

275 Clermont LLC v Johnson
2017 NY Slip Op 30544(U)
March 23, 2017
Supreme Court, Kings County
Docket Number: 503603/15
Judge: Lawrence S. Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of March, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
275 CLERMONT LLC,

Plaintiff,

- against -

CECELIA JOHNSON, a/k/a CECELIA COX, et al.,

Defendants.

-----X
AND RELATED THIRD-PARTY ACTION
-----X

DECISION AND ORDER

Index No. 503603/15

Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF#:

Notice of Motion, Affirmations (Affidavits),
Memorandum of Law, and Exhibits Annexed _____
Affirmation in Opposition, Memorandum of Law,
and Exhibits Annexed _____
Reply Memorandum of Law _____

53-56, 57
59-69
71

The plaintiff 275 Clermont LLC (the plaintiff) alleges that it owns, at least, a 50% tenancy-in-common interest in a three-family house at 275 Clermont Street in the Clinton Hill section of Brooklyn (Block 2105, Lot 25) (the property). According to the plaintiff, the defendant Cecelia Johnson, also known as Cecelia Cox (the defendant), owns, at most, the remaining 50% tenancy-in-common interest in the property. The plaintiff brought this action to, inter alia, quiet title to the property and to determine its and the defendant's respective interests in the property. The defendant joined issue and interposed five counterclaims: (1) abuse of process, (2) injurious falsehood, (3) civil conspiracy, (4) intentional infliction

of emotional distress, and (5) adverse possession (the first through fifth counterclaims, respectively). The plaintiff now moves, pre-reply, to dismiss, pursuant to CPLR 3211 (a) (7), all of the defendant’s counterclaims for failure to state a cause of action.

Discussion

Abuse of Process

“Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (*Perini v Leo*, 2017 NY Slip Op 01012, *1 [2d Dept 2017]). “[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused” (*Mago, LLC v Singh*, 47 AD3d 772, 773 [2d Dept 2008]). The counterclaims here are insufficient to state a cause of action alleging abuse of process, since they fail to allege “any actual misuse of the process to obtain an end outside its proper scope” (*Hornstein v Wolf*, 67 NY2d 721, 723 [1986]).

Injurious Falsehood (Slander of Title)

The elements of the tort of slander of title are “(1) a communication falsely casting doubt on the validity of [the] complainant’s title, (2) reasonably calculated to cause harm, and (3) resulting in special damages” (*39 College Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2d Dept 2006] [internal quotation marks omitted]). To the extent that the defendant’s counterclaims are predicated on the slander of title, they are insufficient for failure to allege special damages (*see Collision Plan Unlimited, Inc. v Bankers Trust Co.*, 63 NY2d 827, 831 [1984], *rearg denied* 64 NY2d 755 [1984]).

Civil Conspiracy

“Although New York does not recognize civil conspiracy to commit a tort . . . as an independent cause of action, a [party] may plead the existence of a conspiracy in order to connect the actions of the [other parties] with an actionable, underlying tort and establish that those actions were part of a common scheme” (*JP Morgan Chase Bank, N.A. v Hall*, 122 AD3d 576, 580 [2d Dept 2014] [internal quotation marks omitted]). Moreover, “[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the [party] must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement” (*Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]). The defendant’s counterclaims fail to allege an underlying tort (*see Swartz v Swartz*, 145 AD3d 818, 826 [2d Dept 2016]). There is nothing wrongful in the plaintiff’s acquisition of the purported heirs’ interests in the property.

Intentional Infliction of Emotional Distress

To the extent that the counterclaims seek to recover damages for intentional infliction of emotional distress, the allegations either lack evidentiary support, or fall short of the requisite extreme and outrageous conduct (*see Mago, LLC v Singh*, 47 AD3d at 773).

Adverse Possession

By way of background, the defendant derives her title to the property as the surviving spouse of Gordon Johnson (Gordon). She married him in Barbados in November 1990. Their Barbados marriage certificate listed her as the “widow” and Gordon as the “bachelor.”

Gordon died in September 2004 at the age of 55.¹ It is unclear whether he left a will. He was a son of the late Sylvia Johnson (Sylvia). It is also unclear whether Sylvia left a will and whether she predeceased (or survived) Gordon. The documents on file with the ACRIS² reflect that until January 1992, Sylvia owned the property as the tenants in common with Robert Earl Johnson (Robert). When Robert died intestate in January 1992, Sylvia, purporting to act as his sole surviving heir, conveyed the property to herself by deed, dated February 1, 1992. This is the last recorded deed in the chain of title preceding the plaintiff's acquisition of the purported heirs' interests in the property. According to the defendant's answer, she lived at the property since, at least, 1990.

It would be premature, at this early juncture, to rule on whether the defendant did (or did not) acquire title to the property by adverse possession. The succession of the owners to the property, their relationship to one other, and their occupancy (or not) of the property cannot be isolated with any degree of certainty at this time (*accord Vollbrecht v Jacobson*, 40 AD3d 1243, 1244-1245 [3d Dept 2007]).

¹ According to the Barbados marriage certificate, Gordon was 41 years old when he married the defendant in November 1990. Considering that Gordon died in September 2004, it appears, based on his age as stated in the Barbados marriage certificate, that he was approximately 55 years old at the time of his death.

² ACRIS stands for the "Automated City Register Information System" website of the Office of the City Register, New York City Department of Finance. The Court may take judicial notice of matters of public record (*see e.g. In re Winona Pi.*, 86 AD3d 542, 543 [2d Dept 2011]), including the documents filed in the ACRIS (*see U.S. Bank Natl. Assn. v Martinez*, 54 Misc 3d 1209 [A], 2016 NY Slip Op 51854[U], *2, n 5 [Sup Ct, Kings County 2016]; *141 Sunnyside LLC v M. Zoarez, Inc.*, 41 Misc 3d 1224[A], 2013 NY Slip Op 51826[U] [Sup Ct, Kings County 2013]; *U.S. Bank Natl. Assn. v Guy*, 40 Misc 3d 1242[A], 2013 NY Slip Op 51532[U] [Sup Ct, Kings County 2013]).

Conclusion

Accordingly, it is hereby

ORDERED that the plaintiff's motion to dismiss the defendant's counterclaims is granted to the extent that the defendant's counterclaims for (1) abuse of process, (2) injurious falsehood, (3) civil conspiracy, and (4) intentional infliction of emotional distress (the first through fourth counterclaims, respectively) are dismissed for failure to state a cause of action, and the plaintiff's motion is otherwise denied, with leave to renew after completion of discovery, as to the remaining (fifth) counterclaim for adverse possession.

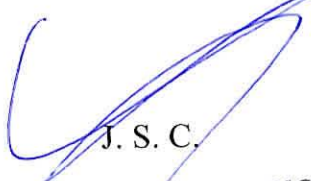
The defendant's counsel shall serve, by email, a copy of this decision and order with notice of entry and shall electronically file the affidavit of service thereof with the County Clerk.

The plaintiff shall reply to the defendant's fifth counterclaim for adverse possession within 20 days after it is served with a copy of this decision and order with notice of entry.

The parties are reminded of their next scheduled appearance in Commercial Part Trial 4 on April 21, 2017.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



J. S. C.

HON. LAWRENCE KNIPEL