall share the subject premises equally during their lifetimes, as follows:

TO HAVE AND TO HOLD the premises herein granted unto the party of the second part [Michael, Frank, Helen and Mary], the distributees or successors and assigns of the party of the second part for and during the natural lives of said parties of the second part, and upon the death of any such party of the second part, then unto the surviving spouse, if any, of such deceased party of the second part to have and to hold during such surviving spouse's natural life; upon the death of any party of the second part who is unmarried at his or her death, or upon the death of any such party's surviving spouse, then such party of the second part's interest or share in the subject premises shall pass in fee simple to the then-living issue of such party per stirpes; in the event that there are no such living issue at the time of the death of any such party or surviving spouse, then such party's interest or share in the subject premises shall pass to the then living and remaining party or parties of the second part or his, her or their surviving spouse(s) per capita, and such interest or share shall thereafter pass in accordance with the provisions hereof.

Plaintiff and Donna are the children of Frank and Anna. Roseanne and Estelle are the children of Mary. By deed dated September 30, 1995, Helen conveyed her life estate interest to Ernest Albanese. By deed dated August 4, 1997, Michael conveyed his life estate interest to Lucille Davis. Michael died in December 1997. By deed dated

December 11, 1999, Lucille Davis purportedly conveyed her (Michael's former 25%) interest to Frank, Helen and Mary.¹

In or around April 2000, an agreement was drafted which provided that the surviving life tenants and remaindermen agreed, in effect, to renounce and disclaim their interests in the subject property and assented to a sale thereof. While the proposed agreement was signed by Mary, Frank, Helen, Anna, Donna, Roseanne and Estelle, plaintiff refused to agree thereto or affix her signature.

Mary died in January 2002 and Helen died in 2013. By deed dated August 11, 2016, Ernest Albanese purportedly conveyed his (Helen's former 25% life estate) interest to Frank, Rosanne and Estelle.² Upon Frank's death in March 2017, his life estate interest passed to his wife, Anna, making Anna the holder of the final life estate interest under the terms of Rosina's bequest and the Executor's Deed.

By deed September 14, 2018, Anna conveyed her life estate interest to Donna. On March 4, 2021, Donna, Estelle and Roseanne executed a deed conveying the property to Lin for \$1,480,000. Although plaintiff was not a party to the deed, the closing statement for the sale (NYSCEF Doc No 35) indicates that \$259,702.98 of the sale proceeds deposited into the escrow account of the closing attorney, defendant Grace V. Mattei, Esq., were to be held in trust for plaintiff.

¹ This deed was executed following the institution of an action to set aside the August 4, 1997 deed.

² This purported conveyance could not be deemed effective since, under the terms of Rosina's bequest and the Executor's Deed, Ernest Albanese no longer had a life estate interest following the death of Helen in 2013 (*see Ifill v Boyd*, 18 Misc 3d 1127[A], 2008 NY Slip Op 50214[U] [Sup Ct, Queens County 2008]).

In her original complaint, filed on July 19, 2021, plaintiff asserted a fee interest in the property and sought to void the March 4, 2021 deed to Lin, compel a partition of the property and recover rental income collected by defendants from tenants or occupants of the premises. On September 8, 2021, an answer was filed by Anna, Donna, Roseanne and Estelle setting forth certain affirmative defenses. On October 15, 2021, Lin filed an answer setting forth numerous affirmative defenses, as well as a counterclaim pursuant to RPAPL article 15 to compel the determination of interests in the subject property and cross claims against Anna, Donna, Roseanne and Estelle for unjust enrichment and contribution/indemnification. Lin thereafter moved for dismissal of the original complaint pursuant to CPLR 3211 (a) (1) and (7) and, in essence, summary judgment on his declaratory judgment counterclaim. In his motion, Lin argued, among other points, that plaintiff did not possess any interest in the property and that Lin is a good faith purchaser for value.

Subsequent to Lin's motion, plaintiff cross-moved to amend the complaint. The proposed amended complaint provides expanded and more detailed factual allegations regarding plaintiff's interest in the property as a remainderman under Rosina's Last Will and Testament and the Executor's Deed, as well as allegations regarding Lin's prior knowledge of plaintiff's claimed interest which contradicts his good faith purchaser assertion. The proposed amended complaint also adds a cause of action against Anna, Donna, Roseanne and Estelle for waste under RPAPL article 8. In opposition to the cross motion to amend, Lin reiterates his arguments that he is a good faith purchaser for value and that plaintiff has no interest in the property and further contends that any interest of

plaintiff intended under Rosina's Last Will and Testament and the Executor's Deed would be void under the Rule Against Perpetuities.

A motion to dismiss a pleading pursuant to CPLR 3211 may not be defeated by an amended pleading where defendants address the merits of plaintiff's claims (*see Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d Dept 2003]) and, as a result, the court will consider the cross motion to amend and deem the motions to dismiss as directed toward the proposed amended complaint (*see 49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243, 243 [1st Dept 2004]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1st Dept 1998]). Leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (*see Caldara v County of Westchester*, 197 AD3d 607, 608 [2d Dept 2021]). "Mere lateness is not a barrier" to amendment, absent prejudice (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks omitted]), which exists where the nonmoving party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014] [internal quotation marks omitted]). "The burden of establishing prejudice is on the party opposing the amendment" (*id.* at 411).

In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail"

(*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The court must accept the facts alleged in the complaint to be true and determine only whether the facts alleged fit within any cognizable legal theory (see *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2d Dept 2000]). The court “is not concerned with determinations of fact or the likelihood of success on the merits” (*Detmer v Acampora*, 207 AD2d 477 [2d Dept 1994]; see *Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). A motion to dismiss, pursuant to CPLR 3211 (a) (1), based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law (see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Lewis & Murphy Realty, Inc. v Colletti*, 187 AD3d 731, 733 [2d Dept 2020]; *25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

At the outset, contrary to the argument of Lin, the estates created by the Last Will and Testament of Rosina and the Executor’s Deed are not invalid under the Rule Against Perpetuities. The Rule Against Perpetuities is codified by Estates, Powers and Trusts Law [EPTL] § 9-1.3 as follows:

(a)(1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.

(2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in

being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

(b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

While Lin argues that a potential spouse of one or more of the four life estate grantees may not be “a life in being” (i.e., not yet have been born) at the time of Rosina’s bequest, and may not die for more than 21 years after taking the final life estate interest following the death of all other life estate grantees and their spouses, EPTL 9-1.3 creates the presumption that “the creator [Rosina] intended the estate to be valid” (EPTL 9-1.3 [b]) and that:

“[w]here an estate would, except for this paragraph, be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate, **and such person is referred to in the instrument creating such estate as the spouse of another without other identification**, it shall be presumed that such reference is to a person in being on the effective date of the instrument” (EPTL 9-1.3 [c])(emphasis added).

Accordingly, any potential future spouse of Michael, Frank, Helen and Mary, being unidentified under the terms of Rosina’s Last Will and Testament, are presumed to be a life in being at the time of the bequest. Because the remainder interests in fee vest immediately upon the termination of the final life in being (actual or presumed)

referenced in the bequest, such interests clearly fall within the 21-year perpetuities period.

Turning to an examination of the proposed amended complaint, the court finds that the first cause of action seeking to void the March 4, 2021 deed is palpably insufficient and does not state a cognizable cause of action. While plaintiff alleges that Donna, Estelle and Roseanne failed to apply for an order pursuant to RPAPL 1602,³ such failure simply leaves plaintiff's remainder interest unaffected by the conveyance (*see* RPAPL 1614). Where a person who has a partial interest in real property executes a deed that purports to convey full title to the property, the deed is not entirely void; rather, the deed is effective, but only to the extent of conveying the grantor's interest in the property (*see* Real Property Law § 245; *Matter of Blango*, 166 AD3d 767, 768-769 [2d Dept 2018]; *Bayview Loan Servicing, LLC v White*, 134 AD3d 755, 756-757 [2d Dept 2015]). Plaintiff does not otherwise set forth particularized allegations to support her claim that the deed should be set aside on the basis of fraud (i.e., that plaintiff relied on certain misrepresentations from defendants, causing injury).

With regard to the remainder of the proposed amended complaint, plaintiff sufficiently alleges that she holds a remainder interest in the subject property pursuant to the Executor's Deed which is or may be adverse to the interests of Lin, Anna, Donna,

³ This statute provides:

"When the ownership of real property is divided into one or more possessory interests and one or more future interests, the owner of any interest in such real property or in the proceeds to be derived therefrom on a directed sale thereof, except the owner of a possessory estate in fee simple absolute therein, may apply to the court designated in section 1603 for an order directing that said real property, or a part thereof, be mortgaged, leased or sold. If any such owner is an infant or otherwise under disability, the application can be made on behalf of such person, by the person duly authorized by law to care for his property interests."

Roseann and Estelle and therefore has established a cognizable cause of action for a declaratory judgment under RPAPL article 15. The proposed amended complaint also sufficiently alleges a new cause of action for waste in that Anna, Donna, Rosanne and Estelle injured and/or destroyed plaintiff's future possessory interest in the subject premises by conveying the subject premises to Lin (RPAPL 831). Finally, as plaintiff alleges a remainder interest in the subject property, she has sufficiently stated cognizable causes of action for partition (RPAPL 901 [2]; EPTL 6-4.7) and for an accounting.

Defendants do not otherwise demonstrate prejudice as a result of the amendments to the complaint, particularly since this action is in its early stages with little, if any, discovery conducted.

As a result, plaintiff's cross motion to amend the complaint is granted, although defendants' motion and cross motion for dismissal, pursuant to CPLR 3211 (a) (7), is granted to the extent that the first cause of action to set aside the March 4, 2021 deed is dismissed. The motion and cross motion for dismissal pursuant CPLR 3211 (a) (7) is in all other respects denied.

Insofar as the documentary evidence does not conclusively establish defendants' defenses (including Lin's good faith purchaser defense) as a matter of law, those parts of the motion and cross motion seeking dismissal of the amended complaint pursuant to CPLR 3211 (a) (1) are denied.

The remaining part of Lin's motion, which seeks (presumably) a judgment under RPAPL article 15 declaring that Lin holds *sole* interest the subject property, is denied. A declaration of the parties' respective ownership interests, if any, in the subject property

cannot be made at this time as questions of fact exists as to, among other things, Lin's status as a good faith purchaser.

The foregoing constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, appearing to read "Karen A. Huber". The signature is written in a cursive style with a large initial "K".

J. S. C.