

Simmons v Bell

2022 NY Slip Op 34663(U)

December 9, 2022

Supreme Court, Queens County

Docket Number: Index No. 703307/16

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

DERRICK SIMMONS, as Executor of the Estate of
BESSIE A. ROGERS, deceased,

Index No. 703307/16

Plaintiff,

Motion

Date May 31, 2022

- against-

Motion

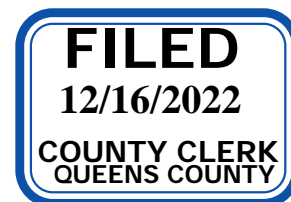
Cal. No.

ALFRED BELL and RHONDA BELL,

Motion

Seq. No. 6

Defendants.



The following numbered e-filed papers were read on this motion by defendants seeking summary judgment on liability, pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits	E176-E209
Affirmation in Opposition - Exhibits	E210-E226
Reply Affirmation - Exhibit	E227-E228

Upon the foregoing papers it is ordered that defendants' motion is determined as follows:

This is an action seeking, among other things, declaratory relief with regard to ownership of real property. A previous action, under Index No. 28487/2008, was transferred to Civil Court, Queens County in 2010. A first motion for the relief requested herein, along with the ground that another action was pending, pursuant to CPLR 3211 (a) (4), was denied with leave to renew in the Civil Court action. Thereafter, upon application of plaintiff, seeking removal from Civil Court back to this court, and the extension of time to file a second notice of pendency, this action was transferred back to this court, but the time to file a second notice of pendency was denied. After the physical transfer of the file was effectuated, defendants moved to dismiss and for sanctions, and plaintiff cross-moved for leave to reargue the denial of its motion to extend its time to file a second notice of pendency. Both motions were denied on May 29, 2020. Defendants now move for summary judgment, dismissing the complaint.

Decedent, Bessie A. Rogers, was the owner of 130-16 Van Wyck Boulevard (alternatively referred to as "Van Wyck Expressway"), South Ozone Park, New York (the subject property) since September 1987. In 1991, defendants purchased 130-26 Van Wyck

Boulevard - two doors away from the subject property. In 1991, Rogers transferred her property to her attorney, Ascher Brand, reserving a life tenancy to herself. In 1994, Rogers conveyed the subject property to one Lucy Hill, and then, in 1995, it was transferred back to Rogers. Thereafter, in 1995, she deeded the property to herself and plaintiff-executor, Derrick Simmons, with whom she, in 1998, “cosigned” a loan from National West Bank of Delaware. In 1998, Rogers and Simmons conveyed the property back to Rogers, who borrowed \$17,776.00 from defendant, Alfred Bell, to pay off the loan, which was satisfied with the borrowed money. Also, in 1998, Rogers transferred the property to herself and defendants, as joint tenants.

In or about 2007, defendants planned to move to South Carolina, and invited Rogers to live with them. As a result, on June 1, 2007, Rogers and defendants sold the subject property to one Monica Krynska. The proceeds of the sale went to Rogers alone, but were deposited into a joint account with defendants. Prior to the closing of such sale, the 1991 deed from Rogers to Ascher Brand raised a “chain of title” issue, resulting in an Executor’s Deed from Brand’s Executor to Rogers, dated May 3, 2007. Rogers died on April 25, 2015, and Derrick Simmons was named Executor of her Estate.

The complaint herein states, among other things, an action to quiet title to the subject property, claiming that the October 13, 1998 filed deed from Rogers to herself and defendants, along with the “handwritten note” of September 21, 1998, and the endorsement on the sale proceeds check, are all forgeries, void *ab initio*, and therefore plaintiff alone has legal title to the subject property. The complaint claims that defendants defrauded Rogers by forgery, and, without right or title, retained the proceeds of the sale of the subject property for their own use. Plaintiff claims that defendants had no right to transfer the subject property to Krynska, due to the “forged” deed. Further, plaintiff raises the “defense” of impossibility in that Rogers, at the time that the October 13, 1998 deed was made, possessed only a “life estate” in the property, due to the viable 1991 deed to Asher Brand, Esq., and, so, could not have passed title to defendants, and that as such, the 1998 deed was void.

“[T]he proponent of a summary judgment motion must 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” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a defendant’s motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (see *Monroy v Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]). Credibility issues regarding the circumstances of the subject transactions require resolution by the trier of fact (see *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]; *Martin v Cartledge*, 102 AD3d 841 [2d Dept 2013]), and the denial of summary judgment.

The court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' " (*see Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011] [citations omitted]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]).

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing and uncertain or disputed jural relation either as to present or prospective obligations" (*see 159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176 [2d Dept 2018] [citation omitted]). An action for declaratory judgment may be utilized only for a justiciable controversy, *i.e.*, where the court has jurisdiction over the subject matter of the action, and the dispute is genuine, rather than academic, between parties with a stake in the outcome (*see Matter of Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD3d 1072 [2d Dept 2018]; *DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725 [2d Dept 2013]).

In the case at bar, defendants allege that plaintiff's complaint must be dismissed because plaintiff cannot commence an action to quiet title, due to the assertion by defendants that they "claim[] no right, title or interest in any of the parcels which are the subject of the action," as required by RPAPL Article 15. However, the complaint herein includes causes of action, beyond an unvarnished declaration quieting title, seeking monetary damages for fraud and the "unlawful retention" of the proceeds of the sale of the subject property.

Defendants' own submissions have demonstrated that there are triable issues of fact (*see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712 [2d Dept 2020]) regarding the essential contention herein, *i.e.*, that Rogers deeded the subject property to defendants in return, and repayment, for Alfred Bell's loan to Rogers in September 1998. Contrary to defense counsel's insistence that the matter is resolved by Rogers' "admissions" to having conveyed the property to defendants, Rogers' deposition and affidavit testimony reflect the contrary. Further, plaintiff has steadfastly claimed Rogers' signatures on such documents were forgeries and introduced some evidence to support such contention. With such disputed and outstanding issues of fact, defendants have failed to establish a *prima facie* entitlement to summary judgment as a matter of law.

Accordingly, defendants' motion for summary judgment, dismissing plaintiff's complaint, is denied.

Dated: December 9, 2022



DARRELL L. GAVRIN, J.S.C.