Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M268705
kbp/

ALAN D. SCHEINKMAN, P.J.
WILLIAM F. MASTRO
LINDA CHRISTOPHER
PAUL WOOTEN, JJ.

2019-12251 DECISION & ORDER ON MOTION

Ranford Gayle, et al., appellants,
v 1557 Park Place Realty Corp., respondent.

(Index No. 12140/15)

Motion by the appellants, inter alia, to stay the trial in the above-entitled action and to stay their eviction from the subject premises, pending hearing and determination of an appeal from an order of the Supreme Court, Kings County, dated July 2, 2019.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

SCHEINKMAN, P.J., MASTRO, CHRISTOPHER and WOOTEN, JJ., concur.

ENTER: Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

Supreme Court of the State of New York
County of Kings

Part 91

RANFORD GAYLE AND SHERIDON GAYLE,

Plaintiff,

against

1557 PARK PLACE REALTY CORP.,

Defendants.

Index Number 12140/2015
SEQ # 008, 009, 010

DECISION/ORDER

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

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other	

Upon review of the foregoing papers, plaintiff's motion to extend time to move for summary judgment, defendant's motion for summary judgment, and plaintiffs cross-motion for summary judgment, are decided as follows:

Plaintiffs brings this action against defendant to determine ownership of the property located at 267 Linden Street, Brooklyn, New York 11237 (hereinafter "property"). Plaintiffs assert claims for the following: (1) adverse possession; (2) forged deed; (3) equitable estoppel; (4) unclean hands; and (5) unjust enrichment. Defendant's counterclaim asserts that plaintiffs knew or should have known of defendant's interest in the property. Now, defendant moves for summary judgment to dismiss plaintiffs' claims, and as to liability on their counterclaim.

Analysis:

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

(1) Adverse Possession:

To establish a claim to property by adverse possession, a claimant must prove that the possession of the property was (1) hostile under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, (5) continuous for the required statutory period (*Hogan v Kelly,* 86 AD3d 590, 591 [2d Dept 2011]). "Adverse possession is not a favored method of proving title, and a prescriptive right may be made out only by clear and convincing proof" (*Hassinger v Kline,* 441 NYS2d 933, 935 [Sup Ct Rockland Cty. 1981]; aff'd 91 AD2d 988 [2d Dept 1983]).

Defendant argues that plaintiffs cannot satisfy the first element required to establish adverse possession in that they did not possess the property under a claim of right. Real Property Actions and Proceeding Law § 501(3) specifically defines "a claim of right" as "a reasonable basis for the belief that the property belongs to the adverse possessor" (*In re Lee,* 96 AD3d 941 [2d Dept 2012]). A plaintiff's admission that title resides in another will destroy the claim, because it negates hostility and destroys the claim of right (*Van Gorder v Masterplanned, Inc.*, 78 NY2d 1106, 1107-08 [1991]; *see also Beyer v Patierno*, 29 AD3d 613, 615 [2d Dept 2006]).

Defendant contends that plaintiffs knew or should have known of defendant's superior claim to title on May 28, 2004 when plaintiffs took out a second mortgage on the property[1]. Defendant contends a title search would have alerted plaintiffs to defendants superior claim to title. Therefore, defendant contends that, as of May 28, 2004, plaintiffs did not have a reasonable basis for belief that the property belonged to them.

Under the New York Recording Act (Real Property Law § 291), "the recording of a transaction involving real property provides potential subsequent purchasers [and

---

[1] Plaintiffs took out a second mortgage, secured by the property, from Fremont Investment & Loan, which was recorded on July 30, 2004.

encumbrancers] with notice of previous conveyances and encumbrances that might affect their interests" (*Gregg v M&T Bank Corporation,* 160 AD3d 936, 940 [2d Dept 2018] [alteration in original]). "If the [encumbrancer] fails to use due diligence in examining the title, he or she is chargeable, as a matter of law, with notice of the facts which proper inquiry would have disclosed" (*id.* [alteration in original]). "When two or more prospective buyers contract for a certain property, pursuant to Real Property Law §§ 291 and 294, priority is given to the buyer whose conveyance or contract is first duly recorded" (*Avila v Arsada Corp.,* 34 AD3d 609, 610 [2d Dept 2006]).

