Burton v Alston
2019 NY Slip Op 33229(U)
October 5, 2019
Supreme Court, Bronx County
Docket Number: 23777/2016E
Judge: Llinet M. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 25
PRESENT: HONORABLE LLINÉT ROSADO, J.S.C.

OLIVETTE BURTON and CYNTHIA D. PERKINS,

Plaintiffs,

-against-

THELVIN ALSTON, JR., LILLIAN ESTRELLA and JP MORGAN CHASE BANK, N.A.,

Defendants.

INDEX NUMBER:23777/2016E

DECISION and ORDER

Upon the forgoing papers, plaintiffs Olivette Burton (Burton) and Cynthia D. Perkins (Perkins) move for an Order (1) pursuant to CPLR 3212 barring defendant and every person claiming under defendants from all claims to an estate or interests in the adverse parcel; (2) determining that the plaintiffs are the lawful owners and invested with an absolute title in fee simple to the adverse parcel; (3) awarding sole title and the right of exclusive possession of the adverse parcels to the plaintiffs; (4) extinguishing and cancelling the mortgage of JP Morgan Chase Bank N.A. as to the adverse parcel; (5) issuing a permanent injunction enjoining defendants from ever entering upon the adverse parcel; (6) for an award of money damages in an amount to be determined at an inquest; (7) awarding compensatory damages to replace the illegally installed gate, for trespass, and conversion of the prior gate in an amount to be determined at a subsequent hearing limited to that purpose and; (8) in addition to compensatory damages an award of punitive damages against the Alston defendants for the willful and wanton conduct in illegally removing the chain-link fence with the intent of hindering and delaying this legal proceeding and to deter future defendants from acting in a similar way; and (9) awarding prejudgment interest and all their costs, disbursements and allowances against the defendants answering this action.

Defendant JP MORGAN CHASE BANK, N.A. (Chase) opposes the plaintiff's motion and cross moves for partial summary judgment pursuant to CPLR 3212 dismissing plaintiffs' amended complaint as to Chase on the grounds that plaintiffs are barred as a matter of law under RPL § 260; that Chase is a good faith purchaser whose title is entitled to protection against the alleged

unrecorded property interest of plaintiffs; and that plaintiffs are estopped from and have waived any right to seek relief against Chase by reason of their own conduct.

Defendants also oppose the motion and plaintiffs and defendant Chase submitted a reply to their respective motions.

The Court entertained oral arguments on the motions on July 8, 2019.

For purposes of this decision, the aforementioned motions are consolidated.

This action involves a dispute between neighbors over the ownership of a parcel of land between the parties' houses. Plaintiffs allege they own the property located at 947 East 156th Street, Bronx NY 10455 since November 1995. In 2007, defendants Thelvin Alston, Jr. (Alston) and Lillian Estrella (Estrella) allegedly purchased the house located at 949 East 156th.

Throughout their papers, plaintiff Burton and her counsel make reference to the disputed parcel of land as plaintiffs' driveway while defendants maintain that its an alleyway and that they own a portion of it and that the chimney for their boiler sits on it and runs from the ground up to the roof of their house.

According to the plaintiff Burton's affidavit, she and co-plaintiff Perkins own the subject parcel of land between the two aforementioned houses because, prior to defendants Alston and Estrella buying the house next door in 2007, the plaintiffs maintained, used and enjoyed their driveway which includes the subject parcel of land for thirteen years. Plaintiff Burton also states that the prior owner of their house, Thomas Bess, intended to and did turn over possession of the driveway to them when he gave them a key.[1] Plaintiff Burton alleges that she and the co-plaintiff regularly drove into and out of the driveway and parked in front of the driveway. While she acknowledges that driveway is small, plaintiff Burton notes that the houses were built during the 1850s to 1920s when there were still horses with carriages on the street. Plaintiff Burton contends that the prior owner of defendants' home, Nancy Goris, had to request permission to access the disputed parcel of land and that plaintiff Burton allowed Nancy Goris to temporarily install a "stove

[1] There is no affidavit from Thomas Bess or anyone else to corroborate plaintiff Burton's assertion as to what Mr. Bess intended or did.

pipe" on the disputed parcel of land to allow them to have heat during the winter.[2] Plaintiff Burton contends that Nancy Goris sold the property to defendants Alston and Burton before fixing the stove pipe but that she met defendants Alston and Burton during the "walk through" and told them that the stove pipe was a temporary fix and permanent remediation was needed. Plaintiff Burton argues that defendants Alston and Estrella also had to request permission of the plaintiffs when defendants wanted to have access to the subject parcel of land.[3] Plaintiffs argue that they have presented clear and convincing evidence that they have achieved adverse possession of the subject property according to applicable state law.

As to defendant Chase, plaintiffs argue that it was on notice of plaintiffs' claim for adverse possession by the fact that the subject parcel of land was completly enclosed at the time the defendants Alston and Estrella purchased their house.

Defendants Alston and Estrella maintain, among many things, that they own part of the subject parcel of land; that plaintiff Burton gave them a key to access it; and that they have utilized and had unfettered access to their portion of subject parcel of land from the time of their purchase of their house in 2007 until about February 22, 2012 when problems with the plaintiffs began. They adamantly deny having met the plaintiff Burton prior to the closing on their home. Defendants Alston and Estrella state that the gate that encloses a portion of the disputed parcel of land was installed in the early 1900s and pre-existed both of the parties' purchases.[4] Defendants Alston and Estrella also challenge plaintiff Burton's assertion that she parked her car in the subject parcel of

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[2] In support of this statement, plaintiff Burton submits a single undated note allegedly written by Nancy Goris requesting access. Said note is not in affidavit form and inadmissible. Plaintiff Burton 's contention that she temporarily allowed Nancy Goris to install a stove pipe on the disputed parcel of land is not corroborated by any other evidence submitted to the Court.

[3] In support of said contention, plaintiff Burton submits three (3) text messages, dated September 29, 2012; December 6, 2012; and April 17, 2013 between her and the defendants, where defendants are seeking access to the disputed parcel of land for repairs. Said date is subsequent to February 22, 2012, when the defendants allege the problems between the parties began. The Court notes that the plaintiff did not submit any text from the defendants seeking access to the disputed parcel of land from 2007 until September 29, 2012.

[4] In support of this assertion, defendants submit a copy of the Longwood Historic District Designation Report dated July 8, 1980.

land daily. Defendants Alston and Estrella state that plaintiff Burton only parked her car there once when she was going away because she could not find someone to move her car while she was away and that she had to fold her mirrors and climb out of the hatchback trunk of her vehicle to park in the narrow parcel of land. Defendants argue that they never had notice of or acquiesced to plaintiffs' allegedly adverse or hostile possession of the subject parcel of land. Defendants also argue that the plaintiffs cannot acquire title of the subject property through adverse possession because the plaintiffs have not established, with clear and convincing evidence, that the plaintiffs have a claim of right to the subject property. Defendants argue that there are genuine questions of fact warranting a denial.

Defendant Chase opposes the plaintiffs' motion on the grounds, among others things, that the plaintiffs are barred from bringing the claim as a matter of law under RPL § 260; that Chase is a good faith purchaser whose title is entitled to protection against the alleged unrecorded property interest of plaintiffs; and that plaintiffs are estopped from and have waived any right to seek relief against Chase by reason of their own conduct. Defendant Chase asks the Court to deny plaintiffs' motion as to it and grant its motion.

In opposition to defendant Chase's cross motion, plaintiff submits an attorney affirmation arguing that defendant Chase has no right to encumber plaintiffs' property; that it is not a good faith purchaser for value; that plaintiffs' refinancing of their mortgage is not relevant to this proceeding; and that defendant Chase has not alleged any harm. Plaintiffs urges the Court to deny the motion and grant plaintiffs' cross motion.

In reply to defendants Alston and Estrella's opposition, plaintiffs' counsel argues that plaintiffs owned the subject parcel of land from 1995 until 2007 and have thus met the 10 year period mandated by law. Additionally, counsel argues that plaintiffs are allowed to tack on the period of the prior owner, Thomas Bess. Plaintiffs argue that the conflict herein did not arise from the 1980 historical designation of the Longwood Historical District and that the report supports the postion that the plaintiffs' house and the other houses in the district were to include a side driveway. Plaintiffs note that the driveway which includes the disputed parcel of land solely provides ingress and egress to plaintiffs' home and backyard. Plaintiffs submit, for the first time in Reply and in response to defendants Alston and Estrella's opposition, the affidavits of five alleged community

members to establish that the plaintiffs openly held out that they are owners of the subject parcel of land.[5] Plaintiffs also state that the prior owners of the defendants' house may or may not have known that there was a strip of property adjacent to their exterior wall but that it likely did not matter as they had access from time to time for repairs. Plaintiff Burton adamantly denies giving the defendants a key to access the disputed parcel of land. Finally, plaintiffs' counsel urges this Court to determine that the plaintiffs have met their burden as Judge Brigantti did in deciding the motion for a preliminary injunction.

Plaintiffs' Motion

In order to prevail on a claim of adverse possession, the plaintiffs must establish that occupation of the subject parcel of land was (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the statutory period of at least 10 years. see *United Pickle Products Corp v Prayer Temple Community Church*, 43 AD 3d 307, 308 (1st Dept 2007); *Keena v Hudmor Corp.*, 37 A.D. 3d 172, 173 (1st Dept 2007). "Since adverse possession was a means of cutting off legal claims to title, it has historically been strictly applied in the sense that all constituent elements must be proved, with the burden resting on the adverse claimant, with the adverse possessor's acts construed against him, and every inference in favor of a possession that is subordinate to the title of the true owner." *Joseph v. Whitcombe*, 279 AD 2d 122, 125 (1st Dept 2001). A claimant must prove each of element his or her claim for adverse possession "by clear and convincing evidence." *Id* at 126. "The adverse possessor must act under claim of right. By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner." See *Walling v Przybylo*, 7 NY3d at 232 (Court of Appeals 2006). Conduct from the adverse possessor "will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors." *Id* at 232-33.

In viewing the evidence in a light most favorable to the defendants, the defendants raised

[5]The Court notes that two of the individuals live in Jersey City, NJ and Chicago, IL while the other three individuals live in the Bronx but not in the Community where the disputed parcel of land sits. Additionally, all five individuals swear that everyone in plaintiffs' community knows that the driveway belongs to the plaintiffs but submit no evidence to support said contention.

issues of material fact that warrant denial of summary judgment in favor of plaintiffs. See *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Sillman v Twentieth Century Fox Film Corp* 3 NY2d 395 (1957). The questions of fact include but are not limited to the acquiescence of defendants in plaintiffs' alleged exercise of possession over the subject parcel in an obvious adverse or hostile ownership through the statutory period, which is the "ultimate element in the rise of title through adverse possession." See *Monnot v Murphy*, 207 NY 240, 245 (Court of Appeals 1913).

Contrary to plaintiffs' counsel's assertion, Judge Brigantti's decision granting a temporary injunction is not a rubber stamp to summary judgment in favor of the plaintiffs as numerous questions of fact exist warranting denial. See, *Alvarez v Prospect Hospital*, 68 NY 2d 320, 508 NYS 2d 923 (1986); *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957); *Rose v DaEcib USA*, 259 AD2d 258, 686 N.Y.S.2d 19 (1st Dept 1999)

Thus, based on the foregoing, defendants have raised issues of material fact as to plaintiffs' claim for adverse possession, and the Court must hereby deny plaintiffs' motion for summary judgment.

Based on said aforementioned ruling, all other branches of the plaintiffs' motion are denied.

Defendant Chase' Cross Motion for Summary Judgment

Defendant Chase has demonstrated its entitlement to dismissal of plaintiffs' claim to cancel or void a portion of the Chase lien pursuant to RPL § 260. Defendants Alston and Estrella's mortgage which includes the disputed parcel of land between the parties homes shall not be void by reason of the fact that at the time the mortgage was made the disputed driveway was allegedly in possession of the plaintiffs claiming title of adverse possession. *Rainbow Coop v City of New York*, 63 AD3d 415 (1st Dept 2009). Although, based on the aforementioned ruling, the Court will not address defendant Chase' other grounds for seeking dismissal, the Court notes the undisputed fact that in 2014, plaintiffs executed and delivered a mortgage and CEMA to defendant Chase which only encumbered and referred to plaintiffs' block and lot and did not encumber or, in any way, refer to the adversely possessed parcel of land and plaintiffs did not sue for a declaration concerning their alleged ownership of the disputed driveway until eight (8) years after defendant Chase made the mortgage loan to defendants Alston and Estrella.

Since defendant Chase has shown its entitlement to summary judgment as a matter of law,

the burden shifts to the plaintiffs to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial of the action. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980). In opposition, plaintiffs have failed to submit proof sufficient to raise a triable issue of fact.

Accordingly, it is

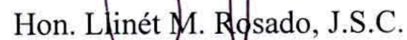
ORDERED that the plaintiffs' motion for summary judgment is denied. It is further

ORDERED that defendant Chase's motion for summary judgment is granted and all causes of action as to defendant Chase are hereby dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: October 5, 2019



Hon. Llinét M. Rosado, J.S.C.

HON. LLINET ROSADO