

**Buckheit v Aiken**

2022 NY Slip Op 32688(U)

August 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 5980/2016

Judge: Robin K. Sheares

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF KINGS

-----X  
 Richard A. Buckheit, The Kings County Public Administrator,  
 as the Administrator of the Estate of David Foote,

Plaintiff,

- against -

Index No. 5980/2016

Enid Aiken,

Defendant/Third-Party Plaintiff.

Motion Sequence 3,4,5

~~Nos. 04, 05, 06~~

-----X  
 Enid Aiken,

Third-Party Plaintiff,

**DECISION/ORDER**

- against -

Geneva Crandell, Davis Family Reh Master Series, LLC 809N,  
 and chai Capital, LLC,

Third-Party Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this Motion:

| <u>Papers</u>                                                            | <u>NYSCEF Document No:</u> | <u>Papers</u>                                                            | <u>NYSCEF Document No:</u> |
|--------------------------------------------------------------------------|----------------------------|--------------------------------------------------------------------------|----------------------------|
| <u>Sequence #03</u>                                                      |                            | <u>Sequence #04</u>                                                      |                            |
| Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed | 49 - 51                    | Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed | 78 - 80                    |
| Exhibits                                                                 | 52 - 62                    | Exhibits                                                                 |                            |
| Opposition                                                               | 65                         | Opposition                                                               | 95                         |
| Exhibits                                                                 | 66 -72                     | Exhibits                                                                 |                            |
| Reply                                                                    | 74                         |                                                                          |                            |
| <u>Papers</u>                                                            |                            | <u>NYSCEF Document No.</u>                                               |                            |
| <u>Sequence #05</u>                                                      |                            |                                                                          |                            |
| Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed | 82 - 83; 90                |                                                                          |                            |
| Exhibits                                                                 | 84 - 89                    |                                                                          |                            |
| Opposition                                                               | 91; 98                     |                                                                          |                            |
| Exhibits                                                                 | 99                         |                                                                          |                            |

Based on the foregoing papers, and after oral arguments, the Court's decision is as follows:

Motion sequence number 03, Defendant/Third-Party Plaintiff Enid Aiken's motion for summary judgment pursuant to CPLR §3212 is DENIED as the Court finds that there are triable issues of fact.

Defendant/Third-Party Plaintiff states that summary judgment should be granted in her favor because she has demonstrated that she obtained the property through adverse possession. In order for a party to prevail on the claim of adverse possession, the party must demonstrate that "his or her possession of the property must be actual, hostile, under a claim of right, open, notorious, exclusive and continuous for the prescriptive period (*Armour v Marino*, 140 AD2d 752, 753; *see also, Brand v Prince*, 35 NY2d 634; *Belotti v Bickhardt*, 228 NY 296)." (*Weinstein Enters. v Pesso*, 231 AD2d 516, 517 [2d Dept 1996]). Moreover, "the party asserting title by way of adverse possession must establish the existence of each of these elements by clear and convincing evidence." (*see, Van Valkenburgh v Lutz*, 304 NY 95; *Rusoff v Engel*, 89 AD2d 587; *Gerwitz v Gelsomin*, 69 AD2d 992). "If any one of these elements is not established by clear and convincing evidence, the claim of adverse possession must fail (*see MAG Assocs. v SDR Realty*, 247 AD2d 516, 669 NYS2d 314 [1998]; *Weinstein Enters. v Pesso*, 231 AD2d 516, 517, 647 NYS2d 260 [1996]). (*Fitzgerald v Conroy*, 15 AD3d 534, 534-535 [2d Dept 2005]).

Here, Defendant/Third-Party Plaintiff asserts that the court should find that she is entitled to the subject based on adverse possession. However, in her moving papers, Defendant/Third-Party Plaintiff does not provide detail as to how she satisfied each element of adverse possession. Defendant/Third-Party Plaintiff states that since the prior owner died without any known heirs, that title to his portion of the subject property passed to her husband, who held title with the prior owner as tenants in common, and then onto her at his death and that she maintained open and hostile possession of the property for over forty (40) years. However, as pointed out in opposition

papers and stated in the deposition transcript provided in Plaintiff's Opposition as Exhibit D. Defendant/Third-Party Plaintiff did not reside at the subject property. Moreover, neither the moving papers or deposition testimony detailed how Defendant/Third-Party Plaintiff's control over the subject property was exclusive as there was no testimony regarding her exclusive possession and control of the property. (*Rote v Gibbs*, 195 AD3d 1521, 1524-1525 [4th Dept 2021]) The moving papers and deposition transcript failed to demonstrate how the Defendant/Third-Party Plaintiff's possession was open and notorious in "that a casual inspection by the owner of the property would reveal the adverse possessor's occupation and use thereof." (*see, West v Tilley*, 33 AD2d 228, 230; *Shinnecock Hills & Peconic Bay Realty Co. v Aldrich*, 132 App Div 118, *affd* 200 NY 533). (*Weinstein Enters. v Pesso*, 231 AD2d 516, 517 [2d Dept 1996]).

Moreover, the Court finds that the relevant statutory period for adverse possession in this matter is twenty (20) years. The Court of Appeals has held that "... absent ouster, a cotenant may begin to hold adversely only *after* 10 years of exclusive possession. RPAPL 541's statutory presumption, therefore, effectively requires 20 years--or two consecutive 10-year periods--of exclusive possession before a cotenant may be said to have adversely possessed a property owned by tenants-in-common." (*Myers v Bartholomew*, 91 NY2d 630, 634-635 [1998]).

Finally, CPLR §212(a) states "an action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years *before the commencement of the action*." (italics added). Therefore, this Court finds that based on CPLR §212(a), the twenty (20) year period begins at the commencement of this instant action. Since Defendant/Third-Party Plaintiff failed to establish each element of adverse possession by clear and convincing evidence, and has not met the statutory twenty (20) years for adverse possession the motion for summary judgment must be denied.

Motion sequence number 04, Third-Party Defendant Geneva Crandell's cross-motion for dismissal for lack of personal jurisdiction pursuant to CPLR §3211(a)(8) and failure to state a cause of action pursuant to CPLR §32121(a)(7) is GRANTED. The electronic court file does not contain an Affidavit of Service reflecting that Defendant Geneva Crandell was served with the Third-Party Notice and Complaint, nor did Defendant/Third-Party Plaintiff provide a copy of the Affidavit of Service in her response papers. Additionally, the Third-Party Complaint fails to state a cause of action. Therefore, this action is DISMISSED as to Defendant GENEVA CRANDELL.

Finally, Motion sequence number 05, Third-Party Defendants' American Regional Real Estate Partners, Inc., Chai Capital, LLC, and Earl Davis's cross-motion for summary judgment and dismissal of the Third-Party Complaint of Defendant Third-Party Plaintiff Enid Aiken is GRANTED for the previously stated reasons.

This constitutes the Decision/Order of the Court.

Dated: August 8, 2022

ENTER:

  
\_\_\_\_\_  
Hon. Robin K. Sheares, A.J.S.C.

For clerks use only

MG

MD

Motion Seq. #03, #05, #06