

<b>Palmer v Mt. Calvary Ind. Africate M.E. Church, Inc.</b>
2021 NY Slip Op 30013(U)
January 4, 2021
Supreme Court, New York County
Docket Number: 160452/2017
Judge: Alexander M. Tisch
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material issues of fact from the case” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (id.). “In this regard, CPLR 3212(b) provides that a summary judgment motion ‘shall be supported by affidavit’ of a person ‘having knowledge of the facts’ as well as other admissible evidence” (Saunders v J.P.Z. Realty, LLC, 175 AD3d 1163, 1164 [1st Dept 2019]). “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]; see Melendez v Dorville, 93 AD3d 528 [1st Dept 2012]).

As relevant here, a claim of adverse possession may be proven by demonstrating possession that is “(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period” (Walling v Przybylo, 7 NY3d 228, 232 [2006]; see RPAPL § 521). The required period is ten (10) years in New York State; and the claim must be proven by clear and convincing evidence (Walling, 7 NY3d at 232).

In support of its motion, defendant submits an answer dated October 18, 2018 from a separate personal injury action.<sup>1</sup> The plaintiffs in this action asserted an answer as defendants in that action denying any ownership, adverse possession, or control over the subject premises. Defendant asserts, without any explanation, that those admissions negate essential elements of all of plaintiff’s claims and seek summary judgment accordingly.

While defendant correctly acknowledges that the answer filed in the related action may constitute a judicial admission, they are not “formal” and therefore not conclusive. Rather, they are considered as “evidence” of the particular fact or fact(s) (Matter of Matter of Liquidation of

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<sup>1</sup> *Sable v Mt Calvary Independent Africate Methodist Episcopal Church, Inc., et al*, Index no. 154327/2018.

Union Indem. Ins. Co. of New York, 89 NY2d 94, 103 [1996]; see Cook v Barr, 44 NY 156, 158 [1870]). This one “admission,” is insufficient to meet defendant’s burden demonstrating entitlement to judgment as a matter of law. Indeed, it may be irrelevant if plaintiffs could otherwise demonstrate they met all the elements for the requisite 10 years prior to this statement being made.

Defendant also submitted an affidavit from Penny Hyman, who asserts that she is the daughter of Rev. Gracie Hyman, who was the owner and most recent pastor of defendant (NYSCEF Doc. No. 34). Ms. Hyman’s affidavit introduces two letters or notes written by plaintiffs in 2008 and 2009, asking to be contacted concerning the condition/alleged neglect of the subject premises, and various maintenance and costs plaintiffs had incurred (NYSCEF Docs. Nos. 38, 39). Defendant argues that “[t]hese letters constitute admissions by Plaintiffs that during the statutory period, Plaintiffs believed that Defendant Church remained responsible for the maintenance and upkeep of the Disputed Building” (NYSCEF Doc. No. 48).

Ms. Hyman’s affidavit and the two letters should not be considered by the Court as Ms. Hyman does not state her authority with respect to the defendant entity (see, e.g., HSBC Bank USA, N.A. v Betts, 67 AD3d 735, 736 [2d Dept 2009] [“the record is barren of any evidence demonstrating that agent’s authority to act on behalf of the plaintiff”]). More importantly, Ms. Hyman affirmatively states that no one in the Hyman family ever received those letters but does not explain where they came from. Accordingly, she has not demonstrated any personal knowledge of those specific facts and/or the evidence submitted (see Saunders, 175 AD3d at 1164 [“A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent’s prima facie burden”])).

Even if they were considered, defendant does not explain what significance they have in terms of the elements of any claim. If it is to suggest, for example, that plaintiffs acknowledged and/or had actual knowledge of a different owner, or the title owner, such “fact” would not negate the claim of right element and defeat the adverse possession claim (Walling, 7 NY3d at 232-233). Further, the parties conduct overall, throughout the statutory time period, would probably be more indicative of whether the element has or has not been met (id. [“[c]onduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors”]). As discovery in this matter has barely begun, it is premature to dismiss the adverse possession claim based on these two letters (see e.g., Rodriguez Pastor v DeGaetano, 128 AD3d 218, 227-28 [1st Dept 2015]).

Accordingly, it is hereby ORDERED that defendant’s motion is denied; and it is further ORDERED that plaintiffs’ cross-motion is granted in part solely to the extent that defendant shall (as directed in this Court’s prior order dated January 20, 2020 [NYSCEF Doc. No. 32]) re-serve courtesy copies of demands within twenty (20) days from entry of this order; plaintiffs shall respond within forty-five (45) days thereafter; and it is further ORDERED that the cross-motion is otherwise denied without prejudice; and it is further ORDERED that the parties shall appear for a remote status conference on 3/10/2021 via Microsoft Teams (link to be provided by Part Clerk Michelle Cruz [miccruz@nycourts.gov]).

This constitutes the decision and order of the Court.

ALEXANDER M. TISCH, J.S.C.

	1/4/2021				
	DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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