

<b>Tree Top, LLC v Dufel</b>
2007 NY Slip Op 33500(U)
October 26, 2007
Supreme Court, Greene County
Docket Number: 0020061/4051
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

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Tree Top, LLC,

Plaintiff,

– against –

Gary A. Dufel and Deborah H. Dufel,

Defendants.

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**Decision and  
Order**

**Index No.: 06-1405  
RJI No.: 19-07-3100**

Supreme Court, Greene County, All Purpose Term, September 20, 2007  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

RALPH C. LEWIS, JR.  
Lewis & Stanzione  
*Attorneys for the Plaintiff*  
287 Main Street  
P.O. Box 383  
Catskill, NY 12414

FREDERICK C. KELLY, ESQ.  
Maynard, O'Connor, Smith & Catalinotto, LLP  
*Attorneys for the Defendants*  
P.O. Box 180  
Saugerties, NY 12477

**TERESI, J.:**

Plaintiff has filed a motion for summary judgment pursuant to CPLR 3212. Defendants oppose the motion for being premature pursuant to CPLR 3212 (f) and filed a motion for leave to serve an amended answer and counterclaim.

On July 3, 1988, William C. Mahfouz, Marilyn J. Mahfouz, Brian Kieran, and Janine

Kieran purchased 8.433 acres of land in Hunter, NY from Angelina Minadeo. The Mahfouz's and the Kieran's both had an undivided one half interest in the property as tenants in the entirety. On September 2, 1989, the Mahfouz's and Kieran's divided the property into four lots, deeding a two acre lot to Marilyn and William Mahfouz and a two acre lot to Janine and Brian Kieran, with a remaining two and one-quarter acre lot and two and one-fifths acre lot both jointly owned by the Mahfouz's and Kieran's.

The jointly owned two and one-fifths acre lot was the only lot that provided direct access to State Route 214. The Mahfouz's lot was located directly in between the two jointly owned lots, and the Kieran's lot was situated behind the Mahfouz's lot and the jointly owned two and one-fifths acre lot. The Mahfouz's lot and the Kieran's lot had a twenty-five foot right-of-way for ingress and egress, which connected to a sixty-six foot right-of-way on the Mahfouz's lot and the jointly owned two and one-fifths acre lot for ingress and egress. A gravel driveway with access to Route 214 began on the two and one-quarter acre jointly owned lot and continued across the Mahfouz's lot and across the jointly owned two and one-fifths acre lot.

On November 17, 2000, the Mahfouz's and the Kieran's sold their jointly owned two and one-quarter acre lot, which is the lot on which the gravel driveway begins, to Patrick Moynihan. Then, on August 11, 2004, the Mahfouz's and Kieran's sold their jointly owned two and one-fifths acre lot, which provides direct access to Route 214, to the Plaintiff, Tree Top, LLC. On that same day, the Mahfouz's and the Kieran's each sold their own lots to Tree Top, LLC. Finally, on July 29, 2006, Patrick Moynihan sold his two and one-quarter acre lot to the Defendants, Gary A. Dufel and Deborah H. Dufel. Currently, Plaintiff owns the lots closest to Route 214, and the Defendants own the farther lot on which the gravel driveway begins.

The Defendants argue that, through adverse possession, they own the driveway and a portion of landscaped area surrounding an outhouse on the border of Defendants' and Plaintiff's property. On the other hand, Plaintiff argues that the elements to satisfy an adverse possession claim have not been fulfilled, which prevents the Defendants from having successfully adversely possessed the property.

A claim for adverse possession can be satisfied if the possession is hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory period. Walling v. Przybylo, 7 N.Y.3d 228, 232 (N.Y. 2006). While the statutory period for adverse possession is ten years, a current possessor can tack any time that the previous possessor adversely possessed the property. Ray v. Beacon Hudson Mountain Corp., 88 N.Y.2d 154, 159 (N.Y. 1996); Brand v. Prince, 35 N.Y.2d 634, 637 (N.Y. 1974). Here, however, the time that the Mahfouz's and Kieran's owned the property cannot be tacked onto any other possessor's time because a possessor cannot adversely possess his or her own property. The possession must be hostile, or against the will of the true owner. Walling, 7 N.Y.3d at 232.

The earliest time at which the statutory period could have started running is November 11, 2000, which is when the Mahfouz's and Kieran's sold part of their property to Patrick Moynihan. Up until that point, however, the statutory clock could not have started because the Mahfouz's and the Kieran's both owned all of the property. With the statutory period being ten years, a claim for adverse possession for any part of this property cannot be successful only six years after the Mahfouz's and Kieran's changed over ownership to the property.

While the Defendants' adverse possession claim fails, Defendants seek to amend their

answer to include a counterclaim for an implied easement. Leave to amend a pleading is to be freely given, so long as the proposed amendment does not lack merit, and there is no prejudice resulting from the delay. Pergament v. Roach, 41 A.D.3d 569, 572, 838 N.Y.S.2d 591, 594 (2<sup>nd</sup> Dep't 2007); Peebles v. Peebles, 40 A.D.3d 1388, 1390, 837 N.Y.S.2d 395, 396 (3<sup>rd</sup> Dep't 2007). No prejudice will result here from an amended answer. The Plaintiff will have ample time to reply to the amended answer. Regarding the merits of the proposed amendment, the Defendants argue that they have a claim for an implied easement. An implied easement exists where property was once under common ownership and was subsequently separated. Monte v. DiMarco, 192 A.D.2d 1111, 1112, 596 N.Y.S.2d 253, 254 (4<sup>th</sup> Dep't 1993). Prior to the separation of the property, the use must have been obvious and show permanence. Id. In addition, the use must be necessary to the beneficial enjoyment of the land and must effect the value of the property. Id. There are substantial facts here to show that the Defendant's claim for implied easement has merit. Therefore, Defendants are granted leave to amend their answer, and the Plaintiff's motion for summary judgment is denied.

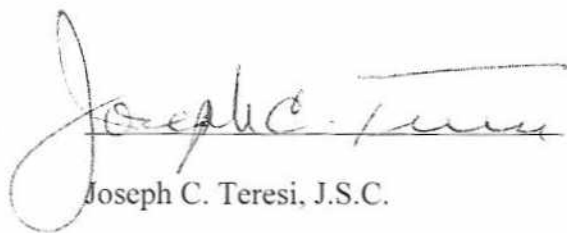
Plaintiff will have 20 days from the date of this decision to respond to the Defendant's Amended Answer.

All papers, including this Decision and Order, are being returned to the Defendant. The signing of the Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

**SO ORDERED!**

Dated:           October 26, 2007

Albany, New York



Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Defendants' Answer, dated January 30, 2007.
2. Plaintiff's Reply, dated February 2, 2007.
3. Plaintiff's Motion for Summary Judgment, dated August 28, 2007, with Attached Exhibits A - D and F - J.
4. Defendants' Motion for Leave to Amend Answer and in Opposition to Summary Judgment, dated September 13, 2007.
5. Defendants' Reply, dated September 19, 2007.