GMMM Westover LLC v New York State Elec. & Gas Corp.
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June 2, 2016
Supreme Court, Broome County
Docket Number: 2015-0449
Judge: Jeffrey A. Tait
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 21st day of January 2016.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

GMMM WESTOVER LLC,

Plaintiff,

vs.

NEW YORK STATE ELECTRIC AND GAS CORPORATION,

Defendant.

DECISION AND ORDER

Index No. 2015-0449
RJI No. 2015-0227-M

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the plaintiff GMMM Westover LLC's motions to dismiss the counterclaims of the defendant New York State Electric and Gas Corporation and for summary judgment in its favor on what is now the complaint in this action.

By Decision and Order dated September 15, 2015, the original petition in this matter was converted to a complaint under Real Property Actions and Proceedings Law (RPAPL) Article 6 and the Order to Show Cause was converted to a motion for summary judgment. NYSEG's answer with counterclaims was received on October 5, 2015. Both parties were given the opportunity to submit additional papers in connection with the motion for summary judgment, which was scheduled to be heard on October 30, 2015. That date was adjourned and the motion was heard on November 18, 2015. The motion to dismiss made in response to NYSEG's answer was heard on January 21, 2016. The motion to dismiss seeks dismissal of four counterclaims in the NYSEG answer – inverse condemnation, declaratory judgment pursuant to RPAPL Article 15, equitable estoppel, and determination of fee title ownership pursuant to RPAPL Article 5.

Background

The parties dispute their respective rights and obligations regarding what was previously locally known as the Goudey Station, which the parties now refer to as the Westover Plant. It was a coal fired electric power generating facility operated by NYSEG. As part of a government plan and regulatory scheme in the 1990s, NYSEG sold the Westover Plant to a

company known as AES. That transaction provided for AES to own and operate the facility generating electric power and for NYSEG to receive and transmit the power from the site. A number of agreements were put in place to provide for and govern the ongoing relationship and rights and obligations of the parties.

This worked reasonably well when AES generated power and needed NYSEG to receive and transmit it. Later, AES shut down the Westover facility and filed for bankruptcy protection. GMMM obtained title to the Westover facility in a bankruptcy court approved purchase. A number of agreements were entered into as part of this transaction. There was no plan for the reopening and operating of the Westover facility to generate electric power. Instead, agreements were put in place providing for NYSEG to separate any facilities it needed for its continuing operation from the Westover facility. Upon separation of those facilities, it was GMMM's plan to demolish the structures on the property.

It is NYSEG's on-going operations on that site and its legal right to continue those operations that are at the core of this dispute. The legal rights and obligations of the parties do not fit neatly into any category. Illustrative of this is NYSEG's contention that it fully intends to separate its facilities from and vacate the Westover facility as soon as practical, but it has no legal obligation to do so and has the right to maintain its operations as currently existing on the property as long as it chooses.

Determining the rights and obligations of the parties requires application of all or parts of several agreements. An analysis of the agreements and the manner in and extent to which they apply is set forth in the September 15, 2015 Decision and Order and will not be repeated here in any detail.

To say that the agreements are convoluted is an understatement. While the situation was complex when NYSEG sold the power generation operation and facilities to AES, it only became more complex when the same power generation facilities (not operating by that time) were sold to GMMM.

Contentions of the parties

A. The motion to dismiss

NYSEG asserts four counterclaims: the first alleges it is entitled to a decree of inverse condemnation should its rights under the Reciprocal Easement Agreement (REA) no longer be in effect; the second asserts it has a valid enforceable perpetual easement under RPAPL Article 15; the third asserts a claim of equitable estoppel; and the fourth asserts a claim of adverse possession under RPAPL Article 5.

GMMM asserts that each of these counterclaims fails to state a claim and should be dismissed under New York Civil Practice Law and Rules 3211.

B. The motion for summary judgment

GMMM asserts that NYSEG is in essence a trespasser on the site, as its time to complete its "Separation Project" has passed, and seeks an order ejecting NYSEG from the building on the site. GMMM supports its motion by establishing that it is the title owner of the property, the operative agreements provide for a "Completion Date" for a "Separation Project," and NYSEG cannot show a legal right to continue occupying a portion of the Westover facility building.

NYSEG asserts it continues to have rights to occupy portions of the Westover facility building by virtue of the fact that the agreements do not impose any obligation for it to vacate

the building by a specific date, the agreements provide for NYSEG to pay certain carrying costs of the Westover facility for as long as it is present there, and the REA it entered into with AES (GMMM's predecessor in title) still applies and provides easement rights.

GMMM counters that the REA no longer applies and the agreements in place require NYSEG to complete its Separation Project and vacate the premises.

Law

A. The motion to dismiss

On a motion to dismiss for failure to state a claim, the Court must accept the facts alleged in the complaint (or in this case, the counterclaim) as true (*see Skibinsky v. State Farm Fire and Cas. Co.*, 6 AD3d 975, 976 [3d Dept 2004], citing *1455 Washington Ave. Assoc. v. Rose and Kiernan, Inc.*, 260 AD2d 770, 771 [3d Dept 1999]). Further, the Court must allow the non-moving party (in this case, the defendant) the benefit of every favorable inference (*see id.*). The Court's task is to determine only whether the facts as alleged fit within any cognizable legal theory upon which relief may be granted (*see id.*).

Inverse condemnation

Inverse condemnation is "the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted" (*Corsello v. Verizon N.Y., Inc.*, 18 NY3d 777, 786 [2012], quoting *United States v. Clarke*, 445 US 253, 257 [1980]). As noted in *Corsello*, there was a time when the term was used to describe a claim by a trespasser with eminent domain authority that it had accomplished a de facto taking and may not be sued for trespass or ejectment. The Court in *Corsello* noted that "to return to the time when that term described an option that might be given to a trespasser,

either to vacate the property or to condemn it" . . . "would invite an entity having the power of eminent domain to occupy property without risking more than damages for a temporary trespass, and to decide at a later date whether to acquire the property or abandon it" (*Corsello*, 18 NY3d at 786). The Court was clear that its ruling did not "imply that an entity having – but not having expressly exercised – the power of eminent domain may be heard to claim, to its own advantage, that it has accomplished a de facto taking, and may not be sued for trespass or ejectment" (*id.* at 787).

Real Property Actions and Proceedings Law Article 15

RPAPL Article 15 governs actions to compel a determination of a claim to real property. RPAPL § 1501 provides that "where a person claims an estate or interest in real property . . . such person . . . may maintain an action against any other person . . . to compel the determination of any claim adverse to that of the plaintiff . . ." Ongoing disputes are resolved by way of an action to quiet title under RPAPL Article 15 (*see Matter of Carpentier v. County of Sullivan*, 123 AD3d 1412, 1413 [3d Dept 2014]).

Equitable estoppel

"The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position (citation omitted)" (*Matter of Shondel J v. Mark D.*, 7 NY3d 320, 326 [2006]). "The purpose

of invoking the doctrine is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another (citations omitted)" (*American Bartenders School, Inc. v. 105 Madison Co.*, 59 NY2d 716, 718 [1983]). It is designed "to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another" (*Stainless Broadcasting Co. v. Clear Channel Broadcasting Licenses, L.P.*, 58 AD3d 1010, 1013 [3d Dept 2009], quoting *American Bartenders School*, 59 NY2d at 718).

Adverse possession

"To establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period (citations omitted)" (*Walling v. Przybylo*, 7 NY3d 228, 232 [2006]). "When use 'has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner'" (*Ropitzky v. Hungerford*, 27 AD3d 1031 [3d Dept 2006], quoting *Longshore v. Hoel Pond Landing*, 284 AD2d 815, 816 [3d Dept 2001]).

B. The motion for summary judgment

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is

found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sams Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). Once this initial burden is met, the opposing party must come forward with proof in admissible form which establishes the existence of a triable issue of fact (*see id.* at 749-750).

Analysis

A. The motion to dismiss

The first counterclaim alleges inverse condemnation. Inverse condemnation, as the term is currently used, refers to the situation where an entity with condemnation authority affects a piece of property such that it amounts to a de facto taking, but does not actually commence a condemnation proceeding to obtain title to it. The Court in *Corsello* was clear that it was **not holding** that an entity with condemnation authority could "be heard to claim, to its own advantage, that it has accomplished a de facto taking, and may not be sued for trespass or ejectment" (*Corsello*, 18 NY3d at 787). As the Court noted, to return to a time when an entity with condemnation authority could use inverse condemnation in the way sought here would invite such an entity to "occupy property without risking more than damages for a temporary trespass, and to decide at a later date whether to acquire the property or abandon it" (*id.* at 786). It is noteworthy that NYSEG has not made a claim exercising its condemnation authority to obtain and maintain its rights.

The skepticism expressed by the Court of Appeals that inverse condemnation can be asserted in this manner supports the view that such a claim is not now recognized. For these reasons, the first counterclaim is dismissed.

The second counterclaim is an action to quiet title. That claim will necessarily be determined based on the complaint. To the extent it provides NYSEG with the ability to also assert its claims, it is properly stated. It makes a clear claim that NYSEG is claiming it has perpetual easements on GMMM's property. GMMM is seeking a determination of the rights of the parties in and to the real property on its motion for summary judgment. In short, this counterclaim seeks a determination of the parties' respective rights – the same thing GMMM seeks. For these reasons, the second counterclaim states a cause of action.

Equitable estoppel is invoked to prevent injustice where there is some level of reliance on what the party to be estopped said or did that engendered detrimental reliance by the entity seeking to invoke the doctrine. These parties negotiated and entered into numerous agreements and participated in several proceedings which led them to this point. They had legal counsel throughout the entire process. To say that either relied on something other than what is in the agreements they negotiated or the determinations of the courts or administrative authorities involved is preposterous. A review of the allegations of the counterclaims reveals no allegation that GMMM said or did anything that NYSEG relied on to its detriment to now find itself in the predicament it is in. For these reasons, the third counterclaim is dismissed.

As noted above, possession under some right, authority, or permission does not become adverse until such right, authority, or permission has been repudiated or renounced. NYSEG's presence on the property was not adverse until at least the time GMMM obtained

title to the property.[1] GMMM received a deed to the property on December 20, 2012. There can be no adverse possession for the required statutory period of ten years under these circumstances (*see* CPLR 212[a]). For these reasons, the fourth counterclaim is dismissed.

B. The motion for summary judgment

GMMM seeks summary judgment on the petition now converted to a complaint by virtue of the Decision and Order dated September 15, 2015. For it to prevail, GMMM must establish a prima facie case of entitlement to relief on its claim. If it does so, then it is incumbent on NYSEG to establish that there are disputed issues of material fact. If NYSEG establishes there are fact issues, summary judgment will be denied.

The September 15, 2015 Decision and Order contains a detailed analysis of the numerous agreements, which ones survive and are currently in force and effect, and who is bound by which provisions of them. That analysis casts doubt on whether the REA remains in force or effect, noting that the December 2012 Assignment Agreement[2] does not bind GMMM to Section 4.4 of the Settlement Agreement[3] and there appears to be no other document which binds GMMM to the REA. That Decision and Order also found that GMMM

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1 And more likely, it was not until NYSEG continued to occupy the property after the "Project Completion Date."

2 Whereby GMMM assumed all right, title, and interest in and all of the duties, liabilities, and obligations of Sections 2.4, 2.5, and 2.7 of the Settlement Agreement, and also agreed to fulfill the obligations set forth in Sections 2.8(b) and (c).

3 As the AES entities were bound. Section 4.4 provides, "Nothing in this Agreement shall affect NYSEG's rights under easements relating to the Non-Operating Facilities, including the [REA]."

as the owner of the property is entitled to possession of it. By virtue of the deed transferring ownership to it, GMMM has established it is the owner of the property.

Having established its prima facie entitlement to relief, it is incumbent on NYSEG to establish a disputed issue of material fact that its continued occupancy or presence on the property is by legal right or authority.

NYSEG maintains that its rights derive from the REA, which it asserts continues in force and effect and provides it with the legal right by virtue of easements to maintain its operations at the Westover facility in perpetuity.[4]

The analysis starts with the Settlement Agreement "entered into as of May 29, 2012," to which the various AES entities, including the one which owned the Westover facility (referred to collectively as Debtors), and NYSEG are parties. In accordance with the Assignment Agreement, GMMM's obligations under the Settlement Agreement are limited to Sections 2.4, 2.5, 2.7, and 2.8(b) and (c).:

Section 2.4 "Debtors' Obligations With Respect to Non-Operating Facilities Before Deemed Rejection Date" provides that prior to the Deemed Rejection Date[5] the Debtors will comply with the terms of the Interconnection Agreement and the REA with respect to the non-

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Though it has no intent to do so and will vacate the premises as soon as it practically and reasonably can . . .

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Which is defined as six months after the date on which the Order approving the Settlement Agreement becomes a final, non-appealable Order. As the Order in that regard dated May 30, 2012 became final and non-appealable on June 14, 2012, the Deemed Rejection Date was December 14, 2012.

operating facilities.

Section 2.5 "Debtors' Obligations with Respect to Non-Operating Facilities After Deemed Rejection Date" provides that until the earlier of NYSEG's completion of the separation of its Transmission System from the non-operating facilities[6] or twenty-two months from the Deemed Rejection Date,[7] whichever is earlier, the Debtors shall, at NYSEG's expense, maintain the non-operating facilities in a manner consistent with the manner they were maintained prior to the Deemed Rejection Date.

Section 2.7 provides that GMMM "shall coordinate with NYSEG before any demolition is performed . . . in order to protect NYSEG's transmission facilities. . ."

Sections 2.8 (b) and (c) required GMMM to pay real estate taxes and municipal assessments and maintain the specified insurance policy through the Project Completion Date, which has passed.

While the REA does provide extensive broad general rights to maintain operations at the Westover facility, the parties dispute whether it remains in force or effect. The deed dated December 20, 2012 by which GMMM acquired title to the property does provide that the transfer is subject to the REA. However, at that time – which was just after the Deemed Rejection Date but prior to the Project Completion Date[8] – the Interconnection Agreement and

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6 Referred to as the "Separation Project."

7 Referred to as the "Project Completion Date." As the Deemed Rejection Date was December 14, 2012, the Project Completion Date would be October 14, 2014.

8 At the time of the May 2012 Settlement Agreement, the actual Deemed Rejection Date

REA were still in full force and effect pursuant to Sections 2.4 and 2.5 of the Settlement Agreement. There is nothing to suggest that GMMM remained bound by the REA after the October 14, 2014 Project Completion Date.

What is clear is that it is the portions of the Settlement Agreement referenced above that governed and controlled the parties' rights and obligations going forward. "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (citation omitted)" (*Greenfield v. Philles Records,* 98 NY2d 562, 569 [2002]). Nothing indicates that NYSEG ever, until this proceeding, asserted that it had the unfettered and perpetual right to be and remain at that location when the agreements were being negotiated and the proceedings that led to them were taking place. Further, nothing has been brought forth to show a typical metes and bounds described easement that provides NYSEG with rights to maintain facilities inside the former power generating building at the site.

In the final analysis, it is worth noting that NYSEG intends to vacate the premises after separation of its Transmission System from the Westover facility. The parties here engaged in extensive proceedings and negotiations at great expense which resulted in modification and extension of past agreements and adoption of new agreements, some of which continue in force and effect, others only portions of which continue in force and effect, and others which are no longer in force and effect. The separation of NYSEG's Transmission System from the

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and Project Completion Date were not known, as the Deemed Rejection Date is "six months after the date on which the order approving this Agreement (the Settlement Agreement) becomes a final, non-appealable order" and the Project Completion Date is 22 months after that.

Westover facility had a Project Completion Date which at the outside is "twenty-two months from the Deemed Rejection Date" – i.e., October 14, 2014.

Unless one is going to render these terms and provisions meaningless, the time for NYSEG to have its Transmission System separated from the Westover Station facility has expired. For these reasons, GMMM is entitled to summary judgment on its cause of action for ejectment.

Conclusion

GMMM's motion to dismiss is granted with respect to the first, third, and fourth counterclaims and denied with respect to the second counterclaim.

GMMM's motion for summary judgment is granted with respect to its cause of action for ejectment.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: June 2, 2016
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice