SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

CHILDREN'S MAGICAL GARDEN, INC.,
Plaintiff,

-v-

NORFOLK STREET DEVELOPMENT, LLC, S&H EQUITIES (NY), INC., SERGE HOYDA, and 157, LLC,
Defendants.

Index No.: 152094/14
Motion Date:
Motion Seq. No.: 02
Motion Cal. No.:

The following papers, numbered 1 to 5 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

This action was commenced by plaintiff to determine the ownership of one of the lots that make up the premises at 157 Norfolk Street at its intersection with Stanton Street in the Lower East Side neighborhood of New York County. The premises currently houses a community operation known as the Children's Magical Garden (Garden). The plaintiff here, Children's Magical Garden, Inc., (CMG) is a not-for-profit corporation that according to the complaint owns and operates the Garden and seeks

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

to have its claimed ownership of the subject parcel adjudicated by this court. Defendants Norfolk Street Development, LLC, S&H Equities (NY), Inc., and Serge Hoyda are alleged to have been the record owners of the premises during the prescriptive period. Defendant 157, LLC is alleged to have purchased the property from Norfolk Street Development on or about January 6, 2014.

The complaint states that the Garden came into existence nearly thirty years ago on or about 1985 as the result of efforts by community activists to improve their neighborhood on an abandoned corner at 157 Norfolk Street which encompasses real property Lots 16, 18, and 19 in Block 154. Members of the Garden cleared debris and enclosed the premises by a chain link fence. Access to the premises was via gates controlled by members who had a key. Members have cultivated the premises as a garden with various plantings. The complaint goes on to allege that the members of the Garden constructed structures upon the premises including walkways, a fish pond, playground and a wooden stage for performances. The members conduct youth programs on the premises always under the supervision of a member.

The complaint further alleges that the members of the Garden actively claimed ownership of the subject premises. It is asserted that in August 1999 the defendants or their agents cut through the fence that had been erected by the members of the Garden and entered upon the premises damaging a structure that

the Garden members had erected. Defendants then allegedly attempted to erect a fence of their own within the property. Plaintiff asserts that members of the Garden tore down defendants' erections and excluded any trace of defendants from the premises.

Plaintiff asserts that this action is being commenced to settle their title to one of the three lots that comprise the Garden, specifically Lot 19. Plaintiff asserts that the other two lots comprising the Garden, Lots 16 and 18 have been enrolled in New York City's "Green Thumb" Program. However, on May 15, 2013, plaintiff states that defendants forcibly entered upon Lot 19, removed plaintiff's structures and erected a metal fence inside the lot limits.

The complaint has four causes of action. The first seeks a declaratory judgment that plaintiff has fee title Lot 19 under the doctrine of adverse possession. RPAPL 501, 522; CPLR 212 (a); but see Franza v Olin, 73 AD3d 44, 45 (4th Dept 2010) ("neither a declaratory judgment action nor a special proceeding is the proper procedural vehicle to determine title to the disputed property [see generally CPLR 103[b]]. Rather, the correct procedural vehicle is an action pursuant to RPAPL 1501"). Pursuant to CPLR 103 (b) the court shall treat this claim as being brought pursuant to RPAPL 1501. See Franza, supra. The second cause of action seeks to permanently enjoin the defendants

from trespassing upon the premises. The third cause of action asserts a claim for private nuisance based upon defendants erection of a fence around the parcel. The fourth cause of action is for trespass and the fifth cause of action is for ejectment. The sixth and final cause of action is for damages allegedly caused by the defendants under RPAPL 861.

Defendants now move pre-answer to dismiss plaintiff's action. The court shall decide both motions, Sequences Number 2 & 3, together herein. On Motion Sequence No. 2, defendants Norfolk Street Development, LLC, S&H Equities (NY), Inc., and Serge Hoyda (collectively "Norfolk"), who claim to have previously held record ownership of the subject parcel move for dismissal. On Motion Sequence No. 3, 157, LLC, (157) allegedly the current record owner, also seeks dismissal of plaintiff's complaint.

On both motions, defendants move to dismiss plaintiffs complaint pursuant to CPLR 3211 (a) (3) & (7). Therefore, as stated by the Court,

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. . . In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v Martinez, 84 NY2d 83, 87-88 (1994) (internal citations and quotations omitted).

Defendants on both motions argue that plaintiff has failed to adequately plead the necessary elements of adverse possession and thus its claim of ownership should be dismissed. Defendants also argue that plaintiff lacks standing to bring this action.

The law of adverse possession prior to 2008 was stated by the Court as follows:

> Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely (RPAPL former 521).4 To establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years). The character of the possession must be such that [it] would give the owner a cause of action in ejectment against the occupier. In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was usually cultivated or improved or protected by a substantial inclosure (RPAPL former 522). Because the acquisition of title by adverse possession is not favored under the law, these elements must be proven by clear and convincing evidence.

Estate of Becker v Murtagh, 19 NY3d 75, 80-81 (2012) (citations and internal quotations omitted). However,

> In 2008 the Legislature enacted changes to the adverse possession statutes contained in RPAPL article 5 (see L 2008, ch 269). In RPAPL 522, which deals with an adverse possession "not under [a] written instrument or judgment," the Legislature replaced the words "land is

> deemed to have been possessed and occupied . . . [w]here it has been usually cultivated or improved," with the words "land is deemed to have been possessed and occupied . . . [w]here there have been acts sufficiently open to put a reasonably diligent owner on notice" (L 2008, ch 269, §5). Additionally, the Legislature added a new section, RPAPL 543, which states: "[n]otwithstanding any other provision of this article, the existence of de minimus [sic] non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse" (RPAPL 543 [1]; see L 2008, ch 269, §8). That section further states: "[n]otwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse" (RPAPL 543 [2]; see L 2008, ch 269, §8).

Maya's Black Cr., LLC v Angelo Balbo Realty Corp., 82 AD3d 1175, 1176-77 (2d Dept 2011).

Defendants here assert that plaintiff did not occupy the property for the statutory period. Defendants further argue that the complaint fails to allege any occupancy by the plaintiff was done under a claim of right, that is plaintiff or its predecessors did not enter the premises under the belief that they owned the premises. Plaintiff opposes the motion.

RPAPL 501 (c) (3) defines claim of right in terms of adverse possession as "a reasonable basis for the belief that the property belongs to the adverse possessor." Defendants citing the Court's decision in Joseph v Whitcombe (279 AD2d 122 [1st Dept 2001]) argue that plaintiff's complaint fails to assert facts that demonstrate that the plaintiff, or its predecessors, entered the premises under a claim of right and that the failure

to assert a pre-entry claim of right is fatal to plaintiff's claim. However, defendants' argument is contrary to binding decisional law. The Court of Appeals has stated in contravention of defendants' assertions that

> "The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period" (see Monnot v Murphy, 207 NY 240, 245 [1913]). . .
> Defendants argue that there is no claim of right when the adverse possessor has actual knowledge of the true owner at the time of possession. However, longstanding decisional law does not support this position. The adverse possessor must act under claim of right. By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner. Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors. The fact that adverse possession will defeat a deed even if the adverse possessor has knowledge of the deed is not new (see Humbert v. Rector, Churchwardens & Vestrymen of Trinity Church, 24 Wend 587, 604, [1840] ["Possession by the defendant with a claim of title for twenty years, can no more be answered by averring that he knew he was wrong, than could the bar of two years, in slander, by the known falsehood of the libel for which it is prosecuted"]). The issue is "actual occupation," not subjective knowledge (see id. [emphasis omitted]).

Walling v Przybylo, 7 NY3d 228, 232-33 (2006).

Directly contrary to defendants' assertions, Walling holds that it is the conduct of exercising ownership rights over the parcel which is determinative as to whether a claim of right is asserted in the adverse possession context, not the subjective knowledge of the adverse claimant that another may have a deeded title to the premises. A claim of right is only defeated where

there is an "overt acknowledgment" by the claimant during the prescriptive period that title is vested in another. Id. at 232; see Joseph, 279 AD2d at 124 supra ("defendants' affidavit . . . acknowledging that [they] did not enter under a claim of right); All the Way E. Fourth St. Block Ass'n v Ryan-Nena Community Health Ctr., 9 Misc 3d 1122(A) [Sup Ct 2005] affd sub nom. All Way E. Fourth St. Block Ass'n v Ryan-NENA Community Health Ctr., 30 AD3d 182 [1st Dept 2006] lv denied 7 NY3d 713 [2006]).

At this pleading stage defendants do not demonstrate any facts asserted in the complaint or any documentary evidence that plaintiff, during the prescriptive period, overtly acknowledged their ownership so as to defeat assertion of a claim of right for pleading purposes. Thus the facts presented here are distinguishable from those presented in Joseph (supra) and All the Way (supra) where the Courts determined there was such an acknowledgment by the claimant during the prescriptive period. Therefore, the allegations asserted in plaintiff's complaint that members of the Garden entered upon the premises for the purposes of establishing a community operation without seeking consent of the alleged record owner are sufficient to assert a claim of right.

The defendants also argue that the plaintiff's occupancy was not continuous for the statutory period. This argument is based upon the fact that plaintiff CMG was only incorporated in 2012

and that the "tacking" doctrine does not apply because there is no allegation or evidence that CMG had the necessary privity with members of the Garden. Defendants also argue that the Garden was incapable of acquiring title to the parcel. Defendants are correct that the law is that

> An unincorporated association has no existence independent of its members (Martin v Curran, 303 NY 276 [1951]). It, therefore, lacks capacity to take or hold title to real property in its own name as grantee and deeds to such unincorporated associations are void (Schein v Erasmus Realty Co., 194 App Div 38 [2d Dept 1920]).

ATIFA v Shairzad, 4 Misc 3d 1007(A) , 2004 NY Slip Op 50752(U) *3 (Sup Ct, Queens County, June 18, 2004 [Flug, J.]). There is no dispute that the plaintiff was only incorporated in December 2012. Therefore defendants are correct that the Garden as an entity could not have acquired title to the subject premises as it was an unincorporated association of its members. However, as argued by the plaintiff based upon binding authority more than a century old, the analysis does not end there.

The Court of Appeals has held that an unincorporated association can adversely possess a parcel and then incorporate and take title to that property if the requisite requirements are met stating in pertinent part

> The [unincorporated] society at Gallupville took possession of the premises in 1844, and thereafter occupied them, claiming to own them, until April, 1869, about twenty-five years, and then it was regularly incorporated, and the plaintiff as such corporation succeeded in the possession of the premises. The society

> manifestly claimed and possessed just what was conveyed to the High Dutch Church of Schoharie, and during the whole time the society held adversely to that church; and while there was no formal conveyance to the plaintiff, it was so far in privity with the society that it has the benefit of the former possession. The corporation, when formed by virtue of section 4 of chapter 60 of the Laws of 1813, succeeded without any formal conveyance to all the property of the society and to all property held for its use. The case must be treated as if the society organized the corporation and transferred to it all the right and possession which it had. In such a case, as the law is settled in this State, there is such a continuity and privity of possession and estate as will enable the last posessor to tack to his possession the prior possession, so as to establish his title by adverse possession. . .
>
> It is objected to the views here expressed that prior to the incorporation of the Gallupville society the voluntary unincorporated society could not acquire title by adverse possession. This is doubtless true. A society of persons which could not take title by grant could not acquire it by adverse possession; but the individuals who compose such a society may acquire title by adverse possession. This society was, from 1844 to 1869, composed of the same individuals or persons claiming in succession under the same title, and in the same right. It at all times had officers, either the same or in succession, who managed its affairs and actually controlled and possessed its property, and could have been sued in an action of ejectment. Such officers could at any time have taken a grant for the benefit of the society, and could acquire title by adverse possession for the benefit of the society. When the corporation was formed in 1869, all difficulty was removed, and it had the benefit of the prior possession, and took the title.

Refm. Church of Gallupville v Schoolcraft, 65 NY 134, 144-45 (1875) (citations omitted).

Thus as argued by plaintiff, its date of incorporation has no significance in its claim for ownership based upon the actions of its members in satisfying the requisites of obtaining title

adversely. "All that is necessary in order to make an adverse possession effectual for the statutory period by successive persons is that such possession be continued by an unbroken chain of privity between the adverse possessors." Belotti v Bickhardt, 228 NY 296, 306 (1920). Defendants arguments as to the alleged lack of continuity of plaintiff's occupancy, which parallel their arguments of plaintiffs' alleged lack of capacity to take title, fail at this pleading stage because the complaint alleges that the members of the Garden exercised possessory control over the premises for a sufficient prescriptive period at least 15 years prior to any of the acts alleged by the defendants to defeat plaintiff's claims of continuity and prior to the incorporation of the plaintiff. See Oistacher v Rosenblatt, 220 AD2d 493, 494 (2d Dept 1995) (where title by adverse possession of grantor was established, grantee's subsequent non-adverse possession does not defeat title transferred by grantor to grantee as "possessory title is entirely an incident of the adverse holder's possession"). Similarly, the defendants' proffer of alleged acts by plaintiff which are argued to be sufficient to defeat plaintiff's allegations of exclusivity, if such a proffer could even be properly considered by this court on a motion against the pleadings, must fail as the proffer only cites acts which occurred after the expiration of the alleged prescriptive period. See Posnick v Herd, 241 AD2d 783, 785 (3d Dept 1997) (plaintiff's

hostile use for the prescriptive period rendered irrelevant any evidence of plaintiff's non-continuous or non-exclusive use subsequent to such period).

Therefore, the complaint adequately alleges the members of the Garden engaged in acts which, if established by proof to the applicable standard, are sufficient to set forth a claim of title by adversity and that such title was transferred to plaintiff CMG.

As the court finds that plaintiff has adequately pled a cause of action for adverse possession, defendants' arguments that plaintiff's remaining claims should be dismissed on the grounds that plaintiff does not have an ownership interest in the subject premises are not subject to adjudication at this stage of the litigation.

With respect to defendants' argument that plaintiff's case should be dismissed because it lacks the capacity to sue, binding authority upon this court states that

> Dismissal pursuant to Business Corporation Law § 1312(a) is not jurisdictional, but rather, affects the legal capacity to sue. Accordingly, a motion to dismiss for lack of compliance with Business Corporation Law § 1312(a) is properly brought pursuant to CPLR 3211(a)(3) . . . It should also be noted that the motion court's characterization of this issue as being one of standing was improper. The question of capacity to sue is conceptually distinct from the question of standing.

Digital Ctr., S.L. v Apple Indus., Inc., 94 AD3d 571, 572 (1st Dept 2012) (citations omitted). Plaintiff now submits evidence

that it is registered to do business in this State and therefore dismissal is not warranted as the nonjurisdictional defect has been cured. See Tri-Term. Corp. v CITC Indus., Inc., 78 AD2d 609, 609 (1st Dept 1980) (granting plaintiff opportunity to cure nonjurisdictional defect prior to dismissing complaint for failure to register to do business within the State).

For the foregoing reasons, the court shall deny the defendants' respective motions to dismiss the complaint.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is DENIED; and it is further

ORDERED that the parties are directed to attend a preliminary conference at IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 10:00 A.M. on Tuesday, December 8, 2015.

This is the decision and order of the court.

Dated: November 23, 2015 ENTER:

DEBRA A. JAMES J.S.C.