

**Estate of Becker v Murtagh**

2008 NY Slip Op 32276(U)

July 30, 2008

Supreme Court, Suffolk County

Docket Number: 0008088/2005

Judge: Joseph C. Pastorella

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**SUPREME COURT OF THE STATE OF NEW YORK  
IAS/ TRIAL PART 34- SUFFOLK COUNTY**

**PRESENT:**  
**HON. JOSEPH C. PASTORESSA**

Motion R/D: 2/27/08  
Adj. Date: 5/14/08  
Mot Seq: # 013-MD

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ESTATE OF ROBERT E. BECKER,  
CHRISTOPHER K. O'HARA, EDWARD J.  
O'HARA and DOUGLAS C. KOELSCH,

**ATTYS FOR PLAINTIFF(S):**  
MARGOLIN & PIERCE, LLP  
111 WEST 57<sup>TH</sup> STREET, STE. 410  
NEW YORK, NY 10019

Plaintiff(s),

**ATTYS FOR DEFENDANT(S):**  
CAHN & CAHN, LLP  
445 BROADHOLLOW ROAD, STE. 332  
MELVILLE, NY 11747

-against-

OWEN J. MURTAGH and LISA PALMERO-  
MURTAGH,

Defendant(s).

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Pages Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1  
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Affidavit (Affirmation) \_\_\_\_\_  
Other Papers \_\_\_\_\_

Upon the foregoing papers, the defendants move for an order (motion sequence #013): (1) striking the plaintiffs' complaint for their alleged failure to engage in court-ordered discovery, or, alternatively, precluding the plaintiffs from offering any evidence in support of their claims; (2) granting summary judgment dismissing the complaint, as well as a judgment as a matter of law on the defendants' first, second and third counterclaims, or, alternatively, severing and continuing them; and (3) vacating the preliminary injunction that was issued by the court (Cohalan, J.) on April 6, 2006.

The plaintiffs commenced this action on March 31, 2005 against the defendants seeking a prescriptive easement and an adverse possession claim regarding a disputed parcel of land which runs along the defendants' property located in Oak Beach, New York.<sup>1</sup> The plaintiff, Robert Becker (deceased)(hereinafter "RB"), now the Estate of Robert Becker (hereinafter "ERB") owns a leasehold interest in lot #29, which is a beach front lot due east of and adjoining the defendants beach front lot #30 in Oak Beach, New York. The defendants, Owen J. Murtagh and Lisa Palermo-

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<sup>1</sup> The plaintiffs and the defendants all own leasehold interests in properties owned by the Town of Babylon in fee simple and leased to the parties for 50 year renewable lease terms.

Murtagh (hereinafter "Murtaghs"), are the owners of a leasehold interest known as 30 Fire Road, Oak Beach, New York or Lot 30 on the Map of Oak Beach, New York (hereinafter lot #30) which they obtained on or about August 2004. The plaintiffs Christopher and Edward O'Hara own a leasehold interest in lot # 14, which is a non-waterfront lot located behind lot #29. The plaintiff Douglas Koelsch owns a leasehold interest interest in lot #15, which is a non-waterfront lot located behind lot #30 and adjacent to lot #14. The plaintiffs O'Hara and Koelsch claim a prescriptive easement of a private walkway and dock running in a north-south direction from the road to the shore along the eastern portion of lot #30 and western portion of lot #29. The plaintiffs O'Hara and Koelsch also claim a prescriptive easement allowing them permission to access the beach on lot #30. The plaintiff ERB claims adverse possession of the same private walkway and dock, with a portion of the walkway and all of the dock located on lot #30.

In 1963 the respective tenants of lot # 29 (RB) and lot # 30 (Nancie Gordon) agreed to construct and install jetties on the easterly line of each of their respective lots. RB installed an approximate four foot wide dock using the jetty as support on one side and built a walkway from the dock in a northerly direction between lots #29 and lot #30 connecting it to an existing walkway. In 1984 Nancie Gordon obtained the services of a surveyor to prepare a survey to determine the lot line of her property. The survey revealed that the lot line of the jetties that had been built was misaligned by five feet and that the previous walkway and dock were encroaching on lot #30 by approximately five feet. The former plaintiff RB averred from 1963 to 1984 he exercised exclusive use and control of the jetty, walkway and dock under a claim of right with the belief that they were part of lot #29. Moreover, RB claimed that when he and Nancie Gordon became aware of the misalignment he continued to exercise exclusive use and control over the walkway and dock and that Ms. Gordon did not object to his exclusive use and control of them. The dispute and subsequently the lawsuit of the disputed parcels of property arose when lot #30 was sold to the defendant Murtaghs in August 2004.

The plaintiffs obtained temporary injunctive relief (Whelan, J.) on March 31, 2005 prohibiting the defendants from interfering with the plaintiffs ingress and egress and/or use of the walkway, dock and beach on lot #30. The plaintiff's were subsequently granted a preliminary injunction (Cohalan, J.) on April 6, 2006 enjoining and restraining the defendants from interfering or preventing the plaintiffs' and their guests from using the walkway and dock.

The defendants were granted leave to amend their answer by order of the court (Burke, J.) dated December 21, 2006 to include additional affirmative defenses and counterclaims. The defendants' counterclaims include the following: a declaration that the plaintiffs recording of easements against their property are null and void; a declaration that the defendants right, title, and interest is absolute and to the exclusion of any rights on the part of the plaintiffs; and a permanent injunction. The defendants were granted dismissal of the plaintiff's complaint by order of the court (Burke, J.) dated August 30, 2007 pursuant to CPLR §3126, which upon the consent of the parties on the record on December 12, 2007 was declared a nullity since the plaintiff Robert Becker died on August 28, 2007 two days before the issuance of the order. The court on December 12, 2007 stayed all proceedings in this matter for 45 days in order for the plaintiffs to facilitate the representation on behalf of the plaintiffs and for the substitution of the Estate of Robert Becker.

In the instant motion, the defendants now aver that the plaintiffs have engaged in dilatory tactics and have willfully refused to engage in discovery which has prejudiced the defendants since there is a preliminary injunction preventing the defendants from interfering with the plaintiffs access to the dock, walkway and beach. The defendants argue that RB's act of granting easements to the disputed walkway, dock and beach to the other plaintiffs in May 2006 delayed this case. The defendants aver that as a result of the filing of the two easements they were required to make an application to the court to amend their pleadings to include additional affirmative defenses and counterclaims. Moreover, the defendants aver that RB's alleged act of severing the freshwater

supply to the defendants premises on lot 30 required the defendants to obtain a temporary restraining order (Pitts, J.) dated July 21, 2006 and a preliminary injunction dated February 21, 2007 (Burke, J.) ordering the plaintiff to restore the water supply to the defendants' premises pending the installation of a new well. In addition, the defendants argue that they have been severely prejudiced as a result of the plaintiffs delays in discharging and obtaining an attorney to prosecute the action. The defendants aver that the plaintiffs for approximately 20 months were embroiled in a fee dispute with their initial attorney of record, Mr. Belford and that Mr. Belford refused to forward the court file to the then in-coming attorney, Mr. Bloom. Mr. Belford subsequently agreed to forward the court file to Mr. Bloom on the condition that he circulate consent to change attorney forms with the plaintiffs, which it is alleged Mr. Bloom was dilatory in obtaining. The plaintiffs have now obtained the services of a third attorney to prosecute this action.

The defendants argue that the substantive facts have not changed since the subsequently nullified court order which dismissed the action on August 30, 2007 for noncompliance with discovery obligations and that the plaintiffs have continued to refuse to engage in court ordered discovery.

The plaintiffs in opposition aver that the defendants have engaged in tactics requiring court intervention and that the defendants are violating the preliminary injunction in constructing a boat lift at the end of the disputed dock which interferes with their ability to swim. Moreover, that the defendants have built a jet ski ramp which also interferes with their ability to swim at the dock. The plaintiffs contend that the defendants have decreased the water pressure to the former RB's premises. In addition, the plaintiff's allege that the defendants cut down a 35 year old tree on Becker's property and have dumped over 35 yards of material onto the plaintiff Koelsch's property causing flooding in the Koelsch's basement.

"To invoke the drastic remedy of striking a pleading, the court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate, and contumacious conduct or its equivalent. The willful and contumacious character of a party's conduct can be inferred from his or her repeated failures to comply with disclosure, coupled with inadequate excuses for those defaults" (Poulas v U-Haul International Inc., 288 AD2d 202; see, CPLR §3126; Kihl v Pfeffer, 94 NY2d 118; Bates v Baez, 299 AD2d 382; Patterson v Greater NY Corp. of Seventh Day Adventists, 284 AD2d 382). However, "[a]ctions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR§3126 is a matter of discretion with the court. The moving party must 'clearly demonstrate' that the failure to comply was willful and contumacious" (Pascarelli v City of New York, 16 AD3d 472). Here, the defendants aver that the plaintiffs have not engaged in any discovery since the issuance of the court order (Burke, J) dated August 30, 2007 dismissing the action (declared a nullity) and have proffered no excuse for the failure to engage in discovery. In opposition, the plaintiffs attorney argues that he attempted to discuss with his adversary the discovery issues on the case but was met with the instant application. While the court does not condone any of the various allegations or alleged conduct of the plaintiffs in delaying this matter, the defendants have failed to "clearly demonstrate" that the delays were willful and/or contumacious conduct (see, Mangiapane v Brookhaven Beach Health Related Facility, 305 AD2d 642; Patterson v New York City Health & Hosps. Corp., 284 AD2d 516; Centerport Ins. Agency v Atlantic Fabricators of Rhode Is., 277 AD2d 414).<sup>2</sup> However, under the circumstances of this particular case the plaintiffs are directed to comply with all outstanding discovery within forty five (45) days from service of a copy of this order with

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<sup>2</sup> The court notes parenthetically that absent from the movant's papers was a good faith affirmation in compliance with 22 NYCRR 202.7, which is reason alone to deny the application.

notice of entry. In the event that the plaintiffs' fail to comply with the order of the court the plaintiffs' pleadings will be stricken and the case will be dismissed.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (see, Zuckerman v City of New York, 49 NY2d 557; Winegard v. New York Univ. Med. Ctr., 64 NY2d 851). "Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue, but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of this action" (Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc., 207 AD2d 880, 880-881). A party seeking to obtain title to real property by adverse possession on a claim not based upon a written instrument must establish that the property was "usually cultivated or improved" or "protected by a substantial inclosure" (RPAPL §522; see, Barnett v Nelson, 248 AD2d 656, 656-657). Moreover, the party must satisfy the common law requirement of showing, by clear and convincing evidence, that the possession of the property was hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory period (see, Samter v Maggiore, 309 AD2d 741). A party claiming an easement by prescription must prove an "adverse, open and notorious, continuous and uninterrupted use" of another's a land for the prescriptive period of 10 years (DiLeo v Pecksto Holding Corp., 304 NY 505, 511-512; see, Eskenazi v Sloat, 40 AD3d 577). In the case at bar, the defendants and the plaintiffs each submit conflicting affidavits with respect to the claims for adverse possession and prescriptive easements as well as on the defendants counterclaims thereby creating triable issues of fact. Notably, the parties submit conflicting affidavits as to whether plaintiffs use of the walkway, dock, and beach were hostile to the defendants. The defendants submit Nancie Gordon's affidavit (former owner of lot 30) which states that "any use the boardwalk, dock and beach on Lot 30 by the plaintiffs and/or their predecessors was always by permission and was never hostile to my interests." In contrast, the plaintiffs submit affidavits from a number individuals averring that they never obtained permission from Ms. Gordon to use the walkway, dock and beach between lots 29 and 30. Accordingly, the defendants' motion for summary judgment dismissing the complaint, as well as a judgment as a matter of law on the defendants' first, second and third counterclaims is denied (see, Samter v Maggiore, supra).

It is well established that the purpose of a preliminary injunction is to preserve the status quo pending trial (see, Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc., \_\_\_ AD3d \_\_\_, 2008 NY Slip Op 4042, [2<sup>nd</sup> Dept, April 29, 2008]). "A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon 'compelling or changed circumstances that render continuation of the injunction inequitable'" (Thompson v 76 Corp., 37 AD2d 450, 452-453) and may be made at any time (see, CPLR §6314). The defendants aver that since the granting of the preliminary injunction circumstances have changed warranting the preliminary injunction being vacated. Specifically, the defendants argue that the subject dock was severely damaged in a storm in the fall of 2006 resulting in a need to replace portions of the dock in order to rectify a safety hazard. In addition, the defendants aver that the plaintiffs have "abused the injunction" in light of the alleged delays by the plaintiffs failure in prosecuting this action. Here, the defendants have failed to allege how the damage to the dock warrants vacating the preliminary injunction preventing the plaintiffs access to the walkway, dock and beach pending a trial in this matter. While the court is extremely disturbed by the lack of discovery in this matter and the amount of time that has transpired prior to this case being assigned to this court, this court now has an order in place to facilitate the orderly progression of discovery to minimize any alleged prejudice to the defendants and will not tolerate any of the type discovery delays that occurred prior to the case being

assigned to this justice.

Accordingly, the defendants have failed to proffer any “compelling or changed circumstances” to render the continuation of the preliminary injunction in its present form inequitable (see, Xander v Haberman, 41 AD3d 489, 490-491; Washington Deluxe Bus, Inc. v Sharmash Bus Corp., 47 AD3d 806; Thompson v 76 Corp., supra; Wellbuilt Equip. Corp. v Red Eye Grill, 308 AD2d 411).

This shall constitute the decision and order of the court.

**DATED: July 30, 2008**

  
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**HON. JOSEPH C. PASTORESSA, J.S.C.**