SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MICHAEL BOGENSTAETTER, LAURE RAEMY

Plaintiff,

- v -

U.S. BANK NATIONAL ASSOCIATION AS LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST,

Defendant.

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INDEX NO. 156323/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant's motion for summary judgment is granted in part and denied in part.

Background

This action concerns two adjoining Manhattan apartments. Both apartments were subject to two separate foreclosure litigations years ago before the undersigned and subsequently acquired by different banks who, in turn, sold the units to different purchasers. However, both apartments were originally owned by the same person prior to the foreclosure actions (*see* NYSCEF Doc. Nos. 17 and 19 [judgments of foreclosure and sale in the two foreclosure cases]). The parties' focus in this case turns on the disputed ownership of a closet.

Plaintiffs acquired Apartment 4N at the subject property via a referee's deed on January 6, 2020. They claim that after they purchased the unit, they realized that there had been an alteration in which the entrance from the living room to the walk-in closet was blocked off.

Plaintiffs maintain that the closet was combined with the neighboring apartment, 4M, which was owned by defendant when this case was commenced but has since been sold. Plaintiffs claim that the square footage was removed from their apartment and seek declaratory relief declaring that the closet space is lawfully part of their apartment. Before defendant sold Apartment 4M, it claims blocked off the closet and sheet rocked it closed.

Defendant previously moved to dismiss and the judge then-assigned to this matter denied the motion with respect to the trespass claim, finding that "the only intent that a party must be alleged to have had to be held liable for trespass is an intent to enter upon the subject property, not an intent to commit trespass" (NYSCEF Doc. No. 43).

Defendant moves for summary judgment on the ground that it has sold 4M, the apartment it owned, after this action was commenced and so it no longer has an interest in this property. It adds that prior to the sale it ceded any interest it had in the closet by sealing it up and surrendering that closet space to apartment 4N. Defendant emphasizes that both plaintiffs and defendant acquired their interest in the subject apartments by virtue of foreclosure proceedings in 2019 and 2020 and that both sales included language requiring the purchaser to take the properties "as is." It points out that the original plaintiff in the foreclosure matter for 4N was non-party HSBC who, after winning the property at an action, eventually sold the property to plaintiffs.

Defendant contends that the remaining causes of action all flow from the trespass claims and so they should be dismissed. It emphasizes that it never took any action with respect to plaintiffs' unit and that plaintiffs are in the same exact position as they were when they purchased this property.

In opposition, plaintiffs contend that they have suffered financial damages from the closet issue. They claim that there is a reduced rental value, ongoing legal fees to get defendant to address it and that they will be required to expend more resources to restore the closet so it is functional. Plaintiffs contend that the sale of the property by defendant is of no moment because plaintiffs seek recovery for damage that occurred during defendant's ownership. They stress that the condo's offering plan and floor plans unambiguously show that the closet should be part of their unit (4N).

They also maintain that defendant did not include any proof that it sealed off the closet and so the Court cannot grant defendant's motion on that basis. Plaintiffs argue that it does not matter whether or not defendant created the condition as defendant continued the wrongful encroachment after it purchased the property.

In reply, defendant claims that plaintiffs did not establish that a trespass occurred and, in any event, there is no question that plaintiffs purchased the property "as is." Defendant insists that it removed the closet area from 4M by sealing it off before it was sold so that it is no longer a part of the unit.

Discussion

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn" (*Huang v Fort Greene Partnership Homes Condominium*, 228 AD3d 912, 917, 215 NYS3d 351 [2d Dept 2024]).

As an initial matter, the Court observes that there are many unanswered questions that require the Court to deny the instant motion with respect to the trespass and unjust enrichment

issue. As noted above, both apartments were owned by the same person and the parties did not adequately address how that impacts the trespass cause of action. Did the former owner intentionally combine the two apartments by knocking down the walls on both sides of the subject closet? If so, then who put up a wall in plaintiffs' side of the apartment and when? Was it the former owner? Was it the non-party bank that initially acquired plaintiffs' unit which then sold it to plaintiff? Are there any documents detailing these actions? Did the former owner ever take any steps to formally combine the units?

All of these questions go to the intentionality issue—obviously, a person cannot trespass on their own property. The issue here is what happens when the apartments were then sold to two different owners (they reverted to the banks at the foreclosure auctions). Neither party addressed these issues and how they affect the trespass issue and so the Court must deny defendant's motion.

Defendant's main point is that any encroachment was not intentional. This argument fails for several reasons. First, defendant did not include anyone with personal knowledge about the creation of the closet within defendant's former apartment that could shed light about the intentionality element. Second, it does not matter if defendant had active knowledge that the closet was part of plaintiffs' apartment. "Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act" (*Marone v Kally*, 109 AD3d 880, 883 [2d Dept 2013] [finding that a trespass claim could survive where a defendant demolished a wall while under the mistaken belief that the wall was on defendant's property]). Of course, it may be that defendant might prevail on the intent element if the prior owner of both apartments simply combined the units—unfortunately, the parties did not brief this issue at all.

Purported Surrender

Defendant claims that in October 2021, more than a year after this lawsuit was commenced, it sealed off the closet so that it became inaccessible from 4M and therefore became part of plaintiffs' unit (4N). It argues that it then sold the property to two individuals who are not parties to this case.

The Court finds that this does not justify granting defendant's motion. The purported surrender is not supported by an affidavit or affirmation from someone with personal knowledge. Defendant attempted to include photographs (NYSCEF Doc. No. 86) of the work done to seal off the closet but these photographs were not properly authenticated. The affiant who attached these photographs is the "records keeper" for defendant and there is no indication that he took these photos (in fact, it is unclear who took the photos). He did not sufficiently establish that these undated photographs are a fair and accurate representation of the "sealed-off" closet. It is also unclear what the photographs show as they are not accompanied by labels or explanations from a witness demonstrating the work done. For instance, it is unclear if these photographs contain "before" and "after" images or just "after."

Defendant also tried to upload, after plaintiffs filed their opposition, a corrected invoice that purportedly shows that a contractor sealed off the closet (NYSCEF Doc. No. 98). This document is titled an "estimate" for work to be done in the future (*id*.). And, critically, it does not state on this document that the closet was sealed off (*id*.). Taken together, the Court finds that defendant simply did not meet its prima facie burden to show that it actually sealed off the closet to constitute a surrender.

Even if the Court was able to conclude that the closet was sealed off[1], that does not necessarily mean that it was an effective surrender requiring the dismissal of the trespass claim. As noted above, there are too many unanswered questions about the various prior configurations of the two apartments and who undertook such actions.

Sale of the Property

Defendant next insists that there are no valid remaining claims against it because it sold the property. Defendant did not cite any binding caselaw holding that giving up a portion of a property negates a purported prior trespass and the alleged damages flowing from that intrusion. On this record, plaintiff raised an issue of fact that there was a trespass for more than a year. Of course, selling the property may affect the amount of damages plaintiffs are able to recover should they prevail—although the Court makes no definitive findings about that.

However, as defendant has moved for summary judgment dismissing all of the remaining causes of action (the fifth claim was dismissed at the motion to dismiss stage), the Court severs and dismisses the first and second causes of action due to the sale. These claims seek a declaration that the missing square footage is part of plaintiffs' apartment and an injunction requiring the property to be returned to plaintiffs' unit. Because defendant does not own the property, the Court can no longer grant that relief as against defendant. And the current owners are not part of this case.

[1] Although plaintiff Bogenstaetter contends that defendant put up drywall, this is not a conclusive admission for purposes of summary judgment nor is it proof of a valid surrender.

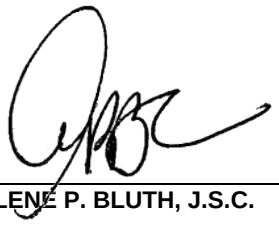
Summary

On these papers, the Court cannot ascertain the exact genesis of the alleged trespass and, consequently, whether one actually existed. Unlike a typical trespass case, the two properties at issue here were formerly owned by the same individual. And she may have treated the units as a single, large apartment; this raises serious concerns about whether there was a trespass. And the parties did not grapple with how the foreclosures of the units would affect the prior owner's treatment of the two apartments, particularly if she treated them as a single unit. Without detailed information about the actions of the prior owner of both apartments, there are simply too many unanswered questions concerning the ownership of this closet space, including who decided to tear down and put up walls, and when.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted only to the extent that the first and second causes of action are severed and dismissed.

See NYSCEF Doc. No. 106 concerning the next conference.



12/15/2025
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE