

Paganucci Real Estate Holdings, LLC v Iannucci

2008 NY Slip Op 32451(U)

August 29, 2008

Supreme Court, Suffolk County

Docket Number: 0014114/2007

Judge: Jr., John J.J. Jones

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

COPY

INDEX NO.: 0014114/2007
SUBMIT DATE: 6/4/2008
MTN. SEQ.#: 006;007;008
009;010

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 006;007 - 5/30/2007
008 - 7/26/2007 009 - 8/23/2007
010 - 11/29/2007
MOTION NO.: 006 - MG
007;008 - WDN
009;010 - MD

-----X		
PAGANUCCI REAL ESTATE HOLDINGS, LLC,	:	MacLACHLAN & EAGAN, LLP
	:	By: Brian E. Matthews, Esq.
Plaintiff,	:	Attys. for Plaintiff
	:	241 Pantigo Road
	:	East Hampton, NY 11937
-against-	:	
	:	TWOMEY, LATHAM, SHEA, KELLEY, DUBIN
ROBERT T. IANNUCCI and SONIA O. EWERS,	:	& QUARTARARO, LLP
	:	By: Kathryn Dalli, Esq.
Defendants.	:	Attys. for Plaintiffs
-----X	:	33 West Second Street
	:	P.O. Box 9398
	:	Riverhead, NY 11901-9398

Upon the following papers numbered 1 to 80 read on this motion for injunctive relief, the cross-motion to dismiss, the three separate motions for orders of contempt; Notice of Motion/Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers 11-19; 20-29; 48-56; 57-67; Answering Affidavits and supporting papers 30-36; 37-41; 68-74; Replying Affidavits and supporting papers 42-45; 46-47; 75-77; Other 78-79; 80; it is

ORDERED that the motion by plaintiff , Paganucci Real Estate Holdings, LLC, for injunctive relief is granted; and it is further

ORDERED that plaintiff shall post an undertaking in the amount of \$500 (see CPLR 6312[b]) and, effective immediately, the defendants, their agents, assigns, contractors and those working in concert with them and/or on defendants' behalf are hereby restrained from entering onto or making use of property within the borders of plaintiff's lot, and the defendants, their agents, assigns, contractors and those working in concert with them and/or on defendants' behalf are restrained from destroying, removing or in any way hindering or preventing the construction or maintenance of a fence along the border of the parties' properties until the resolution of this action or further order of this Court; and it is further

ORDERED that the cross-motion by defendants, Robert T. Iannucci and Sonia O. Ewers, for an order dismissing the complaint for lack of personal jurisdiction has been withdrawn by stipulation dated June 4, 2008; and it is further

ORDERED that the motion by plaintiff for an order of civil contempt against defendants which was made by Notice of Motion dated July 2, 2007 has been withdrawn by affirmation of plaintiff's counsel dated July 26, 2007; and it is further

ORDERED that the two separate applications for an order of civil contempt are denied.

On May 3, 2007, plaintiff, Paganucci Real Estate Holdings, LLC, commenced this declaratory judgment action against defendants, Robert T. Iannucci and Sonia O. Ewers. Plaintiff seeks a determination pursuant to RPAPL Article 15 regarding defendants' claims to the ownership and the right to use a walkway and other areas over property within plaintiff's contiguous oceanfront lot in Montauk, New York. The walkway in this controversy extends from the lawn area outside defendants' residence through brush to the ocean. Also in controversy is a strip of land along the eastern border of defendants' property onto the western side of plaintiff's property that has been cleared and maintained as a lawn by the defendants' house. In support of plaintiff's application for injunctive relief, Robert Paganucci submitted an affidavit in which he avers that a confrontation erupted in or around July 2005 between the neighbors when Paganucci had a survey of his property prepared and the property lines staked. Since defendants asserted ownership rights over the disputed property, plaintiff had a post and rail fence installed along the property line in May 2006. Plaintiff alleges that defendants removed the fence and continued to use the disputed property without his consent. Plaintiff also submitted the affidavit of Laurence Goldfein, who sold the property in November 2004 to the defendants. Goldfein stated that when he acquired the parcel in 1993 it was

vacant, and a house was constructed on the property and completed in August 1995. Goldfein further stated that he was not aware that a strip of lawn around the house encroaches onto plaintiff's property and, to the extent that it extends into the neighboring lot, "it was without any intention to claim a right to acquire any interest in Mr. Paganucci's property. In other words, it was never my intention to acquire any interest in the Paganucci property."

By order to show cause dated May 3, 2007 (Burke, J.), plaintiff obtained a temporary restraining order, as follows:

. . . it is further

ORDERED, that pending the hearing of this application, the defendants, their agents, assigns, contractors and those working in concert with them and/or on defendants' behalf are hereby restrained pursuant to CPLR § 6312 from entering onto or making use of plaintiffs' property or from destroying, removing or in any way hindering or preventing the construction or maintenance of a fence on plaintiffs' property along the border of the property owned by the plaintiff and the property owned by the defendants . . .

Plaintiff now moves for a preliminary injunction and, in separate applications, for an order of civil contempt against defendants for their alleged violation of the temporary restraining order.

To be entitled to a preliminary injunction, a movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of equities in the movant's favor (*Trimboli v Irwin*, 18 AD3d 866, 866-867, 796 NYS2d 659 [2d Dept 2005], citing *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NE2d 166, 552 NYS2d 918 [1990]; *First Franklin Sq. Assoc. v Franklin Sq. Prop. Account*, 15 AD3d 529, 790 NYS2d 527 [2005]; *South Amherst, Ltd. v H.B. Singer, LLC*, 13 AD3d 515, 786 NYS2d 573 [2004]; *Ying Fung Moy v Hoho Umeki*, 10 AD3d 604, 781 NYS2d 684 [2004]). In examining whether the plaintiff has demonstrated a likelihood of success on the merits, this Court is mindful that a party seeking to obtain title by adverse possession must establish his claim by clear and convincing evidence (*Walling v Przybylo*, 7 NY3d 228, 851 NE2d 1167, 818 NYS2d 8 [2006]). A party establishes a claim of title by adverse possession by showing that the parcel was either "usually cultivated or improved" (RPAPL 522[1]) or "protected by a substantial inclosure" (RPAPL 522[2]; see *Blumenfeld v DeLuca*, 24 AD3d 405, 807

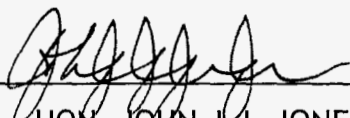
N.Y.S.2d 99). In addition, the party must satisfy the common law requirements by demonstrating that the possession of the parcel was hostile, under a claim of right, actual, open, notorious, exclusive, and that it was continuous for the 10-year statutory period (see *Qualben v Aiello*, ___ AD3d ___, 2008 NYAppDivLEXIS 6220 [2d Dept 2008]; see also *Matter of Perry*, 33 AD3d 704, 823 NYS2d 413 [2d Dept 2006]).

While adverse possession can exist in situations where each party was mutually mistaken as to the true location of the boundary line on property cultivated and maintained as a lawn (see, e.g., *Walling v Przybylo*, *supra*, 7 NY3d 228, 851 NE2d 1167, 818 NYS2d 8 [2006]), plaintiff has demonstrated the likelihood of success on the merits through submission of the Goldfein affidavit, which suggests that the lawn was not established until after the house was completed in August 1995, and the survey which shows that stakes were set along the property line on or about July 18, 2005. To the extent that defendants' persistent assertion of property rights over the disputed area threatens the ownership rights of plaintiff and interferes with plaintiff's quiet use and enjoyment of such property, plaintiff will be irreparably harmed if defendant is not enjoined from destroying or removing a fence that is situated along the survey lines of plaintiff's property. Furthermore, the balancing of the equities is in plaintiff's favor, as it is undisputed that the property in issue is physically located within the boundaries of plaintiff's lot, and there is no evidence before this Court which evidences the adverse possession of the disputed property for the extent of the statutory time period.

To the extent that plaintiff seeks a civil order of contempt against defendants, the record before this Court demonstrates that an Order to Show Cause with a Temporary Restraining Order was signed on May 3, 2007 (Burke, J.) and was served upon the defendants pursuant to CPLR 308 (2) on May 18, 2007. By the stated terms of the Order to Show Cause, the temporary restraining order was effective from the date of its service upon defendants "pending the hearing of this application." The effect of such order terminated on June 4, 2008, the submission or "hearing date" of the motion. By stipulation dated June 4, 2008, defendants conceded jurisdiction. On June 10, 2008, plaintiff had a new post and rail fence installed along his surveyed property line, and the fence was noticed to have been removed on or about June 15, 2008. While defendant Iannucci admits to having removed a previous fence that was installed by plaintiff in 2006 upon his claim that it interfered with his property rights, his alleged removal of the fence in June 2008 can not be punishable by an order of civil contempt, since the temporary restraining order had expired on the return date and had not been continued pending the determination of plaintiff's motion. Nevertheless, the defendants are admonished that plaintiff's claim of ownership of property within the borders of its surveyed lot represents the *status quo* in this matter, and there should be no interference with those property rights during the pendency of this action.

Movant is directed to serve a copy of this order with notice of entry upon counsel for the defendants.

DATED: 29 August 2008



HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION