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INDEX No. 11-30225

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 12-31-13 (001 & 002)
MOTION DATE 3-11-14 (003)
ADJ. DATE 3-11-14
ADJ. DATE 3-18-14
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD
003 - MD

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ROBERT STREBEL,

Plaintiff,

- against -

ESTATE OF MARION DOROTHY BARRY a/k/a ESTATE OF MARION DOROTHY BOHAN by GLORIA BOHAN, ADMINISTRATOR CTA,

Defendant.

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Upon the following papers numbered 1 to 37 read on these motions for summary judgment and to amend ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers 19 - 27 ; Notice of Motion/ Order to Show Cause and supporting papers 28 - 32 ; Answering Affidavits and supporting papers 33 - 35; Replying Affidavits and supporting papers 36 - 37 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by plaintiff for an order granting summary judgment, and the motion (003) by plaintiff for an order granting leave to amend the complaint, are consolidated for the purposes of this determination and are decided together with the cross motion by defendant for an order granting summary judgment; and, it is further

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment for the relief requested in his complaint is granted to the extent that the court finds that he is the owner of a parcel of real property designated as District 0907, Section 001.00, Block 01.00, and Lot 048.000 on Suffolk County Tax Maps by adverse possession; and, it is futher

ORDERED that the cross motion by defendant for an order pursuant to CPLR 3212 granting it summary judgment with regard to the relief requested in its answer is denied; and, it is further

ORDERED that the portions of the motion by plaintiff for an order pursuant to CPLR 3025 granting him leave to serve an amended complaint and pursuant to CPLR 3211 dismissing defendant's affirmative defenses are denied as moot.

Plaintiff commenced this action for adverse possession and to quiet title to a certain unimproved parcel of real property, known and designated as District 0907, Section 001.00, Block 01.00, and Lot 048.000 on Suffolk County Tax Maps ("lot 48"), by the filing of a summons and complaint on September 28, 2011 followed by the service of same upon defendant on October 18, 2011. On or about June 14, 2013 an answer was served asserting three affirmative defenses, the statute of frauds, insufficient facts pled to acquire title through adverse possession, and the failure to support the adverse possession claim. Plaintiff served an amended complaint on August 14, 2013 which added an additional claim for specific performance of a contract, defendant served its amended answer on December 23, 2013 adding a fourth affirmative defense claiming that the amended complaint was late and plaintiff did not have leave of the court pursuant to CPLR 3025.

Plaintiff now moves for summary judgment on his claims asserting that there are no questions of fact in connection with his ownership, by adverse possession, of lot 48. In support of his motion plaintiff includes, a copy of an unsigned, undated sales agreement ("sales agreement") by and between plaintiff, as purchaser, and "Estate of M. Barry c/o Dan Bohan, Exec.", as seller, which indicates that nine lots, including lot 48, were included in the contemplated sale. In addition, he includes copies of seven deeds, all dated June 18, 1996, six of which name "Daniel Bohan, as Devisee under the Last Will and Testament of Marion Dorothy Barry a/k/a Marion Dorothy Bohan, 3102 Omega Office Park, Fairfax, Virginia 22031" as seller. Five of these six deeds transferred single lots to plaintiff, to him and his wife, or to his wife; the sixth transferred three lots to plaintiff. Together these six deeds transferred 8 of the 9 lots which were enumerated by the tax map numbers in the sales agreement (*i.e.* Section 001, Block 01, Lots 46, 47, 49, 57, and 58 and Section 002, Block 01, Lot 2, Section 002, Block 02, Lot 33, and Section 002, Block 03, Lot 48). No deed transferred lot 48 to plaintiff or any relative of plaintiff. However, the seventh deed transferred from "WD Bohan, Inc. c/o Daniel Bohan" to plaintiff and "Jacquelyn Manfied" (plaintiff's daughter) a parcel of property designated by tax map number District 0907, Section 01.00, Block 01.00, Lot 050.000, ("tax lot 50") which did not appear on the sales agreement. Plaintiff ordered a title report for lot 48, paid title charges, and paid $28,000.00 to the Estate of Marion Barry in the care of Daniel Bohan, as was agreed in the sales agreement.

Plaintiff avers in his affidavit in support of the motion that the sale contemplated in the sales agreement included the final parcel known as tax lot 50 which was owned by a corporation (and not necessarily part of the "Estate of M. Barry"). He asserts that Daniel Bohan did not execute a deed for lot

48 because "he mistakenly believed that he did not own the lot even though he received the tax bill for the lot which was in the name of the decedent . . . and that the plaintiff could claim ownership to Lot 48 by paying the taxes and that he wanted nothing further to do with Lot 48. Daniel Bohan gave the plaintiff the 1996 tax bill . . . [and] [a]fter receiving the tax bill from Daniel Bohan the plaintiff had the address changed by the Receiver of Taxes for the Town of Southampton and for the Village of West Hampton Dunes to the plaintiff's address and the plaintiff has paid the taxes every year from 1997 through 2012/2103." Plaintiff included copies of the tax bills evidencing his address on each of the bills from December 1997 through 2012/2013. In 2001, plaintiff states that he had a fence constructed which surrounds the entirety of unimproved lot 48, same is evidenced by a survey dated May 25, 2001. Finally, in support of his motion, plaintiff indicates that in connection with the disposition of the Estate of Marion Dorothy Barry a/k/a Estate of Marion Dorothy Bohan ("the estate"), her son Daniel Bohan was named the executor of her estate but that he died on August 5, 2010 and that his wife, Gloria Lois Bohan was named the successor representative and received Letters of Administration, CTA. Her appointment was necessary as the estate owned two parcels of real property in the Village of Westhampton Beach. Plaintiff asserts that no claim of ownership was made by the estate to property located in the Village of West Hampton Dunes, which includes lot 48. Two properties known as 14 Jessup Lane and 25 Stevens Lane both in the Village of Westhampton Beach were eventually transferred to a trust. Plaintiff maintains that until he served defendant with the summons and complaint, defendant made no claim of ownership to lot 48, and that plaintiff's actions in paying the taxes and fencing in the parcel, under the color of title, grant him title to lot 48 by adverse possession.

Defendant opposes plaintiff's motion for summary judgment and cross-moves for summary judgment seeking the dismissal of plaintiff's complaint. Defendant includes no affidavit from a party or person with knowledge of any facts in support of its motion or in opposition to plaintiff's motion. Defendant's attorney maintains that plaintiff has failed to support his claim of adverse possession, he suggests that the purpose of a fence is unclear, that the change of address on the tax bills "[had] the consequence of denying Defendant knowledge of his ownership, after 1996, of Lot 048." Finally, defendant's attorney suggests that the value of the lots conveyed in 1996 is now in excess of $3,000,000.00 and that plaintiff is seeking a "free" lot after paying only $28,000.00 for all six lots.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

With respect to adverse possession, in July 2008, Real Property Actions and Proceedings Law §§ 501, 522, and 543 were amended and the amendments applied solely to those actions commenced after July 7, 2008 (*see* ***Asher v Borenstein***, 76 AD3d 984, 986, 908 NYS2d 90 [2d Dept 2010]). However, the 2008 amendments are not applicable where the property rights under an adverse possession claim vested prior to the 2008 enactment of the amendments (***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]; *see* ***Sprotte v Fahey***, 95 AD3d 1103, 944 NYS2d 612 [2d Dept 2012]). Under the law as it existed prior to July 7, 2008, where a claim of adverse possession was not based upon a written document, the plaintiffs had to demonstrate that the disputed parcel was "usually cultivated or improved" or "protected by a substantial inclosure" (*see* ***Bratone v Conforti-Brown***, 79 AD3d 955, 913 NYS2d 762 [2d Dept 2010]; Real Property Actions and Proceedings Law former § 522 [1], [2], *cf.* L 2008, ch 269, § 5, as amended). In addition, the plaintiffs had to prove by clear and convincing evidence the following common-law requirements of adverse possession: that (1) the possession was hostile and under claim of right; (2) it was actual; (3) it was open and notorious; (4) it was exclusive; and (5) it was continuous for the statutory period of 10 years (*see* ***BTJ Realty, Inc. v Caradonna***, 65 AD3d 657, 658, 885 NYS2d 308 [2d Dept 2009]; ***Goldschmidt v Ford St.***, *LLC*, 58 AD3d 803, 804-805, 872 NYS2d 493 [2d Dept 2009]).

Since adverse possession is disfavored as a means of gaining title to land, all elements of an adverse possession claim must be proved by clear and convincing evidence (*see* ***Best & Co. Haircutters, Ltd. v Semon***, 81 AD3d 766, 916 NYS2d 632 [2d Dept 2011]). Merely possessing land without any claim of right, no matter how long it continues, gives no title (*see* ***Gerlach v Russo Realty Corp.***, 264 AD2d 756, 695 NYS2d 128 [2d Dept 1999]).

Here, where plaintiff has shown that he exclusively "occupied" the disputed property and has undertaken acts consistent with that ownership, including paying the real property taxes since 1997 and the fencing in of the unimproved lot since 2001 he has satisfied his burden of proof (*see* ***Sprotte v Fahey***, *supra*; ***Maya's Black Creek, LLC v Balbo Realty Corp.***, 82 AD3d 1175, 920 NYS2d 172 [2d Dept 2011]; ***DMPM Property Mgt., LLC v Mastroianni***, 82 AD3d 1332, 918 NYS2d 243 [3d Dept 2011]). During the ten year period after plaintiff began the open and notorious possession (either from 1997 when he began paying the taxes or in 2001 when he fenced in the lot), neither the current nor the prior administrator of defendant, attempted to eject plaintiff, remove the fence, or pay the taxes for the lot. The facts indicate that the usage was open and notorious, exclusive and continuous for a period of more than ten years, and hostile and under a claim of right (*see* ***Best & Co. Haircutters, Ltd. v Semon***, 81 AD3d 766, 916 NYS2d 632 [2d Dept 2011]). Defendant has failed to come forward with any evidence indicating that the current adminstrator's predecessor in title, her husband Daniel Bohan, knew of the parcel, attempted to hold its title, or disputed plaintiff's claims that he "wanted nothing further to do with lot 48".

Accordingly, plaintiff's motion which seeks a declaration as to title to lot 48 via adverse possession is granted and defendant's motion seeking a dismissal of plaintiff's claim is denied. The court declares that plaintiff, Robert Strebel, is the owner of a parcel of real property located in the Village of West Hampton Dunes, Town of Southampton, County of Suffolk, State of New York, and designated as District 0907, Section 001.00, Block 01.00, and Lot 048.000 on Suffolk County Tax Maps, and that defendant, its heirs, successors, and assigns have no claim of ownership of said parcel of realty.

Plaintiff also seeks to amend his verified complaint (presumably *nunc pro tunc* since an answer with affirmative defenses relative to same has already been filed). The amended complaint contains an additional cause of action for specific performance. Defendant opposes such motion, claiming that the cause of action for specific performance is time barred.

The court, in its discretion, may permit amendments of pleadings pursuant to CPLR 3025 (b), and, lateness, in and of itself without a showing of significant prejudice, is not a barrier to an amendment (*see* ***Edenwald Contracting Co., Inc. v City of New York***, 60 NY2d 957, 471 NYS2d 55 [1983]; ***Giuffre v DiLeo***, 90 AD3d 602, 934 NYS2d 449 [2d Dept 2011]; ***U.S. Bank, Nat'l Assn v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]). Pursuant to CPLR 305 (c) the court may allow an amendment "if a substantial right of a party against whom the summons issued is not prejudiced." Here, where defendant answered the "original" complaint over one and a half years after its service, an amended complaint served two months after the date of the answer is not, in and of itself, prejudicial. Defendant answered the amended complaint (albeit four months after its service) and had ample opportunity to oppose it. However, the court has granted summary judgment on plaintiff's adverse possession claim, *supra*, which was pled in his original complaint, therefor an amendment to the complaint to add a cause of action for specific performance (which defendant claims was time barred) is unnecessary.

Accordingly, that portion of plaintiff's motion which seeks to amend his complaint is denied as moot.

Submit judgment within sixty days (including a metes and bounds description of lot 48 which is the subject of the instant litigation).

Dated: December 4, 2014

HON. DANIEL MARTIN, A.J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**