

Rainbow Coop v City of New York

2009 NY Slip Op 32653(U)

November 9, 2009

Supreme Court, New York County

Docket Number: 108071/07

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT: _____

PART 5

Index Number : 108071/2007
RAINBOW COOP
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 108071/07

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2, 3, 4, 5

Replying Affidavits _____

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

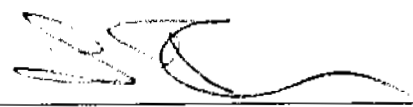
MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

NOV 13 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/5/09



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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,

Plaintiffs,

Index No.108071/07

Mot. Seq.:003

DECISION and ORDER

- against -

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.

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER

Plaintiffs are an unincorporated association of past and present tenants of 274 East 7th 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 defendants UHAB Housing Development Fund Corporation and Urban Homesteading Assistance ("UHAB"), a not for profit organization that helps tenants rehabilitate their buildings and, as per their stated mission, transform renters into homeowners. The transfer of the property to UHAB, according to UHAB, was for the purpose of converting the building to low income housing under Article XI of the Private Housing Finance Law, to complete construction needed at the property, and to ultimately transfer title to a Housing Development Fund Corporation yet to be formed which would include the members of Rainbow Coop as shareholders.

In 2004, UHAB secured financing from NCB Capital Impact, f/k/a NCB Development Corporation ("NCB"). The resulting mortgage loan agreement called for NCB to advance \$2.7 million dollars to UHAB over a twenty-four month period for rehabilitation of the subject 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 extent that [UHAB] might reasonably so act." Plaintiffs assert 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.

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 from the sale, lease, foreclosure, or further encumbering the building.

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.

Previously, NCB moved 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 ("RPL § 260") precluded the declaration that NCB's mortgage against the building is "void or without force or effect." RPL §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.

By decision dated February 25, 2008, this Court granted NCB's motion and the first, second, and seventh causes of action were dismissed as to it. Plaintiffs appealed the

decision. On June 2, 2009, the Appellate Division First Department affirmed the dismissal.

UHAB now moves to dismiss plaintiffs' First, Second, Third and Seventh Causes of action as to it pursuant to CPLR 3211(a)(7) or, in the alternative, to grant summary judgment dismissing those causes of action as well as the Sixth Cause of Action. Plaintiffs oppose and cross-move to compel discovery. UHAB opposes the cross-motion. City submits an "affirmation in response to dismissal motion by UHAB defendants."

Plaintiffs' first and third causes of action seek a declaration of title in favor of plaintiffs' adverse possession of the subject building under the common law and quiet title. Plaintiff's second cause of action seeks declaratory judgment of adverse possession under Real Property Actions and Proceedings Law §§ 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 from: (a) taking any action to sell, assign or transfer record title in the building, or to lease it to a third party; (b) taking any action that could subject plaintiffs to summary proceedings regarding their possession of the building; and (c) 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. Plaintiffs' sixth cause of action is for breach of fiduciary duty as against UHAB. Plaintiffs' fourth and fifth causes of action are for an accounting and for breach of contract, respectively.

UHAB, in support of its motion, submits the following: a decision and order of this Court, dated February 25, 2008; the summons and complaint; a document titled "City Register Recording and Endorsement Page; a copy of a document titled "The Council of the City of New York Resolution No. 374;" and a copy of a document titled "Homesteaders' Membership Agreement . . ."

UHAB first argues that, for the same reasons as NCB, it is entitled to dismissal under RPL §260. UHAB next argues that it could not have breached its fiduciary duty to plaintiffs because a fiduciary duty was never created between it and plaintiffs. UHAB points out that there was no written agreement between the parties which would have created such a duty. UHAB provides the homesteaders agreement and asserts it was "a unilateral one executed by the plaintiffs individually in which the members represent that they understand the nature of the project and that there will

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continue to be restrictions on income, resale, primary residence and other similar restrictions.” City, in its affirmation in support, asserts that if the causes of action for adverse possession are dismissed as to UHAB, they should also be dismissed as to City.

Plaintiffs, in opposition, argue that title of the premises had already passed to plaintiffs, by virtue of adverse possession, before it was transferred from City to UHAB. Thus, RPL §260 is rendered wholly inapplicable. Further, plaintiffs argue that the Court’s prior decision does not apply because the Law of the Case Doctrine only applies where the issues raised are the same as those which were already disposed of in a prior ruling. Plaintiffs assert that this is not the case here as NCB and UHAB have very different interests in the building. Finally, as to the Sixth Cause of Action, plaintiffs argue that there is no requirement that a fiduciary relationship be committed to writing and that their relationship with UHAB is the “classic case of a fiduciary contract.”

In support of their cross-motion, plaintiffs submit the following: portions of the deposition transcript of plaintiff Leslie Steven; a document titled “Letter of Intent;” and the deposition transcript of Andrew Reicher, for UHAB. Plaintiffs argue that they are entitled to discovery with respect to “books and records in order to ascertain what loan monies were furnished to UHAB on Plaintiffs’ behalf, how those loan monies were used and allocated, and what Plaintiffs’ obligations to repay the loan would be per the Letter of Intent entered between the parties.” UHAB, in opposition, argues that plaintiffs have not shown that they are entitled to an accounting of where loan monies were spent.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

UHAB submits a copy of the deed evidencing that City, as the owner of the subject property, transferred it to UHAB on August 19, 2002. Plaintiffs, however, assert that at the time of the transfer, they were already the owners of the property by having adversely possessed the property for a period in excess of 10 years.

“Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied . . . are deemed to have been held adversely.” (*Walling v. Przybylo*, 7 NY3d 228, 232[2006])(internal citations omitted). The five elements that must be proven in order to make a claim of adverse possession are that the possession (1) was hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period, which, in New York, is ten years. (*Id.*)

“Since New York has long disfavored the acquisition of title by adverse possession . . . , its elements must be proved by clear and convincing evidence.” (*Joseph v. Whitcombe*, 279 AD2d 122,126[1st Dept. 2001]). Indeed, as adverse possession served to cut off legal claims to a title, “it has historically been strictly applied in the sense that 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 true owner.” (*Id.* at 125).

It is clear that the “Rainbow Co-op” is not yet an operating cooperative. In the agreement formed between UHAB and City, under its Term Sheet, it states:

Approval to operate as a cooperative-The New York State Department of Law must approve the HDFC’s right to distribute shares and operate as a cooperative.

Upon being questioned at her deposition, Leslie Steven testifies:

- Q: The Rainbow Coop is not a corporation. Is that correct?
- A: Yes
- Q: So it doesn’t issue shares and it hasn’t issued shares. Is that correct?
- A: Yes.

Indeed, plaintiffs readily concede that one of the purposes of working with UHAB

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was to have their assistance in getting the building up to code and gaining approval to act as a cooperative.

The elements of adverse possession must all be proven by clear and convincing evidence. All elements are necessary in order to establish adverse possession. In response to the motion for summary judgment, Plaintiffs must lay bare their proof to show they can establish all of these elements.

In order to satisfy the first element, plaintiffs must show that their possession was hostile and under a claim of right. Generally, hostility will be inferred from satisfaction of the other elements. As to claim of right, plaintiffs readily admit that title was in City at the time that they occupied the premises and that it remained there until the transfer. Without a claim to ownership as of right, plaintiffs occupancy did not constitute adverse possession. The court in *Joseph* found that

. . . one who, while in possession of another's land, admits that title is in another person . . . is not adverse for purposes of the doctrine . . . The present case, in which an urban lot, improved by a residential dwelling in a community occupied by a population that seems to be more settled than transient, and where people tend to know who owns what property, is unusual in that defendants managed to live, rent free, as long as they had in the subject dwelling. Not so unusual, though, is that they did not do so adversely, at least insofar as the doctrine of adverse possession has been traditionally understood and applied. Defendants are essentially squatters, albeit squatters who exercised some care for the house that sheltered them. (*Joseph* at 127)(internal citations omitted).

In the Homesteaders' Membership Agreement, signed by each tenant, there is an acknowledgment that:

the Building is being organized for purchase from the City of New York for conversion to a low-income housing cooperative corporation . . .

The agreement requires that each tenant's "Sweat Equity" and "Cash Equity" contributions will begin on October 1, 2000, prior to the transfer date of August, 2002. Plaintiffs statements and conduct confirm that they did not believe they were in possession of the premises under a claim of right. In *Van Valkenburgh v. Lutz*, 304 NY 95[1952], the court found that:

When the defendant had the opportunity to declare his hostility and assert his rights against the true owner, he voluntarily chose to concede that the plaintiffs' legal title conferred actual ownership . . . (where the court found that the declarations of a tenant who litigated the issue of title and ownership in order to assert his easement rights could be used to infer tenants lack of claim as of right to the subject property).

Plaintiffs allege that they have been in possession of the subject premises:

beginning at least as early as 1981, [they] have either lived continuously at the Premises, or become resident at the Premises through a chain of privity with those who have preceded them, for the minimum period of ten years prescribed by law . . .

Plaintiffs submit only the deposition transcript of one tenant, Ms. Steven, who testifies that she has lived in the building since 1991, and her apartment was vacant when she took possession.

Plaintiffs allege, in their Second Cause of Action, that, pursuant to RPAPL § 521 & 522, they acquired title to the premises through their "cultivations, improvements, and enclosures made at the Premises, during the applicable prescriptive period." Among other things, plaintiffs allege that they "installed an iron gate that encloses the entire front of the building." While it is true that "regular cultivation, improvement and enclosure of another's land constitute open and notorious acts of possession that would place record owners on notice of an adverse claim to the property" (*Ray v. Beacon Hudson Mountain Corp.*, 88 NY2d 154, 160 [1996]), it is only one element to consider when determining whether the disputed property is adversely held.

The very first element, that plaintiffs held the property hostilely and under a claim of right, has not been satisfied. Plaintiffs state in their complaint that "at least as early as 1981, attempted to have the Premises accepted into the City's TIL [Tenant Interim Lease Program] Program" [intended to give tenants who live in City owned buildings a chance to manage and eventually buy their building from the City as a low income cooperative]. Later, on or around October, 2000, Plaintiffs enter into a membership agreement wherein the signatories acknowledge "that the Building is being organized for purchase from the City of New York." Ms. Steven, who states in her deposition that she has resided in the building since 1991, asserts that she is a

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cooperative owner, which cooperative has gained ownership through their maintenance and management of the building over decades. However, plaintiffs generally concede each tenant signed a membership agreement (hers is not provided), recognizing City's ownership.

Plaintiffs claim they adversely possessed the premises for a period of ten years prior to the 2002 transfer of title from City to UHAB. Essentially, they must establish continuous possession from at least 1992. The only support provided is the testimony of Ms. Steven, who establishes a continuous presence for herself only. She states that she obtained keys for the locks on the two entrance doors to Apartment 4C from the co-op, but the remainder of the transcript on that point is not provided. She states that she was secretary of the co-op since 1998, but makes no mention of any other individual affiliated with the co-op prior to that time. Thus, the requirement that the possession be continuous for the statutory period (ten years), is not evident here.

Ms. Steven reports that the premises, seemingly abandoned by City, were actually occupied openly. Plaintiffs assert that over the course of 25 years they made improvements, including plumbing and electrical, to make the premises livable. They claim, in their complaint, that they erected an iron fence around the premises, demonstrating their enclosure of the property. However, no proof in admissible form is presented to support these assertions or the time frames within which they might have been accomplished. Plaintiffs state conclusions with little or no evidence or proof submitted to substantiate those conclusions.

The remaining elements of adverse possession are similarly unsupported. The Court recognizes that a group of occupants of the premises continuously sought record ownership of the premises. Beginning with their efforts to be accepted into the TIL Program and including their cooperative efforts with UHAB, it is clear that such group [Rainbow Coop was formed, according to Steven, in 1982] always intended to become cooperative owners of the premises. Toward that end, plaintiffs claim to have each contributed funds and or sweat equity, aimed at fulfilling the stated mission of UHAB and the City Council, to aid in the growth and development of the City of New York, and encourage responsible ownership in "true housing co-operatives that will remain affordable, in perpetuity."

However, Plaintiffs have a heavy burden, where all adverse possessor's acts are construed against them, and plaintiffs have failed to demonstrate the essential evidence by even the barest of proof in admissible form. The papers provided are

sparse. Indeed, the proof necessary would be within the possession of the Plaintiffs and not the moving party, leaving its absence striking.

The court now turns to UHAB's request for summary judgment dismissing plaintiffs' Sixth Cause of Action, which alleges that UHAB breached a fiduciary duty. UHAB claims it had no fiduciary relationship with plaintiffs by any express contract.

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." (*EBC I, Inc. v. Goldmnan, Sachs & Co.*, 5 NY3d 11[2005]). "Generally, where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency," (*Id.* at 19).

UHAB urges that the Homesteaders Membership Agreement, unilaterally signed by each individual plaintiff, and including plaintiffs' obligations toward the cooperative conversion, was not a contract which created a fiduciary relationship between it and the members. Plaintiffs point out a reference to project financing that can be found in that agreement under the paragraph titled "Purpose of the project." There, it states that the building will be "rehabilitated through a combination of member sweat and cash equity, and *additional financing*" (emphasis added).

UHAB's letter of intent recognizes the homesteaders of 274 E. 7th Street, and includes in its Term Sheet certain obligations to the homesteaders. "The HOMESTEADERS and their counsel will be given reasonable opportunity to review the Land Disposition Agreement and other transfer documents presented by the City to UHAB." There is a requirement that each "resident of the BUILDING will be responsible to make maintenance payments to the HDFC. They will be responsible for 1) payments to UHAB related to loan agreements entered into by the HDFC and UHAB, and 2) certain other charges agreed to by the HDFC and UHAB." Additionally, the Term Sheet provides that UHAB will provide "training and technical assistance to the residents." Indeed, there is no question that Plaintiffs are intended as third party beneficiaries to UHAB's agreement with City. Whether this gives rise to a fiduciary relationship is not clear.

In the absence of an express contract, "a fiduciary duty may be created by . . . factors such as the length of the relationship of the parties, their financial interdependence, and their sharing of confidential and proprietary information." (*ADT*

Operations, Inc. v. Chase Manhattan Bank, N.A., 137 Misc.2d 959[NY County 1997])(citing to *Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 159 AD2d 363[1st Dept. 1990]).

Plaintiffs argue that the relief UHAB seeks is premature, since discovery is not complete.

CPLR 3212(f) states, in relevant part:

Facts unavailable to the opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion . . .

Plaintiffs have legitimate discovery demands regarding their remaining causes of action. Thus, the cross-motion is granted to the extent that UHAB is directed to respond to plaintiffs' First Demand for Discovery and Inspection of the UHAB Defendants, dated February 28, 2008.

Wherefore, it is hereby

ORDERED that defendants UHAB Housing Development Fund Corporation and Urban Homesteading Assistance's motion to dismiss is granted to the extent that the first, second, third, and seventh causes of action of the complaint are hereby severed and dismissed as to it; and it is further

ORDERED that defendant UHAB Housing Development Fund Corporation and Urban Homesteading Assistance's motion for summary judgment as to the sixth cause of action is denied as premature; and it is further

ORDERED that defendant the City of New York, acting by and through its Department of Housing Preservation and Development's motion to dismiss is granted and the complaint is hereby severed and dismissed as to said defendant; and it is further

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

ORDERED that plaintiffs' cross-motion is granted to the extent that defendants

UHAB Housing Development Fund Corporation and Urban Homesteading Assistance shall respond to plaintiffs' First Demand for Discovery and Inspection of the UHAB Defendants, dated February 28, 2008, within 45 DAYS of service of a copy of this order with notice of entry; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of this court. All other relief requested is denied.

Dated: November 9, 2009



Eileen A. Rakower, J.S.C.

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