Barile v Cruz
2014 NY Slip Op 33174(U)
November 24, 2014
Supreme Court, Suffolk County
Docket Number: 12-3451
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

INDEX No. 12-3451
CAL. No. 14-00100OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-5-14
ADJ. DATE 8-12-14
Mot. Seq. # 002 - MD
003- XMD

VICTORIA A. BARILE, Plaintiff, - against - GRACE CRUZ f/k/a, GRACE BARILE, Defendant.	SOMER, HELLER & CORWIN, LLP Attorney for Plaintiff 2171 Jericho Turnpike, Suite 350 Commack, New York 11725 SWEENY & SWEENY Attorney for Defendant 510 Broad Hollow Road, Suite 110 Melville, New York 11747

Upon the following papers numbered 1 to 55 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers 18 - 41 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 42 - 45, 46 - 52 ; Other sur-reply (not considered) 53 - 55 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's first and second causes of action is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor on all causes of action in the amended complaint and dismissing the defendant's counterclaims is denied, the cross motion as it pertains to the defendant's purported counterclaims being deemed academic.

This action was commenced pursuant to RPAPL Article 15 to determine claims to real property located at 61 Eastfield Lane, Melville, New York (the premises), for a declaration that a certain deed which purports to reserve a life estate for the defendant in the premises is invalid or, in the alternative, that the defendant is a month to month tenant, and for a permanent injunction preventing the defendant from claiming or asserting any rights in the premises. In the event that the Court declares that the aforesaid deed

is valid, the plaintiff seeks a declaration that the defendant is chargeable with the payment of her obligations as a life tenant, and a money judgment for those items paid for by plaintiff and her husband.

It is undisputed that the defendant purchased the premises with her now-deceased first husband, Salvatore Barile, on or about September 3, 1959. Salvatore Barile died on or about June 21, 1984, making the defendant the sole surviving tenant by the entirety. In approximately 1986, the defendant married her second husband, she moved to Florida to live with him, and thereafter returned regularly to New York for holidays and one month in the Summer. On January 10, 1991, the defendant executed a deed transferring the premises to her son, Richard J. Barile (Richard) and his wife, the plaintiff, which was recorded in the Office of the Clerk of Suffolk County on February 6, 1991. On January 25, 1991, Richard and the plaintiff received a loan in the amount of $110,000 secured by a duly recorded mortgage on the premises, and they paid the defendant $100,000 in consideration for the transfer of the premises to them. On February 18, 1991, Richard and the plaintiff executed a deed to themselves (Deed) which purports to reserve "a life estate in favor of GRACE CRUZ, formerly known as GRACE BARILE which shall be unassignable and which shall automatically terminate upon the death of GRACE CRUZ."

It is also undisputed that, some time after the death of her second husband on or about October 16, 1996, the defendant moved into an "accessory apartment" at the premises, and that she made modest monthly payments to Richard and the plaintiff until Richard passed away on June 3, 2010. Shortly thereafter, the plaintiff requested and received increased monthly payments from defendant until approximately October 2011, when a dispute between the parties arose regarding the amount of the monthly payments to be made by the defendant to the plaintiff. Unfortunately, the dispute has escalated to the point that the parties accuse each other of acting inappropriately, and it appears that they are incapable of living together under the previous arrangement.

The defendant now moves for summary judgment dismissing the plaintiff's first cause of action for a declaration that the Deed which purports to reserve a life estate for the defendant is invalid, and dismissing the second causes of action for a permanent injunction preventing the defendant from claiming or asserting any rights in the premises. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of the motion, the defendant submits, among other things, the pleadings, excerpts from the plaintiff's deposition, her affidavit, the affidavit of the attorney retained to complete the transactions of 1991, and copies of the relevant deeds and mortgages herein. In her affidavit, the defendant sets forth many of the undisputed facts set forth above, and she swears that, in 1990, Richard and the plaintiff requested that she transfer the premises to them for a price "far below fair market value." She indicates that she agreed to

transfer the premises to Richard and the plaintiff for the sum of $100,000 and a life interest in the premises, that she agreed to allow them to reside in the main part of the house, and that it was her understanding that they would maintain the house and pay the taxes and utilities, while she would maintain a residence in an accessory apartment that she had "previously built onto the main house." She states that Richard and the plaintiff needed to secure a mortgage on the property to pay her the agreed amount, that Richard retained the services of Frank Perrotta, Esq. (Perrotta) to assist in the transaction, and that Perrotta explained that she would first have to transfer the premises to them without reservation in order to allow Richard and the plaintiff to secure said mortgage. The defendant further swears that she signed the first deed with the understanding that a subsequent deed would be filed giving her a life estate in the premises, and that, after said mortgage was recorded, Richard and the plaintiff executed a second deed granting her said life estate. She indicates that any money paid to Richard and the plaintiff was to help contribute to any additional expenses incurred by her stay, and that she paid her own telephone and cable expenses, and any repairs to the accessory apartment.

In his affidavit, Perrotta swears that he was retained by Richard to represent all parties to the subject transactions, that the parties agreed to the transfer of title to the premises "for a sum substantially below the current market value," and that in return the defendant would receive $100,000 and "a guarantee that she would have the right to reside in the home for the rest of her life." The remainder of his affidavit essentially repeats many of the undisputed facts regarding the subject transactions.

At her deposition, the plaintiff testified that, at the time of these transactions, the defendant resided in Florida full time, and that when the Deed was signed, Perrotta explained that the life estate language was added so that "it would be a place if [the defendant] chose to come and stay."[1]

In opposition to the defendant's motion and in support of her cross motion, the plaintiff submits, among other things, the entire transcript of her deposition and that of the defendant, the closing statement regarding the transfer of title from the defendant, an unauthenticated copy of a real estate appraisal of the premises, and unauthenticated copies of the state and federal gift tax returns purportedly filed by the defendant regarding the subject transaction. Said gift tax returns relied on by the plaintiff are plainly inadmissible and they have not been considered by the Court in making this determination. It is a prerequisite to the admission of official records of a court or government office offered in evidence by a party to an action that the document be authenticated as being what it purports to be in order to be admissible under exceptions to hearsay rule (CPLR 4540; ***People v Ricks***, 71 AD3d 1444, 899 NYS2d 756 [4th Dept 2010]; ***People v Smith***, 258 AD2d 245, 697 NYS2d 783 [4th Dept 1999]; ***People v Brown***, 128 Misc2d 149, 488 NYS2d 559 [Madison County Court 1985]; *see also* ***People v Garneau***, 120 AD2d 112, 507 NYS2d 931 [4th Dept 1986]). Similarly, said appraisal has not been considered herein (***Horowitz v Kevah Konner, Inc.***, 67 AD2d 38, 414 NYS2d 540 [1st Dept 1979]; ***Prestige Fabrics v Novik & Co.***, 60 AD2d 517, 399 NYS2d 680 [1st Dept 1977]; ***Material Men's Mercantile Assn., Ltd. v Material Men's Credit Agency, Inc.***, 191 AD 73, 180 NYS 801 [1st Dept 1920]).

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[1] In the excerpt of the plaintiff's deposition provided by counsel for the defendant, the plaintiff essentially repeats many of the undisputed facts regarding these transactions. For the purposes of this motion only, the testimony quoted herein is deemed sufficient to permit a determination of the issues.

