

**Conklin-Penwell v Riverhead Lodge**

2008 NY Slip Op 30091(U)

January 14, 2008

Supreme Court, Suffolk County

Docket Number: 0025091/2003

Judge: Gary J. Weber

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

*P R E S E N T:*

<p>Hon. <u>Gary J. Weber</u> Acting Justice of the Supreme Court</p> <hr style="border: 0.5px solid black;"/> <p>KELLY CONKLIN-PENWELL,  Plaintiff,  -against-  RIVERHEAD LODGE, NO. 2044, B.P.O. ELKS,  Defendants.</p>	<p>MOTION DATE Motion Seq. #</p> <p>CIARELLI &amp; DEMPSEY, ESQS. BY: JOHN L. CIARELLI, ESQ. 737 Roanoke Avenue Riverhead, New York 11901</p> <p>KAUFMAN DOLOWICH &amp; VOLUCK LLP MICHAEL V. DESANTIS, ESQ. and JAMIE A. ROWSELL, ESQ. 135 Crossways Park Drive, Suite 201 Woodbury, New York 11797</p>
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This case was tried as a non-jury trial before the undersigned on August 23 and 24, 2007. The Court has heard the testimony of the witnesses called by each side and finds the testimony of all of the witnesses to have been credible in most respects. The Court will delineate in this opinion those areas relevant to the inquiry where the Court has doubts as to the credibility of the testimony of any particular witness.

The Court has also considered the materials placed into evidence by each side, the oral arguments of counsel and the Plaintiff's Post Trial Memorandum of Law dated October 30, 2007 and the defendants Post Trial Memorandum of Law dated December 10, 2007.

By way of a decision and order dated December 5, 2006 Hon.. Arthur G. Pitts denied summary judgment motions by both sides except to the extent that the motion for summary judgment on behalf of the Exalted Ruler of the defendant Elks Club, Ms. Theresa Hubbard, in her individual capacity, was granted.

Thus, there remains before the court so much of plaintiff's "Amended Verified Complaint" as asserts a claim of right pursuant to R.P.A.P.L. Section 522 to a certain ("Lawn Area") as a First Cause of Action, a Second Cause of Action relating to Trespass pursuant to R.P.A.P.L. Section 871, involving the erection of a fence by the defendant, Elks Club which allegedly served to "cut off" plaintiff from the property she claims as hers pursuant to the First Cause of Action and various claims of Nuisance premised on common law right seeking both injunctive and monetary relief because of the defendant Elk's Club permitting and, in some cases, conducting outdoor events, including law mower and motorcycle racing.

The Facts

A

Apparently the instant dispute, the adverse possession claim, between the defendant (hereinafter "The Elks") and the Plaintiff (hereinafter Ms. Conklin-Penwell) came to a head after the Elks staged a lawn mower racing contest on May 14, 2003 that disturbed Ms. Conklin-Penwell and resulted in the conviction of either The Elks or their Exalted Ruler of violating the Riverhead Town Noise and Public Gathering Permit Ordinances.

After the events of May 14, 2003, and the legal aftermath for "The Elks" in Riverhead Justice Court, "The Elks" erected the stockade fence of which Ms. Conklin-Penwell now complains, sometime in September of 2003.

The fence “cut off” what Ms. Conklin-Penwell now maintains is a portion of her backyard.

Each side to the dispute maintains their own version of the motivations of The Elks in erecting the fence. The Exalted Ruler testified that the fence was erected in order to cut down on the noise and dust Ms. Conklin-Penwell was complaining about, on the other hand, Ms. Conklin Penwell’s side is apparently of the mind that the construction of the fence was in retaliation for her complaints.

The Court is of the impression that there is some truth to the suggestions of both sides in these regards but that, for reasons herein discussed, the true motivations of “The Elks” in putting up the fence are irrelevant. The parties agree that Ms. Conklin-Penwell’s claim of possession does not rest on a written instrument and that neither the description in her deed, nor her title insurance include the subject property.

In ruling on the motions for summary judgment in this case (*supra*) Justice Pitts held in part:

“In order to obtain title by adverse possession on a claim not based upon a written instrument, the plaintiffs ‘must produce evidence that the subject premises were either usually cultivated or improved or protected by a substantial enclosure’ (*Speziale v. Grabeklis*, 303 A.D.2d 746, 758 N.Y.S.2d 106, quoting RPAPL 522 (1)(2)). In addition, the plaintiffs must establish by a clear and convincing evidence ‘actual possession adverse to the true owner’ for a continuous period of 10 years. (*Brand v. Prince*, 35 N.Y.2d 634, 636, 324 N.E.2d 314, 364 N.Y.2d 826; CPLR 212 (a)) Adverse possession, under the common law rule, must be ‘actual, open and notorious, and exclusive and continuous for the statutory period.’ (*Speziale v. Grabeklis*, *supra* at 747; see also *Fenisia Garage Corp. V. Exxon Corp.*, 292 A.D.2d 494, 739 N.Y.S.2d 274)” (*Roland v. Aljajian*, 17 A.D.3d 440, 441, 792 N.Y.2d 618 [2<sup>nd</sup> Dept. 2005]) To meet the statutory requirement that the subject property was held and possessed for a continuous period of ten years, the plaintiff must demonstrate that the prior owner adversely possessed the property and at the time of sale, intended to convey the subject disputed property. (*Zolotov v. Toussie*, 306 A.D.2d 274, 760 N.Y.S.2d 229 [2<sup>nd</sup> Dept. 2003])”

The testimony of the prior owner of Ms. Conklin-Penwell’s property is critical in making a determination on the issue of adverse possession in this case because, unless the period in which that person, one Joseph Ogeka Jr., is “tacked” to Ms. Conklin-Penwell’s period in possession, the requisite ten years statutory period cannot be met.

Mr. Ogeka testified before this court on August 23, 2007.

In part he testified as follows:

“Q. Did you have an understanding as to what was being sold to Kelly as part of that contract and the deed?

A. Yes.

Q. What was that understanding?

A. The understanding was that the house and the land, and even the other property, I told her, I indicated to her that this was, I used as if it was my own. That was discussed to me when I purchased the house from Mr. Charles Martin, to use it as if it’s my own, and that’s what I stated to Kelly as well.”

...

“A. The second part of your statement, I never said that to her or never was discussed.

Q. That’s not clear in your answer.

A. I’m telling you that I told her.

- Q. So you never told her “you would own it.”
- A. I didn’t say that.
- Q. I’m asking if you agree or disagree.  
Did you tell her that she would own it, yes or no?
- A. To that specific wording, no.”

In observing the demeanor of the witness and the manner in which he testified, as well as the import of his literal words from the witness stand, the court is convinced that Joseph J. Ogeka Jr. never has asserted a claim of ownership in and to the disputed premises.

In lieu of any claim of ownership, Mr. Ogeka repeatedly substituted phrases to the effect “as if it was my own”, or “as if it were her own”. These kinds of words do not signify a claim of ownership, instead, they signify an acquiescence that any use or occupation of the property that there may have been by him was “as if” Mr. Ogeka owned the property, as opposed to a claim of ownership of right and that he was an actual owner.

The burden of proof on this issue is on the plaintiff and the court finds that it has not been met.

### B The Nuisance Claim

Ms. Conklin-Penwell’s causes of action in nuisance as were testified to on trial by her and a neighbor, one Isadore Doroski, essentially consist of complaints about excess noise which apparently arose sporadically as a result of some of the activities conducted by “The Elks” on their six acres of property.

The Elks Lodge is located on Main Street in Riverhead Township and, although there are some residences, like Ms. Conklin-Penwell’s near to it, the Elks’ property is in a business zone.

Mr. Doroski did play a tape recording for the court that he had made on a summer day when The Elks were running an event on the property but, from what the court could hear from the tape, the noise was nothing more than that associated with carnivals and other events that organizations like the Elks, Moose, Knights of Columbus, Republicans, Democrats - you name the group, typically put on in the summer months.

This is not to say that if this were done on an every day basis it would not be enjoined.

It is only to say that, on this record at least, whatever harm “The Elks” have done to Ms. Conklin-Penwell’s enjoyment of whatever peace and quiet the area concerned currently affords, does not rise to the level required, under the circumstances, that this court should grant her injunctive relief, at least at the present time.

Further, the record demonstrates that the Riverhead Town authorities did act on at least one of Ms. Conklin-Penwell’s complaints and that Riverhead Town does have a permit process as well as a noise ordinance in place to deal with any future violations by “The Elks”.

For these reasons, at least for now, the court is of the opinion that no injunction should issue and that there have been no compensable money damages. For now, the regulation of the activities of “The Elks” ought be left with the good offices of the Town of Riverhead.

C  
The Trespass Claim

In light of the court's finding on the adverse possession claim, no discussion need be had relative to the trespass claim

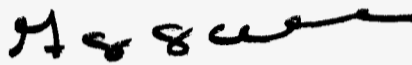
Order

Plaintiff's lawsuit is dismissed in its entirety without costs or disbursements to either side since the court determines that to so allow costs would not be equitable, under all of the circumstances; and it is further

ORDERED, that Defendant's attorney's serve a copy of this decision and order on plaintiff's attorney's as soon as may be practicable; and it is further

ORDERED, that this decision and order shall serve as the order of the court except that defendant shall have leave, if a notice of pendency has been filed and it be not vacated by stipulation, to submit an order on notice vacating any such notice.

Dated: January 14, 2008



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Gary J. Weber, Acting J.S.C.

Final Disposition  
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