

Marciano v MacGregor

2008 NY Slip Op 31732(U)

March 26, 2008

Supreme Court, Suffolk County

Docket Number: 0011192/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 5-31-07
CAL DATE 11-7-07
MNEMONIC: # 001 - MD
002 - XMD

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| -----X | |
| EDWARD MARCIANO and SALLY ANN MARCIANO, | : |
| | : |
| Plaintiffs, | : |
| | : |
| - against - | : |
| | : |
| CHRISTINE MacGREGOR and JAMES LAURIA, | : |
| | : |
| Defendants. | : |
| -----X | |

SHERRI L. KAPLAN, ESQ.
Attorney for Plaintiffs
575 Jericho Turnpike, Suite 210
Jericho, New York 11753

JAMES L. BREEN, ESQ.
Attorney for Defendants
395 Fulton Street
Farmingdale, New York 11735

Upon the following papers numbered 1 to 32 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross-Motion and supporting papers 11 - 28; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 29 - 32; Other ; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion by the plaintiffs for an order pursuant to CPLR 3212 granting them summary judgment on the complaint dismissing the counterclaims is denied; and it is further

ORDERED that this cross-motion by the defendants for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and setting a hearing date to determine the defendants' damages is denied.

The plaintiffs commenced this action pursuant to Real Property Actions and Proceedings Law article 15 to quiet title to a rectangular strip of property approximately 75 feet in length and 2 feet in width totaling approximately 150 square feet, based on adverse possession. The plaintiffs are owners in fee simple absolute of real property known as 14 Larry Road in Selden, New York (hereinafter "14 Larry Road") and the defendant Christine MacGregor (hereinafter "MacGregor") is the owner in fee simple absolute of real property known as 81 Marshall Drive, in Selden, New York (hereinafter "81 Marshall Drive"). The

subject strip of real property is located where the plaintiffs' rear yard abuts the rear yard of the defendant MacGregor. A chain link fence separates the two parcels in said area and the subject strip of real property is located on the plaintiffs' side of the fence.

The plaintiffs claim that the prior owners of 14 Larry Road exclusively owned and used the disputed strip of land for at least fourteen years and that when the plaintiffs obtained possession of 14 Larry Road, the subject strip of land had already been improved by the prior owners inasmuch as a flower bed, trees and bushes were planted and maintained and sprinkler heads had been installed, all of which dated back to at least 1982. In addition, the plaintiffs claim that upon acquiring title to 14 Larry Road, they continued to use and occupy said strip of land, expended sums, and tended to, cultivated and improved it. According to the plaintiffs, they had hostile and exclusive possession of the subject strip of land and used it continuously, openly and notoriously for over nine years, and the prior owners of 14 Larry Road used said strip of land for over fourteen years so that the plaintiffs have acquired title by adverse possession.

By their complaint, the plaintiffs allege a first cause of action for adverse possession of the subject parcel of land; a second cause of action alleging unlawful trespass by the defendants; a third cause of action alleging tortious interference with the plaintiffs' property rights; and a fourth cause of action seeking a permanent injunction as against the defendants.

By their answer, the defendants assert a first counterclaim for the reasonable value of the use and occupancy; a second counterclaim seeking punitive damages for the plaintiffs' trespass; a third counterclaim seeking punitive damages for malicious prosecution; and a fourth cause of action seeking punitive damages for harassment.

The plaintiffs now move for summary judgment in their favor on their complaint, a declaration that the plaintiffs have absolute fee simple title to the subject disputed strip of property by adverse possession and for a permanent injunction as against the defendants preventing the defendants from trespassing and harassing the plaintiffs, as well as for a dismissal of the counterclaims.

Parties seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (see, **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (see, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely (Real Property Actions and Proceedings Law § 521). A party seeking to obtain title

by adverse possession on a claim not based upon a written instrument must produce evidence that the subject property was either “usually cultivated or improved” or “protected by a substantial inclosure” (Real Property Actions and Proceedings Law § 522 [1], [2]). To establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period (*Walling v Przybylo*, 7 NY3d 228, 232, 818 NYS2d 816, 818 [2006]; *Belotti v Bickhardt*, 228 NY 296, 302, 127 NE 239 [1920]; see also, *Van Valkenburgh v Lutz*, 304 NY 95, 99, 106 NE2d 28 [1952]; *Spiegel v Ferraro*, 73 NY2d 622, 624, 543 NYS2d 15 [1989]; *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159, 643 NYS2d 939 [1996]). Successive adverse possessions of property omitted from a deed description, especially contiguous property, may be tacked if it appears that the adverse possessor intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed (see, *Brand v Prince*, 35 NY2d 634, 364 NYS2d 826 [1974]).

Here, the plaintiffs failed to meet their prima facie burden of establishing adverse possession for the statutory period of ten years or more by failing to submit proof of title and proof of the exact date when title was obtained to 14 Larry Road. The plaintiff Edward Marciano merely stated in his affidavit, dated May 8, 2007, that the plaintiffs obtained title at the end of 1996, without submitting a copy of their deed. In addition, the affidavits of the plaintiffs’ two current neighbors attesting that the prior owners of 14 Larry Road exclusively and continuously improved and cultivated the disputed strip of land for almost twenty years or more, constitute hearsay and are therefore inadmissible (cf. *Gjokaj v Fox*, 25 AD3d 759, 809 NYS2d 156 [2d Dept 2006]). If the plaintiffs have only owned 14 Larry Road since the end of 1996 and this action claiming ownership to the disputed parcel by adverse possession was commenced in 2006, it may be necessary for the plaintiffs to tack their adverse possession to that of their predecessor in title (see, *Comrie, Inc. v Holmes*, 40 AD3d 1346, 836 NYS2d 377 [3d Dept 2007], *lv denied* 9 NY3d 815, 849 NYS2d 31 [2007]). The plaintiffs offered no evidence that their predecessors in title intended to and actually turned over possession of the undescribed disputed strip of property with the portion of the land included in their deed (see, *Reis v Coron*, 37 AD3d 803, 830 NYS2d 589 [2d Dept 2007]). Thus, triable issues of fact exist which preclude the granting of the plaintiffs’ motion for summary judgment on their first cause of action (see, *DuMaurier v Lindsay-Bushwick Assoc., L.P.*, 39 AD3d 460, 835 NYS2d 235 [2d Dept 2007]).

With respect to the plaintiffs’ second cause of action, trespass is an intentional entry onto the land of another without justification or permission (see, *Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 748 NYS2d 776, [2d Dept 2002]; see also, *Woodhull v Town of Riverhead*, 46 AD3d 802, 849 NYS2d 79 [2d Dept 2007]). Regarding the plaintiffs’ third cause of action, to establish a cause of action sounding in conversion, the plaintiffs must “establish legal ownership of a specific identifiable piece of property and [defendants] exercise of dominion over or interference with the property in defiance of plaintiff[s] rights” (see, *Ahles v Aztec Enters.*, 120 AD2d 903, 502 NYS2d 821 [3d Dept 1986], *lv denied* 68 NY2d 611, 510 NYS2d 1025 [1986]; see also, *Gilman v*

Abagnale, 235 AD2d 989, 991, 653 NYS2d 176 [3d Dept 1997]). Inasmuch as the plaintiffs have failed to demonstrate as a matter of law that they have title to the disputed strip of property, based on adverse possession, the plaintiffs are not entitled to summary judgment on their second and third causes of action (see generally, **Gilman v Abagnale**, *supra*; **Lico v Tarantelli**, 215 AD2d 999, 627 NYS2d 126 [3d Dept 1995]). Since the plaintiffs have failed to demonstrate that they have the right to possession of the disputed strip of property, they are not entitled to summary judgment on their fourth cause of action for a permanent injunction (see, **Byrne Compressed Air Equip. Co., Inc. v Sperdini**, 123 AD2d 368, 506 NYS2d 593 [2d Dept 1986]). Therefore, the motion by the plaintiffs for summary judgment on the complaint dismissing the counterclaims must be denied, regardless of the sufficiency of the opposition papers (see, **Winegrad v New York Univ. Med. Ctr.**, *supra*).

The defendants now cross-move for summary judgment dismissing the complaint on the grounds that the plaintiffs had owned their property for only nine and a half years when they commenced the subject action and can neither establish “claim of right” nor add the adverse possession of prior owners. They aver that the previous owners of 81 Marshall Drive installed the subject fence, leaving approximately five feet of the property on the opposite side of said fence with the knowledge of the previous owners of 14 Larry Road and of the plaintiffs themselves that the subject strip of property was owned by the title owners of 81 Marshall Drive.

