SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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PHIL KENNELTY-COHEN and SHARON KENNELTY-COHEN,

INDEX NO.: 012789/07

Plaintiffs,

MOTION DATE:11-2-07
SUBMIT DATE: 12-13-07
SEQ. NUMBER - 001

-against-

ERIN MARIE GILLAM HENRY and THOMAS HENRY GILLAM,

MOTION DATE: 11/15/07
SUBMIT DATE: 12-13-07
SEQ. NUMBER - 002

Defendants.

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The following papers have been read on this motion:

Order to Show Cause, dated 10-22-07..... 1
Notice of Cross Motion, dated 11-14-07.....2
Affirmation in Opposition, dated 12-6-07.....3
Reply Affirmation, dated 12-12-07.....4

The motion by the plaintiffs, in effect, for a preliminary injunction directing the defendants to remove fencing separating their respective properties in the City of Long Beach is denied. The cross motion by the defendants for summary judgment dismissing the amended complaint and for sanctions pursuant to 22 NYCRR § 130-1 is granted to the extent that summary judgment is granted and the amended complaint is dismissed, and the cross motion is otherwise denied.

The Clerk is directed to enter a notation that the Notice of Pendency of this action filed with the County Clerk is vacated by this order. The counterclaim for monetary damages is severed and continued, and the parties are to appear for a compliance conference with regard thereto on the second floor of the courthouse at 9:30 a.m. on **February 26, 2008.**

This dispute between backyard neighbors in the City of Long Beach centers on two backyard fences: one erected in the 1980s by the owner of 13 December Walk, a predecessor in interest to the defendants ("first fence"), and a second erected by the defendants themselves after the commencement of this action ("new fence"). Plaintiffs are the owners of the property to the south, 613 West Olive Street. Their action sounds in adverse possession or, in the alternative, prescriptive easement, with other claims based thereon. The relief sought on this present motion is removal of the new fence.

The essential facts of the plaintiffs' adverse possession and prescriptive easement claims are largely based on the location of the first fence. The amended complaint recites that it ran the length of the border from east to west, approximately three and one-half feet north of the plaintiffs' property line. The plaintiffs assert that this fence demarked a strip that they occupied and used for over ten years ("subject property"). They also assert that entry into the rear of their house was not possible without it. Further, on this motion they contend that it provided access to their boiler room, and constituted a means of egress should a fire prevent them from using the front of the house to escape. They also note that certain portions of their house actually extend into the subject area.

According to the plaintiffs, the genesis of the dispute was the inheritance of 13 December Walk by the defendants in 1998 and their more recent attempts to sell this

property. Plaintiffs state that "a title company must have told the defendants that there might be an issue with the southerly edge of their property" because the defendants then-attorney contacted them regarding the subject property in an attempt to reach an agreement. However, when plaintiffs' attorney made "one adjustment" to a written agreement the defendants did not find it acceptable and refused to sign. The first fence was then taken down by the defendants, the plaintiffs commenced this action, and the new fence was then erected by the defendants on the deeded property line. The plaintiffs state that the new fence blocks entry and egress to the rear of their house and the boiler, as well as access to their water meter.

The defendants cross move for summary judgment dismissing the complaint and for sanctions for frivolous litigation. They contend that the first fence was erected by defendant Thomas Henry Gillam's father during the 1980s as a neighborly accommodation to the plaintiffs, but that it also suited his own needs because it blocked from view certain unsightly items that were stored behind it. They also claim use of the subject area throughout the period necessary to establish either adverse possession or a prescriptive easement. The defendants further assert that the permit for the new fence had been applied for several months before this action was commenced; they wish to sell the property, and had lost potential sales because a title report found that the first fence created uncertainty about possession of the subject property.

The defendants' request for sanctions is based on their contention that the plaintiffs know that they cannot succeed in this action, as pointed out to their present counsel by defendants current attorneys, and yet refused to withdraw it. Defendants'

counsel attempted to convince plaintiffs' counsel utilizing, among other things, a recent decision of this Court which discussed the showings needed for a claim of adverse possession. *RSVL v Portillo,* 16 Misc 3d 1137(A) (Sup Ct Nassau County 2007).

A party seeking a preliminary injunction must show a likelihood of success on the merits, irreparable harm absent a granting of the relief requested, and that the equities tip in that party's favor. CPLR 6301; *see, e.g., Nobu Next Door, LLC v Fine Arts Hous.,* 4 NY3d 839 (2005). Given the first prong of this test, a preliminary injunction sought during the pendency of an action sounding in adverse possession and/or prescriptive easement necessarily requires the reviewing court to examine the requirements of such claims. *See, Sugarman v Malone,* 30 AD3d 197 (1st Dept. 2006).

A party seeking to obtain title to real property by adverse possession without resort to written instrument (undisputedly the case here) has the burden of demonstrating, by clear and convincing evidence, that the possession was 1) hostile and under a claim of right, 2) actual, 3) open and notorious, 4) exclusive, and 5) continuous for the statutory period of 10 years. *DiStefano v Saatchi,* 308 AD2d 502 (2d Dept. 2003); *Gerlach v Russo Realty Corp.,* 264 AD2d 756 (2d Dept. 1999); *Manhattan School of Music v Solow,* 175 AD2d 106 (2d Dept. 1991). Mere possession is insufficient, no matter how long the possession. *Soukup v Nardone,* 212 AD2d 772 (2d Dept. 1995).

Further, a party making the claim must show possession by submitting proof that the parcel was "usually cultivated or improved" (RPAPL 522[1]) or "protected by a substantial enclosure" (RPAPL 522[2]). *DiStefano v Saatchi, supra.*. "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." *Brand v Prince,* 35 NY2d 634, 636 (1974).

The adverse possessor's acts, above and beyond simple presence, must be of a character a titled owner would recognize as manifesting a claim to property that was hostile to his own. "The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period." *Walling v Przybylo,* 7 NY3d 228, 232 (2006), *quoting Monnot v Murphy,* 207 NY 340, 245 (1913). In more modern terms, the possession must put the owner on notice that his own rights in property were being affected, and that notwithstanding that notice he chose to do nothing to protect those rights.

Therefore, a party asserting adverse possession by way of usual cultivation or improvement must show that, during the entire 10-year period, more was done than merely taking reasonable steps to keep the site presentable, as opposed to openly altering the landscape. Substantial and obvious alteration is required. Limited activities such as cutting the grass, raking, clearing debris, and even planting or removing a few trees are thus insufficient. *See, Giannone v Trotwood Corp.,* 266 AD2d 430 (2d Dept. 1999); *Simpson v Kao,* 222 AD2d 666 (2d Dept. 1995); *Yamin v Daly,* 205 AD2d 870 (3d Dept. 1994); *cf., Walling v Przybylo, supra,* at 230-231 [bulldozing, deposit of fill and topsoil, installation of PVC pipe, sufficient]. Even the placement of a structure, such as a garage, is not enough to establish hostile possession by improvement if that structure lies mainly on the claiming party's land and the encroachment on the disputed property is slight. *Van*

Valkenburgh v Lutz, 304 NY 95, 99 (1952).

If the claiming party is relying on a fence, its mere presence is insufficient. It must be a substantial barrier erected by that party, without the consent of the owner; a fence erected by or with the consent of the owner, or its predecessor in title, cannot be utilized by the adverse possessor, because its presence can never serve as an indication of conduct or possession openly hostile to the owner's rights. *See, Koudellou v Sakalis,* 29 AD3d 640 (2d Dept. 2006); *Mohawk Paper Mills, Inc. v Colaruotolo,* 256 AD2d 924 (3d Dept. 1998); *Boumis v Caetano,* 140 AD2d 400 (2d Dept. 1988).

The requirements of a prescriptive easement are essentially the same, although the showing to be made by the party seeking to establish such an easement is use, rather than exclusive possession. *Gorman v Hess,* 301 AD2d 683, 685 (3d Dept. 2003). In all other respects, the same law applies. *See, Morales v Riley,* 28 AD3d 623 (2d Dept. 2006).

In his moving affidavit the plaintiff Phil Kennelty-Cohen states that "At some time during my ownership... a fence was erected on Defendants' property, demarking the piece of property I had taken by adverse possession." He is in effect stating a legal conclusion about what had occurred prior to the installation of the first fence, but no proof is offered of any enclosure prior to the erection of the first fence. As to the first fence itself, plaintiffs' careful use of the passive tense falls short of a direct statement that it was their act that led to the enclosure. Nor does he claim that this fence was his property and that it should not have been removed without his permission. This is plainly insufficient as proof that it was the plaintiffs who erected the fence on the defendants' property, which under the authority cited above is essential to their claim of adverse possession or

prescriptive easement. Similarly, the proof of cultivation presented falls far short of what is needed, because it fairly must be viewed as no more than maintenance. So too is the encroachment of their house into the subject property, as it clearly is slight.

Accordingly, the Court finds that the plaintiffs have failed to demonstrate, *prima facie,* that they are likely to be able to prove, by clear and convincing evidence, that they have become the owners of the subject property by adverse possession, or have established a prescriptive easement. Further, to the extent that they argue that there will be irreparable harm and that the equities are in their favor, the defendants' proof has called into question the factual bases upon which these assertions are made. The Court need not rule on them, however, as the plaintiffs' failure on the merits is clear. Their application for a preliminary injunction is therefore denied.

The cross motion is granted. The defendants have presented *prima facie* proof that their predecessor in title had erected the first fence in part as an accommodation to the plaintiffs and in part for his own reasons, and that the subject property was used by him and by defendants and their invitees on a regular basis throughout the period claimed by the plaintiffs in their action

This is sufficient to shift the burden to the plaintiffs to establish that issues of fact exist meriting a trial on their adverse possession and prescriptive easement claims (first and second causes of action). CPLR 3212 (b); *see generally, GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The same is true with regard to the trespass claim (third cause of action), as it is based on construction of the new fence on the subject property, and thus

relies on title arising by adverse possession, or on interference with a prescriptive easement. The fifth and sixth causes of action, sounding in intentional interference with property rights and injunction (founded on, respectively, the placement, and demand for removal of, the new fence), are also dependent on success on the adverse possession and prescriptive easement claims.

In response, and with regard to the merits of their adverse possession and prescriptive easement claims, [1] the plaintiffs have submitted six affidavits by them, their children, a former neighbor, and a former owner of 613 West Olive Street.

However, none of these statements are sufficient with regard to the critical component of open hostility to defendants' rights – even reading, as the Court must on a summary judgment motion, the plaintiffs' affidavits in a manner most favorable to the plaintiffs as the motion opponents. *See, e.g., Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003). In that regard, the stubborn and unchallenged fact that the first fence was erected by the defendants' predecessor in interest remains, and nothing is advanced by the plaintiffs that they took any action to bar the defendants from the subject property, or did anything else that would put them or their predecessor in interest on notice that their rights in the subject area were being challenged.

Further, none of the descriptions of how the subject property was used amounts to

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[1] Much of the what is contained in the papers submitted by the parties concerns the circumstances surrounding the removal of the old fence, construction of the new fence, and other events relevant to the attempted settlement of the dispute prior to commencement of the law suit. However, they are essentially immaterial to the law of adverse possession/prescriptive easement. Accordingly, the Court need not and does not address the charges and countercharges made with respect to these events.

a claim of substantial and obvious alteration of the area. Accordingly, the Court must find that the plaintiffs have failed to rebut the defendants' *prima facie* showing that there is no clear and convincing evidence of an adverse possession or of a prescriptive easement. The cross motion dismissing the complaint is therefore granted.

However, that branch of the defendants' motion that is for sanctions is denied. The Court does not find that this action was frivolous as that term is defined in the Uniform Rules.

Finally, the Court does not make any finding with regard to the plaintiffs' claims with regard to the difficulties they now face as the result of the installation of the new fence. Even assuming that all they say in that regard is accurate, it cannot alter the law of adverse possession and prescriptive easement, which must be and is the basis of this determination.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 15, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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