

Keena v Hudmor Corp.
2006 NY Slip Op 30228(U)
June 28, 2006
Supreme Court, New York County
Docket Number: 0601298/2005
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT:
Index Number : 601298/2005

PART 10

KEENA, WILLIAM B.

vs
HUDMOR

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4/20/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~—

~~motion(s) and cross-motion(s)~~
~~decided in accordance with~~
~~the annexed decision/order~~
~~of even date.~~

FILED
JUL 11 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: JUN 28 2006

JJG
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

WILLIAM B. KEENA and MARY C. KEENA,

Plaintiffs,

-against-

HUDMOR CORP.,

Defendant.

-----X

Decision/Order

Index No.: 601298/05

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's motion [sj] w/JCP affirm in support, affid in support (MCK), exhs	1
Def's affirm in oppos (MJS) w/LM affid in oppos, exhs	2
Pltf's affirm in reply (JCP)	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment. Plaintiffs seek a declaration that certain real property adjacent to their own real property belongs to them by application of the doctrine of adverse possession. The motion is opposed. Issue has been joined and the note of issue has been filed. Since plaintiffs' motion is timely, it may be considered. CPLR § 3212; Brill v. City of New York, 2 NY2d 648 (2004).

Background and Facts Considered

Plaintiffs William B. and Mary C. Keena ("the Keenas") are the owners of two separate, but adjacent and contiguous, parcels of land known as 449 Hudson Street and 449 ½ Hudson Street, in New York County. Defendant Humdor Corp. owns the parcel of land known as 447 Hudson Street. 447 Hudson can be best described as

forming a "L" shape on the side and around the back of 449 and 449 ½ Hudson Street.

Diagrams and surveys provided by each side are consistent as to the legal description of 449 and 449 ½ Hudson Street. Each parcel is 12' 6" wide. Each parcel is 59' 1 3/4" deep. Notwithstanding their legal description, plaintiffs claim that through adverse possession they have acquired two additional, adjacent and contiguous portions of property that are each 12' 6" wide and 8' 1 3/4" deep. These parcels are directly behind 449 and 449 ½ Hudson Street and can be best described as being presently used by these two buildings as their back yard, or deck area.

449 ½ Hudson Street is designated as Section 2, Block 603, Lot 71. 449 Hudson Street is designated as Section 2, Block 603, Lot 171. Defendant's property (447 Hudson Street) is designated as Section 2, Block 603, Lot 72.

Plaintiffs have established, and it is not disputed, that in 1997 they acquired 449 ½ Hudson Street from Mark C. and Karyn L. Pappas ("the Pappas"). The Pappas had purchased the land from Anne Helen Hess ("Hess") in 1994. The Keenas purchased 449 Hudson Street in 2000 from Stephen J. Blauner and Kenneth G. Shelley ("Blauner/Shelley"). Blauner/Shelley acquired title to 449 Hudson Street in 1983 from Hudson Street Landmark Associates.

Plaintiffs maintain that they are entitled to summary judgment because they can establish their common law adverse possession claims through clear and convincing evidence, without the need for a trial. They contend their possession of the disputed parcels is (and has been) hostile and under a claim of right, actual, open and notorious, exclusive and continuous for a period of ten years. Brand v. Price, 35 NY2d 634 (1974). In addition, they aver that they acquired statutory adverse possession of the

parcels under claim of title, not written, because the parcels were "usually cultivated or improved." RPAPL §§ 521, 522.

Plaintiffs state that the disputed areas have been fenced in as part of their own real property for more than 10 years, and possibly as long as 21 years. They describe the hot tub, deck and plants that they own and are ensconced within the enclosed area. They explain how the disputed parcels are accessible only through their property, and that otherwise no one can gain access to them.

While acknowledging that they themselves have not owned either 449 or 449 ½ Hudson Street for the statutorily required minimum time to establish adverse possession (10 years), plaintiffs argue that the court should consider the successive adverse possessions of prior owners in completing the time period. BME Three Towers, Inc. v. 225 East Realty Corp., 3 AD2d 444 (1st dept. 2004). Plaintiffs offer the sworn affidavits of Messrs Blauner and Pappas, successive prior owners in support of this claim.

Messrs Blauner and Pappas each (Identically) state that the parcels behind their respective buildings were indeed fenced in while they owned the property. Neither of them claim that they erected this fence, however, only that "[t]he entity that owned the property on the other side of the fence never took any step to question my dominion and control over the property on the [449 or 449 ½] Hudson Street side of the fence (which included the now disputed parcel) . . . My use of the now disputed property was adverse, open, notorious, exclusive and uninterrupted."

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Moreover, where the dispute involves claims of adverse possession, if any one of the five (5) elements of such a claim is not established by clear and convincing evidence, the claim of adverse possession must fail. Fitzgerald v. Conroy, 15 AD3d 534 (2nd dept. 2005); BME Three Towers, Inc. v. 225 East Realty Corp., *supra*.

Assuming, arguendo, that the successive adverse possessions of prior successive owners work to plaintiffs' advantage, neither of the prior owners states he asserted such control over the parcels "under a claim of right." Thus, for example, neither Messrs Blauner or Pappas states he paid taxes on the disputed parcels believing he was the owner of the parcels. Nor does either Mr. Pappas or Mr. Blauner state that he (as adverse possessor) intended to, and actually took over possession of parcels in dispute although they were not within the description of their respective deeds. BME Three Towers, Inc. v. 225 East Realty Corp., *supra* at 445.

In failing to establish that either of the prior owners adversely possessed the parcels in dispute, the plaintiffs cannot rely upon those prior ownerships to amplify the number of years the property was subject to adverse possession. Since they have not owned either property for 10 years, they have not met the statutory requirement of RPAPL § 522.

Failure to prove any one of the elements of adverse possession results in the movant's failure to make a *prima facie* showing of entitlement to summary judgment as a matter of law. Ayotte v. Gervasio, 81 NY2d 1062 (1993). Therefore, plaintiffs' motion must be denied.

Collaterally, however, the court rejects defendants second argument in opposition to the motion. Whether title to 447 Hudson Street was properly conveyed to Hudmor has no bearing on plaintiffs' claims against Hudmor. This is not an action to quiet title, but for a declaration of plaintiffs' rights against Hudmor. Hudmor professes to be (and plaintiffs do not challenge defendant's status as) the owner of 447 Hudson Street.

In denying plaintiffs' motion for summary judgment, the court further considers whether reverse summary judgment is appropriate. The court may award summary judgment to a non-moving party, provided it is limited to the subject matter of the motion before the court. CPLR § 3212 [b]; Dunham v. Hilco Construction Co., 89 NY2d 425 (1996). Since plaintiffs cannot prove the necessary elements of their adverse possession, and there are no factual disputes that have to be tried, no relief can be had on this complaint. Therefore, not only is plaintiffs' motion for summary judgment denied, defendant is awarded summary judgment dismissing the complaint. The Clerk shall enter judgment in favor of defendant against plaintiffs.

Conclusion

It is hereby

ORDERED that plaintiffs' motion for summary judgment is denied; and it is

[7]
further

ORDERED that the non-moving party (defendant) is granted summary judgment, dismissing each cause of action, the complaint, and this case; and it is further

ORDERED that the clerk shall enter judgment in favor of defendant Hudmor Corp., against plaintiffs William B. Keena and Mary C. Keena dismissing the complaint and this case.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 28, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JUL 11 2006
COUNTY CLERK'S OFFICE
NEW YORK