Conduct in the form of actual continued occupation of the premises under claim of right will prevail over subjective knowledge of the true owner, particularly when the true owner has acquiesced in the exercise of ownership rights by the adverse possessor (see, RPAPL 521; **Walling v Przybylo**, *supra*).

The defendants submit deeds from a chain of title search of both properties indicating that, on May 18, 2004, the defendant MacGregor obtained title to 81 Marshall Drive from non-party William Clausen who obtained title from non-party Robert T. Andaloro (hereinafter “Andaloro”), on August 26, 2003, and that the plaintiffs obtained title to 14 Larry Road, on January 21, 1997, from non-parties Michael Fagan and Maria Fagan, who obtained title to 14 Larry Road, on April 15, 1991, from non-parties Thomas F. Lefko and Jacqueline E. Lefko (hereinafter “Lefkos”). In addition, the defendants submit an affidavit, dated November 29, 1990, by the non-parties Lefkos indicating that the owners of 81 Marshall Drive had placed a chain link fence inside their record line and that the Lefkos would assert no claim of title for land between the lot line and the chain link fence. The defendants also submit an affidavit, dated June 11, 2007, of non-party Andaloro, a prior owner of 81 Marshall Drive, indicating that the Lefkos signed said affidavit at their closing and that the Lefkos never claimed a right to the subject strip of land; that in 1997 the plaintiff Edward Marciano acknowledged to Andaloro that the disputed strip of property was owned by Andaloro based on advisement by the prior owners of 14 Larry Road at the plaintiffs’ closing of title; and that the plaintiff Edward Marciano at one time offered to purchase the strip of property from him and Andaloro declined the offer. The defendants further submit their own affidavits, dated June 12, 2007, indicating that in July 2004 they spoke to the

plaintiff Edward Marciano who acknowledged that he did not own the subject strip of property and agreed to sign an affidavit acknowledging that he would make no claim to said property, which the defendant MacGregor gave to the plaintiff Edward Marciano but he did not sign.

Here, contrary to the defendants' contentions, the plaintiffs' adverse possession claim would not be defeated merely because the plaintiffs were aware that the disputed area was actually owned by the defendant MacGregor (see, **Walling v Przybylo**, *supra*; **Hall v Sinclair**, 35 AD3d 660, 826 NYS2d 706 [2d Dept 2006]). "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" (see, **Monnot v Murphy**, 207 NY 240, 245, 100 NE 742 [1913], cited by **Walling v Przybylo**, *supra* at 232).

Andaloro also indicated in his affidavit that during his initial conversation with the plaintiff Edward Marciano concerning ownership of the disputed piece of property, Andaloro showed the plaintiff the gate in the fence that allowed Andaloro to maintain said area and he added in conclusion that during the time that he owned 81 Marshall Drive, up to and including August 26, 2003, he always maintained the subject strip of property. By a reply affidavit dated July 18, 2007, the plaintiff Edward Marciano stated that the first time that he became aware of the possibility that the subject strip of property might not be a part of the plaintiffs' property was well after the defendant MacGregor purchased 81 Marshall Drive, specifically, when the defendant James Lauria approached his at the backyard fence with an affidavit and a sign that said "this is MacGregor's property." The plaintiff Edward Marciano also disputed Andaloro's characterization that the two had a discussion concerning ownership of the strip of property and that Andaloro showed him a gate in the fence from which Andaloro passed to care for that strip. Edward Marciano emphatically denied that there ever was a gate in the fence between the two properties and submitted color photographs to show the fence and the disputed strip of property and insisted that he has maintained the strip of property just as his predecessors, Michael and Maria Fagan, did. Said affidavits raise questions of fact regarding the credibility of the parties concerning the cultivation and improvement of the disputed strip of property such that the defendants are not entitled to summary judgment on their cross-motion (see, Real Property Actions and Proceedings Law § 522; **S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.**, 34 NY2d 338, 357 NYS2d 478 [1974]; **DuMaurier v Lindsay-Bushwick Assoc., L.P.**, *supra*).

Accordingly, the instant motion and cross-motion are denied.

Dated: March 26, 2008



J.S.C.