SATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE
THEODOR H. KEFF,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 07-1360
RJI NO. 19-08-3512

JAMES A. BULICH, BETTY I. BULICH, JAMES GERARD BULICH, MICAELA NIVEN BULICH, TIMOTHY MARTIN, THOMAS A. DALY, JANET M. DALY, & RONDOUT SAVINGS BANK,

Defendants.

Supreme Court, Greene County, All Purpose term, December 12, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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Attorneys for Defendants Thomas A. Daly and Janet M. Daly
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TERESI, J.:

By this declaratory judgment action plaintiff seeks a declaration of his rights in two parcels of real property located in the Town of Catskill, New York. Plaintiff alleges that the

second parcel (hereinafter "Parcel 2") passes over the property of defendant Timothy Martin (hereinafter "Martin") and defendants Thomas and Janet Daly (hereinafter "Daly defendants"). Martin now moves for summary judgment against plaintiff's claim to ownership of Parcel 2 and granting his own adverse possession counterclaim thereto. The Daly defendants join Martin's motion, both of which are opposed by plaintiff. Because Martin demonstrated his entitlement to summary judgment as a matter of law, and no issue of fact requires a trial, his motion is granted.

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater 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 with "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]).

"[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]). Additionally, for a claim founded upon a written instrument, RPAPL §512(1) requires "acts sufficiently open to put a reasonably diligent owner on notice."

Martin's amended answer, and this summary judgment motion, claim ownership of Parcel 2, a twelve by fourteen hundred and fifty foot strip of land, by adverse possession under color of title. To support his motion Martin submits a copy of plaintiff's survey which demonstrates that Parcel 2 runs directly through a parcel of property he currently owns (hereinafter "Martin parcel"). He claims that his deed for the Martin Parcel does not except out Parcel 2, but rather entirely encloses his parcel. By affidavit he claims that he and his family have owned the Martin parcel since 1941, when it was acquired by his grandparents. In 1986, Martin's grandparents transferred the parcel to his father. Then, in 2006 the parcel was transferred to Martin by his father. Martin alleges that he has paid the mortgage on this property since 1982 and has lived there all of his life.

Martin's affidavit alleges that no one has ever made a claim of ownership or used Parcel 2, other than his family, since 1941. His affidavit and his deposition testimony, further establish that Parcel 2, as depicted on plaintiff's survey, passes through his lawn, vegetable garden and leach field; running directly between to the mobile home he lives in and the remnants of an old barn. He alleges that the mobile home has been located in that area for "many, many years".

Martin's affidavit and his deposition testimony establish, as a matter of law, that his and his family's use of that portion of Parcel 2 which traverses the Martin parcel was "open and notorious, exclusive, continuous, hostile and under a claim of right." (Gallagher, supra at 1013). Martin amply demonstrated that his use was "open and notorious", and in compliance with

RPAPL §512(1), as he used Parcel 2 as part of his own property in an open and regular manner, i.e. as his lawn, leach field and garden. (Guenther v. Allen, 268 AD2d 934 [3d Dept. 2000]). He demonstrated his use was "hostile and under a claim of right" by his conduct in possessing and using Parcel 2 as an uninterrupted part of the Martin parcel. (Walling v. Przybylo, 7 NY3d 228 [2006]). He demonstrated his use was "exclusive", by alleging that no one has made a claim to or accessed Parcel 2 at any time since he has lived there. (Levy v. Kurpil, 168 AD2d 881 [3d Dept. 1990]). Finally, Martin demonstrated his "continuous" use of Parcel 2 by his allegations that his family has owned the property since 1941, that he has paid the mortgage on the property since 1982 and that he has lived at the Martin parcel his entire life. Martin has demonstrated his entitlement to judgment, as a matter of law, shifting the burden on this motion to the plaintiff.

Plaintiff, in opposition, has demonstrated no triable issue of fact. Plaintiff argues that Martin's adverse possession counterclaim is wrongly pled, which precludes summary judgment. However, "even an unpleaded defense may be invoked to... serve as the basis for an affirmative grant of [summary judgment] in the absence of surprise and prejudice, provided that the opposing party has a full opportunity to respond." (Sheils v. County of Fulton, 14 AD3d 919 [3d Dept. 2005]). Here, plaintiff alleges no surprise or prejudice, and has had a full opportunity to oppose Martin's motion.

Additionally, plaintiff claims that issues of fact exist because his surveyor did not specify the location of Martin's garden on his survey, because Martin's lawn is "rustic" and because he believes that a pond was dug on the Martin parcel within the past ten years. Not one of these claimed issues constitutes anything more than irrelevant speculation or "unsubstantiated allegations". (Zuckerman, supra 562). Martin, as the owner and life long resident of the Martin

parcel, testified that his garden was located where Parcel 2 traverses his property and no issue of fact is created by the plaintiff's surveyor failing to set forth its location on their survey. Plaintiff's description of Martin's lawn as "rustic", also fails to raise a material issue of fact as plaintiff specifically testified that his lawn is traversed by Parcel 2. Finally, as Martin does not rely on the age of a "dug pond" to support his motion, such claimed issue is not only speculative but also irrelevant. Importantly, plaintiff at no pont alleges they have challenged Martin's use and occupation of Parcel 2 or in any way "used" Parcel 2. (Walling, supra). Moreover, at plaintiff's son's deposition he stated that he has driven on Parcel 2 only one time, which occurred in 2008, but specifically stated that he did not go onto that portion of Parcel 2 that runs over Martin's property. He acknowledged that he and plaintiff did not know the location of the parcel until 2008, and had never previously traversed it. On this record, plaintiff has failed to demonstrate a material issue of fact that requires a trial.

Accordingly, defendant Martin's motion for summary judgment is granted.

Finally, this Court notes that the Daly defendants, while joining in Martin's motion for summary judgment, have submitted no motion to this court. Because the Daly defendants have not filed a motion, with a return date thereon, that portion of the Daly defendant's papers seeking relief is denied. (Burstin v. Public Service Mut. Ins. Co., 98 A.D.2d 928, 928 [3d Dept.1983]; Bianco v. Ligreci, 298 AD2d 482 [2d Dept. 2002]).

All papers, including this Decision and Order, are being returned to the attorney for defendant Martin. 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: December 29, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, undated, affidavit of Timothy Martin, dated November 6, 2008, affirmation of Ralph C. Lewis, Esq., dated September 8, 2008, and attached Exhibits "A" - "I".
2. Affirmation in Opposition of Rachel L. Cavell, dated December 3, 2008, with attached exhibits "A" - "B".
3. Affirmation in Opposition of Rod Futerfas, dated December 10, 2008, with attached exhibits "A" - "E".
4. Affidavit and Memorandum of Law in Support of Motion for Summary Judgment of J. Theodore Hilscher, dated November 25, 2008, with attached Exhibits "A" - "J".