

O'Leary v O'Leary

2024 NY Slip Op 34858(U)

September 17, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 612872/2022

Judge: Joseph Farneti

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 RICHARD A. O'LEARY,

ORIG. RETURN DATE: 08/31/23
 FINAL SUBMISSION DATE: 11/09/23
 MTN. SEQ. # 001 - MD

ORIG. RETURN DATE: 10/19/23
 FINAL SUBMISSION DATE: 11/09/23
 MTN. SEQ. # 002 - XMotD; CASE DISP

Plaintiff,

PLAINTIFF'S ATTORNEYS:

John P. Graffeo, Esq.
 Novick & Associates
 202 East Main Street, Suite 208
 Huntington, NY 11743
 (631) 547-0300

-against-

DEFENDANTS' ATTORNEYS:

Edwin F. Black, Esq.
 Law Offices of Black & Black, PLLC
 Attorneys for Defendants Christine Ann
 O'Leary, as Trustee of the O'Leary Real
 Property Trust u/a/d July 9, 2015 and
 Ellen P. Woltje
 24 East Carver St.
 Huntington, NY 11743
 (631) 462-5200

JOHN KENNEDY O'LEARY, CHRISTINE
 ANN O'LEARY as Trustee of the O'LEARY
 REAL PROPERTY TRUST u/a/d July 9, 2015
 and ELLEN P. WOLTJE,

SELF-REPRESENTED DEFENDANT:

John Kennedy O'Leary
 15 Lordly Court
 Kings Park, New York 11754

Defendants.

 Upon the e-filed documents numbered 19 through 53, it is

ORDERED that the motion (#001) by the plaintiff Richard A. O'Leary for, *inter alia*, an order granting partial summary judgment in his favor on the complaint and dismissing the affirmative defenses and counterclaims asserted by the defendant John Kennedy O'Leary is denied; it is further

ORDERED that the cross motion (#002) by the defendant John Kennedy O'Leary for an order granting summary judgment in his favor dismissing the complaint

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as asserted against him, and in his favor on his counterclaims is granted to the extent described herein, but is otherwise denied; it is further

ORDERED that the portion of the cross motion seeking dismissal of the complaint is granted, and, in searching the record (see CPLR 3212 [b]), the complaint is also dismissed as asserted against the remaining defendants; and it is further

ORDERED that the remaining portions of the cross motion are denied, as moot.

This is a partition action brought by the plaintiff Richard A. O'Leary against the defendants John Kennedy O'Leary, Christine Ann O'Leary, and Ellen P. Woltje as to real property located in Kings Park, New York. By his verified complaint, the plaintiff alleges, among other things, that on June 18, 2003, his father Richard O'Leary ("Richard Sr.") and his mother Eileen Ann O'Leary ("Eileen") executed a deed in favor of their children as follows: 40 percent to the defendant John Kennedy O'Leary ("John"), 20 percent to the plaintiff, 20 percent to the defendant Christine Ann O'Leary, and 20 percent to the defendant Ellen P. Woltje, reserving life estates in the subject property for themselves and for John. In addition, the plaintiff alleges that Eileen passed away in May 2008, that Richard Sr. died in August 2009, and that he wishes to sell the subject property, but that the defendants have refused. By their verified answers, the defendants generally deny the material allegations as set forth in the complaint, and they assert several affirmative defenses. In addition, John asserts counterclaims for unjust enrichment and for a constructive trust.

The plaintiff now moves for partial summary judgment in his favor and seeking, in essence, a declaratory judgment that John does not possess a life estate in the subject premises, arguing, *inter alia*, that such interest is ⁵ invalid under the "stranger to the deed" rule. In support, the plaintiff submits copies of the pleadings and an affirmation of his attorney.

John opposes the motion, and he cross-moves for an order granting summary judgment in his favor, arguing, *inter alia*, that he possesses a valid life estate, and, in the event that the Court determines otherwise, the Court should impose a constructive trust on the subject property, as asserted in his counterclaim. In opposition to the motion, and in support of the cross motion, John submits several documents, including his own affidavit; an affidavit of nonparty Daniel O'Brien; a copy of a deed to the subject premises, dated June 18, 2003; copies of obituaries for Richard Sr. and Eileen; a copy of Richard Sr.'s last will and testament, dated February 1, 2000; and a memorandum of law. In opposition to the cross motion, the defendants Christine Ann O'Leary and Ellen P. Woltje submit several documents, including an affirmation of their attorney and an affidavit of Ms. Woltje. In reply to the motion, and in reply the cross motion, the plaintiff and John submit affirmations of their attorneys. No other papers were submitted in response to the motion and cross motion.

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The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The long-accepted rule in New York holds that a deed with a reservation or exception by the grantor in favor of a third party, a so called "stranger to the deed," does not create a valid interest in favor of that third party (see *Matter of Estate of Thomson v Wade*, 69 NY2d 570, 573-574, 516 NYS2d 614 [1987] [internal citations omitted]; *Garson v Tarmy*, 187 AD3d 1149, 1152, 134 NYS3d 80 [2d Dept 2020] [internal citations omitted]). A reservation is an interest that *touches* the land, such as a right to use, occupy, profit from, or enjoy the land being conveyed (see *Peters v Smolian*, 154 AD3d 980, 982, 63 NYS3d 436 [2d Dept 2017] [emphasis added]). Further, a life estate in real property may be created by deed, trust, or last will and testament (see *Kurek v Luszczyk*, 51 Misc 3d 19, 20-21, 28 NYS3d 550 [App Term, 2d Dept 2015] [internal citations omitted]). Moreover, if the Court, upon factual inquiry, finds that such a third party to a deed is not a "stranger" to the deed, but is the "real grantee," the "stranger to the deed rule" does not apply (see *In re Austin*, 638 BR 671, 674-675 [US Bankruptcy Ct, NDNY, 2021]; *Nield v Jupiter*, 175 AD 732, 734, 162 NYS.465, 466 [3d Dept 1916], *affd* 226 NY 594, 123 NE 880 [1919]).

At the outset, the plaintiff's submissions fail to establish, *prima facie*, his entitlement to partial summary judgment. The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to meet the plaintiff's initial burden on the motion (see *Zuckerman v City of New York*, *supra*). Accordingly, the motion is denied, regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

As to the cross motion, by his affidavit, John avers, among other things, that his parents, Richard O'Leary, Sr. and Eileen Ann O'Leary, retained attorney Daniel O'Brien for the purposes of preparing the 2003 deed for the subject premises, which gifted John a 40% interest therein, Christine Ann O'Leary a 20% interest, the plaintiff a 20% interest, and Ellen P. Woltje a 20% interest. In addition, John avers that all of his siblings executed real estate transfer documents in connection with the 2003 deed, that all of the parties thereto understood that it was their parents' intention to convey a life estate in the subject premises to John in exchange for him caring for them until their deaths, and that John would pay for all carrying charges associated with the subject property after their parents' deaths. Moreover, by his affidavit, Mr. O'Brien avers, among other things, that he thoroughly explained the legal ramifications of the 2003

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deed to all parties prior to their execution of the legal documents, that all parties agreed and consented to the transfer, and that all parties understood that Richard, Sr., Eileen, and John would have a life estate in the subject premises.

In opposition to the cross motion, by her affidavit, Ms. Woltje avers, among other things, that there was no agreement of any kind between her or John, either written or oral, that he should possess a life estate in the subject premises, and that there were no such agreements of any kind. In addition, Ms. Woltje avers that she was appointed as executor of Richard Sr.'s estate, and that she has not waived any attorney-client privilege as to any averments made by Mr. O'Brien.

Here, John's submissions establish, prima facie, that he has a valid life estate in the subject premises (see *Alvarez v Prospect Hosp.*, supra; *Kurek v Luszczyk*, supra). Regardless of whether there was any agreement between the parties or their parents as to John's life estate in the subject property, the Court finds that the "stranger to the deed" rule does not apply to the instant action, as John was one of the "real grantees" of the 2003 deed (see *In re Austin*, supra; *Matter of Estate of Thomson v Wade*, supra). As John was granted a 40% interest in the subject premises in addition to the life estate reserved for him by Richard Sr. and Eileen, John is a "real grantee," and thus, nullifies the "stranger to the deed" rule (see *In re Austin*, supra; *Nield v Jupiter*, supra). In opposition, the defendants fail to raise any triable issues of fact (see *Alvarez v Prospect Hosp.*, supra; *Zuckerman v City of New York*, supra).

As the Court is granting the portion of the cross motion seeking dismissal of the complaint as asserted against John, the Court shall search the record (see CPLR 3212 [b]), and dismiss the complaint as asserted against the remaining defendants, as there can be no partition of real property while the remaining life tenant is alive, resides within the subject premises, and does not consent to partition (see generally *Harding v Craft*, 21 AD 139, 141-142, 47 NYS 450 [2d Dept 1897]). Moreover, the remaining portions of the cross motion are denied, as moot.

Accordingly, the motion is denied, and the cross motion is granted in part, and denied in part.

Dated: September 17, 2024


HON. JOSEPH FARNETI
Acting Justice of the Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION