

**Paxson v Adler**

2008 NY Slip Op 32487(U)

September 12, 2008

Supreme Court, Greene County

Docket Number: 0020062/9100

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

MICHAEL PAXSON and ELIZABETH PAXSON,

Plaintiffs,

-against-

**DECISION and ORDER**

**INDEX NO. 06-0029**

**RJI NO. 19-07-3118**

DEREK JONATHAN TRISTAN ADLER a/k/a  
DEREK J.T. ADLER and NOREEN R. WEISS ADLER,

Defendants.

Supreme Court Greene County All Purpose Term, September 3, 2008  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Plaintiffs commenced this action to quiet title to a parcel of forested land they claim to own, by deed, located in the Town of New Baltimore, Greene County. The disputed parcel lies along the boundary line of properties owned by plaintiffs and defendants, and consists of approximately 10.39 acres of land (hereinafter the "disputed parcel"). Defendants answered plaintiffs' complaint and asserted their adverse possession counterclaim to the disputed parcel. Plaintiffs denied defendants' counterclaim. Both parties have conducted and completed

discovery. Each party now brings a motion for summary judgment, and defendants also move to amend their answer to include the theory of “practical location”.

Plaintiffs’ motion for summary judgment, as limited by the facts submitted and the arguments presented, seeks dismissal of defendants’ adverse possession counterclaim but does not affirmatively seek summary judgment on their primary claim of ownership by deed.

Likewise, defendants seek summary judgment on their adverse possession counterclaim.

Defendants limit their counterclaim to include only a claim of adverse possession based upon their “cultivating or improving” the disputed parcel, excluding theories that they held it “under color of title” or by the creation of a “substantial enclosure”. Examining Defendants’ adverse possession claim based upon a theory of “usual cultivation or improvement”, both parties’ motions for summary judgment are denied because neither met their initial burden of proof.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). “[A]n affidavit by an individual without personal knowledge of the facts does not establish the proponent’s prima facie burden.” (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384-85 [2005]). Moreover, a movant fails to meet their burden by “pointing to gaps in... proof”, rather the movant’s obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc., 223 AD2d 913, 914 [3d Dept. 1996]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts

to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

“[W]here a party seeks to establish title by adverse possession, it is incumbent upon the party to demonstrate by clear and convincing evidence that for a period of 10 years it actually possessed the property in dispute and that such possession was open and notorious, exclusive, continuous, hostile and under a claim of right.” (Gallagher v. Cross Hill, LLC, 45 AD3d 1013 [3d Dept. 2007][quoting Kitchen v. Village of Sherburne, 266 AD2d 786 [3d Dept. 1999]). “If such assertion is not based upon a written instrument, the proponent must also produce evidence that the subject premises was usually cultivated or improved...” (Id. at 1013-14) Usual cultivation and improvement “consist[s] of acts such as are usual in the ordinary cultivation and improvement of similar lands by thrifty owners.” (Ray v. Beacon Hudson Mountain Corp., 88 NY2d 154, 160 [1996][quoting Ramapo Mfg. Co. v. Mapes, 215 NY 362 [1915][internal quotations omitted]).

Plaintiffs’ summary judgment motion fails because it did not affirmatively demonstrate their entitlement to judgment as a matter of law by disproving defendants’ adverse possession claim. Rather, plaintiffs focused on the lack of proof defendants demonstrated during discovery. To that end, plaintiffs offered the deposition testimony of defendant Derek Adler (hereinafter “Mr. Adler”). He testified that his father owned the property adjacent to the disputed parcel by deed and asserted his adverse possession claim in 1986 or 1987, but passed away in September

2003. Mr. Adler was his father's sole heir, and he took possession of his father's land and claim in 2004. Mr. Adler can only personally recall being on the disputed parcel in 1986 and again in 1997, while re-posting "no trespassing" signs with his father. However, he does claim to have visited it at other unspecified times since 1986. Mr. Adler does not claim to have personally witnessed his father hunting, walking on, or ejecting trespassers from the disputed parcel. Nor does he claim to have witnessed another individual cutting firewood from the disputed parcel with his father's permission. While Mr. Adler's deposition testimony demonstrates his lack of personal knowledge of a large portion of his adverse possession claim, it does not affirmatively demonstrate plaintiffs entitlement to judgment as a matter of law. (Antonucci, supra).

Additionally, the Plaintiffs affirmatively demonstrated, by their surveyor's affidavit, that the print advertisement for Mr. Adler's father's 1987 timber sale did not include the disputed parcel. Thus, plaintiffs argue, that the logging conducted pursuant to the timber sale could not provide any evidence of defendants' adverse possession of the disputed parcel. Such proof, however, did not demonstrate as a matter of law that the disputed parcel was not actually logged nor disprove the defendants' predecessor's use of the property. Plaintiffs also rely upon Mr. Adler's alleged offer to purchase a larger tract of land which included the disputed parcel and his non-inclusion of the disputed parcel in his father's estate tax return to disprove defendants' claim. Both facts, however, fail to demonstrate that Mr. Adler's father recognized title to the disputed parcel in another during the statutory ten year period, which would defeat the defendants' adverse possession claim. (Van Gorder v. Masterplanned, Inc., 78 NY2d 1106 [1991]).

Accordingly, because plaintiffs did not affirmatively demonstrate that defendants'

adverse possession claim fails as a matter of law, their motion for summary judgment is denied.

Turning to defendants' motion, it also fails to set forth sufficient facts to demonstrate their entitlement to summary judgment as a matter of law. As set forth above, Derek Adler can personally recall only two occasions of his actually being on the disputed parcel. While the affidavit he submitted speaks at length of his involvement on a larger tract of land adjacent to the disputed parcel, he candidly admits that he cannot specify "when or how many times" he was on the disputed parcel. Additionally, defendants submitted the affidavit of the consulting forester, Mr. Del Vescovo, who advised and assisted Mr. Adler's father in conduct the logging and timber sale in 1987. Mr. Del Vescovo established that he personally remembers that the 1987 logging and timber sale were conducted on Mr. Adler's father's large tract of land adjacent to the disputed parcel, and that it extended into the disputed parcel as well. He also opines that some current physical features of the disputed parcel demonstrate that it was logged in 1987.

Defendants' licensed surveyor's affidavit did not add to defendants' proof of adverse possession during the statutory period claimed. In sum, the only competent proof submitted by defendants on their motion is that Mr. Adler's father's timber sale in 1987 extended into the disputed area and Mr. Adler has walked the perimeter of the disputed parcel on two occasions. Such proof falls far short of demonstrating as a matter of law defendants entitlement to summary judgment.

Accordingly, defendants' motion for summary judgment is denied.

Defendants also moved to amend their answer to include the affirmative defense of "practical location". (Andersen v. Mazza, 258 AD2d 726 [3d Dept. 1999], Hazen v. Hazen, 26 AD3d 696 [3d Dept. 2006]). "According to this doctrine, a practical location of a boundary line and an acquiescence therein for more than the statutory period [applicable to adverse possession]

is conclusive of the location of such boundary . . . although such line may not in fact be the true line according to the calls of the deeds of the adjoining owners.” (Hazen, supra at 697-698, quoting Fisher v. MacVean, 25 AD2d 575 [3d Dept. 1966])

“It is well settled that provided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR §3025(b) should be freely granted” (Ciarelli v. Lynch, 46 AD3d 1039, 1040 [3d Dept. 2007])[internal quotations omitted]. Here, allowing the amendment will cause no prejudice to the plaintiffs as the proposed amendment adds no new facts, only adding a legal theory closely related to defendants’ previously pled adverse possession counterclaim. Moreover, just as the defendants’ adverse possession counterclaim is not “plainly lacking in merit” neither is their “practical location” theory.

Accordingly, defendants’ motion to amend their answer is granted. However, for the same reasons as set forth above, their motion for summary judgment on their theory of “practical location” is denied.

All papers, including this Decision and Order, are being returned to the attorney for the Defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: September 12, 2008  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion dated May 27, 2008, Affidavit of Michael Paxson, dated May 21, 2008, Affidavit of William Deily, dated May 28, 2008, Affidavit of Robert Ihlenburg, dated May 28, 2008, Affidavit of John Connor, Jr., dated May 27, 2008, with attached Exhibits A-Q.
2. Notice of Cross Motion for Summary Judgment and for Leave to Amend the Answer, dated July 7, 2008; Affidavit of Salvatore R. Santonastaso in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross Motion, dated July 7, 2008, with attached Exhibit A; Affidavit of Anthony Del Vescovo in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross Motion, dated July 7, 2008, with attached Exhibit A-J; Affidavit of Derek J.T. Adler in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross Motion, dated July 7, 2008, with attached Exhibit A-C;
3. Affidavit of Edward Lalor, dated July 29, 2008; Affidavit of William Deily, dated August 1, 2008; Affidavit of Robert Ihlenburg, dated July 28, 2008, with attached Exhibit A; Affidavit of John Connor, Jr., dated August 1, 2008, with attached Exhibits A-D.
4. Reply Affidavit of Salvatore R. Santonastaso in Support of Defendants' Cross Motion, dated August 27, 2008; Reply Affidavit of Anthony Del Vescovo in Support of Defendants' Cross Motion, dated August 26, 2008; Reply Affidavit of Derek J.T. Adler in Support of Defendants' Cross Motion, dated August 27, 2008, with attached Exhibit A-I;