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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK PART 12
Justice

MORSE, ARTHUR

-v-

ECONOMY

INDEX NO. 104585/05

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision.

Settle order.

Dated: 12/22/07

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------X

HERBERT MOSKOWITZ and ARTHUR MORSE,

Plaintiffs,

- against -

ECONOMY, INC.,

Defendant.

----------X

DECISION
Index No. 104585/05
Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

Plaintiffs are the owners of property located at 31 Walker Street in Manhattan. Defendant is the owner of the adjacent property at 35 Walker Street.

Between the two properties is a four-foot wide alley upon which a structure was erected both above and below ground in or about 1905 by defendant's predecessor-in-interest. Plaintiffs claim to have first discovered in 2004 that in 1953, the City of New York had designated two feet of the alley to each property for tax purposes. Plaintiffs commenced this action after defendant, which is converting a portion of its building from commercial into residential premises, applied for a permit to perform construction work that plaintiffs feared would encroach upon what they claim is their two feet of the alley.

Plaintiffs contend that defendant knew prior to this action being commenced in April 2005 that there was a potential claim, since defendant noted that the alley was in dispute on architectural drawings submitted to the Department of Buildings in

2004 in connection with changes to the Addition which defendant intended to make. However, that dispute concerns the rear portion of the alleyway behind the building which is not at issue in this dispute.

Plaintiffs' Complaint seeks a judgment:

(1) granting an injunction restraining defendant, its agents and servants from maintaining or using so much of the encroachments, over the boundary line between plaintiffs' and defendant's properties and overhang;

(2) directing defendant to remove said encroachments; and

(3) reforming plaintiffs' deed to include the two additional feet at issue.

The defendant agreed pursuant to Stipulation dated July 12, 2006 "that it will not alter any structure that is on the 2 feet of the alley claimed by the plaintiff [sic] until an adjudication regarding the property line is made by the Court."

Plaintiffs now move for summary judgment acknowledging that two feet of the alley between the properties belongs to plaintiffs, based, inter alia, on the City's 1953 tax allocation map.

Defendant cross-moves for an order granting quiet title to the defendant by virtue of adverse possession of the alley at dispute, on the ground that no claims regarding the disputed two feet of the

alley were made by the plaintiffs for more than ten years from the time defendant acquired the property in February 1995. In fact, defendant claims that it has occupied the entire alley at dispute open and notoriously for the whole period of its ownership, and that it and its predecessors have actually possessed the alley for at least 100 continuous years. Apparently, the entrance to the alley is located on defendant's property and defendant has done work and repairs on the extension since 1995; plaintiffs only have access to it from the roof of their building.

Defendant further argues that plaintiffs are guilty of laches in failing to bring this action until 20 years after they acquired ownership, see, e.g., Orange and Rockland Utilities, Inc. v. Philwold Estates, Inc., 70 A.D.3d 338 (3rd Dep't 1979; mod. on other grnds., 52 N.Y.2d 253 (1981), and that defendant is prejudiced by the delay. Defendant claims that had plaintiffs claimed their alleged right to the alleyway at dispute prior to 1995, the purchase price on the building would have dropped significantly. Defendant also contends that the cost of removing the Addition now would be significant and claims that it has spent thousands of dollars to get the building permits and hire contractors to convert portions of the property from commercial to residential use.

Finally defendant contends that plaintiffs' deed omits any reference to the alley, whereas defendant's title report mentions the alley as being merged into the defendant's property.

Both parties claim to have been unaware until very recently of the tax allocation made by the City of New York in 1953 or that plaintiffs have been paying taxes on the two feet of the alleyway for over fifty years.

The City's tax maps, however, are not conclusive as to ownership. See, e.g., Morganteen v. Brenner, 28 A.D.3d 725 (2nd Dep't 2006); lv. to app. den., 7 N.Y.3d 707 (2006).

The July 26, 1966 deed conveying plaintiffs' lot to plaintiffs' father is completely silent as to the alleyway. Plaintiffs inherited the property from their father and have been the owners since on or about July 2, 1985.

However, the deed transferring the property to defendant in 1995 transferred the lot upon which the house sits, and "all right, title and interest of the seller, if any, in and to the alleyway adjoining said premises on the Westerly side thereof." Nonetheless, defendant's title insurance company would not insure defendant's title to the alley because, while it appeared that the alleyway ("a strip of land formerly known as Lot 25 being an alleyway comprising the Westerly two (2) feet of the present Lot 26 as it fronts on the Southerly side of Walker Street and being the Westerly four (4) feet of the present Lot 26 at the rear of said

Lot") had been merged into defendant's uncontested lot, "no title to said alleyway can be located in the Records of the City Register."

A December 29, 1994 survey performed by a City Surveyor shows defendant's lot to be 23 feet and eleven inches wide in front, that is, as including the Addition. That survey, however, was based on no more than a visual survey. More recently, the New York City Landmarks Preservation Commission has designated the facade of 35 Walker Street, which it describes as a "dwelling ... almost twenty-four feet wide," as a historical landmark.

However, a 2005 zoning map shows defendant as owning only two feet of the alleyway at the front of the lot. Finally, an October 24, 2005 letter from Fidelity National Title Insurance Company to defendant's architect states as follows:

> Please be advised that the record metes and bounds descriptions used in the Deed Chain for the premises under examination describe a parcel 20 feet wide, whereas the Tax Map shows said parcel to be 22 feet wide on the northerly side and 24 wide on the southerly side. This variation in width between the Deed and the Tax Map descriptions is due to the existence, now or formerly, of a 4 foot wide alleyway leading to Walker Street which is adjacent on the westerly side of the premises under examination. East of Tax Lot 25, the easterly 2 feet of said alleyway was merged into Tax Lot 26; east of Tax Lots 23 and 24, the full 4 feet of said alleyway was merged into Tax Lot 26. The merger was effectuated in 1953 at the request of the Tax Department.
>
> Deeds in the back chain of title for both the premises under examination and adjacent lots thereto cite the existence of said 4 foot alleyway leading to Walker Street for use in common with others. Accordingly, no

> title is certified to that portion of the Tax Lot lying within the lines of the alleyway now or formerly on the westerly side of the premises under examination.

Thus, it appears that neither party has clear title to this alleyway.

Defendant argues that plaintiffs' claim for reformation of the deed is time barred because "[t]he Statute of Limitations for a claim of reformation based upon mistake is six years, accruing on the date of the mistake (CPLR 213[6];...)" Federal Deposit Ins. Corp. v. Five Star Mgmt. Inc., 258 A.D.2d 15, 20 (1st Dep't 1999) which in this case would be the date the deed was made - i.e., the date plaintiffs obtained ownership of the property in July 1985, more than 20 years ago.

Plaintiffs rely on Tursi v. St. Joseph's Sanatorium Inc., 133 A.D.2d 910 [3rd Dep't 1987]) for the proposition that their cause of action for reformation accrued only in 2004, when they discovered that they had been paying taxes on half the subject alleyway. However, in Tursi, the party seeking reformation had been in undisputed possession of the land which the party believed itself to own for 65 years. Accordingly, the Court in Tursi, relying on the Court of Appeals' holding in Hart v. Blabey, 287 N.Y. 257 (1942), held that the cause of action for reformation accrued only once that party's possession of the land at issue was challenged.

Here, by contrast, it is defendant and its predecessors who, for almost one hundred years, have exercised undisputed and visible possession of the land at issue. In addition, the fact that plaintiffs and their predecessors were paying taxes on two feet of the alleyway was not hidden from them by anyone.

Moreover, even if plaintiffs' claim as to reformation was timely it would fail, because plaintiffs cannot show that they own the two feet that they assert to be theirs, or that they should be awarded the land that they claim, solely because they have been paying taxes on it.

Finally, defendant argues that it is entitled to quiet title pursuant to the doctrine of adverse possession. In order to establish a claim of adverse possession a party must show possession that is "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for [10 years]." Walling v. Przybylo, 7 N.Y.3d 228, 232 (2006). Possession for the statutory period need not be by one person, but may be by a succession of tenants in an "unbroken chain of privity." Belotti v. Bickhardt, 228 NY 296, 306 (1920).

Plaintiffs argue that there is no claim of right here and no hostility. Chatsworth Realty 344 v. Hudson Waterfront Co., 309 A.D.2d 567 (1st Dep't 2003); Esposito v. Sackler, 160 A.D.2d 1154 (3rd Dep't 1990); Gerwitz v. Gelsomin, 69 A.D.2d 992 (4th Dep't 1979).

Defendant, however, contends that its predecessors constructed an Addition on the alley at dispute more than 100 years ago which presumes defendant's hostile ownership of the alley unless proven otherwise, which defendant argues plaintiffs have failed to do.

"'[T]he element of "hostility" need not be supported by proof of enmity or literally hostile acts...[a]ll that is required is a showing that the possession actually infringes upon the owner's rights...such as to give the owner a cause of action in ejectment against the occupier throughout the requisite period.'" Moore v. City of Saratoga Springs, 296 A.D.2d 707,710 (3rd Dep't 2002) citing Birkholz v. Wells, 272 A.D.2d 665, 667 (3rd Dep't 2000). See also, Ray v. Beacon Hudson Mtn. Corp., 88 N.Y.2d 154, 159 (1996); Brand v. Prince, 35 N.Y.2d 634, 636 (1974). Clearly, the erection of an Addition or structure on another's land would give the alleged landowner a cause of action in ejectment.

"Since the acquisition of title to land by adverse possession is not favored under the law (*Belotti v Bickhardt*, 228 NY 296, 308 [1920]), these elements must be proven by clear and convincing evidence (*Van Valkenburgh v Lutz*, 304 NY 95, 98 [1952])" Ray v. Beacon Hudson Mtn. Corp., supra at 159.

"Adverse possession, although not a favored method of procuring title, is a recognized one. It is a necessary means of clearing disputed titles and the courts adopt it and enforce it,

because, when adverse possession is carefully and fully proven, it is a means of settling disputed titles and this is desirable' Belotti v Bickhardt, supra at 308."

As Frank Farinella, a registered architect who researched the issue of the boundary between the two buildings on behalf of the plaintiffs stated in his Affidavit, "the language in the deeds to the properties ... was vague and there was no clear holder of title to the space in question separating the zoning lots, ..."

Based on all the papers submitted and the oral argument held on the record on December 13, 2006, it is indisputable that defendant's and its predecessors' possession of the alleyway with the Addition has been hostile and under claim of right, actual, open and notorious, exclusive and continuous for over 100 years. Therefore, defendant is entitled to quiet title under the doctrine of adverse possession.

Accordingly, defendant's cross-motion for summary judgment is granted and plaintiffs' motion is denied.

Settle Order on Notice.

Dated: October 22, 2007

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.