According to Joseph Snell, president of 1557 Park Place Realty Corp., the defendant acquired title to the property by deed dated August 13, 2002 from Cortez Austin and Maretta Jackson and recorded such title in the Office of City Register of the City of New York, Kings County (hereinafter "City Register") on May 29, 2003. On the other hand, plaintiffs allege that they were also received title to the property by deed on May 4, 2003, from the same grantors, Maretta Jackson and Cortez Austin, and recorded with the City Register on September 8, 2003. Plaintiffs are not only subsequent purchasers of the property, but they were on notice, once they recorded their deed, that defendant had previously purchased the property and recorded its deed. Therefore, plaintiffs knew or should have known of defendant's superior interest in the property, thereby destroying any claim of right they may have. Accordingly, plaintiffs' claims for adverse possession are hereby dismissed.

(2) Park Place Deed

Defendant argues that the deed dated August 13, 2002 is in fact valid, and not forged. Defendant relies on the deposition testimony of grantors of the property, Cortez Austin and

Maretta Jackson. Mr. Austin and Ms. Jackson both testified that their signatures on the deed dated August 13, 2002 are genuine. Defendant points out that those signatures are also notarized. A notarized instrument raises a presumption of due execution which can only be rebutted "on proof so clear and convincing so as to amount to a moral certainty" (*Beshara v Beshara,* 51 AD3d 837, 838-839 [2d Dept 2008]). According to the deposition testimony of the notary public, Ary Bazin, his signature and notary stamp upon the August 13, 2002 deed are genuine. Mr. Bazin further testified that it was his practice to require a valid government-issued ID from any signatory prior to taking a signature on a real estate transaction during 2002.

In opposition, plaintiffs argue that defendant has not provided any consideration for the property and thus is not entitled to the protection of Real Property Law §291. Section 291 provides that priority is given to the first conveyance recorded, but that it is only applicable where the purportedly first deed was a valid deed, and was supported by valid consideration (*Barrett v Littles,* 201 AD2d 444 [2d Dept 1994]). Plaintiff contends that defendant does not provide any evidence, in admissible form, that adequate consideration was paid for the property. However, according to the certified deed dated August 13, 2002 and provided by defendant, defendant paid $265,000,000 for the property. Therefore, defendant's deed dated August 13, 2002, the deed recorded first in time, establishes that there was valid consideration to support the conveyance.

(3) Equitable Estoppel

Equitable estoppel is appropriate when one party makes a representation, verbally or through action, to another party that causes such other party to detrimentally rely on that representation or prejudicially change his position based on that representation (*DiMacopoulos v*

Consort Development Corp., 166 AD2d 631, 632 [2d Dept 1990]).

Plaintiff Sheridon Gayle testified at her deposition that she never met Park Place's principal, Joseph Snell, and had not ever heard of Snell until the date of her deposition. There is no other evidence contained in the record that reveals any interactions or contact between plaintiffs and defendant prior to this action. Further, any claim for estoppel is governed by the six-year statute of limitations (CPLR 213). Here, all of the transactions at issue took place in 2002 or 2003. Accordingly, plaintiffs' time to bring any estoppel claim expired during 2009, and that claim is dismissed.

(4) Unclean Hands

The doctrine of unclean hands applies as a defense only when the complaining party can show that the allegedly offending party is "guilty of immoral, unconscionable conduct..." (*Kopsidas v Krokos,* 294 AD2d 406, 407 [2d Dept 2002]).

With regard to the claim that defendant "wrongfully coordinated" defendant's deed, defendant's deed is not a forgery as a matter of law, and the record contains no evidence to the contrary (*Riback v Margulis,* 43 AD3d 1023 [2d Dept 2007]). Furthermore, the purported claim for unclean hands is time barred by CPLR 213 for the same reason stated above. Therefore, plaintiffs' cause of action for unclean hands is hereby dismissed.

(5) Unjust Enrichment

To succeed on their claim for unjust enrichment, plaintiffs must prove that (1) defendant was enriched, (2) at plaintiffs' expense, and (3) that it is against equity and good conscience to permit the defendant to retain the property (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]). Defendant's receipt of some benefit, standing alone, is not sufficient to

support an unjust enrichment claim (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). There must have been a transaction between the parties that the court determines is unjust (*id.*).

Here, there is no transaction between the parties. The evidence shows that defendant and plaintiffs each dealt with Mr. Cortez and Ms. Maretta, and not with each other, when obtaining their title to the property. Therefore, defendant did not confer a benefit upon plaintiffs. In addition, a cause of action for unjust enrichment is also governed by the six year statute of limitations under CPLR 213 "and begins to run upon the occurrence of the alleged wrongful act giving rise to the duty of restitution" (*US Bank National Association v Salen,* 164 AD3d 1289, 1290 [2d Dept 2018]). Because the conduct that gives rise to the unjust enrichment claim dates back to 2002 or 2003, well more than six years before this action was commenced, the claim is time-barred.

In opposition, plaintiffs argue that they are entitled to equitable subrogation. Defendant does not specifically identify this claim in its motion for summary judgment. Accordingly, to the extent that plaintiffs assert or have otherwise given sufficient notice of a claim for equitable subrogation, such a claim is preserved for trial.

(6) Plaintiffs' Cross-Motion

As an initial matter, plaintiffs' cross motion violates the rule against successive motions for summary judgment. Successive motions for summary judgment are generally disfavored and should not be permitted absent a strong showing of new evidence not available at the time of the prior motion (*Capuano v Platzner Int'l Grp., Ltd.*, 5 AD3d 620, 621 [2d Dept 2004]). The Second Department has determined that new evidence must be "facts that were not available to

the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means" (*Vinar v Litman,* 110 AD3d 867, 869 [2d Dept 2003]).

On November 10, 2016, plaintiffs moved for summary judgment on the grounds that the defendant was precluded by the doctrine of judicial estoppel from asserting a claim of ownership over the property. The motion was previously denied by the Honorable Pamela Fisher via order dated April 11, 2017. Plaintiffs provide no evidence of any new or different material facts from the time they first moved for summary judgment until the present motion. Therefore, plaintiffs' cross-motion is denied.

In addition, plaintiffs' cross-motion is untimely. The parties had previously entered into a stipulation dated February 4, 2019, in which they consented to a briefing schedule. According to the stipulation, the cross-motion was to be served and filed on or before March 26, 2019. It was filed on April 3, 2019. Therefore, plaintiffs' cross-motion is denied as it is a successive motion and it is untimely based on a previous stipulation and briefing schedule. Because plaintiffs' cross-motion is denied on these bases, their motion to extend time to move for summary judgment is denied as moot.

Conclusion

For the forgoing reasons, plaintiff's motion to extend time to move for summary judgment is denied as moot. Defendant's motion is granted to the extent that plaintiffs' claims for ownership, adverse possession, forgery, equitable estoppel, unclean hands, and unjust enrichment are dismissed. To the extent that plaintiffs assert or have otherwise given sufficient notice of a claim for equitable subrogation, such a claim is preserved for trial. Defendant moves

for summary judgment on its counterclaim, but makes no substantive argument in favor of granting summary judgment on the claim. While plaintiffs cross-move for dismissal of the claim, their cross-motion is denied on procedural grounds. Accordingly, defendant's counterclaim is also preserved for trial.

This constitutes the decision and order of the court

July 2, 2019
DATE

DEVIN P. COHEN
Justice of the Supreme Court