Eastside Floor Suplies Letd. v Torres-Springer
2018 NY Slip Op 33300(U)
December 19, 2018
Supreme Court, New York County
Docket Number: 157938/2018
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

EASTSIDE FLOOR SUPLIES LETD., EASTSIDE FLOOR SERVICES LTD., 1807-1811 PARK AVENUE DEVELOPMENT CORP. and TEMPLE BOY DEV. CORP.,

Plaintiffs,

Index No.: 157938/2018
Motion Sequence No.: 001

- against -

DECISION/ORDER

MARIA TORRES-SPRINGER, Commissioner, Department of Housing Preservation and Development of The City of New York, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and THE FORTUNE SOCIETY,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In the underlying action, plaintiffs seek a declaratory judgment that they are the legal owners of the property located at 107 East 123rd Street, New York, New York, a/k/a Block 1772, Lot 4 (the Property). Defendant the City of New York (the City)[1] is the fee owner of the Property and is in the process of transferring the Property to defendant the Fortune Society Inc. (the Fortune Society). Plaintiffs assert that they "have exclusively, continuously, openly, and hostilely utilized

[1] The Property is under the Department of Housing Preservation and Development (HPD). Although the caption and complaint names HPD and Maria Torres-Springer, HPD's commissioner, as defendants, the City correctly notes that HPD is not an independent agency with the capacity to be sued. Instead, the City explains, it is the correct defendant. Rather than move to dismiss on this basis, the City states, it overlooks this error under CPLR § 2001, as one which does not affect its rights (see City Mem. of Law, p 3 n 1).

the [Property] for at least 22 years" (Complaint, ¶ 8), and are entitled to be declared the legal owners based on their alleged adverse possession of the Property. Currently, plaintiffs seek a preliminary injunction against defendants which restrains defendants from 1) selling or conveying the property, 2) imposing fines or penalties against plaintiffs in connection with plaintiffs' use of the Property, 3) erecting fences around or building structures on the property or, through any other method, interfering with plaintiffs' use and occupancy of the Property, and 4) removing or in any way tampering with the Property and vehicles which plaintiffs have stored or parked on the Property. On August 27, 2018, Justice Gerald Lebovits signed the Order to Show Cause and issued a temporary restraining order which granted the relief pending the hearing of the motion. The Court conferenced the matter on October 17, 2018 and listened to the arguments of all parties. The Court did not extend the restraining order at that time and, for the reasons below, it denies the preliminary injunction.

Plaintiff's statement of facts

In support of the current application, plaintiffs submit the affidavit of their president and chief executive officer Gerard Flynn.[2] Flynn asserts that since around 1986, plaintiffs have operated lots which surround the Property (107 East 123rd Street, Lot 4). Plaintiffs submit a document from the Division of Corporations which indicates that, as of December 22, 1986, Floor Services owned the property located at 129 East 124th Street. Around August 1996, Temple Corporation bought the property located at 104 East 124th Street, Block 1772, Lot 69 (Lot 69), in Manhattan. The property next to Lot 69 – that is, Lot 4 – was vacant and offered easy access to the property. When plaintiffs commenced their work at Lot 69, they "entered upon the [P]roperty and began to exclusively control [it] in connection with their business" (Flynn Aff., ¶ 17). The

[2] Plaintiffs are Eastside Floor Supplies LTD. (Floor Supplies), Eastside Floor Services LTD (Floor Services), 1807-1811 Park Avenue Development Corp. (Park Avenue Corp.), and Temple Boy Development Corp. (Temple Corp).

following year, 1999, Park Avenue Corp. purchased the property located at 101 East 123rd Street (Lot 1). Plaintiffs constructed a warehouse at the site, and, at some unspecified date after that, Floor Supplies, which is a successor-in-interest to Floor Services, became headquartered at Lot 1. In addition, on March 1, 2012, plaintiffs entered a license agreement which enabled it to enter the property located at 101-102 East 124th Street (Lots 70 and 71) for the purposes of 1) storing materials, 2) placing and using a debris container, and 3) going through the lots to access their (plaintiffs') property.[3] Plaintiffs signed a similar lease agreement on November 15 with the owner of 114 East 124th Street (lots 66, 67, and 68). Plaintiffs submit a digital tax map from the Department of Finance which shows that Lot 1, which they own, abuts the Property, that Lot 69, which they own, is a lot away from the Property, and that the license agreements give them limited use of three lots abutting the Property (Lots 66-68) and one lot which abuts lots 1 and 69 (Lot 70).

Plaintiffs annex a copy of a deed which shows that on June 30, 1989, the Commissioner of Finance of the City of New York deeded the Property to the City through a tax foreclosure. Therefore, plaintiffs state, the City owns the lot in a proprietary capacity. Plaintiffs allege that in addition to using the properties at Lots 1 and Lots 66-69, they also have used the Property in an uninterrupted and open manner, and that their use of the Property has been adverse to the City's interests. They claim that they have erected a fence, pave part of the lot, and installed video cameras at the Property. According to plaintiffs, the City did nothing to stop them from using the Property until August 27, 2018. Plaintiffs state that this is around twenty-two years after they purchased the adjoining property at Lot 1 and began to use the Property. Accordingly, on that date they notified the City by letter of their intent to commence this action by means of the current Order to Show Cause.

[3] This license has been renewed and is still in effect.

Defendants' Statement of Facts

The City states that it did not acquire ownership through the tax foreclosure proceeding in 1989. Instead, the City explains, in 1968 the Board of Estimate (BOE), which governed the matter at the time,[4] created the Harlem-East Harlem Neighborhood Development Area (the Urban Renewal Area). Lot 4, the plot at issue here, is part of the Urban Renewal Area (*see* the December 1968 BOE Resolution, p 8508). The December 1968 BOE Resolution stated that the Urban Renewal Area qualified as an eligible project area under General Municipal Law Article 15 because the property within it was "substandard and insanitary" and, as such, was "detrimental and a menace to the safety, health and welfare of [area] inhabitants and users thereof and of the locality at large" (*id.*, pp 8505-07). Accordingly, and "in the interest of the City and the health and welfare of its residents," the resolution enabled the mayor, through the corporation counsel, to acquire the land in fee simple absolute through an eminent domain proceeding. Subsequent resolutions in 1970 and 1971 enlarged the project area and reiterated the public purpose of the Urban Renewal Area. The City acquired title to the Property on December 1, 1971 upon the filing of the vesting order and the acquisition map (citing Eminent Domain Procedure Law [EDPL] § 402 [B] [5]).

Despite the transfer of title to the City, the Property's former owner, J.R.M.S. Realty Corp. (JRMS), purported to transfer Lot 4 around December 14, 1971. A deed was recorded on March 17, 1972, and it listed Lot 4 as privately-owned. Furthermore, it "was included in a 1988 *in rem* tax foreclosure action and resulting foreclosure judgment and *in rem* deed" (City Mem. of Law, p 2). The City states that this filing was a nullity, and the City has been and remains the owner of the Property as part of the Urban Renewal Area under the December 1, 1971 recordings. Around

[4] BOE was abolished in 1990.

January 2018, HPD, the agency with jurisdiction over the Urban Renewal Area, began negotiating with the Fortune Society with the aim of transferring the Property to the Fortune Society. The Fortune Society plans to build a structure which both contains affordable and supportive housing and provides social services. It is this transfer that plaintiffs seek to enjoin.

LEGAL STANDARD

The standard for granting a preliminary injunction is set forth in CPLR § 6301:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. ...

Courts only grant the injunction if the applicants "demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in [their] favor" [*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005] [Nobu Next Door]). The party seeking the injunction must "prove, by clear and convincing evidence, that they will likely prevail on their claim" (*Gilliland v Acquafredda Enterprises, LLC*, 92 AD3d 19, 24 [1st Dept 2011]). If the applicant makes this showing, prima facie, the court may grant the injunction even if the facts are disputed (*IHG Management [Maryland] LLC v West 44th Street Hotel LLC*, 163 AD3d 413,414 [1st Dept 2018]). The applicant also must demonstrate that the actions they seek to enjoin cause irreparable harm (*see Rockwood Pigments NA, Inc. v Elementis Chromium LP*, 124 AD3d 509, 511 [1st Dept 2015]). As for the equities, courts balance the alleged harm against the hardship and harm that the defendant will sustain if they grant the injunction (*see Bell & Co., P.C. v Rosen*, 114 AD3d 411, 411 [1st Dept 2014]). The goal of a preliminary

injunction, to the extent possible, is to preserve the status quo – and, along with it, to protect the rights of the parties (*Spectrum Stamford, LLC v 400 Atlantic Title, LLC*, 162 AD3d 615, 616 [1st Dept 2018]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts" (*Nobu Next Door*, 4 NY3 at 840).

DISCUSSION

An adverse possessor, plaintiffs note, must make a showing "by clear and convincing evidence" that its possession was "hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years" (*Keena v Hudmor Corp.*, 37 AD3d 172, 173 [1st Dept 2007] [citation and internal quotation marks omitted]). Furthermore, where, as here, the purported right does not arise from a written instrument, the plaintiffs "must establish that the land was usually cultivated or improved or protected by a substantial inclosure" [*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012] [citation and internal quotation marks omitted]). Plaintiffs argue that they have satisfied these legal and evidentiary standards for a preliminary injunction based upon their adverse possession argument.[5] They argue that they have openly and continuously operated their businesses, and made use of Lot 4, since August 1996, well over the ten-year minimum under the law. They state that the fence the City intends to install will prevent plaintiffs from using the Property, which furthermore contains the equipment, materials, and vehicles they have stored there over the years.

In addition, plaintiffs claim that the city's status as a municipality does not affect their right to adversely possess the Property. Although plaintiffs concede that the City is immune from

[5] Under CPLR § 6312, parties seeking this preliminary relief can support their application through the submission of an affidavit along with other evidence. As plaintiffs note, *Park South Assoc. v Blackmer* (171 AD2d 468, 469 [1st Dept 1991]), states that applicants are not required to submit additional evidence along with the affidavit but instead merely have the discretion to do so.

adverse possession claims when it holds real property in its governmental capacity (*see Gallo v City of New York*, 51 AD3d 630, 631 [2d Dept 2008]), they contend that in the instant case no public purpose is at issue and therefore this principle does not apply (*see Eller Media Co. v Bruckner Outdoor Signs, Inc.*, 299 AD2d 166, 167 [1st Dept 2002], *lv denied*, 100 NY2d 507 [2003]). Further, to the extent that the City may have intended to use the property for a public purpose initially, plaintiffs suggest, the City subsequently abandoned the use of the area in this fashion (citing, inter alia, *Albany Parking Serv., Inc. v City of Albany*, 3 AD3d 711 [3rd Dept 2004] [holding that property lost its governmental character after a city ordinance and resolution, standing together, set a new boundary line]; and *Casini v Sea Gate Assoc.*, 262 AD2d 593 [2nd Dept 1999] [adverse possession applied where city held property for a non-public use]). Plaintiffs contend that the City undisputedly held the property in a proprietary manner and was not used for a public purpose.[6]

Plaintiffs next state that they will be irreparably harmed absent injunctive relief. They contend that the City's actions, which include the erection of a fence around Lot 4, will lock them out of the Property, subject them to substantial fines if their vehicles are towed, and deprive them of the use of the lots which they own as well as those they lease. The deprivation of the right to use Lot 4, moreover, is a further and irreparable harm to plaintiffs, according to plaintiffs, because through adverse possession it too has become their property.

Finally, plaintiffs state that the balancing of equities militates in their favor. This prong of the test requires a showing by plaintiffs "that the absence of an injunction would cause [them] greater injury than the imposition of the injunction would inflict upon the defendant[s]" (*Copart*

[6] Further, plaintiffs argue that changes to the law in 2008 which make their claim to Lot 4 less tenable should be ignored because their rights vested before the enactment of the statute (citing, inter alia, *Estate of Clanton v City of New York*, 153 AD3d 787, 788-89 [2d Dept 2017]). The City's papers do not address or challenge this point.

of Connecticut, Inc. v Long Island Auto Realty, LLC, 52 AD3d 420, 421 [2nd Dept 2007]). According to plaintiffs, the equities favor them because the City allowed the property to languish throughout the decades of its purported ownership, while they have improved the Property and relied on its existence for twenty-two years. They assert that the City and the Fortune Society will suffer no harm if the Court issues an order which maintains the status quo.

The City opposes the order to show cause, and the Fortune Society joins in the opposition. According to the City, plaintiffs' position that adverse possession applies lacks merit. Initially it notes that preliminary injunctions are not as easy to obtain as plaintiffs' argument may suggest. Instead, it "is a drastic remedy that should not be granted unless a clear right thereto is shown" (quoting *McGuinn v City of New York*, 219 AD2d 489 [1st Dept 1995], *leave dismissed*, 87 NY2d 966 [1996]; *see 1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Center*, 86 AD3d 18, 23 [1st Dept 2011]). Furthermore, contrary to plaintiffs' statement, the City says, the City cannot lose the Property because it owns the Property in its governmental rather than its proprietary capacity (citing *Litwin v Town of Huntington*, 208 AD2d 905, 906 [2nd Dept 1994], *lv dismissed*, 86 NY2d 777 [1995]; *Akbar Self Help Inc. v City of New York* (24 Misc 3d 243, 247 [Sup Ct Kings County 2009] [dicta]). The City contends this is true even where a municipality "under-utilize[s]" the property in question. It notes that this State "the term 'public use' broadly encompasses any use, including urban renewal, which contributes to the health, safety and general welfare of the public" (quoting *Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 10-11 [1st Dept 2006] [C/S 12th Ave.). As the Urban Renewal Project falls within this definition, the City states, plaintiffs lack the power to gain title to the Property through adverse possession.

Furthermore, the City notes, the attempt by JRMS to transfer the Property was a nullity because JRMS did not have title to the Property when the purported transfer occurred. It cites Eminent Domain Procedure Law 402 (B) (5), which states that "[u]pon the filing of the [vesting] order and the acquisition map [with the County Clerk], the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor." Moreover, once title transfers the Property became "free of all encumbrances and inconsistent proprietary rights" (quoting *Matter of Ossining Urban Renewal Agency*, 39 NY2d 628, 630-31 [1976] [Ossining]). The City annexes a copy of all three Board of Estimate resolutions, copies of the vesting order and acquisition map, dated December 1, 1971, and a copy of the Automated City Register Information System (ACRIS) for Lot 4, which shows the JRMS filing dated March 17, 1972.

Based on the Property's history and the prevailing law, the City states, it acquired the Property for a public purpose on December 1, 1971. Furthermore, the City argues, the 1988 tax foreclosure action and judgment – which, the City stresses, were legal nullities -- do not convert the City's purpose in holding the Property from a public into a proprietary one. Accordingly, the City argues, "the Property is absolutely immune from loss by adverse possession" (City Mem. of Law, p 5) and plaintiffs are unlikely to succeed on the merits (citing *East 13th Street Homesteaders Coalition v Lower East Side Coalition Housing Development*, 230 AD2d 622, 623 [1st Dept 1996]).

In addition, the City argues, the balance of equities favors the defendants. It argues that, as squatters, plaintiffs cannot allege their presence on the Property is in good faith. On the other hand, the City contends, it has a public interest in transferring title to the Fortune Society, which will develop the site for the public good, pursuant to the Urban Renewal Plan, and will provide housing

and services to people in need. This interest, the City says, outweighs the interest plaintiffs have in using the property to store vehicles, debris, and the like. It annexes its request for qualifications, which it issued in 2013, to show that it searched for qualified occupants who would further Lot 4's public purpose years ago.

In reply, plaintiffs state that the 1989 tax lien foreclosure proceeding transformed the nature of the City's interest in the Property, from governmental to proprietary. They also argue that the City's failure to use the Property for a public purpose for nearly 30 years, coupled with plaintiffs' active, adverse use of the site, mandates a finding of adverse possession. According to plaintiffs, defendants implicitly concede that plaintiffs have used the Property openly for the requisite period, thus satisfying the criteria for adverse possession. Moreover, plaintiffs state that because the November 1971 vesting order was not recorded in the New York City Register, the City did not acquire absolute title under the EDPL. Plaintiffs stress that the City's comments about the reason for the tax foreclosure are entirely speculative, and that the City does not provide any affidavits or other evidentiary support. They argue that the City "abandoned" the Property for decades and "offer no semblance of any public purpose" (Plaintiffs' Reply Aff., ¶ 8). They assert that the vesting order granting title of the Property to the City via eminent domain was not properly noted in the records and therefore, despite the fact that the County Clerk's records reflect the filing of the vesting order, City did not acquire the lot in question (citing EDPL § 402 [B] [5] and Real Property Law §§ 290 [4], 297-b, 317, and 319). In addition, plaintiffs reiterate their earlier arguments.

Conclusion

The Court concludes that the City acquired the Property through eminent domain through the procedures set forth in EDPL § 402 (B) (5). Plaintiffs arguments to the contrary have no merit,

because the provision states, in pertinent part, that where compliance with the EDPL has otherwise been satisfied,

> the court shall direct the immediate filing and entry of the order granting the petition, which order the condemnor shall file and enter together with the acquisition map and the bond or undertaking if required, ***in the office of the county clerk or register in each county in which the real property or any part thereof is situated.*** Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.

(emphasis supplied). Thus, under the clear terms of the statute, it was sufficient for the City to file the vesting order in the office of the County Clerk. At this point, its title became absolute (*see Ossining*, 39 NY2d at 630-31; *Thomas Gang, Inc. v State*, 19 AD3d 861, 863 [3rd Dept 2005]). Therefore, the purported transfer of title by the prior owner and the tax foreclosure filing are nullities.

Furthermore, as defendants urge, urban renewal, which is the stated purpose of the project at issue, is a public purpose within the meaning of the law. (*C/S 12th Ave.*, 32 AD3d at 10-11). As such, the title to the Property "cannot be lost through adverse possession" (*Litwin*, 208 AD2d at 906). Therefore, plaintiffs cannot show that they are likely to succeed on the merits. As courts do not grant preliminary injunctions where there is no likelihood of success on the merits (*Nobu Next Door*, 4 NY3d at 840), plaintiffs motion is denied.

Although the Court need not evaluate the matter further, it notes that the plaintiffs have not shown irreparable harm or effectively argued that a balancing of the equities favors them. Plaintiffs will be disadvantaged by their loss of use of the Property, but they can find another area to store their vehicles and another spot to store their debris. Indeed, as they own or lease several properties, some of which are used for storage purposes, they likely can find space on one of those sites. They have not asserted a threat to their ability to sustain their businesses and, at best, can assert that they

will incur financial harm if they must lease another space in which to store their materials and vehicles. Monetary harm is not considered irreparable (*see OraSure Technologies, Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 [1st Dept 2007]). Furthermore, the goal of urban renewal is a laudable one, and the Fortune Society serves an important public service. The loss of a space in which the Fortune Society can provide vital services is irreparable.

The Court has considered the parties' arguments, even if not addressed directly here, and they do not alter its conclusion. Accordingly, it is

ORDERED that the motion for a preliminary injunction is denied.

Dated:

12/19/2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.