BPS Funding Group LLC v Moyal
2017 NY Slip Op 31666(U)
August 7, 2017
Supreme Court, Kings County
Docket Number: 509670/15
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 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 7th day of August, 2017

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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BPS FUNDING GROUP LLC, Individually, and Derivatively on behalf of 2488 FULTON REALTY CORP.,

Plaintiff(s),

- against -

Index No. 509670/15

DAVID MOYAL, et al.,

Defendants,

- and -

2488 FULTON REALTY CORP.,

Nominal Defendant.

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The following papers numbered 1 to14 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-7
Opposing Affidavits (Affirmations)	8, 9-10, 11
Reply Affidavits (Affirmations)	12, 13, 14
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Hopkinson Traders, Inc., (HTI) moves for an order, pursuant to 22 NYCRR § 202.21, striking and vacating the note of issue and,

pursuant to CPLR 3126, compelling plaintiff to comply with HTI's post-examination before trial (EBT) discovery demands or be precluded from offering evidence relating to documents/information sought in said demands. Plaintiff BPS Funding Group LLC moves for an order 1) pursuant to CPLR 3212, granting summary judgment dismissing HTI's counterclaim for adverse possession, 2) removing HTI from the caption as an unnecessary defendant and 3) scheduling an inquest for damages as set forth in an order of this court dated December 4, 2015. HTI moves for an order dismissing all claims against HTI because a) the 1st -13th and the 16th - 30th causes of action were withdrawn as against HTI and the 14th, 15th, 31st and 32nd causes of action were stipulated by plaintiff to be deemed solely as affirmative defenses to HTI's counterclaims, b) plaintiff has failed to set forth any legal or factual basis for any liability of HTI, c) plaintiff lacks capacity to sue and d) plaintiff fails to comply with the "contemporaneous ownership" rule pursuant to Business Corporation Law § 626 (b).

Plaintiff, a 50% owner of nominal defendant 2488 Fulton Realty Corp. (2488 Corp.), seeks to vacate and cancel of record certain deeds conveying the subject contiguous parcels, located at 2488 and 2514 Fulton Street in Brooklyn (the property), from 2488 Corp. to defendant 2488 Fulton LLC (Fulton LLC). The June 2, 2015 deeds were signed on behalf of 2488 Corp. by defendant David Moyal, the other 50% owner of 2488 Corp. Plaintiff argues, in sum and substance, that the conveyances were fraudulent because Moyal did not have authority to execute deeds to the property and the property

was transferred with no consideration to a company solely owned by Moyal in order to divest plaintiff of its interest. 2448 Corp. previously gained title to the property by deeds dated August 8, 1989 and executed by former owner Palmer Sasser. Contemporaneous with the conveyances, Sasser took back a mortgage on the property in the amount of $400,000.00. 2488 Corp. was subsequently dissolved by proclamation on September 29, 1993. By assignment dated October 30, 1997, the mortgage was assigned from Sasser to HTI. On April 16, 1998, HTI commenced a foreclosure action against 2488 Corp. HTI subsequently applied for an order of reference which was issued on February 10, 1999. No further activity occurred in the foreclosure proceeding.

Plaintiff commenced the instant action to quiet title on August 5, 2015, naming as defendants Moyal, Fulton LLC, the title company Kings Title Agency LLC, the closing attorney Joel Pilson and unnamed "John Doe" defendants who may have an interest in the property. No defendant has appeared or answered the complaint except HTI, which filed an answer with affirmative defenses and a counterclaim for adverse possession on September 7, 2015.

On October 21, 2015, plaintiff moved for an order granting a default judgment against all non-appearing defendants, amending the caption to delete the "John Doe" defendants and replace them with HTI a/k/a Fulton Street Parking Lot and scheduling an inquest to determine damages. Plaintiff's motion was granted by order dated December 4, 2015. The order stated that an inquest would be held following the conclusion of the

litigation against HTI. Discovery thereafter proceeded including the EBT of plaintiff by its owner, Moshe Simpson, on September 6, 2016 and the EBT of HTI by its owner, Lenox Slinger, on November 1, 2016. During the EBT of Simpson, the parties stipulated on record that the 1st - 13th, 16th - 29th and 32nd causes of action were not directed toward HTI and were withdrawn by plaintiff without prejudice, while the surviving causes of action, which sought a judgment declaring the rights of the parties to the property, shall only be treated as affirmative defenses to HTI's adverse possession claim.

According to his EBT testimony, Slinger was informed by his brother that Sasser owned the subject property and was looking for a purchaser. Slinger testified that he "purchased" the property from Sasser for "250" but that "when we went to the closing apparently his attorney said there's a problem" and that he could not issue a title (Affirmation of Alan J. Wohlberg, Esq., February 24, 2017, Exhibit I, EBT Transcript of Lenox Slinger, at 13). Slinger testified that he never received a deed to the property but that Sasser gave him a lease and the mortgage executed by 2488 Corp. Slinger testified that HTI occupied the subject property starting in 1997 and used same as a parking lot for 4-5 years before leasing the property to an entity owned by Slinger's wife, Debra Fields.

A note of issue was filed by plaintiff on December 23, 2016.

The court will first address the motion of plaintiff to dismiss HTI's counterclaim for adverse possession. To establish a claim of title to real property by adverse possession, a party must prove that the possession was (1) hostile and under claim of right,

(2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years (*see Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]; *Walling v Przybylo*, 7 NY3d 228, 232 [2006]; *Klein v Aronshtein*, 116 AD3d 670, 671 [2d Dept 2014]). "Plaintiff is not required to show enmity or specific acts of hostility in order to establish the element of hostility for adverse possession. Rather, all that is required is a showing that the possession constitutes an actual invasion of, or infringement upon, the property owner's rights" (*Greenberg v Sutter*, 257 AD2d 646, 646 [2d Dept 1999] [citation omitted]). "The element of 'open and notorious' requires that the possession be sufficiently visible such that a casual inspection by the owner of the property would reveal the adverse possessor's occupation and use thereof" (*Weinstein Enters. v Pesso*, 231 AD2d 516, 517 [2d Dept 1996]; *see West v Tilley*, 33 AD2d 228, 230 [4th Dept 1970]; *Shinnecock Hills & Peconic Bay Realty Co. v Aldrich*, 132 App Div 118 [2d Dept 1909], *affd* 200 NY 533 [1909]). "To establish the 'exclusivity' element, the adverse possessor must alone care for or improve the disputed property as if it were his/her own (*see Beddoe v Avery*, 145 AD2d 818, 819 [3d Dept 1988]). The focus is on whether the party claiming title by adverse possession exercised exclusive possession and control of the property (*Estate of Becker v Murtagh*, 19 NY3d 75 [2012]). "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" (*Ram v Dann*, 84 AD3d at 1205

[internal quotation marks omitted]; *see Best & Co. Haircutters, Ltd. v Semon*, 81 AD3d 766, 767 [2d Dept 2011]).

In 2008, the Legislature enacted changes to the adverse possession statutes (L 2008, ch 269; *see 5262 Kings Hwy., LLC v Nadia Dev., LLC*, 121 AD3d 748, 748-749 [2d Dept 2014]; *Pakula v Podell*, 103 AD3d 864 [2d Dept 2013]; *Hogan v Kelly*, 86 AD3d 590, 592 [2d Dept 2011]). Under Real Property Actions and Proceedings Law [RPAPL] § 522, as amended, a party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel was possessed and occupied "[w]here there have been acts sufficiently open to put a reasonably diligent owner on notice" (RPAPL 522 [1]) or "protected by a substantial enclosure" (RPAPL 522 [2]). In addition, a person claiming adverse possession must show that he or she had "a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL 501 [3]).

In its motion for summary judgment dismissing HTI's adverse possession claim, plaintiff submits, among other exhibits, the EBT testimony of Slinger and copies of the pleadings and litigation documents filed by HTI in the foreclosure action against 2488 Corp. Plaintiff cites to the EBT testimony of Slinger which revealed that HTI took occupancy of the property in 1997 when it was assigned the mortgage from Sasser, that HTI occupied the property for about 4-5 years before the company was dissolved and that following the 4-5 year period, the property was occupied by an entity called Herkimer which was owned by Slinger's wife, Debra Fields. Plaintiff argues that Slinger's

testimony and the 1998 foreclosure establishes that HTI did not have a claim of right, that the possession was not adverse and HTI did not occupy the property for the requisite 10-year period. Plaintiff further alludes to the testimony of Slinger stating that HTI was dissolved, and he submits a printout of NYS Department of State information indicating that HTI was dissolved on December 27, 2000. Based thereon, plaintiff argues that HTI, a dissolved corporation, lacked any capacity to bring the counterclaim for adverse possession.

It is the contention of HTI that the statutory period for adverse possession commenced upon its taking occupancy of the property and ownership of the mortgage in October 1997. Thus, insofar as HTI's adverse possession claim vested in 2007, prior to the statutory amendments, the law in effect prior to the amendments is applicable (*see 5262 Kings Hwy., LLC v Nadia Dev., LLC*, 121 AD3d at 748-749; *Pakula v Podell*, 103 AD3d at 864; *Hogan v Kelly*, 86 AD3d at 592). Under the prior law, "an inference of hostile possession or a claim of right will be drawn [where] the other elements of adverse possession are established, unless, prior to the vesting of title, the party in possession has admitted that title belongs to another" (*Gerlach v Russo Realty Corp.*, 264 AD2d 756, 757 [2d Dept 2009]). If the party who claims to have acquired title to the parcel by adverse possession acknowledges during the 10–year period that actual ownership of the property rests in another, the possession of the parcel is not under a claim of right, and any claim of adverse possession is defeated (*see Van Gorder v Masterplanned, Inc.*, 78 NY2d 1106

[1991], *Dittmer v Jacwin Farms*, 224 AD2d 477 [2d Dept 1996]). Such acknowledgment of ownership in another may be achieved by "words or conduct" (*Walling v Przybylo*, 24 AD3d 1, 7 [3d Dept 2005], *affd* 7 NY3d 228 [2006] *see Guariglia v Blima Homes*, 89 NY2d 851, 853 [1996] [agreement permitting possessor's use of disputed parcel constituted an acknowledgment]; *Van Gorder v Masterplanned, Inc.*, 78 NY2d at 1107-1108 [1991] [oral concession of another's ownership during the statutory period would constitute an acknowledgment and negate a claim of right]; *Falco v Pollitts*, 298 AD2d 838, 839 [4th Dept 2002] [possessor's initial attempt to purchase the land constituted an acknowledgment that title was in another and the possessor had no claim of right]).

The court finds that HTI acknowledged the ownership of 2488 Corp. in the property within the alleged statutory period by commencing the foreclosure action against 2488 Corp. in 1998. The purpose of a foreclosure action "is *to divest the mortgagor of ownership* and to make the property, or its proceeds, available to the mortgagee in satisfaction of [its] claim" (*Da Costa v Hamilton Republican Club of Fifteenth Assembly Dist.*, 187 Misc 865, 868 [Sup Ct, NY County 1946] [emphasis added]). In *Palumbo v Heumann*, 295 AD2d 935 [4th Dept 2002], the court stated that the plaintiffs' claim of right was negated by the plaintiffs' offers to purchase the disputed parcel from the prior owners, which offers "constitute[d] an acknowledgment by plaintiffs that the prior owners had a superior right to title" (*Palumbo v Heumann*, 295 AD2d at 935). Similarly, by

bringing the foreclosure action, HTI acknowledged the superior title of 2488 Corp. to the property which HTI sought to divest through a foreclosure and sale. The court finds unavailing HTI's argument that there was no acknowledgment of 2488 Corp.'s ownership since HTI never expressly alleged in the foreclosure complaint that 2488 Corp. was the owner of the property. "In an action to foreclose a mortgage, all parties having an interest, including persons holding title to the subject premises, must be made a 'party defendant to the action'" (*Home Sav. of Am. v Gkanios*, 233 AD2d 422, 422 [2d Dept 1996]; quoting RPAPL 1311[1]). 2488 Corp. was the only party named as a defendant by HTI in the foreclosure complaint. HTI did not include any "John Doe" defendants representing individuals or entities who may have an interest in the property apart from 2488 Corp. In her affirmation in support of an order of reference, dated October 7, 1998, HTI's counsel stated that "[t]he necessary party defendant was served" and "[t]he necessary party is in default." Insofar as 2488 was named as the sole necessary party, it may be properly concluded that HTI considered 2488 Corp. to be the record title owner of the property and acknowledged such by its inclusion as the sole defendant in the foreclosure action.

To the extent that HTI claims adverse possession vested in any 10-year period following the ostensible abandonment of the foreclosure proceeding in 1999, such argument must likewise fail as the 2008 statutory amendment defining "claim of right" would be applicable. Under the amended statute, HTI could not have a claim of right to the property as there would be no reasonable basis for the belief that the property belonged

to HTI. Slinger testified that HTI did not receive a deed to the property but rather a mortgage and a lease. Because plaintiff established that HTI had no claim of right to the property, HTI's counterclaim for adverse possession is defeated.

As a result, plaintiff's motion for summary judgment dismissing the counterclaim of HTI for adverse possession is granted. The counterclaim is hereby dismissed.

HTI's motion for dismissal of all claims against HTI by plaintiff is denied. All causes of action asserted in plaintiff's complaint were either withdrawn as against HTI or, as plaintiff stipulated, would be deemed only as affirmative defenses to HTI's counterclaim for adverse possession. Because there are no extant claims or causes of action interposed against HTI, its dismissal motion is academic (*see Paniccia v Port Auth. of N.Y. & N.J.*, 8 Misc 3d 1002[A], 2005 NY Slip Op 50890[U] [Sup Ct, Queens County 2005]). The court is cognizant of HTI's argument that the claims were withdrawn "without prejudice" and thus may be revived. However, until the claims are reasserted, they are not presently in controversy and cannot be the subject a dismissal motion. Should plaintiff reinstate any direct claims as against HTI, then HTI may seek dismissal upon further motion.

In light of the dispositions of plaintiff's summary judgment motion and HTI's dismissal motion, HTI's motion to vacate the note of issue and compel discovery is denied.

Those remaining parts of plaintiff's motion are granted. HTI shall be removed from the caption as a defendant in all further interlocutory papers. An inquest on damages shall be scheduled on the date of the parties' next appearance in this Part.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL