

One 56 W. LLC v Aryeh

2023 NY Slip Op 33406(U)

September 28, 2023

Supreme Court, New York County

Docket Number: Index No. 155928/2022

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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ONE 56 WEST LLC,

Plaintiff,

- v -

INDEX NO. 155928/2022

MOTION DATE 05/04/2023

MOTION SEQ. NO. 003

YOSEF ARYEH, DECIMA FAGAN, EDWARD T. FAGAN,
SERETTA FAGAN a/k/a SERETTA FAGAN-LOWE and
JOHN DOE #1 THROUGH JOHN DOE #20

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to quiet title brought pursuant to RPAPL article 15, the plaintiff, One 56 West LLC, seeks a judgment declaring that it is the fee simple owner of a certain parcel of land located at 156 West 122nd Street in Manhattan (the premises), and that the individual defendants Yosef Aryeh, Decima Fagan, Edward T. Fagan and Seretta Fagan, have no interest in the property. The plaintiff moves pursuant to CPLR 3212 for summary judgment on the complaint (MOT SEQ 003). The defendants oppose the motion. The motion is denied.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, *supra*; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st

Dept. 2010). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). Furthermore, “[s]ince the remedy of declaratory judgment lies within the sound discretion of the court to grant or withhold, it is essential that the necessity for the relief be shown at the inception of the litigation.” Am. News Co., v Avon Pub. Co., 283 A.D.1041, 1042 (1st Dept. 1954); see also Ahead Realty LLC v India House, Inc. 92 AD3d 424 (1st Dept. 2012) [declaration denied when complaint failed to state a cause of action].

The plaintiff has failed to meet its burden on the motion in the first instance. As way of background, the submissions show that the plaintiff, under another corporate entity, One 56 Street Corporation, acquired title to the premises in 2014 in a prior action pursuant to RPAPL article 15, on default. See One 56 Street Corp. v Henry Fagan, et al, 158812/14). That judgment was entered in the New York County Clerk’s office on January 15, 2015. The defendants here were not parties to that action. The property was purportedly conveyed to the plaintiff by One 56 Street Corporation by deed dated March 20, 2018.

Following the 2014 action, the Fagan defendants commenced three separate actions seeking to quiet title under RPAPL article 15. One was voluntarily withdrawn and two were dismissed. In a decision of this court (Rosado,J.) dated August 10, 2022, in the action entitled Decima Fagan et al v One 56 Street Corporation, Inc., et al, 156420/21, the court dismissed that complaint upon finding that the plaintiffs lacked standing in light of the default judgment obtained in the 2014 action which declared that One 56 Street Corporation was the sole owner in fee simple of the premises. On or about June 21, 2021, the Fagans purportedly executed powers of attorney to defendant Aryeh and recorded that document with the Automated City Register System (ACRIS) against the premise and then filed a deed dated April 5, 2022, recorded on ACRIS, purporting to convey the premises to themselves, which prompted this action.

The plaintiff’s submissions consist of the aforementioned complaints and court orders from prior actions, the power of attorney and deed dated April 5, 2022, and the prior deeds. Also submitted is an affidavit of Joseph Mahkani, as a member of One 56 West LLC, who opines that “the fraudulent deed is a cloud on plaintiff’s title” which “the defendants had no legal authority to file” and is “an unauthorized form of attachment used by Aryeh to thwart plaintiff’s ownership interest in the premises.” The court notes that Mahkani has been indicted for deed theft and

mortgage fraud in regard to nearby properties. That fact is stated in a decision of this court (Rosado,J.) dated August 10, 2022, in the action entitled Decima Fagan et al v One 56 Street Corporation, Inc., et al, 156420/21, which was submitted by plaintiff in support of this motion.

This court denied the plaintiff's previous motion for leave to enter a default against defendant Aryeh, on essentially the same submissions, finding that the plaintiff did not establish a *prima facie* cause of action as required by CPLR 3215(f) (MOT SEQ 001). CPLR 3212 carries an even higher burden of proof. Further, on this motion, the plaintiff was required to include all pleadings, but did not. However, since the pleadings were electronically filed and available to the court, the omission from the summary judgment motion papers is not a fatal defect. See CPLR 2214[c]; 1 Washington Realty Owners, LLC v 260 Washington Street, LLC, 105 AD3d 675 (1st Dept. 2013). Notably, however, the complaint is skeletal, lacking the particularity required to plead fraud. See CPLR 3016(b). And, ironically, while in the complaint the plaintiff accuses the defendants, descendants of prior owners of the subject property, of filing a "fraudulent deed" in 2022, the proof submitted, which includes questionable deeds and affidavits submitted by the plaintiff in at least one prior motion, suggests an earlier wrongdoing on the part of the plaintiff. In any event, the mere filing of a series of deeds, including the March 20, 2018, deed and the April 5, 2022, deed, does not, alone, demonstrate the absence of triable issues. Rather, it raises issues of fact, *inter alia*, as to the validity or authenticity of the deeds themselves and the parties' interest in the subject property. The plaintiff falls far short of establishing entitlement to the declaration it seeks.

Since the plaintiff failed to meet its burden in the first instance, the court need not consider the defendants' opposing papers. However, those papers include, in regard to the 2014 action, an affidavit of service which purports to have effected service of a motion upon Henry Fagan and Rosalina Fagan at the property address on December 29, 2014, even though Henry died in 1975 and Rosalina died in 1985. The method of service used on the deceased was not specified in the affidavit. The defendants also submit an "Affidavit of Heirship" of defendant Seretta Fagan which indicates that Henry and Rosalina were her grandparents, and that she, Decima Fagan, Joyce Fagan and Edward Fagan are the sole surviving heirs to the Estate of Henry and Rosalina Fagan, who resided at the subject premises until their death.

Finally, the defendants correctly argue that this motion is premature. Notwithstanding the factual issues presented even in its own complaint, the plaintiff moved for summary judgment

soon after the court first directed discovery and scheduled a preliminary conference, and before the court issued the order denying the plaintiff’s default motion. Discovery is ongoing. Depositions of defendants Decima Fagan, Edward T. Fagan and Seretta Fagan, who reside in Barbados, have not been completed due to power outages on the island, as represented by counsel at the most recent discovery conference. Nor had the plaintiff produced Mikhani or any other witness for examination, without excuse. Where, as here, it appears that the facts essential to oppose a motion for summary judgment “exist but cannot then be stated” (CPLR 3212[f]), a court may deny the motion. See Blackstone v Accede, Inc., 194 AD3d 46 (1st Dept. 2021); Rodriguez v Architron Envtl. Svcs., Inc., 166 AD3d 505 (1st Dept. 2018); Figueroa v City of New York, 126 AD3d 438 (1st Dept. 2015).

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff’s motion for summary judgment is denied.

This constitutes the Decision and Order of the court.


 NANCY M. BANNON, J.S.C.
 HON. NANCY M. BANNON

9/28/2023
 DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER