

Xander Corp. v Haberman

2008 NY Slip Op 33277(U)

December 1, 2008

Supreme Court, Nassau County

Docket Number: 14069/03

Judge: Kenneth A. Davis

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SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

XANDER CORP.,

Petitioner,

SUBMISSION DATE: 11/14/08
INDEX No.: 14069/03

-against-

SINCLAIR HABERMAN, D. DOMENICO, LTD.
SCOTT KEMINS as the BUILDING COMMISSIONER
of the CITY OF LONG BEACH, and BELAIR
BUILDING, LLC,

MOTION SEQUENCE # 20,21

Respondents.

BELAIR BUILDING, LLC,

Petitioner,

-against-

KEYSPAN GAS EAST CORPORATION d/b/a
KEYSPAN ENERGY DELIVERY LONG ISLAND

INDEX NO. 17162/03

Respondents,

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... XX
- Answering Papers.....
- Reply..... XX
- Briefs: Plaintiff's/Petitioner's..... XX
- Defendant's/Respondent's..... XX

Motion by petitioner Xander Corp. [Xander] pursuant to CPLR 3212 for, *inter alia*, summary judgment of adverse possession over the disputed property delineated herein is denied.

Cross motion by respondents Sinclair Haberman and Belair Building, LLC pursuant to CPLR 3212 for summary judgment dismissing the third cause of action of petitioner's second amended petition sounding in adverse possession is denied.

This proceeding arises from petitioner's disputed claim to an "L" shaped piece of property, outlined in blue on the survey dated

June 17, 2003 [petitioner's Exhibit "00"] adjacent to premises known as 360 Shore Road, Long Beach, New York, a residential cooperative consisting of 126 units¹ owned by petitioner. Respondent Sinclair Haberman describes the disputed property as more than one-half acre of valuable oceanfront property along the boardwalk in Long Beach, measuring approximately 170' x 145'.

Petitioner claims title to the property by adverse possession or, alternatively, by prescriptive easement. According to petitioner, a portion of its pool deck, as well as designated parking spaces (113-126), and other undesignated parking spaces available to owners of units at 360 Shore Road are located on the disputed property.² At all relevant times, well in excess of the required ten year period, petitioner avers that it has claimed the disputed property as its own with conduct both hostile and open, under a claim of right, while actually and exclusively maintaining same. Petitioner further contends that, having induced prospective purchasers of co-op units with the lure of the opportunity to purchase a parking space with their unit, respondent Sinclair Haberman now seeks to put the property to more profitable use, to wit: construction of the next tower.

Respondent Sinclair Haberman disputes petitioner's adverse possession claim, contending that he is the owner of the property and that petitioner's use thereof has always been with, and subject to, permission expressly granted by him. Moreover, he maintains that 1) over the years, the real estate taxes on property known as lot 46 were paid by him or by entities in which he participated; and that 2) the only fences erected on the property were erected by him.

Proof of actual possession in an adverse possession claim requires that the claimant demonstrate more than simply having occupied the land. A party seeking to obtain title by adverse possession on a claim not based upon a written instrument, must show that the parcel was either usually cultivated or improved or protected by a substantial inclosure for the ten years statutory period.³ Real Property Actions and Proceedings Law § 522[1], [2];

¹360 Shore Road is the first to be constructed of four residential buildings [Sea Pointe Co-op Project] respondent Sinclair Haberman planned to build along Shore Road.

²Petitioner contends that part of the property contains the only access to designated parking spaces (105-110) which are located on petitioner's property and that part of the property consists of a narrow landscaped buffer which was repaved after respondent Sinclair Haberman allegedly destroyed a portion of Xander's parking lot in 2003.

³Petitioner asserts, and respondent disputes, that in 1990, it constructed a fence along the perimeter of the disputed property thereby placing respondent Sinclair Haberman on notice that Xander claimed a right of ownership over said land.

Zeltser v Sacerdote, 52 AD3d 824, 825 [2nd Dept. 2008]; *Beyer v Patierno*, 29 AD3d 613, 614 [2nd Dept. 2006] (citations and internal quotation marks omitted); *Gore v Cambareri*, 14 AD3d 650 [2nd Dept. 2003], *lv to app den.* 5 NY3d 711 [2005]. The type of cultivation or improvement sufficient to satisfy the statute varies with the character, condition, location and potential uses of the property. *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 160 [1996]; *Ramapo Mfg. Co. v Mates*, 216 N.Y. 362 [1915]. In addition, the possessor must establish, by clear and convincing evidence, that the character of the possession is hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years. *Kimber Mfg., Inc. v Hanzus*, __ NYS2d __, 2008 WL 4936973 [N.Y.A.D. 2nd Dept. 2008]; *Qualben v Aiello*, 53 AD3d 604, 605 [2nd Dept. 2008]; *West Middlebury Baptist Church v Koester*, 50 AD3d 1494, 1495 [4th Dept. 2008]; *Walling v Przybylo*, 7 NY3d 228, 232 [2006]. Possession is hostile when it constitutes an actual invasion of, or infringement upon, the owner's rights. *Gore v Cambareri*, *supra* at 553. A claim of right is, by definition, adverse to the title owner and also in opposition to the rights of the true owner. *United Pickle Products Corp. v Prayer Temple Community Church*, 43 AD3d 307, 309 [1st Dept. 2007], *lv to appeal denied* 9 NY3d 977 [2007].

When use has been by permission, or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed an attitude of hostility to any right in the real owner. *Ropitzky v Hungerford*, 27 AD3d 1031 [3rd Dept. 2006] (citations and internal quotation marks omitted). When permission can be implied from the beginning, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner. *Koudellou v Sakalis*, 29 AD3d 640, 641 [2nd Dept. 2006]. Mere possession, no matter how long continued, gives no title by adverse possession unless under a claim of right. *Harbor Estates Ltd. Partnership v May*, 294 AD2d 399, 400 [2nd Dept. 2002].

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. *Hall v Sinclair*, 35 AD3d 660, 662 [2nd Dept. 2006]. Where an encroachment is initially by permissive use, that permission is presumed to continue in the absence of evidence to the contrary. *LongShore v Hoel Pond Landing Inc.*, 284 AD2d 815, 816 [3rd Dept. 2001], *lv to app den.* 97 NY2d 603 [2001].

The elements that are required to sustain a claim under the theory of prescriptive easement are the same as for adverse possession, except for the element of exclusivity. Once the required elements are established, the burden shifts to defendant to show the use was permissive, since the presumption arises that the use was hostile. *Gorman v Hess*, 301 AD2d 683, 685 [2nd Dept. 2003]. The adverse nature of the use is essential to the acquisition of an easement by prescription. Use by express or

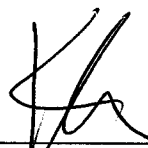
implied permission cannot ripen into an easement by prescription since user as of right, as distinguished from permissive user, is lacking. Neighborly accommodation, willing accord, or a convenience tolerated is not sufficient to establish a permanent right. *Hassinger v Kline*, 110 Misc2d 147, 148 [N.Y. sup. 1981], *aff'd*. 91 AD2d 988 [2nd Dept. 1983].

A party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]. In deciding such a motion, the court must view the evidence in the light most favorable to the non-moving party giving that party the benefit of all favorable inferences which can be drawn from the evidence. *Chernin v New York City Metropolitan Transit Authority*, 52 AD3d 763 [2nd Dept. 2008]. Summary judgment will be denied if there is any doubt as to the existence of a triable issue of fact. *Freese v Schwartz*, 203 AD2d 513, 514 [2nd Dept. 1994], *lv to appeal dismissed*, 84 NY2d 850 [1994].

Applying the relevant principles to the facts at hand renders summary judgment in favor of either movant inappropriate. Whether satisfactory proof of the elements comprising ownership by adverse possession/prescriptive easement does, in fact, exist, whether the alleged improvement(s) to the property were, in fact, made by petitioner, and whether they are sufficient to satisfy the requirement of Real Property Action & Proceedings Law § 522 and, conversely, whether the petitioner's use of the disputed property was permissive, are factual issues which preclude summary judgment in favor of either petitioner or moving respondents Sinclair Haberman and Belair Building, LLC.. If it is established that the use or possession of the disputed property was by permission of the owner, such use cannot be found to sustain a claim to title either by adverse possession or prescriptive easement. *Smith v Folmsbee*, 31 AD2d 584, 585 [3rd Dept. 1968].

This decision constitutes the order of the court.

Dated: DEC 01 2008



KENNETH A. DAVIS J.S.C.

ENTERED
DEC 03 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE