

Tsenesidis v Malba Association

2007 NY Slip Op 34288(U)

September 18, 2007

Supreme Court, Queens County

Docket Number: 0006337/2007

Judge: David Elliot

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

ARGYRIS TSENESIDIS, et al. X

INDEX NO. 6337/07

- against -

SEQ. NO. 1

MALBA ASSOCIATION

BY: ELLIOT, J.

DATED: January 2, 2008

X

Plaintiff Argyris Tsenesidis and plaintiff Polytimi Tsenesidis have moved for (1) summary judgment on their complaint and (2) summary judgment dismissing the counterclaims asserted against them. Defendant Malba Association has cross-moved for (1) a preliminary injunction, inter alia, prohibiting the plaintiffs from making further alterations to a parcel of real property whose ownership is in dispute, (2) an order consolidating this case with another pending in the New York State Supreme Court, County of Queens (Malba Association v Rocco, Index No. 8816/06), and (3) an order compelling discovery.

In September 2004, plaintiff Argyris Tsenesidis and plaintiff Polytimi Tsenesidis purchased premises known as 1 Point Crescent, Malba, New York from Dr. Theocharis J. Karavidas who either separately or with his wife owned the property from 1972. The property lies in the Malba section of Queens County, near the Whitestone Bridge, and close to waters known as Powells

Cove. According to the defendant, the plaintiffs' survey of their property showed that the seaward boundary of their land fell approximately twenty to forty feet short of the high water mark. Although defendant Malba Association, comprised of homeowners, holds record title to a long strip of land running along the edge of Powell's Cove known as Block 4416, Lot 18, the parties herein have disputed the ownership of that part of Lot 18 which abuts the property deeded to the plaintiffs. The disputed parcel lies between the seaward boundary fixed by the plaintiffs' deed and a stone sea wall built at the edge of the waters at Powell's Cove. The plaintiffs allege that their predecessors in title constructed within the disputed parcel a locking gate blocking access, a concrete block garage, a concrete retaining wall, a concrete and bluestone walkway, and lampposts. The plaintiffs further allege that they have constructed a second retaining wall within the disputed parcel. On or about March 12, 2007, the plaintiffs began this action for the purpose of establishing their claim to the disputed parcel pursuant to the doctrine of adverse possession.

Defendant Malba Association claims title to all of the strip of waterfront land in the community of Malba which lies contiguous to and seaward of the boundary line of premises owned by Malba homeowners. The defendant association alleges the following:

- (1) For many years the association has entered and maintained the strip and has prevented unapproved usage of it such as the building

of docks by homeowners. (2) The gate on the disputed parcel has only ornamental use and does not restrict access to the disputed parcel. Malba's residents have been able to "openly walk along the water's edge throughout the time of the ownership of plaintiffs' predecessor in title." Malba's residents have "enjoyed strolling through the property." (3) The plaintiffs' predecessor in title requested permission from the association to construct a middle wall on the strip to prevent soil erosion, and the association gave him permission to do so since the middle wall would protect not only his home but that of his neighbors also. (4) The defendant association installed the lamp at the top of the seawall and constructed the steps in the disputed parcel. (5) The defendant association granted a request by the plaintiffs for permission to rebuild the middle wall and to build a third wall closer to their home, and the association granted such permission since the improvements would benefit the entire community. (6) The plaintiffs' construction activity resulted in the collapse of their middle wall and the collapse of their neighbor's seawall, and the Department of Environmental Conservation charged the plaintiffs with violations of the Environmental Conservation Law.

The plaintiffs' motion for summary judgment is denied. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any

material issues of fact ...” (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) The plaintiffs successfully carried that burden by producing evidence supportive of the elements of a claim of adverse possession which include possession hostile and under claim of right, actual, open and notorious, exclusive, and continuous for the statutory period of ten years. (See, United Pickle Products Corp. v Prayer Temple Community Church, 43 AD3d 307; Penn Heights Beach Club, Inc. v Myers, 42 AD3d 602; Robinson v Robinson, 34 AD3d 975.) The plaintiffs also offered proof of the statutory requirement that they or their predecessors in title improved or enclosed the disputed parcel. (See, RPAPL § 522; Robinson v Robinson, supra.) The court notes that the plaintiffs may “tack on” a period of adverse use by their predecessors in title. (See, Garrett v Holcomb, 215 AD2d 884.) The burden on this motion shifted to the defendant association to produce evidence showing that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.) The defendant association successfully carried this burden. On the present state of the record, when disclosure has barely begun, there are issues of fact pertaining to, inter alia, who made certain improvements on the disputed parcel, whether the alleged possession by the plaintiffs or their predecessors in title was exclusive, and whether the defendant association granted the plaintiffs or their predecessors in title permission to make

certain uses of the disputed parcel. The use of property in common with the general public is not exclusive and will not ripen into title by adverse possession or create an easement by prescription (see, Susquehanna Realty Corp. v Barth, 108 AD2d 909; Peck v State of New York, 15 AD2d 443), and the element of hostility cannot be established where the title owner gave permission for use of his property. (See, Koudellou v Sakalis, 29 AD3d 640; Ropitzky v Hungerford, 27 AD3d 1031.)

That branch of the defendant's cross motion which is for a preliminary injunction is granted to the extent that the plaintiffs are prohibited from making any alterations to the disputed parcel during the pendency of this action. The parties may submit affidavits concerning the proper amount of the undertaking at the time of the settlement of the order to be entered hereon. The defendant alleges that the plaintiffs are altering the landscape and engaging in construction using "heavy earth moving machines." The defendant showed that it is entitled to a preliminary injunction to preserve the status quo. (See, 360 West 11th LLC v ACG Credit Co. II, LLC, ___ AD3d ___, ___ NYS2d ___, 2007 WL 4394501; Kelley v Garuda, 36 AD3d 593.)

That branch of the defendant's cross motion which is for an order consolidating this case with another pending in the New York State Supreme Court, County of Queens (Malba Association v Rocco, Index No. 8816/06) is denied. Although the other case

also involves an adverse possession claim to part of the strip of land bordering on Powells Cove, the defendant failed to establish that the factual and legal issues in the two actions are sufficiently identical to warrant consolidation. (See, M & K Computer Corp. v MBS Industries, Inc., 271 AD2d 660.)

That branch of the defendant's cross motion which is for an order compelling disclosure is granted to the extent that the plaintiffs are directed to comply with the stipulation dated September 18, 2007.

Settle order.

J.S.C.