SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

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LAWRENCE DAVID,

Plaintiff,

Index No. 107898/00

- against -

DECISION AND ORDER

IRENE ABRAMSON and 870 FIFTH AVENUE CORP.,

Defendants.

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MARTIN SCHOENFELD, J.:

In this action plaintiff Lawrence David seeks to be declared the sole owner of the co-operative shares attributable to Apartment 14B of 870 Fifth Avenue, New York, NY. Defendant Irene Abramson ("Abramson") has counterclaimed for a partition of the property. Defendant 870 Fifth Avenue Corp. ("The Co-op"), a residential co-operative, owns the subject building.

Plaintiff now moves for summary judgment and related relief. Abramson now cross moves for summary judgment and related relief and to be allowed to amend her answer to assert that she remained a joint tenant with plaintiff even after their divorce in 1979. The Co-op has not submitted any support for or opposition to either motion. For the reasons set forth herein, the motion and cross-motion are denied.

Background

In May 1973, anticipating marriage, plaintiff and Abramson became joint tenants by purchasing the co-operative shares for $86,000, with each having contributed approximately half of the amount. They were married next month. In April 1979, Abramson left the marital abode and moved to Florida. Plaintiff claims that he removed her possessions and changed the locks.

In August 1979 Abramson petitioned in Florida state court for divorce. The court issued a final judgment of divorce in October 1979. Shortly thereafter, Abramson married a resident of Florida. Meanwhile, plaintiff continued to reside in, maintain, and pay for the apartment. In 1986 he also re-married.

In April 2000 plaintiff commenced the instant action for a declaration of adverse possession. In June 2000 Abramson counter-claimed for a partition.

Discussion

The parties agree that when they purchased the property they became joint tenants. Plaintiff argues that when the parties divorced they became tenants-in-common. Abramson argues that when the parties divorced they remained joint tenants.

Perhaps the first question that needs to be answered is, "What happened when the parties got married?" According to Novak v Novak, 135 Misc 2d 909, 910 (Sup Ct, Dutchess County 1987), their tenancy remained a joint tenancy, and did not convert to a tenancy by the entirety. Upon their divorce, it appears that the tenancy became a tenancy-in-common. 24 NY Jur 2d Cotenancy and Partition § 33, at 351 (1999) (stating that joint tenancy may be severed by "conduct or course of dealing"); cf. Eller v Eller, 168 AD2d 414 (2nd Dept 1990) (tenancy by the entirety becomes tenancy-in-common upon divorce). The salient difference between, on the one hand, tenancies-in-common and, on the other hand, joint tenancies and tenancies by the entirety, is that a right of survivorship attaches to the latter but not the former. Here, neither party could reasonably have expected that a right of survivorship would exist after their divorce, physical separation, and respective remarriages. See generally, 6 Warren's Weed, New York Real Property, Joint Tenants § 3.06 (2001) ("Apparently, a joint tenancy in property . . . can be severed by the court [in a matrimonial action] and the right of survivorship terminated"). Thus, this court finds that during the 1980s and 1990s, the parties owned the apartment as tenants-in-common.

RPAPL § 541 provides as follows:

> Where the relation of tenants in common has existed between any persons, the occupancy of one tenant . . . is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises . . . has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous, exclusive occupancy by such tenant . . . and such occupying tenant may then commence to hold adversely to his co-tenant.

In Myers v Bartholomew, 91 NY2d 630 (1998), the Court of Appeals interpreted this section to provide that a non-ousting tenant-in-common must exclusively occupy property for a 10-year period prior to commencement of the running of the 10-year Statute of Limitations codified in CPLR 212(a). In practical terms, a co-tenant must "adversely possess" for 20 years before acquiring adverse possession against a co-tenant who quits, as opposed to one who is ousted. Id. at 638.

In Belloti v Bickhardt, 228 NY 296 (1920), the court described what sort of possession is "adverse." "First, the possession must be hostile and under claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and fifth, it must be continuous." The doctrine of adverse possession applies to co-operative

apartments. Deering v 860 Fifth Ave. Corp., 220 AD2d 303, 304-05 (1st Dept 1995).

Plaintiff's argument is straightforward: He claims that the parties became tenants-in-common upon their divorce in 1979 and that he has adversely possessed the property for 20 years. Clearly, his possession has been actual; open and notorious; exclusive; and continuous. The question is whether it has also been "hostile." The general rule is that "[w]hen possession is permissive in its inception, adverse possession will not commence until there is a distinct assertion of a right hostile to the owner and brought home to him." Perez v Perez, 228 AD2d 161, 163 (1st Dept 1996), quoting Shandaken Refm. Church v Leone, 87 AD2d 950, 950-51 (3d Dept 1982).

Plaintiff relies on Fields v Fields, NYLJ, Mar. 23, 1999 (Supreme Court, Queens County), copy attached to Moving Memorandum, for the proposition (Moving Memorandum at 8) that "where the co-tenants are divorced spouses and one spouse abandoned the marital home for 20 years, hostility is presumed and the twenty-year statutory period for adverse possession runs from the date of the divorce." Indeed, Fields states as follows:

> While plaintiff [i.e., the out-of-possession ex-spouse] asserts that the [other spouse's] possession of the property was not hostile, the [other spouse] need not

> show enmity or specific acts of hostility. Where . . . the use is open, notorious, and continuous for the full statutory period, a presumption of hostility arises, and plaintiff has not submitted any competent evidence to rebut this presumption.

Here, Abramson attempts to rebut the "presumption of hostility" by submitting evidence that for several years after the parties' divorce, and briefly prior to the instant litigation, she and plaintiff engaged in negotiations pursuant to which plaintiff would purchase Abramson's interest. If plaintiff was negotiating to purchase Abramson's interest, then his possession would not have been "hostile," because it would have been an acknowledgment that Abramson had an interest in the apartment. Abramson would not have been put on notice that possession was hostile; rather, she would have been lulled into assuming it was permissive.

The evidence of negotiations during the 20-years prior to the instant litigation (Abramson's Answer, containing her counterclaims, is dated June 29, 2000) is hardly overwhelming, but it is enough to raise an issue of fact and forestall summary judgment. "As repeatedly held, the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day

in court." Gibson v American Export Isbrandtsen Lines, 125 AD2d 65, 74 (1st Dept 1987).

Abramson's attorney, Stephen Butter, sent plaintiff a letter dated June 20, 1979 (Cross-Moving Exhibit B), stating that Butter understood that plaintiff would like to "settle the [Florida divorce] litigation," and that Butter understood that the "only two things involved in the case [are] the apartment and its contents." In a letter dated July 13, 1979 (id.), plaintiff's attorney, Michael Erdheim, responded that plaintiff had turned Butter's June 20 letter over to Erdheim and that he would be happy to discuss "an amicable resolution." In a letter dated August 27, 1979 (Moving Exhibit C), Butter wrote Erdheim that if the Florida court granted a divorce, Abramson could "always file [for a] partition in New York. However, I have suggested to her to leave the New York property . . . as is and just let them increase in value." Of course, these letters (and some subsequent correspondence in the same vein) are all prior to the 20-year effective limitations period commencing June 29, 1980.

However, in a letter of October 23, 1980 (Cross-Moving Exhibit F), Butter wrote Erdheim that he had telephoned and corresponded several times trying to settle the entire case and that the only remaining issues were the personal and real

property. In a letter to Erdheim dated December 26, 1980 (id.), Butter referred to "pending settlement negotiations." In a letter dated June 9, 1981 (id.), Butter "wonder[ed] whether or not your client wants to continue negotiations." In a letter dated September 1, 1981 (id.), Butter asked Erdheim whether he thought "it [wa]s time to settle this litigation [including] the real estate dispute." Plaintiff questions whether these letters were actually sent, but that simply raises factual issues for the trier thereof.

Any negotiations then lay fallow for some 18 years. Abramson claims (Cross-Moving Affidavit ¶ 24) that in 1999, after a mutual friend interceded, Abramson spoke to plaintiff, who offered to purchase Abramson's interest in the apartment for $200,000. This alone is enough to defeat summary judgment, because "[a]n offer made by one in possession without title [here, plaintiff did not have sole title] to purchase from the record owner during the statutory period is a recognition of the record owner's title and prevents adverse possession from accruing." Manhattan School of Music v Solow, 175 AD2d 106, 107 (2nd Dept 1991); see generally, Colvin v Burnet, 17 Wend 564, 1837 WL 2825 (Sup Ct 1837) ("It is well known that a single lisp of acknowledgment by the defendant, that he claims no title,

fastens a character upon his possession which makes it unavailable for ages.").

Plaintiff claims (Reply Affidavit ¶ 5) that Abramson contends that the early 1980 settlement negotiation letters "constitute a written agreement concerning disposition of the Apartment." All that Abramson contends is that the letters demonstrate an acknowledgment of Abramson's interest in the property. Plaintiff argues (id., ¶ 17) that Abramson's allegation that plaintiff offered $200,000 to Abramson is "under well settled law . . . not admissible into evidence." However, Abramson is submitting evidence of the offer not to show the value of the apartment, or to prove an interest therein; rather, she is submitting it to show an alleged acknowledgment that she had an interest. Plaintiff also argues (id. ¶ 25) that evidence of discussions to resolve the issue at hand is "incredible." Credibility may not be determined on a motion for summary judgment. The court's function on a summary judgment motion is one of issue finding not issue determination. J. Henry Schroeder Bank v. Metropolitan Sav. Bank, 117 AD2d 515, 516 (1st Dept 1986) ("issue finding, not issue determination").

Conclusion

Thus, the parties' respective requests for summary judgment must be denied because there is an issue of fact as to whether plaintiff's possession was "hostile" for 20 years. Abramson's request to amend is denied because the instant decision finds, as a matter of law, that the parties became tenants-in-common in 1979.

This opinion constitutes the decision and order of the Court.

Dated: January 3, 2007

J.S.C.