

Lewis v Holliman
2018 NY Slip Op 33487(U)
December 21, 2018
Supreme Court, Kings County
Docket Number: 507479/13
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 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 21th day of December, 2018.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

-----X

ROLAND LEWIS,

Plaintiff,

-against-

Action #1

Index No. 507479/13

MARY JEAN HOLLIMAN AND STACY REEVES,

Defendants.

-----X

ROLAND LEWIS AND KK GREENE, LLC,

Plaintiffs,

- against -

Action #2

Index No. 522890/16

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,
ON BEHALF OF THE HOLDERS OF THE CSMC
MORTGAGE-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2007-3 AND APPROVED
OIL CO. OF BROOKLYN, INC.,

Defendants.

-----X

The following papers numbered 1 through 10 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Action #1

Action #2

1-3

7-8

Opposing Affidavit (Affirmation) _____

4-5

9

Reply Affidavit (Affirmation) _____

6

10

These related actions involve the property at 365 Greene Avenue in Brooklyn (Property). The following motions are joined for a single disposition. Defendant Mary Jean Holliman died on December 18, 2013, shortly after Lewis commenced Action #1 an

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November 27, 2013. Lewis never substituted Holliman's estate as a defendant, and instead, discontinued the action against Holliman without prejudice. By a stipulation in February, 2017 plaintiffs discontinued Action #2 against defendant Aproved Oil Co. Of Brooklyn, Inc.

In Action #1, Roland Lewis (Lewis) moves, pursuant to CPLR 3212 (e), for an order: (1) granting him partial summary judgment dismissing the counterclaim for adverse possession asserted by defendant Stacy Reeves (Reeves), and (2) granting Lewis immediate possession of the Property.

In Action #2, defendant U.S. Bank National Association, as Trustee, on behalf of the Holders of the CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-3 (US Bank) moves, pursuant to CPLR 2221 (d) and 2221 (e), for an order granting it leave to reargue and renew this court's January 17, 2018 decision and order, which: (1) granted plaintiffs' motion dismissing all affirmative defenses in US Bank's answer except the twenty-ninth and thirty-sixth affirmative defenses, and US Bank's counterclaim for adverse possession asserted on behalf of Holliman, and (2) denied US Bank's cross motion for leave to amend its answer to assert a counterclaim for adverse possession by its mortgagor, Reeves; and, upon reargument and renewal, modifying the January 2018 Order to deny plaintiffs' motion to the extent it seeks to strike US Bank's seventh, tenth, fifteenth, sixteenth and twenty-seventh affirmative defenses, and to grant US Bank's cross motion for leave to amend its answer to add a counterclaim for adverse possession.

The Action #1 complaint alleges that the Property, a brownstone with 7 residential rental units, "was owned by members of the Lewis family since 1947" and that Lewis

acquired the Property by a May 31, 1991 deed . Specifically, the Action #1 complaint alleges that:

“By deed dated May 31, 1991, Lewis, as Administrator for Henry Lewis, his father, transferred title to [the Property] to Lewis and Henry Lewis, Jr., Lewis’s brother. By separate deed dated May 31, 1991, Henry Lewis, Jr., and Lewis transferred [the Property] to Lewis alone” (*id.* at ¶ 5).

Essentially, Lewis allegedly inherited the Property in 1991 after his father’s death in 1990. The Action #1 complaint further alleges that “Lewis was the record owner of [the Property] continuously from May 31, 1991 until on or about March 12, 2004”.

By “a deed dated October 3, 2003 and filed with the Register of the City of New York, County of Kings on March 12, 2004, title to [the Property] purported to be transferred from Lewis to Holliman[,]” Lewis’s estranged wife. Prior to the 2003 transfer, Lewis allegedly “moved out of Brooklyn and was separated from Holliman [who] continued living at [the Property and] undertook to pay all of the expenses, including utilities and taxes . . .”.

The Action #1 complaint alleges that “[t]he signature of Lewis, the supposed grantor of title, is a forgery” because “Lewis did not sign the Forged Deed” and “Lewis received nothing from Holliman in exchange for his supposed transfer of [the Property] to her”. About three years later, “[o]n or about December 8, 2006, Holliman purported to transfer title to [the Property] to her son [Lewis’s step-son] Reeves” by a deed recorded on January 17, 2007.

In 2012, Lewis allegedly learned about the forged deed when he “considered the advisability of transferring [the Property] to his (and Holliman’s) son Donneil Lewis . . .” and retained a lawyer for estate-planning purposes. Lewis’s lawyer allegedly “reviewed the records for [the Property] and learned about the Forged Deed”.

Lewis and Holliman were divorced on January 14, 2013.

Action #1 – The 2013 Action

On November 27, 2013, Lewis commenced Action #1 by filing a summons and a verified complaint asserting causes of action for: (1) a declaration that the October 3, 2003 deed transferring the Property from Lewis to Holliman is void because it was a fraudulent transaction that “was prepared, signed, and filed without Lewis’s knowledge or consent”; (2) fraud; (3) a constructive trust; (4) a permanent injunction “enjoining Holliman, Reeves, and anyone acting on their behalf from making any transfers of any of the interests in [the Property]”; (5) unjust enrichment; and (6) conversion.

On May 12, 2014, Reeves answered the complaint, denied the material allegations therein and asserted affirmative defenses, including: (1) “Reeves is a *bona fide* purchaser and (2) adverse possession. Reeves also asserted a counterclaim for adverse possession, alleging that “Reeves and Holliman’s combined possession and occupation of the Premises exceeds 10 years prior to the commencement of the instant action”.

On or about July 23, 2015, Lewis moved for partial summary judgment on his first cause of action for a declaration that the October 3, 2003 deed transferring the Property to Holliman was a forgery and is, thus, null and void, and that he is the current owner of the Property. In support of his partial summary judgment motion, Lewis submitted handwriting samples in order to establish that his signature on the October 3, 2003 deed was a forgery. Reeves failed to oppose the motion.

By an October 15, 2015 order, this court granted Lewis’ motion, on default, and held that “[p]laintiff is declared the rightful owner of the premises [and] the deed dated 10/3/03, recorded as City Register File # 2004000152163 is voided.” The court further ordered that “[t]he New York City Register is to void/vacate said deed and subsequent deeds and encumbrances on said property.”

About two weeks later, by an October 29, 2015 deed, Lewis transferred a one-third interest in the Property to KK Greene, LLC (KK).

Reeves subsequently moved, by order to show cause, to vacate the court's October 15, 2015 order based on law office failure. By an April 18, 2016 decision and order, this court denied Reeves's motion because he "fail[ed] to demonstrate a potentially meritorious defense. The court elaborated that:

"Firstly, the moving papers do not adequately address the plaintiff's allegations that the deed was forged. Moreover, the papers, which are devoid of both the referenced divorce judgment allegedly awarding the subject property to Holliman and the subsequent 2006 deed allegedly transferring the property from Holliman to Reeves, fail to demonstrate Reeves' ownership interest in the subject property."

On or about September 21, 2017, Reeves moved for leave to reargue the court's prior orders and restore Action #1 to the active trial calendar. By a March 29, 2018 order, the court granted Reeves's motion only to the extent of restoring Action #1 to active status, and ordered that Action #1 "shall proceed on the undetermined claims and counterclaim."

Action #2 – The 2016 Quiet Title Action

Meanwhile, on December 23, 2016, Lewis and KK commenced Action #2 against US Bank to quiet title to the Property, pursuant to RPAPL Article 15, by filing a summons and verified complaint. The Action #2 complaint alleges that US Bank "claims or might claim an estate or interest in the Property that is or would be adverse to Plaintiffs' interest in the Property . . ." because US Bank is the assignee of a \$649,000 note and mortgage that Reeves executed against the Property on December 8, 2006. Additionally, the Action #2 complaint alleges that the October 3, 2003 deed was a forgery, and consequently, the December 8, 2006 deed purporting to transfer the Property from Holliman to Reeves "could not, and did not, convey any right, title, or interest in the Property to Reeves". In Action #2, Lewis seeks a

judgment declaring that US Bank has “no right to or interest in the Property” and an order voiding US Bank’s mortgage on the Property.

On March 2, 2017, US Bank answered the Action #2 complaint. On March 22, 2017, US Bank filed an amended answer denying the material allegations therein and asserting 37 affirmative defenses. The amended answer also asserted a counterclaim for fraud, alleging that Lewis misrepresented that the October 15, 2015 Order in Action #1 adjudged ‘that the [October 2003] Deed was forged and thus void. . .’ while knowing that Holliman’s rights were never properly adjudicated in [Action #1] and the Order was fraudulently obtained. US Bank further alleges that “[t]he court had no jurisdiction to enter the October 15, 2015 Order, which affected Holliman’s rights to the Property, without having a representative appointed on her behalf”.

Thereafter, Lewis and KK moved to dismiss US Bank’s fraud counterclaim, strike US Bank’s numerous affirmative defenses and for an order awarding sanctions against US Bank. US Bank opposed plaintiffs’ motion and cross-moved for leave to amend its answer to assert a counterclaim for adverse possession by its mortgagor, Reeves, and for an award of sanctions against plaintiffs.

By a January 2018 Order, this court granted plaintiffs’ motion to dismiss all of US Bank’s affirmative defenses except the twenty-ninth and thirty-sixth affirmative defenses because “plaintiff[s] demonstrate[d], *prima facie* that U.S. Bank’s . . . affirmative defenses, are merely plead conclusions of law without any supporting facts . . . are not plead with the requisite specificity . . . and/or have no relevance to the within action.” The court further held that “[i]n opposition, U.S. Bank fails to submit any evidence raising a triable issue of fact rebutting the plaintiffs’ *prima facie* showing or as to the merit of any of the . . . affirmative defenses.” In addition, the January 2018 Order denied that branch of plaintiffs’

motion seeking to dismiss US Bank's fraud counterclaim, and also denied that branch of US Bank's cross motion seeking leave to amend its answer to assert a counterclaim for adverse possession on behalf of Reeves. In doing so, the court relied on the First Department's holding in *Bramex Associates, Inc. v CBI Agencies, Ltd* (149 AD2d 383, 385 [1989]), that "a counterclaim may only be asserted on behalf of a defendant already a party to the action."

The Instant Motions

A. Action #1 – Lewis's Partial Summary Judgment Motion

In Action #1, Lewis moves for partial summary judgment dismissing Reeves's counterclaim for adverse possession. In his affidavit, Lewis attests that "[i]n 1992, Holliman and I moved in to the Property as husband and wife" and, several years later, "I decided to leave because of marital discord, but we were still on generally good terms [so] *I allowed her to remain*" (emphasis added). Lewis further attests that "[w]e agreed that she could stay in the Property provided that she paid all the expenses related to the Property . . ." Lewis argues that Holliman's occupancy of the Property was permissive because it "began when the couple moved into the Premises as husband and wife . . ."

Regarding Reeves, Lewis asserts that he "maintained a cordial and cooperative relationship with Reeves, his former stepson . . . even after the marriage between [him] and Holliman became estranged." He attests that as they were all on good terms he raised no objection to Reeves living in the Property which undermines any presumption of hostility. He asserts that he "revoked his permission for Holliman and Reeves to remain there when he initiated this Action" on November 27, 2013.

Further, Lewis argues that Reeves "cannot tack his period of adverse possession onto that of . . . Holliman [because] not only did she not give Plaintiff notice of her hostile claim,

she could not have a claim of right for want of a ‘reasonable basis for the belief’ that she owned the Premises under the 2003 Deed, which she forged.” Also, the recording of the 2003 and 2006 Deeds was insufficient to put him on notice of a hostile property claim, as a matter of law, and that he was not given actual notice of Reeves’ or Holliman’s claims of right. According to Lewis, “[a]t no time did Reeves change the locks on the Premises, erect new fences or gates around the premises, or take any steps to prevent [him] from entering the premises.”

Reeves, in opposition, invokes CPLR 3212 (f), and argues that Lewis’s summary judgment motion is premature because it was filed before the parties completed discovery. According to Reeves, “discovery would reveal the whereabouts and the action or inaction of Roland Lewis for the past 20 years.” While Reeves recalls Mr. Lewis vacating and abandoning the premises long prior to 2003, it is Mr. Lewis who possesses much of the documentary evidence which can confirm this.” More specifically,

...disclosure of Plaintiff’s personal documents, deeds, leases, identification documents, driving records, employment records, bank and credit card records, EZ Pass, and the like[.] Defendant would also need to see Plaintiff’s tax returns, not just to verify his address but to see what real property and commensurate expenses he declared as his own and any income therefrom . . .”

Reeves asserts that “[w]hile the 2003 Deed and 2006 Deed themselves constitute one basis for [his] belief in his and his mother’s ownership, his claim is largely founded upon the dispositions in the matrimonial proceedings and Plaintiff’s subsequent conduct for well over ten (10) years.” Reeves’s argues that his and Holliman’s possession of the Property was hostile because “for over 10 years, [they] acted entirely consistently with being exclusive owners while Plaintiff idly sat back and *allowed* them to do so”.

Furthermore, “[p]laintiff does not demonstrate, by admissible proof[,] that any occupancy during the adverse period was permissive in the first instance” because “[p]laintiff’s statements as to his direct transactions or lack thereof with Ms. Holliman are inadmissible under CPLR § 4519, the ‘Dead man’s Statute.’” Reeves attests that “[p]laintiff has never given me permission to occupy the subject premises or exercise ownership rights and from my ten plus years of observations, I can confirm that he never gave my mother such permission.” Reeves argues that “[a] dispute as to whether any use was initially permissive, raises triable issues of fact which would defeat summary judgment.”

Lewis, in reply, argues that the familial relationship gives rise to a presumption, at law that defendants’ use of the property was permissive.

B. Action #2 – US Bank’s Motion to Reargue and Renew

US Bank moves for leave to reargue and renew this court’s January 2018 Order, which dismissed its affirmative defenses (except the twenty-ninth and thirty-sixth) and denied its cross motion for leave to amend its answer to assert a counterclaim for adverse possession by its mortgagor, Reeves. Upon reargument and renewal, US Bank seeks an order modifying the January 2018 Order to deny plaintiffs’ motion to strike its seventh, tenth, fifteenth, sixteenth and twenty-seventh affirmative defenses and to grant its cross motion to amend its answer to add a counterclaim for adverse possession on behalf of Reeves.

US Bank argues that leave to renew its cross motion that sought to amend its answer to assert a counterclaim for adverse possession is warranted based on the Second Department’s holding in *Emigrant Savings Bank v Walters* (155 AD3d 829 [2017]), which was issued after plaintiffs’ motion and US Bank’s cross motion were fully submitted, and that the court “overlooked or misapprehended certain matters of fact and law in finding that

[it] improperly seeks to assert an adverse possession counterclaim on behalf of Reeves, a non-party . . .”

“[a]ctually, US Bank seeks to assert an adverse possession counterclaim to establish, if necessary, that its mortgage is a valid lien on the subject real property. US Bank is seeking to assert this counterclaim for itself, not on behalf of Reeves, and its ability to assert such a counterclaim was recently confirmed by the Second Department . . .”

Plaintiffs, in opposition, assert that *Emigrant Savings Bank v Walters* does not present a change in the law because it “is a straightforward elaboration of older cases [holding] that the holder of a mortgage interest could . . . have standing to bring an action to quiet title . . . of which adverse possession is merely one such means.”

Discussion

(1)

Action #1 – Lewis’ Partial Summary Judgment Motion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that a party has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real*

Estate Brokers v Oppenheimer, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562). Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012]).

Nevertheless, the court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assocs.*, 263 AD2d 478 [1999]). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). If there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

The Appellate Division, Second Department has held that a party seeking to obtain title by adverse possession must prove by clear and convincing evidence the following common-law requirements of such a claim:

“(1) that the possession was hostile and under claim of right; (2) that it was actual; (3) that it was open and notorious; (4) that it was exclusive; (5) and that it was continuous for the statutory period of 10 years” (*Goldschmidt v Ford St., LLC*, 58 AD3d 803, 804 [2009]).

“Since the acquisition of title to land by adverse possession is not favored under the law, these elements must be proven by clear and convincing evidence” (*Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996] [citations omitted]).

“The purpose of the hostility requirement is to provide the title owner notice of the adverse claim through the unequivocal acts of the usurper” (*Bratone v Conforti-Brown*, 150 AD3d 1068, 1070 [2017] [internal quotations omitted], *leave to appeal denied*, 31 NY3d 902 [2018]). “A rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership, and this presumption continues until the possession is shown to be subservient to the title of another” (*Estate of Becker v Murtagh*, 19 NY3d 75, 81-82 [2012]). “However, hostility is negated by ‘[s]eeking permission for use from the record owner’” (*id.* at 82 [internal citations omitted]). “[W]hen the entry upon land 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” (*Bratone*, 150 AD3d at 1071 [quoting *Hinkley v State of New York*, 234 NY 309, 316 (1922)]). “Such permission can be express or implied . . . and if the first possession is by permission it is presumed to so continue until the contrary appears” (*id.* at 1071 [internal quotations omitted]).

“Further, where there is a close and cooperative relationship between the record owner and the person claiming title through adverse possession, the presumption of hostility may not apply” (*Estate of Becker*, 19 NY3d at 82). “Thus, in order to establish the hostility element, the party asserting the adverse possession claim must come forward with affirmative facts to establish that the use of the property was under a claim of right and adverse to the interests of the true owners” (*Air Stream Corp. v 3300 Lawson Corp.*, 99 AD3d 822, 826 [2012] [quoting *Estate of Becker v Murtagh*, 19 NY3d at 81-82]).

Here, Holliman’s initial entry upon the Property in 1992 was with the permission of Lewis, her then husband and the record owner of the Property. Indeed, Reeves admits that

“[i]n or about 1992, Plaintiff and my mother moved into the subject premises [and] I too moved in to the subject premises prior to 2003.” Thus, Reeves expressly admits that both his and his mother’s initial entry upon the Property occurred with Lewis’s implied permission. As Reeves admits, Lewis indisputably moved out of the Property due to marital problems. Importantly, Reeves’s expressly admits that Holliman and Reeves continued living at the Property while “Plaintiff idly sat back and *allowed* them to do so” (emphasis added). If the initial possession is by permission – as it was here – it is presumed to continue until the contrary appears, as a matter of law (*Bratone*, 150 AD3d at 1071). In addition, Holliman’s and Reeve’s permissive entry upon and continued presence at the Property negates any presumption that their possession of the Property was hostile and under claim of right. Reeves has failed to proffer any factual evidence that the permitted use of the Property was ever repudiated by Lewis prior to his commencement of Action #1 on November 27, 2013. Furthermore, Reeves has failed to raise any triable issue of fact as to whether Holliman’s and his use of the Property was other than permissive. Accordingly, Lewis is entitled to summary judgment dismissing Reeves’s counterclaim for adverse possession.

(2)

Action #2 – US Bank’s Motion to Reargue and Renew

“A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (*see Haque v Daddazio*, 84 AD3d 940, 942 [2011]; *Mazinov v Rella*, 79 AD3d 979, 980 [2010]). A motion pursuant to CPLR 2221 to renew, on the other

hand, “must be (1) based upon new facts not offered on the prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion” (*Matter of Nelson v Allstate Ins. Co.*, 73 AD3d 929, 929 [2010]).

Here, US Bank has failed to demonstrate that this court either overlooked or misapprehended matters of fact or law when it granted that branch of plaintiffs’ motion seeking to dismiss the majority of US Bank’s affirmative defenses. Thus US Bank’s motion for leave to reargue this court’s January 2018 Order is denied.

That branch of US Bank’s motion for leave to renew its cross motion to amend its answer to assert a counterclaim for adverse possession on behalf of non-party Reeves is denied. As this court previously held in the January 2018 Order, “[a] counterclaim may only be asserted on behalf of a defendant already a party to the action” (*Bramex Assocs., Inc. v CBI Agencies, Ltd.*, 149 AD2d 383, 385 [1989]). US Bank’s reliance on the holding in *Emigrant Savings Bank v Walters* (155 AD3d 829 [2017]) is misplaced because *Emigrant* does not represent a change in the law. In the *Emigrant* case, the Second Department held that Emigrant, the mortgagee of the premises, could assert a cause of action to *quiet title* to the property, pursuant to RPAPL 1501, “based on its claim that the mortgage encumbered the entire premises because the mortgagor acquired title to the entire premises by adverse possession.” The *Emigrant* case does not represent a change in the law, but rather, reaffirms the settled principle that a mortgagee can maintain an action to quiet title under RPAPL 1501 because it has an “‘interest in real property’ as that phrase is used in article 15” (155 AD3d at 830). Accordingly, it is

ORDERED that Lewis's motion for partial summary judgment dismissing Reeves's counterclaim for adverse possession in Action #1 is granted and the counterclaim for adverse possession is hereby dismissed; and it is further

ORDERED that the branch of US Bank's motion in Action #2 seeking leave to reargue this court's dismissal of the majority of its affirmative defenses is denied; and it is further

ORDERED that the branch of US Bank's motion in Action #2 seeking leave to renew this court's denial of its cross motion to amend its answer to include a counterclaim for adverse possession is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,



J.S.C.
Karen B. Rothenberg
Justice, Supreme Court

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