

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

JOSEPHINE ROSS, MAE ROSS BROWN & x
MALCOLM BROWN,

Plaintiffs,

-against-

THE QUEENS ORGANIZATION, LLC,

Defendant.

Index
Number 7370 2005

Motion
Date June 15, 2005

Motion
Cal. Number 25

x

The following papers numbered 1 to 7 were read on this order to show cause by the plaintiffs, pursuant to CPLR 602[b] and article 63, for an order removing to this court a holdover proceeding titled The Queens Organization, LLC v Josephine Ross, et al., Index No. L&T 54517/05 pending in the Civil Court, Queens County, and preliminarily enjoining the defendant from prosecuting the holdover proceeding pending a determination of this action.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7

Upon the foregoing papers it is ordered that the order to show cause is determined as follows:

I. The Relevant Facts

In or about February, 2005, the defendant The Queens Organization, LLC (Queens) commenced a holdover proceeding in the Civil Court, Queens County, against Josephine Ross (Ross) and various John Doe respondents, with respect to a premises located at 107-27 171st Street, Jamaica, New York (premises).

Ross interposed two defenses to that proceeding, namely, that: (1) she was a co-owner of the premises and Queens was not an owner, so the court lacked subject matter jurisdiction over the proceeding; and, (2) the proceeding should be removed to the Supreme Court or Surrogate's Court so the claims of ownership could be resolved.

By order to show cause and complaint, Ross, Mae Ross Brown and Malcolm Brown (collectively, the plaintiffs), appearing pro se, commenced this action seeking: (1) a declaration that they are the rightful owners of the premises; (2) a declaration that they gained title by adverse possession; and, (3) to permanently enjoin Queens from evicting them from the premises. This court (Satterfield, J.) granted a temporary restraining order enjoining Queens from proceeding with the holdover proceeding, pending a hearing.

In support of the order to show cause and complaint which is verified by all plaintiffs, Ross submits an affidavit containing the following allegations which are repeated in the complaint: (1) she is the daughter of Mae Ross Brown and the sister of Malcolm Brown; (2) the premises was first purchased in the 1930s by Charles A. Brown, the father of Reginald Brown; (3) Reginald Brown was the husband of Mae Ross Brown, her mother, and the father of Malcolm Brown; (4) by deed dated July 16, 1974, Charles A. Brown deeded his interest in the premises to Reginald Brown; (5) Reginald Brown died in 2002 testate and, by will dated July 17, 1969, he bequeathed all of his real and personal property to the plaintiffs; and, (5) the plaintiffs lived at the premises for over 40 years in an open and notorious manner, and paid all taxes, charges and insurance on the premises.

In further support Ross annexes, inter alia: (1) a written unsworn statement by Mae Ross Brown and Malcolm Brown, stating that they authorize Ross to submit affidavits on their behalf and their statements would be identical to those contained in Ross' affidavit; (2) a mortgage memorandum and closing statement by Home Title Insurance Company, referring to a mortgage made by Charles A. Brown and his wife Muriel Louise Brown, recorded March 9, 1932; (3) a deed dated July 16, 1974 by Charles A. Brown, as surviving tenant by the entirety of Muriel Louise Brown, deeding the premises to Reginald Brown; and, (4) the last will and testament of Reginald Brown, dated July 17, 1969, leaving all real and personal property to Willie Mae Ross, Josephine Marie Ross and Malcolm Brown.

Queens opposes the order to show cause asserting that: (1) although it was served with the summons and complaint, it was not served with the order to show cause, so the order to show cause should be denied for lack of service upon it; (2) the unsworn letter signed by Mae Ross Brown and Malcolm Brown is insufficient to

authorize Ross to litigate on their behalf; (3) in any event, following the conveyance by Charles A. Brown to Reginald Brown, by deed dated December 31, 1984, Reginald Brown conveyed the premises to himself and Hercules Brown "as tenants in common with no right of survivorship;" (4) Hercules Brown died intestate on December 3, 1988 and it is undisputed that Reginald Brown died in 2002; (5) upon the death of either, the 50% ownership interest in the premises passed to their heirs; (6) Hercules Brown was survived by a daughter Lynette L. Williams, who was his sole distributee and heir-at-law; (7) Lynette L. Williams died intestate in Ohio on March 18, 1994 and, at that time, her 50% interest passed to her husband Albert Williams and her son David Spencer Williams; (8) there is no record of a will by Reginald Brown being offered for probate; (9) on December 24, 2004, Mary L. Williams, the sister of Albert Williams, executed an affidavit of heirship stating, inter alia, that Reginald Brown died intestate and never married or had children, so the sole heir to the premises was David Spencer Williams; and, (10) also on December 24, 2004, Albert Williams and David Spencer Williams conveyed the premises to Queens by warranty deed which was recorded on January 11, 2005.

In support Queens annexes, inter alia: (1) the death certificate for Lynette L. Williams; (2) the affidavit of heirship executed by Mary L. Williams dated December 24, 2004; and, (3) a deed of the premises to Queens dated December 24, 2004, given by Albert Williams and David Spencer Williams as sole surviving distributees of Lynette L. Brown Williams, deceased intestate, reciting that "Lynette L. Brown Williams is the sole surviving distributee of H. Lee Brown, deceased [sic], Intestate. Hercules Brown, deceased [sic], intestate own [sic] 50% individually and 50% as sole surviving distributee of Reginald Brown, deceased [sic], intestate."

Queens also interposed a verified answer containing numerous affirmative defenses and, in four counterclaims seeks: (1) a declaratory judgment quieting title to the premises; (2) a judgment of eviction; (3) damages for trespass; and, (4) a judgment permanently enjoining the plaintiffs or their successors and assigns from interfering with Queens' use and quiet enjoyment of the premises.

II. Decision

In light of the affidavits of service indicating personal service of the summons, complaint and order to show cause on Queens and Stephen Weintraub, Queens' mere denial of receipt fails to rebut the presumption of regularity of service (see CPLR 311-a; see also Fekete v Camp Skwere, 16 AD3d 544 [2005]; Carrenard v Mass, 11 AD3d

501 [2004]; Strober King Bldg. Supply Ctrs., Inc. v Merkley, 266 AD2d 203 [1999]). As the complaint was verified by all plaintiffs and contains the same allegations as those contained in Ross' affidavit, Queens' contention concerning the lack of separate affidavits by Mae Ross Brown and Malcolm Brown lacks merit.

It is well settled that an application for a preliminary injunction requires a showing that: (1) the movant is likely to succeed ultimately on the merits; (2) the movant will suffer irreparable injury absent the grant of the preliminary injunction; and, (3) a balancing of the equities favors granting the preliminary injunction (see Singer v Riskin, 304 AD2d 554 [2003]; Marders the Landscape Store v Barylski, 303 AD2d 465 [2003]; Neos v Lacey, 291 AD2d 434 [2002]; Straisa Realty Corp. v Woodbury Assoc., 154 AD2d 453 [1989]). The function of a preliminary injunction is to maintain the status quo until there can be a full hearing on the merits (see Residential Bd. of Mgrs. of Columbia Condominium v Alden, 178 AD2d 121 [1991]).

Here, the plaintiffs explained their relationship to Reginald Brown, and his will indicates that he devised all real and personal property to them. The deed produced by Queens indicates that Reginald Brown and Hercules Brown each owned a 50% share in the premises, with no right of survivorship.

The plaintiffs do not dispute that, to date, the will of Reginald Brown has not been probated. Pursuant to EPTL 3-3.8, the title of a purchaser of real property, in good faith and for valuable consideration, from a distributee of a person who died owning such property shall not be affected by a testamentary disposition of such property by the decedent, unless within two years after the testator's death the will disposing of the property is admitted to probate (see EPTL 3-3.8).

Notably, although Queens produced the affidavit of heirship by Mary L. Williams and a deed conveying title to the premises to Queens, that deed recites that Hercules Brown was the sole surviving distributee of Reginald Brown which is an impossibility, as both Hercules Brown and his daughter Lynette L. Williams predeceased Reginald Brown. Moreover, in view of the allegations in the complaint, the affidavit of Ross and the affidavit of heirship by Mary L. Williams given on the same date as the conveyance to Queens, there is an issue of fact as to the identity of the distributees/devisees of the 50% interest in the premises held by Reginald Brown at the time of his death. Until that threshold issue is resolved, EPTL 3-3.8 does not foreclose the plaintiffs' claims.

Furthermore, in view of the allegations that the plaintiffs lived at the premises for 40 years and paid all real estate taxes and other charges thereon, and the lack of any evidence regarding a connection between Lynette L. Williams, Albert Williams and David Spencer Williams to the premises during that time or at the time of the conveyance to Queens, there are issues of fact with respect to the plaintiffs' claim of adverse possession and Queens' defenses thereto (see RPAPL 511, 522; Ray v Beacon Hudson Mt. Corp., 88 NY2d 154, 159 [1996]; see also RPAPL 311). Finally, as the plaintiffs allege that the premises is their home, they would be irreparably harmed if evicted before a determination of these issues, and a balancing of the equities militates in favor of granting the preliminary injunction. Thus, the plaintiffs have demonstrated all the elements necessary for the issuance of a preliminary injunction.

As the Civil Court cannot afford the parties complete relief, the Civil Court holdover proceeding shall be removed to this Court for joint trial with the causes of action interposed in the complaint and the counterclaims (see Braun v Fraydun Realty Co., 158 AD2d 430 [1990]; see also AIU Ins. Co. v ELRAC, Inc., 269 AD2d 412 [2000]; CPLR 602[b]).

With respect to an undertaking, the preliminary injunctive relief sought affects only further prosecution of the holdover proceeding in the Civil Court, and the holdover proceeding is being removed to this court for joint trial with the claims and counterclaims at issue. As a result, the court sets an undertaking in the amount of \$500.00, which sum shall be posted by the plaintiffs within 45 days of personal service upon them of a copy of this order with notice of entry (see CPLR 6312[b]). The plaintiffs, if they so deem, are advised to file the will of Reginald Brown in the Surrogate's Court, Queens County, for probate.

Conclusion

Based upon the papers submitted to this court and the determinations set forth above, it is

ORDERED that the branch of the order to show cause by the plaintiffs for an order removing to this court a holdover proceeding entitled The Queens Organization, LLC v Josephine Ross, et al., Index No. L&T 54517/05 pending in the Civil Court, Queens County is granted, and the holdover proceeding shall be removed to this court for joint trial with the action pending in this court; and it is further

ORDERED that the Clerk of the Civil Court, Queens County, is directed to deliver to the County Clerk of this court all of the

papers filed in the holdover proceeding; and it is further

ORDERED that the branch of the order to show cause by the plaintiffs, for an order preliminarily enjoining the defendant from prosecuting the holdover proceeding pending a determination of this action is granted only to the extent that the defendant is hereby preliminarily enjoined from further prosecution of the holdover proceeding in the Civil Court, Queens County and, otherwise, that branch of the order to show cause is denied; and it is further

ORDERED that the plaintiffs are directed to post an undertaking in the amount of \$500.00 within 45 days of personal service upon them of a copy of this order with notice of entry.

Dated: July 20, 2005

J.S.C.