

Estate of Charles Everett Whipple v Lopez
2010 NY Slip Op 34111(U)
April 22, 2010
Supreme Court, New York County
Docket Number: 14852/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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THE ESTATE OF CHARLES EVERETT WHIPPLE,
By RICHARD A. FENN AS EXECUTOR,

Index No.
114852/09

Plaintiff,

- against -

**AMENDED
DECISION
and ORDER**

WILFREDO LOPEZ,

Defendant.

Mot. Seq.
01

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HON. EILEEN A. RAKOWER, J.S.C.

This Amended Order supersedes this Court's Interim Order dated March 1, 2010, and its Decision and Order dated April 1, 2010.

Plaintiff, the Estate of Charles Everett Whipple ("Estate") brings this action against Defendant Wilfredo Lopez ("Lopez") seeking a judgment awarding the Estate possession of all rooms and areas of the second floor ("the Premises") of 8 Perry Street ("the Building"), in New York, New York; and an order directing that a warrant issue to remove Lopez from possession of the Premises.

The Estate alleges in its complaint that, until his death on February 20, 2009, Charles Everett Whipple ("Decedent") was the owner of the Building, and an occupant therein. The complaint further alleges that Lopez entered into occupancy of the Premises prior to Decedent's death pursuant to a license granted by Decedent. Taking the position that Lopez's license to remain in the premises expired upon Decedent's death, or alternatively, was terminated by the Estate, the Estate served a Ten [10] Day Notice to Quit the Premises on October 1, 2009, the Notice to Quit directed Lopez to quit the Premises by October 19, 2009. The Estate subsequently commenced this action.

Lopez moves to dismiss the action pursuant to CPLR § 3211(a)(3) on the grounds that the Estate lacks standing to bring the action. According to Lopez's affirmation in support, "a reasonable question of standing exists warranting dismissal

of this action should Plaintiff fail to tender a copy of the deed in an admissible form in opposition to this motion.” Lopez asserts that this is the case because he was unable to ascertain whether Decedent owned the Building, or any part thereof, by way of a search on New York City’s ACRIS system. Lopez annexes printouts of his ACRIS search as an exhibit.

The Estate cross-moves for an order converting Lopez’s motion to dismiss to a motion for summary judgment pursuant to CPLR §3211(c), and awarding summary judgment to the Estate; granting a judgment of possession of the Premises in favor of the Estate and against Lopez, and issuing a warrant of eviction; and awarding costs and sanctions to the Estate pursuant to 22 NYCRR §130-1.1 based upon Lopez’s motion to dismiss, which the Estate claims is frivolous. The Estate submits an attorney’s affirmation, as well as the affidavit of Executor Richard A. Fenn.

As evidenced by certified deed submitted by the Estate, Decedent purchased the Building in 1960. He remained owner of the building until his death, as evidenced by a August 11, 2009 letter from First American Title Insurance Company of New York confirming Decedent’s continued ownership of the Building after conducting a title search. The Estate also submits the Last Will and Testament of Charles Everett Whipple dated February 5, 2008 and a Codicil dated July 8, 2008 (“Will”). Decedent’s Will names Richard A. Fenn Executor of the Estate. The Estate also annexes Letters Testamentary issued to Fenn by the Surrogate’s Court on August 4, 2009.

Paragraph 44 of the Will provides that the Executor

shall, without regard to any statutory or judicial restrictions otherwise applying to Executors, have the following powers and discretions in addition to any conferred by law:

....

C. To sell, at public or private sale, mortgage, lease for any period, alter, improve or otherwise dispose of any real property or interest in real property at any time forming part of my estate or any trust fund hereunder....

While both the extent of the relationship between Decedent and Lopez and the

amount of time Lopez spent in the Premises is disputed¹, it is uncontested that Lopez stayed at the Premises with Decedent and provided care for Decedent prior to his death. It is also undisputed that Lopez paid no rent or use and occupancy to Decedent or the Estate for use of the Premises.

As noted above, the Estate served Lopez with a Notice to Quit on October 1, 2009. Lopez, through counsel, responded to the Notice to Quit by letter dated October 6, 2009. In the letter, counsel directed the Estate's attention to a handwritten letter dated August 13, 2007 from Decedent to Fenn (who would be named Executor in the 2008 Will) which read as follows:

Dear Richard,

Life is so uncertain, Thank you for your friendship and so many helpful things. Bless you.

I want especially to ask you to be kind to Wilfredo [Lopez]. He has been a special sort of friend and very helpful in many ways. For me, help him, please.

Who knows the season. But if he should need help with the expenses of the cottage, taxes, etc., please advance him the necessary funds and they can be returned to the estate when it is settled. Thank you. Be kind.

Also, I would consider it a great favor if you would allow him to continue to have the use of the flat at 8 Perry until the house is sold. It has been one of his homes and important to both of us.

With appreciation, affection and all best wishes.

Gratefully,
Charles Whipple

¹The Estate refers to Lopez as a "friend and caretaker of the Decedent," while Lopez maintains that the two were "life partners." Further, the Estate claims that Lopez "began at times staying at the premises... approximately five years before the Decedent died in order to help care for the Decedent." Lopez, on the other hand, states that he has "continuously resided at 8 Perry Street since 1987...."

The Notice to Quit and Lopez's response with the attached handwritten letter are annexed as exhibits to the Estate's cross-motion.

On December 9, 2009, in response to Lopez's motion to dismiss, counsel for the Estate sent a letter to Lopez's counsel demanding that Lopez's motion to dismiss be withdrawn or it would seek sanctions for a frivolous motion. Counsel for the Estate provided Lopez's attorney with the deed to the Building and FAQs to the ACRIS system (which indicates that documents filed before January 1, 1956 are not available online). The Estate's cross-motion followed.

Lopez submits an affidavit and a memorandum of law in opposition to the Estate's cross-motion. Plaintiff first contends that summary judgment is inappropriate on the ground, *inter alia*, that issue has not yet been joined. Substantively, Lopez claims that the Estate lacks the authority to terminate his license to stay in the Premises prior to the sale of the building, based upon the purported 2007 letter from Decedent to Fenn.

CPLR §3211(a)(3) provides that a party may move for dismissal on the ground that "the party asserting the cause of action has not legal capacity to sue." The Estate has supplied sufficient evidence of Decedent's ownership of the Premises prior to his death, and of Fenn's authority, as Executor of the Estate, to bring the instant action. Accordingly, Lopez's pre-answer motion to dismiss is denied.

With respect to the Estate's cross-motion, the Court declines to convert Lopez's pre-answer motion into a motion for summary judgment pursuant to CPLR §3211(c), as that section cannot be utilized by a plaintiff to obtain summary judgment against a party prior to that party's joinder of issue (*see Rochester v. Chiarella*, 65 N.Y.2d 92, 101-102 [1985]).

Wherefore it is hereby

ORDERED that Lopez's pre-answer motion to dismiss is denied; and it is further

ORDERED that the Estate's cross-motion for summary judgment is denied; and it is further

ORDERED that Lopez shall file and serve his Answer within 20 days of receipt

of a copy of this Amended Order with Notice of Entry thereof.

This constitutes the Amended Decision and Order of the Court. All other relief requested is denied.

DATED: April 22, 2010.



EILEEN A. RAKOWER, J.S.C.