

Frazier v Barnes

2023 NY Slip Op 34905(U)

February 28, 2023

Supreme Court, Bronx County

Docket Number: Index No. 816618/2022E

Judge: Paul L. Alpert

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

SHIRLEY FRAZIER, Individually and as
Administrator of the ESTATE OF LEMUELL X.
FRAZIER a/k/a LEMUEL FRAZIER, JR.
Plaintiff

Index No. 816618/2022E

-against-

Hon. Paul L. Alpert

SONIA BARNES

Justice Supreme Court

Defendant

The following papers numbered 1 to were read on this motion (Seq. No. 1)
for noticed on

Table with 2 columns: Document Type (e.g., Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed) and No(s).

The defendant's motion to dismiss the complaint is decided in accordance with the annexed decision and order of the court.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 2/28/23

Hon. [Signature]
HON. PAUL ALPERT J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
FIDUCIARY APPOINTMENT REFEREE APPOINTMENT



SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 26

SHIRLEY FRAZIER, Individually and as Administrator
of the Estate of Lemuell X. Frazier
a/k/a Lemuell Frazier Jr.,

X

Plaintiff,

Index No.:816618/2022E

-against-

DECISION/ORDER

SONIA BARNES

Present:
HON. Paul L. Alpert

Defendant

X

Paul I. Alpert, J.S.C.

In this action, which inter alia, seeks imposition of a constructive trust, the defendant moves pursuant to CPLR §3211(a)(7) to dismiss the complaint with prejudice on the grounds that it is barred by res judicata and collateral estoppel as well as barred by the statute of limitations. This is the second action commenced by the plaintiff seeking to impose a constructive trust on the premises located at 4340 DeReimer Ave., Bronx, New York. In the prior action (Index No. 801362/2021E) Justice Franco granted the defendant's motion to dismiss the complaint and declared the defendant to be the sole owner of the subject property. A subsequent motion to reargue was granted by this court and adhered to the decision in all respects. The plaintiff now commences the instant action in her individual capacity as well as in her capacity as Administrator of the Estate of Lemuell X. Frazier. She contends that by suing in her capacity as

administrator of the estate she cured any defects contained in the previous complaint. In addition to asserting claims for a constructive trust and unjust enrichment as in the first action she now includes claims for an Equitable lien, Equitable Estoppel and Adverse Possession.

For brevity sake the court will not recite the entire factual history of the proceeding which is set forth in detail in Justice Franco's order. In short the defendant held the property as a joint tenant with right of survivorship with Mr. Frazier commencing in 1995. At the time both Mr. Frazier and the defendant were romantically involved. That relationship ended in 1996 and in 2000 the plaintiff moved into the premises eventually marrying Mr. Frazier in 2005. Mr. Frazier died in 2020 and the plaintiff was appointed administrator of the estate.

In the earlier proceeding Justice Franco held that the plaintiff failed to plead a cause of action for a constructive trust because the plaintiff could not establish that a confidential or fiduciary relationship existed between the parties, that a promise was made between them, and that a transfer was made in reliance upon the purported promise between Mr. Frazier and the plaintiff. The decision further held that the plaintiff failed to overcome the defendants argument that the statute of limitations expired in 2011 because she failed to seek a constructive trust within six years after marrying Mr. Frazier. In addition the Court found the pleading deficient because it failed to allege any information or reference any writing regarding Mr. Frazier's intent to sever the joint tenancy, in violation of General Obligations Law §5-703[3]).

Here the plaintiff attempts to cure any defects contained in the prior action by commencing the action on behalf of the Estate. She now alleges that the defendant made a promise to Mr. Frazier that she would transfer her share of the property back to Mr. Frazier upon vacating the premises. In addition she claims that Mr. Frazier promised to convey his interest in

the property to her by virtue of their marriage should she survive him. As administrator of the estate she seeks to impose a constructive trust on behalf of the estate.

In support of the motion the defendant argues that these very same issue were decided by Justice Franco and that the plaintiff is barred by res judicata and collateral estoppel from maintaining this action. Because the court declared her to be the owner of the property, the plaintiff may not seek to have another bite at the apple by commencing this action in the name of the estate.

The plaintiff contends that res judicata and collateral estoppel do not apply because the issue here are different. She claims that the complaint here was submitted to correct the defects contained in the complaint in the previous action. It is now the estate of Mr. Frazier that seeks to impose a constructive trust. Moreover, because Justice Franco did not dismiss the case with prejudice the door was left open for the plaintiff to re-plead her case.

As a general rule once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*O'Brien v. City of Syracuse* 54 N.Y.2d 353). Collateral estoppel or issue preclusion requires that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding and that in the prior proceeding the party against whom preclusion is sought was afforded a full and fair opportunity to contest the issue (*Allied Chem. v. Niagara Mohawk Power Co.* 72 N.Y.2d 271).

The plaintiff's attempt to "cure" the deficiencies contained in the previous complaint are without merit. In a veiled attempt to revive her claim she now seeks to re-litigate the very same issues decided by Justice Franco, this time in the guise as administrator of the estate of Mr.

Frazier. However the plaintiff cannot overcome the arguments that the parties failed to memorialize any alleged transfer of the property from the defendant to Ms. Frazier or that the action is barred by the statute of limitations. In the prior action Justice Franco in dismissing the complaint relied upon the plaintiff's failure to allege any information or writing evincing Mr. Frazier's intent to sever the joint tenancy. Here, the plaintiff, in order to satisfy the requirements of a constructive trust alleges that the defendant made a promise to Mr. Frazier that as a condition to being added to the deed she would transfer the property back to him if she ever moved out of the premises. The defendant denies that she ever made such a promise and it can never be proven as the only individual who could establish the promise is deceased.

Similarly the plaintiff cannot overcome the expiration of the statute of limitations for the creation of a constructive trust. A claim for a constructive trust is governed by a six year statute of limitations (CPLR §213[1]). The plaintiff argues that the time to commence this action commenced upon the death of Mr. Frazier in 2020, when he failed to transfer the property to her. She maintains that under the continuing performance doctrine there was "a continuing wrong in that Lemuell died without having transferred the property." This argument is unpersuasive and without merit. Since the plaintiff brings this case for a constructive trust in her capacity as Administrator of the Estate she stands in the shoes of the deceased and not of her own self interest. The fact that Mr. Frazier breached his alleged agreement with her to transfer the property has no bearing on when Mr. Frazier's cause of action for a constructive trust accrued. Any claim for a constructive trust would have commenced when the defendant breached the agreement with Mr. Frazier, not when Mr. Frazier breached his alleged agreement with the plaintiff. If, as alleged, the defendant agreed to transfer the property when she vacated the property then any

claim for a constructive trust would have commenced in 1996 when the defendant moved out. The statute of limitations would have expired in 2002. It cannot be seriously argued that the Estate's cause of action for a constructive trust accrued upon the death of Mr. Frazier. The plaintiff in her individual capacity cannot make any claim regarding a constructive trust as she is precluded from doing so by virtue of Justice Franco's decision. Thus her contention that the continuing performance doctrine is applicable is without merit. Mr. Frazier's failure to transfer the property to the plaintiff does not work to the detriment of the defendant. On a motion to dismiss for failure to state a cause of action the Court must liberally construe the complaint, accept the pleaded allegations as true, give every favorable inference to the plaintiff and decide whether the facts as alleged fall within any cognizable legal theory (*Miglino v. Bally Total Fitness Center of Greater NY, Inc.* 20 N.Y.3d 342). Applying those principals, the motion to dismiss the second cause of action for a constructive trust is therefore granted.

Similarly the first cause of action is also dismissed under the doctrines of res judicata and collateral estoppel. The claim in the previous action is the same as the one plead here and was rejected by Justice Franco. It is the same claim alleged now as in the prior proceeding, only under the guise as Administrator.

The plaintiff also seeks to assert an equitable lien on the property (Third cause of action). A cause of action for an equitable trust is governed by a six year statute of limitations and begins to run upon the occurrence of the wrongful act giving rise to a duty of restitution (*Morando v. Morando* 41 A.D.3d 559). An equitable lien may be imposed where one in a confidential relationship with owner of property has expended money for improvement of the property based on a promise to convey, reimburse or grant a lesser interest in the property

(Scivoletti v. Marsala 61 N.Y.2d 806). The defendant argues that this cause of action may not be maintained because there is no allegation that the plaintiff made any improvement to the property as a result of the defendant's promise to convey, reimburse or grant a lesser interest in the property. In addition no confidential relationship exists between the parties. Plaintiff counters that while she does not allege a confidential with defendant there exists a confidential relationship between Plaintiff, as Administrator, and Mr. Frazier. In the first instance this court does not believe that there exists a confidential relationship between the plaintiff in her role as administrator and plaintiff decedent. The confidential relationship that exists is between her as an individual, his wife, and Mr. Frazier, and she cannot circumvent that fact by asserting her role as Administrator of the estate. Moreover, Mr. Frazier no longer owns the property. Defendant became the owner of the property by operation of law upon Mr. Frazier's death. There never was any confidential relationship between the plaintiff and defendant. She may have properly plead a claim for an equitable lien as against Mr. Frazier, but she fails to plead one as against the defendant. The third cause of action is therefore dismissed.

The fourth cause of action for equitable estoppel is also dismissed as the Court finds that it is barred by collateral estoppel and as previously stated, the Estate's cause of action for a Constructive Trust arose in 1996. Moreover the pleadings allege that Mr. Frazier falsely represented or concealed the fact that he had not transferred the property to the plaintiff as promised. It further alleges that she lacked knowledge of his failure to transfer and relied upon his representations to her detriment. There is no allegation that the defendant made any representation or promise that she detrimentally relied upon. Equitable estoppel is simply not applicable to the facts as alleged.

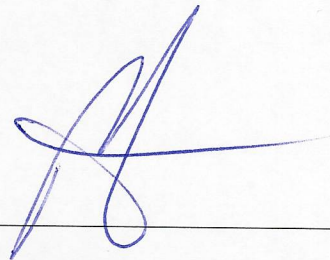
Finally the plaintiff's fifth claim for adverse possession is dismissed. The Estate of Mr. Frazier certainly cannot assert this claim. The claim also fails as to the plaintiff in her individual capacity. To succeed on a claim for adverse possession a party must present clear and convincing evidence that the possession was hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years (*Munroe v. Cheyenne Realty, LLC*, 131 A.D.3d 1141). In order to establish the element of hostility the party seeking the adverse possession claim must come forward with affirmative facts to establish that the use of the property was under a claim of right and adverse to the interests of the true owners (*Air Stream Corp. v. 3300 Lawson Corp.* 99 A.D.3d 822). Here, the plaintiff lived at the premises as the wife of the co-owner. Thus any claim for adverse possession would not begin to accrue until the death of Mr. Frazier. There can be no claim that possession was hostile and open and notorious because it assumes that the defendant was somehow privy to the agreement alleged by the plaintiff that Mr. Frazier intended to deed her the property. The fact that the plaintiff claims that she never recognized the defendant's status as an owner is of no relevance. The plaintiff's right to occupy the premises initially was with permission of her husband. Her occupancy was not hostile nor open and notorious and only became so after the death of her husband and ownership vesting with the defendant. That occurred in 2020, well short of the required 10 year period. The fifth cause of action for adverse possession is also dismissed.

Finally, in opposition to the motion the defendant seeks an award of attorney's fees and for sanctions to be imposed upon plaintiff and plaintiff's counsel. The court declines this application. The court does not believe that sanctions are appropriate here.

Accordingly, the defendant's motion for an order dismissing the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action is granted. All claims are dismissed with prejudice.

This shall constitute the decision and order of the Court.

Dated: Feb. 28, 2023



Paul L. Alpert, J.S.C.