

Burruano v Campione
2021 NY Slip Op 30093(U)
January 11, 2021
Supreme Court, Kings County
Docket Number: 515289/18
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 515289/18
Motion Date: 11-2-20
Mot. Seq. No.: 2

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ELIZABETH A. BURRUANO,

Plaintiff,

-against-

DECISION/ORDER

SERGIO CAMPIONE, Individually and Heir-at-law of
Rosaly Campione, and TELESFORO CAMPIONE,
Individually and as heir-at-law of Rosaly Campione,
JOSEPH CAMPIONE, Individually and as Heir-at-law of
Rosaly Campione, and JOHN DOE "1-10" intending to be
individuals In possession at the property,

Defendant.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 36-61, the motion is decided as follows:

In this action for a judgment of partition and sale of real property located at 8794 Bay 16th Street, Brooklyn, New York 11214 (the "Premises"), plaintiff Elizabeth A. Burruano moves for an order pursuant to CPLR §3212 awarding her summary judgment, directing an accounting and dismissing defendant's counterclaim of adverse possession.

Background:

Pursuant to a deed dated February 8, 1968, Gioachino Campione and Rosaly Campione, as husband and wife, and Sergio Campione, their son, became the owners of the Premises. A grant to grantees as husband and wife and also to a third person creates a tenancy by the entirety as to the husband and wife and a tenancy in common as to the other grantee (see *Prario v. Novo*, 168 Misc. 2d 610, 612, 645 N.Y.S.2d 269, 271; *Bartholomew v. Marshall*, 257 App.Div. 1060, 13 N.Y.S.2d 568; *Price v. Pestka*, 54 App.Div. 59, 66 N.Y.S. 29; 24 N.Y.Jur.2d, Cotenancy & Partition, § 46). Thus, Gioachino Campione and Rosaly Campione became 50% owners of the Premises, as tenants by the entirety, and Sergio Campione became a 50% owner of the Premises, as a tenant in common with his parents.

Gioachino Campione died on August 18, 1989, at which time all his interest in the property vested in Rosaly Campione who acquired a 50% interest in the Premise as a matter of

law. Rosaly Campione died on December 16, 1990 at which time her 50% interest vested in her seven children, Joseph Campione, Telesforo Campione, Elizabeth Burruano – the plaintiff, Angela Locicero, David Campione, Giacomo Campione and Sergio Campione, one of the defendants herein, each acquiring a 7.14% interest. By deeds dated December 16, 2016 and January 5, 2017, Angela Locicero, Giacomo Campione and David Campione transferred their interests to the plaintiff thus making her a 28.6% owner of the Premises.

Plaintiff commenced this action on July 26, 2018, seeking among other things, a judgment of partition and sale. On August 8, 2018, defendant Sergio Campione appeared in the action and asserted in the Fifth Counterclaim of his Verified Answer that he owns a 100% interest in the Premises by virtue of adverse possession. The First, Second, Third and Fourth Counterclaims based upon constructive trust and/or fraud, and duress on Plaintiff's part were dismissed and/or withdrawn in accordance with the Court's prior Order dated November 26, 2018.

Defendant Sergio Campione contends that plaintiff's motion for summary judgment should be denied because there are triable issues of fact as to his claim of adverse possession. In support of his claim, defendant Sergio Campione submitted his own affidavit stating that since his mother's death in 1990, he has been in exclusive possession of the premises. He averred that while the plaintiff was renting an apartment in the premises and paying him a monthly rent of \$220.00, upon taking sole control of the premises after his mother's death, he terminated her occupancy of her apartment and after she vacated the premises over twenty-five years ago, she has had no involvement or connection whatsoever to the premises. He maintained that since he took over exclusive control and possession in 1990, he made all decisions regarding the premises, retained all rental income, and paid all expenses and carrying costs. He averred that at no time during this period did any of his siblings make decisions regarding the premises, receive any of rental income, or pay any expenses or carrying costs related to the premises.

As to his claim of right to the premises, he averred that when he and his parents purchased the premises, he was informed by his attorney that he would become the sole owner upon his parents' death.

Defendant Sergio Campione also submitted the affidavit of Angela Locicero, Elesforo Campione, David Campione and Giacomo Campione, all of whom averred that Sergio

Campione, with the knowledge of all their other siblings, has continuously occupied, managed, and controlled the premises to the exclusion of all the siblings from shortly after their mother passed away in December 1990 to the present date. They all averred that his possession of the premises since 1990 was not permissive in nature.

In a reply, the plaintiff pointed out that within the 20 year period prior to asserting his claim for adverse possession, defendant Sergio Campione requested that she and his other siblings execute a deed dated July 20, 1999, a copy of which he submitted in opposition to the motion, transferring all of their interest in the Premises to the him. While some of Sergio Campione's siblings executed the deed, plaintiff refused to. Plaintiff contends this constituted an acknowledgment by Sergio Campione of her interest in the Premises and that since this occurred within the 20-year period preceding the commencement of the action, his claim of adverse possession must fail.

In a sur-reply, which the Court accepts, defendant Sergio Campione's attorney argues that there is no proof that Sergio Campione offered to pay the plaintiff or his other siblings if they executed the deed and that some of his siblings executed the deed simply to avoid litigation. He in the affidavits submitted by Sergio Campione's siblings, they all state that they signed the deed to avoid a dispute with Sergio and in consideration for him solely maintaining and paying all of the carrying charges for the Premises.

Discussion:

Adverse possession is disfavored as a means of gaining title to land and for this reasons, all elements of an adverse possession claim must be proved by clear and convincing evidence (*see Best & Co. Haircutters, Ltd. v. Semon*, 81 A.D.3d 766, 767, 916 N.Y.S.2d 632; *see Ray v. Beacon Hudson Mtn. Corp.*, 88 N.Y.2d 154, 159, 643 N.Y.S.2d 939, 666 N.E.2d 532). A party claiming adverse possession must prove that his or her possession was (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period (*Belotti v. Bickhardt*, 228 N.Y. 296, 302, 127 N.E. 239 [1920]; *see also Van Valkenburgh v. Lutz*, 304 N.Y. 95, 99, 106 N.E.2d 28 [1952]; *Spiegel v. Ferraro*, 73 N.Y.2d 622, 624, 543 N.Y.S.2d 15, 541 N.E.2d 15 [1989]; *Ray v. Beacon Hudson Mtn. Corp.*, 88 N.Y.2d at 159, 643 N.Y.S.2d 939, 666 N.E.2d 532). "A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be"

(RPAPL 501[3]). Where, as here, the party claiming adverse possession is a tenant-in-common in exclusive possession, the required period required by RPAPL 541 is 20 years of continuous exclusive possession before a cotenant may acquire full title by adverse possession (*DeRosa v. DeRosa*, 58 A.D.3d 794, 795, 872 N.Y.S.2d 497; see *Myers v. Bartholomew*, 91 N.Y.2d 630, 632, 674 N.Y.S.2d 259, 697 N.E.2d 160).

Here, by requesting within the 20-year period prior to asserting his claim for adverse possession that the plaintiff and his other siblings execute a dated transferring their interest in the Premises to him, defendant Sergio Campione negated his claim of adverse possession (see *Larsen v. Hanson*, 58 A.D.3d 1003, 1005–06, 871 N.Y.S.2d 483, 486; *Manhattan Sch. of Music v. Solow*, 175 A.D.2d 106, 107–08, 571 N.Y.S.2d 958, 960). As the Court stated in *Larsen*:

[I]t is settled law that a possessor's offer to purchase property will defeat his or her assertion of title by adverse possession where the offer is tendered “during the statutory period” (*Walling v. Przybylo*, 24 A.D.3d at 7, 804 N.Y.S.2d 435¹; see *Garrett v. Holcomb*, 215 A.D.2d at 885, 627 N.Y.S.2d 113)....

