Lindbergh v Shlo 54 LLC
2013 NY Slip Op 33916(U)
August 23, 2013
Sup Ct, Kings County
Docket Number: 28985/11
Judge: Richard Velasquez

[* 1]

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20 day of August, 2013.

PRESENT:

HON. RICHARD VELASQUEZ,
Justice.

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EDITH LINDBERGH,

Plaintiff,

- against -

Index No. 28985/11

SHLO 54 LLC, ET AL.

Defendants.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants move, (1) pursuant to CPLR 2221, for an order granting leave to renew plaintiff's motion, made pursuant to RPAPL Article 15 and granted by this court by order dated August 22, 2012, resulting in an order awarding plaintiff title, by adverse possession, to a certain strip of land located within the legal boundaries of the property owned by defendant Shlo 54 LLC (Shlo 54); (2) pursuant to CPLR 3211(a)(1) and 3211(a)(7), directing dismissal of plaintiff's first cause of action on the ground that her claim

based on adverse possession is refuted by documentary evidence; and (3) pursuant to 22 NYCRR 130 et. seq., for sanctions.

Plaintiff is the owner of a residential property located at 1346 E. 27th Street, in Brooklyn, New York, having acquired title in fee simple by deed dated September 27, 1972 after having occupied the premises as the tenant of her aunt, the previous owner, since 1957. Shlo 54 purchased the adjacent property, known as 1350 E. 27th Street, Brooklyn, New York (the LLC Property) in April of 2008.

The facts which underlie the instant motion are fully set forth in the court's order of August 22, 2012, and need not be repeated here, other than to reiterate that the court found, based upon defendants' own contention that plaintiff had "stolen" the disputed strip of land, which constitutes a portion of her driveway and approximately three inches of defendants' land onto which her garage encroaches, that plaintiff had satisfied all requirements necessary to establish ownership by adverse possession (*see* 2 NY Jur2d Adverse Possession §8). Defendants' motion for leave to renew is premised on the contention that the court treated the plaintiff's motion as one for summary judgment and set the matter down for a hearing on damages, without providing defendants notice. They further allege that they now possess recently discovered documentary evidence provided by Mark Chraime (Chraime), a prior owner of the LLC Property. The documents consist of two agreements and an affidavit of Chraime, all of which, according to defendants, controvert any argument or finding that Lindbergh ever asserted a claim of ownership to any portion of what is now the LLC Property.

The first document, an Agreement dated October 6, 1980 and which is entitled "Easement," was executed by plaintiff and Joseph H. and Joan C. Farrell, who then owned what was to become the LLC Property. Its stated purpose was to enable plaintiff to erect a

fence, twelve feet in length, that was to be located four inches onto the Farrell's property. By its terms, the "Easement," which was supported by no consideration and was never recorded, provided that (1) the fence would be removed upon the request of the Farrells, (2) the Agreement was not to be deemed a conveyance of any portion of the property, nor was it to survive the sale of 1350 E. 27th Street, and (3) upon sale of 1350 E. 57th Street, the fence would be removed at the request of the new owner.

The second document, entitled a "Boundary Line Agreement," was dated October 19, 1988, and executed by plaintiff and Mark and Barbara Chraime, who purchased 1350 E. 27th Street from the Farrells. Its provisions specifically referenced, and terminated, the foregoing Agreement which had created the Easement, but permitted plaintiff's fence to remain at its location. As was the case with the Easement, the Boundary Line Agreement was not recorded, and its provisions specified both that it was to terminate upon sale of the property by the Chraimes, and that the fence could be removed at any time upon written request of the Chraimes or the new purchasers.[1] However, the Boundary Line Agreement further provided that (1) upon transfer of the Lindbergh property, the fence was to be removed "immediately" unless the terms of the Agreement were ratified by Lindbergh's purchaser, who was required to become a party thereto; (2) in the event that removal of the fence failed to take place, the owner of the premises (i.e., the Chraines) had the "absolute right" to remove the fence at its owner's expense; and (3) the Boundary Line Agreement was not to be construed as an easement.

Based upon the foregoing Agreements, defendants seek renewal so as to assert a contention that hostile possession, an essential element for adverse possession, has been

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[1]The Boundary Line Agreement was signed by Barbara Chraime and Lindbergh. It was not, however, signed by Mark Chraime.

negated (*see Harbor Estates Limited Partnership v May*, 294 AD2d 399, 400 [2002] ["(a)n inference of hostile possession under claim of right will be drawn when the other elements of adverse possession are established, and there has been no admission that title belongs to another prior to the vesting of title"]).

Defendants' contentions are devoid of merit. CPLR 2221(e) provides that a motion for leave to renew "shall be identified specifically as such" and "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (*see Orange and Rockland Utilities, Inc. v Assessor of Town of Haverstraw*, 304 AD2d 668 [2003]). To prevail on a motion to renew, defendants are required to provide newly discovered evidence to their position and a reasonable justification for not previously submitting same (*see In re Estate of Mauawad*, 61 AD3d 1169 [2009]). While defendants, through counsel's affirmation, assert that because the documents were not recorded, they were unaware of their existence, and further set forth some details of the investigation which led to their recovery, they are silent, beyond a conclusory statement bearing on the lack of an opportunity to conduct discovery, on why this could not have been done in a timely fashion.

Equally without merit is defendants' claim that they have, in effect, been prejudiced by the manner in which the court reached its underlying determination. While defendants, without citing any legal authority, cast the court's action as having *sua sponte* converted the plaintiff's motion into one for summary judgment, they fail to address the fact that plaintiff commenced this action under Article 15 of the Real Property Actions and Proceedings Law, and moved by order to show cause for certain relief. An action to compel determination of a claim to real property brought under article 15 of the Real Property Actions and

Proceedings Law is a statutory action which implicates both law and equity (*see New York & Brooklyn Suburban Inv. Co. of N.Y. v Leeds*, 100 Misc 2d 1079,1086 [1979] ["(a) plaintiff must, by pleading and proof, bring this action within the terms and conditions of statute. But beyond this, and in respect of the distinction between an action at law and an action in equity, the action is a hybrid one [where the] relief awarded is in large measure equitable in nature"]). Defendants fail to point to any language in Article 15, such as that found in CPLR 3211(c), as a predicate for the instant motion,[1] or cite any controlling authority that bars the court from granting the relief which plaintiff sought by way of her order to show cause.

Finally, nothing contained in the documents proffered by defendants would change the court's prior determination. Both the Easement and the Boundary Line Agreement clearly refer to a property interest which is not the subject of this dispute, and plaintiff has amply demonstrated that the configuration of her driveway, which overlaps onto defendant's property, underwent no changes in the 54 years she continually resided at 1346 E. 27th Street prior to commencing her lawsuit.

Defendants' contention that plaintiff's action is frivolous is equally devoid of merit.

Based upon the foregoing, the court denies defendants' motion in its entirety.

FILED
AUG 23 2013
KINGS COUNTY CLERK'S OFFICE

ENTER,

J. S. C.
So Ordered
Hon. Richard Velasquez

AUG 20 2013

[1]CPLR 3211(c) requires that if a court intends to treat a CPLR 3211 motion as one for summary judgment under CPLR 3212, it must give the parties notice of its intention to do so (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 258 [2012], citing *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]; *Matter of South Blossom Ventures, LLC v Town of Elma*, 46 AD3d 1337, 1338 [2007]; *Kempf v Magida*, 37 AD3d 763, 765 [2007]).