

Hooper v George

2017 NY Slip Op 33096(U)

April 4, 2017

Supreme Court, Kings County

Docket Number: 14583/14

Judge: David B. Vaughan

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At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of April, 2017.

PRESENT:

HON. DAVID B. VAUGHAN,

Justice.

-----X
GAIL HOOPER,

Plaintiff,

- against -

Index No. 14583/14

DICK GEORGE, CARMEN ARIAS AND
JANE DOE,

Defendants.

-----X
The following papers numbered 1 to 12 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Other Papers _____

Papers Numbered

1-7, 8-10
11, 12

Upon the foregoing papers, defendant Dick George (George) moves for an order:

- (1) staying the enforcement of the eviction of George and the occupants of the building located at 543 Bainbridge Street, Brooklyn, New York (the subject property); (2) staying all orders and proceedings in the instant matter and the related matter entitled *Kim Banks v Dick George, Carmen Arias, Jane Does, and Wells Fargo, NA*, Kings County Index No. 786/16;
- (3) vacating the court's May 26, 2016 order and July 20, 2016 Warrant of Eviction and Possession pursuant to CPLR 5015 (a)(2), (3) and (5); (4) granting George leave to renew and reargue plaintiff Gail Hooper's (plaintiff) prior motion for summary judgment pursuant

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to CPLR 2221; (5) restoring the deeds transferring ownership of the subject property from defendant Carmen Arias (Arias) to Mary Banks (Banks) and from Banks to George; and (6) disqualifying the Rawlins Law Firm, Rawlins Law, PLLC, and Gary Rawlins Esq. from representing plaintiff, Kim Banks, and any other party in the instant matter and the related matter under Index No. 786/16. Plaintiff moves for an order: (1) awarding sanctions against George and his attorneys pursuant to 22 NYCRR § 130-1.1; (2) lifting the stay of eviction of George and all tenants, residents, and occupants of the subject property; (3) allowing plaintiff to proceed with the eviction and possession proceedings against George; (4) lifting the stays of the May 26, 2016 order and the July 20, 2016 Warrant of Eviction and Possession; and (5) enjoining George from seeking an injunction of this order or any other order related to the subject property in this court without prior approval.

Background Facts and Procedural History

In or about July, 2003, Mary Banks (who owned the subject property at that time) conveyed the subject property to one Johnny Hicks. Thereafter, Hicks obtained a mortgage against the subject premises in the amount of \$331,000. On October 14, 2004, Hicks conveyed the subject property to Arias, who obtained a first mortgage against the subject property in the amount of \$364,000 and a second mortgage in the amount of \$91,000. According to George, these conveyances took place pursuant to a fraudulent mortgage foreclosure scheme in which Mary Banks was a victim.

By deed dated October 21, 2011, Arias allegedly conveyed the subject premises back to Mary Banks. The deed indicates that Arias signed the document in the presence of George and one Lenox Decamp. By deed dated May 22, 2014, Mary Banks allegedly conveyed the subject property to George. In this regard, the deed identified Mary Banks as the party of the first part “residing at the [subject property]” and George as the party of the second part “residing at 206 Rogers Ave., Brooklyn New York 11225 for the life of Mary Banks.”¹

On June 26, 2013, in the case of *Gail Hooper v Mary Banks*, Kings County Index No. 22215/11, this court awarded plaintiff Gail Hooper a judgment of possession against Mary Banks with respect to the subject property. On October 10, 2014, plaintiff commenced the instant action against George alleging that she was entitled to sole possession of title in the subject property under adverse possession. The complaint further alleges that plaintiff has a judicial order granting her sole possession of the entire property to the exclusion of all others claiming title. In addition, the complaint alleges that the alleged October 21, 2011 conveyance of the subject property to Mary Banks from Arias was fraudulent inasmuch as Arias’s signature on the deed was forged. Finally, the complaint alleges that the alleged conveyance of the property to George by Mary Banks on June 6, 2014 was invalid inasmuch as Mary Banks was not the title holder of the subject premises at the time of the alleged conveyance. On November 23, 2014, Mary Banks died. On November 28, 2014, plaintiff filed an amended complaint naming Arias as a party defendant to the action. Thereafter,

¹Although dated May 22, 2014, the deed was allegedly executed on June 6, 2014.

George and Arias served separate answers to the amended complaint. Arias's answer also contained a cross claim against George in which she alleged that her signature on the October 21, 2011 deed was forged.²

On August 10, 2015, plaintiff moved for an order granting her possession of the subject property and awarding her partial summary judgment against George based upon a finding that he was not a party in interest to this action inasmuch as Arias's signature on the deed transferring title to Banks was forged. In support of this motion, plaintiff noted that the court had already ruled that plaintiff was entitled to possession of the subject property pursuant to the June 16, 2013 ruling in a related action. Plaintiff further noted that Arias specifically alleged in her verified answer that her signature on the deed had been forged. Finally, plaintiff submitted a report from a handwriting expert who compared Arias's signature on the deed to known Arias signatures and concluded that the signature on the deed was a forgery.

In opposition to this motion, George submitted an affidavit in which he claimed that plaintiff and her attorney "fraudulently made up an affidavit claiming to be from Carmen Arias. The affidavit claimed that she did not sign the same deed that she stole from Mary Banks . . . by lifting Carmen Arias signature off the fraudulent mortgage documents on record and applying it to this fraudulent affidavit." However, plaintiff's motion papers did not contain an Arias affidavit. Rather, as noted above, plaintiff relied upon Arias's verified

²The answer incorrectly identified the cross claim against George as a "counterclaim."

answer in support of her claim that the signature was forged. As a final matter, the court notes that, although the deed indicates that George witnessed Arias sign the deed, George's affidavit in opposition to the motion fails to state that he witnessed Arias sign the deed transferring the subject property to Banks.

On January 20, 2016, while the summary judgment motion was pending, one Kim Banks commenced an action to quiet title against George, Arias, and Wells Fargo under Kings County Index No. 786/16. In this regard, Kim Banks alleged that she was the owner of the subject property and that George was not the owner inasmuch as Arias's signature on the deed transferring title to Banks was a forgery. In that action, Kim Banks is represented by Gary Rawlins Esq., the same attorney who represents plaintiff in this action. On July 13, 2016, plaintiff moved to consolidate the instant action with Kim Banks' action. In the motion, plaintiff (Gail Hooper) withdrew all claims for title to the subject property but maintained all claims related to possession. However, the motion to consolidate was subsequently withdrawn.

In an order dated May 26, 2016, this court granted plaintiff's motion against George in all respects. On July 20, 2016, this court issued a Warrant of Eviction and Possession for the subject property in favor of plaintiff and against George and his tenants and undertenants. On July 26, 2016, a five-day eviction notice was left at the subject property. The instant motions are now before the court.

Motion to Vacate and Renew Based Upon New Evidence

George moves to vacate the court's May 26, 2016 order and July 20, 2016 Warrant of Eviction and Possession pursuant to CPLR 5015 (a)(2). In particular, George maintains that newly discovered evidence has been uncovered that would likely have produced a different result in the prior summary judgment motion. Alternatively, George moves pursuant to CPLR 2221 (e), for leave to renew the prior order based upon new evidence that would change the result of the prior summary judgement motion. In support of these branches of his motion, George submits newly discovered evidence in the form of an affidavit by Lenox DeCamp, who is listed as a witness on the October 21, 2011 deed which transferred ownership of the subject property from Arias to Banks. In this affidavit, Mr. DeCamp avers that he witnessed Arias sign the deed on October 21, 2011. According to George, this affidavit would have changed the result of the prior order inasmuch as it raises issues of fact as to whether Arias's signature on the deed was forged. George's motion papers also state that he was unable to obtain this affidavit prior to submitting his opposition papers to the summary judgment motion inasmuch as he was "unable to reach Mr. DeCamp to discuss the matter" notwithstanding diligent efforts to do so.

CPLR 5015 (a)(2) provides that "[t]he court which rendered a judgment or order may relieve a party from it . . . on motion of any interested person . . . upon the ground of: newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial."

.. ..

“To succeed on a motion to vacate a judgment on the ground of newly-discovered evidence, the movant must establish, among other things, that the evidence could not have been discovered earlier through the exercise of due diligence” (*State Farm Ins. Co. v Colangelo*, 44 AD3d 868 [2007]). Similarly, CPLR 2221 (e)(2) provides that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination,” while CPLR 2221 (e)(3) requires that a motion to renew “shall contain reasonable justification for the failure to present such facts on the prior motion.” Thus, the failure to offer reasonable justification for failing to present the new evidence on the prior motion is fatal to a motion seeking leave to renew (*Deutsche Bank Trust Co. v Ghanes*, 100 AD3d 585 [2012]; *Madison v Tahir*, 45 AD3d 744 [2007]).

Here, George has failed to demonstrate that he could not have obtained Mr. DeCamp’s affidavit at the time he opposed the prior motion as required by CPLR 5015 (a)(2). Similarly, George has failed to present reasonable justification for failing to previously produce this affidavit as required under CPLR 2221 (e)(3). In this regard, George’s motion papers merely state, in conclusory fashion, that he was “previously unsuccessful in his efforts to obtain a sworn affidavit from Mr. DeCamp.” George fails to specify what efforts were made to locate Mr. DeCamp or why he was able to obtain the affidavit after the motion was decided, but not before. It is also notable that the claim regarding efforts to obtain the affidavit was not made in George’s own affidavit, but instead is contained in the affirmation of George’s attorney, who presumably lacks firsthand knowledge regarding the purported efforts to locate

DeCamp. Finally, the court notes that George did not need to obtain Mr. DeCamp's affidavit in order to oppose the prior motion. In particular, in addition to Mr. DeCamp, George himself is listed as a witness on the October 21, 2011 deed. However, although George submitted a 20-page affidavit in opposition to the motion, he did not claim to have witnessed Arias sign the deed in that affidavit. Thus, it is clear that George's failure to raise a triable issue of fact regarding the validity of Arias's signature in opposition to the prior motion was due to his own willful neglect rather than the inability to obtain an affidavit from Mr. DeCamp. Accordingly, that branch of George's motion which seeks to vacate the May 26, 2016 order and July 20, 2016 Warrant of Eviction and Possession pursuant to CPLR 5015 (a)(2) is denied. That branch of George's motion which seeks leave to renew based upon newly discovered evidence is also denied.³

Motion to Vacate Based Upon Fraud and Misrepresentation

George also moves to vacate the May 26, 2016 order and July 20, 2016 Warrant of Eviction and Possession pursuant to CPLR 5015 (a)(3). In this regard, George maintains that plaintiff committed fraud and otherwise misrepresented facts to the court in obtaining the award of summary judgment. In particular, George maintains that plaintiff falsely claims in her pleadings that she is the owner of the subject property by virtue of adverse possession. However, according to George, plaintiff cannot establish ownership by adverse possession and did not even plead the necessary elements to an adverse possession claim in her

³Although George's order to show cause indicates that he seeks leave to reargue the prior order, the motion papers themselves contain no argument seeking reargument.

complaint. George also notes that in order to establish adverse possession, a plaintiff must establish that she continuously possessed the subject property for ten years. However, plaintiff only occupied one floor of the subject property for a period of four years.

Under CPLR 5015 (a)(3), the court which rendered a judgment or order may relieve a party from it if it is shown that the order or judgment was obtained by “fraud, misrepresentation, or other conduct of an adverse party.” A party moving to vacate an order or judgment based upon this statute has the burden of demonstrating that such fraud or misrepresentation is the very means by which the judgment was procured (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 47 AD3d 463 [2008]; *Mohmann v Lynch-Mohrmann*, 24 AD3d 735 [2005]).

Here, George has failed to demonstrate that plaintiff obtained summary judgment against him in the prior order through fraud or misrepresentation. In this regard, the purported lack of merit to plaintiff’s adverse possession claim was not even raised in the prior motion. Rather, the issue in the prior motion concerned the validity of the deed transferring title from Arias to Banks, and consequently, the validity of the subsequent transfer from Banks to George. If, as George now claims, there is no basis for plaintiff’s adverse possession claim, it was incumbent upon him to move to dismiss the complaint pursuant to CPLR 3211 or 3212. However, George failed to avail himself of this remedy. Accordingly, that branch of George’s motion which seeks to vacate the May 26, 2016 order .

and July 20, 2016 Warrant of Eviction and Possession pursuant to CPLR 5015 (a)(3) is denied.

Remaining Matters

Given the court's denial of George's motion pursuant to CPLR 5015 (a)(2) and (3) to vacate the May 26, 2016 order, that branch of George's motion which seeks to vacate the July 20, 2016 Warrant of Eviction and Possession pursuant to CPLR 5015 (a)(5) must also be denied. Similarly, there is no basis to restore the deeds transferring ownership of the subject property from Arias to Banks and from Banks to George. In addition, that branch of George's motion which seeks to disqualify plaintiff's attorney Gary N. Rawlins is denied as Mr. Rawlins' sworn affirmation states that he has obtained conflict waivers from his clients. Finally, George has failed to cite to any authority for the proposition that the Warrant of Eviction and Possession must be vacated based upon the failure to serve him with copy of the May 26, 2016 order with notice of entry.

Plaintiff's Motion

Plaintiff moves, by order to show cause, for an order awarding sanctions against George and his attorneys pursuant to 22 NYCRR § 130-1.1. Plaintiff further moves for an order lifting the stays of the May 26, 2016 order and eviction proceeding and enjoining George from seeking an injunction of this order or any other order related to the subject property in this court without prior approval. In opposition, George contends that this motion is jurisdictionally defective inasmuch as plaintiff failed to serve the order to show cause and

exhibits in the manner directed by the court in the order. In particular, George notes that the order to show cause directs personal service upon his attorney, Scott B. Richman. However, according to Mr. Richman's affirmation, neither he, nor anyone from his office was personally served with a conformed copy of the order to show cause.

It is well-settled that the method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with (*Gonzalez v Haniff*, 144 AD3d 1087, 1088 [2016]; *Codrington v Citimortgage, Inc.*, 118 AD3d 843, 844 [2014]). When a party makes a motion by order to show cause and fails to follow the method of service directed in the order, the motion is jurisdictionally defective and must be denied regardless of the merits of the motion as the court lacks jurisdiction to determine the motion (*U.S. Bank Nat. Ass'n v Feliciano*, 103 AD3d 791 [2013]; *Lobo v Soto*, 73 AD3d 1135, 1136 [2010]).

Here, the order to show cause signed by Justice Velasquez directed "personal service of [the order] . . . upon Scott B. Richman, Esq., an attorney for Defendant Dick George, upon Abraham Hoschander, Esq., an attorney for Defendant Carmen Arias and Danielle P. Light, Esq, attorney for Defendant Wells Fargo, N.A." However, the affirmation of service attached to order to show cause indicates that it was served on "Dick George, Esq." as well as Mr. Hoschander and "Houser & Allison, PC, Attorneys for Wells Fargo Bank" via "email and fax and mail."⁴ Thus, it is clear from plaintiff's own affirmation of service that the order

⁴The court notes that the affirmation of service lists George's address as 2004 Ralph Avenue, Brooklyn, NY 11234, which is the address for Mr. Richman's law firm, Held & Hines LLP.

to show cause was not served as directed by Justice Velasquez. In particular, plaintiff did not serve George's attorney Mr. Richman as directed, but instead served George. Further, none of the parties were served via personal service as directed. Instead the parties were served via email, fax, and regular mail. Moreover, as previously noted, Mr. Richman's affirmation indicates that neither he nor anyone from his law firm were personally served with a conformed copy of the order to show cause, a claim which plaintiff does not deny in her October 19, 2016 de-facto reply affirmation. Under the circumstances, it is clear that plaintiff's motion is jurisdictionally defective and must be denied without reaching the merits of the matter.

Summary

George's motion is denied in its entirety. Plaintiff's motion is denied for failure to serve her order to show cause as directed in the order.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. DAVID B. VAUGHAN

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