

Perfito v Einhorn

2008 NY Slip Op 33719(U)

June 17, 2008

Supreme Court, Westchester County

Docket Number: 15704/06

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

FILED
JUN 17 2008
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

-----X
RICHARD PERFITO, LORRAINE PERFITO and
PETER PERFITO,

MOTION DATE: 5/30/08
Index No. 15704/06

Plaintiffs,

-against-

ADAM EINHORN and ANDREA EINHORN,

Defendants.

-----X

The following papers numbered 1 to 5 were read on this motion by defendants for an Order pursuant to CPLR 2221 granting reargument of this Court's Order granting plaintiff summary judgment, etc.

Papers Numbered

Notice of Motion - Affirmation (Spector)- Exhs. (A-D).....	1-3
Answering Affirmation (Ponzini).....	4
Replying Affirmation (Spector).....	5

Upon the foregoing papers, it is Ordered that this motion is disposed of as follows:

A movant on a reargument motion pursuant to CPLR 2221 must demonstrate that the Court, in reaching its prior Decision and

Order, had misapprehended any of the relevant facts or had misapplied any controlling principal of law. See CPLR 2221, subd. (d), par. 2; Pro Brokerage Inc. v. Home Insurance Co., Inc., 99 A.D.2d 971 (1st Dept. 1984); Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept. 1979). After this Court's careful review of its prior Decision and Order granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment, and the parties' respective arguments herein, the Court now denies defendants' reargument motion.

On the original motion, defendants had failed to demonstrate compliance with the requirements of RPAPL §522(1) in that there was no proof that there had been any substantial or open and obvious alteration of the landscape, or that they or their predecessors in title did anything to the property in issue other than merely take reasonable steps to keep the subject property presentable; this is wholly insufficient to satisfy the statute. See Giannone v. Trotwood Corp., 266 A.D.2d 430 (2nd Dept. 1999); Simpson v. Kao, 222 A.D.2d 666 (2nd Dept. 1995); RSVL Inc. v. Portillo, 16 Misc.3d 1137(a) (Nass. Co. Sup. Ct. 2007); Kennelty-Cohen v. Henry, 2008 WL 227007 (Nass. Co. Sup. Ct. 2008); Cf. Casini v. Sea Gate Association, 262 A.D.2d. 593 (2nd Dept. 1999).

Similarly, defendants had failed to prove compliance with RPAPL §522(2) in that there is no proof that the property had been

"protected by a substantial enclosure." Indeed, the record at bar, and particularly the affidavit from Robert Williams, apprizes only that there had been a chain link fence installed on the subject property by some unknown person at the time that defendants' predecessors had purchased the subject property and that defendants' predecessors, the Williams, had caused a stockade fence to be erected up against the original chain link fence.

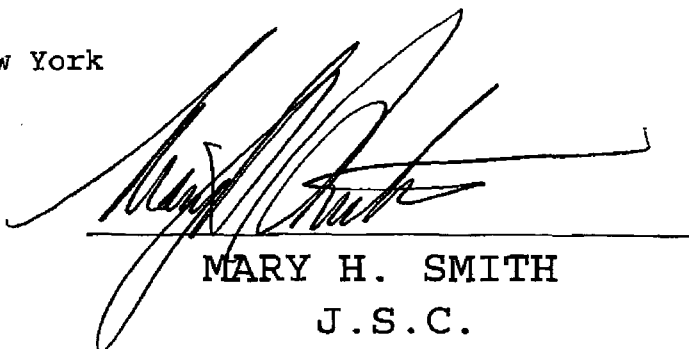
Similarly, the mere presence of a fence is insufficient. There must be a showing that it was a substantial barrier erected by the party claiming adverse possession, without the consent of the owner; a fence erected by or with the consent of the owner, or its predecessor in title, cannot be utilized by the adverse possessor, because its presence can never serve as an indication of conduct or possession openly hostile to the owner's rights.

RSVL Inc. v. Portillo, supra.

Here, there is no evidence as to who had constructed the existing chain link fence situated originally on land belonging to plaintiffs' predecessor, only that the Williams subsequently had constructed their stockade fence "up against the original chain link fence ..." A careful review of Mr. Williams' affidavit reveals that he was approximately 11 years of age when his parents had built this stockade fence upon which defendants rely as constituting the statutorily necessary "substantial enclosure," and

that, "to the best of [his] knowledge, no permission was ever sought by [his] parents from any other property owner to use that portion of the property adjacent to the stockade fence at the rear of the property ...". To this Court, the foregoing undisputed facts establish only that there had been an implied permission for the construction of the fence. See Koudellou v. Sakalis, 29 A.D.3d 640 (2nd Dept. 2006). An eleven year old's understanding, which may or may not be accurate, and which is stated merely upon "the best of [his] knowledge," simply cannot establish the necessary element that the stockade fence had been constructed without the true owner's consent; since there is no credible proof that the fence had been constructed without the true owner's consent, its presence does not constitute a substantial enclosure because building it was not conduct hostile to the true owner's rights. See Kennelty- Cohen v. Henry, supra,

Dated: June 17, 2008
White Plains, New York



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J.S.C.

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