Trautmann v Stellar 341 LLC

2025 NY Slip Op 30540(U)

February 11, 2025

Supreme Court, Kings County

Docket Number: Index No. 522030/2024

Judge: Anne J. Swern

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the **11th** day of February 2025

PRESENT:

HON. ANNE J. SWERN, J.S.C.

AMANDA TRAUTMANN and PETER TRAUTMANN,

Plaintiffs,

-against-

STELLAR 341 LLC and 309 10th OWNER LLC,

Defendants.

ORDER

Index No.: 522030/2024

Calendar No.: 47

Motion Seq.: 001

Recitation of the following papers as required by CPLR 2219(a):

	Papers Numbered
Notice of Motion, Affirmation, Affidavits and Exhibits (NYSCEF 7-22)	1, 2
Affirmation in Opposition and Exhibits (NYSCEF 25)	3
Reply Affirmation and Exhibits (NYSCEF 26-29)	4

Upon the foregoing papers and after oral argument, defendants pre-answer motion to dismiss plaintiffs' complaint pursuant to CPLR § 3211 [a] [1] and [a] [7], is decided as follows:

Facts

Plaintiffs commenced this action seeking to quiet title to a 15' x 18' Strip of land ("Strip")[1] pursuant to RPAPL § 1501 based on adverse possession and the doctrine of practical location. The complaint also seeks a judgment declaring their ownership in all right, title and interest in and to the Strip, free of any right, title, or interest of defendants.[2] It is alleged that the

[1] NYSCEF 21, ¶1
[2] *Id.* at ¶43 [a] through [d]

Strip is in and about the backyard of plaintiffs' property, 274A 9th Street, Brooklyn, New York, Block 1010, Lot 18 (the "property").[3] The undisputed facts are as follows:

Plaintiffs' backyard directly abuts the Sixth Avenue Subway Line operated by the New York City Transit Authority/Metropolitan Transportation Authority.[4] The construction of the subway line started in the 1930s and was completed by 1940.[5] The Sixth Avenue subway tunnel runs parallel to the rail tracks and comprises thick stone walls, is approximately 40' above ground and 80' wide. The Tunnel's north wall (Tunnel wall) abuts the disputed Strip.[6]

In 1965, to increase low-income housing, the City of New York sold part of this adjoining property, now known as 341 10th Street, Brooklyn, New York, Block 1010, Lot 26, to Prospect Park Housing, Co., Inc. The deed included a restrictive covenant that the property would be utilized solely to build an 18-story apartment building known as the Prospect Towers, a Mitchell-Lama development.[7] The restrictive covenant was "to run for a period of 50 years from the completion of the clearance, replanning and reconstruction and neighborhood rehabilitation of the area."[8] The deed also included an easement to the New York City Transit Authority.[9] This easement was not separately recorded in the Office of the City of Register of the City of New York.[10] Finally, the deed acknowledged that adjoining property "is no longer required for public use by the City, pursuant to the provisions of Section 30 of the Private Housing Finance Law."[11]

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[3] *Id.* at ¶2
[4] *Id.* at ¶¶8-11
[5] *Id.* at ¶¶9 and 12
[6] *Id.* at ¶11
[7] *Id.* at ¶14 and NYSCEF 10, p.2
[8] NYSCEF 10, p.2, ¶A
[9] NYSCEF 21, ¶15 and NYSCEF 10, p.2, ¶5
[10] NYSCEF 22, p.23, fn.8
[11] NYSCEF 10, p.1

By a deed dated 2/10/2006, defendant Stellar 341 LLC ("Stellar") acquired title to the adjoining property from 341 Housing Corp., a New York limited-profit housing company.[12] Stellar then transferred the property to defendant 309 10th Owner LLC ("309") by a deed dated 6/28/2024. Plaintiffs acquired title to their property by a deed dated 5/8/2023.[13]

Plaintiffs' Allegations

Plaintiffs' property is attached to their neighbors on both sides. The only means of access to plaintiffs' backyard is through their home.[14] Likewise, defendants only access to the Strip of land adjacent to north Tunnel wall would be through plaintiffs' home.[15] Plaintiffs' fences run from the house to the north Tunnel wall, enclosing the Strip into the backyard and has been in place since at least 1965.[16] The Tunnel wall has served as the boundary between plaintiffs' property and Prospect Towers since 1965.[17] Therefore, it is alleged that,

> Each of the Plaintiffs' predecessors-in-title transferred their interest in the Strip to their successor-in-title, with the Plaintiffs being the ultimate successors-in-title, and so holding that transferred interest in the Strip. For this reason, the periods of continuous occupation of the Strip by those predecessor-in-title "tacks on" to the Plaintiffs' occupation of the Strip for the purposes of the causes of action alleged in this Complaint including, without limitations, the claims sounding in adverse possession and the doctrine of practical control.[18]

Defendants' motion pursuant to CPLR § 3211 [a] [1]

"A motion pursuant to CPLR § 3211 [a] [1] to dismiss the complaint on the ground that the action is barred by documentary evidence may be [appropriately] granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense, as a matter of law" (*Karpovich v City of New York*, 162 AD3d 996, 997

[12] NYSCEF 9
[13] NYSCEF 12
[14] NYSCEF 2, ¶22
[15] NYSCEF 2, ¶¶26-27
[16] NYSCEF 2, ¶23
[17] *Id.*
[18] NYSCEF 1, ¶31

[2d Dept 2018] citing *Mawere v Landau*, 130 AD3d 986, 987 [2d Dept 2015]; *see Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "To constitute 'documentary' evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable" (*Karpovich v City of New York*, 162 AD3d at 997-998; *see Prott v Lewin & Baglio*, 150 AD3d 908, 909 [2d Dept 2017]). Affidavits submitted in support of such motion do not qualify as documentary evidence because their "contents can be controverted by other evidence, such as another affidavit" (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]; *Prott v Lewin & Baglio*, 150 AD3d at 909).

Here, defendants' affidavits without the project plans and proof of the alleged approval by the City of New York do not conclusively establish as a matter of law that that the disputed Strip of property is being developed in accordance with the restrictive covenant in the 1965 deed for the public purpose of constructing affordable housing and a public park (*Phillips v Taco Bell Corp.*, 152 AD3d 807). Defendants also did not provide the public website to access defendants' public submissions for the project and the City's approvals so that the Court could take judicial notice of their contents.

The affidavits also do not establish that the Strip is part of a public trust, which would defeat any claim to adverse possession (*Rodrigues v Catskill Revitalization Corp.*, 302 AD2d 762, 764 [3rd Dept 2003] ["Legislature imposed an express limitation on the property, namely, if the property was no longer used for recreational or park purposes by the general public, title would *revert* to the seven towns which had comprised the committee." [italics added]). Here, once the restrictive covenant in defendants' deed terminated, the property did not revert to the City of New York. Therefore, unlike property subject to a public trust with a reversionary

interest in favor of a municipality, defendants could convey fee simple title free of the restrictive covenant after 50 years (*cf. Rodrigues v Catskill Revitalization Corp.*, 302 AD2d 764). The affidavits and deed also establish that the Strip is not owned by either the City of New York or the NYCTA/MTA which would, as a matter of law, defeat any claim for adverse possession (*Litwin v Huntington,* 208 AD2d 905, 906 [2nd Dept 1994] [Property that is (1) *owned* by a municipality in its governmental capacity and (2) *dedicated* to a public purpose cannot be lost through adverse possession.).

Next, the GeoLand survey lacks the proper foundation to utterly refuse plaintiffs' allegations and serve as a basis for a motion to dismiss pursuant to CPLR § 3211 [a] [1]. This survey was created on 12/11/2023,[19] after plaintiffs purchased their property on 5/8/2023.[20] The surveyor did not review (1) the easement drawings dated 12/16/1931, (2) the survey in connection with the 1965 deed, or (3) the surveys relied upon by defendant Stellar's title company when it took possession of the property in 2006.[21] The tax maps relied upon by the surveyor do not have a scale and, therefore, fails to establish the metes and bounds of the easement.

The proof submitted by defendants fail to establish that plaintiffs were on notice of the boundary lines of the easement in favor of the New York City Transit Authority (*Clements v Schultz,* 200 AD2d 11 [4th Dept 1994]). The 1965 deed and the tax maps do not set forth the metes and bounds of the easement or its exact location (*id.* at p.13). Therefore, defendants' reliance on *Clements* is misplaced. The dispute over whether the easement and defendants' property line extends beyond the Tunnel wall is a question that cannot be determined based on

[19] NYSCEF 14, ¶4
[20] NYSCEF 12, p.3
[21] *See* Surveyor's Affidavit, NYSCEF 14. Defendants did not provide prior surveys in support of this motion.

the proof provided in support of defendants' motion pursuant to CPLR § 3211 [a] [1] or § 3211 [a] [7].

Defendants' motion pursuant to CPLR § 3211 [a] [7]

"CPLR § 3211 allows [plaintiffs] to submit affidavits [in opposition], but it does not obligate [them] to do so on penalty of dismissal" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Therefore, plaintiff may stand on the pleadings alone, "confident that its allegations are sufficient to state all of the necessary elements of a cognizable cause of action" to survive a motion to dismiss under CPLR § 3211 [a] [7] (*id.*). When determining a motion to dismiss pursuant to CPLR § 3211 [a] [7], the Court must accept the factual allegations in the complaint as true and "accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Thus, contrary to defendants' arguments in the reply, the Court cannot convert this motion to a summary judgment motion without notice to plaintiffs and the opportunity to supplement their opposition to withstand such a motion or penalize them by dismissing the action because they have not made an evidentiary showing in support of the complaint (CPLR § 3211[c]; *see Rovello v Orofino Realty Co.*, 40 NY2d 635-636).

Plaintiffs were not required to search outside of their direct chain of title and cannot be charged with notice of the easement unless defendants' deed or another instrument creating the easement was recorded in plaintiffs' chain of title (*Clements v. Schultz*, 200 AD2d 14). Therefore, to enforce the easement and property line beyond the north Tunnel wall, defendants must demonstrate that plaintiffs "had actual or constructive notice either by virtue of the recording statutes or because of the visible and obvious nature of the [easement's boundaries]" (*id.*).

Thus, accepting the allegations in the complaint as true, plaintiffs' have stated cognizable causes of action (*Leon v Martinez,* 84 NY2d 88). The questions of whether (1) the easement extends into the Strip beyond the north Tunnel and (2) plaintiffs and their predecessors have adversely possessed the Strip that is not owned by a municipality are questions of fact that cannot be resolved upon this motion and are more appropriately the subject of a motion for summary judgment (*cf. Clements v Schultz, supra;* and *Rovello v Orofino Realty Co., supra*) after the benefit of discovery. Defendants have not cited any case law that *private property* cannot be adversely possessed that is (1) used for the public purpose of affordable housing and (2) has an easement for a public purpose in favor of a municipality such as the NYCTA/MTA cannot be adversely possessed.

Failure to Join the NYCTA and MTA as Necessary Parties Pursuant to CPLR § 1001

CPLR § 1001 provides that "[P]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." At any stage of a litigation, the Court on its own motion may "determine whether there is a nonjoinder of necessary parties" (*Lezette v Board of Education,* 35 NY2d 272, 282 [1974]; *Dish Realty, LLC v Town of Huntington*, 122 AD3d 665, 665 [2nd Dept 2014]).

Here, plaintiff has failed to join the NYCTA and MTA, the holders of the easement, as necessary parties to this action. Any judgment in plaintiffs' favor may inequitably affect the NYCTA and MTA easement rights created in the 1965 deed. Neither party has personal knowledge of (1) the use of the Strip by the NYCTA and MTA to access the Tunnel since 1965 to defeat plaintiffs' claims of adverse possession by "tacking; (2) the use of the Strip by plaintiffs' predecessor in title; or (3) whether the defendants' predecessors and the NYCTA and MTA

abandoned that portion of the easement that is alleged to extend beyond the north Tunnel wall into the Strip (*see generally Consolidated Rail Corp. v MASP Equipment Corp.*, 67 NY2d 35 [1986]). Defendants' affidavit does not address this issue which would support plaintiffs' claims that their predecessors adversely possessed the Strip up to the north Tunnel wall.

Therefore, on the Court's own motion, plaintiff shall file and serve a Supplemental Summons and Amended Complaint naming said entities as defendants in this action with 30 days of service of this Order with Notice of Entry. The failure to file and serve said amended pleadings may result in dismissal of this action upon further order of the Court.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss this action is denied in its entirety, and it is further

ORDERED that defendants shall serve a copy of this Order with Notice of Entry within fifteen (15) days of entry in NYSCEF, and it is further

ORDERED that defendants shall serve an answer to the summons and complaint within ten (10) days of service of this Order with Notice of Entry pursuant to CPLR § 3211 [f], and it is further

ORDERED that plaintiffs shall file a Supplemental Summons and Amended Complaint naming the NYCTA and MTA as necessary parties to this action pursuant to CPLR § 1001 within 30 days of service of this Order with Notice of Entry, and it is further

ORDERED that plaintiff shall serve a copy of this Order, the summons and complaint and the Supplemental Summons and Amended Complaint on the NYCTA and MTA within 60 days of filing the supplemental and amended pleadings in NYSCEF, and it is further

ORDERED that upon the failure of plaintiffs to file and serve a Supplemental Summons and Amended Complaint, this action may be dismissed upon further Order of this Court, and it is further

ORDERED that service of the Supplemental Summons and Amended Complaint upon the defendants who have appeared in this action shall be deemed complete upon the filing in NYSCEF and defendants shall serve an answer to the amended pleadings within 30 days of service.

This constitutes the decision and order of the Court.

ENTER:

Hon. Anne J. Swern, J.S.C.
Dated: 2/11/2025

For Clerks use only:
MG _____
MD _____
Motion seq. # _____