

Romanoff Equities, Inc. v Lucas

2010 NY Slip Op 30104(U)

January 12, 2010

Supreme Court, New York County

Docket Number: 600515/04

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROMANOFF EQUITIES, INC.,
Plaintiff,

Index No.: 600515/04

Motion Date: 10/06/09

- v -

Motion Seq. No.: 04

JOANNE LUCAS,
Defendant.

Motion Cal. No.: 92

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

PAPERS NUMBERED

1

2

3

FILED

JAN 20 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff moves for summary judgment dismissing defendant's counterclaims for adverse possession and prescriptive easement; permanently restraining defendant, her employees, servants, agents, attorneys, and all other persons acting in concert with defendant from trespassing upon plaintiff's property; restoring said property to the condition that existed prior to defendant's trespass; and directing defendant to remove any and all objects placed by defendant and/or her agents on said property.

This is a trespass and nuisance action. Plaintiff is the owner of a commercial building located at 823 Washington Street,

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

New York, New York. Defendant is the owner of a building located at 69 Gansevoort Street, which houses a restaurant. Plaintiff's property includes a triangular piece of land adjacent to 69 Gansevoort Street (premises). This premises, which is accessible only through the back door of the restaurant, has been used by defendant and members of her family for over fifty years. Plaintiff alleges that defendant has installed on the premises ventilation pipes, a commercial air conditioning system, a flute pipe and a shelving area. Defendant has allegedly also stored waste on said premises. These activities have allegedly occurred without plaintiff's approval, and plaintiff seeks the removal of the installations.

In her answer, defendant includes two counterclaims, alleging that the possession and/or use of the premises constitutes adverse possession and/or a prescriptive easement. Plaintiff brings this motion to dismiss the counterclaims and to compel defendant to remove the installations.

Plaintiff initially argues that the premises was used by defendant and her father, who was the previous owner of the building on 69 Gansevoort Street, with the permission of plaintiff and its predecessors. Plaintiff claims that there existed a license to utilize the premises for the purpose of managing the restaurant. Plaintiff states that the license was revoked when plaintiff discovered, sometime in 2003, that

defendant had installed the aforesaid objects. Plaintiff contends that there is no adverse possession involved because defendant's claim is based on mere use, and there is no element of hostility or claim of right. Moreover, plaintiff argues that a party seeking title by adverse possession on a claim not based upon a written instrument must show that the land was either usually cultivated or improved or protected by a substantial enclosure and that defendant allegedly fails to offer such proof. Plaintiff also contends that there is no prescriptive easement because there is no element of hostility.

Plaintiff relies in part on deposition testimony from defendant who testifies that she did not know whether permission or authority was ever given to any of the occupants or prior owners to use the premises. She also stated that she did not know if Michael Romanoff, plaintiff's President, was ever refused access to the premises from the 1950's to the present. Defendant testified that she did not have any "correspondence" regarding a claim of ownership to the premises.

An affidavit from Michael Romanoff states that, in the late 1960's he, in his capacity as manager of the subject property, gave permission to R & L Restaurant to use the premises. At that time, defendant's father was the owner of the building at 69 Gansevoort Street. He also managed the restaurant. Up until the mid 1980's, Romanoff claims that he and his family ate at such

restaurant on an almost daily basis, and maintained a close relationship with defendant's family. In 1985, Florent Morellet rented the ground floor of the space previously used by R & L Restaurant and operated his own restaurant. Romanoff states that he spoke to Morellet and gave him permission to use the premises. He states that in 2003, when he observed the ventilation pipes and other installations, he attempted unsuccessfully to have defendant remove the installations. Thereafter, he commenced this action.

In opposition to the motion, defendant argues that plaintiff never gave permission to defendant or defendant's father to use the premises at any time prior to the commencement of this action. Defendant contends that the original complaint did not contain any reference to a license to use the premises and it is only mentioned in the amended complaint.

In an affidavit, defendant attests that the air conditioning system and a water tower had been installed as early as 1985, and that in 2002, the water tower was replaced by two HVAC units. Defendant states that she has been the owner of the building on 69 Gansevoort Street since 1995, and she denies ever having a conversation with Michael Romanoff about the use of the premises. She does not recall Romanoff ever requesting use and/or access to the premises.

Defendant contends that Michael Romanoff's deposition testimony shows that he was not aware of ever discussing the premises with defendant. He testifies that he had conversations with defendant's father about the use of the premises. Defendant notes that apparently none of these conversations were reflected in writing, even in plaintiff's business records. Moreover, defendant avers that her father is deceased and any aforesaid conversations would be barred by CPLR 4519, known as the Dead Man's Statute.

Defendant asserts that there was no license to use the premises and no revocation of the license. It is defendant's contention that plaintiff has fabricated the license to avoid or discredit legitimate claims of adverse possession or a prescriptive easement.

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 a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of ten years. Keena v Hudmor Corp., 37 AD3d 172, 173 (1st Dept. 2007). All constituent elements for adverse possession must be proved, with the burden resting on the adverse claimant's acts construed against him or her, and with every inference in favor of a

possession that is subordinate to the title of the true owner.
Id. at 173-174.

There is a dispute as to whether defendant's possession of the premises is hostile and under claim of right. When possession is permissive in its inception, adverse possession will not arise until there is a distinct assertion of right hostile to the owner and brought home to him. Perez v Perez, 228 AD2d 161, 163 (1st Dept 1996). Plaintiff argues that it gave defendant's family permission to use the premises at least since the 1960's and withdrew its permission when the installations were observed. Defendant contends that there is no proof of permission or whatever proof has been provided by plaintiff is precluded by the Dead Man's Statute.

Pursuant to CLPR 4519, a party or person interested in an event, speaking on his or her behalf, is disqualified from testifying about a communication or transaction with a decedent that is offered against some person with standing to invoke the statute. Standing includes deriving an interest from a decedent. See Kwon v Delum Builders & Suppliers, Inc., 173 AD2d 326 (1st Dept 1991). According to defendant, Romanoff, an agent of plaintiff, which has an ownership interest in the premises, communicated with defendant's father, now deceased, about permission to use the premises. Defendant claims to derive an interest in the property that her father previously owned, and

purports to be a person protected by the statute. Defendant argues that any communications concerning permission to use the premises made by Romanoff on his behalf would be used against defendant's interest. Defendant seeks the disqualification of such testimony on this motion for summary judgment.

The Dead Man's Statute is applicable at a hearing on the merits of a civil action, including summary judgment motions. Evidence not admissible under this rule may not be considered in support of a motion for summary judgment. See Friedman v Sills, 112 AD2d 343, 344 (2d Dept 1985). Such evidence may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered. See Miller v Lu-Whitney, 61 AD3d 1043, 1045 (3d Dept 2009). Romanoff's affidavit, offered by plaintiff, and his deposition testimony, offered by defendant, would be barred by the statute if used accordingly. Romanoff, as an officer and manager of plaintiff, having testified that he was the sole shareholder of plaintiff, would be interested in the event in this action. With respect to his conversations with the deceased, he would be disqualified from speaking against the claims made by defendant in this case.

In the absence of the evidence precluded by the Dead Man's Statute plaintiff cannot on this record establish its entitlement to summary judgment. However, defendant at trial must demonstrate a claim of right to the premises on the counterclaim.

Apparently, there is no written or documentary proof of a claim of right. A claim of right supporting adverse possession may arise from ancestral ownership of a residence, though not passed by a written instrument, coupled with a continuous occupancy and incidents of ownership, such as keeping out intruders and paying taxes, or when the adverse possessor is title owner to the adjacent parcel, whose original boundaries expanded to the disputed parcel, or whose use of the disputed structure derived from prior ownership. Joseph v Whitecombe, 279 AD2d 122, 126 (1st Dept 2001). Or, as plaintiff stated, where land has been usually cultivated or improved. See RPAPL 522. As the premises has allegedly been improved by defendant's installations, there is an issue of fact as to the existence of a claim of right to the premises.

While there are theoretical differences between adverse possession and easement by prescription, they depend upon the same elements: adverse, open and notorious, continued and uninterrupted use of the property for 10 years. Pickett v Whipple, 216 AD2d 833, 834 (3d Dept 1996). There remains an issue of fact as to whether there was adverse use of the premises.

Accordingly, it is

ORDERED that the motion is DENIED; and it is further

ORDERED that the parties are directed to attend a status conference on February 23, 2010, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: January 12, 2010

ENTER:

[Signature]
J.S.C.

DEBRA A. JAMES

FILED
JAN 20 2010
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