

**Aviation Distrib, Inc., Formed May 1945 v Aviation
Distrib., Inc., Formed Feb. 2014**

2019 NY Slip Op 31648(U)

June 10, 2019

Supreme Court, New York County

Docket Number: 155301/15

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
AVIATION DISTRIBUTORS, INC., FORMED MAY 1945
AND DIANE HASLETT,

Plaintiffs,

-against-

AVIATION DISTRIBUTORS, INC., FORMED
FEBRUARY 2014; COMMUNITY PRESERVATION
NEIGHBORHOOD INC., FUTURE HOLDING TRUST,
KOJO GLOBAL PROPERTY DEVELOPMENT INC.,
AND "JOHN DOE #1" THROUGH "JANE DOE #10,"
the last ten names being fictitious and unknown to the
plaintiffs, the persons or parties intended being the
occupants, tenants, persons or entities, if any, having or
claiming an interest in or lien upon the mortgaged premises
described in the verified complaint,

Defendants.

-----X
COMMUNITY PRESERVATION NEIGHBORHOOD, INC.,

Plaintiff,

AVIATION DISTRBTRS, INC., JOHN KWABENA-ZI,
a/k/a JOHN ZI, AVIATION DISTRIBUTORS, INC.,
VICTORIA I. KEELEY, a/k/a VICTORIA KELLEY, THE
CITY OF NEW YORK DEPARTMENT OF FINANCE
and their respective successors, assign, distributes, heirs-at-
law, next of kin and legal representatives, and John Doe and
Jane Doe, the persons or parties intended being the tenants,
Occupants, persons, entities, or corporations, if any, having
or claiming an interest in or lien upon the premises,

Defendants.

-----X
CAROL R. EDMEAD, J.S.C.:

In a consolidated action involving real estate in Manhattan, Plaintiffs in Action No. 1,
Aviation Distributors, Inc., Formed May 1945 (Aviation-1945) and Diane Haslett (Haslett)

DECISION AND ORDER

Index No. 155301/15
Motion Seq. Nos. 005

Action No. 1

Action No. 2
Index No. 153297/2014

move, pursuant to CPLR 3212, for summary judgment. Specifically, Aviation-1945 and Haslett seek an order declaring that: (1) Aviation-1945 is the owner of the Land at the property known as 44 West 73rd Street, New York, New York, Block 1125, Lot 160; (2) Diane Haslett is the sole owner/shareholder of Aviation-1945; (3) Aviation Distributors, Inc., Formed February 2014, Future Holding Trust, Kojo Global Property Development, Inc., Aviation Distribtrs, Inc., John Kwabena-Zi; a/k/a John Zi, Aviation Distributors, Inc., Victoria I. Keeley, a/k/a Victoria Kelley (collectively, Kojo) have no ownership or other interest in the Premises whatsoever; and (4) the following transactions recorded in the Office of the City Register are void: (a) The transfer of the Premises from defendant Aviation-2014 to defendant Kojo via an April 11, 2014 deed under CFRN 2014000135119; (b) the Correction Deed filed on or about October 8, 2014 under CFRN 2014000334746. Aviation-1945 and Haslett also seek dismissal of Kojo's claims.

Plaintiff in Action No. 2, Community Preservation Neighborhood Inc. (Community) cross-moves for an order declaring Community to be the owner in fee simple of the building located at the subject property and granting Community an easement. Community also seeks dismissal of all claims by other parties seeking a declaration of ownership of the premises. Kojo opposes the motion of Aviation-1945 and Haslett, as well as Community's cross motion.

BACKGROUND

This case involves a highly contested piece of real estate, and an appurtenant building, located at 44 W. 73rd Street in Manhattan. All three sets of litigants--Aviation 1945, Kojo, and Community assert rights over this parcel.

Aviation-1945 acquired the land at the Premises from nonparty Marion Miller (Miller) by deed dated December 31, 1976 (NYSCEF doc No. 195) (the December 1976 deed). Haslett

presents checks in the amount of \$58,672.30 that she has issued, between 2005 to 2011, to pay for real estate taxes Aviation-1945 owed on the premises (NYSCEF doc No. 199).

