

Sugarman v Malone

2007 NY Slip Op 31449(U)

May 29, 2007

Supreme Court, New York County

Docket Number: 0108748/2005

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Sugerman

INDEX NO. 108748/05

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

Malone

The following papers, numbered 1 to _____ were read on this motion to/for and cross-motion summary judgment

Notice of Motion/and Cross-Motion ~~Order to Show Cause - Affidavits - Exhibits~~
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____
Memo of Law	4)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/29/07



J.S.C.
Hon. Marcy S. Friedman

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

WHICH/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
LYDIA K. SUGARMAN,

Plaintiff(s),

Index No.: 108748/05

- against -

LAURENCE F. MALONE and EAST RIVER
HOUSING CORP.,

DECISION/ORDER

UNFILED JUDGMENT
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_____ x
In this action, plaintiff Lydia K. Sugarman seeks a judgment declaring that she is the owner of shares for a cooperative apartment in Manhattan through adverse possession.¹ Plaintiff moves for summary judgment against defendant Laurence F. Malone for the relief sought in the complaint. Defendant cross-moves for summary judgment dismissing plaintiff's complaint.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])."

_____ x
¹ Plaintiff previously moved for a preliminary injunction to restrain defendants from transferring title in the premises pending determination of plaintiff's claims. Plaintiff's motion was denied by order of this court dated July 28, 2005, which was affirmed by order of the Appellate Division of this Department by order dated June 8, 2006.

(Zuckerman, 49 NY2d at 562.)

The following relevant material facts are undisputed: Plaintiff moved into the premises with her husband, Howard Sugarman (“Howard”), in 1984. Howard’s father, Jack Sugarman (“Jack”) was at that time the record owner of the premises. Howard died in 1990, and Jack died in 1995. Jack left the premises to his daughter and Howard’s sister, Thea Malone (“Thea”). Thea died in 1996 and left her ownership interest in the premises to her husband, defendant Laurence Malone. Defendant Malone commenced a holdover proceeding against plaintiff in Civil Court in March 2005, which was marked off calendar pending determination of this motion. (See P.’s Aff. In Support, ¶ 30.)

“In order to prevail on a claim of title by adverse possession, the adverse possessor must demonstrate, by clear and convincing evidence, that the character of the possession is hostile and under claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years. Moreover, all constituent elements must be proved, with the burden resting on the adverse claimant, with the adverse possessor’s acts construed against him, and every inference in favor of a possession that is subordinate to the title of the true owner.” (Keena v Hudmor Corp., 37 AD3d 172, 173-174 [1st Dept 2007] [internal citations and quotation marks omitted].)

In moving for summary judgment, plaintiff contends that her possession of the apartment became hostile within months of the death of her husband Howard in 1990, when Jack, and later Thea, told her on numerous occasions to move. (See P.’s Aff. In Support, ¶¶ 17-18.) In opposition, defendant contends that plaintiff entered into possession as a licensee of her father-in-law and not under a claim of right. Defendant also argues plaintiff cannot demonstrate that her occupancy was hostile and that she acknowledged defendant’s title by offering to purchase

his interest in the apartment.

Contrary to defendant's apparent contention, the mere fact that plaintiff's occupancy was permissive in its inception does not as a matter of law preclude a claim of ownership by adverse possession. Mere occupancy for an extended period with open conduct but without an initial claim of right "may not ripen into ownership by adverse possession." (All The Way East Fourth St. Block Assn. v Ryan-NENA Community Health Ctr., 30 AD3d 182 [1st Dept 2006], lv denied 7 NY3d 713.) Thus, "[w]hen adverse possession is permissive in its inception, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner and brought home to him." (Perez v Perez, 228 AD2d 161, 163 [1st Dept 1996] [citing Shandaken Rcfm. Church v Leone, 87 AD2d 950, 951 [3d Dept 1982], lv denied 57 NY2d 602], lv dismissed 89 NY2d 917.)

Here, however, plaintiff fails to make a prima facie showing that she asserted a right hostile to Jack Sugarman or Thea Malone. The sole evidence that plaintiff offers in support of her claim of assertion of such a right is her affidavit attesting to conversations with Jack and Thea, both of whom are now deceased.² This testimony would not be admissible in evidence on plaintiff's direct case at a trial of the action (see CPLR 4519),³ and plaintiff fails to make any showing on this record that she has other evidence establishing that she asserted a right hostile to

²It is noted that while plaintiff claims on the instant motion that she had conversations with Jack and Thea in which they told her to move (P.'s Aff. In Support, ¶¶ 17-23), plaintiff submitted affidavits on prior motions denying that she ever had any conversations with Jack or Thea regarding her occupancy at the premises. (See, e.g., Dattoma Aff. In Support of Cross-Motion, Ex. 4.)

³Pursuant to the "Dead Man's Statute," plaintiff's evidence of conversations with the decedents would be admissible only if defendant were to be examined in his own behalf or to give evidence of communications with the decedents concerning the same transaction. (See CPLR 4519.)

decedents.

In any event, plaintiff's claim of adverse possession is defeated by her making of an offer within the 10 year statutory period to purchase the premises from defendant. It is well settled that "an adverse possessor's claim of right or ownership will not be defeated by mere knowledge that another holds legal title." (Walling v Przybylo, 7 NY3d 228, 232 [2006].) In contrast, "[a]n offer made by one in possession without title to purchase from the record owner during the statutory period is a recognition of the record owner's title and prevents adverse possession from accruing." (The Manhattan School of Music v Solow, 175 AD2d 106, 107 [1st Dept 1991]; Albright v Beesimer, 288 AD2d 577 [3d Dept 2001].)

It is undisputed that defendant Malone's attorney, by letter dated May 14, 1998, offered to sell the cooperative to plaintiff for the price of \$64,500.00. (P.'s Aff. In Support, Ex. A.) Plaintiff responded by her attorney's letter dated June 9, 1998, which states that "[m]y client is willing to buy out your client's interest for \$10,000.00 to be paid by December 31, 1998." (Dattoma Aff. In Support of Cross-Motion, Ex. 1.) Plaintiff characterizes this letter as "not so much to purchase the Unit, but rather for me to take care of what I perceived at the time to be an annoyance."⁴ (P.'s Aff. In Opp., ¶9.) This characterization is inconsistent with the plain language of the letter and is therefore insufficient to raise a triable issue of fact as to whether she made an offer to purchase which defeated her claim of adverse possession.

The court further rejects plaintiff's claim that she did not waive her rights by making an offer because defendant was not the owner of the unit at the time the offer was made. Plaintiff

⁴ Plaintiff, in her moving papers, admits receiving an offer to purchase the apartment, but denies offering to purchase the premises. (See P.'s Aff. In Support, ¶ 37.) In reply, plaintiff states that she had "not recalled" the letter when attesting to the above. (See P.'s Aff. In Reply, ¶ 9.)

makes no factual showing in support of that contention.

The court has considered plaintiff's remaining contentions and finds them to be without merit. The court accordingly holds that defendant is entitled to summary judgment dismissing plaintiff's first cause of action for a declaratory judgment that she is the owner of the premises by adverse possession. In view of this holding, plaintiff's remaining causes of action for unjust enrichment, constructive trust and injunctive relief, all of which are based on plaintiff's claim of title by adverse possession, must be dismissed.

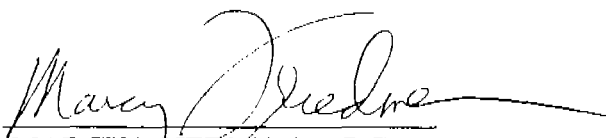
It is accordingly hereby ORDERED that plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted to the extent that it is

ORDERED, ADJUDGED and DECLARED that plaintiff Lydia Sugarman does not have an ownership interest in the shares of the premises known as Apartment A-2102 at 457 FDR Drive, New York, New York; and it is further

ORDERED that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
May 29, 2007


MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1413).