SUFFOLK ACADEMY OF LAW
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Negotiating, Neutralizing and Nullifying Nasty Neighbors in New York

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NEGOTIATING, NEUTRALIZING, AND NULLIFYING NASTY NEIGHBORS: PART ONE – BOUNDARY DISPUTES, ADVERSE POSSESSION, AND EASEMENTS

A. SURVEYS AS TOOLS IN NEIGHBOR DISPUTES

(John A. Robinson, LLS – John A. Robinson Land Surveyor)

1. Why and how to hire a surveyor, including the legal requirements for surveyors to provide surveying services in this jurisdiction.

2. Understanding the State Board for Engineering and Land Surveying ("SBELS") and Land Surveying Practice Guidelines.

   (*See* http://www.op.nysed.gov/prof/pels/lsurvguide.htm)

3. Gathering factual information, such as old surveys, deeds, and preliminary field investigations.

4. Finding the best surveyor for your client.

5. What is desired in a field survey?

6. How will appropriate access to the property be arranged?

7. How will the field work be performed and by whom?

8. How will exhibits be prepared?

9. Meeting with the surveyor to learn of his findings and research.

10. What evidence may be recovered such as historical surveys and documents?

11. Will aerial photography help to see the picture?

12. Will an affidavit from the surveyor help to make the case?

13. How best can mapping be prepared to shed light on the situation?

14. Preparing a surveyor to testify at deposition and at trial.

B. BOUNDARY DISPUTES AND ADVERSE POSSESSION PRE-2008

(Kenneth A. Brown, Esq. – Harras Bloom & Archer LLP)

1. Conflicting deed language.

2. Overlaps.

3. Gaps or gores.

4. Hierarchy of calls in deed interpretation:

   (i) natural objects or landmarks;

   (ii) artificial monuments;

   (iii) adjacent boundaries;

   (iv) courses and distances; and

   (v) quantity (*e.g.*, acreage).

5. Ambiguities are construed against the grantor.

6. Deed must be construed according to intent of grantor.

7. Resolving conflicting surveys.

8. Encroachments.

9. Projections.

10. Adverse Possession Pre-2008 Amendments.

    (i) New York law is axiomatic that a defense of adverse possession may be sustained only if the would-be adverse possessor meets the heavy burden of proving by clear and convincing admissible evidence of each of the following common law elements:

        (a) Hostile;

        (b) Under Claim of Right;

(c) Actual;

(d) Open and notorious;

(e) Exclusive;

(f) Continuous for the statutory period, which generally 10 years.

(ii) If any of these elements is wanting, the possession will not effect a bar to the legal title. *Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 192 A.D.2d 501, 596 N.Y.S.2d 435, 436 (2d Dep't 1993) (emphasis added); *see also Litwin v. Town of Huntington*, 208 A.D.2d 905, 617 N.Y.S.2d 888 (2d Dep't 1994) (affirming dismissal of plaintiff's adverse possession claim because plaintiff failed to substantiate assertion that cultivation and other activities were continuous, open, and notorious for requisite period), *leave to appeal dismissed*, 86 N.Y.2d 777, 631 N.Y.S.2d 609 (1995); *Colnes v. Colligan*, 183 A.D.2d 693, 583 N.Y.S.2d 281, 282 (2d Dep't 1992).

(iii) The stringent and demanding standard of "clear and convincing" proof applies to each of the elements of an adverse possession defense. *E.g., Rusoff v. Engel*, 89 A.D.2d 587, 452 N.Y.S.2d 250 (2d Dep't 1982). "Clear and convincing proof" is the highest burden of proof applicable in civil litigation. *See generally* Black's Law Dictionary 227 (5th ed. 1979) ("[t]hat measure or degree of proof which will produce in the mind of trier of facts a firm belief or conviction as to allegations sought to be established; it is intermediate, being more than mere preponderance, but not to extent of such certainty as is required beyond reasonable doubt as in criminal cases" (emphasis added)).

(iv) If the would-be adverse possessor has not been in possession more than ten (10) years, he or she may seek to "tack" his or her period of possession to that if his or her predecessor in title. *See Berman v. Golden*, 131 A.D.2d 416, 515 N.Y.S.2d 859, 861 (2d Dep't 1987). *But cf. Firsty v. Swan*, 184 N.Y.S.2d 250 (Sup. Ct., Westchester County, 1959) (adverse possession claim based upon "tacking" must fail when there is no evidence that predecessors ever asserted adverse claim to disputed area or intended to transfer any adverse possession that they may have had), *aff'd & modified on other grounds*, 11 A.D.2d 692, 204 N.Y.S.2d 609 (2d Dep't 1960).

(v) A claim of adverse possession based upon tacking must fail when (1) a party's predecessors never asserted a claim of right to the disputed area,

and (2) the deed to such party excluded the disputed area. *Meerhoff v. Rouse*, 4 A.D.2d 740, 163 N.Y.S.2d 746 (4th Dep't 1957).

(vi) Adverse Possession Claims Based Upon a Written Instrument.

(vii) Adverse Possession Claims Not Based Upon a Written Instrument.

11. Resolving Boundary Disputes.

(i) Boundary Agreements.

(ii) Quit Claim Deeds.

(iii) Affidavits.

(iv) Licenses.

(v) Easements.

(vi) Article 15 of the Real Property Actions and Proceedings Law.

C. ADVERSE POSSESSION AFTER THE "2008 AMENDMENTS"

(Andrew J. Luskin, Esq. – McLaughlin & Stern, LLP)

1. What Prompted the 2008 Adverse Possession Amendments?

(a) The *Walling* decision: *Walling v. Przybylo* (August 2006): The Court of Appeals held that actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor.

(b) Where does this notion come from? *Humbert v. Rector, Churchwardens & Vestrymen of Trinity Church*, 24 Wend. 587 (1840): Actual knowledge of the possessor does not preclude a claim of adverse possession.

(c) What is a "claim of right"?

(d) By definition, a claim of right is a claim adverse to the title owner and also in opposition to the rights of the true owner.

(e) Conduct will prevail over knowledge, particularly where the true owner has acquiesced in the adverse possessor's exercise of ownership rights.

(f) Remedies for other wrongs or infringements are cut off upon expiration of the applicable statute of limitations, so why is adverse possession any different?

2. The Walling Decision Did Not Sit Well With the People of the State of New York.

3. Chapter 269 of the Laws of 2008: Approved and effective July 7, 2008; An act to amend the real property actions and proceedings law in relation to adverse possession.

4. The act amended seven sections of the New York Real Property Actions and Proceedings Law ("RPAPL"): §§ 501, 511, 512, 521, 522, 531, 541, and 543

5. The act added one new section: RPAPL § 543

6. Summary of the Significant Amendments

(a) RPAPL § 501: Revised the definition of an adverse possessor: An "adverse possessor" is a person or entity that occupies real property of another with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

(b) Expressly gives title to the adverse possessor after ten years, provided that the adverse possessor satisfies the other elements of adverse possession.

(c) Defines "claim of right": A reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. But note: a claim of right is not required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

(d) RPAPL § 512: Adverse Possession Under a Written Instrument or Judgment: Adverse possession can be claimed under a written instrument, where:

(i) There have been acts sufficiently open to put a reasonably diligent owner on notice; or

(ii) The land has been protected by a substantial enclosure (except as provided in RPAPL § 543); or

(iii) Although not enclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

(e) RPAPL §§ 521 & 522: Adverse Possession not Under a Written Instrument or Judgment: To constitute adverse possession not under a written instrument or judgment, land is deemed to have been possessed and occupied in either of the following cases, and no others:

(i) Where it has been usually cultivated or improved [former version of statute] there have been acts sufficiently open to put a reasonably diligent owner on notice; or

(ii) Where it has been protected a substantial enclosure, except as provided in RPAPL § 543(1).

(f) RPAPL § 543: Adverse Possession; how affected by acts across a boundary line:

(i) The existence of *de minimis* non-structural encroachments, including, but not limited to, fences, hedges, shrubbery, plantings, sheds, and non-structural walls, shall be deemed to be permissive and non-adverse; and

(ii) The acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.

7. Are the 2008 Amendments Really Applied Retroactively?

(a) The statutory amendments expressly state that they take effect immediately (July 7, 2008), and shall apply to claims filed on or after that date.

(b) The courts have held that if title by adverse possession vested before the July 7, 2008 effective date, then the pre-amendment version of the statute applies.

D. PRESCRIPTIVE EASEMENTS

(Thomas G. Sherwood, Esq. Of Thomas G. Sherwood, LLC)

1. Required elements for prescriptive easements.

   - Open and notorious;
   - Continuous for the prescriptive period;
   - Hostile and under claim of right.

2. Differences between prescriptive easements and ownership by adverse possession. The common law elements are the same, except for exclusivity, see Gorman v. Hess, 301 A.D.2d 683 (3d Dep't 2003).

   - No statutory overlay? Changes to RPAPL 501 should cover prescriptive easements as well.
   - Right to use vs. ownership
   - No need to prove exclusivity – but use of "easement" by general public may defeat the prescriptive easement claim, see Reiss v. Maynard, 148 A.D.2d 996 (4th Dep't 1989) and Pirman v. Confer, 273 NY 357 (1937).

3. Element of continuous use: What is required?

   - Seasonal use is enough, if continuous and uninterrupted and "commensurate with appropriate existing seasonal uses," see Miller v. Rau, 193 A.D.2d 868 (3d Dep't 1993).
   - Frequency?

4. Element of hostility before and after 2008 statute changes.

   - Defeated by express permission
   - Defeated by implied permission? (how to deal with silence – is it neglect or acquiescence - very difficult to prove when litigated)
   - May be satisfied through proof of actual hostility – what really qualifies?

- May be satisfied through presumption of hostility when applicable. The presumption that use was hostile and under a claim of right arises from clear and convincing proof of open and notorious, continuous and uninterrupted use for longer than the ten-year statutory period, Rivermere Apartments v. Stoneleigh Parkway, 275 A.D.2d 701 (2d Dep't 2000).

5. The presumption of hostility is subject to major exceptions, including the "neighborly accommodation" doctrine, see Hassinger v. Kline, 91 A.D.2d 988 (2d Dep't 1983); Estate of Becker v. Murtagh, 19 N.Y.3d 75 (2012). "Close and cooperative relationship" between the parties will defeat the presumption of hostility under Becker. A "mere claim of neighborly accommodation is not proof of permission," see Reed v. Piedmonte, 138 A.D.2d 937 (4th Dep't 1988). Conflicting inferences drawn from burdened owner's silence – implied permission? Background history and relationship may control. Implied permission/neighborly accommodation found where claimant used neighbor's parking lot to access his own. Use by the owner and general public defeats presumption, see Colin Realty v. Manhasset Pizza, 137 A.D.3d 838 (2d Dep't 2016). See Pirman v. Confer, 273 N.Y. 357 (1937) – presumption of hostility applies, even when general public uses the same area, where the use by the party seeking the prescriptive easement is inconsistent with the rights of the owner, or there is a "decisive act" on the part of the claimant indicating a use that is "separate and exclusive from the general use."

6. Where actual hostility needs to be proven, may be very difficult to establish by "clear and convincing evidence."

   In one case, the following language in a court pleading filed in an action commenced twenty years earlier was found to be insufficient to prove actual hostility:

   Defendants, their predecessors in interest, and employees, agents, invitees, customers and delivery persons of defendants and their predecessors in interest have crossed and traversed over the (disputed) property in an open, notorious, continuous, uninterrupted, hostile, undisputed and adverse manner of actual possession without objection by plaintiff or plaintiff's predecessors in interest under a claim of right to said easement, commencing in or about 1941 when (defendant) purchased (defendant's) Property

7. Scope and extent of the easement obtained by prescription – "the right acquired is measured by the extent of the use." Expanding the nature of the use acquired by prescription may require a new prescriptive period, see Mandia v. King Lumber and Plywood Co. Inc., 179 A.D.2d 150 (2d Dep't 1992); expanding the frequency of use may not, see Dermody v. Tilton, 85 A.D.3d 1682 (4th Dep't 2011). Tenants' use may create easement for landlords, and landlord's easement can be used by tenants, see Pouy v. Mandia, 234 A.D. 897 (2d Dep't 1931).

8. Application of prescriptive easement doctrine to specific types of easements-parking, rights of way (see Ducasse v. D'Alonzo, 100 A.D.3d 953 (2d Dep't 2012), shopping centers. 315 West Main St. Poughkeepsie LLC v. WA 319 Main, LLC, 62 A.D.3d 690 (2d Dep't 2009) makes parking lot and driveway cases very difficult to win if the presumption of hostility is not applied.

9. Termination of prescriptive easements.

   - Court order – Quiet title or permanent injunction
   - Abandonment - non-use for the statutory period is not enough – must be able to show that "manifested an intent to give up use of the easement, or acted inconsistent with the existence of the easement" see Miller v. Rau, supra.
   - Physical obstruction for statutory period. Contrast to short interruption during the prescriptive period.

John A. Robinson, Land Surveyor
Curriculum Vitae

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Massapequa Park, New York 11762
Telephone: (516) 799-3127 - (unlisted)

Education:

Massapequa High School - Regents Diploma - 1969
Hofstra University - B.B.A. - 1973

State Licensure:

Land Surveying License No. 49059 – Issued 16 July 1974
Certificate of Authorization No. 0013992 – Expires 31 May 2020
Registration Certificate – Expires 30 April 2019
Issued by the University of the State of New York

Professional Experience:

June 1973 - December 31, 1974
Employed by A. Prescott Halsey, Land Surveyor Massapequa, New York

January 1, 1975 - present
Private Practice - This office maintains the records of the following:

1. A. Prescott Halsey, Land Surveyor
2. John P. Searby, Land Surveyor
3. Searby & Miller, Land Surveyors
4. John A. Miller, Land Surveyor
5. John W. Brown, Land Surveyor
6. Walter B. White, Land Surveyor (partial)
7. Robert Patterson, Land Surveyor
8. F. Earle Tiller, Land Surveyor
9. Seelye, Stevenson, Value, & Knecht, Inc. (partial)
10. Sanders & Thomas of New York, Inc. (partial)
11. Edwin S. Voorhis and Son, Inc.
12. Chester E. Voorhis, Land Surveyor
13. I. Henry Kirby, Land Surveyor
14. Robert G. Tufano, Land Surveyor
15. Harold R. Bausch
16. Harold R. Bausch, PC.
17. Harold R. Bausch, Sr.
18. Bausch & Bausch 9.
19. Emanuel Hirsch
20. William Patrick
21. Albert C. Purdy

Professional Associations:

1. Nassau - Suffolk Civil Engineers, Inc. (a regional of the New York State Association of Professional Land Surveyors)
   a. Currently seated on the Board of Directors
   b. Elected Secretary of the Corporation - 1990, 1991
   c Elected Vice - President of the Corporation - 1992, 1993
   d. Elected President of the Corporation - 1994, 1995, 1996, 1997
2. New York State Association of Professional Land Surveyors
   a. Director of the Corporation - 1992, 1993, 1994, 1995, 1996, 1997
3. National Society of Professional Land Surveyors
4. American Congress on Surveying and Mapping

WHAT WILL A SURVEY COST?

★ The cost of surveys differ because of varying sizes and locations of properties. Such things as the complexity of the descriptions, terrain and the shape of the property are factors which must be considered. As a result, only a Professional Land Surveyor can accurately estimate the cost of a survey.

★ The cost of a survey can range from a few hundred to several thousands of dollars. However, most Professional Land Surveyors are willing to discuss their fees and offer an estimate before you authorize a survey. You should keep in mind that the cost of a survey represents a very small percentage of your total investment, but it can help you avoid costly and painful problems in the future.

WHERE CAN I FIND A QUALIFIED PROFESSIONAL LAND SURVEYOR?

★ All land surveys in New York must be performed by a Pofessional Land Surveyor who has been licensed and registered to practice in the state.

★ Surveyors who are members of Nassau-Suffolk Civil Engineers, Inc. are all licensed and registered to practice in New York State. In addition, they have subscribed to the "Code of Practice for Land Surveys" adopted by the New York State Association of Professional Land Surveyors, Inc. This code is designed to help maintain a high standard of care and precision in the preparation of land surveys.

★ You should inquire whether the surveyor you are considering will certify that his survey has been prepared in accordance with this code and whether he is a member of Nassau-Suffolk Civil Engineers, Inc.

★ You can find members listed in the classified section of your telephone directory under "Surveyors, Land".

PROTECT YOUR INTEREST

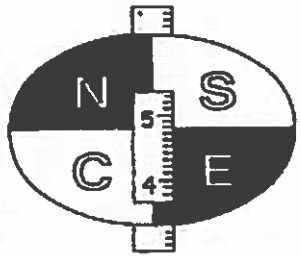
★ The Professional Land Surveyor locates the property upon which improvements are planned and constructed. His professional services will cost less in time, worry and expense than the cost of moving a building, relocating improvements or defending a law suit in court due to a land boundary controversy. Retain a licensed Professional Land Surveyor prior to the investment of funds as a protection of your interests.

why you need a Land Survey... when you buy Real Estate

NASSAU SUFFOLK

CIVIL ENGINEERS

Incorporated 1927



A Professional Society of Land Surveyors and Engineers

A LAND SURVEY

★ A land survey locates upon the ground, the land that your deed describes.

★ For most people, the purchase of a home or other real property represents the largest single investment of a lifetime.

★ A casual inspection of your property will not be sufficient to determine its boundaries and assure that all buildings, fences and other improvements on your land as well as that of your neighbors are properly located.

★ There are many questions you should ask before you purchase land. The most importand are:

1. EXACTLY WHERE ARE THE PHYSICAL BOUNDRIES OF THE PROPERTY THAT I HAVE CONTRACTED TO PURCHASE?

2. ARE THE PHYSICAL IMPROVEMENTS (HOUSE, GARAGE, FENCES, ETC.) THAT I WAS SHOWN, ACTUALLY ON THE PROPERTY?

The answers to these questions can be reassuring or distressing, but if they are discovered after closing the sale, the results may be a financial disaster.

WHY ARE THESE QUESTIONS IMPORTANT?

★ They are important because the property described in a contract often is not exactly as it was shown or appeared to the purchaser. Sometimes property that has been improved and maintained by a seller actually belongs to a neighbor. The property lines may go through a garden, a garage, or even a house. Occasionally, a contract describes completely different land than was shown to the purchaser.

WHO CAN ANSWER THESE QUESTIONS?

★ Only a Professional Land Surveyor legally licensed and registered to practice land surveying may provide the service necessary to answer these vital questions. A licensed Professional Land Surveyor is an expert at interpreting descriptions of property and is uniquely qualified to accurately and precisely locate property lines.

★ A title search will insure that the seller owns the property that he has contracted to sell.

★ The services of an attorney will, among other things, assure an understanding of the survey and other documents necessary to the transaction, as well as of the obligations incurred by signing a given document.

WHAT WILL A PROFESSIONAL LAND SURVEYOR DO TO ANSWER THESE QUESTIONS?

★ The surveyor will study the documents that you supply, including those in your title search. Then a field survey will be conducted, searching for and obtaining evidence of property boundaries and locating any visible improvements on or near the property. When the field survey is complete, the measurements are mathematically proven and the documents compared with the evidence found. After the exact locations are determined by the surveyor, a report is prepared, usually in the form of a survey map.

WHAT WILL THE SURVEY MAP SHOW ME?

★ The survey map will show you the location of the property lines as described in the deed and title search. It will show you the dimensions of the land and the location of other lines that affect the property as described in your documents such as easements and rights of way. It will note any variations from the described angles, lengths and areas that the surveyor may find. The map will also depict the location of visible improvements on or near the property and the relation of those improvements to the property's boundary.

★ It may show that the garden you admired actually belōngs to a neighbor or that a part of the land is being used by others. It may show you that the easement, reserved for others in the deed, is just the place where you thought your pool might go someday. It is also possible that there will be evidence of an easement that was not recorded.

★ With the survey map, your attorney can determine whether or not property conforms to the local zoning requirements. A survey will aid him in evaluating the effect of any covenants and/or restrictions on the property.

★ The inside fold of this pamphlet lists many of the questions answered by a survey map.

WHAT IF THE SELLER HAS A PREVIOUS SURVEY?

★ First, It will certainly aid your Surveyor in his background research.

★ Second, A previous survey may not accurately depict current conditions.

★ Third, A survey done for a previous owner was done for a specific purpose and is not transferable to subsequent purchasers.

THIS IS SOME OT THE INFORMATION WHICH A SURVEY MAP WILL PROVIDE

COUNTY TAX MAP IDENTIFICATION

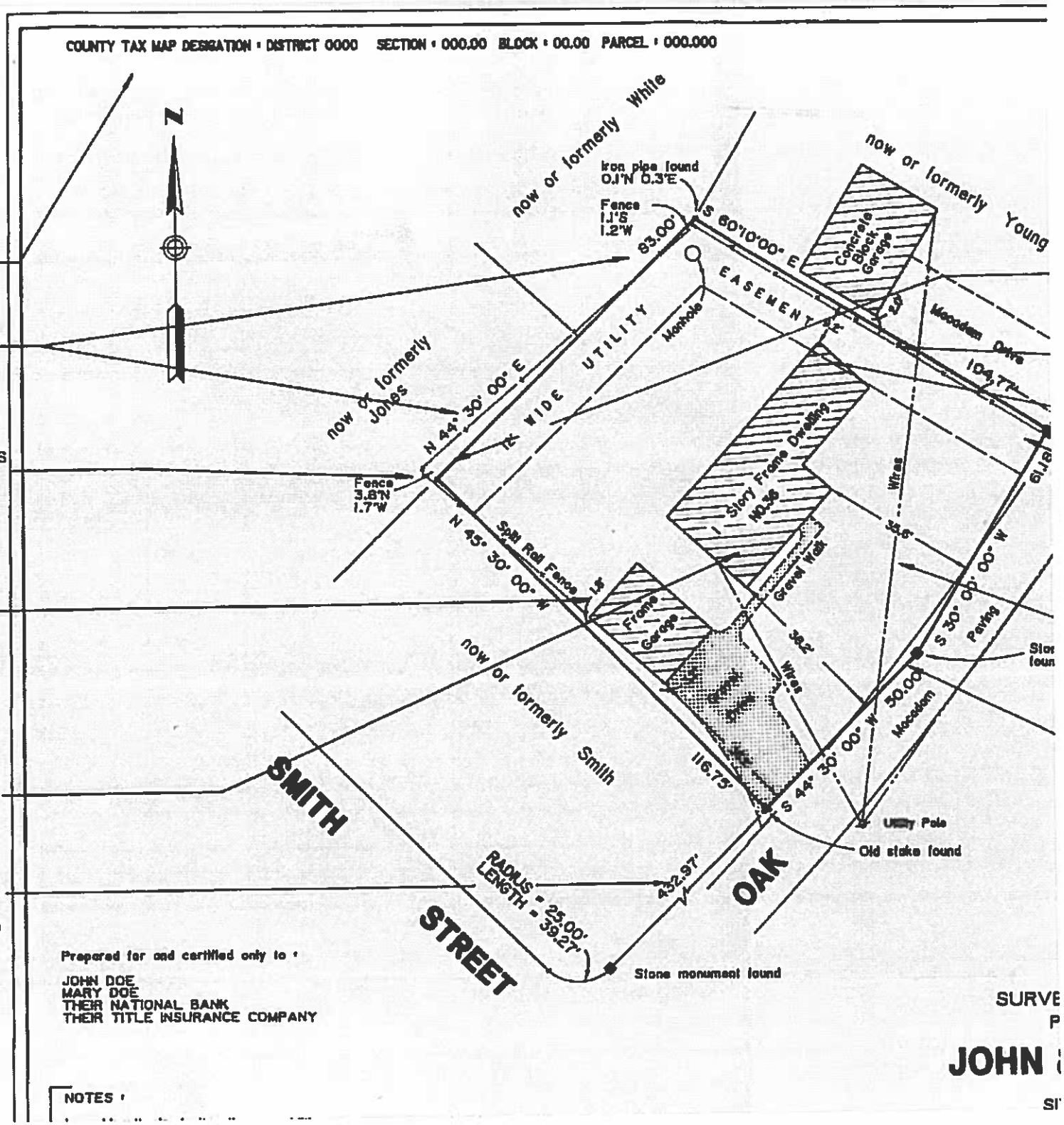
THESE NUMBERS CALLED BEARINGS AND DISTANCES DEFINE THE SHAPE OF THE PROPERTY.

THE MAP SHOWS VARIOUS IMPROVEMENTS ON THE PROPERTY AND THEIR RELATIONSHIP TO THE PROPERTY LINES.

THE DISTANCE CALLED AN OFFSET SHOWS THE SHORTEST DISTANCE FROM AN IMPROVEMENT TO THE PROPERTY. IT IS USEFUL FOR PLANNING IMPROVEMENTS AND CHECKING ZONING REQUIREMENTS.

THIS NUMBER IS THE STREET ADDRESS OF THE PROPERTY.

THIS DISTANCE, CALLED A TIE, SHOWS THE DISTANCE FROM A STREET INTERSECTION OR OTHER REFERENCED CORNER TO THE BEGINING OF THE PROPERTY



Prepared for and certified only to :

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MARY DOE
THEIR NATIONAL BANK
THEIR TITLE INSURANCE COMPANY

SURVE
P
JOHN
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NOTES :

Kenneth A. Brown, Counsel, Harras Bloom & Archer LLP

Kenneth A. Brown focuses on commercial, corporate, land use, and real estate litigation in state and federal courts. Ken is a graduate of Columbia College, Columbia University, where he studied Political Science and Economics. Ken graduated *magna cum laude* from New York Law School, where he was ranked 4th in his class, a recipient of a full-tuition merit scholarship, and a research editor of the Law Review. While a law student, Ken interned with state and federal judges.

After graduation from law school, Ken held a two-year position as a Law Clerk to the Honorable Robert D. Potter, Chief Judge of the United States District Court, Western District of North Carolina, located in Charlotte, North Carolina. He then returned to New York and worked on numerous complex litigation matters in state and federal courts.

In addition to being admitted to practice before the courts of the State of New York, Ken is admitted to practice in the United States District Courts of the Southern and Eastern Districts of New York. He is a member of the New York County Lawyers' Association and the Suffolk County Bar Association, where he is an officer of the Suffolk Academy of Law, which is the educational arm of the Suffolk County Bar Association.

Ken has made several continuing legal education presentations for the National Business Institute (NBI) on the topics of water boundaries, boundary dispute resolution, and ethics.

Ken was born in Manhattan, and has lived on Long Island most of his life. He now resides in Massapequa with his wife Maryjane Altman.

Ken writes a blog entitled "Negotiating, Neutralizing, and Nullifying Nasty Neighbors in New York."

Ken is a co-author and co-editor of "A Wiser Course: Ending Drug Prohibition" (June 1994), a report of the Special Committee on Drugs and the Law of the Association of the Bar of the City of New York.

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148 A.D.3d 672
Supreme Court, Appellate Division,
Second Department, New York.

Fidelina DIAZ, respondent,
v.
MAI JIN YANG, et al., appellants.

March 1, 2017.

Synopsis

Background: Owner of residential property brought action against neighbor, who also owned residential real property, seeking judgment declaring that she had acquired title and all rights, by adverse possession, to neighbor's portion of double garage and driveway located partially on both parties' property, and seeking damages for use and occupancy, trespass, and slander of title. Neighbor brought counterclaims seeking declaration that they were owners of disputed property. The Supreme Court, Kings County, David B. Vaughan, J., denied neighbor's motion for summary judgment. Neighbor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] owner's use of neighbor's portion of double garage and driveway was permissive, and

[2] neighbor's motion was not premature.

Reversed and remitted.

West Headnotes (7)

[1] **Adverse Possession**
⇐ Character and elements of adverse possession in general

Adverse Possession
⇐ Weight and Sufficiency of Evidence

To establish a claim of title to real property by adverse possession, a party must prove, by clear and convincing evidence, 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.

Cases that cite this headnote

[2] **Easements**
⇐ Adverse possession

To extinguish an easement, a party must establish, by clear and convincing evidence, the five elements of adverse possession by showing that the party's use of the property adverse to the owner of the easement has been: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the statutory period of 10 years.

Cases that cite this headnote

[3] **Adverse Possession**
⇐ Tacking Successive Possessions

Adverse Possession
⇐ When possessions may be tacked in general

A party claiming adverse possession may establish possession for the statutory period by tacking the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property; in order for tacking to be applicable, a party must show that the party's predecessor intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed.

Cases that cite this headnote

[4] **Adverse Possession**
⇐ Permissive entry and occupation, and license

Property owner's use of neighbor's portion of double garage and driveway, which was located partially on both parties' property, was permissive, precluding owner's claim that she acquired title by adverse possession.

Cases that cite this headnote

[5] **Adverse Possession**
Permissive entry and occupation, and license

Permissive use of the property at issue negates the element of hostility necessary to establish a claim of adverse possession.

Cases that cite this headnote

[6] **Adverse Possession**
Time Requisite for Acquisition of Rights

Property owner did not use or possess disputed property for at least 10 years, as required to support claim for title by adverse possession.

Cases that cite this headnote

[7] **Judgment**
Hearing and determination

Neighbor's summary judgment motion in adverse possession action was not premature, absent demonstration by owner of adjoining property that discovery could lead to relevant evidence or that facts essential to opposing the motion were exclusively within neighbor's knowledge or control. McKinney's CPLR 3212(f).

Cases that cite this headnote

Attorneys and Law Firms

**486 Borchert & LaSpina, P.C., Whitestone, NY (Robert W. Frommer of counsel), for appellants.

Stern & Stern, Brooklyn, NY (Pamela Smith of counsel), for respondent.

RANDALL T. ENG, P.J., JOHN M. LEVENTHAL, JEFFREY A. COHEN, and COLLEEN D. DUFFY, JJ.

Opinion

*672 Appeal by the defendants from an order of the Supreme Court, Kings County (David B. Vaughan, J.), dated February 26, 2015. The order denied the defendants' motion for summary judgment dismissing the complaint and for summary judgment on their first, third, and fourth counterclaims.

*673 ORDERED that the order is reversed, on the law, with costs, the defendants' motion for summary judgment dismissing the complaint and for summary judgment on their first, third, and fourth counterclaims is granted, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment in accordance herewith.

The plaintiff owns residential real property that is adjacent to the defendants' residential real property. A double garage and a driveway are located partially on the plaintiff's property and partially on the defendants' property. The plaintiff acquired her property by deed recorded on July 1, 2006. In October 2012, the plaintiff commenced this action pursuant to RPAPL article 15, seeking, among other things, a judgment declaring that she had acquired title and all rights, by adverse possession, to the defendants' portion of the double garage and the driveway, and that an easement over her property in favor of the defendants' property to access the double garage was extinguished. The plaintiff also asserted causes of action seeking to recover damages for use and occupancy, trespass, and slander of title. The defendants moved for summary judgment dismissing the complaint and for summary judgment on their first, third, and fourth counterclaims, which sought a judgment, inter alia, declaring that they are the owners of the disputed property and that the plaintiff has no interest in the disputed property, and related injunctive relief. By order dated February 26, 2015, the Supreme Court denied the motion, and the defendants appeal.

[1] [2] To establish a claim of title to real property by adverse possession, a party must prove, by clear and convincing evidence, 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 (*see Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 81, 945 N.Y.S.2d 196, 968 N.E.2d 433; *Walling v. Przybylo*, 7 N.Y.3d 228, 232, 818 N.Y.S.2d 816, 851 N.E.2d 1167; *Klein v. Aronshtein*, 116 A.D.3d

670, 671, 983 N.Y.S.2d 298). In 2008, the Legislature amended the adverse possession statutes (*see* L. 2008, ch. 269; *Estate of* ****487** *Becker v. Murtagh*, 19 N.Y.3d at 81 n. 4, 945 N.Y.S.2d 196, 968 N.E.2d 433). These amendments included the following statutory definition of the "claim of right" element: "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be" (RPAPL 501[3]; *see Hogan v. Kelly*, 86 A.D.3d 590, 592, 927 N.Y.S.2d 157). Furthermore, to extinguish an easement, a party must establish, by clear and convincing evidence, the five elements of adverse possession: that the party's use of the property adverse to the owner of the easement has been (1) hostile and under a claim of right, ***674** (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years (*see Spiegel v. Ferraro*, 73 N.Y.2d 622, 625, 543 N.Y.S.2d 15, 541 N.E.2d 15; *Koudellou v. Sakalis*, 29 A.D.3d 640, 641, 814 N.Y.S.2d 730).

[3] "A party claiming adverse possession may establish possession for the statutory period by 'tacking' the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property" (*Munroe v. Cheyenne Realty, LLC*, 131 A.D.3d 1141, 1142, 16 N.Y.S.3d 842; *see Stroem v. Plackis*, 96 A.D.3d 1040, 1042–1043, 948 N.Y.S.2d 90). In order for tacking to be applicable, a party must show that the party's predecessor "intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed" (*Brand v. Prince*, 35 N.Y.2d 634, 637, 364 N.Y.S.2d 826, 324 N.E.2d 314).

[4] [5] [6] [7] Here, the defendants' submissions were sufficient to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint. They submitted evidence demonstrating, among other things, that the plaintiff's use of the disputed property was not hostile and under a claim of right, but was permissive. In this regard, permissive use of the property at issue "negates the element of hostility necessary to establish a claim of adverse possession" (*Chatsworth Realty 344 v. Hudson Waterfront Co. A*, 309 A.D.2d 567, 568, 765 N.Y.S.2d 39; *see Bratone v. Conforti-Brown*, 79 A.D.3d 955, 957–958, 913 N.Y.S.2d 762). In opposition, the plaintiff failed to raise a triable issue of fact. It is undisputed that the plaintiff did not possess the disputed property for the 10–year statutory period. Contrary to the plaintiff's contention, she failed to provide evidence that the 10–year period could be satisfied by "tack[ing]" on the periods of adverse possession or use by her predecessors (*Munroe v. Cheyenne Realty, LLC*, 131 A.D.3d at 1142, 16 N.Y.S.3d 842; *see CSC Acquisition-NY, Inc. v. 404 County Rd. 39A, Inc.*, 96 A.D.3d 986, 988, 947 N.Y.S.2d 556; *Reis v. Coron*, 37 A.D.3d 803, 804, 830 N.Y.S.2d 589). The plaintiff's contention that the defendants' motion for summary judgment was premature also is without merit, since the plaintiff failed to demonstrate how discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the defendants' knowledge or control (*see* CPLR 3212[f]; *Reyes v. Carroll*, 137 A.D.3d 886, 890, 27 N.Y.S.3d 80). Consequently, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the plaintiff's adverse possession causes of action.

Since the plaintiff did not acquire title by adverse possession of the disputed property, the defendants are entitled to summary judgment dismissing the remaining causes of action, ***675** which sought to recover damages for use and occupancy, trespass, and slander of title (*see Reyes v. Carroll*, 137 A.D.3d at 888–889, 27 N.Y.S.3d 80). The defendants are also entitled to summary judgment on their ****488** first, third, and fourth counterclaims. The defendants submitted the deed to their property as well as a survey of their property establishing that they are entitled to the requested declaratory and injunctive relief (*see CSC Acquisition-NY, Inc. v. 404 County Rd. 39A, Inc.*, 96 A.D.3d at 988, 947 N.Y.S.2d 556; *Skyview Motel, LLC v. Wald*, 82 A.D.3d 1081, 1082, 919 N.Y.S.2d 191).

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the defendants are the owners of the disputed property and that the plaintiff has no interest in the disputed property (*see Lanza v. Wagner*, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670). The judgment should also include a provision enjoining the plaintiff from interfering with the defendants' quiet enjoyment of the disputed property.

All Citations

148 A.D.3d 672, 48 N.Y.S.3d 485, 2017 N.Y. Slip Op. 01534

End of Document

Citing References (7)

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**1. Loss of private easement by nonuser or adverse possession** 25 A.L.R.2d 1265 This annotation deals with the effect of disuse, either alone or with attending circumstances, as extinguishing a private easement. Among such attending circumstances may be those...	1952	ALR	—	1 2 N.Y.S.3d
—	**2. Carmody Wait 2d New York Practice with Forms s 39:83, Before or after completion of disclosure or discovery proceedings-When motion not premature** A motion for summary judgment is not premature due to lack of discovery where the plaintiff does not demonstrate that discovery was necessary to obtain facts within the sole...	2017	Other Secondary Source	—	7 N.Y.S.3d
—	**3. Carmody Wait 2d New York Practice with Forms s 13:121, Tacking of successive possessions** While possession must be continuous for the statutory period in order for a claim of adverse possession to ripen into title, the possession need not be in the same person for the...	2017	Other Secondary Source	—	1 N.Y.S.3d
—	**4. CJS Adverse Possession s 80, Generally** CJS Adverse Possession A key element in proving adverse possession is an intent to hold against the true owner as adverse possession is totally inconsistent with that of permissive use. As a general...	2017	Other Secondary Source	—	6 N.Y.S.3d
—	**5. N.Y. Jur. 2d Adverse Possession and Prescription s 39, Permissive possession or use** N.Y. Jur. 2d Adverse Possession and Prescription It is the general rule that a use or possession of land by express or implied permission or license from the owner cannot ripen into title by adverse possession no matter how long...	2017	Other Secondary Source	—	4 5 6 N.Y.S.3d
—	**6. N.Y. Jur. 2d Adverse Possession and Prescription s 61, Tacking successive possessions, generally; effect of interruption of possession or use** N.Y. Jur. 2d Adverse Possession and Prescription Under the statutes in some jurisdictions, but not in New York, a claim by adverse possession cannot prevail by tacking on possession by predecessors in title to the claimant. For...	2017	Other Secondary Source	—	3 N.Y.S.3d
—	**7. N.Y. Jur. 2d Adverse Possession and Prescription s 63, Tacking possession or use of property not included in deed or contract, generally** N.Y. Jur. 2d Adverse Possession and Prescription A deed or contract alone does not establish such privity between the grantor and grantee or vendor and vendee as is essential to a tacking of their successive possessions of an...	2017	Other Secondary Source	—	3 N.Y.S.3d

153 A.D.3d 787
Supreme Court, Appellate Division,
Second Department, New York.

ESTATE OF Vertley CLANTON, respondent,
v.
CITY OF NEW YORK, appellant.

Aug. 23, 2017.

Synopsis

Background: Landowner brought action against city to compel the determination of claims to real property which city had used as a truck parking lot for at least 30 years. The Supreme Court, Kings County, Genovesi, J., granted landowner's motion for summary judgment declaring that landowner was the sole owner of the real property, denied city's cross motion for summary judgment on counterclaim for a judgment declaring that it acquired title to the property by adverse possession, and enjoined city from entering property. City appealed.

[Holding:] The Supreme Court, Appellate Division, held that city established its prima face entitlement to judgment as a matter of law on adverse possession claim.

Reversed and remitted.

West Headnotes (5)

[1] **Adverse Possession**
Character and elements of adverse possession in general

To establish a claim to property by adverse possession, a claimant must prove, that possession of the property was: (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period.

1 Cases that cite this headnote

[2] **Adverse Possession**
Necessity

The purpose of the hostility requirement for an adverse possession claim is to provide the title owner notice of the adverse claim through the unequivocal acts of the usurper.

Cases that cite this headnote

[3] **Adverse Possession**
Presumptions and burden of proof

In an action for adverse possession, 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.

Cases that cite this headnote

[4] **Adverse Possession**
Presumptions and burden of proof

In an action for adverse possession 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.

Cases that cite this headnote

[5] **Adverse Possession**
Character and elements of adverse possession in general

Possession of property and use of property by city department of sanitation as truck parking lot was actual, open, notorious, exclusive, and continuous for at least ten years, and thus city established its prima facie entitlement to judgment as a matter of law on claim for adverse possession of property, although landowner had paid taxes on property; department paved property, fenced it in, and installed lighting.

Cases that cite this headnote

Attorneys and Law Firms

**362 Zachary W. Carter, Corporation Counsel, New York, NY (Claude S. Platton and Damion K.L. Stodola of counsel), for appellant.

Jonathan S. Roller, Brooklyn, NY, for respondent.

WILLIAM F. MASTRO, J.P., L. PRISCILLA HALL, JEFFREY A. COHEN, and ANGELA G. IANNACCI, JJ.

Opinion

*787 In an action, inter alia, pursuant to RPAPL article 15 to compel the determination of claims to real property, the defendant appeals, as limited by its brief, **363 from so much of an order of the Supreme Court, Kings County (Genovesi, J.), dated January 11, 2016, as granted the plaintiff's motion for summary judgment declaring that the plaintiff is the sole owner of the subject real property, denied the defendant's cross motion for summary judgment on its counterclaim, in effect, for a judgment declaring that it has acquired title to the property by adverse possession, and enjoined the defendant from entering the property.

*788 ORDERED that the order is reversed insofar as appealed from, on the law, with costs, the plaintiff's motion for summary judgment is denied, the defendant's cross motion for summary judgment on its counterclaim, in effect, for a judgment declaring that it has acquired title to the subject property by adverse possession is granted, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment declaring that the defendant has acquired title to the subject property by adverse possession.

In 1948, the plaintiff's predecessors in interest purchased real property in Brooklyn. For at least 30 years, the subject property, which is in the middle of other lots owned by the defendant, City of New York, has been used by the New York City Department of Sanitation (hereinafter the DSNY) as a truck parking lot. During this time, the DSNY has paved the property, fenced it in, and installed lighting. In 2006, the plaintiff filed a notice of claim against the City regarding the property and in 2007, the plaintiff commenced an action, inter alia, for a declaration that it is the sole owner of the property. The City counterclaimed, in effect, for a judgment declaring that it had acquired title to the property by adverse possession. The plaintiff contended, and the Supreme Court held, that the City's collection of tax payments from the plaintiff and its predecessors over the years constituted an admission or a concession that it did not possess the property under claim of right, thereby defeating its claim of adverse possession.

In 2008, the Legislature enacted sweeping changes to the provisions of RPAPL that address claims of adverse possession (*see* L. 2008, ch. 269, § 5). The 2008 amendments to the adverse possession statutes contained in RPAPL article 5 (*see* L. 2008, ch. 269, § 5) are not applicable where the alleged adverse possessor's property right, as alleged, vested prior to the enactment of those amendments (*see Galchi v. Garabedian*, 105 A.D.3d 700, 961 N.Y.S.2d 588; *Pakula v. Podell*, 103 A.D.3d 864, 962 N.Y.S.2d 254; *Matter of Lee*, 96 A.D.3d 941, 946 N.Y.S.2d 621; *Sprotte v. Fahey*, 95 A.D.3d 1103, 944 N.Y.S.2d 612; *Shilkoff v. Longhitano*, 94 A.D.3d 974, 943 N.Y.S.2d 144; *Hogan v. Kelly*, 86 A.D.3d 590, 927 N.Y.S.2d 157; *see also Barra v. Norfolk S. Ry. Co.*, 75 A.D.3d 821, 907 N.Y.S.2d 70; *Franza v. Olin*, 73 A.D.3d 44, 47, 897 N.Y.S.2d 804). It is of no consequence that the adverse possessor did not seek to quiet title until after the amended RPAPL went into effect, provided that the possessor's title vested in the property by adverse possession before the amendments took effect (*see Franza v. Olin*, 73 A.D.3d at 47, 897 N.Y.S.2d 804). Moreover, "RPAPL 501(2), as amended, recognizes that title, not the right to commence an action to determine title, is obtained upon the expiration of the limitations *789 period" (*id.*). As such, the 2008 amendments are inapplicable here.

[1] Under the law before the 2008 amendments, in order to establish a claim to property by adverse possession, a claimant must prove, inter alia, that possession of the property was: (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous **364 for the required period (*see Walling v. Przybylo*, 7 N.Y.3d 228, 232, 818 N.Y.S.2d 816, 851 N.E.2d 1167; *Belotti v. Bickhardt*, 228 N.Y. 296, 302, 127 N.E. 239; *Hogan v. Kelly*, 86 A.D.3d 590, 927 N.Y.S.2d 157; *Bratone v. Conforti–Brown*, 79 A.D.3d 955, 957, 913 N.Y.S.2d 762; *Asher v. Borenstein*, 76 A.D.3d 984, 986, 908 N.Y.S.2d 90; *Gourdine v. Village of Ossining*, 72 A.D.3d 643, 897 N.Y.S.2d 647).

[2] [3] [4] The purpose of the hostility requirement is to provide the title owner notice of the adverse claim

through the "unequivocal acts of the usurper" (*Monnot v. Murphy*, 207 N.Y. 240, 245, 100 N.E. 742; *see Walling v. Przybylo*, 7 N.Y.3d at 232, 818 N.Y.S.2d 816, 851 N.E.2d 1167; *Bratone v. Conforti–Brown*, 79 A.D.3d at 957, 913 N.Y.S.2d 762; *Hall v. Sinclaire*, 35 A.D.3d 660, 662, 826 N.Y.S.2d 706). 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 (*see Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 82, 945 N.Y.S.2d 196, 968 N.E.2d 433). "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*, 79 A.D.3d at 957, 913 N.Y.S.2d 762 [internal quotation marks omitted]; *see United Pickle Prods. Corp. v. Prayer Temple Community Church*, 43 A.D.3d 307, 309, 843 N.Y.S.2d 1; *Harbor Estates Ltd. Partnership v. May*, 294 A.D.2d 399, 400, 742 N.Y.S.2d 347; *City of Tonawanda v. Ellicott Cr. Homeowners Assn.*, 86 A.D.2d 118, 449 N.Y.S.2d 116).

[5] Here, the City established its prima facie entitlement to judgment as a matter of law by submitting evidence establishing that its possession of the property was actual, open and notorious, exclusive, and continuous for at least 10 years. Therefore, the burden shifted to the plaintiff to rebut the presumption of adversity. We conclude that the mere payment of taxes on the subject property is insufficient to rebut the presumption. Even assuming that knowledge of the true ownership of the property can be imputed to another municipal department in the City, such knowledge is not sufficient to defeat a claim of adverse possession (*see Walling v. Przybylo*, 7 N.Y.3d 228, 818 N.Y.S.2d 816, 851 N.E.2d 1167). Accordingly, the Supreme Court should have denied the plaintiff's motion, granted the City's cross motion, and entered a judgment declaring that the City has acquired title to the subject property by adverse possession.

All Citations

153 A.D.3d 787, 60 N.Y.S.3d 362, 2017 N.Y. Slip Op. 06254

End of Document

History (2)

Direct History (2)

1. Clanton v. The City of New York
2016 WL 10749473 , N.Y.Sup. , Jan. 26, 2016

Reversed by

2. Estate of Clanton v. City of New York
153 A.D.3d 787 , N.Y.A.D. 2 Dept. , Aug. 23, 2017

Citing References (5)

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	**1. Jason T. Lorenz and SHARON F. KAVY a/k/a SHARON F. LORENZ, Plaintiffs, v. Antonio D. Soares and ELIZA S. SOARES, Defendants.** 2018 WL 358435, *5 , N.Y.Sup. DECISION & ORDER In an action pursuant to RPAPL article 15 to determine claims to real property (1) the defendants move for summary judgment dismissing the complaint (motion...	Jan. 10, 2018	Case		1 N.Y.S.3d
—	**2. 63 Causes of Action 2d 1, Cause of Action for Ownership of Property by Adverse Possession Between Cotenants** Adverse possession is a doctrine under which a person in possession of real property owned by someone else may acquire valid title to it, so long as certain common law and, if...	2017	Other Secondary Source	—	1 N.Y.S.3d
—	**3. 142 Am. Jur. Proof of Facts 3d 349, Acquisition of Title to Property By Adverse Possession** Am. Jur. Proof of Facts 3d In general, adverse possession is a doctrine under which a person in possession of real property owned by someone else may acquire valid title to it so long as certain common law...	2017	Other Secondary Source	—	1 N.Y.S.3d
—	**4. CITY WINS ADVERSE POSSESSION DISPUTE** City Law Department of Sanitation parked trucks on lot for more than ten years. In 1948, Vertley Clanton and her husband acquired a lot located at 1716 Pacific Street in the Utica area of...	2017	Other Secondary Source	—	5 N.Y.S.3d
—	**5. 2018 CityLand 1, CITY WINS ADVERSE POSSESSION DISPUTE** CityLand Department of Sanitation parked trucks on lot for more than ten years. In 1948, Vertley Clanton and her husband acquired a lot located at 1716 Pacific Street in the Utica area of...	2018	Other Secondary Source	—	5 N.Y.S.3d

58 Misc.3d 1209(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, Westchester County, New York.

Jason T. Lorenz and SHARON F. KAVY a/k/a SHARON F. LORENZ, Plaintiffs,
v.
Antonio D. Soares and ELIZA S. SOARES, Defendants.

71204/2015
|
Decided on January 10, 2018

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Opinion

William J. Giacomo, J.

***1 DECISION & ORDER**

In an action pursuant to RPAPL article 15 to determine claims to real property (1) the defendants move for summary judgment dismissing the complaint (motion sequence No.1); and (2) the plaintiffs cross-move to amend the complaint to add a cause of action for precise location (motion sequence #2):

Papers Considered

Notice of Motion/Affirmation of Jared Altman, Esq./ Exhibits A-S;

Notice of Cross Motion/Affirmation of Mark I. Reisman, Esq./Exhibits 1-4;

Affirmation of Jared Altman, Esq. in Reply and Opposition.

Factual and Procedural Background

Plaintiffs are the owners of real property located at 3 Bayden Road, Ossining, New York. Plaintiffs purchased the property in April 2005. The backyard of 3 Bayden Road is adjacent to three different properties that are located on Feeney Road, including 10 Feeney Road, owned by the defendants. Defendants acquired title to their property in January 1988. A chain link fence existed on the strip of property that runs along the southern boundary of defendants' lot and close to portions of the northern boundary of plaintiffs' lot. The fence was located entirely on the defendant's property and was set back approximately ten feet.

Plaintiffs commenced this action seeking to quiet title by adverse possession of the area of defendants' property between the chain link fence and the boundary line of plaintiffs' property, which covers approximately 800 feet (hereinafter the 'disputed land'), and damages for trespass, nuisance, and an injunction. Plaintiffs allege that between 2005 and 2015, they maintained the grass of the disputed land and planted a vegetable garden. Plaintiffs also assert that a shed was erected on the disputed land by their predecessor in interest.

Relevant Deposition Testimony

At an examination before trial, plaintiff Jason Lorenz testified that he and his wife purchased 3 Bayden Road on April 22, 2005. Prior to purchase, they viewed the back yard and observed a chain-link fence on defendants'

property. There were trees and shrubbery in front of the fence.

Mr. Lorenz testified that 3 Bayden is a pie shaped piece of property. On the northerly side of the backyard there are three abutting neighbors' property lines; the defendants' property is in the middle. A post and rail fence began at the front of 3 Bayden Road and continued to the backyard and became L-shaped into the first abutting property. From there, a chain link fence attached on defendants' property and continued the length of the southern portion of defendants' property. Mr. Lorenz described the chain link fence as green and 4 feet tall. The disputed land was south of the chain link fence and reached the property line. Mrs. Lorenz testified at her examination before trial that she measured the disputed land as 80 feet long. Plaintiffs replaced the post and rail fence in 2010. Plaintiffs never performed any maintenance or repairs to the chain link fence.

Mr. Lorenz never had any conversations with the prior property owners about the disputed land. Plaintiffs planted four arborvitaes in 2010 on the disputed land. There are also maple trees on the disputed land. The maple trees have been there as long as plaintiffs owned the property. Mr. Lorenz does not know who planted the maple trees. According to plaintiffs, when they purchased their property, a metal shed existed in the backyard on the disputed land which was put up by Brian Rink, a previous owner of the 3 Bayden property. Mr. Lorenz moved the shed in 2010.

*2 Mr. and Mrs. Lorenz both testified that between the time plaintiffs purchased the property in 2005 and 2010, they did not plant anything on the disputed land and merely mowed the area and cleaned up any fallen branches. They testified that a shed was located on the disputed land. In 2010, they retained a company to take down pine trees and planted four arborvitaes on the disputed land. In the spring of 2011, plaintiffs planted a vegetable garden on the disputed land.

Plaintiffs had a pool installed in their backyard in 2015. Around that time, defendants removed the chain link fence. As a result, plaintiffs did not have a proper barrier around the pool and had to install a fence on their property. It was at that time that they started investigating a lawsuit with respect to the disputed land.

Brian Rink, a previous owner of the plaintiffs' property, testified that he and his wife moved to 3 Bayden Road in 1993. They lived in the house for two or three years and then rented it for approximately three or four years prior to selling the property. Mr. Rink testified that he erected an aluminum shed on the property. Mr. Rink testified that when installing the shed, he tried to keep it on his own property because he didn't want any problems. He thought the trees denoted the property line. Mr. Rink intended to install the shed about a foot away from the property line. Mr. Rink was shown defendants' exhibit A, which is attached to defendants' motion papers, and was asked to mark the location of the shed that he installed. Mr. Rink drew a box entirely within the boundary of 3 Bayden Road to depict the location of the shed. He testified that he did not do any clean up, planting, or mowing of the disputed land.

Motions

Defendants move for summary judgment dismissing the complaint. Defendants argue that awarding plaintiffs adverse possession of the disputed land would violate public policy as a Town of Ossining Zoning Ordinance requires that all single family residences occupy a minimum lot area of 15,000 square feet. The size of the lot of defendants' property is 15,156 square feet and if they lost 900 square feet to plaintiffs, their property would not be in compliance with the zoning ordinance.

Defendants further argue that there has been no showing of exclusive occupancy by plaintiffs of the disputed land. The chain link fence, defendants argue, was a flimsy wire green fence and was not a substantial enclosure pursuant to RPAPL 522.2. In addition, while plaintiffs assert that a portion of the shed was erected on the disputed land, Mr. Rink, who installed the shed, testified that it was entirely within plaintiffs' property and was not situated on the disputed land. Defendants argue that the minimal acts of mowing grass and cleaning branches are not adequate to put them on notice of adverse possession. Defendants argue that the plaintiffs have not satisfied the ten-year requirement for adverse possession, which, if at all, did not begin until 2010 when plaintiffs cleared the disputed land and planted a garden. Defendants also seek summary judgment in their favor on the causes of action for trespass and nuisance arguing that since plaintiffs do not own the disputed land, they cannot assert such claims.

*3 Plaintiffs oppose defendants' motion arguing that defendants rely upon hearsay to support their claims and failed to include authenticated exhibits. As to the merits, plaintiffs argue that issues of fact exist in this case including whether the shed erected by Mr. Rink was on the disputed land; whether the disputed land was visible from defendants' property; whether the plaintiffs' use of the disputed land was continuous for ten years; whether the chain link fence qualified as a substantial enclosure; whether the plaintiffs' use of the property is sufficient to indicate exclusive ownership; and whether the plaintiffs' predecessor in interest built the fence. Plaintiffs argue that the defendants' zoning ordinance argument is without merit and unsupported by any applicable law. Further, plaintiffs argue that their claims for trespass and nuisance should not be dismissed as the ownership of the disputed land is at issue in this action.

Plaintiffs also cross-move to amend the complaint to add a cause of action for practical location. They argue that the proposed amendment to the complaint is not palpably insufficient or patently devoid of merit and, if granted, would not prejudice the defendants.

In opposition to the cross motion, defendants claim that the proposed amendment to the complaint has no merit. Defendants argue that plaintiffs cannot establish two key elements required for a cause of action for practical location; to wit, mutual acquiescence and clear demarcation.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v NY Univ. Med. Ctr.*, 64 NY2d at 853).

'Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action' (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

'The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist' (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]).

***4 Adverse Possession**

To establish a claim of title to real property by adverse possession, a party must demonstrate, by clear and convincing evidence, 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 (*see Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]; *Klein v. Aronshtein*, 116 AD3d 670 [2d Dept 2014]).

Adverse possession of property for the statutory period vests title to the property in the adverse possessor (*see Franza v Olin*, 73 AD3d 44, 46 [4th Dept 2010]). Adverse possession for the statutory period of time cuts off the true owner's remedies and divests the owner of his or her estate (*see Franza v Olin*, 73 AD3d at 47, *quoting Connell v Ellison*, 86 AD2d 943, 944 [3d Dept 1982]). Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor (*see Franza v Olin*, 73 AD3d at 47).

Moreover, '[a] party claiming adverse possession may establish possession for the statutory period by tacking the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property' (*Munroe v Cheyenne Realty, LLC*, 131 AD3d 1141, 1142 [2d Dept 2015]; *see Stroem v Plackis*, 96 AD3d 1040, 1042-1043 [2d Dept 2012]). In order for tacking to be applicable, a party must show that its' predecessor 'intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed' (*Brand v Prince*, 35 NY2d 634, 637 [1974]; *Diaz v Mai Jin Yang*, 148 AD3d 672 [2d Dept 2017]).

In 2008 the Legislature enacted changes to the provisions of the RPAPL with respect to claims of adverse possession. The 2008 amendments include 'rewriting RPAPL 501 to include, for the first time, a statutory definition of the 'claim of right' element necessary to acquire title by adverse possession' (*Hogan v Kelly*, 86 AD3d 590, 591-592 [2d Dept 2011]). Pursuant to RPAPL 501(3), as amended, a claim of right is defined as 'a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be' (*see also Diaz v Yang*, 148 AD3d 672 [2d Dept 2017]).

Moreover, the 2008 amendments abrogate the common law of adverse possession and define as 'permissive and non-adverse' actions that, under the prior statutory law and long-standing principles of common law, were sufficient to obtain title by adverse possession (*see Franza v Olin*, 73 AD3d at 47). RPAPL 543 provides:

1. Notwithstanding any other provision of this article, the existence of de minimus [de minimis] non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse.

2. Notwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.

***5** The 2008 amendments to RPAPL article 5 took effect on July 7, 2008, and apply to all claims filed on or after the effective date of the amendments (*see Hartman v Goldman*, 84 AD3d 734 [2d Dept 2011]). 'The 2008 amendments to the adverse possession statutes contained in RPAPL article 5 [ ] are not applicable where the alleged adverse possessor's property right, as alleged, vested prior to the enactment of those amendments' (*Estate of Vertley Clanton v City of New York*, 153 AD3d 787, 788 [2d Dept 2017]; *Pakula v Podell*, 103 AD3d 864 [2d Dept 2013]). Where title has vested by adverse possession, it may not be disturbed retroactively by newly-enacted or amended legislation. RPAPL 501 (2), as amended, recognizes that title, not the right to commence an action to determine title, is obtained upon the expiration of the limitations period (*see Franza v Olin*, 73 AD3d at 47).

Defendants argue that plaintiffs cannot establish a claim of right or exclusive occupancy and have not satisfied the ten-year requirement. Plaintiffs argue that whether the 2008 amendments apply or whether the prior law applies, defendants are not entitled to summary judgment.

Here, the 2008 amendments to RPAPL article 5 are applicable to this action (*see* L 2008, ch 269) as the plaintiffs had not possessed the disputed property for 10 years when the statute was enacted and their purported adverse possession did not vest prior to the enactment of the statute in 2008 (*see Reyes v Carroll*, 137 AD3d 886 [2d Dept 2016]).

In *Diaz v Mai Jin Yang*, 148 AD3d 672, the plaintiff owned residential real property that was adjacent to the defendants' residential real property. A double garage and a driveway were located partially on the plaintiff's property and partially on the defendants' property. The plaintiff acquired her property by deed recorded on July 1, 2006. Plaintiff commenced an action in October 2012 pursuant to RPAPL article 15, seeking, among other things, a judgment declaring that she had acquired title and all rights, by adverse possession, to the defendants' portion of the double garage and the driveway. The plaintiff also asserted causes of action seeking to recover damages for use and occupancy, trespass, and slander of title. The defendants moved for summary judgment dismissing the complaint which was denied by the Supreme Court. The Second Department reversed and granted defendants' motion for summary judgment dismissing the complaint. The Court held that under the 2008 amendments, defendants demonstrated that the plaintiff's use of the disputed property was not hostile and under a claim of right, but was permissive. In opposition, plaintiff failed to raise an issue of fact that she possessed the property for ten years. Plaintiff also failed to submit evidence that the ten-year period could be satisfied by tacking on the periods of use by her predecessors.

Similarly, here, the defendants demonstrated prima facie entitlement to judgment as a matter of law dismissing the complaint. Defendants demonstrated that the plaintiffs' use of the disputed property was not under a claim of right or continuous for ten years. In this case, the plaintiffs' acts of clearing branches from the disputed land, mowing the lawn, or the existence of a shed on the disputed land are permissive and non-adverse (*see* RPAPL 543). The permissive use of the property at issue 'negates the element

of hostility necessary to establish a claim of adverse possession' (*Chatsworth Realty 344 v Hudson Waterfront Co. A*, 309 AD2d 567, 568 [1st Dept 2003]).

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs fail to raise an issue of fact that the 10-year period could be satisfied by tacking on the periods of adverse possession or use by their predecessors, since they offered no evidence that their predecessors intended to and actually turned over possession of the disputed property with the portion of the land included in the deed (*see CSC Acquisition-NY, Inc. v 404 County Rd. 39A, Inc.*, 96 AD3d 986, 988 [2d Dept 2012]; *Stroem v Plackis*, 96 AD3d 1040, 1043 [2d Dept 2012]).

*6 Accordingly, inasmuch as the plaintiffs have not acquired title to the disputed land by adverse possession, the defendants are entitled to summary judgment dismissing the remaining causes of action seeking to recover damages for trespass, nuisance, and injunctive relief (*see Reyes v Carroll*, 137 AD3d 886, 888-889 [2d Dept 2016]).

Leave to Amend the Complaint

As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the opposing party and where the amendment may have merit (*see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; CPLR 3025[b]; *Assevero v Hamilton & Church Props., LLC*, 154 AD3d 728 [2d Dept 2017]).

'[A] party seeking leave to amend a pleading need not make an evidentiary showing of merit, and leave to amend will be granted unless such insufficiency or lack of merit is clear and free from doubt [internal citations omitted]' (*Stein v Doukas*, 128 AD3d 803, 805 [2d Dept 2015]; *see Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). The decision whether to grant leave to amend a complaint is committed to the sound discretion of the court (*Davis v South Nassau Communities Hosp.*, 26 NY3d at 580; *Castagne v Baroub*, 249 AD2d 257 [2d Dept 1998]).

Plaintiffs seek leave to amend the complaint to add a cause of action pursuant to the doctrine of practical location. Under the doctrine, a practical location of a boundary line and an acquiescence therein for more than the statutory period governing adverse possession is conclusive of the location of such boundary (*see Jakubowicz v Solomon*, 107 AD3d 852 [2d Dept 2013]; *Lounsbury v Yeomans*, 139 AD3d 1230, 1231 [3d Dept 2016]; *McMahon v Thornton*, 69 AD3d 1157, 1160 [3d Dept 2010]). '[A]pplication of the doctrine requires a clear demarcation of a boundary line and proof that there is mutual acquiescence to the boundary by the parties such that it is 'definitely and equally known, understood and settled' ' (*Jakubowicz v Solomon*, 107 AD3d at 853, *quoting McMahon v Thornton*, 69 AD3d 1157, 1160 [3d Dept 2010] [internal quotation marks and citation omitted]).

Practical location of a boundary line, to be effectual, 'must be an act of the parties, either express or implied; and it must be mutual, so that both parties are equally affected by it. It must be definitely and equally known, understood and settled. If unknown, uncertain, or disputed, it cannot be a line practically located' [ ]. Where land is unimproved and uncultivated, the mere running of a line through the woods, ex parte, by one of the owners, so long as such line is not settled upon and mutually adopted by the adjoining owners as a division line, is an immaterial fact. In such a case, until the adjoining owner shows his assent to it, it would amount to a mere expression of the individual opinion of the owner who ran the line (*see Hadix v Schmelzer*, 186 AD2d 239, 239-240 [2d Dept 1992] [internal quotation marks and citations omitted]).

The evidence here clearly establishes that at no time did the defendants acquiesce in the establishment of the chain link fence as the boundary line. Indeed, plaintiff Sharon Lorenz testified that in 2010, when plaintiffs were replacing the post and rail fence on their property, defendant Antonio Soares asked the company hired by plaintiffs to move the chain link fence back toward the defendants' property line. Mr. Soares confirmed this conversation. Thus, plaintiffs have failed to allege facts that would support that the chain link fence in question was mutually understood to reflect the boundary line and that such an understanding persisted for more than 10 years (*see Hadix v Schmelzer*, 186 AD2d 239; *Chatsworth Realty 344 v Hudson Waterfront Co. A*, 309 AD2d 567).

***7 Conclusion**

Based upon the foregoing, the defendants' motion for summary judgment dismissing the complaint is GRANTED (motion sequence #1) and the complaint is dismissed; and the plaintiffs' cross-move to amend the complaint to add a cause of action for precise location is DENIED (motion sequence #2).

Dated: White Plains, New York

January 10, 2018

HON. WILLIAM J. GIACOMO, J.S.C.

All Citations

Slip Copy, 58 Misc.3d 1209(A), 2018 WL 358435 (Table), 2018 N.Y. Slip Op. 50019(U)

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Andrew J. Luskin received his law degree from Hofstra University School of Law, with distinction, in 1985. He was graduated from the State University of New York at Albany cum laude in 1982. He served as Managing Editor of the Hofstra Labor Law Journal, a law review dedicated exclusively to the field of labor and employment law.

Before joining the firm in 1988, Mr. Luskin served as an Assistant District Attorney in Kings County, New York, where he prosecuted misdemeanor and felony criminal cases from inception through trial. He now practices general commercial litigation in state and federal trial and appellate courts, and works on matters involving contracts, arbitrations, employment-related claims, franchise disputes, intentional torts, landlord and-tenant disputes, and zoning.

Adverse Possession in New York After the "2008 Amendments"

Andrew J. Luskin
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What Prompted the 2008 Adverse Possession Amendments?

The *Walling* decision: *Walling v. Przybylo* (August 2006): The Court of Appeals: Actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor.

This meant that it was possible to acquire title to another's land even if you knew that you had no title and that some else was the true owner.

Where did this notion come from?

Humbert v. Rector, Churchwardens & Vestrymen of Trinity Church, 24 Wend. 587 (1840):

Actual knowledge of the possessor does not preclude a claim of adverse possession.

The *Walling* Court considered:

What is a claim of right?

By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner.

The *Walling* Court considered that:

Remedies for other wrongs or infringements are cut off upon expiration of the applicable statute of limitations.

So why is adverse possession any different?

The *Walling* decision did not sit well with many people.

The notion that adverse possession can ripen into title even when the adverse possessor knows that someone else owns the land did not seem fair and equitable.

But what court could overrule the Court of Appeals?

Approximately two years after *Walling*, the state legislature stepped in essentially to overrule the Court of Appeals.

Hence . . . the 2008 amendments to Real Property Actions and Proceeding Law Article 5, which deals with adverse possession, were enacted, effective July 7, 2008.

(Chapter 269 of the Laws of 2008)

An act to amend the real property actions and proceedings law in relation to adverse possession

The act amended seven sections of the RPAPL:

§§ 501, 511, 512, 521, 522, 531, 541, and 543

The act added one new section: § 543

RPAPL Section 501:

Revised the definition of an adverse possessor:

> An "**adverse possessor**" is a person or entity that occupies real property of another with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

Expressly gives title to the adverse possessor after ten years, provided that the adverse possessor satisfies the other elements of adverse possession.

RPAPL Section 501:

Defines "**claim of right**": A reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be.

But note: a claim of right is not required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

Section 512: Adverse Possession Under a Written Instrument or Judgment

Adverse possession can be claimed under a written instrument, where:

- There have been acts sufficiently open to put a reasonably diligent owner on notice; or
- The land has been protected by a substantial enclosure (except as provided in § 543); or
- Although not enclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

Sections 521 and 522: Adverse Possession ***not*** Under a Written Instrument or Judgment

To constitute adverse possession not under a written instrument or judgment, land is deemed to have been possessed and occupied in either of the following cases, and no others:

Where ~~it has been usually cultivated or improved~~ there have been acts sufficiently open to put a reasonably diligent owner on notice; or

Where it has been protected a substantial enclosure, except as provided in § 543(1).

Section 543: Adverse Possession; how affected by acts across a boundary line

- The existence of *de minimis* non-structural encroachments, including, but not limited to, fences, hedges, shrubbery, plantings, sheds, and non-structural walls, shall be deemed to be permissive and non-adverse.
- The acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.

By its terms, the legislative enactment says that the amendments apply to all cases filed after the effective date (July 7, 2008).

But what about cases filed after the effective date, but where title vested by adverse possession prior to the effective date?

Which law should apply?

The old or the new?

The courts have held that if title by adverse possession vested before the July 7, 2008 effective date, then the pre-amendment version of the statute applies.

Tom Sherwood – Thomas G. Sherwood, LLC

Tom Sherwood is the founding member of the firm of Thomas G. Sherwood, LLC, located in Garden City, New York. Tom has practiced in the areas of commercial litigation, real estate litigation, title insurance litigation and transactional real estate for more than 30 years. Tom has lectured and written on many legal topics, including boundary disputes, easements, title insurance claims, real estate broker commissions, and time of the essence real estate closings. He is a member of the Nassau County and American bar associations and the American Association for Justice. Tom received his B.A. degree from Fordham University and his J.D. degree from the University of California at Berkeley.

Miller v Rau
Supreme Court, Appellate Division, Third Department, New York
May 06, 1993
193 A.D.2d 868
597 N.Y.S.2d 532

193 A.D.2d 868, 597 N.Y.S.2d 532

Duane S. Miller, Appellant,

v.

John W. Rau et al., Respondents.

Supreme Court, Appellate Division, Third Department, New York
67023
(May 6, 1993)

CITE TITLE AS: **Miller v Rau**

Levine, J.

The parties own adjacent lots located in the Town of Summit, Schoharie County. Plaintiff's 75-acre parcel to the northeast of defendants' parcel is landlocked, except for his claim to a prescriptive easement over a roadway located on defendants' property. The Town and County ceased maintaining the roadway in the 1930s after it fell out of public use. In 1940, a common grantor conveyed the respective parcels to the parties' predecessors in title.

The evidence was that plaintiff's predecessors in title, Janice Reiser and her former husband, purchased their property in 1964 and built a cabin and related structures on their parcel and improved the portion of the roadway on their property; they used it until 1975 when Reiser acquired full title in a divorce settlement. After Reiser and her husband first purchased the property, they used the roadway as the exclusive means of access to their property. Reiser conveyed the property to plaintiff in 1986. Defendants acquired their parcel in 1984. In 1986, defendant Kenneth R. Rau advised plaintiff that there was no right-of-way over defendants' land, declined plaintiff's offer to sell his property to defendants, and subsequently erected steel posts to block the roadway.

Plaintiff thereafter commenced this RPAPL article 15 action seeking a declaration that he had acquired an easement by prescription over the roadway located on defendants' property. Defendants answered. After a nonjury trial, Supreme Court dismissed the complaint, finding that Reiser and her former husband had used the roadway to access the property "on occasional weekends during the summer and fall until Thanksgiving of each year" and that such use, while open and adverse, was not continuous or uninterrupted. Plaintiff now appeals.

In order to establish a prescriptive easement over defendants' property, plaintiff had to show by clear and convincing evidence adverse, open and notorious, and continued and uninterrupted use of the roadway for the prescriptive period *(see, Bova v Vinciguerra,* 184 AD2d 934; *Hamilton v Kennedy,* 168 AD2d 717, 718, *lv denied* 77 NY2d 808; 2 Warren's Weed, **869* New York Real Property, Easements, § 5.01 [4th ed]), which is 10 years *(see,* RPAPL 311; *see also,* CPLR 212 [a]). Once these elements are established, a presumption arises that such use was hostile and the burden shifts to defendants to show that the use was permissive *(see, Bova v Vinciguerra, supra; see also, Di Leo v Pecksto Holding Corp.,* 304 NY 505, 512). Seasonal use of the roadway will not prevent plaintiff from establishing a prescriptive easement, as long as such use was continuous and uninterrupted and commensurate with appropriate existing seasonal uses *(see, Bova v Vinciguerra, supra; Epstein v Rose,* 101 AD2d 646, 647, *lv denied* 64 NY2d 611; *Slater v Ward,* 92 AD2d 667, 668; *Beutler v Maynard,* 80 AD2d 982, 983, *affd* 56 NY2d 538; 2 Warren's Weed, New York Real Property, Easements, § 5.06 [4th ed]; 2 NY Jur 2d, Adverse Possession, § 56, at 363). This is because "[t]he requisite of continuity depends upon the nature of the right claimed [and] [t]he use need not be constant" *(Beutler v Maynard, supra,* at 983). Further, plaintiff is not required to demonstrate that his predecessors' use of the roadway was exclusive as long as they were the principal users of the road *(see, Bova v Vinciguerra, supra; Epstein v Rose, supra,* at 647).

In the instant action, a review of the record demonstrates that each year from 1964 until 1975 Reiser and her former husband exclusively used the roadway on defendants' property to gain access to their property every other weekend between Memorial Day and Labor Day and at Thanksgiving. Reiser testified that during 1964 they stayed in a tent on the property; in 1965 they built a plywood shelter and later, in 1969, built a cabin, outhouse and tool shed, and subsequently dug a pond. On three occasions in 1969, defendants' predecessors in title placed trees and stones in the roadway blocking access to plaintiff's property, but Reiser and her former husband removed the obstructions and continued to use the roadway. They never asked permission to use the roadway. Although others apparently walked across the roadway for hunting and fishing and other uses, the record reflects that plaintiff's predecessors in interest were the principal users of the path on defendants' property *(see, Bova v Vinciguerra, supra,* at 935; *Reed v Piedimonte,* 138 AD2d 937, *lv denied* 72 NY2d 803).

We conclude that Reiser and her former husband's use of the roadway to access their property, although not constant, qualified as an appropriate seasonal use *(see, Beutler v Maynard, supra,* at 983). Indeed, "[w]here such regular seasonal use is made for access to a summer cabin, a [servient] landowner **870* may not reasonably believe that a hostile claim is not being asserted. The presence of a cabin, although not constantly inhabited or utilized, is a clear expression of intention to use the right of way; use of the [roadway] was actual, not

merely threatened, and defendants were not powerless to stop the use during the prescriptive period" *(Beutler v Maynard, supra,* at 983). Plaintiff has demonstrated by clear and convincing evidence that his predecessors' use of the roadway on defendants' property was open, notorious and seasonally continuous from at least 1964 through 1975, thus satisfying the 10-year prescriptive period and giving rise to the presumption that the use was adverse, thereby shifting the burden to defendants to show that the use was permissive *(see, Bova v Vinciguerra, supra,* at 935). Defendants failed to present sufficient evidence to rebut the presumption.

Moreover, the record does not support defendants' claim that the prescriptive easement was ever abandoned due to nonuse or otherwise. Although Reiser testified that she did not use her property from 1976 until she sold it to plaintiff in December 1986, the record is devoid of any evidence that plaintiff or his predecessors ever manifested an intent to give up use of the easement or acted inconsistent with the existence of the easement *(see, Consolidated Rail Corp. v MASP Equip. Corp.,* 67 NY2d 35, 39-40; 3 Powell, Real Property, Easements ¶ 423, at 34-249--34-260; Restatement of Property § 504, comments *c, d; see also,* 49 NY Jur 2d, Easements and Licenses in Real Property, §182 *et seq.; compare,* 2 Warren's Weed, New York Real Property, Easements, §§ 12.01, 12.07, at 67, 76 [4th ed]). Accordingly, plaintiff has established his claim for a prescriptive easement over the roadway to access their property.

Weiss, P. J., Crew III and Mahoney, JJ., concur.
Ordered that the judgment is reversed, on the law and the facts, with costs, judgment granted in favor of plaintiff and it is declared that plaintiff has a prescriptive easement over defendants' property.

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Decision and Order of the Honorable James V. Brands, dated May 23, 2008, Appealed From [pp. 4 - 7]

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

315 Main Street Poughkeepsie, LLC,

Plaintiff,

-against-

WA 319 Main, LLC,

Defendant.

DECISION AND ORDER ON MOTIONS
Index No: 2086/07

The following papers were read and considered on this motion by the defendant for summary judgment and the plaintiff's cross-motion for summary judgment.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A-P

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A-F

AFFIDAVIT OF MARCO INCORVAIA
AFFIDAVIT OF JOHN FITZPATRICK
EXHIBITS

AFFIRMATION IN OPPOSITION TO CROSS-MOTION

This action arises over a dispute over use of a parking lot behind adjacent premises on Main Street, in the City of Poughkeepsie, Dutchess County, New York.

It is undisputed that on April 15, 1995, Mesmme Corporation entered into a lease with respect to the first floor of the property located at 315 Main Street to operate a delicatessen called "The Daily Grinder". Mesmme Corporation operated the deli from April 15,1995 through November 14, 2006 at which time it was sold to DEBA, Inc. In August of 2007, Mesmme Corporation retook control of The Daily Grinder and operates it to date.

To the rear of 315 Main Street is a macadam parking area approximately 60 feet by 20 feet. The 315 Main parking area has been used for The Daily Grinder's employees, customers, and for the location of, use of, and truck access to, a commercial dumpster servicing the delicatessen. The 315 Main parking area is surrounded by a parking lot owned by defendant WA 319 Main, LLC "319 Main". The only access to the 315 Main parking area is by entering from Mill Street (Routes 44/55) and crossing 319 Main's parking lot.

It is undisputed that from in or about April of 1995 through the present the tenants and invitees of 315 Main Street have had access to and from the parking area by crossing 319 Main's lot. According to counsel for defendant 319 Main, its lot was also used by the general public, for example, those who parked for access to the deli ("The Daily Grinder") at 315 Main Street. According to the affidavit of Marco Incorvaia, and officer of Incanno Corporation, ("The Daily Grinder") on a daily basis for more than 10 years 315 Main's tenants, employees, and invitees, have crossed 319 Main's parking lot to access 315 Main's parking area, and this was done openly and continuously and without ever receiving consent or permission from the owners of 319 Main Street.

According to the affidavit of John Fitzpatrick, a member of 315 Main Street Poughkeepsie, LLC ("315 Main"), 315 Main acquired the building located at 315 Main Street on April 26, 2005. It has up to five tenants, including The Daily Grinder plus residential units. Tenants are permitted to park their cars in the spaces located on the 315 Main parking area. In addition, since no commercial trash is permitted on Main Street, a commercial dumpster is located in that area and is removed by commercial haulers accessing the 315 Main parking area from Mill Street, by crossing the 319 Main Street parking lot.

He claims that in or about November of 2006 defendant contacted the plaintiff, 315 Main and advised that it would no longer permit plaintiff, its tenants, and/or its invitees to use defendant's parking lot to access its own parking area. Defendant commenced construction of a fence to cut off access, resulting in an application for a temporary restraining order, which was granted on January 29, 2008. Mr. Fitzpatrick agrees that plaintiff, its tenants, and their invitees have used defendant's parking lot to access the 315 Main parking area for more than 10 years, on a daily basis, in an open, actual, notorious, hostile and continuous manner. He says this was all done without seeking permission from defendant.

Counsel for the plaintiff argues that the use of the property in this fashion has created a prescriptive easement (citing Coverdale v. Zucker, 261 AD2d 429 [2nd Dept. 1999]). He claims that the use in this fashion gives rise to a presumption that the use was adverse and places the burden upon the landowner to prove that the use was permissive which would defeat the claim of a prescriptive easement. (Id.). Counsel points out that a claim of easement by prescription differs from a claim of adverse possession in that the use does not have to be exclusive. (Citing McLean v. Ryan, 157 AD2d 928 [3rd Dept. 1990]).

The defendant, in its motion for summary judgment, argues that since the right of way was used by the general public, the inference that the use was adverse or hostile is defeated. Defendant's counsel argues that there is no evidence in the record of automobiles of any of the principals of plaintiff, or its tenants, or employees, were towed during the more than 10 years at issue here. Accordingly, counsel argues that this accommodation negates any inference that the use of the property was hostile. Rather, he states it was permissive. One of the principals of 319 Main Street testified that it was an accommodation to the tenants at 315 Main Street, the operators of The Daily Grinder, and their customers, that they were permitted to cross over 319 Main's property to reach the parking spaces on 315 Main. He states he and members of his staff who occupied the building at 319 Main Street regularly patronized The Daily Grinder and that it was "just a good neighbor policy". (Stall deposition at Page 14, line 19-page 15, line 1, annexed as Exhibit N).

Defendant's counsel points to case law which provides that if the plaintiff is able to establish by clear and convincing evidence, three of the four elements required to prove an easement, a presumption that the use is hostile is permitted. However, when that use is also made by the general public, no presumption of adversity exists, and the burden remains upon the plaintiff to establish the fourth element of hostility or adversity. Further, he argues that when a relationship of neighborly accommodation exists, as he claims it did here, an inference arises that the use is permissive. (Citing DiLeo v. Peekskill Holding Corp., 304 NY 505 [1952]; Eskenazi v. Sloat, 40 AD3d 577 [2nd Dept. 2007] setting forth the four elements of an easement by prescription: (1) the use of the purported easement must be open and notorious; (2) the use must be continuous; (3) the use must be adverse; and (4) it must have continued uninterrupted for a period of ten years preceding the commencement of the action. Rivermere Apts., Inc. V. Stoneleigh Pkwy., Inc., 275 Ad2d 701 [2nd Dept. 2000]) is cited for the proposition that the burden of proving all of these elements is on the party asserting it. Use of the right of way by the general public negates the inference that the use was adverse. (Citing Susquehanna Realty Corp. V. Barth, 108 AD2d 909 [2nd Dept. 1985]) and that the existence of a neighborly relationship creates an inference of permissive use (Cannon v. Sikora, 142 AD2d 662 [2nd Dept. 1988]; Hassinger v. Kline, 91 AD2d 988 [2nd Dept. 1983]).

At bar, counsel for the defendant argues that the general public routinely used the defendant's property to access the parking area behind the plaintiff's property and therefore, there can be no easement by prescription. (Susquehanna, supra).

It is undisputed that plaintiff's use was in conjunction with use of the parking lot by the general public. Accordingly, this court does not have to address the issue of whether the use was adverse or permissive. Customers of the delicatessen are members of the general public. (See, for example, Tulley v. Bayfront North Limited, 286 AD2d 873 [4th Dept. 2001]; Backiel v. Citibank, N.A., 299 AD2d 504 [2nd Dept. 2002]; Gallagher v. St. Raymonds R.C. Church, 21 NY2d 554 [1968]). Accordingly, the court cannot find that an easement by prescription exits. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied. It is further

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted. Absent further permission by the defendant, the plaintiff has no right to use defendant's parking lot. It is further

ORDERED that as defendant's second cause of action for damages as to plaintiff's use and occupancy of defendant's property remains, a conference shall be held on July 10, 2008 at 9:15 a.m. in order to set a hearing date, if it is determined that same remains necessary.

The foregoing constitutes the decision and order of this court.

Dated: May 23, 2008
Poughkeepsie, New York

ENTER:

James V. Brands
Supreme Court Justice

Kelly and Meenagh, LLP
Anthony Carlini, Esq.
135 North Water Street
PO Box 1031
Poughkeepsie NY 12602

Vergilis, Stenger, Roberts & Davis, LLP
Kenneth M. Stenger, Esq.
1136 Route 9
Wappingers Falls NY 12590

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.

315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC
Supreme Court, Appellate Division, Second Department, New York
May 05, 2009
62 A.D.3d 690
878 N.Y.S.2d 193
62 A.D.3d 690, 878 N.Y.S.2d 193, 2009 N.Y. Slip Op. 03713

*1 315 Main Street Poughkeepsie, LLC, Appellant

v

WA 319 Main, LLC, Respondent.

Supreme Court, Appellate Division, Second Department, New York
May 5, 2009

CITE TITLE AS: 315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC

Kelly & Meenagh, LLP, Poughkeepsie, N.Y. (Anthony C. Carlini, Jr., of counsel), for appellant.
Vergilis, Stenger, Roberts & Davis, LLP, Wappingers Falls, N.Y. (Kenneth M. Stenger and Lisa M. Cobb of counsel), for respondent.

In an action, inter alia, for a judgment declaring that the plaintiff has a prescriptive easement over property owned by the defendant, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Dutchess County (Brands, J.), dated May 23, 2008, as granted that branch of the defendant's motion which was for summary judgment declaring that it does not have a prescriptive easement over the property and denied its cross motion for summary judgment declaring that it has a prescriptive easement over the property.

Ordered that the order is affirmed insofar as appealed from, with costs, and the matter is remitted to the Supreme Court, *691 Dutchess County, for the entry of a judgment declaring that the plaintiff does not have a prescriptive easement over the property owned by the defendant.

An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period (*see Turner v Baisley*, 197 AD2d 681, 682 [1993]; *see also Weinberg v Shafler*, 68 AD2d 944, 945 [1979], *affd* 50 NY2d 876 [1980]; *Hassinger v Kline*, 110 Misc 2d 147, 148-149 [1981], *affd* 91 AD2d 988 [1983]), which is 10 years (*see* RPAPL 501). Where the use has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the alleged prescriptive easement to show that the use was permissive (*see Frumkin v Chemtop*, 251 AD2d 449 [1998]; *Turner v Baisley*, 197 AD2d at 682; *Wechsler v New York State Dept. of Envtl. Conservation*, 193 AD2d 856, 859-860 [1993]). *2

While there was evidence in the present case that the plaintiff's use of the defendant's parking lot for the purpose of gaining access its own parking lot was open, notorious, continuous, and undisputed, the defendant established as a matter of law that the plaintiff's use of the purported easement was permitted as a matter of willing accord and neighborly accommodation (*see Duckworth v Ning Fun Chiu*, 33 AD3d 583, 583-584 [2006]; *Allen v Mastrianni*, 2 AD3d 1023, 1024 [2003]; *Frumkin v Chemtop*, 251 AD2d at 449). Therefore, the burden shifted to the plaintiff to come forward with evidence of hostile use sufficient to raise a triable issue of fact (*see Frumkin v Chemtop*, 251 AD3d at 450). Since the plaintiff failed to do so, the Supreme Court properly awarded summary judgment to the defendant.

The plaintiff's remaining contention is without merit.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Dutchess County, for the entry of a judgment, inter alia, declaring that the plaintiff does not have a prescriptive easement over property owned by the defendant (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]). Rivera, J.P., Covello, Dickerson and Chambers, JJ., concur.

END OF DOCUMENT

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

D48194
G/htr

Argued - January 26, 2016

_____AD3d_____

JOHN M. LEVENTHAL, J.P.
THOMAS A. DICKERSON
COLLEEN D. DUFFY
HECTOR D. LASALLE, JJ.

2014-01218

DECISION & ORDER

Colin Realty Co., LLC, respondent, v Manhasset Pizza, LLC, et al., appellants, et al., defendants.

(Index No. 6563/11)

Thomas G. Sherwood, LLC, Garden City, NY (Rebecca J. Waldren of counsel), for appellants.

Rosenberg, Calica & Birney, LLP, Garden City, NY (Robert M. Calica and Judah Serfaty of counsel), for respondent.

In an action, inter alia, pursuant to RPAPL article 15 for a judgment declaring that the defendants do not have any easement, license, occupancy rights, or other right of access over the plaintiff's real property, the defendants Manhasset Pizza, LLC, and Fradler Realty Corp. appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Nassau County (K. Murphy, J.), entered January 22, 2014, as, upon an amended decision dated November 18, 2013, made after a nonjury trial, is in favor of the plaintiff and against them, declaring that they do not possess any easement, license, occupancy rights, or other right of access over the plaintiff's real property, and enjoining them from trespassing over such property to gain access to their premises for food delivery vehicles and construction machinery and equipment.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

The defendant Fradler Realty Corp. (hereinafter Fradler) owns a parcel of real property on Plandome Road in Manhasset that is improved with a one-story retail building. The building is subdivided into five rental spaces, which can be accessed from either Plandome Road or from the rear of the building, where there is a small parking area that has room for six or seven vehicles. The plaintiff, Colin Realty Co., LLC (hereinafter Colin Realty), owns an adjacent one-story retail building, which is also subdivided into five rental spaces. In the rear of Colin Realty's building

is a private parking lot, with room for approximately 32 vehicles, that is used primarily by customers of Colin Realty's tenants. In order to access the small parking area behind the Fradler building, and the rear entrances of Fradler's retail stores, vehicles and pedestrians must cross over Colin Realty's parking lot.

In 2011, Fradler and the defendant Manhasset Pizza, LLC (hereinafter Manhasset Pizza), sought approval from the Board of Zoning Appeals of the Town of North Hempstead (hereinafter the ZBA) to place a 45-seat, full-service, dine-in restaurant in one of the vacant storefronts in the Fradler building. After the ZBA granted the necessary conditional use permit and related variances, Colin Realty commenced, inter alia, a CPLR article 78 proceeding challenging that grant. The Supreme Court denied Colin Realty's petition and dismissed the proceeding on the merits and this Court, on appeal, affirmed (*see Matter of Colin Realty Co., LLC v Town of N. Hempstead*, 107 AD3d 708). The Court of Appeals granted leave to appeal and, upon appeal, affirmed this Court's decision and order (*see Matter of Colin Realty Co., LLC v Town of N. Hempstead*, 24 NY3d 96).

In the interim, while the related CPLR article 78 proceeding was pending, Colin Realty commenced this action pursuant to RPAPL article 15 for a judgment (1) declaring that Fradler and Manhasset Pizza (hereinafter together the defendants) do not have any easement, license, occupancy rights, or any other property interest in, or means of access over, the Colin Realty property to the small parking area located behind the Fradler building, that any limited license previously granted had been revoked, and that the use of the Colin Realty property to gain access for food delivery vehicles and construction machinery and equipment constituted a prohibited act of trespass, and (2) enjoining the defendants from trespassing over the Colin Realty property or otherwise attempting to gain access to the parking area behind the Fradler building for food delivery vehicles and construction machinery. In their answer, the defendants asserted, among other things, that their agents, tenants, and customers had an easement by prescription over Colin Realty's property. After a nonjury trial, the Supreme Court entered a judgment, inter alia, declaring that the defendants do not possess any easement, license, occupancy rights, or other right of access over Colin Realty's property, and enjoining them from trespassing over such property to gain access to their premises for food delivery vehicles and construction machinery and equipment. The defendants appeal, and we affirm.

"An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period" (*315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC*, 62 AD3d 690, 691; *see Curanovic v Cordone*, 134 AD3d 978; *Old Town Tree Farm, Inc. v Long Is. Power Auth.*, 101 AD3d 692, 692; *Garden Homes Mobile Home Park Co. LP v Patel*, 100 AD3d 688, 689; *Masucci v DeLuca*, 97 AD3d 550, 551; *Duckworth v Ning Fun Chiu*, 33 AD3d 583, 583). In general, "where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive" (*Duckworth v Ning Fun Chiu*, 33 AD3d at 583; *see Ducasse v D'Alonzo*, 100 AD3d 953, 954; *Mispalleleh Beis Medresh Torah Vadaas v Yeshivath Kehilath Yakov, Inc.*, 89 AD3d 700; *Eskenazi v Sloat*, 40 AD3d 577; *J.C. Tarr, Q.P.R.T. v Delsener*, 19 AD3d 548, 550). This presumption, however, does not arise "when the parties'

relationship was one of neighborly cooperation or accommodation" (*Ward v Murariu Bros., Inc.*, 100 AD3d 1084, 1085; *see Estate of Becker v Murtagh*, 19 NY3d 75, 82; *Allen v Mastrianni*, 2 AD3d 1023, 1024). Similarly, the presumption of hostility is inapplicable when the use by the claimant is not "exclusive" (*Susquehanna Realty Corp. v Barth*, 108 AD2d 909, 909). In this regard, "'exclusivity' is not established 'where [a claimant's] use is in connection with the use of the owner and the general public" (*Estate of Becker v Murtagh*, 19 NY3d at 83, quoting *Pirman v Confer*, 273 NY 357, 363; *see Manouselis v Woodworth Realty, LLC*, 83 AD3d 801).

Here, while, as the Supreme Court found, it appears undisputed that the defendants' traversing of Colin Realty's lot was open, notorious, and continuous for the prescriptive period, the court properly determined that the presumption of hostility did not arise. Fred Colin, the manager of Colin Realty, testified that he permitted such use to Fradler and the public at large as a matter of willing accord and neighborly accommodation. He further explained how he had, over the years, protected Colin Realty's ownership interest when others had abused the permission he afforded. The court credited this testimony in concluding that the use was permissive and, upon our review, we see no basis to disturb this determination (*see 315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC*, 62 AD3d at 691; *Duckworth v Ning Fun Chiu*, 33 AD3d at 584; *see generally Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499; *Family Operating Corp. v Young Cab Corp.*, 129 AD3d 1016). The defendants' remaining contentions are without merit.

LEVENTHAL, J.P., DICKERSON, DUFFY and LASALLE, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court