

Stevens v Communicare Prop. LLC

2013 NY Slip Op 33645(U)

February 6, 2013

Sup Ct, Kings County

Docket Number: 500013/2012

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of December, 2012

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X

IRA STEVENS,
Plaintiff,

- against -

Index No. 9040/07
500013/12

COMMUNICARE PROPERTIES LLC, NABIR UDDIN,
BNY MORTGAGE COMPANY LLC AND KEVIN L.
WALKER SR.,

Defendants.
-----X

The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2 _____
Cross Motion Annexed _____	1, 2, 3 _____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

In this action to quiet title, defendants Nabir Uddin and BNY Mortgage Company LLC (BNY) move to dismiss the complaint insofar as asserted against them. Plaintiff opposes the motion

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and cross-moves for a default judgment against defendants Communicare Properties LLC and Kevin L. Walker, Sr.

Plaintiff alleges that by deed dated January 15, 1980, he acquired title to the property located at 466 Franklin Avenue in Brooklyn (the subject property). By deed dated February 13, 1998, the property was purportedly transferred to Communicare Properties LLC (Communicare). By deed dated March 13, 1998, Communicare, through defendant Kevin L. Walker, Sr., transferred the property to Hillcrest Homes, Inc., which, in turn, transferred the subject premises to Derrick and Rosalind Wright and Tonya Holland by deed dated July 31, 1998. By referee's deed dated November 18, 2003, title was transferred to defendant Uddin. In an affidavit accompanying the deed, the referee avers he was duly appointed in a mortgage foreclosure action entitled *Chase Manhattan Mortgage Corporation v Derrick Wright et al.* The property is presently encumbered by a mortgage held by defendant BNY.

Plaintiff alleges that his signature on the purported deed to Communicare was forged, and that the alleged conveyance, made without consideration, is a nullity, as are all subsequent deeds, mortgages and liens. Defendant Walker was arrested in August 2000, and charged with the theft of eleven properties by filing false deeds to the properties and selling them or using them to secure mortgage loans. According to a Kings County District Attorney press release, one of the 11 properties is plaintiff's property at 466 Franklin Avenue. In an affidavit dated September 12, 2000,

the Associate Commissioner for Legal Affairs for the New York City Department of Finance averred that the City has been advised that the signature of the grantor on the deed which “purports to transfer ownership from Ira Stevens to Communicare Properties, LLC” may be forged, and that until such time that the alleged fraudulent conveyance is nullified, “this affidavit shall serve as a notice to the public of a possible defect in the chain or title.” On March 5, 2001, Kevin L. Walker withdrew his plea of not guilty to Indictment 7150/2000 in Supreme Court, Kings County, and entered a guilty plea, admitting that he did not own any real property in Kings County.

Movants answered the complaint, and included affirmative defenses, counterclaims and cross claims. The first affirmative defense is that the action to set aside a forged deed is time-barred. The second affirmative defense is that the action fails to state a claim upon which relief may be granted. The third alleges “waiver, laches, ratification, estoppel and/or release,” including the statute of limitations, and the fourth alleges that the action is barred “because plaintiff has no standing or legal capacity to bring this claim.”

In this motion, Uddin and BNY argue that plaintiff’s complaint should be dismissed insofar as asserted against them because it does not allege plaintiff was in possession “within the ten-year statute of limitations.” Without being in possession, it is urged, the claim to quiet title accrued on February 13, 1998, the date of the alleged deed to Communicare, and “is obviously time-barred” as is any claim of unjust enrichment. Movants contend that while a plaintiff in possession may bring

a claim to quiet title at any time, one who claims title but is not in possession must commence the action within ten years. A claim for unjust enrichment must be made within six years of the recording of the deed in question, so that this claim, too, is time-barred.

Plaintiff cross-moves for a default judgment against Communicare and Walker, and to strike movants' first, second and fourth affirmative defenses. Since, it is argued, the transfer to Communicare is fraudulent, the transfer to Hillcrest and all subsequent transfers are nullities. Further, as a result of the void deed to Communicare, no subsequent recipient of a deed can be a bona fide purchaser for value and Uddin does not have the benefits or defenses usually afforded to such a purchaser. Once a property has been obtained by way of forged deed, any subsequent purchaser will not be protected and such transfer is a nullity. Similarly, any mortgage based on such a deed is invalid. This is not unfair, it is urged, since title insurance exists for this very situation. Uddin has no standing to raise the statute of limitations defense with respect to the forged deed. Uddin's defense is, in reality, a claim to title based upon adverse possession. However, he cannot satisfy the ten-year limitations period. The mere recording of a deed - albeit a void one- is not sufficient to put plaintiff on notice of the hostile possession of another; rather, the adverse possession of another is measured from the time an owner should have known he was out of possession. An owner had no duty to check the registrar's office for new recordings, and until there is an actual open and notorious occupation by the adverse possessor, there is no actual notice to an owner. It is not

plaintiff's burden to show possession, since plaintiff is still the true owner of the property. Defendant must affirmatively demonstrate each of the elements of adverse possession for the requisite time period. Uddin has the burden of showing ten years of uninterrupted hostile possession under a claim of right to make his adverse possession claim, which he cannot do. He took title in 2003 and therefore cannot possibly show possession for ten years, but even if he could, he would have to show a claim of right, i.e. a reasonable basis for the belief that the property belongs to him. In light of the declaration by the City of New York dated September 12, 2000, he cannot possibly show this factor either. Movants were on actual notice of the forged deed procured by Walker and chose to ignore the declaration. Plaintiff was and remains the fee owner. Similarly, it is argued, the first and second affirmative defenses should be stricken, since the action is timely and states a cause of action upon which relief can be granted. Likewise, the fourth affirmative defense, claiming lack of standing, must be stricken, since plaintiff, as titled owner, has the capacity to maintain this action and is not dis-invested by a fraudulent deed.

As for Communicare and Walker, they have failed to answer or respond to the complaint or otherwise appear in this action. A default judgement should be granted and a declaration made that the purported deed to Communicare is void and directing the New York City Registrar to vacate and expunge said deed.

In reply, movants' attorney argues that Uddin and BNY "are not relying on adverse possession and/or a bona fide purchaser for value defenses. Defendants are not required to prove the elements of adverse possession such as "claim of right." Plaintiff, it is urged, was put on notice by the filing of the February 17, 1998 deed to Communicare and this deseized plaintiff of record title. Plaintiff had to bring this quiet title action within ten years from then because he was not in possession of the property. Plaintiff has not established legal title and is not entitled to the presumption of possession pursuant to RPAPL 311. Uddin, as record owner, has title and is entitled to the presumption of possession. It is plaintiff who does not have standing to bring this action because he cannot establish possession within the statute of limitations period.

"It is well settled law that if a document purportedly conveying or encumbering property is void, the conveyance or encumbrance is a nullity and neither the grantee nor those subsequent in the chain of title or encumbrances, including bona fide purchasers or encumbrancers for value * * * gain anything of value from the void transaction" (*JP Morgan Chase Bank v Kalpakis*, 30 Misc 3d 1236(A), 2011 WL 892813 [Supreme Court, Suffolk County 2011], *affd* 91 AD3d 722 [2d Dept. 2012]).

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."

RPAPL 311 provides that “in an action to recover real property or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the legal title for ten years before the commencement of the action.”

CPLR 212(a) “must be read together with RPAPL § 311, which creates a presumption that the person who establishes legal title was possessed of the premises within the required period, which presumption may be overcome only by proof of possession adverse to the legal title. The effect of the provisions taken together is that adverse possession of real property for 10 years or more constitutes a bar to an action for the recovery of the property or its possession” (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 212.01 [2d Ed 2012]).

In the case at bar, plaintiff purchased the property by deed dated September 10, 2010. There is no claim that this deed was questionable, let alone invalid, or that plaintiff did not acquire title to the subject property thereby. By forged deed dated February 13, 1998, the property was purportedly conveyed to Communicare. Walker was arrested for stealing the subject property and several other properties. The City Department of Finance filed an affidavit in September 2000 giving notice that there was reason to believe the property was stolen and that the 1998 deed was invalid. On March 5, 2001, Walker pleaded guilty to stealing, *inter alia*, the subject property. By referee’s

deed dated November 18, 2003, Uddin purportedly obtained the property. From this time line, it is plain that plaintiff established title, which is unchallenged, in 1980, and is therefore presumed to be in possession of the subject property. Thus, this action is timely commenced, and can only be defeated if Uddin can demonstrate adverse possession for 10 years, something he has not done and his attorney contends he is not trying to do. This court rejects the argument by counsel for movants that Uddin is the title owner entitled to the presumption of possession, and that the forged 1998 deed deseized plaintiff. The 1998 deed was void ab initio, as are all the transactions and mortgages based thereon. Plaintiff has shown in addition that the challenged affirmative defenses are meritless.

Accordingly, the motion by defendants Nabir Uddin and BNY Mortgage Company LLC to dismiss the complaint insofar as asserted against them is denied. Plaintiff's cross motion for a default judgment against defendants Communicare Properties LLC and Kevin L. Walker, Sr. is granted.

The foregoing constitutes the decision and order of this court; and it is further,

ORDERED, ADJUDGED and DECLARED that the purported deed dated February 13, 1998 allegedly conveying the subject premises from Ira Stevens to Communicare is void and the New York City Registrar is hereby directed to vacate and expunge said deed.

E N T E R F O R T H W I T H,



J. S. C.

**HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE**

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