

**Rainbow Coop v City of New York**

2008 NY Slip Op 30512(U)

February 25, 2008

Supreme Court, New York County

Docket Number: 0108071/2007

Judge: Eileen A. Rakower

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

**EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_ **J.S.C.**

PART **Part 5**

*Justice*

Index Number : 108071/2007

**RAINBOW COOP**

vs.

**CITY OF NEW YORK**

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 108071-07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ here read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2,3

4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

FEB 27 2008

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: February 25, 2008

[Signature]  
**EILEEN A. RAKOWER** J.S.C.  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X

THE RAINBOW COOP, ANGEL IBANEZ, DIANE  
EZGHIABER, BERNAHARD MUELLER, SERGIO  
CABALLERO, WILLIAM EDELMAN and JOANNE  
EDELMAN, ELIZABETH SALAM, BEVERLEY LOVE,  
LESLIE STEVEN, OWEN THWAITES and ELGA  
SERRANO, ANTJE RICKEL and ROBERT  
BLUMENTHAL, and ANGELEA WENDT,

Index No.  
108071/07

Plaintiffs,

- against -

DECISION  
and ORDER

THE CITY OF NEW YORK CITY acting by and through  
its DEPARTMENT OF HOUSING PRESERVATION and  
DEVELOPMENT, UHAB HOUSING DEVELOPMENT  
FUND CORPORATION, URBAN HOMESTEADING  
ASSISTANCE (U-HAB), INC. and NCB CAPITAL  
IMPACT, f/k/a NCB DEVELOPMENT CORPORATION,

Defendants.

-----X

HON. EILEEN A. RAKOWER

Plaintiffs are an unincorporated association of past and present tenants of 274 East 7<sup>th</sup> Street, (the building) in the County and State of New York, who claim that by virtue of adverse possession they are now the legal owners of the building which was once owned by the City of New York(City). On August 19, 2002, City deeded the building to UHAB Housing Development Fund Corporation (UHAB), a not for profit organization that helps tenants rehabilitate their buildings and gain eventual ownership of them. Even before City's conveyance of the building to UHAB, it approached plaintiffs who were amenable to working with it in hope of obtaining official recognition of their "*de facto* ownership" status.

In 2004, UHAB secured financing from NCB Capital Impact, f/k/a NCB Development Corporation ("NCB") when the two corporations entered into a

mortgage loan agreement that called for NCB to advance \$2.7 million dollars to UHAB over a twenty-four month period for rehabilitation of the building and four other properties. As additional security for the loan, UHAB executed an "assignment of leases and rents" which authorizes NCB to, *inter alia*, "enter or take possession of all or part of the Properties, and to perform all acts necessary for the operation and maintenance of the Properties in the same manner and to the same manner and to the same extent that [UHAB] might reasonably so act." Plaintiffs worked with UHAB; however, they state that UHAB failed to make all necessary payments to contractors and plaintiffs were forced to use their own funds for renovation and to make repairs. In January, 2007, a UHAB architect certified that the building was in compliance with the standards required by New York's building code.

Plaintiffs believe that UHAB redirected NCB loan money to projects other than the building and the four other properties that it was meant to benefit. They have requested an accounting from UHAB, but UHAB will not disclose any information to them other than to represent that its agreement with NCB has "matured" and the companies are restructuring and extending their loan agreement. Plaintiffs state that they have never been consulted and have been continuously excluded from UHAB and NCB's financial negotiations and arrangements.

In June, 2007, plaintiffs brought this action seeking declaratory relief regarding possession, interest and title of the building. Plaintiffs also seek an accounting and damages as against defendants UHAB for breach of contract and breach of fiduciary duty in connection with UHAB's alleged obligation to negotiate for funding on behalf of plaintiffs. Additionally, plaintiffs seek a declaration permanently enjoining UHAB or NCB Capital Impact, f/k/a NCB Development Corporation ("NCB") from the sale, lease, foreclosure, or further encumberancing the building.

Defendant NCB makes this motion to dismiss the first, second and seventh causes of action in the complaint for failure to state a cause of action upon which relief may be granted (CPLR §3211 (a)(7)), arguing that Real Property Law § 260 precludes the declaration that NCB's mortgage against the building is "void or without force or effect." Plaintiff oppose the motion. The City of New York ("City") takes no position.

When considering a motion to dismiss, the court in *Leon v. Martinez*, 84 N.Y.2d 83 (1994), held that:

the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit.

Plaintiff's first cause of action seeks declaratory judgment of adverse possession under the common law. Plaintiffs state that they acquired title to the building through adverse possession, at least as early as July 9, 1991, but, in any event, no later than August 18, 2002, thereby rendering City's deeding of the building to UHAB on August 19, 2002, a nullity. Further, plaintiffs state that by virtue of the nullity of City deeding the building to UHAB, any rights or interests that UHAB or NCB claim in the building are void and without force and effect.

Plaintiff's second cause of action seeks declaratory judgment of adverse possession under Real Property Actions and Proceedings §§ 521 and 522. Plaintiff's state that their right to the building is exclusive of any other right claimed by City, UHAB or NCB.

Plaintiffs seventh cause of action seeks a judgment permanently enjoining UHAB or NCB (a) from taking any action to sell, assign or transfer record title in the building, or to lease it to a third party (b) from taking any action that could subject plaintiffs to summary proceedings regarding their possession of the building, and (c) from doing anything to further encumber the building, or to enter or take possession, or begin a foreclosure action with respect to NCB's mortgage or secured interest in the building.

Real Property Law § 260 states:

**Lands adversely held may be conveyed or mortgaged**

No grant, conveyance or mortgage of real property or interest therein shall be void for the reason that at the time of the delivery thereof such real property is in the actual possession of a person claiming under a title adverse to that of the grantor.

Plaintiffs argue that because their claim of title under adverse possession must be accepted as true, it cannot be said, as a matter of law, that NCB is entitled to dismissal of these causes of action. They argue that because UHAB does not have a valid title to the building, NCB's financial arrangement with UHAB is not a mortgage on the building, "but rather a non-collateralized loan." Plaintiffs argue that their position is supported by the legislative intent of the 1941 amendment of RPL § 260 which was accomplished merely to reverse a prior rule that barred a mortgagee from suing in his own name.

NCB argues that plaintiffs' interpretation of the legislative intent of the 1941 amendment to RPL § 260 is unnecessary to understand the clear and unambiguous meaning of a statute entitled "Lands adversely held may be conveyed or mortgaged." NCB notes that plaintiffs admit that prior to the 1941 amendment, a grant or mortgage was void if at the time of delivery the property was in actual possession of a person claiming title under adverse possession. They argue that the purpose of the amendment was to expressly validate a conveyance of property by one out of possession and rectify an anomaly in the statute based on an antiquated theory of property law.

In fact, "[t]his amendment [L.1941, c. 317] expressly validates a conveyance by one out of possession of land held adversely" and "[i]t [L.1941, c. 317] changes the rule that a conveyance of land adversely held is invalid." (McKinney's Consol. Laws of New York, Book 49, Real Property §260, Historical and Statutory Notes, Notes of Commission).

As NCB states in its reply, plaintiffs may be entitled to be declared the legal owners of the building. However, even accepting that fact as true, (*Leon v. Martinez, supra*), pursuant to RPL § 260, NCB's mortgage on the building is nonetheless valid and it is entitled to dismissal of plaintiffs' first, second and seventh causes of action against it, as a matter of law. Wherefore, it is hereby

ORDERED that defendants' motion to dismiss is granted and the first, second and seventh causes of action of the complaint as against NCB Capital Impact, f/k/a NCB Development Corporation are dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is all other respects continues.

This constitutes the decision and judgment of this court.

Dated: February 25, 2008

  
\_\_\_\_\_  
Eileen A. Rakover, J.S.C.

**FILED**  
FEB 27 2008  
NEW YORK  
COUNTY CLERK'S OFFICE