SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: **HON. ROBERT I. CALORAS** **PART** **PART 36 MOTIONS**
Justice

----------X

NORMAN MCKENZIE,

Plaintiff,

- v -

MAFIQ17, 9725 QUEENS VILLAGE CORPORATION, JOHN DOE, JANE DOE

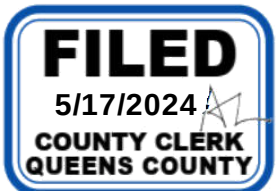
Defendants.

----------X

INDEX NO. **713624/2023**

MOTION SEQ. NO. **001**

DECISION + ORDER ON MOTION



The following e-filed documents, listed by NYSCEF under the motion, cross-motion and cross-cross-motion as: 14-43, were read on the motion, brought by order to show cause, by the plaintiff Norman McKenzie to stay, remove, and consolidate a holdover proceeding pending in the Civil Court, Queens County with this action; the cross-motion by the defendant Mafiq17 LLC pursuant to CPLR 3211 (a)(5), (7), and 4519 to dismiss the action insofar as asserted against it, and to cancel and dismiss the plaintiff's notice of pendency; and the cross-cross-motion by the plaintiff for a default judgment against the defendant 9725 Queens Village Corporation.

Upon the foregoing papers it is ordered that the motion, cross-motion, and cross-cross-motion are determined as follows:

In May 2023, Mafiq17 LLC (Mafiq) commenced a holdover proceeding against Norman McKenzie (McKenzie), among others, entitled *Mafiq17LLC v Norman McKenzie*, in the Civil Court, Queens County, under Index No. LT-308948-23/QU (the holdover proceeding). Mafiq seeks to evict McKenzie from real property known as and located at 104-81 165th Street, Jamaica, New York (the premises).

In June 2023, McKenzie commenced the instant action against Mafiq and 9725 Queens Village Corporation (9725 Queens Village), among others. In his complaint, McKenzie sets forth that prior to 1972, title to the premises was held by Douglas Alexander (Douglas) and Annie (Annie) Alexander, husband and wife, as joint tenants with rights of survivorship. Douglas predeceased Annie and, at some point prior to 2002, Annie died. He further sets forth that in 2022, by a series of conveyances, specific surviving heirs of the Alexanders conveyed their respective interests in the premises via deed to 9725 Queens Village. By deed dated January 6, 2023, 9725 Queens Village conveyed its interest in the premises to Mafiq.

McKenzie also alleges in his complaint that he has resided at the premises since 1990. He states that from 1990 through 2002, he resided at the premises as a tenant and paid rent to Barbara Thompson (Thompson), who he believed to be the owner of the premises and a surviving heir of Annie. McKenzie alleges that in 2002, Thompson advised him orally that she would convey the premises to

him in exchange for him paying the carrying charges, utilities, taxes, and other costs associated with the premises. However, this sentiment was never reduced to writing.

As a result, in 2002, McKenzie ceased paying rent. He alleges that from 2002 through the present, he has paid all utilities, carrying charges, and real property taxes for the premises and has made improvements to the premises. He asserts a first cause of action for adverse possession seeking an order declaring that he is the owner of the premises by adverse possession, and a second cause of action for preliminary and permanent injunctive relief against Mafiq to enjoin it from selling the premises and to restrain it from taking further action in the holdover proceeding.

McKenzie now moves by order to show cause to stay the holdover proceeding, remove it to this court, and consolidate it with this action. Mafiq opposes the order to show cause and cross-moves pursuant to CPLR 3211 (a)(5), (7), and 4519 to dismiss the action insofar as asserted against it, and to cancel and dismiss the plaintiff's notice of pendency. McKenzie opposes Mafiq's cross-motion and cross-cross-moves for a default judgment against 9725 Queens Village.

First, the court turns to that branch of Mafiq's motion pursuant to CPLR 3211 (a) (7) to dismiss McKenzie's cause of action asserting adverse possession. "On a motion to dismiss pursuant to CPLR 3211 (a) (7), 'the standard is whether the pleading states a cause of action' " (*Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662, 663 [2d Dept 2021], quoting *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]). "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 1181 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

"A party seeking to obtain title by adverse possession must prove, by clear and convincing evidence, the following common-law requirements of adverse possession: that the possession was (1) hostile and under claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years" (*Auto Gobbler Parts, Inc. v Serpico*, 109 AD3d 943, 943-944 [2d Dept 2013]). "To possess property under a claim of right under the common law, an individual must assert a right to the property that is adverse to the title owner and also in opposition to the rights of the true owner" (*Jasopersaud v Lewis*, 222 AD3d 630, 632 [2d Dept 2023] [internal quotation marks and citations omitted]).

Here, McKenzie's permissive possession of the property negates the element of hostility (*see id*. at 632; *Bratone v Conforti-Brown*, 150 AD3d 1068, 1171-1173 [2d Dept 2017]). In accepting the facts as alleged in the complaint as true and according McKenzie the benefit of every possible favorable inference, following 2002, when McKenzie ceased paying rent, he continued to reside at the premises with Thompson's implied or actual permission.

In opposition to Mafiq's cross-motion, McKenzie relies on RPAPL 531. " '[W]hen...permission can be implied from the beginning, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner' " (*Koudellou v Sakalis*, 29 AD3d 640, 641 [2d Dept 2006], quoting *Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 192 AD2d 501, 503 [2d Dept 1993]). However, RPAPL 531 provides that in circumstances where there is a landlord tenant relationship with no written lease, permission is implied for ten years following the time of the last rent paid, after which the tenant is deemed to have commenced holding adversely (*see* RPAPL 531; *Auto Gobbler Parts, Inc. v Serpico*, 109 AD3d at 944; *Hogan v Kelly*, 86 AD3d 590, 593 [2d Dept

2011]). " 'Hostility can be inferred simply from the existence of the remaining four elements, thus shifting the burden to the record owner to produce evidence rebutting the presumption of adversity' " (*Bratone v Conforti-Brown*, 150 AD3d at 1170, quoting *United Pickle Prods. Corp. v Prayer Temple Community Church*, 43 AD3d 307, 309 [1st Dept 2009]). However, the presumption of hostility may be rebutted by proof that the party claiming title by adverse possession sought permission for use of the property from the record owner or had a close and cooperative relationship with the record owner (*see Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]; *Bratone v Conforti-Brown*, 150 AD3d at 1171).

McKenzie argues that, by operation of RPAPL 531, the presumption of nonadversity expired in 2012 and, thus, that his claim for adverse possession ripened in 2022. However, this argument is unavailing for two reasons. First, the court notes that McKenzie does not allege in either his complaint or order to show cause that he was a tenant at the premises after 2002. Rather, he sets forth that the premises was conveyed to him in 2002 and that, subsequently, he occupied same as an owner. As such, the contention that a landlord tenant relationship existed post-2002, governed by RPAPL 531, is tenuous.

Second, even under an RPAPL 531 analysis, RPAPL 531 equates nonpayment of rent with the assertion of hostility, whereas here, Thompson and her heirs, both openly or tacitly over the years, gave McKenzie permission to reside at the premises. Indeed, McKenzie's own submissions establish that his possession of the premises was permissive and resulted from a cooperative relationship with Thompson. In his complaint, McKenzie sets forth that he and Thompson "shared a close relationship and their families were also close." In his affidavit in support of his order to show cause, McKenzie avers that in 2002, Thompson orally conveyed the premises to him in exchange for him paying the carrying charges, utilities, real estate taxes, and other charges, and maintaining, upkeeping, and repairing the premises. McKenzie also submits the affidavit of Samuel L. Crosby, dated July 24, 2023, and the affidavit of Samuel H. Crosby, dated July 24, 2023. They are heirs of Thompson who each aver that Thompson gave the premises to McKenzie pursuant to the abovementioned terms in approximately 2001, and that, since then, the premises has been owned by McKenzie.

As such, even if, by operation of RPAPL 531, the presumption of nonadversity expired in 2012, McKenzie's continued possession of the premises for the subsequent 10-year period was not hostile insofar as it was permissive. Based on the record before the court, the first distinct assertion of a right hostile to the owner did not occur until 2023, when Mafiq commenced the holdover proceeding and McKenzie commenced the instant action. Consequently, McKenzie fails to state a claim for adverse possession insofar as, accepting the facts as alleged as true and according McKenzie the benefit of every possible favorable inference, he has not possessed the premises under a hostile claim of right for the statutory period of 10 years (*see id.* at 1172).

Next, the court turns to that branch of Mafiq's motion pursuant to CPLR 3211 (a) (7) to dismiss McKenzie's second cause of action for injunctive relief. " '[I]njunctive relief is simply not available when the plaintiff does not have any...substantive cause of action against [the] defendants" (*Hogue v Village of Dering Harbor*, 199 AD3d 900, 903 [2d Dept 2021], quoting *Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58-59 [1st Dept 2012]). As McKenzie's only substantive cause of action, for adverse possession, is subject to dismissal, the separately pleaded cause of action for injunctive relief is also subject to dismissal (*see Ajie Chen v Deliso*, 169 AD3d 761, 762 [2d Dept 2019]).

As such, Mafiq's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it is granted. In light of the foregoing, the court need not consider Mafiq's remaining contentions in its cross-motion.

The court now turns to the McKenzie's order to show cause to stay the holdover proceeding, remove it to this court, and consolidate it with this action. "Where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Kally v Mount Sinai Hosp.*, 44 AD3d 1010, 1010 [2d Dept 2007). Since Mafiq's motion to dismiss the complaint insofar as asserted against it is granted herein, the holdover proceeding and the instant action no longer concern the same parties nor the same questions of law or fact. As such, McKenzie's order to show cause is denied.

Finally, the plaintiff's cross-cross-motion for a default judgment against 9725 Queens Village must be denied. A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party (*see* CPLR 2215). "The express language of CPLR 2215 is clear that cross-motions are solely for seeking relief against the initial moving party" (*Pizzo v Lustig*, 216 AD3d 38, 43 [2d Dept 2023]).

Accordingly, it is

ORDERED that McKenzie's order to show cause is denied in its entirety; and it is further

ORDERED that Mafiq's motion to dismiss the complaint insofar as asserted against it is granted; and it is further

ORDERED that the County Clerk of Queens County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action on July 17, 2023, against property known as 104-81 165th Street, Jamaica, NY 11433, designated as Block 10164, Lot 6 and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order; and it is further

ORDERED that McKenzie's cross-cross-motion for a default judgment against 9725 Queens Village is denied in its entirety.

This constitutes the decision and order of this court.

Dated: May 15, 2024

ROBERT I. CALORAS, J.S.C.