

**New York Greek Am/Atlas Soccer Team, Inc. v 25-33
Astoria Blvd.**

2014 NY Slip Op 33097(U)

November 7, 2014

Supreme Court, Queens County

Docket Number: 1619/2014

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

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NEW YORK GREEK AMERICAN/ATLAS
SOCCER TEAM, INC.,

Index No: 1619 2014

Motion Date: June 25, 2014

Plaintiff,

Mot. Seq. No. 1

-against-

25-33 ASTORIA BLVD., JOHN MANNIS, SR.
AND JOHN MANNIS, JR.

Defendants.

The following papers numbered 1 to 11 read on this motion by defendants for an order granting summary judgment in their favor.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-5
Opposing Affirmation-Exhibits.....	6-9
Reply Affirmation.....	10-11

Upon the foregoing papers the motion is determined as follows:

Plaintiff New York Greek American/Atlas Soccer Team, Inc., commenced this action on January 31, 2014, pursuant to Article 15 of the Real Property Action and Proceedings Law, seeking a judgment declaring that they are the lawful owners, by adverse possession, of certain real property located at 25-33 Astoria Boulevard, Astoria, New York. Said real property is improved by a three story building which consists of a main floor, a second and third floor with residential apartments and a cellar. Plaintiff's first cause of action for adverse possession is asserted against 25-33 Astoria Blvd. Corp. The second cause of action for adverse possession is asserted against John Mannis Sr., and John Mannis Jr., who entered into a ten year lease for the main floor and basement level of the premises in September 2013.

Plaintiff alleges that the Greek American Club, Inc. was "organized" (incorporated) on July 14, 1958; that the Greek American-Hellenic Sport Club of New York, Inc. was incorporated on May 5, 1977 and succeeded the Greek American Club, Inc.; and that the New York Greek American/Atlas Soccer Team, Inc. was incorporated on February 19, 1998

and succeeded the Greek American-Hellenic Sport Club of New York, Inc. Plaintiff claims that it and its predecessors, have been in actual, open, notorious, and continuous possession of the subject real property since September 5, 1973.

It is alleged that the Greek American Club Inc. owned real property located at 31-08 Astoria Boulevard, Astoria, New York, which it utilized as its headquarters. Said real property was sold on May 1, 1973 and it is alleged that a portion of the proceeds of sale were used by said club and its members to acquire the subject premises on September 5, 1973. It is also alleged that members of said club also made donations, contribution and “advances” that were used to acquire the subject real property; and that said “advances” were repaid by the plaintiff and/or its predecessors. Plaintiff alleges that said club made unspecified improvements and renovations to the subject premises for its own benefit and that of its members. Plaintiff alleges that the Greek American Club Inc. continuously and exclusively occupied the premises from September 5, 1973 to May 4, 1977, without paying rent, use and occupancy, or other consideration, and that said club operated, maintained and controlled the premises during said time period.

Plaintiff alleges that on May 5, 1977 the Greek American Club Inc. was succeeded by the Greek American-Hellenic Sport Club of New York, Inc., on May 5, 1977, and that a majority of the members of said club were members of the Greek American Club, Inc. It is alleged that the Greek American-Hellenic Sport Club of New York, Inc. entered into possession of the subject premises on May 5, 1977; made unspecified improvements and renovations to the subject premises for its own benefit and that of its members; and that it continuously and exclusively occupied the premises from May 5, 1977 to February 18, 1977, without paying rent, use and occupancy, or other consideration; and that said club operated, maintained and controlled the subject premises during said time period.

Plaintiff alleges that it succeeded the Greek American-Hellenic Sport Club of New York, Inc. on February 19, 1998; that a majority of its members were members of the Greek American-Hellenic Sport Club of New York, Inc; that plaintiff entered into possession of the subject premises on February 19, 1998; that plaintiff made unspecified improvements and renovations to the subject premises for its own benefit and that of its members; that it has continuously and exclusively occupied the premises from February 19, 1998 to the present without paying rent, use and occupancy, or other consideration; and that said plaintiff has operated, maintained and controlled the subject premises from February 19, 1998 to the present.

Plaintiff alleges that the two apartments on the second and third floors of the premises have been rented to third parties, since September 5, 1973, and that the income generated from these rental units have been used to pay real estate taxes, water and sewer, insurance and heating for the premises, for the benefit of the plaintiff, its predecessors and their

respective members.

Defendants have served an answer, and now move for summary judgment dismissing the complaint on the grounds that the plaintiff cannot establish its claims for adverse possession. Defendant 25-33 Astoria Blvd. Corp. asserts that it was incorporated in 1973, and has owned the subject improved real property since that time. It is asserted that it maintains the premises, collects the rents, pays the taxes and utilities, and has historically supported a soccer club with its net income, pursuant to a trust agreement dated April 15, 1998. It asserts that plaintiff's occupancy of the main floor of the subject premises has always been permissive, and not hostile or adverse to the defendants. Defendants also assert that plaintiff's occupancy of the premises has never been exclusive, as there have always been residential rent paying tenants in the upper floors. It is further assert that plaintiff cannot establish a "claim of right", as this claim was first raised in this action and the club previously acknowledged in a complaint in a 2011 lawsuit that 25-33 Astoria Blvd. Corp. owned the property and that the club occupied or utilized the first floor of the premises.

Plaintiff, in opposition to the within motion, has submitted a copy of a deed dated September 5, 1973, whereby the subject property was conveyed to 25-33 Astoria Blvd. Corp.

Plaintiff has also submitted a copy of a trust agreement, between 25-33 Astoria Blvd. Corp. and thirteen individuals who are identified as trustees, which provides, in pertinent part, that although the corporation was incorporated under the Business Corporation Law, its is in actuality a not-for-profit corporation and intended to utilize its income for athletic, educational and philanthropic objectives; that a single share of stock was issued to the trustees, as trustees and not as owners of the corporation, and solely to carry out its athletic, educational and philanthropic objectives; that the corporation has no actual stockholders as its initial capital investment for the purchase of the real property at 25-33 Astoria Boulevard, Astoria, New York, was donated; and that the net income would be utilized each calendar year by the trustees "to sustain a soccer club comprised of Greek-American players in New York City and/or such other athletic, educational and philanthropic activities as may be determined by the Trustees".

Plaintiff's counsel in opposition to the within motion takes the position that the former statutory provisions might be applicable here, and claims that plaintiff has demonstrated that it, and its predecessors have had actual, open and notorious and exclusive use of the subject premises for more than ten years. George Mellis, a director and officer, of the plaintiff has submitted an affidavit in which he states that plaintiff has sufficiently stated an action for adverse possession, and asserts that triable issues of fact exist as to whether plaintiff entered the premises under a claim of right, whether its occupation was hostile to the defendants, and whether it exclusively occupied the premises.

It is undisputed that on April 14, 2011, a special meeting of the trustees was held at which time, by a vote of 7-3, it was agreed that the subject real property would either be sold, with the proceeds donated to St. Michael's Home for the Aged, or that the property would be deeded as an outright gift to St. Michael's Home for the Aged. The three dissenting trustees were Peter Eliou, George Mellis and Gus Andreikopoulos. The April 14, 2011 resolution has given rise to two prior lawsuits. On February 2, 2011, an action for declaratory judgment was commenced under Index No. 2509/2011 by the Greek American Atlas Soccer Club against 25-33 Astoria Boulevard Corp., as well as ten of the trustees who had voted on April 14, 2011. The plaintiff therein sought a declaration to the effect that the trust must provide the net income from the rental property to the plaintiff and that it may not sell or convey the property. The Honorable Roger N. Rosengarten, in an order dated October 11, 2011, dismissed the complaint and any cross claims against the defendants, on the grounds that the plaintiff was not a trust beneficiary and lacked standing to challenge the trustees' conduct under the trust agreement. The cross motion by the dissenting trustees, co-defendants Peter Eliou, George Mellis and Gus Andreikopoulos, to disqualify was denied as moot. As not all of the defendants' interests were aligned, the court stated that these three dissenting trustees would have standing to bring on action on behalf of the trust, and therefore the dismissal was without prejudice to such a plenary action.

On November 1, 2011, Peter Eliou, George Mellis and Gus Andreikopoulos commenced an action against 25-33 Astoria Boulevard Corp. and the seven trustees who voted in favor of the April 14, 2011 resolution (Index No. 24849/2011). The plaintiffs therein sought, among other things, an injunction to prevent the sale of the subject real property, and alleged that 25-33 Astoria Boulevard Corp. was the owner of the subject real property; that the trust was created to sustain a soccer club, which since its inception has been the Greek American Atlas Soccer Club, and that said club had utilized the ground floor of the subject premises since approximately 1973. Said action was discontinued pursuant to a stipulation dated July 16, 2012.

In September 2013, John Mannis Sr., and John Mannis Jr., entered into a ten year lease agreement with 25-33 Astoria Blvd. Corp. for the lease of the main floor and basement of the subject premises.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

To establish a claim to property based on adverse possession, a plaintiff must prove the common law requirements that possession of the subject property was hostile, under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory 10-year period (*see Estate of Becker v Murtagh*, 19 NY3d 75 [2012]; *Walling v Przybylo*, 7 NY3d 228[2006]; *Brand v Prince*, 35 NY2d 634 [1974]; *Shilkoff v Longhitano*, 94 AD3d 974 [2d Dept 2012]; RPAPL 501). Stated differently, for title to vest under the doctrine of adverse possession “there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period” (*Brand v Prince*, 35 NY2d at 636). As the acquisition of title to land by adverse possession is not favored under the law, the elements of such a claim must be proven by clear and convincing evidence (*Estate of Becker v Murtagh*, 19 NY3d at 81; *Ray v Beacon Hudson Mt. Corp.*, 88 NY2d 154, 159 [1996]).

Prior to July 2008, a party seeking to establish title by adverse possession on a claim not based upon a written instrument had to show that the land was “usually cultivated or improved” or “protected by a substantial enclosure” (former RPAPL 522). The type of cultivation or improvement sufficient under the statute varied with the character, condition, location and potential uses for the property (*see Zeltser v Sacerdote*, 52 AD3d 824 [2d Dept 2008]; *Blumenfeld v DeLuca*, 24 AD3d 405 [2d Dept 2005]; *Barnett v Nelson*, 248 AD2d 656[2d Dept 1998]; *see also Ramapo Mfg. Co. v Mapes*, 216 NY 362 [1915]), and only needed to be consistent with the nature of the property to indicate exclusive ownership (*see Gaglioti v Schneider*, 272 AD2d 436 [2d Dept 2000]; *Katona v Low*, 226 AD2d 433 [2d Dept 1996]). Amended by the Legislature in 2008, RPAPL 522 now states that, after July 7, 2008, a party without a claim of title based upon a written instrument making a claim of ownership of land based on adverse possession must establish either that “there have been acts sufficiently open to put a reasonably diligent owner on notice” or that the land at issue had been “protected by a substantial enclosure”. RPAPL 501, also amended by the Legislature in 2008, now defines the common law element of “claim of right” as meaning “a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case might be.” However, the Appellate Division, Second Department, has ruled that the Real Property Actions and Proceedings Law as amended cannot be applied retroactively to deprive a claimant of a property right that vested prior to the commencement date of the new legislation (*see Shilkoff v Longhitano*, 94 AD3d 974; *Hogan v Kelly*, 86 AD3d 590 [2d Dept 2011]; *see also Hammond v Baker*, 81 AD3d 1288 [4th Dept 2011]; *Barra v Norfolk S. Ry.*

Co., 75 AD3d 821 [3d Dept 2010]; *Franza v Olin*, 73 AD3d 44 [4th Dept 2010]).

Plaintiff’s submissions are insufficient to establish, as a matter of law, that the instant action is governed by the former RPAPL 522. The complaint, at best, alleges that the main floor of the subject premises has been occupied since 1973 by successive incorporated soccer clubs, whose members are Greek Americans, and that the plaintiff has occupied this space since February 1998. Plaintiff dot not allege that the Greek American Club Inc. or the Greek American-Hellenic Sport Club of New York, Inc., ceased its corporate existence, or that they were merged with or acquired by another corporation. Moreover, plaintiff does not allege, and there is no evidence that either the Greek American Club Inc. or the Greek American-Hellenic Sport Club of New York, Inc. ever claimed to have adversely possessed the subject premises.

Plaintiff cannot establish that it has meet the ten-year statutory period for adverse possession, a Mr. Mellis admits in his affidavit that the April 14, 2011 resolution and September 2013 lease were the impetus for commencing this action.

The court further finds that the evidence presented establishes that 25-33 Astoria Blvd. Corp. acquired title to the premises pursuant to a deed on September 5, 1973, and that successive Greek-American soccer clubs, including plaintiff, were permitted to occupy of the first floor of the subject property, rent free. In view of the fact that plaintiff’s occupancy has always been permissive and consented to by the defendant corporation, plaintiff’s claim for adverse possession cannot be maintained. The court further finds that plaintiff’s submissions are insufficient to raise a triable issue of fact as to whether its occupancy of the subject premises was hostile and under a claim of right.

Finally, it is undisputed that the two upper floor apartments have been rented to residential tenants since the defendant corporation acquired the premises. Plaintiff does not claim to have leased these apartments to the tenants, or to have collected and retained the tenants’ rent. Nor does plaintiff claim that it made any payments in connection with the maintenance of the real property. The fact that 25-33 Astoria Blvd. Corp. has utilized some portion of the rental income to maintain the subject premises and provide space, rent free, to the plaintiff soccer club, is clearly insufficient to establish that plaintiff’s occupancy of the subject premises is exclusive. Plaintiff’s submissions, thus, are insufficient to raise a triable issue of fact as to whether its occupancy of the subject premises is exclusive.

In view of the foregoing, defendants’ motion to dismiss the complaint in its entirety is granted.

Dated: Nov.7, 2014

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J.S.C.