

Bisnath v Porteus

2018 NY Slip Op 33418(U)

November 26, 2018

Supreme Court, Bronx County

Docket Number: 310337/2010

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

**RAJENDRANAATH BISNATH and TARAMATIE
BISNATH,**

INDEX NUMBER: 310337/2010

Plaintiffs,

-against-

**Justice:
ALISON Y. TUITT**

**JOAN CHIAPPA PORTEUS, ALFRED CHIAPPA,
JOHN PORTEUS and JASON PORTEUS,**

Defendants.

The following papers numbered 1-5,

Read on this Plaintiffs' Motion for Leave to Intervene and Defendants' Cross-Motion to Dismiss

On Calendar of 6/26/17

Notices of Motion/Cross-Motion-Exhibits, Affirmations	1, 2
Affirmation in Opposition	3, 4
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Upon the foregoing papers, plaintiffs' motion for leave to intervene and to amend the caption and defendants' cross-motion to dismiss the action are consolidated for the purposes of this decision. For the reasons set forth herein, plaintiffs' motion is granted and defendants' cross-motion is denied.

Plaintiffs reside at 1937 Hunt Avenue Bronx, New York. The within matter pertains to real property located next door at 1941 Hunt Avenue, Bronx, New York. In their Verified Complaint, plaintiffs allege as follow: Prior to September 10, 2010, defendants Joan Chiappa Porteus and Alfred Chiappa were seized in fee simple of 1941 Hunt Avenue when the Sheriff sold the interest of defendant Joan Chiappa Porteus at a public sale. The sale was pursuant to a Judgment in an action between Rajendranauth Bisnath and Taramatie Bisnath and Joan Chiappa Porteus for the sum of \$558,820. On August 11, 2010, plaintiffs purchased Joan Chiappa Porteus' title and interest in the premises under a deed to the premises issued to plaintiff by Lindsay

Eason, as Sheriff of the City of New York. The deed was dated September 13, 2010 and recorded on September 23, 2010. Since September 13, 2010, plaintiffs have been a one-half interest, co-owner as tenant in common with defendant Alfred Chiappa. Defendants Joan Chiappa Porteus and Alfred Chiappa are in use, possession and occupancy of the premise and have refused to allow plaintiffs entry to the premises. Plaintiffs claim they have advanced diverse funds of money in furtherance of maintenance of the property. Upon information and belief, the value of the occupancy of the premises is \$5,000 per month and defendant Alfred Chiappa collected rents and proceeds from the premises or forgave the rents. Plaintiffs have no knowledge of the exact amount of the rents collected or the sums paid by Alfred Chiappa for the expenses related to the premises. Although demanded by plaintiffs, defendant Alfred Chiappa has failed or refused to account to plaintiffs for the sums that he had received by way of rents or proceeds from the premises. Since the date of the sale, defendants have remained in possession of the premises. Plaintiffs seek a finding that they are co-owner and tenant in common of the premises and are entitled to the immediate use, possession and occupancy thereof; plaintiffs are seized and possessed as tenants in common in fee of an undivided one-half part of the premises; that a sale is necessary; that an accounting be had; directing a partition and division of the premises.

Plaintiffs had previously moved for summary judgment for partition of the property which was denied by Justice Sharon Aarons by decision and Order dated December 18, 2013. The Court found numerous issues of fact existed as to the validity of the judgment obtained by plaintiffs, including whether the judgment was fraudulently obtained and whether the Sheriff's sale was valid. The question arose because Justice Stanley Green granted plaintiff's motion to levy against Joan Chiappa Porteus' interest in the subject premises by his decision dated April 20, 2009 which provided that: "Motion for an order directing sale of property is granted on default. Settle order by regular & CMRRR [certified mail return receipt requested]." However, there is no evidence that plaintiffs settled the order by regular and certified mail return receipt requested.

Following Justice Aarons decision, defendant Alfred Chiappa transferred 100% of the property to his nephews John Porteus and Jason Porteus. The transfer was recorded in the Office of the City Register on or about January 2014. Plaintiffs then brought an Order to Show Cause for a temporary restraining order enjoining defendant Alfred Chiappa from transferring the property to his nephews which was denied by Justice Aarons by decision and Order dated November 17, 2014. Justice Aarons noted that the Court did not place any restriction on Alfred Chiappa from transferring his property. Moreover, notwithstanding that Alfred Chiappa did not specify on his prepared Deed that he could only transfer 50% of the property, eventually the City Register corrected the Deed and listed the transfer as encompassing only 50% of the property. The Court noted that the

record of title is clear that the plaintiffs have a purported interest in the premises by virtue of the filed Sheriff's deed. Justice Aarons also ordered that John Porteus and Jason Porteus be substituted as defendants in place of Alfred Chiappa.

Plaintiffs now move for leave for Ullin Bisnath to intervene in the within action and directing that Ullin Bisnath be added as a party. Plaintiffs also seek to remove Alfred Chiappa from the caption in this case. Ullin Bisnath is the daughter of plaintiff Taramatie Bisnath. Plaintiffs argue that Ullin Bisnath has also been harmed by the actions of defendant Joan Chiappa Porteus but could not seek this relief sooner due to infancy. Ullin Bisnath is now 20 years old and seeks to intervene on the grounds that her damages are the same as her mothers. CPLR §1013 Intervention by permission provides

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Here, permission to intervene pursuant to CPLR 1013 and to remove Alfred Chiappa from the caption is granted since defendants state in their papers that "Defendants the Porteus family do not oppose (a) removing Alfred Chiappa, brother of Joan Porteus, from the caption of this case, or (b) the adding of the Bisnaths' 20-year-old daughter to this seven year-old case..."

Defendants' cross-motion to dismiss the action on the grounds that plaintiffs have failed to produce the settled order pursuant to Justice Green's decision is denied. This is the second motion by defendants. Defendants Alfred Chiappa, John Porteus and Jason Porteus moved for partial summary judgment seeking to declare as invalid the sheriff's sale held on August 11, 2010 and the motion was denied by Justice Aarons by decision and Order dated August 8, 2016. Justice Aarons wrote

Defendants-counterclaimants argue that they are entitled to partial summary judgment based upon certain statement of facts from this Court's December 18, 2013 decision and order. In quoting from this decision and order, they state that "[p]laintiffs have not shown that they validly obtained the Sheriff's Deed conveying [Joan] Porteus' half of property to them."...

This argument, however, fails... first, this quoted sentence is a legal conclusion reached by this Court after evaluating the proof submitted in plaintiffs' prior motion for summary judgment. It is not, as defendants... characterize, an uncontroverted fact. Rather, this Court held that plaintiffs' moving papers were deficient...

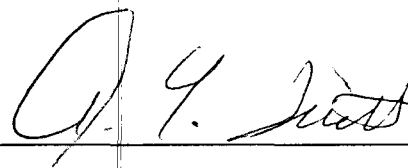
Second, Defendants-counterclaimants... as the moving party here... do not submit any proof showing the ownership interest in the subject property; they do not submit a copy of the

pleadings. Hence, the burden never shifted to plaintiffs as defendants-counterclaimants failed to meet their respective summary judgment burden.

In an accompanying decision and Order, plaintiffs were directed to produce the settled order within 30 days after service of that Order with Notice of Entry. In any event, the cross-motion seeks the same relief as defendants sought in the prior motion. Pursuant to C.P.L.R. Rule 2221, a party may move for reargument where it is shown that the Court overlooked or misapprehended any matters of fact or law in issuing the underlying Order. (Reargument of a motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. Massey v. City of New York, 672 N.Y.S.2d 679 (1st Dept. 1998); Pahl Equipment. v. Kassis, 588 N.Y.S.2d 8 (1st Dept. 1992). Nor is a motion to reargue designed to cure a deficiency in the original application. Defendants here have failed to show that this Court overlooked or misapprehended matters of law or fact in deciding the underlying motion. A motion for leave to renew “... *shall be based upon new facts* not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination... *and... shall contain reasonable justification for the failure to present such facts on the prior motion.*” C.P.L.R. Rule 2221. [Emphasis added]. Renewal should be denied where the motion is based on the same facts asserted in earlier motion and fails to present new facts. Pahl Equipment. v. Kassis, 588 N.Y.S.2d 8 (1st Dept. 1992). Renewal should also be denied where new facts are presented but the party fails to offer a valid excuse for not submitting the additional facts upon the original application. Foley v. Roche, 418 N.Y.S.2d 588 (1st Dept. 1979). Defendants have failed to make such a showing here.

This constitutes the decision and Order of this Court.

Dated: 11/26/18



Hon. Alison Y. Tuitt