(58 A.D.3d at 1005, 871 N.Y.S.2d at 486

The court explained that:

¹ In *Walling v. Przybylo* the court stated: “the possessor's overt acknowledgment that another holds title, prior to the running of the statutory period, will defeat a claim of adverse possession because then it “is not a claim in utter hostility to the true title” (*Bedell v. Shaw*, 59 N.Y. 46, 49 [1874]; see *Guariglia v. Blima Homes*, 89 N.Y.2d 851, 853, 652 N.Y.S.2d 731, 675 N.E.2d 466 [1996] [agreement permitting possessor's use of disputed parcel constituted an acknowledgment]; *Van Gorder v. Masterplanned, Inc.*, 78 N.Y.2d 1106, 1107–1108, 578 N.Y.S.2d 126, 585 N.E.2d 375 [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 A.D.2d 838, 839, 747 N.Y.S.2d 874 [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]; *Dittmer v. Jacwin Farms*, 224 A.D.2d 477, 478, 637 N.Y.S.2d 785 [1996] [description in deed to possessor explicitly excluding the disputed parcel—not merely failing to include it—constituted possessor's acknowledgment during the statutory period]; 2 NY Jur.2d, Adverse Possession § 61). Here, defendants do not allege that plaintiffs ever overtly recognized or acknowledged defendants' title. Rather, plaintiffs have consistently asserted their claim of ownership of the parcel throughout the statutory period (24 A.D.3d 1, 4, 804 N.Y.S.2d 435, 437 (2005), *aff'd*, 7 N.Y.3d 228, 851 N.E.2d 1167).

Because the purpose of the required elements “essential to constitute an adverse possession is that the real owner may, by unequivocal acts of the usurper, have notice of the hostile claim, and be thereby called upon to assert his [or her] legal title” in the subsequent 10 years (*Monnot v. Murphy*, 207 N.Y. 240, 245, 100 N.E. 742 [1913]; see RPAPL 511; 512), where, as here, the possessor has acknowledged title in another, he or she must take some action, aside from continued possession, to put the other on notice that the possessor now claims to own the property.

(58 A.D.3d at 1005–06, 871 N.Y.S.2d at 486).

Similarly, in *Manhattan Sch. of Music v. Solow*, the Court stated:

An offer made by one in possession without title to purchase from the record owner during the statutory period is a recognition of the record owner's title and prevents adverse possession from accruing (see, *Campano v. Scherer*, *supra*, at 643, 370 N.Y.S.2d 237; *Stauffer Chem. Co. v. Costantini*, 38 A.D.2d 863, 330 N.Y.S.2d 90).

(175 A.D.2d 106, 107–08, 571 N.Y.S.2d 958, 960). The party claiming adverse possession in *Manhattan Sch. of Music* made an offer to purchase the property in dispute on April 13, 1981. In granting summary judgment in favor of *Manhattan Sch. of Music*, the Court stated:

Having acknowledged the School's legal title to the disputed property on April 13, 1981, the appellant was required to set forth sufficient proof to raise triable issues of fact concerning his adverse possession of the disputed property for 10 years prior to April 13, 1981.

(*id.*).

While Sergio Campione may not have offered to pay the plaintiff and his other siblings for executing the deed, this makes no difference. The mere fact that he presented them with the deed was an acknowledgment by him of their ownership interest in the Premises. For the above reasons, defendant Sergio Campione's claim of adverse possession must be dismissed.

Turning to plaintiff's motion for summary judgment on her action for partition and sale, while the plaintiff established her ownership and right to possession of the Premises and that a physical partition would lead to great prejudice, there are substantial unresolved issues as to their respective interests, rights, and shares in the property. Before an interlocutory judgment of

partition may be made, these rights must be determined (*see* RPAPL 907, 915; *Goldberger v. Rudnicki*, 94 A.D.3d 1048, 1050, 943 N.Y.S.2d 176, 177–78; *George v. Bridbord*, 113 A.D.2d 869, 871, 493 N.Y.S.2d 794; *Levine v. Goldsmith*, 71 App.Div. 204, 75 N.Y.S. 706).

Accordingly, it is hereby

ORDRED that the motion is **GRANTED** to the extent that the plaintiff is awarded summary judgment dismissing Sergio Campione’s claim of adverse possession; and it is further

ORDERED that an accounting be had of the rents, profits and of all the dealings with and transactions concerning the Premises, including but not limited to, the rents and expenses, from the time of Rosaly Campione’s death to the present.

This constitutes the decision and order of the Court.

Dated: January 11, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020