

Anoroc Realty, Inc. v Hunterspoint Realty, LLC

2011 NY Slip Op 31719(U)

June 7, 2011

Supreme Court, Queens County

Docket Number: 19101/09

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

ANOROC REALTY, INC.
Plaintiff

Index No. 19101/09
Motion Date: 6/1/11
Motion Cal. No.: 2
Motion Seq. No. 3

- against -

HUNTERSPOINT REALTY, LLC, and
THE CITY OF NEW YORK,
Defendants.

HUNTERSPOINT REALTY, LLC,
Third-Party Plaintiff,

-against-

TONY ARGENTO, CARRIERO ASSOCIATES,
PLLC and J. JAMES CARRIERO,
Third-Party Defendants.

_____X

The following papers numbered 1 to 13 read on this motion by non-parties JRJ Equities LLC, (“JRJ”), and Emily Anne Properties, LLC (“Emily”) for an order pursuant to C.P.L.R. §1018, permitting those entities to substitute as parties defendant in the place and stead of defendant Hunterspoint Realty, LLC, or alternatively, pursuant to C.P.L.R. §1012(a)(2) and (3) granting intervention as of right, or pursuant to C.P.L.R. §1013 allowing the permissive intervention of the movants in the above entitled action, directing that the movants be added as parties defendant in the place and stead of Hunterspoint Realty, LLC, directing that the summons and complaint be amended by adding JRJ and Emily thereto as a parties defendant, and allowing JRJ and Emily to serve their answer to the complaint

	<u>Papers</u> <u>Numbered</u>
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Upon the foregoing papers it is ordered that the motion by JRJ and Emily for an order pursuant to C.P.L.R. §1018, permitting those entities to substitute as parties defendant in the place and stead of defendant Hunterspoint Realty, LLC, or alternatively, pursuant to C.P.L.R. §1012(a)(2) and (3) granting intervention as of right, or pursuant to C.P.L.R. §1013 allowing the permissive intervention of the movants in the above entitled action, directing that the movants be added as parties defendant in the place and stead of Hunterspoint Realty, LLC, directing that the summons and complaint be amended by adding JRJ Equities, LLC and Emily Anne Properties, LLC thereto as a parties defendant, and allowing JRJ Equities, LLC and Emily Anne Properties, LLC to serve their answer to the complaint, is decided as follows:

As set forth in this Court's July 15, 2010 summary judgment decision, this action involves, plaintiff Anoroc Realty, Inc. (AR), which owns property located at 48-02 29th Street, Long Island City, New York, and defendant Hunterspoint Realty, LLC (HR), which owns property located to the south at 29-55 Hunters Point Avenue, Long Island City, New York. The properties adjoin along the southern border of AR's property. The properties both front on a 40 foot wide strip of land to the east which is a right of way for the benefit of the Long Island Railroad and which is also known as 29th Street, although it is not a mapped public street. HR's property includes a strip of land approximately 25 feet wide that has been paved with asphalt (the asphalt strip), and the asphalt strip runs from the southerly edge of AR's property and along the westerly edge of 29th Street to Hunter's Point Avenue to the south. Plaintiff AR alleges that the public has used the asphalt strip as a street for more than ten years and that the City of New York has exercised dominion and control over it for more than ten years. Defendant HR denies these allegations.

J. James Carriero, an attorney representing AR, sent a letter to HR dated April 14, 2009 stating that his client had learned that HR had placed its property for sale and informing HR that AR claimed an easement over the asphalt strip since it "has been openly and continuously used by my client and numerous others as a driveway and passageway ***." AR, which had attempted several times to purchase HR's property, allegedly made the claim of an easement for the purpose of obstructing HR's sale of the property to others. Defendant HR denied that AR had an easement and notified AR that it had entered into a contract for the sale of its property to JLR Scott Avenue Properties (JLR) and would hold AR liable if the contract did not close because of the claim. AR abandoned its claim of an easement and instead asserted that the asphalt strip had become a public highway pursuant to Highway Law § 189. AR alleged that the city had exercised dominion and control over the asphalt strip because (1) it is paved, (2) a stop sign had been placed at the corner of the asphalt strip where it intersects with Hunterspoint Avenue, and (3) AR allegedly believed that the city had maintained and repaired the asphalt strip.

On or about July 17, 2009, plaintiff AR began this action for a judgment declaring that the asphalt strip is a public highway pursuant to Highway Law § 189. HR answered the complaint and asserted counterclaims for slander of title and tortious interference with contract. HR also began a third-party action against Tony Argento, a principal of AR, Carriero Associates, the law firm representing AR, and J. James Carriero, an attorney with Carriero Associates, asserting causes of action for slander of title and tortious interference with contract. The issues presented by AR's complaint are (1) whether for a period of ten years the asphalt strip was used by the public and (2) whether for a period of ten years the City of New York exercised dominion and control over the road.

Thereafter, third-party defendant Carriero Associates, PLLC and third-party defendant J. James Carriero moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint against them, and plaintiff Anoroc Realty, Inc. and third-party defendant Tony Argento moved for, inter alia, an order pursuant to CPLR 3211(a)(7) dismissing the counterclaims and the third-party complaint against them respectively, and defendant/third-party plaintiff Hunterspoint Realty, LLC moved for, inter alia, summary judgment dismissing the complaint against it. In its July 15, 2010 decision, this Court ordered that (1) those branches of the motion by plaintiff Anoroc Realty, Inc. and third-party defendant Tony Argento which were for an order pursuant to CPLR 3211(a)(7) dismissing the counterclaims and the third-party complaint against them respectively was granted; (2) that branch of the motion by plaintiff Anoroc Realty, Inc. which was for an order permitting it to serve an amended complaint was denied without prejudice to renewal; the motion by third-party defendant Carriero Associates, PLLC and third-party defendant J. James Carriero for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint against them was granted; and the motion by defendant/third-party plaintiff Hunterspoint Realty, LLC for, inter alia, summary judgment dismissing the complaint against it was denied.

Non-party movants now seek to substitute or intervene in the above entitled action as parties defendants in the place and stead of Hunterspoint Realty, LLC, claiming that Hunterspoint Realty, LLC ("Hunterspoint") no longer has an interest in the outcome of this matter. Plaintiff Anoroc Realty, Inc. opposes the motion claiming that JRJ has delayed asserting these rights for nearly two years, and also because it will be bound by any judgment entered in this case.

Regarding the branch of the motion seeking substitution, C.P.L.R. § 1018 provides that "Upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Regarding the branch of the motion seeking intervention, as stated in Wells Fargo Bank, Nat. Assn. v McLean, 70 AD3d 676, 676-677 (2d Dept. 2010);

"Upon a timely motion, a person is permitted to intervene as of right in an action involving the disposition of property where that person may be adversely affected by the judgment (see CPLR 1012 [a] [3]; Velazquez v

Decaudin, 49 AD3d 712, 717 [2008]; George v Grand Bay Assoc. Enter. Inc., 45 AD3d 451, 452 [2007]; Greenpoint Sav. Bank v McMann Enters., 214 AD2d 647 [1995]; *but see* Citibank, N.A. v Plagakis, 8 AD3d 604, 605 [2004]). In addition, a court, in its discretion, may permit a person to intervene, inter alia, when the person's claim or defense and the main action have a common question of law or fact (see CPLR 1013). Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings (see Berkoski v Board of Trustees of Inc. Vil. of Southampton, 67 AD3d 840 [2009]; Matter of Bernstein v Feiner, 43 AD3d 1161, 1162 [2007]; Sieger v Sieger, 297 AD2d 33, 36 [2002]; County of Westchester v Department of Health of State of N.Y., 229 AD2d 460, 461 [1996]; Perl v Aspromonte Realty Corp., 143 AD2d 824, 825 [1988]). In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party (*see* Reliance Ins. Co. of N.Y. v Information Display Tech., 2 AD3d 701 [2003])."

In support of their motion, JRJ and Emily have submitted, inter alia, affidavits of James Juliano, the manager of JRJ, Robert Linekin, managing member of Emily, and Harold Levy, managing member of Hunterspoint, and a Satisfaction of Promissory Note, which indicate the following: When this action was commenced, defendant Hunterspoint was the owner of the Subject Parcel. It was at that time a party to a contract to sell the Subject Parcel to an affiliate of the Movants. The contracting purchaser (JLR Scott Avenue Properties) thereafter assigned that contract to the Movants who completed the purchase of the Subject Property on or about August 17, 2009. On that date Hunterspoint Realty, LLC executed and delivered to Movants the deed to the Subject Parcel which was recorded in the office of the New York City Register in Queens County as CRFN 2009000273688. When the parties to the contract of sale discovered plaintiff's notice of pendency and its associated complaint, they amended the contract of sale in order for the closing to proceed. The sale price of the Subject Parcel was reduced, and Hunterspoint took on a contingent liability to JRJ and Emily which would ripen if Hunterspoint did not quickly cause the plaintiffs' claims to be dismissed. The first amendment to the Contract of Sale contained as exhibits a "Memorandum of Understanding" and a "Promissory Note", both of which were executed as of August 17, 2009. Those documents explain why Hunterspoint had a continuing interest in this matter following its sale of the Subject Parcel to the Movants.

However, on April 14, 2011, the Movants and Hunterspoint entered into a global settlement of their differences in which the Promissory Note was cancelled. As a result, Hunterspoint has no continuing interest in the outcome of this suit. However, JRJ and Emily

have an interest in this suit, as a judgment concerning title to the Asphalt Strip is potentially binding upon them. JRJ and Emily claim that they are necessary parties, who "ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." JRJ and Emily claim an interest in the outcome of this lawsuit, since property which they own and paid fair consideration to acquire may be held to have been adversely lost. Also they claim to have been initially content to allow Hunterspoint to represent their interests, such is no longer the case since Hunterspoint no longer has any motivation or interest to continue the defense of this action, as its contingent liability to the Movants under its promissory note, has been cancelled. They also claim that this motion is timely made because no activity in the case has taken place since the Court rendered its decision and order in July, 2010, following initial motions to dismiss. This discovery consisting of the municipal defendant having answered some interrogatories.

Anoroc claims that JRJ is late in asserting its right because, as the contract-vendee of the subject property, it was aware of plaintiff's claims when the complaint was filed n July 2009, which is not disputed by JRJ. Instead, it chose to allow Hunterspoint to defend the claims without JRJ's intervention. Plaintiff also claims that since JRJ took title subject to the lis pendens filed by plaintiff and its privity with Hunterspoint, JRJ is not a necessary party to this action since it will be bound by any judgment rendered in this action. As such, its substitution is not essential for complete relief to be granted. Plaintiff also claims considerable discovery has already taken place in this case and it is awaiting responses to demands from Hunterspoint. Plaintiff also claims that Hunterspoint is a necessary party to this action as it was the owner of the property at the pertinent times. As such, substitution is not appropriate. Plaintiff does argue that if intervention is granted it should be limited to the extent that JRJ and Emily cannot have unfettered discovery.

The Court finds that the moving parties have a direct and substantial interest in this action. Moreover, plaintiff has failed to show any substantial prejudice regarding the motion and the granting of this motion will promote the efficient and timely conclusion of this matter. However, it is also clear that although Hunterspoint may no longer have a direct interest in this action, it is in position to provide necessary information regarding the subject matter of the action. In this vein, Hunterspoint has not been deposed by plaintiff and it would be an undue burden on plaintiff to require it to now seek information from Hunterspoint as a substituted party, i.e. a non-party. Accordingly, the Court denies the branch of the motion seeking substitution and grants the branch of the motion seeking intervention. JRJ and Emily shall serve and file an answer within 20 days of service of a copy of this order with notice of entry, which answer shall be in the form proposed in the instant motion. The caption shall be amended hereinafter, in accordance with this Order, by adding as party defendants JRJ Equities LLC and Emily Anne Properties, LLC. It shall read as follows:

_____X
ANOROC REALTY, INC.
Plaintiff

- against -

**HUNTERSPOINT REALTY, LLC,
JRJ EQUITIES LLC, EMILY ANNE
PROPERTIES, LLC and THE CITY
OF NEW YORK,**
Defendants.
_____X

The parties must appear for a discovery conference, in Part 17, on July 15, 2011, at 9:30 a.m. A copy of this Order is being sent to the parties by means of facsimile transmission on June 7, 2011.

Dated: June 7, 2011

ORIN R. KITZES, J.S.C.