

Air Stream Corp. v 3300 Lawson Corp.

2007 NY Slip Op 33852(U)

November 16, 2007

Supreme Court, Nassau County

Docket Number: 5902-06/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 12

AIR STREAM CORP.,

Plaintiff,

**INDEX NO.: 005902/2006
MOTION DATE: 10/05/2007
MOTION SEQUENCE: 002 & 003**

-against-

3300 LAWSON CORP.,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed.....	1
Affirmation in Opposition to Plaintiff's Motion for Partial Summary Judgment of Linda S. Agnew, Affidavits & Exhibit Annexed.....	2
Notice of Motion, Statement Pursuant to Rule 19-a of the Commercial Division of the Supreme Court, Affirmation, Affidavit & Exhibits Annexed.....	3
Counter Statement Pursuant to Rule 19-a of the Commercial Division.....	4
Affirmation in Opposition to Defendant's Motion for Summary Judgment of Christine McInerney & Exhibits Annexed.....	5
Affidavit in Opposition to Defendant's Motion for Summary Judgment of Robert Fitzsimmons.....	6
Affidavit in Opposition to Defendant's Motion for Summary Judgment of Thomas Fitzsimmons.....	7
Affidavit in Reply to Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment of Robert Fitzsimmons & Exhibits Annexed.....	8
Reply Affirmation in Further Support of Defendant's Motion for Summary Judgment of Linda S. Agnew, Affidavit & Exhibits Annexed.....	9
Reply Affirmation Further Support of Plaintiff's Motion for Partial Summary Judgment of Christine McInerney.....	10

Motion by the plaintiff Air Stream Corp pursuant to CPLR 3212 for partial summary judgment on its: (1) second cause of action for a prescriptive easement over a certain seven-foot strip of land; and (2) on its fifth cause of action for a permanent injunction enjoining the defendant, from, *inter alia*, interfering in any way with the plaintiff's use of the alleged prescriptive easement and loading dock located thereat.

Motion by the defendant 3300 Lawson Corp., pursuant to CPLR 3212 for summary judgment: (1) dismissing the complaint; and (2) for judgment on its second and third counterclaims, and (3) for a further order severing its first counterclaim.

In 1993, the plaintiff Air Steam Corp ["the plaintiff"] purchased commercial property located at 3300 Lawson Boulevard, Oceanside, New York, on which is located a warehouse and loading platform with several attached loading docks (Cmplt., ¶¶ 6-8). The defendant 3400 Lawson Corp. ["the defendants"] owns the directly adjoining property, which it purchased in 1999 (Girardi Aff., ¶¶ 7-8).

The loading platform connects both properties in uninterrupted fashion and, therefore, is partially on the plaintiff's property and partially on the defendant's adjacent property (Girardi Aff., ¶ 10[d]).

Specifically, the property line between the two parcels extends in a east-west direction across the platform area and essentially divides the so-called "third loading dock" in half, *i.e.*, the plaintiff's property constitutes the southerly half of the dock area, while the defendant's portion of the dock is to the north (Fitzsimmons Aff., ¶¶ 5-6).

The northerly half of the dock area – a roughly seven-foot wide strip – constitutes what the parties have described as the "disputed" area or strip (Girardi Aff., ¶ 7; Fitzsimmons Aff., ¶ 9).

The plaintiff contends that it has, at the very least, established the existence of a prescriptive easement over the disputed area, since it has allegedly: (1) exclusively and/or dominantly controlled and used that area for the loading and unloading of its goods from 1993 to date; and (2) continuously maintained the area over the years by sweeping, plowing, paving a nearby driveway, removing debris, installing lighting and making repairs – all of which occurred without the consent of the defendants and/or the defendant's predecessors-in-title (Fitzsimmons

Aff., ¶¶ 13-14; McInerney Opp. Aff., ¶¶ 14-15).

The defendant primarily contends, however, that the plaintiff's use of the property was "permissive" from 1999 to 2006, since it allegedly permitted the plaintiff to use the disputed area solely and exclusively as a "neighborly accommodation" (Girardi Aff., ¶ 14).

In support of the accommodation claim, the defendant's principal, Florestano Girardi, further argues that he and the plaintiff's principals, the Fitzsimmons, "were long time, close personal friends" who socialized together frequently – a claim disputed by the Fitzsimmons, who contend that the defendant's principals were at most merely acquaintances (Fitzsimmons Opp. Aff., ¶¶ 4-5).

Additionally, Girardi contends that one of his previous tenants, National Antenna Systems ["NAS"], regularly utilized the disputed area and third loading dock from 2001 through April 2003; that its current tenant, New Era, has similarly utilized the docking area from 2004 and that use continues to date (Kraim Aff., ¶¶ 3-4); that NAS, in particular, constantly complained about the plaintiff's interference with its use of the loading dock area from the inception of its leasehold (Girardi Aff., ¶¶ 17-22 *see*, Girardi Dep., 30-36, 41-42; 96).

Girardi further asserts that Lawson has maintained the disputed strip since 2000 (Girardi Reply Aff., ¶ 9).

At some point in March of 2005, the plaintiff installed a raised cement platform toward the rear of its property which, according to the plaintiff, is within the disputed area and, which the defendant claims, encroaches some three feet onto its property (McInerney Aff., ¶¶ 65-67; Girardi Aff., ¶¶ 23-25; Fitzsimmons Opp. Aff., ¶ 19).

Significantly, the plaintiff advises that the defendant raised no objection to the construction of the platform until the instant lawsuit was commenced in April of 2007 (Fitzsimmons Opp., Aff., ¶ 20).

Moreover, and according to the defendant, prior to 2006, the plaintiff had repeatedly damaged the defendant's property by, among other things, driving its vehicles and other equipment – including a "high-lo" apparatus – into the defendant's buildings and by blocking and obstructing its tenant's access to the disputed loading dock area.

By letter dated March 22, 2006, the defendant advised that it intended to install fencing

and metal posts on its southerly property line, thereby enclosing the disputed area (Def's Exh., "O").

In response, the plaintiff commenced the within action and moved for a preliminary injunction precluding the defendant from enclosing the disputed area (Pltff's Exh., "G").

By order dated June 15, 2006, the Court granted the application and temporarily enjoined the defendants from installing the fence and post (Pltff's Exh., "H").

The Court (Martin, J.) held in part that, "[w]here, as here, plaintiff demonstrates by clear and convincing evidence that its use of the purported easement was adverse open, notorious, continuous and uninterrupted for a period of ten years, the court will presume that said use was adverse and the burden shifts to defendant to rebut the presumption by demonstrating that is was permissive" (Order, at 2).

The Court further observed that, "[i]n opposition, defendant fails to offer any proof in admissible form that plaintiff's use of the property was permissive".

The plaintiff's subsequently interposed an amended complaint containing five causes of action which allege, *inter alia*, that: (1) it has obtained title to the disputed area by adverse possession; (2) that it has also established the existence of a prescriptive easement over the area; (3) that the defendant does not possess an easement over the disputed area; and (4) that to the extent that it does, that such easement, if any, was extinguished by the plaintiff's adverse possession of the area.

The defendant has answered, denied the material allegations of the amended complaint, and interposed three counterclaims, *i.e.*, claims sounding in trespass; ejection relating to the cement platform; and a third counterclaim for a declaration that it enjoys an alleged express easement over the disputed area (Def's Reply Exh., "C").

The parties now move for summary judgment on stated portion of the respective claims. Specifically, the plaintiff moves for summary judgment on its second cause of action for a declaration that it possesses a prescriptive easement over the disputed area and for related injunctive relief incidental thereto.

The defendant moves for summary judgment: (1) dismissing the complaint; and (2) for judgment on its second and third counterclaims; and (3) for a further order severing its first

counterclaim. The plaintiff's motion is granted. The defendant's motion should be denied.

It is settled that "[a] party claiming an easement by prescription must prove an 'adverse, open and notorious, continuous and uninterrupted [use]' of another's land for the prescriptive period of 10 years" (*Eskenazi v. Sloat*, 40 AD3d 577, quoting from, *Di Leo v. Pecksto Holding Corp.*, 304 NY 505, 510-512 [1952] see, *Bouton v. Williams*, 42 AD3d 795; *Duckworth v. Ning Fun Chiu*, 33 AD3d 583).

Here, the plaintiff has submitted evidence indicating that, *inter alia*, that it purchased the subject property in 1993; that it continually and openly utilized the disputed area for its business and loading activities since that date; that it maintained the area by, *inter alia*, sweeping, plowing, removing debris, installing lighting and making repairs; and that the defendant was well aware of the allegedly adverse use, since it had received regular complaints from its tenants that the plaintiff's employees were constantly utilizing the dock, blocking their access to it, and damaging the defendant's property through their activities (Pltff's Exhs., "K," "L") (*e.g.*, *Goss v. Trombly*, 39 AD3d 1128, 1130).

Notably, "[p]roof that use of a property was open, notorious, continuous and undisputed generally gives rise to a presumption that the use was hostile and under a claim of right, shifting the burden of proof to the servient property owner to show that the use was permissive" (*Allen v. Mastrianni*, 2 AD3d 1023 see also, *J.C. Tarr, Q.P.R.T. v. Delsener*, 19 AD3d 548, 550; *Cole v. Rothe*, 18 AD3d 1058, 1059 see also, *Eskenazi v. Sloat, supra*; *Duckworth v. Ning Fun Chiu, supra*). Moreover, for the purposes of establishing a prescriptive easement, it is not necessary that the plaintiff demonstrate that its use of the area "was exclusive as long as * * * [it] was the principal user[] of the * * * [area]" (*Miller v. Rau*, 193 AD2d 868, 868-9 see, *Top Hat Car Wash Co., Inc. v. McDonly*, 277 AD2d 310, 311; *Bova v. Vinciguerra*, 184 AD2d 934, 935; *Borruso v. Morreale*, 129 AD2d 604, 605).

However, a claim of adverse use will fail where the use is based on an established "neighborly accommodation" and therefore permissive (*see, Koudellou v. Sakalis*, 29 AD3d 640; *Duckworth v. Ning Fun Chiu*, 33 AD3d 583, 584; *Kelly v. Schwend*, 15 AD3d 450, 451 *cf.*, *Reed v. Piedimonte*, 138 AD2d 937).

Contrary to the defendant's contentions, the record at bar does not support the assertion

that the plaintiff's use of the disputed area was permissive or the product of a neighborly accommodation.

Specifically, and apart from assertions currently made in the pending litigation, there is nothing of a probative nature in the record which memorializes any purported agreement or accommodation relative to the plaintiff's use of the disputed area (*see, Goss v. Trombly, supra; Reed v. Piedimonte, supra*).

The contemporaneously authorized correspondence relied on by the defendants – in which it complained about the plaintiff's activities – contain neither express reference to any such accommodation nor statements from which the existence of such an understanding can be viably inferred.

The mere fact that the parties may have maintained a personal relationship – the extent of which is disputed – does not generate a factual issue with respect to the defendant's claim of permissive use. If anything, the record suggest that the parties' relationship was contentious and strained throughout the relevant period while remaining civil (*Reed v. Piedimonte, supra see also, Reiss v. Maynard, 148 AD2d 996*). In any event, an unsupported "claim of neighborly accommodation is not proof of permission" (*Reed v. Piedimonte, supra*).

The plaintiff is therefore entitled to partial summary judgment on its second cause of action and for related relief on its fifth cause of action enjoining the defendant from interfering with its use of the disputed area and the loading dock.

Correspondingly, those branches of the defendant's motion which are to dismiss the second and fifth causes of action relating to the plaintiff's prescriptive easement causes of action, are denied.

With respect to the defendant's motion for dismissal of the plaintiff' remaining claims including the adverse possession cause of action, it is, settled that to succeed on a claim of adverse possession, the possessor must establish by clear and convincing evidence 'that the character of the possession is 'hostile and under a claim of right, actual, open and notorious, exclusive and continuous' for the statutory period of 10 years'" (*Ray v Beacon Hudson Mtn. Corp., 88 NY2d 154, 159 [1996], quoting from, Brand v Prince, 35 NY2d 634, 636 [1974] see, Walling v. Przybylo, 7 NY3d 228, 232 [2006]; Penn Heights Beach Club, Inc. v. Myers, 42*

AD3d 602, 605; *Robinson v. Robinson*, 34 AD3d 975, 976).

Moreover, where, as here, "a claim of right to property is not founded upon a written instrument, judgment or decree, only that portion of the disputed premises that was cultivated, improved or protected by a substantial enclosure will be deemed to have been held adversely" (*Robinson v. Robinson*, *supra*; at 976 *see*, *Comrie, Inc. v. Holmes*, 40 AD3d 1346, 1347; *DuMaurier v. Lindsay-Bushwick Associates, L.P.*, 39 AD3d 460; *Eddyville Corp. v. Relyea*, 35 AD3d 1063, 1065). At bar, the parties' conflicting assertions and claims have generated issues of fact with respect to the plaintiff's cause of action for adverse possession.

In particular, there are opposing claims relating to, *inter alia*, the extent to which the plaintiff has exclusively utilized and/or dominated and controlled the disputed area, and whether, in fact, it has satisfactorily "cultivated, improved or protected" the subject property within the meaning of RPAPL §§ 521[1], 522 (*see*, *Gallas v. Duchesne*, 268 AD2d 728; *Parillo v. Prunier*, 257 AD2d 807, 808). Significantly, "[t]he type of improvement or cultivation activity 'sufficient to supply the record owner with notice of an adverse claim will vary with 'the nature and situation of the property and the uses to which it can be applied'" (*Robinson v. Robinson*, *supra*, at 976, quoting from, *Ray v Beacon Hudson Mtn. Corp.*, *supra* at 160; *Parillo v. Prunier*, *supra*).

The Court's holding with respect to the plaintiff's adverse possession claim precludes any award of judgment to the defendant based on an alleged express easement contained in the deed by which Air Stream acquired the property from its immediate predecessor-in-title (McInerney Opp., Aff., ¶¶ 56-57; Ans., ¶ 26; Agnew Reply Aff., ¶ 27). Although the precise contours of the defendant's express easement theory are not entirely clear, it is settled that "an easement created by grant may be extinguished by adverse possession" (*Spiegel v. Ferraro*, 73 NY2d 622, 665 [1989]; *Zeledon v. MacGillivray*, 263 AD2d 904, 905). Similarly, summary dismissal of plaintiff's third cause of action for a declaration that the defendant "never acquired" an easement over the subject area is denied. (Cmplt., ¶¶ 25-26).

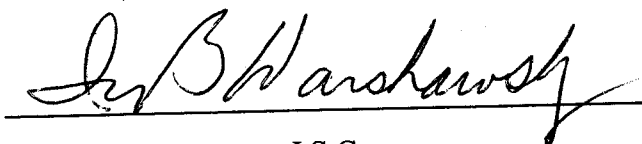
Lastly, the Court agrees that issues of fact exist with respect to whether the cement structure installed by the plaintiff in 2005, is, in fact, within the disputed area, and if so, whether title to the property on which it was built passed by adverse possession to the plaintiff upon the expiration of the applicable prescriptive period.

Accordingly, the defendant's motion for summary judgment on its third counterclaim, which is for judgment directing the plaintiff to remove the foregoing structure, is denied.

The Court has considered the defendant's remaining contentions and concludes that they fail to establish its entitlement to judgment as a matter of law and/or to defeat the plaintiff's motion for partial summary judgment.

The foregoing constitutes the decision and order of the Court.

Dated: November 16, 2007



J.S.C.

ENTERED

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