Haslett describes herself as the owner of Aviation-1945. The court notes, however, that Aviation-1945 was dissolved--three years after acquiring the land at the subject property--on March 27, 1979 (NYSCEF doc No. 207). Haslett acknowledges this, but asserts that Aviation-1945 has been operating as a *de facto* corporation for the last 30 years with her as the sole shareholder (NYSCEF doc No. 181, paragraphs 11-12).

Haslett is also the sole shareholder and president of nonparty El Pridian Corporation (El Pridian). Haslett alleges that on the same date that Miller deeded Aviation-1945 the land, Miller also entered into 99-year lease for the building on the Premises with El Pridian. While Haslett cannot locate the lease (*see* NYSCEF doc No. 227 [an affidavit from Haslett outlining the history of the lease's maintenance, as well as her efforts to locate the lease]), Haslett and Aviation-1945 submit a memorandum of lease and urge the court to accept it as the best evidence of the lease (NYSCEF doc No. 32).¹ The memorandum of lease, filed with the City Register on January 3, 1977, states that the lease began on December 31, 1976 and terminates on December 31, 2075.

Following the death of Miller, Community purchased from her estate the ownership rights in the "premises" that the estate retained (NYSCEF doc No. 39). Community filed a deed with the City Register reflecting its acquisition of these rights on February 23, 2014 (*id.*) (February 2014 deed). The deed specifically states that for "ten dollars and other valuable consideration," Community acquired Miller's remaining ownership rights in the premises "to the

¹ No party substantially challenges that the original lease cannot be found and that the memorandum of lease is valid secondary evidence.

extent owned by [Miller's estate] and subject to the 99 years lease held by El Pridian Corporation" (*id.*).

Meanwhile, Kojo, through its principle John Kwabena-Zi (Zi) forged a 1976 contract of sale and a 1977 deed, which was filed in October 2014 (the 1977/2014 Deed). In connection with these forgeries, Zi was convicted of grand larceny in 2017 (*see* NYSCEF doc Nos. 201-206 [transcripts of Zi's criminal proceeding]). The evidence proffered by the prosecution at trial included the fact that the subject deed, purportedly recorded in 1977, utilized Calibri font, which was invented in 2004, to describe, among other things, satellite dishes, which also did not exist in 1977 (*id.*).

Despite Zi's conviction, Kojo maintains that it is, nevertheless, the rightful owner of the subject property. Thus, the court must parse three deeds--the December 1976 deed, the February 2014 deed, and the 1977/2014 deed--and their implications for the three sets of litigants before the court.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. The 1977/2014 Deed

Both Aviation-1945 and Community argue that the 1977/2014 Deed is a nullity. The court agrees, as a criminal proceeding already determined that the 1977/2014 Deed, as well as the transfer underlying it, were forgeries. The doctrine of collateral estoppel applies to this issue.

“The doctrine of collateral estoppel is applicable where the issue in the current litigation is identical to a material issue decided in a prior proceeding, and the party to be precluded had a full and fair opportunity to litigate the issue in that proceeding” (*Auqui v Seven Thirty Ltd. Partnership*, 83 AD3d 407, 410 [1st Dept 2011]). While the party arguing for collateral estoppel has the burden of showing that the issue in question is identical and decisive, it is the opposing party’s burden to show the absence of a full and fair opportunity to litigate the issue in the prior determination (*Ryan v New York Tel. Co.*, 62 NY2d 494, 501 [1984]).

Aviation-1945 makes an exhaustive showing that the issue of whether the 1977/2014 Deed was a forgery was fully litigated in the criminal proceeding (NYSCEF doc Nos. 201-206). In similar circumstances, the Appellate Division has held that a criminal conviction for forgery could not have been obtained “without a concomitant determination that the deed and mortgage in question were fraudulent” (*Altegra Credit Co. v Tin Chu*, 29 AD3d 718 [2d Dept 2006]).

Moreover, it is undisputed that Zi is in privity with all of the Kojo entities claiming ownership rights to the premises. In these circumstances, the criminal proceeding’s determinations as to the validity of the 1977/2014 Deed, and the documents underpinning it, are binding on the Kojo entities as well as Zi (*see Altegra Credit Co.*, 29 AD3d at 720 [holding that

since there was privity between the individual convicted of forging documents and his successor in interest, “the latter cannot now claim that it was denied a full and fair opportunity to litigate said issue in the criminal proceeding”]).

In Kojo’s brief opposition, it argues that, as Zi is appealing his conviction, the doctrine of collateral estoppel does not apply. However, Kojo does not support this contention with citation to caselaw.

In short, the criminal proceeding definitively determined that the Zi and the Kojo entities have no ownership rights to the premises. Accordingly, the branches of Aviation-1945 motion and Community’s cross motion that seek dismissal of Kojo’s claims must be granted. Moreover, the branch of Aviation-1945’s motion seeking a declaration that the 1977/2014 deed, and the transfer underlying it, are void must also be granted. Finally, Aviation-1945 is entitled to a declaration that Kojo has no interest in the subject property.

II. The December 1976 Deed

No party challenges the validity of the December 1976 deed. Moreover, Aviation-1945 and Community both agree that the deed granted Aviation-1945 ownership of the land of the Premises. The deed refers to “[a]ll that certain plot, piece or parcel of land” at the Premises, but does not refer to the appurtenant building (NYSCEF doc No. 195). Thus, it is clear that Aviation-1945 is the owner of the land of the Premises.

The court notes that no party attacks Aviation-1945’s assertion that it has been operating as a *de facto* corporation since its formal dissolution in 1979. “Under very limited circumstances, courts may invoke the de facto corporation doctrine where there exists (1) a law under which the corporation might be organized, (2) an attempt to organize the corporation and (3) an exercise of corporate powers thereafter” (*In re Hausman*, 13 NY3d 408, 412 [2009]). Here, Aviation-1945

has made a *prima facie* showing that, subsequent to 1979, it continued to operate as a corporation by paying real estate taxes on the Premises. As that showing has not been rebutted, the court deems Aviation-1945 a *de facto* corporation. Moreover, no party has rebutted Haslett's *prima facie* showing that she is the sole shareholder of Aviation-1945. Thus, the branch of Aviation-1945 and Haslett's motion that seeks a declaration of Haslett's sole ownership of Aviation-1945 must be granted.

III. The February 2014 Deed

As discussed above, the February 2014 Deed transferred all rights that Miller retained in the Premises at the time of her death to Community, "subject lease held by El Pridian Corporation" subject to the 99 years lease held by El Pridian Corporation" (NYSCEF doc No. 39). This deed, like the December 1976 Deed, is valid.

The two valid deeds clearly bifurcate ownership of the land of the subject property and the building on the property. However, the court must determine to what extent the El Pridian's lease encumbers Community's ownership of the building on the Premises.

To add to the mystery of this litigation, Aviation-1945 and Haslett cannot locate the El Pridian lease. In her affidavit dated April 29, 2019, Haslett explains the case of the missing lease:

"At that time [that the lease was signed], I was the vice president of El Pridian Corporation and either Francis J. Voyticky or Richard Vogel, Esq. prepared the lease and the lease was signed by Mr. Voyticky on behalf of El Pridian. I recall the details of the lease: that it was between Marion R. Miller and El Pridian Corporation, that it was for the premises located at 44 West 73rd Street, New York, New York and that it was for a period of 99 years, beginning December 30, 1976 and terminating on December 31, 2075. This information is also reflected in the Memorandum of Lease for Recording. The lease was maintained at the offices of Mr. Voyticky and Mr. Vogel, located at 105 Court Street, Brooklyn, NY. The office has been closed now for a number of years. Mr. Vogel passed away over ten years ago and his wife passed away also and I have no other contact information regarding his files. Mr. Voyticky has also passed away. Some records were kept at my late sister's house ... Sometime in the intervening decade: since

the lease was signed, it was lost and at this time it remains lost. I have conducted a diligent search for it since this action was begun in 2015 and I have been unable to find it. I have searched all my records which include the records from my late sister's house and have been unable to locate it. To my knowledge, there were no other locations where the lease would have been kept. I am not aware of anyone else who could be in possession of the original or any copies thereof

(NYSCEF doc No. 227).²

The memorandum of lease filed with the City Register in 1977 provides that the “premises” are leased to El Pridian for “99 years commencing on the 31st day of December 1976, and terminating on the 31st day of December, 2075 (NYSCEF doc. No. 32). In these circumstances, Aviation-1945 and Haslett have sufficiently established the existence of the El Pridian lease and its terms.

“Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence” (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644 [1994] [internal citation omitted]). Here, Aviation-1945 and Haslett have made sufficiently explained the unavailability of the lease.

Moreover, the memorandum of lease makes clear that Miller’s estate had no present possessory right to convey to Community. While Miller’s estate conveyed an ownership right in the premises, *i.e.*, the building located on the subject premises, the right to possess that structure does not ripen until December 31, 2075. This is the full scope of the interest that Miller’s estate held in the subject property and it could not have conveyed more.

² No party challenges the veracity of Haslett’s efforts locate the lease. Nor does any party substantially challenge El Pridian’s lease interest.

IV. Community's Application for an Easement

Community argues that severing of the ownership interests with respect to the land and the building on the subject property created an easement by necessity. To create an easement by implication as a matter of necessity, "it must be strictly necessary to the beneficial enjoyment of the land in favor of which the easement is to be implied. Such necessity must exist in fact and not as a mere convenience" (*Town of Pound Ridge v Golenbock*, 264 AD2d 773 [2d Dept 1999]).

Here, as discussed above, Community has no present possessory interest in the subject property. Thus, it would be illogical to grant it an easement to enjoy rights that it does not have.

Accordingly, Community's application for an easement is denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Plaintiffs in Action No. 1, Aviation Distributors, Inc., Formed May 1945 (Aviation-1945) and Diane Haslett's (Haslett) motion for summary judgment is granted; and it is further

ORDERED, ADJUDGED and DECLARED that:

(1) Aviation-1945 is the owner of the Land at the property known as 44 West 73rd Street, New York, New York, Block 1125, Lot 160; (2) Diane Haslett is the sole owner/shareholder of Aviation-1945; (3) Aviation Distributors, Inc., Formed February 2014, Future Holding Trust, Kojo Global Property Development, Inc., Aviation Distributors, Inc., John Kwabena-Zi; a/k/a John Zi, Aviation Distributors, Inc., Victoria I. Keeley, a/k/a Victoria Kelley (collectively, Kojo) have no ownership or other interest in the Premises whatsoever; and (4) the following transactions recorded in the Office of the City Register are void: (a) The transfer of the Premises from defendant Aviation-2014 to defendant Kojo via an April 11, 2014 deed under CFRN 2014000135119; (b) the Correction Deed filed on or about October 8, 2014 under CFRN 2014000334746;

And it is further

ORDERED that Kojo's claims of ownership are dismissed; and it is further

ORDERED that Plaintiff in Action No. 2, Community Preservation Neighborhood Inc.'s cross motion for summary judgment is granted in part and denied in part; and it is further

ORDERED, ADJUDGED and DECLARED that:

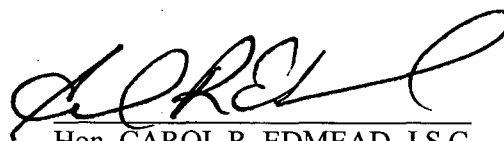
Community Preservation Neighborhood Inc. is the owner of the Premises, i.e., the building, at the property known as 44 West 73rd Street, New York, New York, Block 1125, Lot 160. However, this ownership right is subject to the 99-year lease held by nonparty El Pridian Corporation. Thus, Community Preservation Neighborhood Inc. has no present possessory right in the premises until December 31, 2075;

And it is further

ORDERED that counsel for Aviation-1945 and Haslett shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: June 10, 2019

ENTER:



Hon. CAROL R. EDMEAD, J.S.C.

**HON. CAROL R. EDMEAD
J.S.C.**