

Brimberg v O'Mara

2008 NY Slip Op 32326(U)

August 18, 2008

Supreme Court, New York County

Docket Number: 0107285/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Brimberg +
Schmidt
-v-
O'Mara

INDEX NO. 107285-07
MOTION DATE 8/18
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and compliance conference adjourned from a/c to November 6, 2008 AP

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK
J.S.C.

Dated: AUG 18 2008

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Barnett J. Brimberg and
Esther Matthews Schmidt,

Plaintiffs,

-against-

Lawrence K. O'Mara and
Alexandra O'Mara,

Defendants.

DECISION/ ORDER

Index No.: 107285-2007

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR § 2219 [a] of the paper considered in the review of
this (these) motion(s):

Papers	Numbered
Defs' n/m (compel) w/ LDS and DDJ affirms, exhs	1
Pltfs' x/m (compel and protective order), w/WS and FLV affirms, exhs	2
Defs' reply w/LDS affirm, exhs	3
Pltfs' supp affid in support w/WS affid	4
PC order, so-ordered stip 1/17/07	5,6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action arising from a dispute among adjoining property owners who each claim rightful title through adverse possession of a strip of land. Issue has been joined.

Defendants have served a Notice of Deposition on plaintiffs ("Brimberg" and "Mrs. Schmidt"). Although Brimberg has no objection to being deposed, he has not yet appeared for his deposition. Mrs. Schmidt, however, has cross moved for a protective order vacating the Notice as to her. Both plaintiffs also seek enforcement of their discovery demands of defendants dated January 22, 2008, as well as their Notice of

Discovery and Inspection dated March 18, 2008. Defendants oppose plaintiffs' cross motion in all respects.

Arguments

Brimberg owns the brownstone located at 158 East 83rd Street ("number 158") and Mrs. Schmidt owns the brownstone located at 156 East 83rd Street ("number 156"), both in New York City. Defendants own the brownstone at 160 East 83rd Street, also in New York City ("number 160"). The brownstones are each next to the other, but number 160 also runs behind, on the south side of, the other two brownstones. The parties have a long history of disputes which began in 2006, when defendants started renovations of number 160.

Plaintiffs contend that they obtained title to a strip of land through adverse possession, facilitated by 40 year old fence enclosing the area ("the strip"). They contend further that the defendants renovated their brownstone in such a manner so as to encroach on the strip. The area in dispute is directly behind numbers 156 and 158 and for ease of reference is part of their "back yards."

Mrs. Schmidt, the owner of number 156, is 93 years old. She resides in Florida for part of the year where her son, Whitney Schmidt, Esq. also lives. Mr. Schmidt is a lawyer admitted to the New York bar. He provides two sworn affidavits attesting to his mother's poor health and her recent hospitalizations, one involving a fall. He states that his mother will not be testifying at trial, and that her deposition is not only unnecessary and unreasonable, but he really knows more about the property than Mrs. Schmidt does.

Mr. Schmidt states that he grew up at number 156 and that as an adult, he

assisted his father in the care, maintenance, and improvement of the building. He contends that the back yard area involved in the parties' dispute can only be accessed by climbing out a window. He states his mother never did this, but that he and his father did climb out the window, as needed. He states that even if she did climb out the window, she has been physically incapable of doing this for a number of years, and certainly not since 2006 when the defendants renovated their brownstone. Thus, he contends his deposition testimony is "better" for defendants than Mrs. Schmidt's.

Mrs. Schmidt's doctor, Dominick Grosso, M.D., provides a letter. He states that given his patient's advanced age, and fragile condition, a deposition is "medically inadvisable" because it is stressful event which she cannot handle. He outlines some of her physical ailments, which include hypothyroidism, polymyalgia and rheumatics. Mrs. Schmidt has also had a hip and knee replacement, carpal tunnel surgery, and sustained a femoral fracture. She also has a history of syncopal episodes, chronic insomnia, gastro-intestinal ailments, and she suffers from anxiety. Dr. Grosso's practice is in New Jersey.

In support of its motion to compel Mrs. Schmidt's deposition, and in opposition to Mrs. Schmidt's cross motion for a protective order, defendants argue that they are entitled to depose Mrs. Schmidt about her claims of adverse possession. By doing so, they can determine whether her possession of the disputed strip has, in fact, been "actual, open and notorious," as claimed. RPAPL §§ 521, 522; Brand v. Price, 35 NY2d 634 (1974). Thus, defendants contend Mrs. Schmidt's testimony is "crucial" to her case, and if she is not competent to testify maybe she needs a guardian ad litem.

Plaintiffs have requested documents from the defendants that they have

objected to on the basis of materiality and relevance. The plaintiffs also served defendants with a Notice for Discovery and inspection, seeking an inspection of the interior of defendants' brownstone. Defendants object on the basis that nothing inside the structures has any bearing on whether the outside encroaches onto the disputed strip, and that this is little more of a fishing expedition to see if plaintiffs can find any other reasons to bring legal action against them. Defendants agree that plaintiff can have limited access to certain parts of their property, and state they are willing to set up a mutually convenient access schedule.

Discussion

"To establish title by adverse possession a party must demonstrate that the possession was hostile and under a claim of right, actual, open, notorious, and exclusive, and it must have been continuous for the statutory period." Guariglia v. Blima Homes, Inc., 224 A.D.2d 388, 389 (2nd Dept 1996) affirmed 89 N.Y.2d 851 (1996).

Depositions

The court may, under the appropriate circumstances, issue a protective order (CPLR 3103) limiting, conditioning, or regulating the use of any disclosure device, this is to prevent unreasonable annoyance, expense, embarrassment, disadvantage or any other prejudice to the person seeking that relief. Therefore, the moving party seeking the protective order has the burden of proving such an order is necessary. Estate of Thomas Carvel, 4/15/98 NYLJ 31, (col. 2) (Westchester County, Surrogate's Court). Otherwise, it is black letter law that a party can be deposed. CPLR 3101.

Although Mrs. Schmidt is elderly, and suffers a number of ailments, the doctor's

statement is that her deposition is inadvisable because it is a stressful event. Litigation, however, is seldom a non-stressful event. Defendants are entitled to both plaintiffs, not just Brimberg, so they can garner information about, and evaluate the bona fides of, plaintiffs' claims and also prepare their own defense. Having turned to the court for resolution and adjudication of her disputes with the defendants, Mrs. Schmidt must now cooperate with the process and appear for her deposition.

The court will, however, take into account Mrs. Schmidt's physical condition and order the following:

Since it appears that Mr. Schmidt is willing to be deposed, and he may have personal knowledge of some of the facts, defendants can depose him first. If after he is deposed, they still want to depose Mrs. Schmidt (plaintiff herein), then they may either proceed by video taping her deposition, at plaintiff's expense, or if they prefer to depose her in person, then they can do so in Florida at their own expense. The deposition of Mr. Schmidt shall be held no later than **September 22, 2008 at 10:00 a.m.**, or such other date that the parties shall mutually agree to in writing. Mrs. Schmidt's deposition shall take place no later than **October 31, 2008**, regardless of where held.

The deposition of Brimberg has not proceeded, apparently because of scheduling difficulties, but not because Brimberg refuses to be deposed. The court hereby orders that Brimberg's deposition shall take place **on October 13, 2008 at 10:00 a.m.** at defendants' attorneys' office, or such other date or on such other date before then that the parties shall mutually agree to in writing and submit to the court for so-ordering.

In light of the deadlines set in this decision/order, **the conference presently**

scheduled for September 18, 2008 before the court is hereby adjourned and rescheduled to November 6, 2008 at 9:30 a.m. so the parties can report the status of the case.

