

Hakes v East Campbell Fire Dept.

2016 NY Slip Op 31314(U)

July 13, 2016

Supreme Court, Steuben County

Docket Number: 99776

Judge: Marianne Furfure

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State of New York
County of Steuben

Supreme Court

GORDON HAKES,

Plaintiff

DECISION

vs.

Index No. 99776

EAST CAMPBELL FIRE DEPARTMENT,
Defendant.

Appearances: Gordon Hakes, Painted Post, Pro Se

Scott D. Moore Law Office, P.C., Elmira (Scott D. Moore, of
counsel) for Defendant

This motion for summary judgment filed by defendant comes before the Court seeking dismissal of plaintiff's complaint in which plaintiff requests the equitable relief of adverse possession or specific performance. Defendant claims that specific performance must be denied because the parties never executed a written contract for sale of the disputed parcel, nor did defendant's Board of Directors (Board) approve the sale. Defendant claims that the claim for adverse possession must be dismissed because plaintiff's possession of the property was not hostile and under claim of right, nor did he have continuous possession of the property for the statutorily required (10) years prior to filing the complaint.

A party seeking summary judgment must set forth sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the proponent fails to make this showing,

the motion for summary judgment must be denied regardless of the adequacy of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden then shifts to the opponent of the motion to come forward with evidence in admissible form to establish the existence of material issues of fact which require a trial (*Gonzalez v. 98 Mag Leasing Corporation*, 95 NY2d 124, 129 [2000]; *Alvarez v. Prospect Hospital*, Id.). In reviewing a motion for summary judgment, the evidence must be considered in the light most favorable to the opponent and that party is given the benefit of every reasonable inference to determine whether any triable issues of fact exist (*Houston v. McNeilus Truck and Manufacturing, Inc.*, 124 AD3d 1210 [4th Dept. 2015]; *Ruzycki v. Baker*, 301 AD2d 48, 50 [4th Dept. 2002]).

Plaintiff commenced this action under Article 15 of the Real Property Actions and Proceedings Law in May of 2008, seeking a declaration that he owns an "L" shaped parcel of property currently titled in the defendant's name. Plaintiff alleges that defendant agreed to sell him this property in 1996 and that he paid \$2,500.00 but never received a deed. He claims that since 1996 he has continuously occupied the premises, built a barn and housed animals on it, all without permission of defendant. In their motion papers, defendant submitted minutes from the defendant's records that, in 1996, the Board agreed to sell some property to plaintiff once the boundary line was surveyed, received \$2,500.00 for the land and that, as of December, 1997, the Board was waiting for plaintiff to

produce the survey. In February of 2002, defendant's attorney contacted plaintiff indicating that they had a survey of the parcel originally contracted to be sold and an additional twelve (12) feet which they were willing to convey. This parcel was smaller than the area plaintiff claims was originally agreed to. The letter requested plaintiff to contact the attorney to make arrangements to sign the necessary papers. No deed was ever signed. Plaintiff claims title to the "L" shaped parcel of land, claiming first, title by adverse possession, and second, an order requiring defendant to transfer title to the "L" shaped parcel under the terms of the original unwritten purchase agreement.

ADVERSE POSSESSION

Adverse possession is recognized as a necessary, although not favored, means to clearing title to land disputes (*Walling v. Przybylo*, 7 NY3d 228, 230 [2006]). When a party claims title to property, without relying on a contract or other written instrument, the claim must be established by proof that, for a period of at least ten (10) years preceding the claim, that party's possession has been hostile and under claim of right, open and notorious, actual rather than constructive, and exclusive (*Walling v. Przybylo*, Id.; *Olivieri v. Colosi*, 129 AD3d 1540 [4th Dept. 2015]; *East 13th St. Homesteaders' Coalition v. Lower E. Side Coalition Hous. Dev.*, 230 AD2d 622, 623 [1st Dept. 1996]).

Defendant claims that, during at least part of the ten (10) years prior to May 1, 2008 when plaintiff filed his complaint, the parties were negotiating plaintiff's purchase of the property and, therefore, plaintiff's possession of the property during that time was not "hostile and under a claim of right". Defendant also claims that, even if plaintiff was not attempting to purchase the property, he was not in continuous possession for ten (10) years because he was incarcerated from November, 2005 until 2007.

In response, plaintiff claims that he has openly used the property as his own, including building a horse arena and a barn on the parcel, boarding horses on the property even while incarcerated, and defendant has taken no action to recover the property in the intervening nineteen (19) years.

Until 2008, a party could assert "that he or she was acting under 'claim of right' regardless of whether he or she had actual knowledge of the true owner at the time of possession" (*Hogan v. Kelly*, 86 AD3d 590, 591 [2nd Dept. 2011]). For claims filed after July 1, 2008, a party claiming title by adverse possession must prove a reasonable basis for the belief that the property belongs to the adverse possessor or property owner" (Real Property Actions and Proceedings (RPAPL) Section 501(3)). As plaintiff's complaint was filed prior to July 1, 2008, the common law definition of claim of right applies to plaintiff's cause of action for adverse possession.

Even if one assumes that plaintiff's use of the parcel by building a barn and boarding horses, was open and notorious, actual and exclusive, he cannot prove the essential element that his possession was hostile and under claim of right for the necessary ten (10) year period, as a matter of law. An inference of hostile possession and claim of right can be drawn when the other elements of adverse possession are present, unless the party in possession of the property has admitted title belongs to another party prior to the vesting of title (*Merget v. Westbury Properties LLC*, 65 AD3d 1102, 1104-1105 [2nd Dept. 2009]; *Gerlach v. Russo Realty Corp.*, 264 AD2d 756 [2nd Dept. 1999]; *Lewis v. Village of Lyons*, 54 AD2d 488, 492 [4th Dept. 1976]). An offer to purchase a disputed parcel negates the claim of adverse possession because the offer "constitutes an acknowledgment by plaintiff that the prior owners had a superior title" (*Palumbo v. Heumann*, 295 AD2d 935, 936 [4th Dept. 2002]).

In his complaint and answer to the summary judgment motion, plaintiff acknowledges that he agreed to purchase the property from defendant, paid the agreed upon price and made efforts to obtain a deed, but never received one. "The mere possession of land without any claim of right, no matter how long it may be continued, gives no title" (*Lewis v. Village of Lyons*, 54 AD2d 488, 492 quoting *Schoenfeld v. Chapman*, 280 AD 464, 466 [2nd Dept. 1952]). Adverse possession cannot accrue when the party in possession has recognized the record owner's title to the property (*The Manhattan School of Music v. Solow*, 175

AD2d 106, 107 [2nd Dept. 1991]). As plaintiff acknowledged the defendant's ownership of the property when he offered to buy it, he cannot gain title by treating the property as if it were his own.

Plaintiff cannot rely on the doctrine of laches to support his claim of adverse possession. Laches cannot be used as a cause of action upon which to bring a claim but may be used only as a defense to a cause of action (*Gerlach v. Russo Realty Corp.*, 264 AD2d 756 [2nd Dept. 1999]). Therefore, defendant's motion to dismiss plaintiff's cause of action for title by adverse possession is granted.

SPECIFIC PERFORMANCE

Defendant claims that plaintiff's second cause of action seeking specific performance must also be dismissed because the parties had no written agreement memorializing the terms of sale; the parties never reached an agreement on the size of the parcel to be conveyed, and the Board never approved the sale.

Not-For-Profit Law (NFPL) Section 509(b) provides that a corporation shall not sell its real property unless the sale is authorized by a majority of the board of directors. In support of its claim that the Board never authorized the sale, defendant submits the affidavit of David L. Pierce, defendant's current president, who stated that he reviewed meeting minutes from 1995 through 2008, and found no mention of Board approval for the sale.

The Court has reviewed the meeting minutes, attached to defendant's motion as Exhibit H, and finds no formal discussion or decision by the Board authorizing the sale of the parcel. However, that does not resolve the issue. A corporation, whether municipal or private, "may ratify a contract made on its behalf which it has the authority to make even if the contract was initially invalid because the person who executed it did not have the requisite authority" to do so (*Seif v. City of Long Beach*, 286 NY 382, 387 [1941]; *Elia v. Highland Cent. School Dist.*, 78 AD3d 1265, 1269 [3rd Dept. 2010]).

In this case, the Board minutes establish that in December, 1995, the Board agreed to sell plaintiff a piece of property with the understanding that plaintiff would provide a survey to determine the dimensions of the property using "the great line" as the starting point. The minutes further reflect that defendant's surveyor recommended defendant and plaintiff walk the boundaries together to reach an agreement on the size of the parcel. The minutes reflect that, for the next two years, plaintiff claimed that he was in the process of obtaining a survey and defendant waited for him to produce the document. In February, 2002, defendant's attorney wrote to plaintiff, confirming defendant was willing to transfer the property as shown on an enclosed survey plus an additional twelve (12) feet.

This evidence is sufficient to find that, while defendant did not formally authorize sale of real property to plaintiff by majority vote of the Board, the Board members ratified the agreement to sell the land by conduct which is "inconsistent

with any other supposition than that it intended to adopt and own the act done” (*Elia v. Highland Cent. School Dist., Id.*, citing *Seif v. City of Long Beach, Id.*). Therefore, defendant’s motion to dismiss the complaint based on non-compliance with NFPL Section 509(b) is denied.

Defendant also claims that plaintiff’s request for specific performance must be dismissed because the parties had no written agreement memorializing any terms of sale, in violation of General Obligations Law (GOL) Section 5-703. This statute, generally referred to as the Statute of Frauds, provides that an interest in real property can be created or conveyed only by a written contract, or notes or memorandum establishing the contract and signed by the party against whom enforcement is sought (GOL Section 5-703(3)). However, a court may compel specific performance of an oral agreement to sell real property when one party has partially performed in reliance on the agreement, and the moving party establishes that the acts performed can be explained only by reference to the oral contract (GOL Section 5-703(4); *Bowers v. Hurley*, 134 AD3d 1191, 1193 [3rd Dept. 2015]; *Sivos v. Eppich*, 78 AD3d 1360, 1361 [3rd Dept. 2010]).

To establish the existence of a valid and binding oral contract, there must be proof that “the terms were clear and definite, and that the conduct of the parties evinces ‘mutual assent sufficiently definite to assure that the parties [were] truly in agreement with respect to all material terms’ ” (*Carlsen v. Rockefeller Center North, Inc.*, 74 AD3d 608, 609 [1st Dept. 2010], citing *Matter of Express*

Indus. & Term. Corp. v. New York State Dept. of Transp., 93 NY2d 584, 589 [1999]). “This requirement assures that the judiciary can give teeth to the parties’ mutually agreed terms and conditions when one party seeks to uphold them against the other” (*Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, *Id.*). Conduct such as payment of the full contract price, taking possession of the property, and substantially improving the property are sufficient to establish part performance necessary to take the oral agreement outside the requirements of the Statute of Frauds (*Mott v. Devine*, 102 AD2d 946, 947 [3rd Dept. 1984]). “Before a Court will impose a contractual obligation based on an oral contract, the proponent must establish that a contract was made and that its terms are definite” (*Muhlstock v. Cole*, 245 AD2d 55, 58 [1st Dept. 1997]).

In this case defendant acknowledges that an agreement was made to sell plaintiff a parcel of property and that it received payment for the purchase amount. Defendant has submitted a hearsay statement from a deceased board member stating that the agreed upon parcel was to be 195 feet by 150 feet and that plaintiff was to erect a fence around the defendant’s property, have the land surveyed and provide the deed. Although the Board minutes submitted by defendant do not reflect the boundary lines of the proposed parcel, other than it started at the “great line,” they do reference that the Board was waiting on paperwork from plaintiff to complete the sale, as of December 1, 1997. Defendant also submitted a letter from its counsel to plaintiff dated February 19, 2002,

confirming defendant had made the necessary arrangements to transfer the above parcel plus an additional twelve (12) feet to him.

In plaintiff's complaint, he alleges that defendant agreed to sell not only the 195 x 150 feet parcel but an additional 90 x 379 feet parcel on which plaintiff had built a horse barn and that plaintiff had demanded defendant convey the property to him. In response to defendant's motion, plaintiff affirmed that his agreement to purchase the property was made with the then President of the defendant, an individual who is allegedly no longer competent to give testimony in this action. Plaintiff also swears that he was not present at any of the Board meeting when the contract was discussed, and that he fulfilled all his contractual obligations when he sent payment to defendant. He further asserts that he made numerous attempts to resolve the matter to no avail and submitted a letter he allegedly sent to defendant complaining of their refusal to respond to his requests.

Although defendant asserts that plaintiff's claim for specific performance must be dismissed because the parties never agreed to the boundary lines of the property, the evidence considered in the light most favorable to the defendant presents a question of fact as to the size of the parcel agreed upon and who was responsible for the failure to complete the transaction. Both parties acknowledge that there was an agreement to sell plaintiff the parcel. The question is which parcel was agreed upon: the parcel proffered by defendant or the parcel asserted by plaintiff. Although defendant alleges that plaintiff failed to fulfill his contractual

obligation to prepare the deed and survey and thus is not entitled to specific performance, it appears this obligation was waived by defendant when it prepared a deed and survey in 2002. Neither party submitted evidence as to what transpired thereafter from which the Court could determine who refused to complete the transaction and why. Additionally, plaintiff has alleged improvements to the property which would support his claim that the larger parcel was part of the original agreement. Defendant has not disputed that these actions were taken but disputes plaintiff had any right to do so. Plaintiff has come forward with sufficient evidence to present a question of fact on the issue of whether he is entitled to specific performance (see generally *Sivos v. Eppich*, 78 AD3d 1360 [3rd Dept. 2010]).

Plaintiff's claim that defendant's affirmative defenses are barred by the Statute of Limitations is without merit. The Statute of Limitations is an affirmative defense which must be raised by motion before service of a responsive pleading or in a responsive pleading (CPLR Section 3211 (e)). Plaintiff's claim was raised for the first time in opposition to defendant's motion for summary judgment, which is not a pleading, and therefore, plaintiff's claim is untimely and improper.

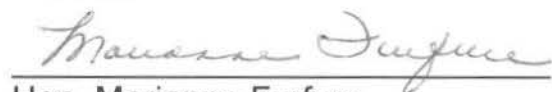
Defendant filed an application for leave to file an amended answer to add a counterclaim of ejectment. As the proposed amendment would set forth a valid cause of action, should defendant prevail on its claim that plaintiff has no right or title to the parcel he claims as his, the request to amend the answer to add this

cause of action, is granted. Defendant shall serve the amended answer within twenty (20) days from the date of entry of the Order.

Defendant's counsel to submit order.

Dated: July 13, 2016.

ENTER:



Hon. Marianne Furfure
Acting Supreme Court Justice