

195E76 LLC v 197 E. 76th St., LLC

2022 NY Slip Op 31125(U)

April 8, 2022

Supreme Court, New York County

Docket Number: Index No. 152131/2021

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

-----X

195E76 LLC

Plaintiff,

- v -

197 EAST 76TH STREET, LLC,

Defendant.

-----X

INDEX NO. 152131/2021

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15-67 were read on this motion for summary judgment.

By notice of motion, defendant 197 East 76th Street LLC moves pursuant to CPLR 3212 for an order: (1) dismissing the amended complaint; (2) directing the county clerk to cancel the amended notice of pendency filed by plaintiff; and (3) granting it judgment on its counterclaim for a declaratory judgment. Plaintiff opposes.

I. PERTINENT BACKGROUND

A. Amended complaint (NYSCEF 4)

Plaintiff commenced this action to recover real property and for damages in trespass. In its amended complaint, plaintiff contends that it owns the property known as 195 East 76th Street, block 1411, lot 132, in Manhattan. Defendant owns the adjoining property known as 197 East 76th Street, block 1411, lot 133.

According to plaintiff, the eastern lot line of its property adjoins, along 25.8 feet, the western lot line of defendant’s property. At some point, defendant entered upon plaintiff’s property, erected a building thereon, and now withholds possession from plaintiff (disputed

area).

Plaintiff thus seeks, as its first claim, an ejectment of defendant from plaintiff's property and a judgment declaring that it is the lawful owner of the disputed area and directing defendant to remove the building. As its second cause of action, plaintiff seeks damages for defendant's trespass on its property.

B. Answer and counterclaim (NYSCEF 6)

Defendant denies plaintiff's allegations, and alleges in its counterclaim that those portions of plaintiff's property on which stands defendant's building were and are occupied and possessed by defendant "under a claim of right; without permission; openly and notoriously; continuously; exclusively and actually for over ten (10) years preceding this action; and as such that a diligent owner would have had notice of such occupancy and possession by others."

Defendant thus seeks a judgment declaring that it acquired title to the disputed area by adverse possession.

C. Parties' statements of undisputed facts (NYSCEF 46, 63)

The parties agree that the following facts are undisputed:

(1) Defendant obtained possession of its premises on September 22, 2008, as evidenced by a vesting deed of the same date and recorded in the Office of the City Register of the City of New York on October 2, 2008.

(2) The vesting deed contains a description of defendant's premises, as follows:

BEGINNING at a point on the northerly side of 76th Street, distant 57 feet westerly from the northwest corner of Third Avenue and 76th Street; RUNNING THENCE westerly along said northerly side of 76th Street, 22 feet 7 inches; THENCE northerly parallel with Third Avenue and through a party wall, 25 feet 8 inches; THENCE easterly parallel with the northerly side of 76th Street, 22 feet 7 inches; THENCE southerly parallel with Third Avenue and through a party wall, 25 feet 8 inches to the northerly side of 76th Street, at a point or place of BEGINNING.

- (3) Before defendant purchased the premises, a title search done by Stewart Title Insurance Company demonstrated that the premises are free and clear of any encumbrances.

D. Prior action (NYSCEF 16)

On or about June 16, 2014, co-owners of plaintiff commenced an ejectment action in this court against defendant, seeking damages for trespass. Defendant answered and asserted counterclaims, including one for a judgment declaring that it had acquired the disputed area by adverse possession.

After the parties entered into a so-ordered stipulation for discovery in 2019, they failed to appear for a compliance conference on July 2019, and the action was thus dismissed. The parties thereafter unsuccessfully attempted to restore the action by stipulation, but the justice presiding found that they had unreasonably delayed in stipulating to restore and had not shown excusable default. On March 2, 2021, the justice denied the co-owners' motion to vacate their default, absent a showing of a reasonable excuse for failing to appear at the July 2019 conference. No appeals were taken, and the co-owners thereafter commenced the instant action.

E. Defendant's affidavits

Defendant's former manager from September 2008 to January 2019, attests that since 2019, she serves as defendant's administrator and representative, succeeding her deceased husband. She resided at the premises until August 2020. (NYSCEF 36). She claims that on September 22, 2008, defendant obtained possession of the premises from the prior owner, and at that time defendant believed the premises to be free and clear of any encumbrances based on: (1) a Title Land Survey, dated April 21, 2008, (2) a title search conducted by Stewart Title, and (3) the Vesting Deed. (*Id.*).

Based on these documents, the former manager maintains that there was no indication that defendant's premises encroached plaintiff's property line. Rather, defendant believed that the building located on its premises was completely enclosed within its premises and was separated from plaintiff's premises by a shared party wall. (*Id.*).

The former manager's duties included managing and operating defendant and its premises, and she attests that defendant continuously possessed and exercised control of all portion of its premises since 2008. No construction work was performed and any construction work was performed before its acquisition. (*Id.*).

Defendant's managing principal since January 2019 reiterates the former manager's allegations. (NYSCEF 40).

II. CONTENTIONS

A. Defendant (NYSCEF 16)

According to defendant, before it obtained possession of its premises, the survey and title search showed that the premises were free and clear of any encumbrances. Moreover, in the vesting deed, the property is described as including the disputed area, and neither the survey nor the deed demonstrates that defendant's premises encroached plaintiff's property line.

Additionally, based on construction drawings defendant acquired from the prior owner, as well as a final certificate of occupancy issued on November 20, 2008, any modification to the premises, which resulted in the disputed area being enclosed within defendant's premises, was completed by no later than November 2008. Thus, the 10-year statutory period began to run in 2008 and ended in 2018.

Defendant also contends that as it always believed that the disputed area was within its premises, its use thereof has been adverse and non-permissive. As defendant demonstrates its

adverse possession of the disputed area, plaintiff's claims for an ejectment and trespass fail.

Alternatively, defendant contends that plaintiff's ejectment claim is time-barred as, pursuant to CPLR 205, plaintiff was required to file a new action within six months after the first action was terminated in August 2019. Thus, plaintiff's time to file the claim expired in February 2020, whereas this action was not commenced until March 2021.

Based on its entitlement to dismissal of the complaint against it, defendant argues that the notice of pendency must also be stricken, and that it is entitled to recover its costs and expenses pursuant to CPLR 6514.

B. Plaintiff (NYSCEF 52)

Plaintiff maintains that summary judgment is premature as discovery is not complete and depositions have not been held. Moreover, given defendant's admission that it always believed that the disputed area belonged to it, it has negated the element of hostility, as it does not allege that it intended to enter on plaintiff's property or possess it adversely.

According to plaintiff, it did not acquire the neighboring property until 2012, and it was not until a survey was done in 2013 that the encroachment was discovered, at which point plaintiff notified defendant and the parties attempted to resolve the issue. As they were unable to reach a settlement, the first action was commenced. Thus, the 10-year period did not begin to run until 2013, when the encroachment was discovered, and has not yet expired. Plaintiff also contends that as the encroachment is not reflected in defendant's title search and survey, it cannot have been open and notorious.

As the trespass continues to this day, plaintiff asserts that its claims for trespass and an ejectment are not time-barred, and that there is no basis for an award of costs and expenses based on its filing of a notice of pendency.

C. Reply (NYSCEF 64)

Defendant denies that its motion is premature and contends that it is irrelevant when plaintiff discovered the encroachment, as defendant's hostile possession of the disputed area began in 2008, and that the ejectment is time-barred, that it does not constitute a continuing or ongoing violation, and that it is entitled to attorney fees related to the cancellation of the notice of pendency.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A claim of adverse possession requires a demonstration by the adverse possessor that the character of the possession is hostile and under a claim of right, that it is actual, open, notorious, exclusive, and continuous for a period of ten years. (RPAPL § 501; *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154 [1996]). The elements must be established by clear and convincing evidence, as acquiring property by adverse possession is not favored. (*Id.*).

Moreover, the adverse possessor need not show enmity or specific acts of hostility in

order to establish the hostility element, but rather a right to the property that is adverse to the record owner. A rebuttable presumption of hostility arises from possession accompanied by usual acts of ownership, and the presumption continues until the possession is shown to be subservient to another's title. To establish hostility, the adverse possessor must submit proof by affirmative facts establishing that the disputed use was under a claim of right and adverse to the record owner's interest. (*Estate of Becker v Murtagh*, 19 NY3d 75 [2012]).

In 2008, the New York State Legislature changed the law relating to adverse possession by, *inter alia*, defining the "claim of right" element as constituting "a reasonable basis for the belief that the property belongs to the adverse possessor or property owners, as the case may be." (RPAPL § 501[3]). RPAPL § 522 now provides that a party seeking title by adverse possession must show that the property was possessed and occupied "[w]here there have been acts sufficiently open to put a reasonably diligent owner on notice" or it was "protected by a substantial enclosure."

Here, even assuming that defendant met its *prima facie* burden, plaintiff raises a triable issue as to when the 10-year period began to run based on its proof that the encroachment was not discovered by the parties until 2013. The Court's decision in *Bullock v Louis* is instructive. There, the parties owned adjoining parcels, with the defendants having acquired title to their property in 2006 and the plaintiff in 2008. In 2015, the plaintiff had a survey taken of her property, which showed that the defendants' property encroached on hers. The Court held that the 2008 amendments to RPAPL § 501 applied as the alleged adverse possession did not vest until 2015, and thus defendants had not possessed the disputed property for the required 10 years. (188 AD3d 783 [2d Dept 2020]). Defendant thus fails to establish that it is entitled to dismissal of plaintiff's claims and to judgment on its counterclaim.

Pursuant to CPLR 205, a second action must be commenced within six months of the dismissal of the first action in order to avoid dismissal of the second action as time-barred. Plaintiff cites no authority for its argument that the ejectment claim is not time-barred as a continuing violation.

As defendant fails to establish entitlement to dismissal of all of plaintiff's claims, its arguments related to the notice of pendency need not be considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted solely to the extent of severing and dismissing plaintiff's ejectment claim, and is otherwise denied; and it is further

ORDERED, that the parties submit a preliminary conference stipulation, by email to cpaszko@nycourts.gov, on or before May 11, 2022.

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BARBARA JAFFE, J.S.C.

4/8/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: