Kings Heritage Corp. v Evans
2020 NY Slip Op 33079(U)
September 18, 2020
Supreme Court, Kings County
Docket Number: 511400/2019
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 17

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KINGS HERITAGE CORP.,

Plaintiff,

- against –

EUGENE J. EVANS, DIANA C. EVANS-HENRY, AND HILDA GEORGE F/K/A HILDA SULLIVAN,

Defendants.

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Index No.: 511400/2019
Motion Date: 7/29/2020
Motion Seq.: 02, 03, 04, 05

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number: (Motion 02) 10-25, 47-52; (Motion 03) 26-31; (Motion 04) 42, 43, 60-62; and (Motion 05) 38-41, 53-59 were read on this motion for summary judgment.

In this action for a partition of real property, the plaintiff, Kings Heritage Corp., has filed a motion (Motion 02) for an order: 1) striking the Answer of defendant Diana Evans-Henry; 2) directing entry of summary judgment in favor of the plaintiff; and 3) for such other and further relief as may seem just and proper to the Court. Defendant Diana Evans-Henry has filed a cross-motion (Motion 05) seeking an order: 1) denying plaintiff's motion; 2) granting her leave to file an amended answer; and 3) for other relief as the Court deems just and proper.

The plaintiff also filed a motion (Motion 03) for an order: 1) for default judgment against defendant Eugene Evans pursuant to CPLR § 3215; 2) directing partition of the property described in the Complaint; and 3) for costs, sanctions, and such other and further relief as may seem just and proper to the Court. Defendant Eugene Evans has filed a cross-motion (Motion 04) seeking an order: 1) dismissing the Complaint as against him or, in the alternative, allowing him to file an Answer; and 2) for other relief as the Court deems just and proper. For the reasons set forth below, Motions 02 and 03 are denied and Motions 04 and 05 are granted.

This is an action for the partition sale of a property located at 277 Nichols Avenue in Brooklyn, New York. The plaintiff states that it commenced this action after acquiring the interest of four prior owners of the subject premises, and that it now owns 75% of the premises as a result of these acquisitions. Plaintiff asserts that Diana Evans-Henry now occupies and enjoys the entire property without the consent of co-owners despite having only a 12.5% interest, and that she has defaulted on real estate taxes and the water bill. Plaintiff states that Eugene Evans also maintains a 12.5% interest but has not made any financial contributions to maintain the property.

According to the plaintiff, the relevant ownership lineage of the subject property dates back to September 1, 1982, when Ivy Evans and Alfred Sullivan acquired the property as tenants in common. *See* Exhibit H, NYSCEF Doc. No. 18. Plaintiff asserts that Alfred Sullivan died on December 18, 2015, at which point his 50% ownership interest passed to his wife, Hilda Sullivan

a/k/a Hilda George (who was discontinued from the instant action), and his son, Jashun Allar f/n/a Cornell Sullivan (hereinafter the Sullivan Heirs). Plaintiff further alleges that Ivy Evans died intestate on July 2, 2016, at which point her 50% ownership interest passed to her four children: Diana Evans-Henry, Eugene Evans, Monica Evans, and Pamela Ann Garcia.

Plaintiff formed as a corporation on January 8, 2019. Thereafter, and beginning with the first transfer on or about January 10, 2019, plaintiff set about acquiring the various interests in the property from the aforementioned heirs. When the plaintiff found itself unable to acquire the interests from the defendants, it ultimately brought the instant action for partition.

I. Plaintiff's Motion for Summary Judgment (Motion 02) and Defendant Diana Evans-Henry's Cross-Motion for Leave to File an Amended Answer (Motion 05)

Plaintiff argues that no issue of fact exists as to whether it has established majority ownership of the property, and that the subject property should be sold because it would be prejudicial to the owners to physically partition it. Plaintiff further claims that it is inequitable to allow a minority owner to hold the premises "hostage," particularly when said owner has failed to stay current with existing costs of the premises.

The defendants advance several arguments in opposition to Motion 02. Defendants first contest that Ivy Evans actually died intestate, claiming that there is a will that went missing in 2015. The defendants also argue that the property was adversely possessed by Ivy Evans, claiming that Alfred Sullivan was a "co-owner" in name only because he never actually lived at the property and never shared in responsibilities typically expected of owners, such as paying bills or making improvements to the property. Defendants claim that Ivy Evans had satisfied all the elements of adverse possession by 2002 and was therefore the sole owner of the subject property from that year forward; as a result, Alfred Sullivan's interest was adversely possessed by Ivy Evans and therefore could not be validly transferred to the Sullivan Heirs.

In addition, the defendants challenge the sufficiency of the plaintiff's evidence with regard to the Sullivan Heirs' interests in the property. Defendants argue that copies of the deeds along with the affidavits of the Sullivan Heirs are insufficient to establish that they were the rightful heirs of the property interests. Namely, defendants argue that the plaintiff did not establish that Mr. Sullivan died intestate, that no other descendants of Mr. Sullivan exist, and that no proceedings occurred with regard to Mr. Sullivan's estate. As a result, defendants allege that there is a gap in the chain of title, as no evidence has been offered to show that the Sullivan Heirs properly gained title from Mr. Sullivan following his death.

In addition, the defendants argue that the equities are balanced in their favor. Defendants allege that the plaintiff is involved in a predatory real estate scheme involving the use of coercive, unethical tactics in order to acquire properties and sell them at a profit (typically in minority communities and/or low-income areas). Defendants argue that the right to partition is not absolute, but rather subject to equities between the parties. The defendants also invoke several equitable defenses to support their opposition, including, *inter alia*, unjust enrichment and the doctrine of unclean hands.

Defendant Diana Evans-Henry also cross-moves for leave to file an amended answer in this matter. Before she obtained counsel, Ms. Evans-Henry filed a handwritten answer using a form typically utilized in foreclosure proceedings. Ms. Evans-Henry argues that the plaintiff will not be prejudiced if she is allowed to file her proposed amended answer.

The plaintiff opposes the relief sought in the cross-motion, stating that the application is untimely as it was filed 243 days after the initial filing of the answer. Plaintiff further argues that while leave to file amended pleadings are typically to be granted freely, the defenses asserted in the amended answer are devoid of merit and therefore that leave should not be granted here.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a *prima facie* showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez*, at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the *prima facie* burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez,* at 324; *Zuckerman*, at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. *Zuckerman*, at 562. In the instant matter, summary judgment must be denied as material issues of fact exist with respect to the plaintiff's interest in the property.

Although title to real property automatically vests in the heirs of a decedent who dies intestate (*Kraker v Roll*, 100 AD2d 424 (2d Dept 1984)), it is incumbent upon the movant to demonstrate that the decedents did in fact die intestate. *See Wilson 3 Corp v Deutsche Bank Nat. Trust Co*, 172 AD3d 960 (2d Dept 2019). Neither the conclusory "Heirship Affidavits" nor the "third-party affidavits" are sufficient to establish that Alfred Sullivan and Ivy Evans died intestate. Significantly, the third-party affidavits consist of boilerplate, fill-in-the-blank forms of family members and "friend(s) of the family" who each claim to have known the Evans or Sullivan families for a certain number of years. The affidavits even contradict each other: the affidavit of Jashun Allar states that Alfred Sullivan died intestate, whereas the affidavits of Hilda Sullivan and Lori-George Norford assert that he died testate. *See* Exhibit B, NYSCEF Doc. No. 12. As such, the movant has failed to demonstrate that the transfers to the plaintiff are valid such that judgment as a matter of law is warranted.

Furthermore, there exists a question of fact as to whether Ivy Evans adversely possessed the property from Alfred Sullivan for the requisite statutory period. To establish a claim of adverse possession, five elements must be proven: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period." *Midgley v Phillips*, 143 AD3d 788, 790 (2d Dept 2016), *quoting Walling v Przybylo*, 7 NY3d 228 (2006); *see also Galli v Galli*, 117 AD3d 679 (2d Dept 2014). Diana

Evans-Henry alleges in her affidavit that Alfred Sullivan never actually lived in the property, rendering him a co-owner in name only to help Ivy Evans qualify for financing, and that this arrangement was understood by Mr. Sullivan. Ms. Evans-Henry further states that Mr. Sullivan never contributed to mortgage payments, nor did he pay anything towards expenses. Furthermore, Diana Evans-Henry asserts that Ivy Evans cared for the property by herself from 1982 to 2012, and in doing so satisfied all of the elements of adverse possession for the required statutory period. Therefore, the defendants have set forth sufficient questions of fact as to whether Ivy Evans could have adversely possessed the property such that denial of the plaintiff's motion for summary judgment is warranted.

In addition, the right to partition is not absolute, and subject to the equities between the parties. *See* RPAPL § 901; *see also Ripp v Ripp*, 38 AD2d 65 (2d Dept 1971); *Guo v Guo*, 137 AD3d 974 (2d Dept 2016); *Arata v Behling*, 57 AD3d 925 (2d Dept 2008). A tenant in common has the right to maintain an action for partition but the Court has an obligation to balance the equities of the co-tenants and a "great variety of circumstances." *Ripp*, at 68; *see also Tsoukas v Tsoukas*, 107 AD3d 879 (2d Dept 2013). Here, contrary to what the plaintiff argues, the equities lie in favor of the defendant, Diana Evans-Henry. Ms. Evans-Henry has lived at the property since 1982 (except for a three-year period from 2008 to 2011), has made efforts to maintain the property, and now lives there with two of her children. The defendants also invoke the doctrine of unclean hands, which could form a proper basis for an equitable defense to partition. *See Kopsidas v Krokos*, 294 AD2d 406 (2d Dept 2002). The only equitable claim the plaintiff has is that it allegedly has a 75% interest in the property, which itself is not a fact the plaintiff has sufficiently established. As such, the defendants have raised a triable issue of fact with regard to equitable considerations.

Lastly, pursuant, to CPLR § 3025(b), "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court." Motions for leave to amend pleadings should be freely granted in the absence of prejudice or surprise to the opposing party unless the proposed amendment is "palpably insufficient or patently devoid of merit." *Wells Fargo Bank, N.A. v Confino*, 175 AD3d 536, 537 (2d Dept 2019); *see also Lucido v Mancuso*, 49 AD3d 220 (2d Dept 2008). The legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt. *Lucido*, at 227; *see also Sample v Levada*, 8 AD3d 465, 467–468 (2d Dept 2004).

Here, the plaintiff has not demonstrated that the proposed amendments are palpably insufficient or patently devoid of merit. The plaintiff has also failed to establish that it was so surprised or prejudiced by the proposed amendment such that denial of leave to amend is warranted. As such, the branch of Ms. Evans-Henry's motion seeking leave to file an amended Answer is granted.

II. Plaintiff's Motion for Default Judgment Against Eugene Evans (Motion 03) and Defendant Eugene Evans' Cross-Motion to Dismiss the Complaint (Motion 04)

Plaintiff argues that it is entitled to default judgment against Eugene Evans because it effectuated service of the Summons and Verified Complaint on Mr. Evans on June 4, 2019. Pursuant to the affidavit of service, plaintiff attempted to effectuate service using the "nail and mail" method after the process server made three failed attempts to personally serve Mr. Evans at 277 Nichols Avenue, which plaintiff alleges is Mr. Evans' home address. *See* Exhibit E, NYSCEF Doc. No. 31.

In opposition to plaintiff's Motion 03, Mr. Evans argues that he was never properly served pursuant to CPLR § 308 because the plaintiff did not: 1) demonstrate due diligence in attempting to serve under §§ 308(1) and (2); 2) affix the summons and complaint at his dwelling place or usual place of abode; and 3) timely file proof of service. Mr. Evans asserts that he has not lived at the subject property since 2015, and that a reasonable inquiry would have made the plaintiff aware of that fact. As such, Mr. Evans argues that the complaint should be dismissed pursuant to CPLR § 3211(a)(8) for the failure to establish jurisdiction over him. In the alternative, Mr. Evans requests leave to file an Answer.

Plaintiff argues that Mr. Evans did not properly contest service because he did not submit a sworn denial to defeat the presumption of proper service. Plaintiff further argues that the affidavit offered to support the cross-motion is improper because the affiant is Diana Evans-Henry, not the allegedly defaulting party Eugene Evans, and therefore that the affidavit should not be considered. Plaintiff also argues that Diana Evans-Henry' affidavit in support cannot be relied upon because she has conflicting, adverse interests to Eugene Evans. Plaintiff adds that, at a minimum, an evidentiary hearing is needed.

In reply, Mr. Evans reiterates the arguments offered in the original cross-motion while adding that an evidentiary hearing is unnecessary because Eugene Evans clearly does not reside at the property, thus removing any fact of consequence to be resolved at a hearing. Mr. Evans further contends that the affidavit of Diana Evans-Henry is reasonable because she has personal knowledge as a result of having lived at the subject abode, and that the interests of Diana Evans-Henry and Eugene Evans are in fact aligned.

Service of process may be made "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode" only where the alternate methods of personal service provided for in CPLR § 308(1) or (2) "cannot be made with due diligence." *Serraro v Staropoli*, 94 AD3d 1083, 1084 (2d Dept 2012), *quoting* CPLR § 308(4). The due diligence requirement must be strictly observed because there exists a reduced likelihood that a defendant will actually receive the summons when it is served pursuant to CPLR § 308(4). *Serraro*, at 1084; *see also McSorley v Spear*, 50 AD3d 652 (2d Dept 2008); *Kaszovitz v Weiszman*, 110 AD2d 117 (2d Dept 1985). "What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality." *McSorley*, at 653.

In the instant matter, there is no evidence to establish that the plaintiff made a genuine effort to learn the actual address at which Mr. Evans resides. Plaintiff offers no evidence that Mr. Evans was in any way attempting to evade service, nor is there evidence that the process server inquired about another potential dwelling place or place of employment. In addition, the process server did not affix the summons to the actual dwelling place or usual place of abode pursuant to CPLR § 308(4). *See Estate of Waterman v Jones*, 46 AD3d 63 (2d Dept 2007). Further, even if Mr. Evans ultimately received the summons and complaint, "when the requirements for service of process have not been met, it is irrelevant that the defendant may have actually received the documents." *County of Nassau v Letosky*, 34 AD3d 414, 415 (2d Dept 2006), *quoting Raschel v Rish*, 69 NY2d 694 (1986). As such, the plainly improper service warrants dismissal of the complaint as against Eugene Evans. *See Kaszovitz*, at 120 (finding that the lower court should have dismissed a complaint in the absence of strict compliance with the prerequisites of "nail and mail" service provided for in CPLR § 308(4)).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment (Motion 02) is DENIED in its entirety; and it is further

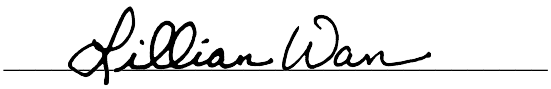
ORDERED, that the plaintiff's motion for default against defendant Eugene Evans (Motion 03) is DENIED in its entirety; and it is further

ORDERED, that the defendant Eugene Evans' cross-motion to dismiss the complaint or, in the alternative, allow him to file an Answer (Motion 04) is GRANTED to the extent that the complaint is dismissed as against Eugene Evans; and it is further

ORDERED, that the defendant Diana Evans-Henry's cross-motion (Motion 05) is GRANTED to the extent that Diana Evans-Henry is permitted to file an amended Answer.

This constitutes the decision and order of the Court.

DATED: September 18, 2020



Hon. Lillian Wan, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.