Hamik v Lenox Ave. Commons LLC
2020 NY Slip Op 31858(U)
June 15, 2020
Supreme Court, New York County
Docket Number: 653110/2018
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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BRAD HAMIK and SANSAN LO

Plaintiffs,

-against-

LENOX AVENUE COMMONS LLC,
LENOX PARKING GARAGE LLC,
CITY PARKING, INC., and
THE BOARD OF MANAGERS OF THE LENOX CONDOMINIUM

Defendants.

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INDEX NO.: 653110/2018

SEQ. NO.: 002

DECISION AND ORDER

MELISSA A. CRANE, J.S.C.:

Plaintiffs, Brad Hamik and Sansan Lo, own Condominium Unit 9J located at 380 Lenox Avenue, New York, New York (the "Condo"). Defendant Lenox Commons is the owner of the Condo's commercial unit, which operates as a parking garage (the "Parking Garage"). Defendants Lenox Parking and Citi are the lessees and operators of the Garage.

On January 26, 2007, Abraham Berger, plaintiffs' predecessor-in-title, purchased and acquired the deed for unit 9J for $798,950 from the Condo's Sponsor (*see* Blumenfield Aff dated October 22, 2019, ¶ 7[d]). The purchase price included $758,950 for Unit 9J, plus $40,000 for a parking easement, a non-exclusive right to park or store a motor vehicle in the Condo's Parking Garage (*id.*). On March 4, 2008, the Condo's Sponsor sold the Parking Garage to Labro Harlem Realty, LLC ("Labro Realty"). The Sponsor transferred title to Labro Realty in a deed dated March 4, 2008, and recorded on April 24, 2008. On December 1, 2014, Lenox Commons purchased the Parking Garage from Labro Realty. Labro Realty transferred title to Lenox Commons in a deed dated December 1, 2014, and recorded on December 19, 2014.

Subsequently, on July 1, 2017, Lenox Commons leased the Parking Garage to Lenox Parking, pursuant to a written lease. During lease negotiations, Lenox Commons told Lenox Parking that certain residential units had a parking easement for reduced parking rates (*see* Feldman Aff, dated October 10, 2019, Ex. A, Massie Aff ¶ 4). Lenox Commons specifically listed the units that had the easement, that included 2C, 3A, 3B, 4C, 4F, 5J, 6C, 7E, 8B, 9A, 9B, and PHD. The list did not include 9J (*id.*). In addition, when Lenox Parking started operating the Parking Garage, Abraham Berger was not renting a space in the Garage (*id.* at 5).

On February 8, 2018, plaintiffs purchased and acquired title to Unit 9J from Abraham Berger for $1,160,000. Then, on February 21, 2018, plaintiffs executed a two-year lease to tenants Roger Parris and Judith Parris ("plaintiffs tenants"). The lease included all appurtenant rights and easements attached to Unit 9J, required under the By-Laws of the Condo. Plaintiffs, with the understanding that they had a parking easement, paid a monthly service fee in addition to common charges, to maintain the easement. The current service fee for the parking easement should be $121.03. However, starting in January 2019, Lenox Parking required plaintiffs to pay an additional $50.00 per month ($171.03) to use the parking easement (*see* Hamik Aff, dated September 23, 2019, Ex. A, ¶ 9).

On June 21, 2018, plaintiffs commenced this action, and claimed that defendants wrongfully obstructed and unreasonably conditioned access to the parking easement when it demanded payment of additional money. On December 5, 2018, plaintiffs discontinued this action as to defendant The Board of Managers of the Lenox Condominium (see NYSCEF doc no 42). Further, plaintiff has served defendant Lenox Commons, the Garage Unit owner, with the complaint, but Lenox Commons has not appeared in this action or answered the complaint. Plaintiffs now move pursuant to CPLR 3212, for summary judgment against defendants for (i)

declaratory judgment on plaintiffs' entitlement to the parking easements; and (ii) a money judgment for the money that defendants charged plaintiff for use of the parking easement in excess of what the Condo's Offering Plan permitted. Defendants Lenox Parking and Citi oppose plaintiffs' motion, and ask the court to dismiss the plaintiffs' complaint. However, defendants have not cross-moved to dismiss. Accordingly, the court will not address their request at this time. The court also reminds both sides that there is to be no future motion practice without prior conference with the court.

Standard of Review

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the court must deny the motion (*id*.). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc*., 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp*., 79 NY2d 540, 555 [1992]).

Discussion

The issue at the crux of this case is whether Lenox Commons had notice of the non-exclusive parking easement that Abraham Berger purchased for $40,000, but that Mr. Berger neglected to record against Lenox Commons.

A bona fide purchaser of real property takes the property free and clear of any prior conveyance, encumbrance, or servitude if the purchaser did not have actual or constructive notice at the time of purchase (*see* Real Property Law § 291*).* Absent actual notice, constructive or inquiry notice of easements that appear in deeds or other instruments of conveyance in the property's direct chain of title bind owners of a servient estate (*Witter v Taggart,* 577 NY2d 234, 238 [1991]). Inquiry notice arises when there are sufficient facts to "excite the suspicion of an ordinary prudent person to investigate" (*Akasa Holdings, LLC v 214 Lafayette House, LLC,* 177 Ad3d 103 [1st Dept 2019], *citing to Anderson v Blood,* 152 NY 285, 293 [1897]). A purchaser with prepurchase notice, actual or constructive, of an unrecorded instrument is not a good faith purchaser for value and cannot avail itself of the benefits of the recording statutes (*Unique Laundry Corp v Hudson Park NY LLC,* 55 AD3d 382 [1st Dept 2008]). In counties that use a "block and lot" indexing system, like New York City, a purchaser has notice of all matters indexed under the block and lot corresponding to the purchaser's property, regardless of whether that information appears in the direct chain of title (*Farrell v. Sitaras,* 22 Ad3d 518, 520 [2d Dept 2005]).

Defendants assert that the Abraham Berger, and plaintiffs as successor-in-title, did not record Unit 9J's parking easement within the Parking Garage's direct chain of title. The building that encompasses the residential units and Parking Garage contains 79 different tax lots in Block 1727. The Parking Garage is Lot 1001, another commercial unit is Lot 1002, and 77 individual

residential units are Lots 1003-1079. Unit 9J is Lot 1062. In December 2014, when Lenox Commons took title to the Parking Garage, defendants claim that only 13 of the Condo's residential unit owners had recorded their deeds against the Garage. Defendants argue that there are 77 individual parcels of land, and Mr. Berger in Lot 1062 did not appear to have an easement recorded against the Parking Garage in Lot 1001.

Plaintiffs argue that it is irrelevant whether Mr. Berger recorded Unit 9J's deed against the Parking Garage. Plaintiffs assert that the Condo recorded the Declaration itself against the Garage Unit Lot 1001, and therefore, that afforded defendants notice and plaintiffs' easement exists in Lenox Commons' direct chain of title. According to the Condo's Offering Plan, the Sponsor offered for sale "81 Parking Easements" at the price of $40,000 per easement (*see* Blumenfield Aff, dated October 22, 2019, ex 1). The contract of sale between Mr. Berger and plaintiffs included, in section 2(ii), the "easement to gain access to and park a motor vehicle in the parking garage located at the Condominium" (*see* Blumenfield Aff, dated October 22, 2019, ex 7). The language in Mr. Berger's deed, and subsequently plaintiffs' deed as successor-in-title, states

> ***TOGETHER with a non-exclusive easement to gain access to park or store a motor vehicle in the Commercial Unit of the Condominium which is identified and used as a parking garage (the one primarily located on the lower level of the Building and referred to as the "Garage Unit")*** subject to (i) encroachments and easement in favor of all other Unit owners that purchase such nonexclusive parking easements, (ii) such reasonable rules and regulations as may be promulgated by the Owner of the Garage Unit, and (iii) said Garage Unit Owner's continuing right to inspect, maintain and/or repair the Garage Unit.
> (*see* Hamik Aff, dated September 23, 2019, Ex. A).

The deed that Lenox Commons signed ("Garage Unit Deed"), states

> Together with and subject to, the rights, obligations, easements, restrictions and other provisions set forth in the Declaration and the By-Laws of The Lenox Avenue Condominium, as the same may be amended from time to time, all of ***which shall constitute covenants running with the Land and shall bind any***

> ***person*** having at any time any interest or estate in the Unit, as though recited and stipulated at length herein.
>
> ***By executing this Deed, the Grantee accepts and ratifies the provisions of the Declaration and the By-Laws and the Rules and Regulations of the Condominium recorded simultaneously with and as part of the Declaration*** and agrees to comply with all the terms and provisions hereof, as the same maybe amended from time to time by instruments recorded in the City Register's Office. (*see* Antar Aff, dated September 23, 2019, Ex. F).

Based on the foregoing, there are disputed material issues of fact that the court cannot determine without a trial. The Offering Plan, Declaration and By Laws, and Mr. Berger's and plaintiffs' deeds created a claim to a parking easement in the Parking Garage. However, Mr. Berger failed to record Unit 9J, Lot 1062, against the Parking Garage. Mr. Berger also apparently did not rent a space in the Parking Garage when Lenox Parking took over the lease in 2017 (*see* Feldman Aff, dated October 10, 2019, Ex. A, Massie Aff ¶ 5). Plaintiffs do not state whether or not Mr. Berger paid the monthly service fee like other unit owners who had recorded parking easements from 2007-2017, so as to give Lenox Parking inquiry notice. Plaintiffs claim that, since January 2019, they have paid an extra $50.00 a month over the amount set forth in the Offering Plan to use the parking easement. It is unclear whether plaintiffs were paying the reduced parking rate, like other units with parking easements, prior to January 2019.

Thus, it is an issue of fact whether it would have been reasonable for Lenox Parking to inquire if plaintiffs had a parking easement upon receiving plaintiffs' monthly payments for their tenants' use of the easement. Mr. Berger and plaintiffs' monthly service fee payments might have put Lenox Parking on notice that they should have conducted a reasonable inquiry and search of Unit 9J's real property record.

Further, an issue of fact exists as to whether, during lease negotiations, Lenox Commons should have been on notice that Unit 9J had a parking easement because 13 other residential

units had recorded easements. The Garage Unit deed that Lenox Commons signed clearly stated that the parking easement "constitutes a covenant running with the Land and shall Bind…" the Garage owner. That the deed and Offering Plan provided notice to Lenox Commons that it purchased the Garage Unit with easements, might have rendered it reasonable to expect Lenox Commons to conduct a property search for each of the 77 residential unit Lots.

Plaintiffs rely on the court's holding in *Asaka Holdings, LLC v 214 Lafayette House LLC,* 177 AD3d 103 [1st Dept 2019], finding that a recorded Declaration containing an easement put the owner of the servient estate on constructive notice, irrespective of a later ministerial error that broke the direct chain of title. In *Asaka,* the defendant's predecessor-in-interest properly recorded the easement in 1981 against Lot 30. Prior to that, in the 1970s, the easement was part of Lot 9. In 1984, the city subdivided Lot 30 into three subdivisions, including Lot 9, which again contained the easement at issue (*id.* at 105-106). However, the easement was not reindexed as Lot 9. The lower court in *Asaka Holdings* reasoned that a reasonably prudent prospective purchaser would have realized, after completing a search limited to documents indexed against Lot 9, that the results of that search did not provide a full picture of servient estate's title status, and that there was an apparent gap in the chain of title (177 AD3d at 106).

Unlike in *Asaka,* because Mr. Berger did not record the easement against the Parking Garage, Lenox Commons never encountered an incomplete chain of title. Although the Condo recorded the Declaration itself against the Garage Unit Lot 1001, Unit 9J had its own Lot, 1062. Defendants claim that only 13 of the Condo's residential unit owners had recorded their deeds against the Garage. It is not as obvious in this case whether defendants reasonably should have suspected a break in Unit 9J's title status and conducted a search of every remaining unit of the

Condo's residential units. Notably, plaintiffs have apparently chosen not to sue the seller of the unit, Abraham Berger, for breach of contract or similar theory for failure to record the deed.

For these reasons, the court denies plaintiff's motion for summary judgment.

Accordingly, it is

ORDERED that the court denies plaintiff's motion for summary judgment (motion seq. no. 2).

The parties are directed to contact the court at macrane@nycourts.gov, cc'd to all sides, to arrange for a settlement conference.

Dated: June 15, 2020

ENTER:

HON. MELISSA A. CRANE, J.S.C.