Index No: 22473/2005

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

PRESENT:
Hon. RALPH T. GAZZILLO
A.J.S.C.

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MARK McAULIFFE,

Plaintiff(s),

- against -

STEPHEN JOHANN,

Defendant(s).

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This controversy flows from the plaintiff's adverse possession claim. Its non-jury trial was held before the undersigned on April 5, 2010[1]. As was demonstrated during the proceeding, a number of the relevant facts are not in dispute and may be summarized as follows:

The parties are owners of adjoining residential properties within Huntington Township, Suffolk County. The plaintiff purchased his property on April 18, 1995, long after the defendant had taken title to his parcel. Towards the northern portion of both of their properties is the disputed parcel. That parcel is triangular in shape, and perhaps best described as a cone which points towards the south. Its three sides are as follows:

1) The top or northern-most side begins at a westerly point and runs east approximately 50

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[1] This decision has been held in abeyance pending receipt of the parties' post-trial memoranda. Pursuant to their agreement, and following their applications for adjournments, those papers were not submitted until July 22, 2010.

feet along the undisputed property line shared with an uninvolved third party.

2) Another side—the "eastern leg'—starts at the eastern-most point of the top and runs south-westerly some 230 feet or so. (It is not disputed that this leg follows the plaintiff's property line and thereby marks his property's existing western boundary.)

3) The last or "western leg" starts at the most south-westerly point of the "eastern leg." From there, it runs almost due north some 221 feet or so, ending at the place of beginning. (This leg is the focus of the lawsuit. Indeed, but for this action, this leg would appear to be well within the defendant's property.)

The plaintiff now seeks to have his property line moved west from the "eastern leg" so as to end at the third or "western leg" and to thereby acquire title to all of the property within the triangle.

The plaintiff acknowledges that the disputed parcel may once have been the defendant's. Plaintiff claims, however, that he has since acquired title by adverse possession. In response, the defendant asserts that the plaintiff's contention is without merit. Neither side, however, disputes that the plaintiff has not been in possession (adverse or otherwise) for the statutorily required ten-year period and to prevail, he must "tack" his time to that of his property's prior owner. As revealed by the record, the trial was marked by a number of issues but the primary focus was resolution of the "tacking" issue, critical to which was establishing the existence, time-period, and location of a fence.

The plaintiff's case chiefly relied upon his testimony and that of William Henry Els as well as a number of exhibits. That proof included the facts surrounding the plaintiff's purchase as well as a legal and visual description of the property. As further reflected by the record, the testimony indicated that while the plaintiff had taken title in 1995, it wasn't until early fall of 2004 that the

defendant erected a fence between their properties and enclosed the now-disputed parcel. That fence notwithstanding, the plaintiff claims the property's boundaries had been defined by a previous fence. Purportedly, the prior fence had followed the "western leg" of the now-disputed parcel and, after the passage of the statutory time, had extinguished the defendant's right and title to the land between that fence and plaintiff's property line.

To support his contentions, the plaintiff offered a number of photographs. Two of these photos displayed a gazebo and a fence. These photos were admittedly old[2] and their age purportedly supplied the "tacking" needed to establish the plaintiff's claim. For the reasons set forth below, they were, however, disallowed. Additionally, the plaintiff offered a series of maps and testimony submitted as proof of the fence.

As to the defense, after the close of the plaintiff's case, the defendant chose not to present a case, instead relied upon the proof—or lack thereof—provided during the plaintiff's case-in-chief.

LAW

Adverse Possession

It is abundantly clear that 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

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[2]The record contains a stipulation by the parties that the photographs were sufficiently old so as to qualify under the time period contained within the ancient document rule. As explained during the trial, the defendant did so solely to spare the plaintiff the expense of an expert to prove their age; as was said by defendant's counsel during the trial, he "will concede that the photographs are old." He did not concede the balance of the foundation. TR 27.

improved" (RPAPL § 522 [1]) or "protected by a substantial inclosure" (RPAPL § 522 [2]; *see also, Beyer v Patierno*, 29 A.D.3d 613 [2d Dept 2006]; *Hall v. Sinclaire,* 35 AD3d 660 [2d Dept 2006]). Indeed, it has somewhat recently been held that cutting down two trees, replacing them, planting shrubs and maintenance on a chain link fence was insufficient to establish the cultivation and improvement or substantial enclosure requirement. *Walsh v. Ellis*, 64 AD2d 702 (2d Dept 2009).

In addition, to succeed, a party must prove the common-law requirements of adverse possession, *viz.*:

(1) that the possession was hostile and under claim of right;

(2) that it was actual;

(3) that it was open and notorious;

(4) that it was exclusive; and

(5) *that it was continuous for the statutory period of 10 years* (emphasis supplied). *See, e.g. Walling v Przybylo,* 7 NY3d 228 (2006)*;Bellotti v. Bickhardt,* 228 NY 296 (1920); *Hall v. Sinclaire, supra*; *DeRosa v. DeRosa,* 58 AD3d 794 (2d Dept 2009); *Beyer v Patierno, supra.*

As to the time period, it must be "continuously uninterrupted" but "[u]se or possession by predecessors in title, also meeting the requirements, may be tacked on to one's adverse use to establish the statutory period, as long as there is an 'unbroken chain of privity between the adverse possessors.'" *Rose Valley Joint Venture v. Appollo Plaza Associates,* 178 AD2d 695 at 696 (3d Dept 1991)(citations omitted).

It has been held that "[r]educed to its essentials, [to prevail as an adverse possessor] means nothing more than that there must be possession in fact of a type that would give the owner a cause

of action in ejectment against the occupier throughout the prescriptive period." *Brand v Prince*, 35 NY2d 634, 636 (1974).

As simple as that formula may appear, there are, however, a number of caveats. For example, an "[a]wareness that others own the property upon entry on the property or within the 10-year statutory period will defeat any claim of right." *Oak Ponds v Willumsen*, 295 AD2d 587 at 588 (2d Dept 2002); *see also, Bockowski v Malak*, 208 AD2d 572 (2d Dept 2001).

In addition to the number of elements required, the law places another difficult demand upon the would-be adverse possessor: Not only must *all* of the elements be proven (*Bellotti v. Bickhardt, supra*), the evidence must be *clear and convincing. See, e.g., Walling v. Przybylo, supra; DeRosa v. DeRosa, supra; Beyer v. Patierno, supra; Hall v. Sinclaire, supra; Giannone v. Trotwood Corp.*, 266 AD2d 430 (2d Dept 1999); *MAG Assoc. v SDR Realty*, 247 AD2d 516 (2d Dept 1998).

The Photographs

Focusing on the issue of the photographs' admissibility, the foundation (as with most demonstrative evidence) should provide some satisfactory indicia of reliability. While typically a photograph is admitted as a fair and accurate or a "correct representation" of what it depicts *(see, e.g.*, PRINCE, RICHARDSON ON EVIDENCE, 11th ed., §4-212), the old photos proffered during the matter at bar were claimed to be admissible under the "ancient document rule." Under that principle, a record or document is admissible if it is: 1) found to be more than 30 years of age, and; 2) proven to have come from proper custody, and; 3) itself free from any indication of fraud or invalidity. *See, e.g., Tillman v. Lincoln Warehouse Corp.*, 72 AD2d 40 (1st Dept 1970). It would, however, be a

misconception to infer that the document entirely "proves itself"; rather, its genuineness is decided by a court, based upon the totality of the circumstances of the specific questioned document. FISCH ON NEW YORK EVIDENCE, 2d ed., §§107, 1016.

By various, somewhat analogous statutes, a ten-year rule has been applied to certain specified documents. For example, the rule applies to lost executions or writs after a sheriff's sale of real property when based upon filed certificates (RPAPL §331), recitals as to heirships in recorded conveyances (RPAPL §341) and maps, surveys and official records affecting real property filed in certain state, county, court or department offices (CPLR §4322).

Research has not disclosed, nor has counsel provided, any case or statute which deems a photograph of any age within the "ancient document" concept's embrace.

ANALYSIS

Upon that backdrop, the court's analysis begins by noting that the undersigned has reviewed the evidence, testimonial as well as by way of exhibits. Regarding that testimony, the exercise included cooly, calmly and objectively observing the witnesses, "the very whites of [their] eyes," during some brief, limited questioning by the court as well as and primarily direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth." WIGMORE ON EVIDENCE, §1367. As a result, the court is satisfied that the record contains sufficient facts to resolve the issue at hand. It should go without saying that in evaluating the witnesses' contributions—in this as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g.,* FISCH ON NEW YORK EVIDENCE, 2d ed., § 1090. Additionally, during the course of its fact-finding analysis, the undersigned's task included, of course, segregating the

competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006). Finally, the evidence has been juxtaposed to logic and commonsense, guided, of course, by the relevant law.

As above-indicated, the plaintiff's burden in this matter was not only credible evidence, but clear and convincing evidence of each of the required elements. The proof, however, falls far short of being either clear or convincing. For example, and focusing on the pivotal tacking requirement, the testimony of the plaintiff and that of his witness may have been candid, but individually and collectively it was inconclusive and less than persuasive. As regards the other relevant issues, the testimony was also far below the required clear and convincing standard. As too was the demonstrative evidence. For example, the so-called "fence" is something less than such; it is not continuous and somewhat physically disintegrated.

The old photographs were even less satisfying. In the first instance, there is some question as to whether they are "documents" within the ancient documents rule's embrace. Secondarily, as noted above, one of the three prongs of the rule is proof that a questioned document came from proper custody[3]. In the matter at bar, such proof is woefully lacking[4]. Lastly, even if, *arguendo*, these

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[3] Parenthetically, it bears noting the older, specified documents statutorily permitted as evidence come from the custody of the state, a county, a court or a department.

[4] Other than some vague references to an unidentified nurse, two unidentified, deceased women, and an unidentified nursing home ("out in Ronkonkoma") the plaintiff supplied little information regarding the photograph's chain of custody. TR 9,10,13,14.

defects were overlooked and the photos deemed admissible, they do not provide clear and convincing evidence of the plaintiff's allegations. The photos may depict a gazebo, etc., but they invite speculation as to whether they are one and the same as on the property today and, if so, at the same location.

DETERMINATION

As a result, it is the determination of the undersigned that the plaintiff has failed to demonstrate, by clear and convincing evidence, that he has acquired title to the disputed real property by adverse possession. Specifically, and as indicated, he has failed to prove that his possession of the disputed land was continuous for the statutory period of ten years.

The Court, therefore, finds for the defendant, and the plaintiff's complaint is dismissed.

The forgoing constitutes the decision, verdict, and order of the Court.

Dated: 8/10/10
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

FINAL DISPOSITION_____NON-FINAL DISPOSITION_____

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