270A 9th St. LLC v 309 10th Owner LLC
2025 NY Slip Op 34067(U)
October 16, 2025
Supreme Court, Kings County
Docket Number: Index No. 509926/25
Judge: Steven Z. Mostofsky
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At an IAS Term, Part 9, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of October, 2025.

P R E S E N T:

HON. STEVEN Z. MOSTOFSKY,
Justice.

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270A 9TH STREET LLC,

Plaintiff,

-against-

Index No. 509926/25

309 10TH OWNER LLC,

Defendant.

---X

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	5-6, 25-27, 15, 18, 20
Opposing Affidavits (Affirmations)	26, 32-33
Affidavits/ Affirmations in Reply	32-33

Upon the foregoing papers, defendant 309 10th Owner LLC moves for an order, pursuant to CPLR 3211 (a) (1), (7) and (10), dismissing the complaint of plaintiff 270A 9th Street LLC (Motion Sequence [MS] # 1). Plaintiff cross-moves for an order: (1) pursuant to CPLR 3025 (b), granting plaintiff leave to amend its complaint to include the New York City Transit Authority (NYCTA) and/or the Metropolitan Transportation Authority (MTA) as parties; (2) pursuant to CPLR 1003, permitting the action to continue without naming NYCTA and/or MTA as necessary parties until a later date, or granting leave to add these parties at this stage of the litigation; and (3) pursuant to CPLR 3025 (b), granting leave to amend the complaint to the extent it fails to articulate the elements

for a cause of action under the theories of adverse possession and/or doctrine of practical location (MS # 2).

Along the south side of 9th Street in Brooklyn, between 4th and 5th Avenues, is a certain row of houses (9th Street houses) which includes plaintiff's property at 270A 9th Street, known as Block 1010, Lot 15. The exterior rear walls of the 9th Street houses form the southern boundaries of the respective properties; the property lines do not extend beyond the physical structures to include any "rear yard." Directly to the south of the rear boundaries of the 9th Street houses and extending to 10th Street is a large lot, designated as Block 1010, Lot 2, which is owned by defendant. Running through the middle of the otherwise vacant lot, roughly parallel to the southern boundaries of the 9th Street houses, is a concrete structure which covers the opening of the tunnel utilized by subway trains proceeding between the elevated tracks of the 4 Av-9 St Station and the underground 7 Avenue Station. The vacant area of defendant's lot between the northern wall of the concrete tunnel structure (Tunnel wall) and the 9th Street houses forms, in effect, "rear yards" to each of the houses.

Defendant's lot was formerly part of a larger property designated as Block 1010, Lot 26, (Former Lot 26) which was owned by the City of New York (City) until it was conveyed to Prospect Park Housing Company (PPHC) by deed dated July 27, 1965. The 1965 deed included a 50-year restrictive covenant requiring that the lot be used solely for affordable housing. The deed also stated that the conveyance was "[s]ubject to terms, conditions and all permanent and perpetual easements as required by The New York City Transit Authority particularly as shown on Drawing No. 370, File No. 6604, dated

December 16, 1931, including specific limitations of pounds per square foot on the subway structure."

By deed dated August 23, 1978, PPHC conveyed Former Lot 26 to 341 Housing Corp., which then conveyed the property to Stellar 341 LLC (Stellar) by deed dated February 10. 2006. Defendant's lot, a portion of Former Lot 26 which was designated with the new tax lot description, Block 1010, Lot 2, was conveyed by Stellar to defendant by deed dated June 28, 2024.

The instant action was brought pursuant to Real Property Actions and Proceedings Law article 15 to quiet title to the yard behind plaintiff's property after plaintiff learned of alleged plans by defendant to install concrete caissons and steel struts in the yard, and the yards of plaintiff's neighbors, to support a platform over the tunnel structure, upon which a residential building would be constructed. In the complaint, filed on March 25, 2025, plaintiff sets forth causes of action sounding in adverse possession, doctrine of practical location, and for a judgment declaring plaintiff the owner of the yard at issue (disputed yard), extending from the rear of plaintiff's house to the Tunnel wall. On May 23, 2025, defendant filed the instant motion to dismiss the complaint pursuant to CPLR 3211 (a) (1), (7) and (10).

In order to demonstrate adverse possession, a plaintiff is required to demonstrate that its possession 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 10 years" (*Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 649 [2d Dept 2014]; *see Ram v Dann*, 84 AD3d 1204, 1205 [2d Dept 2011]; *Corigliano v Sunick*, 56 AD3d 1121 [4th Dept 2008]). "Plaintiff is not required to show enmity or specific acts of hostility in order to

establish the element of hostility for adverse possession. Rather, all that is required is a showing that the possession constitutes an actual invasion of, or infringement upon, the property owner's rights" (*Greenberg v Sutter*, 257 AD2d 646, 646 [2d Dept 1999] [citation omitted]). "The element of 'open and notorious' requires that the possession be sufficiently visible such that a casual inspection by the owner of the property would reveal the adverse possessor's occupation and use thereof" (*Weinstein Enters. v Pesso*, 231 AD2d 516, 517 [2d Dept 1996]; *see West v Tilley*, 33 AD2d 228, 230 [4th Dept 1970]; *Shinnecock Hills & Peconic Bay Realty Co. v Aldrich*, 132 App Div 118 [2d Dept 1909], *affd* 200 NY 533 [1909]). "To establish the 'exclusivity' element, the adverse possessor must alone care for or improve the disputed property as if it were his/her own (*see Beddoe v Avery*, 145 AD2d 818, 819 [3d Dept 1988]). The focus is on whether the party claiming title by adverse possession exercised exclusive possession and control of the property" (*Estate of Becker v Murtagh*, 19 NY3d 75, 83 [2012]).

In 2008, the Legislature enacted changes to the adverse possession statutes (L 2008, ch 269; *see 5262 Kings Hwy., LLC v Nadia Dev., LLC*, 121 AD3d 748, 748 749 [2d Dept 2014]; *Pakula v Podell*, 103 AD3d 864 [2d Dept 2013]; *Hogan v Kelly*, 86 AD3d 590, 592 [2d Dept 2011]). Under the former version of RPAPL 522, land was "deemed to have been possessed and occupied in either of the following cases . . . (1) [w]here it has been usually cultivated or improved [or] (2) [w]here it has been protected by a substantial inclosure." The type of acts constituting the required improvement or cultivation vary "with 'the nature and situation of the property and the uses to which it [could] be applied' and ... 'consist[ed] of acts such as are usual in the ordinary cultivation and improvement of similar lands by thrifty owners'" (*Ray v Beacon Hudson Mtn. Corp.*,

88 NY2d 154, 160 [1996], quoting *Ramapo Mfg. Co. v Mapes*, 216 NY 362, 373 [1915]). Under RPAPL 522, as amended, a party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel was possessed and occupied "[w]here there have been acts sufficiently open to put a reasonably diligent owner on notice" (RPAPL 522 [1]) or "protected by a substantial enclosure" (RPAPL 522 [2]). In addition, a person claiming adverse possession must now show that he or she had "a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL 501 [3]). The amendments also added RPAPL 543, which provides that certain "de [minimis] non structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non structural walls, shall be deemed to be permissive and non adverse" (RPAPL 543 [1]). This section further provides that, "[n]otwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non adverse" (RPAPL 543 [2]).

"A party claiming adverse possession may establish possession for the statutory period by 'tacking' the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property" (*Munroe v Cheyenne Realty, LLC*, 131 AD3d 1141, 1142 [2d Dept 2015], *lv denied* 27 NY3d 904 [2016]). "Tacking is permitted where there is an 'unbroken chain of privity between the adverse possessors'" (*id.*). "For tacking to apply, a party must show that the party's predecessor 'intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed'" (*id.*, quoting *Brand v Prince*, 35 NY2d 634, 637 [1974]; *see*

Avraham v Lakeshore Yacht & Country Club, Inc., 278 AD2d 842, 842-843 [4th Dept 2000]).

Pursuant to the doctrine of practical location, "'[a] practical location of a boundary line and an acquiescence therein for more than the statutory period is conclusive of the location of such boundary . . . although such line may not in fact be the true line according to the calls of the deeds of the adjoining owners'" (*Jakubowicz v Solomon*, 107 AD3d 852, 852 [2d Dept 2013], quoting *McMahon v Thornton*, 69 AD3d 1157, 1160 [3d Dept 2010]; see Katz v Kaiser, 154 NY 294 [1897]). The "'[a]pplication of the doctrine requires a clear demarcation of a boundary line and proof that there is mutual acquiescence to the boundary by the parties such that it is definitely and equally known, understood and settled'" (*Jakubowicz*, 107 AD3d at 853 [internal quotation marks omitted], quoting *McMahon*, 69 AD3d at 1160; *see Lounsbury v Yeomans*, 139 AD3d 1230, 1231 [3d Dept 2016]).

In the complaint, plaintiff alleges that fences run from the 9th Street houses (including plaintiff's property) to the Tunnel wall, completely enclosing the land adjoining the Tunnel wall, and incorporating that land into the backyard of the respective dwellings (Complaint, NYSCEF Doc No 1, ¶ 29). Plaintiff alleges that these fences have continually been present (subject to repairs and maintenance) since at least 1965 and, for each 9th Street house, the Tunnel wall has served as the boundary of the property between each 9th Street house and defendant's lot. Furthermore, plaintiff alleges that the land adjoining the Tunnel wall in the backyards of the 9th Street houses has been improved or used exclusively by occupants of the respective 9th Street houses since at least 1965. Plaintiff cites current improvements which include not only the fencing but

also sheds, a chicken coop, concrete pads, gardens, a trampoline, and a basketball hoop (Complaint, ¶ 29).

Plaintiff states that the 9th Street house owners (including plaintiff), and defendant, and each of their respective predecessors-in-title, have treated the Tunnel wall as the boundary marker between defendant's lot and the 9th Street houses (including plaintiff's property) since at least 1965. In this regard, plaintiff asserts that the Tunnel wall serves as the "fourth leg" of the enclosure of those backyards, with the fences on either side comprising second and third legs and the dwelling itself the first leg (Complaint, ¶ 30).

Plaintiff maintains that defendant and its predecessors-in-title have acquiesced to the use of the Tunnel wall as the boundary marker since at least 1965, and neither defendant nor any of its predecessors-in-title has asserted a different boundary line, complained about the use of the Tunnel wall as the boundary marker, or made any effort to communicate to any of the owners of the 9th Street houses (including plaintiff) or their predecessors-in-title any different boundary marker or property line for the relevant properties since at least 1965 (Complaint, ¶ 30).

Plaintiff asserts that because the respective portions of the land next to the Tunnel wall are incorporated into and fenced off together with the backyards of each of the respective 9th Street houses, the only way to access that land is through the respective dwellings (Complaint, ¶ 31). Plaintiff further alleges that the Tunnel wall is approximately 40 feet in height and that there is currently no means, nor has there ever been any means, of accessing the land situated between the Tunnel wall and the 9th Street houses from the top of the tunnel structure or from any other location on Defendant's

property. Plaintiff asserts that the tunnel structure lacks any doors, openings, or other forms of access, either from its interior or from the exterior (including the top of the structure), to the land between the Tunnel and the 9th Street houses. Accordingly, plaintiff contends that if Defendant or any of its predecessors-in-title sought to access this land, they would have had to do so through the respective 9th Street properties. (Complaint, ¶¶ 32–33). Plaintiff alleges that neither defendant nor any of its predecessors-in-title have entered any part of the land abutting the Tunnel wall from at least 1965 until 2024, when defendant and/or its agents entered plaintiff's property in order to remove the fences enclosing the subject yard, cut the steel staircase leading from the rear of plaintiff's house to the disputed yard, and erect a construction fence (Complaint, ¶ 33).

Plaintiff asserts that although the disputed area behind the 9th Street houses is not accessible from any part of defendant's lot, the fences thereon are highly visible from the top of the tunnel structure; from one of the parking lots on defendant's lot, as well as from the numerous balconies on the eighteen-story apartment building on the parcel abutting defendant's lot (Complaint, ¶ 35). Plaintiff also maintains that each of its predecessors-in-title transferred their interest in the disputed land to their successor-in-title, and for this reason, the periods of continuous occupation of the disputed land by those predecessor-in-title "tacks on" to plaintiff's possession for purposes of supporting claims sounding in adverse possession and the doctrine of practical location (Complaint, ¶ 36).

A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence submitted by the moving party utterly refutes the

factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). 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]; *see Prott v Lewin & Baglio*, 150 AD3d 908, 909 [2d Dept 2017]). The court finds that the documentary evidence submitted by defendant, which includes the 1965 deed from the City and subsequent deeds to Former Lot 26 and to defendant's lot, the tax map of defendant's lot, the documents publicly filed by the MTA, the survey of defendant's lot completed by GeoLand and the aerial photograph of the disputed yard, do not conclusively establish a defense to plaintiff's claims as a matter of law.

Defendant points to the restrictive covenant in the 1965 deed and subsequent deeds which limited, for a 50-year period, the use of the property for the public purpose of building affordable housing. Defendant argues that as a result of the restrictive covenant, its lot could not be adversely possessed until the restriction expired in July 2015, which is fewer than ten years prior to defendant's entry onto the disputed yard. However, the two cases relied on by defendant to support this argument, *Litwin v Town of Huntington* (208 AD2d 905 [2nd Dept 1994]) and *Rodrigues v Catskill Revitalization Corp.* (302 AD2d 762 [3d Dept 2003]) are distinguishable from the instant action.

In *Litwin*, the court noted the settled law that property "owned by a municipality in its governmental capacity cannot be lost through adverse possession" (*Litwin*, 208 AD2d at 906 [citations omitted]) and that inasmuch as the property at issue in that case "was dedicated to a public purpose ***and was thus held by the Town in its governmental***

capacity" (*id.* [emphasis added]), any claim that the property was adversely possessed for the requisite prescriptive period must fail. In contrast, Former Lot 26 (which included defendant's lot), though restricted to public use, was not owned by the City or a municipal entity during the relevant period (1965-2015). In *Rodrigues*, the subject property, while conveyed by a municipality to a private not-for-profit entity, was subject to a public trust and would revert back to the municipality if the property were no longer used for the public purpose. Here, there is no such reversion provision in the 1965 deed should the restrictive covenant be breached or upon its expiration. Title to the lot would remain with its private owner and be freely alienable following the expiration of the covenant.

With respect to defendant's argument that plaintiff's possession was not exclusive due to the existence of an easement in favor of the MTA and/or NYCTA on the disputed yard, the documentary evidence submitted does not conclusively establish as a matter of law that the easement extended beyond the Tunnel wall, or that plaintiff had actual or constructive notice of the easement (*see Clements v Schultz*, 200 AD2d 11 [4th Dept 1994]). The easement does not appear in the chain of title to plaintiff's property, and neither the 1965 deed from the City nor the tax map submitted by defendant sets forth the metes and bounds of the easement or its exact location. Further, the documentary evidence does not show that the MTA and/or NYCTA entered upon the disputed yard pursuant to the easement at any time during the adverse period alleged (1965-2024).

Finally, the aerial photograph which shows the disputed yard obscured by tree cover, submitted to establish that plaintiff's possession was not open and notorious, does not defeat plaintiff's allegation of this element as a matter of law. There is no photograph

submitted which depicts the area in winter months when the trees may be bare, or documentary proof which otherwise conclusively shows that the disputed yard was never visible to the owners of defendant's lot during the adverse period alleged.

As a result, that part of defendant's motion to dismiss the complaint under CPLR 3211 (a) (1) is denied.

In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 880, 880-881 [2d Dept 2016]; *Cecal v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). The court "is not concerned with determinations of fact or the likelihood of success on the merits" (*Deter v Acampora*, 207 AD2d 477, 477 [2d Dept 1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Stated differently, the court is not concerned at this juncture that plaintiff "cannot establish" its claims, as defendant argues in its memorandum of law. Although a complaint may be inartfully drawn, illogical or even informal, it will be "'deemed to allege whatever cause of action can be implied from its statement by fair and reasonable intendment'" (*Shields v School of Law, Hofstra Univ.*, 77 AD2d 867, 868 [2d Dept 1980]; quoting *Lupinski v Village of Ilion*, 59 AD2d 1050, 1050 [4th Dept 1977]). "[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Sokol*, 74 AD3d at 1182 [internal quotation marks

omitted]). "Indeed, a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*id.* [internal quotation marks omitted]; *see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Construing the complaint liberally, as this court must on a pre-answer motion to dismiss, and affording plaintiff every favorable inference, the court finds the allegations in the complaint are sufficient to sustain plaintiff's claims based on adverse possession and doctrine of practical location, and the affidavits submitted by defendant do not otherwise conclusively establish that plaintiff has no such causes of action (*see Levine v Stellar 341 LLC*, 83 Misc 3d 1299[A], 2024 NY Slip Op 51330[U] [Sup Ct, Kings County 2024]; *Trautmann v Stellar 341 LLC*, 2025 NY Slip Op 30540[U] [Sup Ct, Kings County 2025] [Related adverse possession and practical location cases involving defendant's lot and other 9th Street houses]).

Accordingly, that part of defendant's motion for dismissal pursuant to CPLR 3211 (a) (7) is denied.

Defendant also seeks dismissal under CPLR 3211 (a) (10) based on plaintiff's failure to join as parties the MTA and NYCTA, which hold the easement rights over defendant's lot. "A party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the court should not proceed in the absence of a person who should be a party" (CPLR 3211 [a] [10]). As there may be an issue with respect to the parameters of the easement, and whether the easement extends north of the Tunnel wall and onto the disputed yard, the court finds that the MTA

and NYCTA are necessary parties (*see Trautmann*, 2025 NY Slip Op 30540[U], at *3-4). However, "'[t]he only time a court should dismiss the case for nonjoinder of a person is where a series of factors all coincide: 1. the person is not subject to jurisdiction and will not appear voluntarily; 2. no CPLR 1001 (b) alternative is available; and 3. such person is so essential to the litigation that it cannot justly proceed in his absence'" (*926 Port Chester Mgt. Group LLC v Slabakis*, 52 Misc 3d 1203[A], 2016 NY Slip Op 50982[U], *3 [Sup Ct, Kings County 2016], quoting Practice Commentaries, by David D. Siegel NY CPLR 3211(a)(10) 3211:34 Book 7b [2016]). In this matter, there is no showing that the aforesaid factors are present, and plaintiff is seeking leave to join the MTA and NYCTA by way of its cross-motion.

As a result, that part of defendant's motion to dismiss the complaint under CPLR 3211 (a) (10) is denied and plaintiff's cross-motion is granted to the extent that plaintiff is permitted leave to join the MTA and NYCTA as parties.

The court has considered all other arguments of defendant not addressed herein and finds them unavailing. Any relief not expressly granted herein, has been considered, and is denied.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss this action (MS # 1) is denied in its entirety; and it is further

ORDERED that defendant shall serve an answer to the amended complaint within forty-five (45) days of service of a copy of this order with notice of entry (in light of the fact this court has granted plaintiff leave to amend its complaint within 30 days of service of a copy of this order with notice of entry); and it is further

ORDERED that plaintiff's cross-motion (MS # 2) is granted to the extent that plaintiff is granted leave to join the MTA and NYCTA as necessary parties; and it is further

ORDERED that plaintiff shall file a supplemental summons and amended complaint naming the NYCTA and MTA as necessary parties to this action pursuant to CPLR 1001 within thirty (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.

The foregoing constitutes the decision and order of the court.

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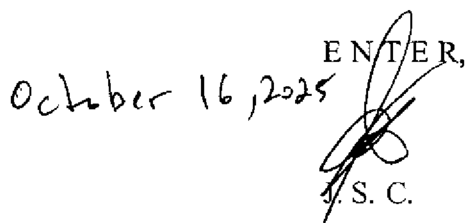

J. S. C.

HON. STEVEN Z. MOSTOFSKY