Thomas v Slaton
2017 NY Slip Op 31766(U)
August 11, 2017
Supreme Court, New York County
Docket Number: 157528/12
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

DONALD THOMAS and RONALD THOMAS,

Plaintiffs,

-against-

INDEX NO.: 157528/12
Mot. Seq. No.: 001

DENISE SLATON and CHINIQUE JOE-FRANKLIN,

Defendants.

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this action for adverse possession, defendants Denise Slaton ("Slaton") and Chinique Joe-Franklin ("Joe-Franklin") (collectively, "defendants") move for an order: (1) pursuant to CPLR 3212 and CPLR 6514, (1) granting summary judgment in favor of defendants dismissing the action; (2) directing the County Clerk to cancel the Notice of Pendency filed by plaintiffs brothers Donald Thomas ("Donald") and Ronald Thomas ("Ronald") (collectively, "plaintiffs") with respect to property located at 559 West 152nd Street, New York, New York (the "Property"); and (3) directing plaintiffs to reimburse defendants for all costs and expenses occasioned by the filing and cancellation of the Notice of Pendency, in addition to the costs of this action.

Plaintiffs cross-move for summary judgment declaring that plaintiffs are the rightful owners of the Property, and awarding plaintiffs attorneys' fees and disbursements. Plaintiffs oppose the motion and defendants oppose the cross-motion.

BACKGROUND

In the Verified Complaint, plaintiffs allege that they and their parents have resided at and paid the carrying costs for the Property since the 1950s (Verified Complaint ["Complaint"], ¶¶ 6, 7). Although the Complaint alleges that pursuant to a deed, dated December 8, 2012, the Property was transferred by plaintiffs' grandmother, nonparty Elizabeth

Thomas, to nonparty Abigail Slaton ("Abigail") (*Id.*, ¶ 8), the copy of the deed attached as Exhibit "A" bears the date of December 8, 1950. Pursuant to a deed, dated September 27, 2002, the Property was transferred by Abigail to defendants (*Id.*, Exhibit "B"). Plaintiffs allege that they only learned about the transfer of the Property to defendants in September 2012 when they "were contacted to conduct an appraisal of [the] [P]roperty" at that time (*Id.*, ¶ 9).

This action was commenced on October 24, 2012, and a notice of pendency was filed on November 9, 2012 (Notice of Motion, Exhibits "4" and "5"). Plaintiffs maintain that they have satisfied the elements to establish their ownership of the Property by adverse possession, and seek a judgment declaring that they are the fee simple owners of all rights, title and interest in the Property, a judgment declaring that defendants do not have any rights, interest in or lien upon the Property, and attorney's fees, and costs and disbursements incurred in this action (*Id.*, Exhibit "4"). In their Verified Answer, defendants interposed three counterclaims for: (1) an accounting; (2) payment of use and occupancy; and (3) cancellation of the Notice of Pendency (*Id.*, Exhibit "9").

DISCUSSION

Summary Judgment

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, 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"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]; *see also Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]).

> "Issue-finding, not issue determination, is the purpose of a summary judgment motion. Thus, summary judgment is to be granted only when there are no genuine issues of material fact. In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility"

(*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990] [internal citations omitted]; *see F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]). "However, bald, conclusory assertions or speculation and a shadowy semblance of an issue are insufficient to defeat summary judgment, as are merely conclusory claims" (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation and citations omitted]).

Parties' Claims

In support of their motion, defendants offer an affidavit of defendant Slaton, sworn to on July 8, 2014. Slaton states, among other things, that: (1) pursuant to the deed dated September 27, 2002, Abigail (Slaton's mother) conveyed the Property to defendants Slaton and Joe-Franklin (Slaton's daughter) (Slaton Affidavit in Support, ¶ 6; Exhibit "2" [copy of the deed and records showing that the deed was recorded by David E. Thomas. Esq. on April 30, 2010]); (2) plaintiffs are Slaton's first cousins once removed, Joe-Franklin's second cousins, and Abigail was plaintiffs' grand aunt (*Id.*, ¶¶ 8, 9); (3) plaintiffs had been aware prior to filing this action and the Notice of Pendency that the Property belonged to Abigail and that, in or about 2002, the Property was conveyed to Slaton and Joe-Franklin (*Id.*, ¶ 10); (4) since approximately 2002, plaintiffs' occupancy of the Property has "been based on an understanding" among the parties that "[p]laintiffs need not pay [defendants] rent or use and occupancy, provided that [p]laintiffs pay all carrying charges associated with the [P]roperty on behalf of [defendants], including the real estate taxes, the utilities and the like" (the "Understanding") (*Id.*, ¶ 11); (5) plaintiffs "honored and abided" by this "agreement and understanding" "for a period of a number of years" and paid the carrying charges, including the real estate taxes and utility charges (*Id.*, ¶ 12; Exhibit "6"

[property tax bills], Exhibit "7" [copies of cancelled personal checks issued by plaintiff Donald Thomas to the NYC Department of Finance evidencing payments of property taxes]); (6) plaintiffs' use of the Property has therefore been permissive and not hostile, based on the Understanding under which "plaintiffs [t]hemselves performed for a number of years (*Id.* ¶ 14); (7) given that plaintiffs paid carrying charges pursuant to the parties' Understanding, defendants did not demand that plaintiffs pay them rent or use and occupancy (*Id.*, ¶ 13); (8) by letter dated October 4, 2012 (the "October 4 Letter"), defendants gave plaintiffs a 30-day notice of their [defendants'] intention to take occupancy of the Property (*Id.*, ¶ 18; Exhibit "8" [October 4 Letter]);[1] (9) in response to the October 4 Letter, plaintiffs changed the locks to the Property denying defendants access; and (10) plaintiffs commenced this action and filed a Notice of Pendency "in bad faith, without a genuine 'claim of right'" and "solely" to cloud defendants' title to the Property (*Id.*, ¶¶ 19, 20).

Plaintiffs allege that they are the lawful owners of the Property by adverse possession. In support of their cross-motion for summary judgment, plaintiffs proffer an affidavit of plaintiff Donald, sworn to on August 20, 2014 ("Thomas Affidavit in Support"). Donald asserts that (1) plaintiffs' possession of the Property was hostile given that they have lived at the Property for decades in opposition to the rights of the defendants and the defendants' predecessor in interest; (2) plaintiffs' possession of the Property was open and obvious; (3) three generations of plaintiffs' family have lived at and taken care of the Property, and as such, plaintiffs' possession of the Property was exclusive;[2] and (4) plaintiffs have been in continuous possession of the Property well in excess of the statutory period of ten years (Thomas Affidavit in Support, Exhibit "A", ¶¶ 22- 35). Plaintiffs have offered a list of documents, such as tax returns, pay

[1]The October 4 Letter did not request plaintiffs vacate the Property but "only to make space on the bottom two floors with joined usage of third floor" (*Id.*, Exhibit "8"). The letter is unsigned and fails to set forth any recipient or sender names or addresses.
[2]Plaintiffs claim further that the Property is currently undergoing a renovation paid for by plaintiffs (*Id.*, ¶32).

stubs, various statements and tax bills, in support of their claim that they, their parents and grandparents have lived continuously at the Property since the 1950s (Thomas Affidavit in Support, Exhibit "A").[3]

In opposition to plaintiffs' cross-motion, defendants contend that plaintiffs' possession is permissive, and not hostile. Defendants essentially allege a family feud. Defendants claim among other things, that plaintiffs were misled by their father, Rufus Thomas, who misrepresented to them that he owned the Property. However, defendants allege that plaintiffs have known since July 2001, when told by Rufus, in Slaton's presence, that Abigail owned the Property.[4] Defendants also claim that in or about October 2002, Abigail told plaintiffs that she conveyed the Property to defendants. Defendants argue further that plaintiffs' occupancy has been permissive[5], that plaintiffs' occupancy has not been exclusive in that Abigail and defendants have also occupied the Property at various times[6] and that plaintiffs cannot establish the element of claim of right, because plaintiffs are aware that the Property does not belong to them.

Determination

To establish adverse possession, plaintiffs must show by clear and convincing evidence that their possession of the property was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period," which in this case is at least 10 years (*Walling v Przybylo*, 7 NY3d 228, 232 [2006]).

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[3]There is no supporting documentation attached to this list.
[4]Defendants also claim that in or about July 2001, Abigail was constantly harassed by Rufus and Ronald who tried to coerce Abigail to sell the Property to them (Slaton Reply Affidavit, ¶ 15).
[5]Defendants maintain that plaintiffs' permissive use is demonstrated by ratification of the Understanding by plaintiffs when they paid tax bills which listed Abigail or Slaton as the owner between October 2002 through October 2012 (Slaton Reply Affidavit, ¶ 20).
[6]Slaton's Reply Affidavit attaches certain documents, such as birth and death certificates, and funeral bills as evidence that defendants also occupied the Property. However, these documents are dated in the 1940s, 1950s and 1970s (*Id.*, Exhibit "4").

Possession is adverse if it "would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Joseph v Whitcombe*, 279 AD2d 122, 125-126 [1st Dept 2001] [citations and internal quotation marks omitted]). "Possession is hostile when it constitutes an actual invasion of or infringement upon the owner's rights" *(United Pickle Prods. Corp. v Prayer Temple Community Church*, 43 AD3d 307, 308 [1st Dept 2007] [citation and internal quotation marks omitted]).

Here, although defendants have met their burden establishing that they are the record owners of the Property during the relevant period, plaintiffs have raised an issue of fact as to whether plaintiffs otherwise have a claim to title in the Property by adverse possession.[7]

Prior to the 2008 amendments to the Real Property Actions and Proceedings Law (the "RPAPL"), the fact that "the adverse possessor has actual knowledge of the true owner at the time of possession" did not undermine the element of a 'claim of right' (*Walling v Przybylo*, 7 NY3d at 232). "Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors" (*Id.* at 232-233).

"In 2008, the adverse possession statute (RPAPL art 5) was amended in its entirety (L 2008, ch 269) (the "2008 Amendments") to, among other things, discourage people from claiming adverse possession over real property they know belongs to another with superior ownership rights" (*Estate of Becker v Murtagh*, 19 NY3d 75, 84 n 4 [2012]). "These changes included rewriting RPAPL 501 to include, for the first time, a statutory definition of the 'claim of right' element necessary to acquire title by adverse possession. Pursuant to RPAPL 501 (3), '[a] claim of right means a reasonable basis for the belief that the property belongs to the adverse

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[7]There does not appear to be a dispute that plaintiffs were in possession of the Property for the requisite ten years [*see* RPAPL 501(2); CPLR 212(a)]. Rather, it is the nature of that possession that is in dispute.

possessor or property owner, as the case may be'" (*Hogan v Kelly*, 86 AD3d 590, 592 [2d Dept 2011]).

The Legislature provided that the 2008 Amendments to the RPAPL "shall take effect immediately, and shall apply to claims filed on or after such effective date," which was July 7, 2008 (*see* 2008 McKinney's Session Law News of NY Ch 269, § 9; *see also Franza v Olin,* 73 AD3d 44, 46 [4th Dept 2010] ["(t)he amendments apply to claims filed on or after July 7, 2008"]).[8]

Most significantly, however, neither the Court of Appeals nor the Appellate Division First Department has ruled on the issue as to how the 2008 Amendments are to be applied. The Fourth Department has not applied the amendments to cases that, although commenced after July 7, 2008, involve claims that title to a disputed property was obtained by adverse possession prior to the effective date of the amendments.

> "It is well-settled law that the adverse possession of property for the statutory period vests title to the property in the adverse possessor. . . .Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor. Title to property may be obtained by adverse possession alone, and title by adverse possession is as strong as one obtained by grant. It therefore follows that, where title has vested by adverse possession, it may not be disturbed retroactively by newly-enacted or amended legislation"

(*Franza v Olin*, 73 AD3d 44, 46-47 [4th Dept 2010] [internal quotation marks and citations omitted] [applying pre-amendment law in a case, commenced after the amendment took effect, where a plaintiff "contend[ed] that she acquired title to the disputed property by adverse

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[8]In *Estate of Becker v Murtagh* [19 NY3d at 84 n 4], the Court noted that the 2008 Amendments were not applicable when plaintiff's title vested by adverse possession, and the action instituted before the effective date of the 2008 Amendments. Here, it is undisputed that the instant action was commenced in 2012, after the effective date of the amendment (July 7, 2008) (*see Hogan v Kelly*, 86 AD3d 590, 592 [2d Dept 2011].

possession as early as 1985, i.e., 10 years after the commencement of her alleged period of adverse possession"]).

In *Hogan v Kelly* [86 AD3d 590, 592 [2d Dept 2011]). the plaintiff "contend[ed], relying on the new statutory definition of 'claim of right,' that the defendants failed to establish that they acquired title to the premises by adverse possession because they were aware that" decedent's daughter was the "sole heir and, thus, the rightful owner of the premises" (86 AD3d at 592). The Second Department disagreed:

> "Although this action was commenced after the effective date of the 2008 amendments, we agree with our colleagues in the Third and Fourth Departments that the amendments cannot be retroactively applied to deprive a claimant of a property right which vested prior to their enactment (see *Hammond v Baker*, 81 AD3d 1288, 1290 [2011]; *Perry v Edwards*, 79 AD3d 1629, 1631 [2010]; *Barra v Norfolk S. Ry. Co.*, 75 AD3d 821, 825-826 [2010]; *Franza v Olin*, 73 AD3d 44, 47-48 [2010]). Therefore, *the version of the law in effect at the time the purported adverse possession allegedly ripened into title is the law applicable to the claim, even if the action was commenced after the effective date of the new legislation*"

(*Id.* [emphasis added]; *cf. Reyes v Carroll*, 137 AD3d 886, 887 [2d Dept 2016] [affirming the trial court's grant of summary judgment dismissing the complaint where "[t]he defendants established, prima facie, as a matter of law, that the plaintiffs' purported adverse possession did not vest prior to the enactment of the statute," and the trial court "properly applied the 2008 amendments to RPAPL article 5"]).

Given that neither the Court of Appeals nor the First Department has ruled on the issue of whether or not the 2008 Amendments shall be applied retroactively, this Court is bound to follow the rulings of the other departments (*see e.g. Tzolis v Wolff*, 39 AD3d 138, 142 [1st Dept 2007] ["[a]bsent any authority from this Court, the motion court was bound to follow the applicable ruling of another department"]).

"Since title allegedly vested in [plaintiffs] prior to the enactment of the 2008 amendments, the new statutory definition of 'claim of right' is not controlling" (*Hogan v Kelly*, 86 AD3d at 592). Here, plaintiffs allege that they have continuously resided at, and have paid the carrying costs for, the Property since the 1950s (Complaint, ¶¶ 6, 7). Plaintiffs argue that title to the Property vested in them by way of adverse possession long before the 2008 Amendments went into effect. Accordingly, whether or not plaintiffs were aware of another title owner is irrelevant and will not undermine their claim (*see Walling*, 7 NY3d at 232-233). Accordingly, plaintiffs have made a *prima facie* showing that they possessed the Property under a claim of right.

However, not only must a party prove that possession of property was under a claim of right, and continuous for the requisite ten year time period, possession of the property must be hostile, exclusive, open and notorious. Here, there are issues of fact as to whether plaintiffs' possession of the Property was hostile and exclusive. Specifically, defendants claim that plaintiffs' use of the Property was permissive, in that defendants permitted plaintiffs to occupy the Property. Defendants maintain that the parties allegedly agreed based on the Understanding that defendants would not collect rent from plaintiffs, provided that plaintiffs paid the carrying charges associated with the Property on defendants' behalf (Slaton Affidavit, ¶¶ 11-13, 31). Plaintiffs, however, dispute this assertion that their possession was not hostile (Thomas Affidavit in Opposition , ¶¶ 13-22 ["there was never any agreement or understanding, written or oral, between the parties as to the occupancy or maintenance of the subject property" or to support defendants' allegations that plaintiffs' use was permissive). As to the element of exclusivity, plaintiffs claim that they and their family (grandmother and parents) had exclusive possession of the Property since the 1950s. Plaintiffs contend that they have cared for, managed and renovated

the Property and have continuously received and paid all utility bills and completed all necessary repairs for decades (Thomas Affidavit in Support, ¶¶ 30-33). In opposition, defendants contend, that they and/or Abigail occupied the Property "throughout the period from the 1940's to the 1980's" (Slaton Reply Affidavit, ¶¶ 29-32; Exhibit "4 [copies of various documents from 1946, 1948, 1955, 1974, 1975, 1977 and 1978 listing the Property as defendants' and Abigail's address]).

In light of this Court's determination finding an issue of fact as to plaintiffs' right to possession of the Property by adverse possession, defendants' application for cancellation of the Notice of Pendency is denied. Defendants have not made a sufficient showing that the Notice of Pendency was filed by plaintiffs in bad faith. Plaintiffs also have neither demonstrated their entitlement to an award of costs and expenses, nor an entitlement to an award of attorney's fees and disbursements.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED, that the motion of defendants Denise Slaton and Chinique Joe-Franklin for summary judgment, to direct the County Clerk to cancel the Notice of Pendency and for costs and expenses is denied; and it is further

ORDERED, that the cross-motion of plaintiffs Donald Thomas and Ronald Thomas for summary judgment and for attorneys's fees and disbursements is denied.

Dated: August 11, 2017

ENTER

J.S.C.

SHLOMO HAGLER
J.S.C.