P360 Spaces LLC v Orlando
2017 NY Slip Op 30716(U)
April 11, 2017
Supreme Court, New York County
Docket Number: 156534/2015
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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P360 SPACES LLC,

Plaintiff,

-against-

PATRICIA ORLANDO; DARREN ORLANDO; ZOE CAMPBELL; KEVIN CAMPBELL; JOHN DOE; and ABC CORP., being unknown to Plaintiff, the parties intended being the persons occupying or claiming an interest in the premises described in the complaint,

Defendants.

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Index Number: 156534/2015

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's motion, pursuant to CPLR 3212, for summary judgment:

	Papers Numbered:
Notice of Motion - Affirmation - Affidavit - Exhibits	1
Affirmation in Opposition - Affidavit - Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, plaintiff's motion for summary judgment is denied.

Background

Plaintiff, P360 Spaces LLC, is the owner in fee of Unit 1E Front ("the Front Unit"), a commercial space, in a condominium building located at 104 Charlton Street in Manhattan ("the Condo"). The Front Unit is designated as Tax Lot 1102, Block 597 of the Borough of Manhattan on the Tax Map of the Real Property Assessment Bureau of the City of New York ("Tax Map"). Ronnie Peters is plaintiff's President and Managing Member. Defendants Patricia and Darren Orlando are a married couple who jointly own Unit 1E Rear/2E Rear ("the Back Unit"), a residential space, in the Condo. The Back Unit is designated on the Tax Map as Tax Lot 1103, Block 597 of the Borough of Manhattan. This action arises out of a dispute between plaintiff (specifically, Peters) and the Orlandos, as to who owns the 1,195 square feet of cellar/basement space in the Condo ("the Basement").

Prior to 2005, non-parties Nicholas Baxter and Margot Slade ("the Sellers") owned the Front Unit, the Back Unit, and the Basement collectively. In 2005, the Orlandos responded to an ad marketing the sale of all three spaces. The Orlandos allege that at that time, they were only interested in purchasing the Back Unit and the Basement, to which the Sellers agreed. The Sellers allegedly also assured the Orlandos that the Condo's Board ("the Board") would permit them to excavate the Basement. On or about September 22, 2005, allegedly based on the Sellers' assurances, Patricia Orlando purchased the Back Unit and the Basement for $1,730,000. Defendants allege that the purchase price reflects a premium for the Basement. Defendants further allege that the Board reviewed and approved the sale of the Back Unit and the Basement.

Sometime after closing the sale, the Orlandos submitted their renovation plans for the Basement to the Board for approval. Defendants allege that in or around 2006, Peters joined the Board as a member and has continued to be a member and even, at times, President of the Board. Defendants allege that the Board, on which Peters sat, reviewed and approved the Orlandos' renovation plans. However, sometime after renovations commenced, the Board denied the Orlandos' request to excavate the Basement, explaining that even prior to the sale of the Back Unit, the Board had given

the Sellers written notice informing them that excavation would not be permitted. On or about April 28, 2006, the Orlandos commenced a lawsuit, Patricia Orlando v Nicholas Baxter et al., Index No. 105858/2006, against the Sellers in this Court, alleging causes of action for breach of contract and fraudulent inducement. By decision and order dated October 24, 2007, Justice Edward H. Lehner granted the Sellers' motion for summary judgment, holding that the Sellers' mere silence about board disapproval is not actionable as fraud, especially where Patricia Orlando failed to inquire or request the Board's permission to excavate. The aforementioned lawsuit did not discuss the issue of who owned the Basement.

Not permitted to excavate, the Orlandos instead chose to raise the Basement's ceiling to 6'6" and physically sever the Basement from the Front Unit in order to attach it exclusively for the Back Unit's use; they spent approximately $600,000 on these renovations. The Orlandos allege that the Basement now serves as a recreation room with closets and recessed lighting. Plaintiff, on the other hand, alleges that defendants are using it for residential purposes in violation of the Condo's Certificate of Occupancy dated July 28, 2004.

In or around 2007, the Sellers sold the Front Unit to non-party Ian Grant. Grant allegedly acknowledged that the Basement was not part of his purchase and, undisputedly, never used it. On or about April 10, 2012, while serving as President of the Board, Peters emailed Baxter to inquire:

> When you sold the basement ... to Orlando and separate[d] it from the [Front Unit], did the city know about this? Did they re-assess the taxes according to the new property lines and the smaller footprint of [the Front Unit] and the larger property of [the Back Unit]? Did the condo approve of the change and were the common charges also reassessed/adjusted to reflect the [same]?

Baxter responded, "As far as I know the city would have been notified by the filing change on ownership. The board certainly knew about the sales and as to the recalculation of condo charges [I] don't know as [I] was no longer involved." It is unclear whether Peters obtained answers to his questions.

Thereafter, plaintiff acquired the Front Unit from Ian N. Grant, LLC by deed dated August 14, 2013 and contract dated April 25, 2012, for approximately $650,000. The rider to the aforementioned contract states at paragraph 41, "Purchaser [*i.e.* plaintiff] acknowledges that no portion of the cellar or basement is being conveyed to Purchaser hereunder ... Seller shall ... use reasonable best efforts to effect and confirm the foregoing ownership of the cellar and basement by Seller prior to the Closing ... This paragraph shall survive the Closing for up to one year." Grant failed to take further steps to sever the Basement from the Front Unit within the allotted time. It is unclear whether plaintiff paid consideration for the Basement per the terms of its contract of sale.

The question of ownership of the Basement apparently did not come up again until 2014. On September 3, 2014, Peters sent Darren Orlando an email stating, "We made [i]nquiries with the city as we were concerned that we are paying taxes on space that we are not occupying. They said that the taxes we are paying are only on the [Front Unit] - the implication that the rear basement is separate." By email dated September 4, 2014, Darren Orlando responded, "I appreciate you acknowledging that [the Basement is] mine." The parties did not reach a consensus as to who owns the Basement and who has been paying its real property tax. Thereafter, the parties' email correspondence further demonstrate that, to date, they are unable to reach a consensus as to who has the exclusive right to the Basement.

In or around December 2014 or January 2015, the parties learned that a company named "Tofu Factory" was seeking to purchase the Condo's air rights for approximately $5,000,000. On January 5, 2015, the Board held a meeting, which Peters and Darren Orlando attended, wherein it was discussed that each unit owner's share of the air rights proceeds would be based on the square footage he or she owned, including any limited common elements, such as the Basement. During the meeting, Peters and Darren Orlando each claimed that he owed the Basement and, ergo, it should be included in his respective square footage calculation. The dispute was not resolved.

In or around 2015, the Orlandos began leasing the Back Unit and Basement to defendants Zoe and Kevin Campbell.

In or around March 2015, the Orlandos received their first letter from plaintiff's attorney alleging that they were trespassing. Plaintiff claims that it owns the Basement because the Condo's governing documents show it is a "limited common element" of the Front Unit. The Condo's April 17, 2003 Declaration of Condo, CRFN #20003000481711 ("Declaration"), states the following: (1) that the percentage interest of each unit is based on, inter alia, floor space and the availability of common elements for exclusive or share use; (2) that no amendment shall alter the percentage interest in the common elements appurtenant to any unit without the consent of 100% of the affected unit owners, which consent shall be expressed on the instrument of amendment; and (3) that there are no "limited common elements" appurtenant to the Back Unit. The Condo's Offering Plan states: (1) that the Basement is specifically allotted to the Front Unit; (2) that the square footage of the Front Unit is 1,206 square feet, not including limited common areas; and (3) that for purposes of calculating common charges and real property taxes, the 1,195 square feet of basement space is calculated into plaintiff's total square footage.

Defendants do not dispute that the Declaration and Offering Plan state that the Basement is appurtenant to the Front Unit, but instead argue that these governing documents were implicitly amended because, inter alia: (1) when the Orlandos purchased the Back Unit in 2005, the Sellers allegedly recognized, in writing, that the Basement was being sold with the Back Unit; (2) Peters, plaintiff's managing member, was allegedly on the Board at the time the Orlandos submitted renovation plans for the Basement and was, therefore, on notice that the Orlandos were claiming ownership of the Basement; and (3) when plaintiff purchased the Front Unit in 2013, it expressly acknowledged in its contract of sale that "no portion of the cellar or basement is being conveyed."

The Instant Action

On June 29, 2015, plaintiff commenced this action against defendants for trespass, ejectment, unjust enrichment, permanent injunction, and compensatory and punitive damages. Plaintiff cites Real Property Law § 339-o, which states that the data necessary for the proper identification of a condominium unit must, as a matter of law, be set forth in the condominium's declaration, which plaintiff alleges was not done here. Plaintiff further alleges that New York City's Department of Finance relies on the recorded declaration in its assessment and levy of taxes against all units in the Condo, meaning that plaintiff has been paying the Basement's real property taxes. Plaintiff requests that this Court direct a hearing be held to fix and determine: (1) the proportionate share of common charges, real property taxes, and rent attributable to plaintiff's unit; and (2) the cost of restoring exclusive access of the Basement to plaintiff. On August 21, 2015, defendants e-filed their answer, alleging counterclaims for: (1) a declaratory judgment that a justiciable controversy exists as to which party owns, and, therefore, has exclusive rights to, the Basement; (2) unjust enrichment, should the Court find that plaintiff owns the Basement, as defendants incurred $600,000 in renovating the Basement; and (3) attorneys' fees, costs, and disbursements. Defendants cite Real Property Law § 240(3), which states that every instrument transferring an interest in real property must be construed according to the parties' intent. Defendants allege that the Sellers intended to attach the Basement to the Back Unit when the Orlandos purchased it in 2005, and clearly represented to Grant, who then represented to Peters, that the Basement is not appurtenant to the Front Unit.

While defendants do not specifically enumerate an adverse possession cause of action, the facts they allege in their answer give rise to such a defense. Defendants allege that since 2005, now more than 10 years ago, the Orlandos have openly and notoriously used the Basement, and that their use of the Basement has been continuous and exclusive. Plaintiff does not object to these facts.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendants. On August 12, 2016, defendants opposed the motion, and on September 1, 2016, plaintiff replied.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062

(1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Plaintiff has failed to establish entitlement to summary judgment against defendants. Although the Declaration and Offering Plan clearly designate the Basement as a "limited common element" appurtenant to the Front Unit, the Court must give credence to the fact that the parties' conduct for the last decade, including non-parties such as the Board and the Sellers, implies that all parties involved had an understanding that the Orlandos own the Basement. Given the dispute's long-standing history and the numerous factual disputes at issue, this case is not appropriate for summary relief. On the record before the Court, questions of fact exist as to, inter alia: (1) whether the Sellers represented, in writing, to the Orlandos in 2005 that the Basement was included with the sale of the Back Unit; (2) whether Peters, as a Board Member or Board President, was, by virtue of his position, put on notice of the fact that the Orlandos were claiming ownership of the Basement, and, hence, whether he is estopped now from claiming otherwise; (3) whether the Board is even authorized to "approve" the separation and attachment of the Basement from the Front Unit to the Back Unit; (4) whether Peters at some point acknowledged to the Orlandos that they owned the Basement, and whether that has any bearing on this case; (5) whether either party paid consideration for the Basement; (6) whether, pursuant to the Tax Map, plaintiff has effectively been paying common charges and taxes allocable to the Basement since it purchased the Front Unit in 2013; and (7) whether the parties' actions can implicitly establish that the Basement belongs to the Orlandos, or whether the four corners of the Condo's governing documents must prevail even if it results in an inequitable outcome. See Quiles v Greene, 291 AD2d 345, 346 (1st Dept 2002) ("The conflicting versions provided by [plaintiff] and [defendant] reveal issues of disputed material fact"). Given the conflict between the parties' affidavits and recollections of fact, summary judgment at this stage would be premature and inappropriate. See Didco Urban Renewal Co. v Mann Mgmt., Inc., 224 AD2d 195, 195 (1st Dept 1996) (summary judgment "would be premature prior to the completion of discovery and precluded by triable material issues of fact raised by the conflicting affidavits as to whether plaintiff had either waived or was estopped from termination of the parties' … agreement").

Furthermore, plaintiff's argument that defendants may not submit Baxter's emails as evidence is indicative of the fact that there is need for further discovery, as it will give all parties a chance to depose witnesses and obtain the information necessary to resolve this dispute. Baxter, although a non-party, played an essential role in the transference of both the Front Unit and the Back Unit and the information or knowledge he has may be the key to untying this gordian knot of ownership disputes. Without further discovery, defendants are prejudiced in that they cannot fully and completely defend against plaintiff's allegations. See CPLR 3212; see also Bingham v Wells, Rich, Greene, Inc., 34 AD2d 924, 925 (1st Dept 1970) ("[party] has demonstrated that facts essential to justify opposition may exist and he should be afforded the opportunity to avail himself of disclosure devices").

The Court has considered the parties' other arguments and finds them unavailing.

Accordingly, plaintiff's motion for summary judgment against defendants is hereby denied.

Conclusion

Plaintiff's motion for summary judgment is hereby denied.

The Court encourages the parties to use it as a resource to attempt settlement. A call to (646) 386-3181 or an email to aengoron@nycourts.gov can get the ball rolling.

Dated: April 11, 2017

Arthur F. Engoron, J.S.C.