Discovery

1. Access to the interior of number 160

Plaintiffs seek a physical inspection of the interior of number 160, which defendants have objected to on the basis that anything inside the home is immaterial and irrelevant to the claims by either side about adverse possession. Plaintiffs have not addressed these arguments. They have not explained why they need to see the interior of the brownstone, if their complaints are that exterior portions of the renovation encroach on the strip. Moreover, plaintiffs have not responded to defendants offer to allow a limited inspection that is mutually agreed to. Having failed to develop this branch of their cross motion, plaintiffs' cross motion for access to the interior of defendants' home is denied without prejudice.

2. Documents Demanded

Plaintiffs seek production of any "marketing materials" the defendants examined or considered when deciding to purchase their brownstone. Plaintiffs explain that this material will help show that defendants were aware of their claims, that the 14 inch strip of land is their property, and that there was a fence enclosing the area in dispute. Defendants have asserted their own adverse possession counterclaim against the plaintiffs. This is supported by claims that there is a 70 year old brick wall at the boundary line which defendants contend delineates and marks the other side of the strip of the land. This counterclaim is asserted against Brimberg only.

Defendants object to production of such documents (assuming they even exist, or they looked at them) on the basis of relevancy. They argue that even if they did know about plaintiffs' adverse possession claims (and the fence) before they bought the property this would not help plaintiffs prove their case. Defendants contend that plaintiffs burden of proving their adverse possession claim cannot be met by showing that the defendants knew the plaintiffs were adversely occupying the strip when they bought number 160.

This argument, however, not only overlooks defendants' own burden with respect to their counterclaim for adverse possession, but also the underpinnings of CPLR 3101 which provides for full disclosure by a party to an action of all matter that is "material and matter in the prosecution or defense of the action, regardless of the burden of proof, unless it is privileged.

In deciding whether to enforce a discovery demand, the court applies a test of "usefulness and reason." Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968). Applying such a test to the demand plaintiffs have made, the court agrees that the defendants has to produce any marketing materials, like broker brochures, informal surveys, etc., that the defendants examined when they were deciding on whether or not to buy their brownstone. On defendants counterclaim for adverse possession they (like plaintiffs) have the burden of proving their possession of the strip (and that of the predecessor owners) was actual, open, notorious, and exclusive. Guariglia v. Blima Homes, Inc., supra. Whether the marketing materials are ultimately useful to plaintiffs in defending against the counterclaim, or even in preparing their own case for trial, is of no moment. see CPLR 3101 (a).

Plaintiffs also seek information about the contractors, architects, contractors, expeditors, etc., that defendants either solicited bids from, or whom were actually used for, the renovations. Plaintiffs also ask for copies of payments made, releases signed, inspection reports, diaries, and material delivery tickets. Plaintiffs argue this information will allow them to prove that the defendants tried to save money by having the job done piecemeal by different contractors, rather than using a single general contractor who would have been responsible for quality control. This information is not even remotely relevant to the parties' dispute. Therefore the demand for this information is hereby stricken.

Also stricken are plaintiffs' demands for email and other correspondence among the defendants, their contractors and architects. Defendants have already produced certain documents in their redacted form that plaintiffs seek in their unredacted state. These documents include minutes of meetings that defendants had with construction personnel. The court will not require any further, or more complete production of these documents. Therefore this demand is also hereby stricken.

Conclusion

Defendants' motion to compel plaintiffs to appear for their deposition is granted to the extent provided. Plaintiffs' cross motion for a protective order is granted to the extent provided, otherwise it is denied.

Plaintiffs' cross motion for an order enforcing their discovery demands is granted in part, denied without prejudice in part, and otherwise denied.

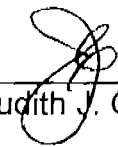
Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This case was previously scheduled for a compliance conference on September 18, 2008. In light of the deadlines set in this decision/order, **that conference is hereby adjourned and rescheduled to November 6, 2008 at 9:30 a.m.** so the parties can report the status of the case.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

Dated: New York, New York
August 18, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
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NEW YORK