

<b>1941-1947 Madison Ave. Assoc., LLC v M. Fund, Inc</b>
2006 NY Slip Op 30855(U)
March 21, 2006
Supreme Court, New York County
Docket Number: 110284/04
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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1941-1947 MADISON AVENUE ASSOCIATES, LLC,

Plaintiff,

-against-

M. FUND, INC, et al.

Defendant.

-----x

**Findings of Fact and  
Conclusions of Law**

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**WALTER B. TOLUB, J.:**

The issues in the above entitled action having been tried before me at an IAS Part 15 of the above mentioned Court held in and for the County of New York on January 4, 2006 and January 5, 2006, and having heard the testimony and proofs of the respective parties and reviewed the Exhibits received in evidence at said Trial and due deliberation having been had thereon, I hereby make the following findings of essential facts which I deem established by the evidence, and reach the following conclusions of law:

Findings of Fact

1. Plaintiff is the owner of a commercial building located at 1941-1947 Madison Avenue, New York, New York, which is also known as 50/56 East 125<sup>th</sup> Street ("the building"). The building is located at the corner of Madison Avenue and East 125<sup>th</sup> Street in Manhattan, and is indexed as Block 1749, Lot 50 (hereinafter referred to as "Lot 50"). The property was

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acquired by plaintiff's predecessor in 1988.

2. The Defendant, M. Fund, Inc., acquired the adjacent unimproved lot known as 58 East 125<sup>th</sup> Street, New York, New York on May 12, 2003 which property is indexed as Block 1749, Lot 49 (hereinafter referred to as "Lot 49" and which property was transferred to the defendant Brukhah Assets, LLC for tax purposes.
3. Lot 49 was previously occupied by a building which was built on the entire lot. The court has not been provided with any evidence establishing when the building on Lot 49 was demolished. However, by 1988, the building on Lot 49 had been demolished and the fire escape which is the subject matter of this action had been erected (Plaintiff's Exhibit 3).
4. On January 22, 2003, the building on Lot 50 was the subject of a fire which destroyed the second floor. Plaintiff claims that said fire also made the third floor of the building on Lot 50 unusable.
5. Lot 50 had a fire escape on the easterly wall of the building which projected over Lot 49. Lot 49 was encumbered by a makeshift flea market and was covered with debris including bicycle parts and a trailer. Access to the Street from lot 49 was completely blocked by the debris and the flea market, and at one time was also blocked by a fence (Plaintiff's Exhibits 3, 4; Defendant's Exhibits A-J).

6. The fire escape did not conform to Building Code Section C26-273 in that it was blocked by debris and the flea market, and there was evidence that it was at one point, fenced in (Plaintiff's Exhibits 3, 4; Defendant's Exhibits A-J).
7. In September and October of 2003, defendants removed said fire escape.
8. The plaintiff did not object to the removal of said fire escape.
9. In May, 2004, the plaintiff filed plans to renovate the building on Lot 50. The renovations consisted of a type 2 alteration to restore the property to the conditions that existed prior to the fire.
10. The plans included as a means of egress, the fire escape that had been removed in September and October 2003. The plans indicated that the fire escape serviced the second floor of the building located on Lot 50 and did not extend to the third floor.
11. The Building Code of the City of New York requires two means of egress from a building.
12. The fire escape which was removed from the building on Lot 50 was not a legal means of egress because there was no access to the street.
13. A fire escape could be constructed on the front of the building on Lot 50 to provide a secondary means of egress.

13. The Court therefore finds that the Defendants did not trespass upon Plaintiff's property and additionally finds that Plaintiff is not entitled to a declaratory judgment directing the Defendants to restore said fire escape.
14. The Court further finds that the Plaintiff did not establish that it is entitled to any damages.

#### Conclusions of Law

In this action, plaintiff's claims are predicated on two separate, but related, theories. The first is that the fire escapes that were constructed over the defendant's property resulted in a taking by adverse possession. The second theory is that plaintiff acquired an easement by necessity.

Title by adverse possession is generally not favored (Gallea v. Hess Realty Corporation, 128 AD2d 274 [4<sup>th</sup> Dept. 1987]). To acquire title by adverse possession five essential elements must be established. (1) Possession must be hostile and under a claim or right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous (Belotti v. Bickhardt, 228 NY 296 [1920]).


In the instant case, plaintiff has failed to establish that possession here was hostile and under a claim of right. Moreover, it is clear that possession was not exclusive and indeed from the little evidence that was presented at trial, it is clear that the encroachment upon defendant's property never constituted a legally

conforming fire escape. Access to the street was blocked not only by debris and a flea market, it was fenced in. In this regard, it should be noted that a "fire escape" without a means of egress would create no independent legal right.

Finally the court notes that plaintiffs have failed to establish an easement by necessity. An easement by necessity arises when an owner of a unified premises divides it up and the easement is necessary for the beneficial enjoyment of the property asserting it (Minoque v Monette, 158 Ad2d 843 [3<sup>rd</sup> Dept. 1990]). In the instant case, there was no unity and subsequent separation of Title. Moreover, as defendants' architect testified, it is feasible to construct a legally permissible fire escape in the front of plaintiff's property, obviating the necessity for the reconstruction of the old fire escape.

Accordingly the plaintiff's complaint is dismissed.  
Settle Order and Judgment.

Dated: 3/21/06

  
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HON. WALTER B. TOLUB, J.S.C.