SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 12, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

751 The People of the State of New York, Respondent, Ind. 2159/11

-against-

Kerri Roberts,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), for appellant.

Cyrus R. Vance, District Attorney, New York (Alice Wiseman of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals (__ NY3d ___, 2018 NY Slip Op 03172 [2018]), judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Roger S. Hayes, J. at jury trial and sentence), rendered June 7, 2013, convicting defendant of criminal possession of a forged instrument in the second degree (two counts) and identity theft in the second degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

Defendant was charged with two counts of criminal possession of a forged instrument in the second degree and one count of identity theft in the second degree in connection with allegations that he had attempted to purchase over $1,000 worth of merchandise at a Champs Sports store in Times Square using a counterfeit New Jersey State driver's license and American Express card, both imprinted with the fictitious name "Craig E. Jonathan." The license featured defendant's photograph. When the machine at the store was unable to read the card, defendant insisted that the cashier enter the card manually. The manager told defendant that he knew the card was fraudulent and would call the police if defendant refused to leave. Defendant continued but never succeeded in buying the goods.

After defendant's arrest outside of the store, the police searched him and found identification bearing his true name. They also found a scrap of paper listing various account numbers and associated codes. Defendant admitted that he paid someone for the fake credit card and driver's license. "Craig E. Jonathan" was a fabricated identity. The State of New Jersey had no such person in its records.

At trial, defendant moved to dismiss the identity theft

count, asserting that he was purporting to be Craig E. Jonathan and not the actual credit card account holder. The trial court denied the motion, and defendant was convicted as indicated.

On appeal, we modified to the extent of vacating the conviction for identity theft, and otherwise affirmed (138 AD3d 461 [1st Dept 2016]). We reasoned that in order to establish the crime, a defendant had to both use the victim's personal identifying information and assume the victim's identity. We reasoned that while defendant had used the victim's personal identifying information, he had not assumed her identity, but rather, that of a fictitious person.

The Court of Appeals reversed, reasoning that defendant had assumed the identity of the victim within the meaning of the statute. The Court rejected defendant's argument that "the requirement that a defendant assumes the identity of another is not a separate element of the crime," explaining that the statutory language "simply summarizes and introduces the three categories of conduct through which an identity may be assumed" (Slip Op at 5).

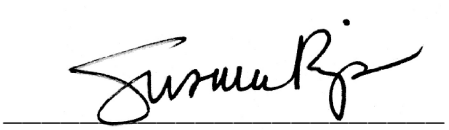
The Court remitted the case for consideration of the facts and issues raised but not determined on the appeal (CPL

470.25[2][d]; 470.40[2][b]).

We find that defendant's conviction of identity theft in the second degree was not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490 [1987]). The fact that the store manager was fired for letting a customer use his employee discount does not render his testimony incredible. The allegedly faulty memories of nonexpert witnesses concerning the appearance of the counterfeit card were immaterial. The minor inconsistencies that defendant cites to, and which the witnesses admitted were the result of faulty memory, did not render the verdict against the weight of the evidence (*see People v Danielson*, 9 NY3d 348 [2007]). Rather, each witness's testimony was generally corroborative of each other's, and was also corroborated by the surveillance videos. Further, a representative from American Express testified at length concerning the factors demonstrating that defendant's card was a fake.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 12, 2018



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Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4583 The People of the State of New York, Ind. 627/08
Respondent,

-against-

David J. Palmer,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Patricia Di Mango, J. at plea; Michael Gross, J. at sentencing), rendered December 17, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 13, 2018,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 12, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kern, Singh, JJ.

4901 Anthony Farrugia, Index 151857/12
Plaintiff-Respondent, 590634/13

-against-

1440 Broadway Associates, et al.,
Defendants-Respondents-Appellants,

Harbour Mechanical Corp.,
Defendant-Appellant-Respondent,

The Martin Group, LLC, et al.,
Defendants.

- - - - -

[And a Third-Party Action]

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Westerman Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Joanne Emily Bell of counsel), for appellant-respondent.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Jillian Rosen of counsel), for respondent.

London Fischer LLP, New York (Brian A. Kalman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered September 15, 2016, which, to the extent appealed from as limited by the briefs, denied defendant Harbour Mechanical Corp.'s motion for summary judgment dismissing the complaint and cross claims of defendants 1440 Broadway Associates, 1440 Broadway Owner, LLC and 1440 Broadway Mgt., LLC (collectively, the property owner), as against it, and

denied the property owner's motion for summary judgment dismissing the complaint as against them, affirmed, without costs.

Plaintiff, an operating engineer, contends that while working in the pump room of the property owner's building, he was injured when he stepped into an exposed opening or hole in a metal plate[1] that caused him to fall. Harbour Mechanical was a contractor that the property owner retained to convert its building from a gas heating system to a Con Ed "clean steam station" (the conversion project). Plaintiff claims that Harbour, while working on the project, which included removal of an oil tank and other equipment, caused, created, exacerbated or "launche[d] a force or instrument of harm" when it removed the tank and left a large opening in the metal plate exposed (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Plaintiff contends that the opening was not dangerous until the oil tank was removed because the opening had been beneath the equipment (*see Miller v City of New York*

[1]The exposed area is sometimes described in the briefs as an opening or hole and the area encompassing the opening or hole is at times also described as grating made of metal, a metal grate or a metal plate. For expediency, the area at issue will be referred to here as an exposed opening in a metal plate.

(100 AD3d 561 [1st Dept 2012]).

We find that Supreme Court correctly denied Harbour's motion for dismissal of the complaint and cross claims against it, as well as the property owner's motion for summary judgment dismissing the complaint. Defendants failed to demonstrate their entitlement to judgment as a matter of law (*see Lopez v New York Life Ins. Co.*, 90 AD3d 446 [1st Dept 2011]). Moreover, there are issues of fact whether the exposed opening in the metal plate was open and obvious and not otherwise inherently dangerous (*see generally Powers v 31 E 31 LLC*, 123 AD3d 421 [1st Dept 2014]).

Plaintiff testified at his deposition that on the day of the accident he was working in the building's pump room, repairing a valve on equipment that was only three or four steps away from an exposed opening in a metal plate on the floor. While facing the equipment he was working on, plaintiff stepped back to reach for a tool. As he did so, he stepped into an exposed circular opening in the metal plate, causing him to fall backwards and strike his head on the concrete floor.

Plaintiff's claim against the property owner is that it failed to maintain its property in a reasonably safe condition

because the opening was a dangerous condition of which it had notice, but failed to take remedial measures (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). Plaintiff testified that when he first noticed the exposed opening, a few months before his accident, he took a picture of it with his cell phone and showed it to property owner's manager (Kohlbrecher). Kohlbrecher told plaintiff that he was busy at the moment, but that later he would take a look at the condition for himself.

Plaintiff's claim against Harbour is that when it removed the old fuel tank that was situated on the metal plate, Harbour launched a force or instrument of harm by creating a dangerous condition or making the condition less safe than it was before Harbour did its work. Harbour concedes that it removed a tank and other equipment during the conversion project and that the tank was to be serviced. It denies, however, that it made any structural changes to the metal plate or that the metal plate was inherently dangerous. Harbour maintains that the metal plate and any opening in it, once exposed, was open and obvious, particularly since plaintiff knew it was there and even took a photo of it.

Alternatively, Harbour argues it did not owe plaintiff, a noncontracting third party, a duty of care, and that even if

it did expose an opening in the metal plate when it removed the oil tank, it cannot be held liable in negligence for merely doing the work it was contractually retained to do. Harbour denies that under the terms of its contract it had any contractual obligation to cover up, remediate or protect any opening it made when removing equipment from the pump room, and that the property owner and/or subcontractors were responsible for doing so. Harbour contends that it cannot be found to have caused or created a dangerous condition or have launched a force of harm because it did not make the exposed opening in the metal plate any less safe than it was before its removal of equipment from the pump room.

Although both defendants argue that the exposed opening in the metal plate was open, obvious, readily observable and known to plaintiff, a property owner has a nondelegable duty to maintain its premises in a reasonably safe condition, taking into account the forseeability of injury to others (*Basso*, 40 NY2d at 241). Moreover, although a defect or hazard may be discernable, this does not end the analysis, or compel a determination in favor of the property owner (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004]). Plaintiff's awareness of a dangerous condition

does not negate a duty to warn of the hazard, but only goes to the issue of comparative negligence (*Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599, 600 [1st Dept 2010]). Given the exposed opening's proximity to equipment that required service, the circumstances of plaintiff's accident present an issue of fact of not only whether the condition was open and obvious, but also whether it was inherently dangerous (*see Westbrook*, 5 AD3d at 69, 71-73; *Rubin v Port Auth. of N.Y. & N.J.*, 49 AD3d 422, 422 [1st Dept 2008]). Some hazards, although discernable, may be hazardous because of their nature and location (*see Westbrook* at 72). Defendants did not establish that the exposed opening - given its location in the floor near other mechanical equipment in the pump room - was not only open and obvious, but that there was no duty to warn, and that the condition was not inherently dangerous (*see Cupo v Karfunkel*, 1 AD3d 48, 51-52 [2d Dept 2003]).

A contractual obligation, standing alone, will not give rise to tort liability in favor of a noncontracting third party (*Espinal* 98 NY2d at 138]). One exception to this broad rule is where the contracting party, in failing to exercise

reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*Espinal* at 140). We depart from the dissent in finding that Harbour failed to make a prima facie showing that it did not owe plaintiff a duty of care and that it did not negligently cause, create or exacerbate a dangerous condition.

Even if Harbour's contract did not require that it cover, remediate, fill in or repair any of the floor openings resulting from its work, Harbour did not take even minimal corrective measures to protect the exposed opening in the floor after it removed the obsolete oil tank. Thus, while its removal of the tank was in fulfillment of its contractual obligation, a reasonable jury could find that Harbour's leaving an exposed and unprotected opening in the floor exposed, caused or created a dangerous condition even if previously the metal plate containing the opening was not unsafe. The dissent's view relies on cases where the defendant did not owe a duty of care because the condition the plaintiff complained of was precisely what was called for in the defendant's contract (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351 [2007]; *Peluso v ERM*, 63 AD3d 1025 [2d Dept 2009]; *Miller v City of New York*, 100 AD3d 561 [1st Dept 2012];

Agosto v 30th Place Holding, LLC, 73 AD3d 492, 492-493 [1st Dept 2010]). We take no issue with Harbour's argument, and the dissent's view, that Harbour was contractually obligated to remove the tank and that it fulfilled its contract by doing so. Our view, however, is that while the metal plate and its opening were under the tank, they were not a hazard because the tank prevented, or at least made it difficult, for anyone to step into that area. However, once the tank was removed, and the opening below it exposed, the metal plate and its opening were no longer protected. There is a view of the facts that Harbour, by leaving the exposed opening without any kind of warning or minimal protection, created or caused an unsafe condition, or made the previously obscured opening in the metal plate "less safe" than before Harbour did its work (*see Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 67 [1st Dept 2004], *lv dismissed* 4 NY3d 739 [2004]; *cf. Santos v Daniello Carting Co., LLC*, 148 AD3d 463, 464 [1st Dept 2017], *lv denied* 30 NY3d 903 [2017]). Thus the issue is not whether Harbour had a contractual obligation to protect the opening, but whether by leaving the opening in the metal plate exposed it created an unreasonable risk of harm to the plaintiff.

Harbour's motion for summary judgment dismissing the owner's cross claims against it was properly denied because the same issues of fact preclude summary dismissal of 1440 Broadway's cross claim as against Harbour for common-law indemnification and/or contribution (*see Scuderi v Independence Community Bank Corp.*, 65 AD3d 928 [1st Dept 2009]. The operative indemnification provision is written in broad terms, providing, in relevant part, that "TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW," Harbour must "INDEMNIFY, PROTECT, DEFEND AND HOLD HARMLESS OWNER . . . FOR, FROM AND AGAINST ALL LIABILITIES . . . DIRECTLY OR INDIRECTLY ARISING OUT OF, CAUSED BY, OR RESULTING FROM (IN WHOLE OR IN PART), [1] THE WORK PERFORMED HEREUNDER . . . " by Harbour or any of its subcontractors. Such indemnification is triggered when the claim arises out of the contractor's work even though the subcontractor has not been negligent (*see e.g. Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]). Contrary to Harbour's argument, the indemnification provision does not run afoul of General Obligations Law § 5-322.1 because the limitation it contains ("TO THE FULLEST EXTENT PERMITTED BY LAW") obligates Harbour to only indemnify the owner to the

extent that plaintiff's accident arose out of Harbour's and its contractor's work, except for that percentage of negligence attributable to the owner. Consequently, the owner will not be indemnified for its own negligence (*see e.g. Brown v Two Exch. Plaza Partners*, *supra*).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

All concur except Andrias and Singh, JJ. who dissent in part in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (dissenting in part)

I agree with the majority insofar as it affirms the denial of the 1440 Broadway defendants' motion for summary judgment dismissing the complaint as against them. However, I disagree with the majority insofar as it affirms the denial of defendant Harbour Mechanical's motion for summary judgment dismissing the complaint as against it and 1440 Broadway's cross claims for common-law indemnification and contribution. Harbour, an independent contractor, demonstrated prima facie that it owed no duty of care to plaintiff by submitting evidence that its contract with 1440 Broadway did not obligate it to cover or remediate any preexisting floor openings exposed by its work, and that 1440 Broadway, which owned the property and was aware of the openings, never requested that Harbour do so. In opposition, plaintiff and 1440 Broadway failed to raise a triable issue of fact as to whether Harbour failed to exercise reasonable care in the performance of its work and "launche[d] a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Consequently, I dissent in part.

1440 Broadway hired Harbour as a general contractor for the installation of a new Con Ed steam station. Months after

Harbour and its subcontractors had substantially completed their work, plaintiff, an operating engineer employed by the property manager, was changing a check valve on a pump in the building's subbasement. After installing the new valve, he turned to grab a tool and his foot allegedly went into an opening in a metal "diamond plate" in the floor that was a couple of feet from the pump, causing him to fall. While plaintiff claims that Harbour exposed the opening when it removed a tank that was covering it, there is conflicting testimony indicating that the opening was located in front of the tank and was already exposed.

Plaintiff had seen the opening, which he estimated was "two feet by two feet," and "maybe a foot deep," "once a couple of months before" his accident. At that time, he took a photograph of it with his cell phone and tried to show it to his supervisor, Wayne Kohlbrecher, who told him that he would take a look at the floor himself later. Although nothing obstructed plaintiff's view of the opening from where he was working, and the room was well lit for the most part, he did not see it on the date of his accident because he "was paying attention to the job and everything else going on in that room."

Generally, a contractual obligation standing alone will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d at 140). As is relevant to this appeal, an exception applies where "the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm" by taking affirmative steps that create or exacerbate a dangerous condition (*id.*).

The majority finds that Harbour failed to make a prima facie showing that it did not owe plaintiff a duty of care under this *Espinal* exception. The majority posits that while Harbour was contractually obligated to remove the tank, a reasonable jury could find that Harbour's leaving an exposed and unprotected opening in the floor of the pump room, without any kind of warning, negligently created or exacerbated a dangerous condition because the tank had previously covered or "at least made it difficult" for anyone to step into that area, so that its removal made the area "less safe" than it was before.

However, "[i]n the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has

no duty to install safety devices or to inspect or warn of any purported defects" (*Rappaport v DS & D Land Co., L.L.C.*, 127 AD3d 430, 431 [1st Dept 2015]). Where the creation of the allegedly dangerous condition is precisely what was called for in the contract, the contractor cannot be said to have created an unreasonable risk of harm to plaintiff (*see Miller v City of New York*, 100 AD3d 561 [1st Dept 2012]; *see also Peluso v ERM*, 63 AD3d 1025 [2nd Dept 2009] [Where a contractor fulfilled its contractual obligations in accordance with contract specifications and in the absence of evidence that it assumed a continuing duty to return to the premises after completing its work, it cannot be said to have affirmatively created a dangerous condition]).

Applying these principles, Harbour established prima facie that it did not owe plaintiff a duty of care through evidence that: (i) the opening in the metal plate predated its work and was there to allow for removal of the plate to service the piping for the old heating system and for maintenance for the trench beneath; (ii) the metal plate was not altered or damaged by Harbour in the course of its work; (iii) Harbour had no contractual obligation to remediate or

repair any preexisting floor openings or metal plates that would become obsolete as a result of the change in the heating system; (iv) Harbour substantially completed its work by September or October 2011, months before plaintiff's accident in February, 2012, and was told to remove all of its equipment and that other parties would fill in obsolete floor penetrations; (v) two punch lists created by an engineering firm hired on behalf of 1440 Broadway did not list any open items relating to openings in the grate or floor and 1440 Broadway never made any complaints or contacted Harbour about the plate, the piping or the opening in the plate before plaintiff's accident; and (vi) 1440 Broadway retained a third party to remediate and cover all obsolete openings in the floor in a separate project after plaintiff's accident (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-361 [2007]; *Miller v City of New York*, 100 AD3d at 561; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492, 492-493 [1st Dept 2010]; *Peluso v ERM*, 63 AD3d at 1025-1026).

In *Fung*, the defendant was contracted to plow snow. The plaintiff alleged that the defendant created or exacerbated a dangerous condition because its failure to salt or sand the

area it plowed left open the possibility that the mounds of snow may have melted and refrozen, or that its plowing left a thin sheet of snow. The Court of Appeals held that "by merely plowing the snow, as required by the contract, [the] defendant's actions could not be said 'to have created or exacerbated a dangerous condition'" and that the defendant owed no duty of care to the plaintiff because the contract did not require the defendant to salt or sand the area absent a request to do so, and no such request had been made (9 NY3d at 361).

In *Miller*, this Court held that the defendant contractor could not be held liable to plaintiff for injuries sustained as a result of an alleged defect in the roadway where its contract with the utility called for the contractor to leave the trench an inch and a half below grade and the utility failed to raise an issue of fact whether the contractor performed its contractual obligations negligently and created an unreasonable risk of harm to plaintiff (100 AD3d at 561). Contrary to the utility's contention, we found that no issue of fact existed as to whether the defendant breached its contractual duty to "protect and maintain" the 1½-inch-deep trench for five days after completing its work by failing to

place cones or barricades in the vicinity (*id.*).

In *Agosto*, the defendant contractor was hired to remove the tiles from a lobby floor. Six weeks after the defendant finished its work, the plaintiff tripped on an area of the floor that had not been completed by the contractor hired to install the new flooring. This Court held that the defendant could not be said to have created an unreasonable risk of harm to plaintiff because the contract only required it to remove tiles, and there was no evidence that the defendant failed to exercise due care in performing the contract. Although the contractor had exposed a concrete section of floor, "the creation of that allegedly dangerous condition was precisely what was called for in [its] contract" (73 AD3d at 492-493).

In *Peluso*, the defendant contractor was required to backfill an excavated parking lot and tamp it down, but not repave it. Approximately two months after the defendant had satisfactorily completed its work, the plaintiff allegedly was injured when she tripped and fell on rocks that had accumulated in the lot. The Second Department held that the contractor owed no duty to the plaintiff and did not affirmatively create a dangerous condition absent evidence it breached its contractual obligation to backfill the excavated

areas or assumed a continuing duty to return to the premises and remedy any defects that developed there (63 AD3d at 1025-1026). Further, the defendant justifiably relied on the contract specifications and "reasonably believed that the employer would repave the parking lot after their work was completed, thereby eliminating any dangerous condition likely to cause injury" (*id.* at 1026).

As in *Fung*, *Miller*, *Agosto* and *Peluso*, while plaintiff attributes the dangerous condition to Harbour's work, there is no evidence that Harbour breached its contractual obligations or was negligent in the performance of its duties. Harbour removed the tank from the pump room as required and was not contractually obligated to take any action with respect to the preexisting floor opening allegedly exposed by its work. In fact, 1440 Broadway never requested that Harbour take any remedial action with respect to the opening in its punch lists or otherwise, and told Harbour that the work would be done by another contractor. Harbour cannot be held liable to plaintiff for a failure to become "an instrument for good," which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party (*see Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]; *Berger v NYCO*

Plumbing & Heating Corp., 127 AD3d 676, 678 [2nd Dept 2015]). Furthermore, as in *Rappaport* (127 AD3d 430, 431, *supra*), the opening in the metal plate was visible to 1440 Broadway and it employees. Indeed, plaintiff acknowledges that he was fully aware of the existence of the opening and claims that he informed his supervisor about it because of safety concerns. Given these circumstances, the majority's holding would unduly expand an independent contractor's duty of care to a third party (*see Church*, 99 NY2d at 111).

Accordingly, the complaint should be dismissed as against Harbour. Further, in the absence of any evidence that Harbour breached a duty of care to plaintiff, Harbour is also entitled to summary judgment dismissing 1440 Broadway's cross claims against it for common-law indemnification and contribution (*see San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590 [1st

Dept 2012]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891 [1st Dept 2003]).

The Decision and Order of this Court entered herein on January 18, 2018 is hereby recalled and vacated (157 AD3d 565 [1st Dept 2018]) (*see* M-871 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 12, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman J.P.
Dianne T. Renwick
Peter Tom
Marcy L. Kahn
Cynthia S. Kern, JJ.

5251-
5252
Index 152094/14

_____x

Children's Magical Garden, Inc.,
Plaintiff-Respondent,

-against-

Norfolk Street Development, LLC, et al.,
Defendants-Appellants.
_____x

Defendants appeal from the orders of the Supreme Court, New York County (Debra A. James, J.), entered November 23, 2015 and July 5, 2016, which denied their motions to dismiss the complaint.

Rex Whitehorn & Associates, P.C., Great Neck (Rex Whitehorn of counsel), for Norfolk Street Development, LLC, S&H Equities (NY), Inc., and Serge Hoyda, appellants.

Herrick Feinstein LLP, New York (Janice I. Goldberg and Arthur G. Jakoby of counsel), for 157, LLC, appellant.

Sidley Austin LLP, New York (Benjamin F. Burry, Nicholas P. Crowell, Angela Zhu and Alexander I. Cohen of counsel), for respondent.

TOM, J.

This appeal involves what must be an extremely rare occurrence in Manhattan, to wit, a claim of adverse possession of prime real estate located in the Lower East Side neighborhood of Manhattan. Specifically, we are presented with a dispute over a vacant corner lot located at 157 Norfolk Street at its intersection with Stanton Street, one block south of East Houston Street in lower Manhattan. Plaintiff Children's Magical Garden (the Garden), a not-for-profit corporation incorporated in 2012, is a community garden founded by its members in 1985 on Lots 16, 18, and 19 in Block 154. The Garden was founded by activists outraged by the accumulation of garbage and used needles on the lots located across the street from an elementary school.

Defendants Norfolk Street Development, LLC, S&H Equities (NY), Inc., and Serge Hoyda are alleged to have been the record owners of Lot 19 during the prescriptive period. Defendant 157, LLC is alleged to have purchased the property from Norfolk Street Development on or about January 6, 2014.

The central issue presented by this appeal is whether plaintiff stated a claim for adverse possession of Lot 19 by sufficiently pleading the continuous possession element. We

find that the complaint sufficiently pleaded a cause of action for adverse possession (*see* CPLR 3211[a][7]; *Walling v Przybylo*, 7 NY3d 228, 232 [2006]; *United Pickle Prods. Corp. v Prayer Temple Community Church*, 43 AD3d 307, 308 [1st Dept 2007], *lv denied* 9 NY3d 977 [2007]).

The complaint alleges that more than 30 years ago, in 1985, the Garden was founded by community activists who sought to improve their neighborhood. Because crime plagued the neighborhood at that time, and used needles and piles of garbage littered the abandoned corner lot in question - across the street from elementary school P.S. 20 - these neighborhood activists decided to build what plaintiff describes is now a "neighborhood icon." Plaintiff also states that defendants and their predecessors abandoned Lot 19 as a "shameful eyesore" and that plaintiff and its members took possession and "by their tremendous efforts transformed the Premises into a vibrant community garden where generations of children have thrived."

Among other things, Garden members, starting in 1985, cleared garbage and debris, pulled weeds, and erected a chain-link fence to enclose the premises. They planted fruit,

vegetables, plants, bushes and trees, including an apple tree and a dogwood tree, built a seesaw and other playground equipment, and added a stage used for concerts and to display art. Over the years, neighborhood children have used the stage to put on performances. At some point, members also built a fish pond and pathways throughout the Garden.

Plaintiff also alleged that the Garden has never been open to the general public, and that the premises can only be accessed by first unlocking the gate with a special key secured only by members. Members keep the gates locked at night and any other time the Garden is not in use under the supervision of a member.

In addition, over many years the Garden hosted various schools, afterschool and camp programs for science, math, culinary arts, and community service activities. Each year, the Garden hosted local youth for the planting of a "pizza garden" and in the fall held a pizza-making party on the premises where children enjoyed the harvest of vegetables.

Other events held at the Garden included poetry readings and music events during the summers, and each September the Garden hosted a concert as a participant in the Vision Festival

Jazz in Gardens Series. The Garden was also opened each December 21st for a Winter Solstice celebration with art and live music.

Plaintiff maintains that throughout all these years the Garden's members protected the Garden's claim of right, including against defendants. As an example, plaintiff alleges that in August 1999, defendants Hoyda, Norfolk, and S&H Equities or their agents cut through the Garden's exterior fence and entered the premises. They claim that a tree planted more than a decade earlier was chopped down and a children's clubhouse was damaged. A makeshift interior fence was also erected. However, Garden members immediately tore down the fence and removed it. Members also repaired the other damage.

According to plaintiff, in May 2013, a group of men with power tools and construction equipment accompanied by private security guards arrived at the Garden, and signaled their intention to breach the exterior fence. A standoff took place with Garden members blocking the gate. Ultimately, police officers ordered the group of men to be given access to the premises. Plaintiff alleged the men were defendants or their agents and that among them was an attorney purporting to

represent defendant Hoyda.

The men "trampled, destroyed, and dug up plants, shrubs, trees" and erected a metal fence inside the Garden purporting to barricade Lot 19 from the remainder of the other two lots. Defendants also employed a private security firm to guard the premises.

Plaintiff states that despite requests from various public officials to remove the fence, the fence still cuts across the premises rendering certain vegetable beds, trees and a meditation area inaccessible.

In July 2013, the other lots that make up the Garden - 16 and 18 - were preserved under New York City's GreenThumb program after Manhattan Community Board 3 passed a resolution declaring that it "very strongly favors a proposal to the extent possible to preserve the whole community garden." Under that program, the New York City Department of Parks and Recreation enters into licensing agreements with community groups which create and maintain gardens on city-owned vacant property.

According to the record evidence, on or about December 15, 1998, defendant Serge Hodya, through 28 Properties, Inc. (28 Properties), entered into a contract of sale to purchase

157 Norfolk Street, Lot 19, from 88 Holding Corp. In the contract, 88 Holding warranted that it would deliver Lot 19 "vacant and free of any occupancy and any claim of right of occupancy." In or about November 1999, 28 Properties brought an action against 88 Holding for specific performance and a declaration that it must satisfy the vacancy condition of the contract. 28 Properties' complaint alleged that "a portion of the Premises, has been, and remains, *occupied by third parties claiming a right to use and occupy a portion of the Premises* (emphasis added)."

In an affidavit filed in that action, after 88 Holding took no "action to remove the unlawful occupants," defendant Serge Hodya admitted that 88 Holding "claimed that such occupancy was illegal and unauthorized." Despite the foregoing, Hodya "waive[d] the condition in the contract that the premises be delivered vacant (*id.*, ¶ 8; 253, ¶ 12)". Accordingly, by order entered May 30, 2003, the court (Walter B. Tolub, J.) granted 28 Properties' motion for summary judgment.

On or about August 27, 2003, defendant Norfolk Street Development LLC (Norfolk, d/b/a 28 Properties), in which Hodya is a member, and an affiliate of defendant S&H Equities (NY),

Inc., became the record owner of Lot 19. By deed, dated January 9, 2014, Norfolk conveyed Lot 19 to defendant 157, LLC, allegedly for $3,350,000 and other consideration.

Plaintiff commenced this action in 2014, alleging that defendants had filed an application to construct a six-story, 70-foot-tall residential building on Lot 19. The complaint asserts six causes of action, including one for declaratory judgment that plaintiff is the sole and exclusive legal and equitable owner of Lot 19, via adverse possession. With regard to that cause of action, plaintiff alleged that the Garden was surrounded by a fence and has been cultivated and improved and accessed by a locked gate since 1985. Plaintiff also alleged that it had possessed Lot 19 continuously under a claim of right for not less than 10 consecutive years, and had possessed it in a hostile, actual, open and obvious manner which was exclusive and continuous for that time period.

Defendants each moved to dismiss the complaint for failure to state a cause of action, claiming that since the Garden did not exist until December 2012, it could not have occupied the property for the requisite period. They also asserted that the complaint fails to allege any occupancy by plaintiff was done under a claim of right.

In opposition, Kate Temple-West, the president and director of the Garden, stated that when she moved to 153 Norfolk Street in 1997, she observed that the Garden, which was enclosed by a fence, had various trees and bushes planted in it and structures that were regularly maintained. Temple-West also observed children playing in the Garden, which was managed by members, who controlled access with a key and supervised visitors. Temple-West became involved with the Garden soon after moving to the neighborhood and has since helped others to excavate and demolish the burned-down remains of a building that once stood on Lot 19, using shovels, pick-axes, and wheelbarrows. Beginning in or about 2000, Temple-West hired trucks to haul away rubble and debris from the Garden and has since hired dumpsters and/or trucks approximately once per year for maintenance.

Since Temple-West's arrival in 1997, she and other members have installed chicken wire on the perimeter chain-link fence to keep rats and garbage out. They have laid down soil and compost, planted various types of trees and shrubs, constructed brick paths that run through the garden, built a swing set, and observed and/or overseen the installation of a second seesaw, concrete art sculptures, a

traditional medicine plant bed, a youth meditation area, and a rain garden. In 2003, Temple-West became the Garden's co-director. She later became the director. In December 2012, the Garden incorporated and took title to Lot 19. Temple-West became the Garden's president and director. David Currence and Eve Berkson are the two other board members.

Temple-West noted the Garden's role in the community since her arrival, including hosting various student groups, the Cub Scouts, pizza-making parties, concerts, poetry readings, and movie nights, and noted recent events, including the installation of a chicken coop in 2012. As of the time of submission of Temple-West's opposition to defendants' motion to dismiss, the Garden had over 20 active adult members and 30 children who used the Garden each week, and events hosted at the Garden are attended by hundreds of community members.

In his affidavit, Barden Prisant explained he was a member of the Garden from about 1985 until 1991, during which time he, Carmen Rubio, and Alfredo Feliciano cultivated, improved, and maintained the Garden. In 1985, the Garden was filled with piles of garbage, discarded metal, and other debris. Prisant, Rubio, Feliciano, and others cleaned up the Garden, planted trees and bushes, and oversaw the installation

of structures, including a seesaw, pond, and wooden stage. Prisant remained a member of the Garden until 1991, when he moved away. During his time as a member, Prisant, who contributed financially to the Garden, observed that no one was permitted access unless either he, Feliciano, or Rubio had opened the gates and was present, and that the Garden was enclosed by a chain-link fence, which was accessible by gates at Stanton and Norfolk Streets.

During Prisant's involvement with the Garden, members put on various programs, including a May Day festival at which a Maypole was erected in the Garden. At Christmas time each year, children would decorate a pine tree which he and Feliciano had planted. The wooden stage was used for painting and acting classes as well as for musical performances.

Prisant averred that since 1985 the Garden has been enclosed by a chain-link fence. After Prisant moved in 1991, he converted his wife's studio apartment at 151 Norfolk Street into his office and passed the Garden daily, on his way to and from work. For approximately eight years thereafter, on a daily basis he observed that the Garden, which had a steady growth of trees and plantings, remained enclosed by a chain-link fence, with gates that were kept locked unless the

Garden was under supervised use. He also observed during that time period that Rubio, Feliciano and others he understood to be members continued the care and maintenance of the Garden.

Supreme Court denied the motions to dismiss. In so doing, the court found that no allegations in the complaint and no documentary evidence showed that plaintiff overtly acknowledged defendants' ownership of the property or defeated plaintiff's assertion that it occupied the property under a claim of right. Thus, the court found that for pleading purposes the complaint adequately asserted a claim of right. The court also rejected defendants' contention "that the plaintiff's occupancy was not continuous for the statutory period," finding that plaintiff's recent date of incorporation was inconsequential and that plaintiff adequately pleaded an unbroken chain of privity between the members of the Garden for the statutory period. We now affirm.

On a motion to dismiss pursuant to CPLR 3211, we afford the "pleading ... a liberal construction," accept the facts as alleged in the complaint as true, "accord plaintiffs the benefit of every possible favorable inference," and thus "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88

[1994]).

In order to establish a claim of adverse possession, a plaintiff must prove that the possession was: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous throughout the 10-year statutory period (*see Walling v Przybylo*, 7 NY3d 228, 232 [2006]). In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was "usually cultivated or improved" or that the land "has been protected by a substantial enclosure" (*see* former RPAPL 522; *Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]). The only elements in dispute here are the "claim of right" and "continuous" elements.

Defendants argue that plaintiff failed to plead sufficient facts evidencing continuous possession by its predecessor members for the statutory period, through an unbroken chain of privity, by tacking periods between anonymous possessors who are not alleged to have intended to transfer title to the incorporating members. This argument is based on the fact that plaintiff was incorporated in 2012 and defendants' contention that there is no allegation that

plaintiff had the necessary privity with Garden members prior to incorporation. This argument fails, particularly at the pleading stage of this litigation.

It is well settled that an unincorporated association may adversely possess property and later incorporate and take title to it because "[a]lthough the unincorporated society could not acquire title by adverse possession, its officers could for its benefit, and when the corporation is duly organized *the prior possession may be tacked to its own to establish its title under the statute of limitations*" (*Reformed Church of Gallupville v Schoolcraft*, 65 NY 134, 134 [1875] [emphasis added; citations omitted]).

In *Reformed Church of Gallupville*, the Court of Appeals recognized that a formerly unincorporated society "composed of the same individuals or persons claiming in succession under the same title and in the same right" for 25 years, "who managed its affairs and actually controlled and possessed its property . . . "could at any time have taken a grant for the benefit of the society, and could acquire title by adverse possession for the benefit of the society" (*id.* at 145).

Here, the complaint sufficiently alleges possession by

the Garden members for nearly 30 years before the Garden was incorporated. As set forth above, the allegations include significant work by the members to clean the abandoned lot and transform it into a treasured community resource containing a fish pond, playground equipment, trees, plants, and a stage, all of which has been fenced-off with access restricted by members. Such allegations, if proven, would establish adverse possession by the members for the statutory period.

Further, to the extent that the complaint alleges and the record evidence shows that there has been a succession of different individual Garden members, "[a]ll that is necessary in order to make an adverse possession effectual for the statutory period by successive persons is that such possession be continued by an unbroken chain of privity between the adverse possessors" (*Belotti v Bickhardt*, 228 NY 296, 306 [1920]).

Since it is alleged that the Garden members had adversely possessed the lot for the statutory period long before the Garden was incorporated, the question of tacking is not at issue here (*compare Keena v Hudmor Corp.*, 37 AD3d 172, 173-174 [1st Dept 2007] [issue of fact presented as to whether predecessors entered parcel under a claim of right, whether

they intended to convey the parcel to plaintiffs, and thus whether plaintiffs could tack prior owners possession onto their ownership to meet the statutory period]). Indeed, based on the allegations in the complaint, the members possessed the lot for more than 10 years and could transfer their interest in the lot to the corporation in 2012.

Defendant 157 LLC contends that the complaint does not satisfy the standards set forth in *Reformed Church of Gallupville* since the complaint refers only to "anonymous 'Members'" and "fails to allege that any Members have continuously been a Member of the Unincorporated Garden and [CMGI] for the entire 30 year period." However, 157 LLC places too high a burden on plaintiff at the pleading stage. While *Reformed Church of Gallupville* does note that the society in question was "composed of the same individuals or persons claiming in succession under the same title, and in the same right" (65 NY at 145), the complaint here, as supplemented by affidavits, satisfies that standard.

In particular, Prisant stated that he was a member of the Garden from 1985 to 1991 during which time he, Carmen Rubio, and Alfredo Feliciano cultivated, improved, and maintained the Garden. However, he also explained that from 1991 to 1999 he

worked near and passed by the Garden daily and observed Rubio and Feliciano and other members continue to maintain and possess the Garden, and that it remained enclosed by a fence and locked gates. In addition, Temple-West also stated that from 1997 to 2013 she and other members continued to possess the Garden and keep it enclosed by the fence and locked gates. These statements, along with the complaint, adequately allege continuous possession of Lot 19 for more than the statutory period by the same individuals and members of the Garden.

157 LLC's reliance on cases involving transients seeking to adversely possess separate units in residential apartment buildings is unavailing. For example, in *East 13th St. Homesteaders' Coalition v Lower E. Side Coalition Hous. Dev.* (230 AD2d 622, 623 [1st Dept 1996]), we denied a coalition of homesteaders who sought adverse possession of an apartment building a preliminary injunction (a different standard of review), finding that there was no evidence of privity between successive occupants of the apartments, or evidence of any intended transfers, with some apartments having remained vacant for extended periods, "such that the vacating occupant and the new occupant apparently had no contact at all." Unlike *East 13th St.*, here, the allegations are that the same

individual members of the Garden worked together, enclosed the property by a chain-link fence, limited access by locked gates, and improved the property.

In stark contrast to the allegations in this case, in *Rainbow Coop v City of New York City* (2009 NY Slip Op 32653 [U], *6 [Sup Ct, NY County 2009]), relied on by defendants, also involving a claim of adverse possession over an apartment building, the trial court rejected the plaintiff association's claim, as it was supported only by the testimony of one tenant who could not speak for the other tenants' occupancy of their individual apartments.

Nor are defendants aided by referencing the 1999 effort allegedly by the Hodya defendants to retake possession of the premises. The allegations in the complaint are that the statutory period had been met by 1995, and, in any event, the 1999 intrusion did not cause any disruption in the Garden's exclusive possession, as the members took swift action to repair the damage caused by the unidentified intruders (*see Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 156 [1996] [efforts to eject trespassers helped satisfy element of continuous actual possession]). We also reject 157 LLC's contention that the post-2008 version of RPAPL 501, which

requires the adverse possessor to have a "reasonable basis for the belief that the property belongs to the adverse possessor," has any bearing on this matter since there are no adverse possession claims alleged to have ripened after 2008.

Defendants also argue that plaintiff has not sufficiently pleaded the mandatory element of a claim of right under *Walling v Przybylo* (at 232). Specifically, defendants maintain that plaintiff must plead an initial claim in the land rooted in expectations that have an "objective basis in fact." This claim is without merit.

The "hostile and under a claim of right" element under *Walling* contains "two parts ... [that] have been viewed as virtually synonymous. Both parts require that the possession be truly adverse to the rights of the party holding record title" (*Walling v Przybylo*, 24 AD3d 1, 6 [3d Dept 2005], *affd* 7 NY3d 228 [2006]). In *Humbert v Trinity Church* (24 Wend 587, 604 [1840]), the Court for the Correction of Errors, the predecessor to the Court of Appeals, held that ownership can be obtained by adverse possession even where the possessor claims title wrongfully, fraudulently and "with whatever degree of knowledge that he has no right." The present day

Court of Appeals has cited *Humbert* approvingly, noting that "the fact that adverse possession will defeat a deed even if the adverse possessor has knowledge of the deed is not new" (*Walling*, 7 NY3d at 233).

In *Estate of Becker* (19 NY3d 75, *supra*), the Court of Appeals further explained that the element of hostility is "satisfied where an individual asserts a right to the property that is 'adverse to the title owner and also in opposition to the rights of the true owner'" (19 NY3d at 81, quoting *Walling* 7 NY3d at 232-233). Further, the *Estate of Becker* court noted that "[a] rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership, and this presumption continues until the possession is shown to be subservient to the title of another" (19 NY3d at 81; *see also Monnot v Murphy*, 207 NY 240, 245 [1913] ["The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period"]).

In *Walling*, the Court of Appeals noted that "an adverse possessor's actual knowledge of the true owner is not fatal to

an adverse possession claim," absent an overt acknowledgment by the claimant during the prescription period (*Walling v Przybylo*, 7 NY3d at 233, citing *Van Valkenburg v Lutz*, 304 NY 95, 99-100 [1952]). "The issue is 'actual occupation,' not subjective knowledge (*id.*, citing *Humbert v Trinity Church*, 24 Wend 587, 604 [1840]). Stated another way, "[c]onduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors" (*id.* at 232-233). A presumption of hostility will not apply, however, where the use of disputed land is permissive (*Estate of Becker*, 19 NY3d at 82).

Here, the complaint sufficiently alleges that plaintiff's predecessor members continuously occupied Lot 19, improved the land, restricted entry and kept out intruders, and thus actually occupied the land in a manner adverse to the true owner. Therefore, the complaint satisfies the "hostile and under a claim of right" element. Moreover, as neither plaintiff nor the predecessor members have overtly acknowledged any of defendants' rights to Lot 19, and there is no indication that the use was permissive, Supreme Court properly found that the claim of right element had been

sufficiently asserted.

Defendants, relying on this Court's holding in *Joseph v Whitcombe* (279 AD2d 122, 126 [1st Dept 2001]), seek to limit the "claim of right" element to those situations in which "the adverse possessor is title owner of the adjacent parcel, whose original boundaries extended to the disputed parcel . . . or whose use of the disputed structure [or land] derived from prior ownership." However, as the foregoing controlling decisions from the Court of Appeals make clear, valid adverse possession claims are not limited to such circumstances. Indeed, "[r]educed to its essentials, [the elements of adverse possession] mean[] nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Brand v Prince*, 35 NY2d 634, 636 [1974]). In any event, in *Joseph* the defendant overtly acknowledged the record owner's ownership of the disputed property and that he was a squatter. Finally, *Joseph* concerned a motion for summary judgment, a very different standard of review than this appeal.

Moreover, unlike this case, in *All the Way E. Fourth St.*

Block Assn. v Ryan-Nena Community Health Ctr. (9 Misc 3d 1122(A) [Sup Ct, NY County 2005], *affd* 30 AD3d 182 [1st Dept 2006], *lv denied* 7 NY3d 713 [2006]), which also involved a community garden, the Block Association sought and received a month to month tenancy under Operation Greenthumb for the disputed parcel and from 1981 through 1994 when the Association erected its fence, the Association sought to determine the true ownership of the lot so that it might receive the consent of the owner for the erection of the fence. No such allegations which demonstrate overt acknowledgement of the true owner's ownership are present in this case.

Since we conclude that plaintiff has adequately pleaded a cause of action for adverse possession, we also find that Supreme Court properly declined to dismiss the remaining causes of action at this juncture.

Accordingly, the orders of the Supreme Court, New York County (Debra A. James, J.), entered November 23, 2015 and July 5, 2016, which denied defendants' motions to dismiss the complaint, should be affirmed, without costs.

All concur except Friedman, J.P.
who concurs in a separate Opinion.

FRIEDMAN, J.P. (concurring)

I concur in affirming the denial of the motion to dismiss on the ground that the affidavit of Kate Temple-West sufficiently alleges, for purposes of pleading an adverse possession claim, that the corporate plaintiff's alleged predecessor-in-interest, an alleged unincorporated association (Unincorporated CMG), continuously occupied the subject parcel for at least ten years (*see* RPAPL 501[2]; CPLR 212[a]) before July 7, 2008. On that date, a statutory amendment took effect that made "a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL 501[3]) a necessary element of an adverse possession claim.[1] Temple-West alleges that she became a member of Unincorporated CMG in 1997 and remained so until the corporate plaintiff (of which she is now president) was organized in 2012 and succeeded to Unincorporated CMG's interest. Thus, based on the allegations of the complaint as supplemented by Temple-West's affidavit, plaintiff may be able to prove that its claim to ownership of

[1]Plaintiff does not allege that Unincorporated CMG had a reasonable basis for believing (or that it actually believed) that the parcel belonged to it before the adverse possession claim ripened. Under *Walling v Przybylo* (7 NY3d 228 [2006]), this was not a bar to an adverse possession claim before the aforementioned amendment of RPAPL 501.

the subject parcel through adverse possession ripened before the amendment to the RPAPL became effective. Whether Unincorporated CMG's occupation of the parcel was interrupted by the attempt to oust it in 1999 (an incident alleged in the complaint) cannot be determined as a matter of law on a pleading motion.

I disagree with the majority to the extent it holds that the complaint, as supplemented by the affidavit of Barden Prisant, sufficiently alleges that Unincorporated CMG continuously occupied the parcel from 1985 to 1997. Prisant alleges that he was a member of Unincorporated CMG from 1985 to 1991, when he moved out of the neighborhood. Plaintiff has not identified any person who was a member of Unincorporated CMG, or any persons who were members of it, from 1991 to 1997.[2] Plaintiff cannot predicate its adverse possession

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[2]Prisant's affidavit states that he continued to "pass by the garden [on the parcel] daily on my way to and from work" for "approximately eight years" after his membership ceased in 1991, and that during such walks he observed that the garden established by Unincorporated CMG was still maintained on the property. However, Prisant's statement that, at unspecified times during this eight-year period, he saw two people who had been members of Unincorporated CMG at the same time he was (Carmen Rubio and Alfredo Feliciano) engaged in "care and maintenance of the garden" does not constitute an allegation that Rubio (who apparently is now deceased) and Feliciano remained members of Unincorporated CGM during the entire

claim on an occupation by an unincorporated association without identifying particular individuals who were members of the association for the entire period relied upon (*cf. Reformed Church of Gallupville v Schoolcraft*, 65 NY 134, 145 [1875] [permitting a claim of adverse possession based, in part, on an occupation by an unincorporated association composed of identified members and officers]). However, if plaintiff believes that it is able to identify particular individuals who were members of Unincorporated CMG from 1991 to 1997, it may seek leave to amend the complaint to add such allegations.

Orders of the Supreme Court, New York County (Debra A. James, J.), entered November 23, 2015 and July 5, 2016, affirmed.

Opinion by Tom, J. All concur except Friedman, J.P., who concurs in a separate Opinion.

Friedman, J.P., Renwick, Tom, Kahn, Kern, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 12, 2018

CLERK

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period in question. Rubio and Feliciano are not even mentioned in Temple-West's affidavit.