

**Williams v Wilmington Sav. Fund Socy., FSB**

2024 NY Slip Op 34240(U)

November 21, 2024

Supreme Court, Kings County

Docket Number: Index No. 411/2023

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21<sup>st</sup> day of NOVEMBER, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
DAVID WILLIAMS III,

Plaintiff,

-against-

Index No.: 411/2023

WILMINGTON SAVINGS FUND SOCIETY, FSB,  
D/B/A CHRISTIANA TRUST AS OWNER TRUSTEE OF  
THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST,

**DECISION AND ORDER**

(Mot. Seq. No. 3)

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

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Defendant Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Owner Trustee of the Residential Credit Opportunities Trust (“Defendant”) moves for an order, pursuant to CPLR 3211 (a) (1), (7) and (8), dismissing Plaintiff David Williams III’s (“Plaintiff”) complaint (Mot. Seq. No. 3). Plaintiff opposes the motion.

This action concerns real property located at 8 Van Siclen Avenue in Brooklyn, New York (the “Property”). Defendant obtained title to the Property through its action (index No. 504182/2012), foreclosing a mortgage held by the then owner Paul Dingle (the “Foreclosure Action”). Defendant avers that the service of the summons and complaint in the foreclosure matter was served upon the sole tenants of the Property, Nelson Black and Rita Black in 2012. A Judgment of Foreclosure and Sale was issued on November 30, 2017, and Defendant was deemed the successful bidder and obtained a Referee’s Deed, dated April 17, 2018.

Thereafter, Defendant commenced an eviction action (index No. LT-081626-18; “Eviction Action #1”) and Plaintiff appeared but did not allege ownership in his answer. Eviction Action #1 was discontinued, and Defendant commenced another eviction action (index No. LT-56538-19; “Eviction Action #2”). In Eviction Action #2, Plaintiff moved to dismiss on the grounds that he was not served with notice of the action. According to Defendant, at a hearing on Plaintiff’s motion, Plaintiff offered to purchase the Property from Defendant for \$125,000. Defendant then filed another eviction action (index No. LT-324961-22; “Eviction Action #3”) and Plaintiff defaulted. A warrant of eviction was issued on May 12, 2023. Plaintiff filed an order to show cause, asserting improper service of the Eviction Action #3 petition. On the date of the hearing of the order to show cause, Defendant asserts that Plaintiff served Defendant’s counsel the Summons with Notice in the instant action.

Plaintiff later filed a complaint in which he seeks (i) a declaratory judgment against Defendant that Plaintiff is the fee simple owner of all right, title, and interest by adverse possession; and (ii) an injunction prohibiting Defendant from interfering with Plaintiff’s use of the Property pending a determination of this action. In his complaint, Plaintiff alleges that he has been in possession of the Property for longer than ten years, exclusive of Defendant and Defendant’s predecessor-in-interest and with hostility and under claim of right. Plaintiff further alleges that he has improved and cultivated the Property and has maintained complete, exclusive and full possession for a period of greater than ten years.

Now, Defendant moves to dismiss, pursuant to CPLR 3211 (a) (8), due to Plaintiff’s alleged failure to personally serve the Summons with Notice on Defendant. First, Defendant argues that Plaintiff attempted service in violation of CPLR 2103 (a), which provides that service may be made by any person not a party to the action. Second, since Defendant’s counsel is not an agent of Defendant, service upon counsel violated CPLR 311.

Further, Defendant moves to dismiss the complaint for failure to state a cause of action for adverse possession, pursuant to CPLR 3211 (a) (7). Under the amended Real Property Actions and Proceedings Law (“RPAPL”) Article 5, Defendant argues that land is deemed possessed and occupied only under two circumstances: (1) where there have been acts sufficiently open to put a reasonably diligent owner on notice, RPAPL § 522 (1); or (2) where it has been protected by a substantial enclosure, RPAPL § 522 (2). According to Defendant, Plaintiff’s claim to have “improved and cultivated the subject property” fails to allege the necessary elements of an adverse

possession claim. In addition, Defendant contends that Plaintiff's complaint lacks any factual allegations in support of his claim, in violation of CPLR 3013. In addition, Defendant contends that Plaintiff does not meet the definition of "adverse possessor" since his occupancy is consistent with a tenancy.

Lastly, Defendant claims that its documentary evidence refutes Plaintiff's claim of adverse possession, pursuant to CPLR 3211 (a) (1). Here, Defendant argues that it has established ownership of the Property by the Referee's Deed and thus, the burden shifts to Plaintiff to establish adverse possession by clear and convincing evidence. Since Plaintiff's complaint fails to set forth the necessary elements of adverse possession, Plaintiff cannot refute the presumption of ownership by Defendant's deed. Further, Defendant avers that documentary evidence establishes that Plaintiff did not reside at the Property during the necessary period to establish adverse possession. Defendant cites to two exhibits. The first exhibit purports to reflect property data for the subject address indicating that it is a one family dwelling. The second exhibit contains two affidavits of service of the summons and complaint in the Foreclosure Action reflecting service on Nelson Black and Rita Black.

In opposition, Plaintiff argues that when the parties appeared at a conference before the Court on Defendant's motion to dismiss for failure to file a complaint (Mot. Seq. No. 1),<sup>1</sup> Defendant waived any objection to personal jurisdiction by agreeing to accept the complaint on the record. Plaintiff argues that the complaint was properly served via NYSCEF. Moreover, Plaintiff argues that since Defendant failed to annex the affidavits of service of the Summons with Notice, the allegation that it was improperly served is unsupported. In addition, Plaintiff asserts that each element of adverse possession is sufficiently pled. In his affidavit, Plaintiff states that he has been in possession of the Property since 2008 when he knew the owners of the Property had left and has taken care of the grounds and landscaping, paid to have the roof repaired, and fixed the water main and a busted pipe. Accordingly, Plaintiff argues that there is a claim of hostility, a claim that it was as of right, and a claim that it has been open and notorious. Plaintiff also notes that Defendant failed to attach an affidavit of someone with personal knowledge.

In its reply, Defendant maintains that Plaintiff has not pled the material elements of an adverse possession claim under the amended RPAPL Article 5. Further, Defendant argues that Plaintiff is not an adverse possessor and instead, his occupancy is consistent with a tenancy. Since

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<sup>1</sup> This motion was ultimately withdrawn on December 28, 2023 (NYSCEF Doc No. 3).

Plaintiff admitted to moving into the Property because he knew the prior owners had moved, his entry upon the Property was not based on any claim of right to ownership. Defendant also cites to the prior eviction actions where Plaintiff did not claim ownership. Defendant further contends that Plaintiff's offer to purchase the Property establishes that there is no adverse possession. Moreover, Defendant argues that documentary evidence establishes that Plaintiff is unable to claim possession for the required ten-year period since at the time of service of the foreclosure complaint in 2012, only Nelson Black and Rita Black occupied the Property. With respect to service, Defendant denies that it consented to jurisdiction of the Court or waived its right to contest service of process.

The Court will first address Defendant's motion to dismiss the action under CPLR 3211 (a) (8). Here, Defendant bases its lack of jurisdiction argument solely on counsel's affirmation, in which he asserts that an unnamed attorney was served by Plaintiff himself. On a motion to dismiss on jurisdictional grounds, a mere assertion by counsel is insufficient to establish improper service. Moreover, upon review of the record, the Court notes that Plaintiff filed two affidavits of service on June 26, 2023, purporting to show service of the Summons with Notice upon Defendant by non-parties. One affidavit does reflect that Defendant's counsel Friedman Vartolo, LLP was served on June 14, 2023. The other reflects service of process was effectuated on Defendant by delivering a copy at 500 Delaware Avenue in Wilmington, Delaware to Aaron Keinama, Defendant's alleged general agent, on June 15, 2023. This would indicate that even if Plaintiff personally handed a copy to counsel at the hearing, proper service was attempted in another manner, which Defendant has not rebutted (*see United States Bank N.A. v Fessler*, \_\_\_AD3d\_\_\_, 2024 NY Slip Op 04999, \*3 [2024]). Accordingly, the branch of Defendant's motion seeking to dismiss the complaint for lack of personal jurisdiction is denied.

The Court next turns to the portion of Defendant's motion seeking dismissal under CPLR 3211 (a) (1). Pursuant to CPLR 3211 (a) (1), a complaint will only be dismissed if there is documentary evidence that "utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Granada Condo. III Ass'n v Palomino*, 78 AD3d 996, 996 [2d Dept 2010]). For evidence to be considered documentary, it must be unambiguous, authentic and undisputed (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). Therefore, "affidavits, deposition testimony, [and] letters are [not considered] 'documentary evidence' within the intendment of CPLR 3211 (a) (1)" (*Granada*

*Condo. III Ass'n*, 78 AD3d at 997). In an action involving real property, a lease, deed, mortgage, closing statement and a satisfaction of mortgage have been held to constitute documentary evidence (see *Sunset Café, Inc. v Mett's Surf & Sports Corp.*, 103 AD3d 707, 709 [2d Dept 2013]; *Casso v Kaplan*, 16 Misc 3d 1130[A] [Sup Ct, Kings County 2007]).

Here, Plaintiff does not contest that Defendant holds title to the Property pursuant to the Referee's Deed. However, the Court finds Defendant's contention that the affidavits of service on Nelson Black and Rita Black in the Foreclosure Action indicate that they were the sole tenants in 2012 unavailing. All it reflects is that the Blacks were served with process. Defendant's property data exhibit is also unpersuasive. First, the document was not certified or authenticated. Second, the document merely identifies the Property's building class. Whether the Property is a one-family or multi-family home has no bearing on Plaintiff's alleged possession. Since it cannot be said that Defendant's documentary evidence resolves all factual issues and conclusively disposes of Plaintiff's claim, Defendant's motion to dismiss under CPLR 3211 (a) (1) is denied.

The Court now considers the portion of Defendant's motion seeking dismissal under CPLR 3211 (a) (7). "On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]). "Moreover, '[a] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true'" (*Canzona v Atanasio*, 118 AD3d 837, 838 [2d Dept 2014], citing *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]).

Here, the 2008 amendments to the adverse possession statute within RPAPL, Article 5 (see L 2008, ch 269, § 5) apply since Plaintiff's alleged property right did not vest prior to the enactment of those amendments (see *Hogan v Kelly*, 86 AD3d 590, 592 [2d Dept 2011]). Under the current law, "[t]o establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years)" (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]; see RPAPL 501 [3] [defining "claim of right"]). Where, as here, a claim for adverse possession is

not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where there have been acts sufficiently open to put a reasonably diligent owner on notice.
2. Where it has been protected by a substantial enclosure (RPAPL 522).


Plaintiff's complaint is wholly devoid of factual allegations in violation of CPLR 3013, which requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." While Plaintiff attempts to add facts in his affidavit, the Court finds that certain facts therein are fatal to his claim. In particular, Plaintiff avers that he "moved in [to the Property] because [he] was aware that the prior owners . . . had moved to Georgia" (NYSCEF Doc No. 19, ¶ 7). This is not a situation where Plaintiff had a reasonable basis for believing he owned the Property (*cf. Calder v 731 Bergan, LLC*, 83 AD3d 758, 759 [2d Dept 2011]). Instead, he acknowledged that the Property had owners and because they moved, he saw an opportunity to take possession (*see Fini v Marini*, 164 AD3d 1218, 1220 [2d Dept 2018] [finding that defendant cannot establish possession was under a claim of right where he did not have a reasonable basis for the belief that the property belonged to him alone]). Under these circumstances, Plaintiff's adverse possession claim falls because there are no facts that would establish the material element of "claim of right" under the amended RPAPL.

Accordingly, it is hereby

ORDERED, that Defendant's motion to dismiss (Mot. Seq. No. 3) is granted to the extent it is based on CPLR 3211 (a) (7).

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

  
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Hon. Ingrid Joseph, J.S.C.  
**Hon. Ingrid Joseph**  
**Supreme Court Justice**