

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

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LAVERNE MOORE,

Plaintiff,

-against-

Index No. 14843/07
Motion Date: 9/12/07
Motion Cal. No. 44

**NYC DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT and
THE CITY OF NEW YORK,**

Defendants.

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The following papers numbered 1 to 12 read on this application by plaintiff for an order granting a hearing to determine whether Plaintiff is encroaching on the adjacent property owned by the defendants, granting Plaintiff quiet title to a portion of the subject parcel on the grounds of adverse possession, and granting Plaintiff a preliminary injunction enjoining and restraining defendants from interfering with Plaintiff's use of the subject land located at Block 12164, Lot 69, with a street address of 160-25 111th Avenue, Jamaica 11433, Queens County, New York, by removing a chain link fence that separates the above property from the adjacent property located at Block 12164, Lot 59; and cross-motion by defendants for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint for failure to state a cause of action.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavit-Exhibits.....	1-3
Notice of Cross-Motion & Affirmation in Opposition-Exhibits.....	5-6
Memorandum of Law.....	7-8
Affirmation of Service.....	9
Reply Affirmation & Opposition to Cross-Motion-Exhibits.....	10-12

Upon the foregoing papers it is ordered that this application by plaintiff for an order granting a hearing to determine whether Plaintiff is encroaching on the adjacent property owned by the defendants, granting Plaintiff quiet title to a portion of the subject parcel on the grounds of adverse possession, and granting Plaintiff a preliminary injunction enjoining and restraining defendants from interfering with Plaintiff's use of the subject land located at Block 12164, Lot 69, with a street address of 160-25 111th Avenue, Jamaica 11433, Queens County, New York, by removing a chain link fence that separates the above property from the adjacent property located at Block 12164, Lot 59; and cross-motion by defendants for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint for failure to state a cause of action is decided as follows:

According to the complaint, plaintiff is the owner of the property located at 160-25

111th Avenue, Jamaica 11433, Queens County, New York. Plaintiff claims that she and her late husband and members of his family have been in possession of the property for over fifty years and during that time they have been in possession of a portion of the property on the adjoining real property located at Block 12164, Lot 59. During that time Plaintiff, her late husband and members of her late husband's family have erected structures on portions of this "disputed" area and used the area since on or before 1954 in an open and notorious and hostile manner. The City of New York acquired title to the adjoining real property located at Block 12164, Lot 59, on or about June 9, 1999. Plaintiff claims Defendants unjustly claim some ownership right in this disputed area and seeks equitable relief to provide a remedy. According to Plaintiff's affirmation submitted in support of her Order to Show Cause, there is a chain link fence on the property that marks off the area in dispute. Plaintiff claims that Defendants are planning to remove this fence and has made the instant application to prevent such removal.

Defendants oppose the instant application and have cross-moved to dismiss the action for failure to state a cause of action. Initially, the cross-motion is denied. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.) Contrary to defendants assertion, when viewed under the above standard it is clear that the complaint sufficiently identifies the property in which she claims adverse possession.

Plaintiff claims the preliminary injunction is needed to protect its unique interest in the subject premises. Plaintiffs also claim they have set forth sufficient facts to satisfy the needed elements for the requested injunctive relief. They have submitted, *inter alia*, an attorney's affirmation, the complaint and plaintiff's verification of the complaint. Defendants oppose this application, claiming the plaintiff has not made out the elements needed for the granting of a preliminary injunction. Specifically, Defendants claim the encroachment by plaintiff is delaying the sale of the property to a developer of affordable housing. They also claim that Plaintiff did not maintain a claim of right to any part of the subject premises in a prior deed that was executed and thus her current claim is not going to succeed. Finally, defendants claim that Plaintiff cannot acquire title to land by adverse possession that is owned by a municipality in its governmental capacity.

A preliminary injunction may issue only if the moving party can demonstrate (1) the likelihood of success on the merits; (2) irreparable injury if the preliminary injunction is not granted, and (3) a balancing of the equities in its favor. (Doe v Axelrod, 73 NY2d 748; Preston Corp. v Fabrication Enters., 68 NY2d 397; W.T. Grant Co. v Srogi, 52 NY2d 496.) The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. "Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law . . . and the burden of showing an undisputed right rests upon the movant." (Zanghi v State of New York, 204 AD2d 313, 314.) However, the decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court. Ying Fung Moy v Hohi Umeki, 10 AD3d 604 (2d Dept 2004.)

Regarding the likelihood of success on the merits, at issue is whether plaintiff has shown sufficient support for her claim to title to real property by adverse possession on a claim not based upon a written instrument. To the likelihood of success, conclusive proof is not required, [*See* Terrell v Terrell, 279 A.D.2d 301 (1st Dept 2001)] and the court may grant an injunction even when there are questions of fact for trial. Ying Fung Moy v Hohi Umeki, 10 AD3d 604 (2d Dept 2004.) The elements needed for showing a right to adverse possession are, the possession of the property was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period. Gerlach v. Russo Realty Corp., 264 A.D.2d 756 (2d Dept. 1999), *app denied*, 97 N.Y.2d 611 (2002.) Contrary to the appellants' contentions, the plaintiff has made the requisite showing of the likelihood of success.

Here, the defendant has not submitted any evidence that refutes the fact that the chain

link fence has separated the two properties for more than fifty years and marks off the disputed area as being on plaintiff's side of the fence. Moreover, defendants' do not refute that plaintiff and the prior owners have utilized this land during her possession. This evidence establishes the necessary elements for an adverse possession. Contrary to defendants' claim, the fact that plaintiff did not indicate ownership of the disputed land when title was transferred in 2001 does not preclude adverse possession. While the mere possession of land without any claim of right, no matter how long it may be continued, gives no title, an inference of hostile possession or claim of right can be drawn from the other established elements. *See, Gerlach v. Russo Realty Corp., supra*. Such claim of right is to be found in evidence in support of the other elements.

Finally, defendants argument that Plaintiff cannot acquire title to the subject land by adverse possession because it was owned by defendants in its governmental capacity is without merit. It is well settled that municipality cannot lose title through adverse possession to property which it owns in its governmental capacity, or which has been made inalienable by statute. City of New York v Wilson & Co., 278 NY 86 (1938.) However, it is also well settled that when a municipality holds real property in its proprietary capacity, there is no immunity against adverse possession. Starner Tree Serv. Co. v City of New Rochelle, 271 AD2d 681(2d Dept 2000.) In an adverse possession context, if a municipality decides to sell a portion of a parcel, the portion that is for sale is regarded as a proprietary holding. Monthie v Boyle Road Associates, 281 AD2d 15 (2d Dept 2001. Here, the defendants acknowledge that the property is to be sold and consequently, the subject disputed property is a proprietary holding not immune to adverse possession. *Id.* Based on the above, the Court finds that plaintiff has adequately demonstrated a likelihood of success on the merits.

In addition, the court finds that plaintiffs would suffer irreparable injury if the preliminary injunction is not granted and the equities balance in plaintiffs' favor since such removal of a portion of the premises would most likely cause a serious decrease in the plaintiff's ability to enjoy her property. Finally, while the delay of defendants sale of the property to an affordable housing developer is a serious consequence, such does not outweigh the harm done to plaintiff if she were to lose a portion of property that either she or a close family member has enjoyed for more than fifty years. Accordingly, a preliminary injunction is granted to the extent that defendants, their agents, attorneys, et. al., are enjoined and restrained from engaging in any activities which seek to remove the chain fence or prevent plaintiff from enjoying the disputed property. The foregoing relief is conditioned upon plaintiff posting an undertaking in the amount of one thousand dollars (\$1,000.00) on or

before October 22, 2007.

The remaining branches of plaintiff's application are denied as premature since there has been no discovery in this action.

Dated: September 18, 2007

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ORIN R. KITZES, J.S.C.