

<b>RLR Invs., LLC v FMC Co.</b>
2021 NY Slip Op 31295(U)
April 14, 2021
Supreme Court, Kings County
Docket Number: 526739/19
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 4 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 14<sup>th</sup> day of April, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

RLR INVESTMENTS, LLC,

Plaintiff,

- against -

Index No. 526739/19

FMC COMPANY and FMC ENTERPRISES, LLC,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_

14, 16-26

Opposing Affidavits (Affirmations) \_\_\_\_\_

27-33

Upon the foregoing papers in this action for a declaratory judgment regarding a mutual driveway easement, plaintiff RLR Investments, LLC (RLR) moves (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (b), granting it a judgment on the pleadings on Count II of the amended complaint.

By a February 9, 2021 order, this court converted RLR's motion (in mot. seq. one) to a CPLR 3212 motion for partial summary judgment on Count II of the complaint, pursuant to CPLR 3211 (c). After conversion, the parties were provided an ample

opportunity to supplement the record to submit any evidence that could properly be considered either in support of or in opposition to RLR's summary judgment motion.

### *Background*

On December 9, 2019, RLR commenced this action against FMC Company by filing a summons and an unverified complaint. Thereafter, on January 15, 2020, RLR filed an amended complaint adding FMC Enterprises, LLC (FMC LLC), FMC's Company's successor, as a defendant.

The amended complaint alleges that RLR is the owner of the property at 512 Gardner Avenue in Brooklyn (RLR Property), which it leased to Truck-Rite Distributions Systems Corporation (Truck-Rite) (amended complaint at ¶¶ 4 and 8). FMC Company and FMC LLC are the alleged owners of the adjacent property at 500 Gardner Avenue in Brooklyn (FMC Property), which they leased to Old Dominion Freight Line, Inc. (Old Dominion) (*id.* at ¶¶ 5-6). The amended complaint alleges that "[t]here is a mutual driveway easement for a strip of land that encompasses both a portion of the RLR Property and a portion of the [FMC] Property (the 'Easement') (*id.* at ¶ 9).

The amended complaint further alleges that, in June 2013, FMC Company and Old Dominion executed an amended lease that "purported to add use of the area governed by the Easement ('RLR's Easement Property') to their lease for an additional rent payment . . ." and "[i]n or about August 2015, RLR learned that FMC [Company] and/or Old

Dominion were parking trailers on, and blocking full access to, RLR's Easement Property" (*id.* at ¶¶ 10-11).

The amended complaint alleges that, on or about November 2, 2015, RLR commenced an action in the Kings County Supreme Court under index No. 513477/15 asserting claims against FMC Company and Old Dominion for trespass and unjust enrichment (Prior Litigation) (*id.* at ¶ 13). During the Prior Litigation, FMC Company allegedly "asserted that it had obtained title to RLR's Easement Property by way of adverse possession [but] FMC [Company] never advised the Court that it had sold or transferred any of the property that was at issue in the Prior Litigation [to FMC LLC]" (*id.* at ¶ 16).

Count II of the amended complaint alleges that, in the Prior Litigation, FMC Company asserted a counterclaim alleging that it could not be liable for trespass because it obtained title to RLR's Easement Property by adverse possession (the Counterclaim) (*id.* at ¶ 29). FMC Company and Old Dominion allegedly moved to dismiss RLR's complaint in the Prior Litigation (*id.* at ¶ 30). The court issued a June 18, 2019 order dismissing, among other things, the Counterclaim (*id.* at ¶ 32). The amended complaint alleges that FMC Company did not appeal from the dismissal of the Counterclaim, and thus, "the Court's dismissal of the Counterclaim in the Prior Litigation is a final judgment as against both FMC [Company], the named party, as well as FMC LLC, the alleged successor in interest" (*id.* at ¶ 33). Count II of RLR's amended complaint seeks a declaration that the assertions by FMC Company and its alleged successor, FMC LLC, "that either has obtained

title by way of adverse possession or other improper and invalid transfer of ownership to a portion of the RLR Easement Property is barred by the doctrine of *res judicata and judicial estoppel*" (*id.* at ¶ 36).

On January 22, 2020, defendants FMC Company and FMC LLC collectively answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that "[t]he determination of the Court in the prior action was not a determination on the merits of FMC's rights with respect to adverse possession" and "[t]here was no full litigation on the parties' respective rights concerning adverse possession" (answer to amended complaint at ¶¶ 24-25).

#### ***RLR's Summary Judgment Motion***

RLR's converted motion seeks partial summary judgment on Count II of the amended complaint, by which RLR seeks a "definitive" declaration that FMC Company and FMC LLC are barred by *res judicata* from asserting in the future that they obtained title over the RLR Easement Property by adverse possession.

RLR, in support of its summary judgment motion, submits an attorney affirmation annexing exhibits, including the pleadings and some of the motion papers filed in the Prior Litigation, and a memorandum of law. In its memorandum of law, RLR asserts that "[a]s part of RLR's opposition to FMC's efforts to dismiss RLR's Complaint in [the Prior Litigation], RLR argued that FMC's Counterclaim must be dismissed because FMC had affirmatively admitted that it was on the property at issue with permission, which defeats

the hostility requirement of adverse possession[.]” “[t]he Court dismissed RLR’s complaint and FMC’s Counterclaim in that prior litigation” and FMC failed to appeal from the dismissal of the Counterclaim. RLR asserts that “[b]ecause the prior litigation involved a claim for adverse possession between RLR and FMC which resulted in a final order that FMC did not appeal, FMC is barred by the doctrine of *res judicata* from relitigating its assertion that it obtained title to RLR’s Easement Property by way of adverse possession . . .” RLR asserts that FMC LLC is equally bound by the dismissal of the Counterclaim in the Prior Litigation as FMC Company’s successor.

### *FMC’s Opposition*

FMC, in opposition, first asserts that “there is no claim pending by FMC, as a direct action, counterclaim or affirmative defense that FMC is the owner of the property described in the Driveway Easement as a result of adverse possession.” FMC argues that “RLR’s action at bar seeks an impermissible advisory opinion from this Court that if one day FMC seeks to establish by action or counterclaim that it owns the ‘Subject Property’ that FMC should be barred from asserting such claim.”

Regarding the merits, FMC argues that the dismissal order in the Prior Litigation granted FMC Company and Old Dominion’s cross motion to dismiss RLR’s complaint for trespass and unjust enrichment on the ground that RLR was an out-of-possession property owner (having leased the RLR Property to Truck-Rite) who lacked standing. FMC clarifies that RLR did not move to dismiss the Counterclaim for adverse possession, and FMC was

not provided an opportunity to address the merits of its Counterclaim. FMC asserts that the dismissal order in the Prior Litigation did not “discuss or review the merits of whether FMC had adverse possession . . .” and “does not indicate that the dismissal of the Counterclaim was on the merits or with or without prejudice.” FMC argues that “[t]he Court having dismissed RLR’s prior claims based upon lack of standing of RLR necessarily means that it did not adjudicate the merits of the claims raised therein.” FMC argues that the Counterclaim for adverse possession was “administratively” dismissed, since the court dismissed RLR’s complaint on the ground that RLR lacked standing because it determined that RLR had no possessory rights in the RLR Property.

*RLR’s Reply*

RLR, in reply, submits a memorandum of law arguing that the court should “reject” FMC’s “specious” argument that there is no justiciable controversy, since FMC did not cross-move to dismiss the complaint. RLR argues that “[t]he assertion itself, a direct attack against the landowner’s status as the landowner, immediately establishes a justiciable controversy and the landowner’s standing to challenge that claim.” RLR asserts that “[t]he fact that FMC is not at this time actively pursuing an affirmative claim for adverse possession is irrelevant” since “FMC . . . reserves the right to assert its claimed title in the future.” In addition, RLR reiterates that FMC’s Counterclaim in the Prior Litigation “was dismissed on the merits because FMC’s own multiple admissions defeated its substantive claim for adverse possession.”

### *Discussion*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Here, there is no dispute that FMC has no current claim, defense or counterclaim for adverse possession of RLR’s Easement Property, and RLR admittedly seeks a declaration, in Count II of the complaint, that FMC Company and FMC LLC have no right to assert an adverse possession claim over RLR’s Easement Property *in the future*.



However, the Second Department has held that:


“The courts of New York do not issue advisory opinions for the fundamental reason that in this State the giving of such opinions is not the exercise of the judicial function . . . Thus, courts may not issue judicial decisions which can have no immediate effect and may never resolve anything” (*Hirschfeld v Hogan*, 60 AD3d 728, 729 [2009] [internal quotations marks omitted]).

RLR’s motion for partial summary judgment on Count II of the complaint seeks an impermissible advisory opinion regarding FMC’s right to assert adverse possession in the future, which will have no immediate effect and may never resolve any actual dispute or controversy. Consequently, RLR’s motion for partial summary judgment on Count II of the complaint is denied (*see Simon v Nortrax N.E., LLC*, 44 AD3d 1027, 1027 [2007] [denying defendant’s motion for a declaration that action was commenced on certain date as an impermissible request for an advisory opinion]). Accordingly, it is hereby

**ORDERED** that RLR’s motion (in mot. seq. one) for partial summary judgment on Count II of the amended complaint is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE**