

**DLC Props., LLC v Carstan, LLC**

2009 NY Slip Op 30690(U)

March 24, 2009

Supreme Court, Nassau County

Docket Number: 020072/2005

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 9**

DLC PROPERTIES, LLC,

Plaintiff,

INDEX NO.: 020072/2005  
MOTION DATE: 02/27/2009  
MOTION SEQUENCE: 001

- against -

CARSTAN, LLC, BIENER NISSAN AUDI, INC.,  
NATIONAL WESTMINSTER BANK USA, VW  
CREDIT, INC., and UNITED STATES POSTAL  
SERVICE and "JOHN DOE" Nos. 1 through 5,

Defendants.

The following papers read on this motion:

Notice of Motion, Plaintiff's Statement of Undisputed Facts. Affirmation, Affidavit & Exhibits Annexed .....	1
Memorandum of Law in Support of Motion for Summary Judgment .....	2
Biener Defendants' Response to Plaintiff's Statement of Material Facts Pursuant Commercial Division Rule 19-a, Affirmation, Affidavits & Exhibits Annexed .....	3
Biener Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment .....	4
Reply Affirmation in Further Support of Anthony F. Prisco, Esq., Reply to Statement of Undisputed Facts & Exhibits Annexed .....	5
Reply Memorandum of Law in Support of Motion for Summary Judgment .....	6

**PRELIMINARY STATEMENT**

This is an action involving title to a disputed triangular-shaped portion of land to which the Plaintiff has record title. The action is for a declaration of title to property and for trespass. The Defendants responded to the Complaint with claims for adverse possession and a prescriptive easement. The Plaintiff moves for Summary Judgment pursuant to Civil Practice

Law and Rules § 3212 and for dismissal of the Counterclaims. Carstan, LLC and the Biener Defendants oppose the motion and claim that they have title by virtue of open, notorious and exclusive possession for the requisite period so as to acquire title by adverse possession.

### BACKGROUND

The Plaintiff acquired title to Parcel 1, premises known as 37 — 39 Watermill Lane Road, Great Neck (Sec. 2, Block 42, Lot 302) by virtue of a deed from Klein Communications dated March 19, 2002.<sup>1</sup> Carstan, LLC owns the adjoining Parcel 2, known as 45 — 55 Watermill Lane Road (Sec.2, Block 42, Lot 304). This property is leased to Biener Nissan Audi under lease dated September 23, 2003.

Both parcels were at one time owned by Biener Pontiac, Inc., predecessor in interest to Biener Nissan Audi. In 1972 the property was split, with Biener Pontiac issuing a deed to Parcel 1 to Water Mill Lane Properties, Inc. There is a controversy between the parties as to whether there were two separate deeds, or a single deed to Water Mill.<sup>2</sup> The deed upon which both parties agree contains a denomination of a Dominant Parcel and a Servient Parcel, language typically employed in the creation of an easement. The relevant language of the deed is as follows:

RESERVING from a portion of the property herein conveyed, (said portion hereinafter described as SERVIENT PARCEL) the use and occupation of said servient parcel to the United States Post Office, the tenant of the dominant parcel, at no cost and expense for the duration of the present lease of the United States Post Office of the dominant parcel and any and all extensions thereof.

There then follows a metes and bounds description which comports with the depiction of the area termed "Easement" on the Charles E. Ward, Inc. survey dated June 7, 1972.<sup>3</sup> It is this parcel which is the subject of the dispute. It was initially begun to be used by the United States Postal Service (USPS) in 1967 in conjunction with their lease of 55 Watermill Lane (Parcel 2)

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<sup>1</sup> Exh. "A" to Motion.

<sup>2</sup> Exhs. "F" and "G" are separate deeds. But Biener Defendants' Response to Statement of Material Facts at ¶ 6 claims only a single deed., recorded in Liber 8406 cp. 296. (Exh. 'G').

<sup>3</sup> Exh. "6" to Biener Defendants' Response.

from the Biener interests. This became a month-to-month tenancy in December 1992 and the occupancy was terminated by a notice to the landlord dated January 28, 1993, effective February 28, 1993.<sup>4</sup>

During the course of their occupancy, USPS enclosed the disputed parcel with fencing. It was apparently not removed upon vacating the premises, and USPS paid \$24,000 to cover restoration or repair of the premises to their condition prior to the inception of the lease.<sup>5</sup> While the specific date is in dispute, it appears that after the USPS vacated the parcel, Biener Nissan Audi, the tenant of Carstan under a September 20, 2003 lease,<sup>6</sup> began to utilize the enclosed area for the storage of vehicles, and claims to have done so openly, notoriously under claim of right as to acquire title by adverse possession.

Parcel 2 (Sec. 2, Block 42, Lot 304) has, since the division of the land into Parcels 1 and 2 in 1972, has, despite mesne conveyances, remained within Biener control. In August 2003, Esther Weinstock, Elaine B. Wolf Family, LLC, and Martin Biener executed a contract to sell the property to Stanley H. Weinstock and Carol A. Weinstock, Mr. Biener's daughter and son-in-law. This contract was assigned to Carstan, LLC on September 12, 2003 and, on September 23, 2003, each of the three sellers signed separate deeds to their interest in the property to Carstan.<sup>7</sup> None of these deeds, nor the deeds into the three grantors, included a description of the disputed area. Neither did a 2001 Deed from Elaine Wolf to the Elaine B. Wolf Family, LLC.

The Biener Defendants claim that the 10-year vesting period commenced on February 28, 1993, the date USPS surrendered possession of the disputed area, concluded on February 28, 2003, and that transactions before or after the vesting period are of no consequence. The Plaintiffs contend that the 2001 deed from Elaine Wolf to Elaine B. Wolf Family LLC, which did not include any reference to ownership of the disputed parcel, constitutes an acknowledgment that there was no claim to title of the parcel.

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<sup>4</sup> Exh. "E" to Motion.

<sup>5</sup> *Id.*

<sup>6</sup> Exh. "C" to Motion.

<sup>7</sup> Exh. "B" to Motion.

## DISCUSSION

The Plaintiff has record title to the disputed parcel, which constitutes a portion of Lot 302.<sup>8</sup> The “easement” noted on the 1972 survey represented, at best, a temporary easement which expired in 1993 upon the USPS vacating the adjoining premises. It is more clearly viewed as a leased portion of Lot 302, which the Plaintiff’s predecessor in title, Klein Communications, took subject to when it acquired title by deed dated December 31, 1986.<sup>9</sup> Biener Pontiac, Inc., the predecessor in interest to the Biener Defendants, conveyed title to Lot 302 (Parcel 1), to K. Ogawa Realty Corp. by deed dated April 8, 1980.<sup>10</sup> That deed recited the easement for the benefit of the adjacent premises for the purposes defined in the Deed recorded in Liber 8406 cp. 296.<sup>11</sup> It is this Deed which contains the limitation on the easement to the expiration of the existing lease with USPS or any extensions thereof. The so-called easement ceased to exist when USPS vacated in 1993.

Assuming that on the day USPS surrendered possession of the disputed area, the Biener Defendants commenced using the enclosed portion of Parcel 1 for their own purposes for the storage of vehicles, and continued to do so for a period of ten years, did they acquire title by adverse possession? This is the issue before the Court.

Adverse possession requires that there be five essential elements of the possession, which must be:

- (1) hostile and under claim of right;
- (2) actual;
- (3) open and notorious;
- (4) exclusive; and
- (5) continuous.

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<sup>8</sup> Exh “A” to Motion. Deed from Klein Communications, Inc. to DLC Properties, LLC

<sup>9</sup> Exh. “U” to Motion.

<sup>10</sup> Exh. “S” to Motion.

<sup>11</sup> Exh. “G” to Motion.

They much each be established by clear and convincing evidence.<sup>12</sup>

The enclosure of the disputed area, originally by USPS, and subsequently repaired or restored by Carstan or Biener, was not initially hostile. The first consideration is whether the expiration of the permissive use of the property by USPS is automatically converted to a hostile use when, what is in effect the owner who created the “easement” begins to use it for their own purpose. A further question is whether, under these circumstances, their can reasonably be found a claim of right.

Parties cannot so easily escape the actions of their predecessors in interest. Biener Pontiac, Inc., the predecessor of the Defendant Biener Nissan Audi, Inc., owned both parcels, and split the property by its June 27, 1972 conveyance to Water Mill Properties, Inc. of what is now Parcel 1, which contains the disputed area. In that deed, Biener created the arrangement whereby the occupant of Parcel 2 would have use of the portion of Parcel 1 designated as the “Servient Parcel”, but only for so long as the current lease and any extensions remained in effect. The month-to-month extension of the lease expired on February 28, 1993.

In 1975 Biener Pontiac, Inc. deeded Parcel 2 to Martin Biener, a principal of the corporation.<sup>13</sup> It conveys title to Lot 304, containing 14,658 square feet, and does not include any portion of Lot 302, on which the disputed land is situated. A correction deed to restate the description was issued on April 8, 1980, and again it was limited to Lot 304.<sup>14</sup> In 1981 Biener deeded the property to himself and two family members as tenants in common<sup>15</sup>, and in 2001, as previously noted, Elaine Wolf transferred her one-third share to a Family, LLC.

The three parties contracted to sell the parcel to Stanley H. Weinstock, the president of Biener Nissan Audi, Inc. and the son-in-law of Martin Biener, and his wife Carol A. Weinstock. The Weinstocks assigned the contract to a company they formed, Carstan, LLC, which is now the

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<sup>12</sup> *Brand v. Prince*, 35 N.Y.2d 634 (1974). Now codified in Real Property Actions and Proceedings Law § 501.

<sup>13</sup> Exh. “K” to Motion.

<sup>14</sup> Exh. “M” to Motion.

<sup>15</sup> Exh. “N” to Motion.

holder of title to Parcel 2 pursuant to three separate deeds from the Sellers.<sup>16</sup> Biener Nissan Audi occupies the premises under a lease with Carstan. Given this history, the Defendants cannot honestly believe that they have occupied the disputed property under a claim of right.

While there are conflicting statements as to whether, during the period 1986 — 2002, Klein Communications gave the Biener interests permission to park in the disputed area, or vice versa,<sup>17</sup> the stated belief of the Defendants that the enclosed disputed area was a part of the Biener property, may be an honest statement, but it flies in the face of reality. At the very least, the limitation in the 1972 deed to Water Mill, reserving the right to use the land for the benefit of the tenant on the retained portion of land, clearly reflects the Biener Defendants knowledge, through not only their predecessor in title, but their corporate predecessor in interest, that the disputed area was part of Lot 302.

While the Court can understand that laymen may well be confused, particularly to the classification of the disputed area as being subject to an easement, the clear fact is that this “easement” was temporary in nature, was for the limited benefit of USPS, and terminated upon the expiration of the lease under which they occupied the premises. The Defendants must be chargeable with this knowledge of record title in the Plaintiff, but there is a controversy as to whether or not this knowledge is sufficient to defeat a claim for adverse possession.

The Court of Appeals has essentially concluded that actual knowledge of the record title of the parcel sought to be acquired by adverse possession does not bar acquisition. “By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner. Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors.”<sup>18</sup>

*Przybylo* has not been without its detractors, including the New York State legislature. Real Property Tax Law § 501 was amended, effective July 7, 2008, as a direct response to the

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<sup>16</sup> Exh. “B” to Motion.

<sup>17</sup> Exh “12” to Biener Defendants’ Response, Deposition of Harold Klein at p. 41; Affidavit of Harold Biener, attached to Biener Defendants’ Response, at ¶¶ 37 — 42.

<sup>18</sup> *Walling v. Przybylo*, 7 N.Y.3d 228, 232 — 233 (2006)

decision. An earlier effort, passed by the legislature, was vetoed because the Governor opposed the introduction of individual belief as an element of adverse possession.<sup>19</sup> However, in 2008, Chapter 269, § 1 of the Laws of 2008 amended the section in its entirety and renamed it. As stated in the Introducer's Memorandum in Support of the new bill the legislation " 'is all about good faith. ' " <sup>20</sup>

If this standard were to be applied to the facts of this action, it is inconceivable that the Biener successors in interest could, in good faith, believe that the property which they themselves conveyed in 1972, subject to an "easement" for the benefit of the tenant of the retained parcel, which by its terms expired on the vacating of the property by USPS in 1993, was now somehow subject to their claim of ownership, whether of fee title or an easement. While the "reasonable basis" test is, in the opinion of this Court, a far more just approach, the statute creating the standard post-dates both the expiration of the occupancy period and the claim for relief in this action. The Plaintiff's claim must either stand or fall under the *Przybylo* standards.

The Plaintiff and Defendant in that case were adjoining owners of residential parcels of land in the Town of Queensbury, Warren County, New York. The Wallings Plaintiffs purchased their plot in 1986 and the Defendant Przybylos purchased in 1989. The Plaintiffs promptly started work on the construction of their home, while Defendants did not construct their home until 1991 and moved in only in May 1994. In 1987 the Plaintiffs bulldozed and deposited fill and topsoil on a portion of the Defendants' property. They installed PVC piping to carry water from their eaves and down-spouts to transport water from their home to the disputed parcel. They also constructed an underground wire fence to enclose their dog and planted, watered, mowed and raked the grass on the disputed parcel. In 1992 they planted a 10 foot pole topped by a bird feeder on the area as well. The Defendants obtained a survey in 2004, almost 15 years after acquiring title, which showed the intrusion onto their land by the Plaintiffs.

While taking the position that "(i)n the absence of an overt acknowledgement, our courts have recognized since *Humbert v. Trinity Church* [24 Wend 587 (1840)] that an adverse

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<sup>19</sup> McKinney's RPAPL § 501, PRACTICE COMMENTARIES.

<sup>20</sup> *Id.*

possessor's claim of right or ownership will not be defeated by mere knowledge that another holds legal title' " the Court also noted that "(a)lthough not conceded by the defendants, it appears that each party was mutually mistaken as to the true location of the boundary line."<sup>21</sup> This is not insignificant, and constitutes a meaningful difference from the facts of the instant matter.

The Biener Defendants through their successor-in-interest, Carstan, LLC, and Carstan's tenant, Biener Nissan Audi, could not be mistaken as to the true location of the boundary line. They divided the property in 1972, procured surveys, and conveyed by metes and bounds descriptions. The improvements which would otherwise demonstrate a claim of ownership and dominance, the fenced enclosure, was in place since approximately 1967, when the USPS, as tenant of the combined parcels, utilized the area for the parking of trucks and equipment. The placement of the fence was not, therefore, an act which was hostile to the true owners of record.

When the lawful occupation of the disputed parcel by the USPS ended in 1993, Klein Communications was the owner of the land of which the disputed parcel was a part. He had little or no access to the fenced-in area before 1993, and nothing changed thereafter. The question, then, is whether the continuation of a previously lawful use, coupled with repairs to the fence, re-paving of the blacktop, and the maintenance of a lock on the gate to the area are adequate to constitute adverse, open, and notorious occupation of the parcel so as to require the record owner to commence an ejectment action within ten years or lose title to the affected area.

In order for Klein to know that the use of the disputed parcel was adverse to his record title, he would have to know the status of the lease agreement between the Bieners and USPS. The fact that postal vehicles were replaced by automobiles, may have triggered an inquiry, but the changeover did not necessarily mean that the USPS lease had expired. It is also possible that they had sub-leased the property to Biener Nissan Audi, along with their right to utilize the fenced-in area.

In *Przybylo* none of the drainage, planting, mowing, raking or installation of the underground dog wire or bird feeder had a lawful status which existed at the time of purchase by

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<sup>21</sup> *Przyobolo* at 231.

the adjoining owner. Their occupation was always adverse to the lawful title.

In this case however, the initial occupation was lawful, and the conveyance of title to Klein's predecessor, Water Mill Lane Properties, Inc. for which Biener Pontiac, Inc. received consideration, was specifically subject to the lawful use of the property by the tenant of the adjoining owner. The lawfulness ceased to exist upon the termination of the USPS lease, but neither Klein nor DLC should be charged with knowledge of the expiration of the lease to which they were not a party.

The facts in this case are sufficiently different from those in *Pryzbolo* so as to warrant a different result. The Plaintiff is entitled to unfettered title to the disputed parcel. The entitlement of the occupant of Parcel 1 to occupy the enclosed area within the boundaries of Parcel 2 expired on February 28, 1993. The Defendants' occupancy of the disputed parcel since that date constitutes a trespass upon the property of the Plaintiff. But the failure by the Plaintiff, or Klein, its predecessor in title, to exercise their right of ejectment within ten years of February 28, 1993 bars any claim for damages.<sup>22</sup> The Defendants' counterclaims are dismissed.

This constitutes the Decision and Order of the Court.

Submit Judgment.

Dated: March 24, 2009

  
J.S.C.

**ENTERED**  
MAR 26 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>22</sup> Civil Practice Law and Rules § 212 (a).