Matter of Scotto v Scotto
2015 NY Slip Op 32343(U)
November 13, 2015
Supreme Court, Suffolk County
Docket Number: 8727-10
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX No. 8727-10

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/23/15
SUBMIT DATE _____
Mot. Seq. # 003 - MD
CDISP Y____ N __X__

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In the Matter of DOROTHY CROVATIN SCOTTO, as Executrix of the Estate of Ida Rock Crovatin,

Plaintiff,

-against-

DOROTHY CROVATIN SCOTTO, in her individual capacity, JORDAN CROVATIN, JR., MARIUCCA CROVATIN, LUCIANO CROVATIN and "JOHN DOE #1" through "JANE DOE #10", the last ten names being fictitious and unknown to the plaintiff, the persons or parties intended being the occupants, tenants, persons or entities, if any, having or claiming an interest in or lien upon the premises described in the verified complaint,

Defendants.

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VanBRUNT, JUZWIAK & RUSSO
Attys. For Plaintiff
140 Main St.
Sayville, NY 11782

Upon the following papers numbered 1 to 3 read on this motion for a default judgment _____; Notice of Motion/Order to Show Cause and supporting papers 1 - 2; Notice of Cross Motion and supporting papers _____; Answering papers _____; Reply papers _____; Other 3 (memorandum) _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the plaintiff for a default judgment on the complaint filed in this action for a determination of adverse claims to real property pursuant to Article 15 of

the Real Property Actions and Proceedings Law [RPAPL] is considered under CPLR 3215 and RPAPL § 1501, *et. seq.*, and is denied.

By the complaint served and filed in this action, the plaintiff seeks a determination that the plaintiff's decedent is the sole owner of a parcel of unimproved real property located in the Town of Huntington. In April of 1940, the parcel was deeded to Giusto Crovatin and Jordan Crovatin, as tenants in common.

The plaintiff alleges in the complaint that Giusto Crovatin died in 1949 while on a trip to Italy and that his wife, Giovanna Scarpetti Crovatin, predeceased him (*see* Complaint ¶ 32-35). However, in a Report of Death of an American Citizen issued on July 21, 1959, Giusto Crovatin was reported as having died at age 70 on June 3, 1950 and notice of such death issued to his wife, Giovanna S. Crovatin, at an address in Trieste, Italy and to his son, Giusto Crovatin, at the same address, and to his daughter, Maria C. Houser, at her separate address in Trieste Italy (*see* Exhibit N attached to the moving papers). No information regarding, Giusto Crovatin, the son of the co-tenant title holder under the 1940 deed of the same name is provided in either the complaint or the moving papers. Rather, the plaintiff alleges that the co-tenant title grantee under the 1940 deed, namely Giusto Crovatin, was survived only by his daughter, "Mariucca Crovatin", a son, Luciano Crovatin, and by Giordano Crovatin a/k/a Jordan Crovatin, the co-tenant title owner under the 1940 deed (*see* Complaint, ¶¶ 33-34). Neither the Maria C. Houser, who was identified as the daughter of the deceased, Giusto Crovatin, and the informant on the Report of Death of an American Citizen nor the son, Giusto Crovatin, designated as such in said Report, is accounted for in the complaint or moving papers.

The other co-tenant grantee under the 1940 deed, Jordan Crovatin, who is referred to as Jordan Crovatin Sr., as he has a son of the same name, is alleged to have died on February 13, 1996, leaving a Will dated October, 17, 1966 which left his entire estate to his wife, Ida Rock Crovatin, the decedent listed above (*see* Will attached to the complaint). According to the complaint, the 1966 Will, although in the possession of the plaintiff at the time of the filing of the complaint in this action, was never probated by her deceased mother or by the plaintiff herself, since they believed that probate was unnecessary because the entire estate passed to Ida Rock Crovatin, the wife of the testator. Notwithstanding the non-admission of the Will to probate, the plaintiff concludes that "[b]ased upon the Last Will and Testament of Jordan Crovatin, Sr., the decedent [Ida Rock Croatin] is entitled to his [Jordan Crovatin Sr.] fifty percent [50%] fee title interest in the vacant land that is the subject of this court proceeding and any additional due to the death of his father, Giusto Crovatin (*see* Complaint ¶ 31).

The plaintiff's decedent and mother, Ida Rock Crovatin, died on June 9, 2008 and her Will was admitted to probate on February 23, 2009 by decree of the Kings County Surrogate's court. Prior thereto, the decedent received a title report dated February 25, 2008, which listed said decedent, and her two children, Dorothy Crovatin Scotto (the plaintiff who is also a defendant in her individual capacity) and Jordan Crovatin, Jr., as title holders due to their status as heirs at law of Jordan

Crovatin, Sr. The title report further listed and Mariucca Crovatin and Luciano Crovatin and Jordan Crovatin Sr. as being the heirs at law of Giusto Crovatin and his wife, Giovanna Scarpetti Crovatin, as a possible title holder. The title report does not recite the share interests of any of these purported title holders nor is there any suggestion that the heirs of Jordan Crovatin, Sr., succeeded not only to his 50% ownership interest under the deed, but also to his share of the 50% interest conveyed to Giusto Crovatin under the 1940, which devolved upon him due to his purported status as a son and thus heir at law of Giusto Crovatin.

In 2010, the plaintiff commenced this action for a judgment declaring that her deceased mother, Ida Rock Crovatin, is the sole owner of the subject parcel. The claim rests entirely upon allegations that the plaintiff's deceased mother paid the taxes on the property and that no others having a title interest therein contributed in any way to such expenses. Service of the summons and complaint were effected upon the plaintiff in her capacity as a defendant title holder pursuant to CPLR 308(1) on April 20, 2010 and upon her brother, Jordan Crovatin, Jr., pursuant to CPLR 314 at his residence in Virginia. Two children of Giusto Crovatin, namely, "Mariucca Crovatin" and Luciano Crovatin, who were joined as party defendants but whose whereabouts were allegedly unknown to the plaintiff, were served by publication in two newspapers under the terms of orders of this court which issued in June and July of 2010. The plaintiff interposed a motion for a default judgment (#002) in April of 2011, but the same was denied as moot as it was withdrawn by the plaintiff's counsel prior to determination. The time limitations period set forth in CPLR 3215(c) were nevertheless satisfied by the interposition of that motion (*see* ***US Bank Nat. Ass'n v Dorestant***, 131 AD3d 467, 15 NYS2d 142 [2d Dept 2015]).

By the instant motion, which is interposed more than five years from service of process in this action, the plaintiff moves a new (#003) for a default judgment on her complaint. Therein, the plaintiff explains that, since the filing of her complaint and prior motion for a default judgment, she petitioned the Kings County Surrogate's Court for a decree appointing her administratrix of the estate of her father's estate (Jordan Crovatin, Sr). That application culminated in a decree issued in March of 2014 in which the plaintiff was appointed administratrix with restrictions and she was issued limited letters of administration which precluded her, among other things, from "selling, transferring, mortgaging or in any manner encumbering the real property of the deceased, except upon further order of this court and the filing of a bond pursuant to SCPA 805(3)". In her affidavit in support of this motion, the plaintiff makes no mention of the 1966 Will of her father, which she alleged was in her possession in the 2010 complaint filed herein. In his supporting affirmation, the plaintiff's counsel states that said Will could not be located by his office staff or the plaintiff (*see* ¶¶ 28-29 of counsel's affirmation). There are no allegations regarding whether the existence of the 1996 Will was disclosed in the administration proceeding brought by the plaintiff in the Kings County Surrogate's Court in the early part of 2014 or offered for probate as a lost will pursuant to SCPA §1410.

For the reasons stated below, the instant motion is denied.

A party's right to recover upon a defendant's default in answering is governed by CPLR 3215, and, pursuant thereto, the moving party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer (*see* CPLR 3215[f]; ***U.S. Bank Natl. Ass'n v Alba*** 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***Oak Hollow Nursing Ctr. v Stumbo,*** 117 AD3d 698, 985 NYS2d 269 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Dela Cruz v Keter Residence, LLC***, 115 AD3d 700, 981 NYS2d 607 [2d Dept 2014]; ***Kolonkowski v Daily News, LP***, 94 AD3d 704, 941 NYS2d 663 [2d Dept 2012]; ***Triangle Prop. #2, LLC v Narang*** 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). Appellate case authorities have recently instructed that proof of service of the papers required by CPLR 3215(g)(1), if applicable, must be submitted in support of the motion for a default judgment (*see* ***Paulus v Christopher Vacirca, Inc.***, 128 AD3d 116, 6 NYS3d 572 [2d Dept 2015], ***Sterk-Kirch v Uptown Communications & Elec., Inc.***, 124 AD3d 413, 2 NYS3d 80 [1st Dept 2015]). Some proof of the amount due, if any, is also required, but only where said amount is capable of being reduced to a sum certain by simple calculation discernable from the papers before the court and without resort to extrinsic proof (*see* CPLR 3215[f]; ***Reynolds Sec. v Underwriters Bank & Trust Co.***, 44 NY2d 568, 572, 406 NYS.2d 743 [1978]; ***Vinny Petulla Contr. Corp. v Ranieri***, 94 AD3d 751, 941 NY2d 659 [2d Dept 2012]).

While the quantum of proof necessary to support an application for a default judgment is not nearly as exacting as the proof required on a motion for summary judgment, some firsthand confirmation of the facts forming the basis for the claim must be presented (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 760 NYS2d 727 [2003]; ***Feffer v Malpeso***, 210 AD2d 60, 619 NYS2d 46 [2d Dept 1994]). Accordingly, the plaintiff must advance facts from which the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant in an affidavit or complaint verified by a party having knowledge of the facts alleged (*see* ***Boudine v Goldmaker, Inc.***, 130 AD3d 553, 2015 WL 3972170 [2d Dept 2015]; ***DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.***, 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; ***Williams v North Shore LIJ Health Sys.***, 119 AD3d 937, 989 NYS2d 887 [2d Dept 2014]; ***CPS Group, Inc. v Gastro Enter. Corp.***, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; ***Resnick v Lebovitz***, 28 AD3d 533, 813 NYS2d 480 [2d Dept 2006]; ***Beaton v Transit Fac. Corp.***, 14 AD3d 637, 789 NYS2d 314 [2d Dept 2005]), together with proof of the amount due, if sufficiently certain (*see* CPLR 3215[f]). Where these elements are established, a motion for the entry of a default judgment should be granted (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, *supra*; ***Csaszar v County of Dutchess***, 95 AD3d 1009, 943 NYS2d 610 [2d Dept 2012]; ***King v King,*** 99AD3d 672, 951 NYS2d 565 [2d Dept 2012]; ***Tarrytown Professional Ctr., Inc. v Family Medicine of Tarrytown***, 93 AD3d 712, 939 NYS2d 868 [2d Dept 2012]). Where they are not, the motion should be denied (*see* ***DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.***, 128 AD3d 760, *supra*; ***Paulus v Christopher Vacirca, Inc.***, 128 AD3d 116, *supra*).

Claims for declaratory relief of the type advanced in the plaintiff's complaint sound in quiet title or adverse claim determination and are thus governed by RPAPL Article 15. Declaratory relief aimed at removing clouds on title to real property or to determine adverse claims to such property is available under the provisions of that statute. In addition, common law relief in the form of a judgment quieting title is available under RPAPL Article 15 to remove clouds on property which serve as an apparent title, such as a deed or other instrument that is actually invalid or inoperative (*see* ***Acocella v Bank of New York Mellon***, 127 AD3d 891, 9 NYS3d 67 [2d Dept 2015]).

In those actions commenced pursuant to RPAPL §1501, *et. seq.*, in which the plaintiff seeks a judgment quieting his or her title, the plaintiff cannot succeed by relying upon defects in the title of the defendant, but instead, must establish good title in himself or herself (*see* ***LaSala v Terstiege***, 276 AD2d 529, 713 NYS2d 767 [2d Dept 2000]; ***Bridgehampton Natl. Bank v Schaffner***, 47 AD2d 351, 667 NYS2d 938 [2d Dept 1998]; ***Town of N. Hempstead v Bonner***, 77 AD2d 567, 429 NYS2d 739 [2d Dept 1980]). A viable claim for a declaration that the plaintiff is the sole title holder of a parcel of land must thus rest upon substantiated allegations that the title claimed by the plaintiff reposes in him or her to the exclusion of the defendants and all others or that the plaintiff's title is superior to the title of the defendants (*see* ***Crawford v Town of Huntington***, 299 AD2d 446, 749 NYS2d 737 [2d Dept 2002]). "When reliance is placed solely upon paper title, the land not having been occupied, improved or inclosed, the proof must be of a chain of title from the original patentee or grantee" (***O'Brien v Town of Huntington***, 66 AD3d 160, 884 NYS2d 446 [2d Dept 2009]). Breaks in the chain of title due to insufficient proof of the devolution of the property by deed Will, or intestate succession will leave a plaintiff without an entitlement to the declarations of title sought in his or her complaint.

Due to the in rem nature of the actions embraced by RPAPL Article 15, specific pleading and party joinder requirements are imposed by RPAPL Article 15 and plaintiffs are required to state their interests in the premises, the source of such interest and its nature and quality, the adverse interests of others and/or the existence of a removable cloud on the property arising from an invalid or inoperative instrument (*see* ***Piedra v Vanover***, 174 AD2d 191, 579 NYS2d 675, 678 [2d Dept 1992]). In addition, RPAPL Article 15 plaintiffs must identify and join all persons having interests in the premises which may be adversely affected by the granting of the relief and state whether such persons are known and/or unknown and, if known, whether they suffer from any of the legal disabilities described in RPAPL § 1515.

These specific pleading and joinder requirements reflect the elements of a viable claim for relief under RPAPL Article 15. They are derived from the statutory mandate that a judgment issued pursuant to RPAPL Article 15 must "declare the validity of any claim ... established by any party," and may direct that an instrument purporting to create an interest deemed invalid be cancelled or reformed (RPAPL § 1521[1]; *see also* ***TEG N.Y. LLC v Ardenwood Estates, Inc.***, 2004 WL 626802, at *4 [E.D.N.Y. 2004]). The judgment must "also declare that any party whose claim to an estate or interest in the property has been judged invalid, and every person claiming under him ... be forever

barred from asserting such claim...." (RPAPL § [1]; *see also* ***O'Brien v Town of Huntington***, 66 AD3d 160, 884 NYS2d 446, 451 [2009]). However, no declaration is required to be made by the court in those cases wherein the defendant does not assert title and the plaintiff fails to establish that the title reposing in the defendant is invalid (*see* ***Crawford v Town of Huntington***, 299 AD2d 446, *supra*).

Here, the plaintiff failed to establish facts constituting cognizable claims for the declaratory judgment which she seeks in her complaint, namely, that her deceased mother be declared the sole owner in fee of the property that is the subject of this action and that the defendants be forever barred from asserting any future claims to said property. The facts alleged do not set forth any valid legal basis for the granting of such relief as neither sole title in the plaintiff's decedent nor the invalidity of the 50% title in the subject premises reposing in the descendants of the co-tenant title grantee, Giusto Crovatin, under the 1940 deed was established.

In addition, the obvious breaks in the chain of title identified in the 2008 title report due to the unknowns nature of the existence and identity of the all of the heirs of Giusto Croavatin were not cured by the allegations in the complaint or the moving papers. The allegations regarding the existence, death or non-existence of the descendant, heirs-at law of Giusto Crovatin are inconsistent with the documentation appended to the complaint and are otherwise insufficient to establish the devolution of Giusto Crovatin's 50% interest in the subject premises and the vesting of title thereto in equal shares in Mariucca Crovatin. Luciano Crovatin and the plaintiff's deceased father, Jordan Crovatin, Sr. The plaintiff's recitation of the devolution of such title is based, in large part, upon allegations that Giusto Crovatin, died intestate and that his wife Giovanna Scarpetti Crovatin, predeceased him and that he was survived only by the plaintiff's father, Jordan Crovatin, Sr., (the co-tenant grantee owner of the other 50% interest in the premised under the 1940 deed), a daughter, Mariucca Crovatin, and a son, Luciano Crovatin. However, these allegations, which are premised upon information and belief, the source of which is not identified, are flatly contradicted by the Report of Death of an American Citizen appended to the complaint. The 2008 title report thus notes that the existence or death and heirship of each of these persons must be established in order to establish the chain of title to the subject premises and the share interests of those in whom title vested by devolution.

The plaintiff also failed to establish that the fifty percent interest the subject premises conveyed to Jordan Crovatin, Sr., under the 1940 deed vested solely in the plaintiff's deceased mother, Ida Rock Crovatin, at the time of her death in 2008 and that any title vested in others is inferior. Because Jordan Crovatin, Sr. was survived by two children, namely, Dorothy Crovatin Scotto, the plaintiff herein, and Jordan Crovatin, Jr., in addition to his wife, Ida Rock Crovatin, his 50% ownership interest in the premises did not vest solely in his wife, Ida Rock Crovatin, as the plaintiff and her deceased mother "believed". Instead, title thereto vested in the wife and the issue of Jordan Crovatin, Sr., by representation, under the provisions of EPTL § 4-1.1, because the provisions of the 1966 Will of Jordan Crovatin Sr. were ineffective absent the probate of such Will.

For reasons not explained, said Will, a copy of which is attached to the moving papers and referenced in the complaint, could not be found in 2014, when the plaintiff petitioned for letters of administration of her father's estate. That application was granted and the decree issued upon an implicit finding that Jordan Crovatin, Sr., died intestate. By her own actions, the plaintiff established that title to the 50% interest in the subject premises owned by Jordan Cordavin, Sr., under the 1940 deed devolved to her mother, herself, her brother, Jordan Cordavin, Jr. However, she advances no legal grounds upon which the title reposing in the plaintiff and her brother was lost to their mother. As indicated above, the mere payment of real estate taxes on the subject premises for a certain period of time is not a sufficient factor to wrestle away title duly vested in the heirs at law at the time of the deaths of the co-tenant grantees of title under the 1940 deed, or their heirs, devisees or successors-in-interest.

The court further finds that there are at least two procedural irregularities of a jurisdictional nature that preclude the granting of the relief requested in the complaint on this motion for a default judgment. First, the plaintiff never moved for the appointment of a Guardian ad Litem for defendants, Mariucca Crovatin and Luciano Crovatin, both of whom are listed as known and existing persons even though their whereabouts have never been known to the plaintiff (*see* RPAPL § 1513). Nor did the plaintiff join as unknown defendants the person or persons who may have an interest in the premises as heirs at law or devises of Giusto Crovatin, a co-tenant grantee of the subject premises, such as the heirs, devisees or successors of his wife, Giovanna Scarpetti Crovatin, or those of Mariucca Crovatin and Luciano Crovatin, each of whom may have died subsequent to Giusto Crovatin, thereby vesting their ownership interests in the subject premises in them and, upon their deaths, if any, the vesting of their title in their respective heirs at law or devisees under a probated will.

Finally, court finds that it is without jurisdiction to determine this motion due to the plaintiff's failure to notice the defendants of the interposition of this motion as required by CPLR 3215(g). Although the plaintiff noticed this motion as one returnable before this court on October 23, 2015, the instant motion is correctly characterized as an ex-parte application as it was not served upon any of the defendants. Since, however, more than one year has elapsed from the defendants' default in answering occurred, they were entitled to notice of this motion (*see* CPLR 3215[g][1]). The failure to provide the defendants with the notice required by CPLR 3215(g)(1), like the failure to provide proper notice of other kinds of motions, is a jurisdictional defect that deprives the court of the authority to entertain a motion for leave to enter a default judgment (*see* ***Paulus v Christopher Vacirca, Inc.***, 128 AD3d 116, *supra*).

In view of the foregoing, the instant motion is denied and the proposed judgment attached to the moving papers has been marked "not signed".

DATED: 11/13/15

THOMAS F. WHELAN, J.S.C.