

**Neighborhood Eighth Ave., LLC v 454-458 W. 128th
St. Co., LLC**

2010 NY Slip Op 31160(U)

May 7, 2010

Sup Ct, NY County

Docket Number: 113189/08

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

NEIGHBORHOOD EIGHTH AVENUE, LLC,

Plaintiff,

-against-

454-458 W. 128TH STREET COMPANY, LLC, et al.,

Defendants.

INDEX NO. 113189/08

MOTION DATE March 16, 2010

MOTION SEQ. NO. 002

MOTION CAL. NO. 95

The following papers, numbered 1 to 5 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers, the motion of defendant 454-458 W. 128th Street Company, LLC for an order pursuant to CPLR § 3212 granting summary judgment in its favor, *inter alia*, dismissing the complaint is decided in accordance with the accompanying decision and order.

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/7/10

O. Peter Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

-----X
NEIGHBORHOOD EIGHTH AVENUE, LLC.,

Plaintiff,

-against-

454-458 W. 128th STREET COMPANY, LLC.,
PONCE DE LEON FEDERAL BANK, LANDAU
REALTY CO., and BUREAU OF HIGHWAY
OPERATIONS,

Defendants.

-----X
O. PETER SHERWOOD, J.:

DECISION AND
ORDER

Index No. 113189/08

FILED

MAY 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

This is an action brought pursuant to Article 15 of the New York Real Property Actions and Proceedings Law ("RPAPL") to compel the determination of claims to a parcel of real property. Defendant 454-458 W. 128th Street Company, LLC ("128th Street Co.") moves for an order pursuant to CPLR § 3212 granting summary judgment in its favor dismissing the complaint and entering judgment in its favor on its counterclaims. Plaintiff Neighborhood Eighth Avenue LLC ("plaintiff" or "Neighborhood") opposes the motion. For the reasons that follow, 128th Street Co.'s motion is

Background

This action arises out of a dispute as to the ownership of a strip of land located on the plaintiff's property. Plaintiff claims that it is the owner by deed, while defendant 128th Street Co. claims ownership through adverse possession.

On July 30, 1996, 128th Street Co. became the owner of the property located at 454-458 West 128th Street, New York, New York, known as Block 1967, Lot 85 ("Lot 85"). On July 17, 2007, plaintiff became the owner of the property located at 423-429 West 127th Street, New York, New York, known as Block 1967, Lot 60 ("Lot 60"). Lot 85 is located immediately north of Lot 60.

128th Street Co.'s President and sole shareholder, Jose Betancourt, attests in his affidavit attached to the moving papers, that since the 128th Street Co. purchased Lot 85 in 1996, it has continuously used a concrete strip of land located at the southerly end of Lot 85 ("the Adverse Possession Area"). The Adverse Possession Area measures 8' 8" in width and 63' 1" in length (*see*

Affirmation in Support of Jose William Cotto, Esq. [Cotto Affirm.], Exhibit "O", Defendant's Survey). Betancourt attests that he uses the Adverse Possession Area for storage and erected a fence and a shed in that area. He acknowledges that plaintiff and/or plaintiff's predecessors owned the Adverse Possession Area, but argues that he has a claim for adverse possession. Betancourt also stated that he believed that he had an easement on the Adverse Possession Area (*see* Affidavit in Support of Jose Betancourt [Betancourt Aff.] ¶ 7, Exhibit "C" Betancourt Deposition, at 107). Plaintiff submits a copy of the easement, which permits the owner of Lot 85 to construct, maintain, and use a fire escape from the building on Lot 85 (Affirmation in Opposition of Anetta V. Ekenberg [Ekenberg Affirm.], Exhibit "F"). There is a fire escape in the Adverse Possession Area, which plaintiff acknowledges is permissible under the easement.

In September 2008, plaintiff brought this action seeking (1) a judgment declaring that none of the defendants has a property interest in the Adverse Possession Area; (2) a permanent injunction barring the defendants from asserting that persons other than plaintiff have a property interest in the Adverse Possession Area; and (3) damages for trespass. 128th Street Co. asserts counterclaims against plaintiff seeking a declaration that 128th Street Co. acquired title to the Adverse Possession Area by adverse possession and is, therefore, the title owner. 128th Street Co. now moves for summary judgment dismissing the complaint and granting judgment on its counterclaims.

Analysis

128th Street Co. argues that the complaint must be dismissed because under the provisions of CPLR § 212 (a) the record owner of real property must commence an action within 10 years of the beginning of the adverse claim. Therefore, 128th Street Co. asserts that plaintiff's commencement of this action in 2008 was beyond the 10-year statutory period as calculated from the commencement of 128th Street Co.'s adverse claim in 1996.

CPLR 212 (a) provides that:

An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action.

However, CPLR 212 (a) must be read with RPAPL § 311, which creates the presumption that the person who establishes legal title, through a deed, for example, was possessed of the premises within

the required period, and this presumption is only overcome by proof that the premises has been held and possessed adversely for 10 years before the commencement of the action (*see* Weinstein-Korn-Miller, NY Civ Prac ¶ 212.01; RPAPL § 311).

Here, it is presumed that plaintiff possesses legal title, as shown by the deed for Lot 60 (Ekenberg Affirm., Exhibit “H”), and, thus, has commenced this action timely. This presumption may be overcome by evidentiary proof that 128th St. Co. has adversely possessed the Adverse Possession Area for 10 years prior to the commencement of this action.

To establish a claim of adverse possession, the following five elements must be proved by clear and convincing evidence: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period of 10 years (*see*, *Walling v Przybylo*, 7 NY3d 228, 232 [2006]; *United Pickle Prods. Corp. v Prayer Temple Community Church*, 43 AD3d 307, 308 [1st Dept 2007], *lv denied* 9 NY3d 977 [2007]; *see also* *McMahon v Thornton*, 69 AD3d 1157, 1159 [3rd Dept 2010]). 128th Street Co. has the initial burden of establishing an entitlement to judgment as a matter of law by tendering evidentiary proof demonstrating each of these elements (*id.*).

The first element is that possession must be hostile and under a claim of right. Pursuant to legislative enactments to the RPAPL, effective July 7, 2008, a claim of right now requires “a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be” (RPAPL 501 [3]; *see*, *Sawyer v Prusky*, 71 AD3d 1325 [3rd Dept 2010]). Here, Betancourt states that he does not dispute that “the plaintiff and/or plaintiff’s predecessor was the owner of the adverse possession area, however, [he] thought [he] had an easement on the adverse possession area” (Betancourt Aff. ¶ 7). This admission defeats his claim of adverse possession, because he did not have a belief that the property belonged to his company, 128th Street Co. Rather, he believed his company only had an easement. Betancourt’s awareness, during the 10-year time period, that others owned the property subject to the easement defeats any claim of right made by 128th Street Co. (*see*, *Robinson v Eirich*, 2 AD3d 617 [2nd Dept 2003]; *Harbor Estates Ltd. Partnership v May*, 294 AD2d 399, 400 [2nd Dept 2002]). Based on the foregoing, 128th Street Co. cannot, as a matter of law, establish a claim for adverse possession.

The court also notes that Betancourt admitted in his deposition testimony that he offered to purchase the Adverse Possession Area (Cotto Affirm., Exhibit “C”, Betancourt Deposition, at 102). Such conduct constitutes an admission that title belonged to another, and that 128th Street Co. did not enter the land under a claim of right (*see Sugarman v Malone*, 48 AD3d 281 [2nd Dept 2008]; *Beyer v Patierno*, 29 AD3d 613 [2nd Dept 2006]). However, while not essential to the Court’s determination, it is not exactly clear if this offer was made within the 10-year time period.

Pursuant to CPLR § 3212 (b), this court has the discretion to grant summary judgment to a non-moving party, if it appears that such party is entitled to judgment (*see, Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984] [in an action for a declaratory judgment, the court should make a declaration, even if party seeking relief is not entitled to the declaration he or she seeks]; *Horst v Brown*, 2010 WL 1286697 [1st Dept 2010]). Summary judgment must be granted, in part, in favor of the plaintiff against 128th Street Co., in regard to plaintiff’s first cause of action seeking a declaratory judgment that 128th Street Co. does not have an ownership interest in the land, as 128th Street Co. has no claim for adverse possession. Further, as there is no claim for adverse possession, 128th Street Co.’s counterclaims must be dismissed. Plaintiff’s remaining claims shall be severed and continued, and the action continues against the remaining defendants.

Conclusion

Based upon the foregoing discussion, it is hereby

ORDERED that the motion of defendant 454-458 W. 128th Street Company, LLC for summary judgment dismissing the complaint as against it and granting judgment on its counterclaims declaring that it is the title owner by adverse possession of a portion of plaintiff’s property is denied; and it is further

ORDERED that the counterclaims of defendant 454-458 W. 128th Street Company, LLC are dismissed; and it is further

ORDERED that plaintiff Neighborhood Eighth Avenue LLC is granted partial summary judgment as against defendant 454-458 W. 128th Street Company, LLC with respect to its first cause of action to the extent set forth herein and not otherwise; and it is further

ORDERED, ADJUDGED and DECLARED that defendant 454-458 W. 128th Street Company LLC does not have an ownership interest in the strip of land described in Exhibit “B” of

the complaint which is part of the metes and bounds description of plaintiff's property known as Block 1967, Lot 60 and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's remaining claims are hereby severed and shall continue; and it is further

ORDERED that this matter is referred back to the Trial Support Office for re-assignment to the appropriate Mediation or Trial Part; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants and upon the Clerk of the Trial Support.

This constitutes the decision and order of the court.

DATED: 5/7/10

ENTER,
O. Peter Sherwood
O. PETER SHERWOOD
J.S.C.

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE