

**Board of Mgrs. of the Glen at Great Kills
Homeowners Assn. v NBM Realty Holdings**

2010 NY Slip Op 31923(U)

July 12, 2010

Supreme Court, Richmond County

Docket Number: 100263/05

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

Index No.: 100263/05

**BOARD OF MANAGERS OF THE GLEN AT
GREAT KILLS HOMEOWNERS ASSOCIATION,**

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**NBM REALTY HOLDINGS and
NBM DEVELOPMENT, LLC,**

Defendants

Procedural History

By decision and order entered on January 2, 2008 this court granted the defendants' motion for summary judgment and denied the plaintiff's motion for summary judgment seeking an order declaring it the lawful owner by adverse possession of Block 4645, Lot 275. On January 27, 2009 the Appellate Division, Second Department modified this court's order by deleting the provisions granting those branches the defendants' motion for summary judgment declaring that the plaintiff is not the lawful owner, by adverse possession, of Block 4645, Lot 275.

By order of this court dated July 21, 2009 this matter was referred to a Judicial Hearing Officer or Court Attorney Referee to hear and report on the issues of liability and damages. Justice Philip G. Minardo, the Administrative Judge for the 13th Judicial District referred this matter to Judicial Hearing Officer Lester Sacks. J.H.O. Sacks conducted a trial on liability and damages on November 4, 2009. By stipulation dated March 19, 2010 between counsel for both the plaintiff and defendants to have this court decide the matter based on the trial record, the exhibits and post hearing briefs.

Findings of Fact

After trial the court makes the following findings of fact that there is sufficient evidence to support a finding that the plaintiff has standing to bring this action against the defendants. While the defendants offered evidence that demonstrates that the homeowner's association organized by the original sponsor, Great Kills Associates, intended to change the name of the homeowners association to Evergreen Park Homeowners Association, Inc. No evidence was presented that supports the contention that the original homeowners associations amended its certificate of incorporation.

The defendant asserts that in or about March 1993, a predecessor sponsor of the development, Building a Rainbow Realty Corp., ("Rainbow") formed the Glen at Great Kills Homeowners Association, prior to the issuance of an offering for The Glen at Great Kills Homeowners Association, Inc., Phase II, Woodcutters Lane. But the defendants do not offer any New York State Department of State filings, or any other documentary evidence to support this position. The record shows a certificate of incorporation for the Glen at Great Kills Homeowners Association being signed on April 15, 1980.

In an unrelated matter *The Board of Directors of The Glen at Great Kills Homeowners Association v. The Board of Managers of Evergreen Park Condominium I*, Index Number 101694/2006, this court by decision and order dated March 17, 2009 found that "[i]t is undisputed that the Glen and Evergreen are two of three distinct communities which make up the development." While there are two separate entities there has been no showing that Evergreen Park Homeowners Association, Inc. is owned by Glen at Great Kills Homeowners Association, Inc. that was incorporated in 1980. As such, the plaintiff had standing to commence this action.

Under both the 1979 and 1985 Offering Plans the sponsors retained seats on the homeowner association's board of directors. Witnesses during the trial testified that the builder/sponsor of the development maintained at least one seat, and possibly two seats on the plaintiff homeowners association's board of directors until at least the mid-1990's. Prior to

purchasing the defendant purchasing the property from the predecessor builder/sponsor of the development the homeowner's association made certain improvements to the subject lot without the objection of the predecessor builder/sponsor of the development. The plaintiff installed a sign, planted shrubberies and flowers, and at the northern edge of the parcel planted a line of trees, all without objection of predecessor builder/sponsor. Testimony indicated that the builder/sponsor representative on the homeowners association's board of directors never contested the placement of improvements on the parcel of land in dispute.

Bruno Savo, a member of the defendant NBM Development, LLC, purchased lot 275 from the development's predecessor builder/sponsor on or about May 1, 2000. Savo testified that his company purchased the parcel of land for future commercial development. He further testified that after taking possession of lot 275 the LLC continued to permit the homeowners association to keep their sign on the property until it was ready to commence development of the parcel.

While the plaintiff did in fact cultivate the land by mowing the lawn, placing a sign, shrubberies and flowers, and planting a tree line, it did not have exclusive control of the parcel of land in dispute. Testimony at trial indicated that the general public had access to the parcel in dispute. Specifically, testimony indicated that the general public could walk their dogs on the grounds and neighborhood children had access to the parcel.

Conclusions of Law

A party seeking to claim title by adverse possession must demonstrate, by clear and convincing evidence, the five common law elements of the claim: 1) the possession must be hostile and under claim of right; 2) it must be actual; 3) it must be open and notorious; 4) it must be exclusive; and 5) it must be continuous. In addition, the party seeking title must demonstrate

that the party cultivated, improved or substantially enclosed the land.¹

The court finds that the plaintiff did not establish its entitlement to title by adverse possession to lot 275. The plaintiffs possession of the subject parcel was not hostile and under claim of right. Rather, it is the opinion of the court that placement of the sign, shrubs and flowers, and the tree line were permitted by the original builder/sponsor that owned the subject parcel and continued through each successor owner.

The plaintiff asserts in its post-trial memorandum of law that Court of Appeals decision in *Walling v. Przybylo*, does not support such a finding.² In *Walling*, the titled owner argued that there could be no claim of right when the adverse possessor has actual knowledge of the true owner at the time of possession. The Court of Appeals rejected this argument stating that “conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors.”³

In this case the defendant argues that the presence of the builder/sponsor on the board of the plaintiff from its inception until the mid-nineties and its favoring of the placement of those improvements constitutes permissive use. This court agrees. The predecessor builder/sponsor’s approval as a member of the board of directors, as well as the defendant’s continuation of the plaintiff’s permissive use of the parcel in question does not satisfy the hostility requirement.

Furthermore, this court finds that the use of subject parcel is not exclusive. Testimony supported the defendant’s contention that the land while cultivated was not for the exclusive use of the plaintiff. Instead it was conceded that the neighborhood as a whole could access lot 275 for recreational activities.

¹ See, *Walsh v. Ellis*, 64 AD3d 702, [2d Dept 2009]; RPAPL former 522.

² 7 NY3d 228, [2006].

³ Id. (Internal citations omitted).

Accordingly, it is hereby:

ORDERED, that after trial the Board of Managers of the Glen at Great Kills Homeowners Association's claim for adverse possession is dismissed. Judgment in favor of the defendant.

ENTER,

DATED: July 12, 2010

Joseph J. Maltese
Justice of the Supreme Court