At her deposition, the defendant testified to many of the undisputed facts herein, that in 1990 she knew that she could not handle the expense of the premises by herself, and that she "asked Richard if he wanted to have the house." She indicated that she was "willing to have them have the house if I could stay there until I die," and that she slept downstairs in the playroom, which had been converted into a bedroom for her parents when they lived with her, after Richard and the plaintiff "came to the house." She stated that she believes that the premises was worth $300,000 at the time of the transfer of title, that she gave her second son, David, the sum of $75,000 from the money that she received from the transaction, and that she signed the deed transferring title to Richard and the plaintiff which indicates that her address was in Florida. The defendant acknowledged that the name of the company which completed a gift tax return in her name sounded "familiar,'' that the gift tax return indicates that she gifted one-half of the value of the premises to Richard and the plaintiff by giving each of them $50,000 of value in the house, and that she did not recall but is "sure" that she authorized someone to give the information on the return. The defendant further testified that she did not know why an appraisal was done for the premises, that she used the $100,000 that she received from the transaction to create the accessory apartment, and that she gave David "$40,000 or $50,000" some time thereafter. She indicated that she did not pay the real estate taxes, mortgage expenses, or landscaping bills from 1991 to the date of her deposition, and that she only paid a portion of the gas and electric bills whenever she was staying at the premises. She stated that, if she was to have sole possession of the premises, she was not financially able to pay the taxes or utilities for the premises.

At her deposition, the plaintiff testified that, in 1986, she and her husband purchased a home located in Ronkonkoma, New York. She indicated that, in 1991, the defendant lived in Florida and only returned to the premises on holidays, that her husband told her that his mother wanted to sell the premises, and that they decided to purchase the premises so they sold their Ronkonkoma home. She stated that the premises was worth about $200,000 at the time, that they paid the defendant $100,000, that the balance was paid by way of a $100,000 gift from the defendant, and that, thereafter, they paid all of the mortgage expenses, taxes, maintenance and utilities for the premises, as well as all expenses for renovations to the property. She vouched that, to her knowledge, the defendant filed a gift tax return regarding the transaction. The plaintiff further testified that the defendant added a kitchen to the playroom/bedroom at the premises after she and her husband purchased the home, that this occurred while the defendant's second husband was still alive, and that, after he died, the defendant asked Richard if she "could come back and live with us." She indicated that the defendant was paying $220 per month at the time that Richard died, that the utilities were not billed separately, and that she was not in the "position to carry [the defendant]." She stated that she asked the defendant for more money or, if that was not possible, to move into one of the upstairs bedrooms. The plaintiff further testified that she and her husband "spent every red cent that we made for that home," and that they never assumed that, upon his death, the defendant could dictate who lives at the premises and "who pays and who doesn't pay."

The closing statement created by Perrotta for the transfer of title from the defendant to Richard and the plaintiff indicates that the closing took place on January 25, 1991, the same date that the subject mortgage was secured, that the purchase price was $200,000, which was paid by delivery of $100,000 to the defendant and another $100,000 "via gift." The closing statement also indicates that all of the closing costs were paid by Richard and the plaintiff, and that the parties waived the right to any property tax adjustment in their favor.

Here, viewing the evidence in the light most favorable to the plaintiff, the defendant has failed to establish her prima facie entitlement to summary judgment as triable issues exist as to whether the Deed was intended to reserve a life estate or some lesser interest in the premises to the defendant. It is well settled that the "real substance of a life estate consists in the life tenant's right to exclude all others from the possession of the subject property for the duration of his or her own life" (***Matter of Carey***, 249 AD2d 542, 672 NYS2d 131 [2d Dept 1998]; *see also* ***Torre v Giorgio***, 51 AD3d 1010, 858 NYS2d 765 [2d Dept 2008]). In addition, a life tenant is the owner of the property and is responsible for payment of the property taxes levied during her lifetime (RPTL 408, ***Board of Educ., Hewlett-Woodmere Union Free School Dist. v Board of Assessors of County of Nassau***, 54 AD2d 978, 389 NYS2d 27 [2d Dept 1976]), as well as all upkeep, repairs, insurance and carrying charges (***Matter of Erwin***, 277 AD 378, 100 NYS2d 200 [1st Dept 1950]; ***In re Houlihan***, 13 Misc3d 419, 824 NYS2d 554 [Sur Ct, Franklin County 2004]). There are triable issues whether the plaintiff paid full consideration for the "purchase" of the premises, whether the defendant "paid" any consideration for the purported life estate in the Deed, and what was the agreement regarding the defendant's ability "to stay" in premises. That is, what was the intended scope of her right to occupy and possess the premises, if any.

Accordingly, the defendant's motion for summary judgment dismissing the plaintiff's first and second causes of action is denied.

The Court now turns to that branch of the plaintiff's motion which seeks summary judgment on the five causes of action set forth in the amended complaint. For the reasons set forth above, there are triable issues regarding the plaintiff's first cause of action for a declaration that the Deed which purports to reserve a life estate for the defendant is invalid, and the second cause of action for a permanent injunction preventing the defendant from claiming or asserting any rights in the premises. In addition, because, among other things, there are triable issues regarding the terms of the agreement between the parties, the plaintiff has failed to establish that the "stranger to the deed" doctrine is applicable herein. Said doctrine holds that a grantor cannot create a life estate in a party who does not have an ownership interest in the property (***Sganga v Grund***, 1 AD3d 342, 766 NYS2d 585 [2d Dept 2003]; *see eg.* ***Dichter v Devers***, 68 AD3d 805, 891 NYS2d 426 [2d Dept 2009]; ***Beachside Bungalow Preserv. Assn. of Far Rockaway v Oceanview Assoc.***, 301 AD2d 488, 753 NYS2d 133 [2d Dept 2003]). The plaintiff's contention is that the defendant did not have an ownership interest in the premises at the time the deed purporting to reserve a life estate for her was executed. Here, the Court cannot determine the impact of the doctrine absent a resolution of the factual issues raised by the parties.

The amended complaint sets forth three additional causes of action. Respectively, they seek a declaration that the defendant is a month to month tenant, a declaration that the defendant is chargeable with the payment of her obligations as a life tenant, and a money judgment for the items chargeable to the defendant as a life tenant but paid for by her and her husband. The plaintiff has failed to establish her prima facie entitlement to summary judgment regarding the enumerated causes of action as there are triable issues of fact as set forth above, and the Court is not able to determine on the basis of this record the defendant's interest, if any, in the premises, or her the rights and obligations with respect thereto.

The court now turns to that branch of the plaintiff's motion for summary judgment which essentially seeks the dismissal of the counterclaims purportedly asserted by the defendant. Both the record herein, and

the Court's review of the file maintained by the Clerk of the Court, reveal that the plaintiff commenced this action by the filing of a summons and complaint on February 1, 2012. The defendant joined issue in the action by the service of a verified answer with counterclaims on March 14, 2012. The plaintiff properly served an amended complaint without leave of court on March 19, 2012 (CPLR 3025 [a]). On April 11, 2012, the defendant served a verified answer to amended verified complaint which did not include any counterclaims against the plaintiff.

The service of an amended answer eliminates the answer that it was intended to supersede, the previous pleading has no effect, and the litigation proceeds as if the previous answer had never been served (***Westinghouse Elec. Corp. v Lyons***, 281 AD 820, 119 NYS2d 1 [1st Dept 1953]; *see also* ***Healthcare I.Q., LLC v. Tsai Chung Chao***, 118 AD3d 98, 986 NYS2d 42 [1st Dept 2014]; ***Stella v Stella***, 92 AD2d 589, 459 NYS2d 478 [2d Dept 1983]; ***Halmar Distribs. v Approved Mfg. Corp.***, 49 AD2d 841, 373 NYS2d 599 [1st Dept 1975]; ***Millard v Delaware, Lackawanna & W. R.R. Co.***, 204 AD 80, 197 NYS 747 [3d Dept 1923]). Here, pursuant to the amended answer served by the defendant, there are no counterclaims asserted against the plaintiff .

Accordingly, the plaintiff's cross motion for summary judgment in her favor on all causes of action in the amended complaint and dismissing the defendant's counterclaims is denied, the cross motion as it pertains to the defendant's purported counterclaims being deemed academic.

The court notes, in accordance with CPLR 2214(c), that the defendant's sur-reply, including her affidavit and the affirmation of her attorney were not considered herein.

Dated: NOV 24 2014

HON. JOSEPH A. SANTORELLI
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**