

**Cascino v Adams**

2007 NY Slip Op 34116(U)

December 11, 2007

Supreme Court, Nassau County

Docket Number: 3285-07/

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. GEOFFREY J. O'CONNELL**

Justice

TRIAL/IAS, PART 4  
NASSAU COUNTY

\_\_\_\_\_  
MICHAEL CASCINO and THERESA CASCINO,

Plaintiff(s),

INDEX No. 3285/07

-against-

MOTION DATE: 10/29/07

DANIEL ADAMS, MICHAEL ORLANDO  
and UNIVERSAL REALTY OF LONG ISLAND, INC.,

Defendant(s).

MOTION SEQ. No. 1-MD  
2-MD

\_\_\_\_\_  
The following papers read on this motion:

- Orlando Notice of Motion/Affirmation/Exhibits
- Cascino Notice of Cross Motion/Affirmation/Exhibits
- Reply
- Reply

Defendant MICHAEL ORLANDO and plaintiffs MICHAEL and THERESA CASCINO seek Orders granting them summary judgment in this Declaratory Judgment action. In the Complaint the plaintiffs seek an Order granting them adverse possession of a strip of land located between the premises at 698 South Bayview Avenue, Freeport and 700 South Bayview Avenue, Freeport. Plaintiffs seek title to a parcel of land they contend is located between the two properties identified above.

On or about January 24, 2003 the plaintiffs purchased 700 South Bayview Avenue. Approximately one year after purchasing the property, the plaintiffs placed fence posts and sprinklers on part the parcel of land belonging to 698 South Bayveiw Avenue. Plaintiffs claim in their Summons and Complaint that they are

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entitled to title of this strip of land under the theory of adverse possession.

On or about August 25, 2004 the defendant ORLANDO became the owner of the premises known as 698 South Bayview Avenue. Due to this claim defendant ORLANDO has not been able to sell his property.

Defendant ORLANDO seeks a summary judgment dismissing the Complaint contending that the plaintiffs are not entitled to title as they have not satisfied the Statutory or common law requisites for adverse possession. Real Property Actions and Proceedings Law § 522; *MAG Assoc. v. SDR Realty*, 247 AD2d 516 (2<sup>nd</sup> Dept. 1998); *Belotti v. Bickhardt*, 228 NY 296 (1920). The defendants argue that the plaintiffs have failed to demonstrate that the possession was hostile and under a claim of right, it was exclusive, open and notorious and it was continuous for a period of 10 years. *Koudellou v. Sakalis*, 29 AD3d 640 (2<sup>nd</sup> Dept. 2006).

Plaintiffs seek a declaratory judgment granting them title stating that they, and their predecessor in interest have claimed and used the property in question since 1987. Plaintiff claims that their predecessors in interest cared for the strip of grass, raking, seeding and mowing it therefore "cultivating" it for more than ten years prior to the plaintiff's purchase of the property in 2003. The prior owner states in an affidavit that his care of the lawn was open and without permission of the property's owner prior to the defendants. He does not state, however, that anyone owning the property objected or asked him to stop. They also provide a neighbor's affidavit stating that she saw him care for the lawn.

There has been no discovery or depositions of the parties or prior property owners to date.

The doctrine of adverse possession, which in essence permits a person to take someone else's private property for his own use, is rationalized by a number of judicially created fictions stated as presumptions. *O'Hara v Wallace*, 83 Misc2d 383, 386 (Sup. Ct. Suff. Cty., 1975).

The basic law and context of adverse possession were succinctly stated by the Court of Appeals in *Brand v Prince* (35 NY2d 634, 636):

" Acquisition of title by adverse possession derives historically from the early English statutes limiting actions to recover land. Truly Statutes of Limitation, their purpose was "for quieting of men's estates, and avoiding of suits["] (Statute of Limitations, 21 Jac. I, ch. 16). The necessary effect, by barring the real owner's right to recover his property, is, of course, to extinguish his title and make absolute the wrongful possessor's.

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Actual possession adverse to the true owner for the statutory period is required before title will vest. In qualifying the character of the possession required at common law, it is usually said that it must be hostile and under claim of right, actual, open and notorious, exclusive and continuous. (e.g., *Belotti v. Bickhardt*, 228 N. Y. 296, 302.) Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period. (See, generally, 3 American Law of Property, § 15.3.)"

The party asserting the acquisition of title by adverse possession has the burden of proving his or her claim by clear and convincing evidence. *Van Valkenberg v Lutz*, 304 NY 95, 98 (1952); *Katona v Low*, 226 AD2d 433 (2d Dept, 1996). Where the claim to title is not founded upon a written instrument, judgment or decree, the additional element that the property has either been usually cultivated or improved or protected by a substantial enclosure must be established by proof of the same quality. RPAPL §522; *Van Valkenberg v Lutz*, supra at 98.

The plaintiffs assert that the period of adverse possession commenced to run during the ownership of the prior owner of 700 South Bayview Avenue and that they are entitled to "tack", that is, to credit his ownership years prior to their coming into title against the ten year statutory period (CPLR § 212(a)). In *Belotti v Bickhardt* (228 NY 296, 306), the Court of Appeals said:

" It is clear that where the defense is founded on adverse possession, color of title by deed or other documental semblance of right is required, but it is equally clear that neither a deed nor any equivalent instrument is necessary when the possession is indicated by actual possession and any other evidence of an adverse claim exists. The claim of such possession may continue unbroken by a succession of tenants and where this occurs the adverse possession may be just as effectual as though the premises were held during the whole period by one person."

However, such period of prior possession may only be tacked after a transfer of title by deed if it appears that the prior adverse possessor intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed. *Brand v Prince*, 35 NY2d 634, 637.

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Other than the affidavits that the prior owner provided general lawn care, there is no specific evidence as to what, if anything, was cultivated in the area. While the element of hostility does not require a showing of enmity or specific hostile acts, there must be shown an actual invasion or infringement upon the titled owner's rights. *Katona v Low*, 226 AD2d 433 (2d Dept, 1996). It has been said that the use must be inconsistent with the rights of the record owner and call out for objection. *Rusy-Bohm Post No. 411 v Islip Enterprises*, 5 AD2d 774 (2d Dept, 1958), *affd.* (5 NY2d 856). Taking into consideration the character, condition, location and potential uses of this strip of land there is nothing about mowing or caring for a lawn which called out for objection.

Based on the limited proof presented, the Court cannot determine whether the plaintiffs have acquired title by right. Thus, both applications are Denied at this time and the parties are directed to appear to set a schedule for discovery.

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 10<sup>th</sup> of January, 2008, at 9:30 a.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

It is, SO ORDERED.

Dated: Dec 11, 2007

  
HON. GEOFFREY J. MCANNELL, J.S.G.  
**ENTERED**

DEC 14 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE