

Healy v Amedore Quantum, LLC

2010 NY Slip Op 32515(U)

September 16, 2010

Supreme Court, Albany County

Docket Number: 07/0292

Judge: Joseph C. Teresi

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

STATE OF NEW YORK
SUPREME COURT
ROBERT L. HEALY, JR.,

COUNTY OF ALBANY

Plaintiff,

-against-

AMEDORE QUANTUM, LLC and
PIONEER SAVINGS BANK,

Defendants.

DECISION and ORDER
INDEX NO. 07-0292
RJI NO. 19-08-3543

AMEDORE QUANTUM, LLC and
PIONEER SAVINGS BANK,

Third-Party Plaintiff,

-against-

JAY GROSSMAN, RICHARD BALL,
HERSHBERG & HERSHBERG and
FRANCIS G. McCLOSKEY,

Third-Party Defendants.

Supreme Court Albany County - All Purpose Term, September 3, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Farer & Schwartz, PC
Steven D. Farer, Esq.
Attorneys for Plaintiff
12 Century Hill Drive
Latham, New York 12110

Englert, Coffey & McHugh
Peter V. Coffey, Esq.
Attorneys for Defendants/Third Party Plaintiffs
PO Box 1092
Schenectady, New York 12301-1092

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Peter Lauricella, Esq.
Attorneys for Third Party Defendants
Hershberg & Hershberg and Francis G. McCloskey
677 Broadway
Albany, New York 12207

Lemery Greisler, LLC
Daniel J. Tyson, Esq.
Attorneys for Third Party Defendant Richard Ball
50 Beaver Street
Albany, New York 12205

Herzog Law Firm P.C.
Keith J. Roland, Esq.
Attorneys for Third-Party Defendant Jay Grossman
7 Southwoods Boulevard
Albany, New York 12211

TERESI, J.:

Plaintiff commenced this adverse possession action, not based upon a written instrument,¹ to quiet title to an “L” shaped parcel (hereinafter “disputed parcel”) of property in Albany, New York. The disputed parcel is located immediately adjacent to the parcel of property Plaintiff and his predecessor in interest (his mother) have owned and lived on since 1968. Issue was joined by Defendants,² title owner and mortgagee of a larger tract of land which includes the disputed parcel. Amedore thereafter commenced a third party action against the prior owners (hereinafter collectively “Grossman and Ball”) and the surveyors they hired³ prior to their purchase of the

¹ That this action is not based upon a written instrument was undisputed by plaintiff and previously held in the prior Decision and Order herein of the Hon. Michael Lynch, dated June 25, 2009, at page 3 (hereinafter “Lynch Decision and Order”).

² Defendants and Third Party Defendants will collectively be referred to as “Amedore.”

³ Hershberg & Hershberg and Francis G. McCloskey will hereinafter collectively be referred to as “H&H.”

disputed parcel. The Third Party Defendants have all joined issue. Discovery has been conducted, is complete and a trial date certain has been set. Each party now moves for summary judgment of their respective claims, with corresponding opposition papers also filed by each. Except for Grossman and Ball's motion, the parties' motions fail to demonstrate their entitlement to judgment as a matter of law, and are denied. Grossman and Ball, however, demonstrated their entitlement to judgment as a matter of law dismissing the third party complaint against them. As no issue of fact was raised, Grossman and Ball's motion for summary judgment is granted.⁴

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion on for summary judgment, the movant must establish, with admissible proof, their right to judgment as a matter of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]; JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384-85 [2005]). Moreover, the movant's burden is an affirmative one, it “may not be met by pointing to gaps in plaintiff's proof.” (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Dow v. Schenectady County Dept. of Social Services, 46 AD3d 1084 [3d Dept. 2007]; Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 [3d Dept. 1996]). If the movant establishes its right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Considering first Plaintiff's motion for summary judgment of its adverse possession

⁴ Grossman and Ball also moved for preclusion of Plaintiff's expert at trial. However, because the claims against them are dismissed, such motion is denied as moot.

claim “it is incumbent upon the [Plaintiff] to demonstrate by clear and convincing evidence that for a period of 10 years [he] 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]). Because Plaintiff’s summary judgment motion alleges a ten year period of adverse possession occurring prior to July 7, 2008, “plaintiffs are entitled to have their claims measured in accordance with the law of prescription as it existed prior to the enactment of the 2008 amendments” to the RPAPL. (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821 [3d Dept. 2010]; see L 2008, ch 269; Franza v. Olin, 73 AD3d 44 [4th Dept. 2010]). As such, Plaintiff must “produce evidence that the subject premises was usually cultivated or improved...” (Gallagher, supra at 1013-14). Which “consist[s] of acts such as are usual in the ordinary cultivation and improvement of similar lands by thrifty owners.” (Ray v. Beacon Hudson Mountain Corp., 88 NY2d 154, 160 [1996][quoting Ramapo Mfg. Co. v. Mapes, 216 NY 362 [1915][internal quotations omitted]; Walling v. Przybylo, 7 NY3d 228 [2006]). Moreover, Plaintiff’s claim extends to “only that portion of the disputed premises that was [actually] cultivated, improved or protected by a substantial enclosure.” (Robinson v Robinson, 34 AD3d 975, 976 [3d Dept. 2006], lv denied 8 NY3d 805 [2007]; Silipigno v. F.R. Smith & Sons, Inc., 71 AD3d 1255 [3d Dept. 2010]).

On this record, Plaintiff failed to demonstrate his entitlement to judgment as a matter law. Plaintiff’s claim is defined by the survey he submitted, which depicts the disputed parcel as bounded on two sides by his adjacent parcel and a public road. Such sides are then enclosed in an “L” shape by a line marking “edge of mowed lawn.”

Considering first Plaintiff's deposition testimony, his generalized allegations fail to meet his prima facie burden of demonstrating "continuous" adverse possession of a specific parcel. He alleges "forty years" of mowing and other non-specific time periods for maintenance of the disputed parcel, without providing any details about the time frame and frequency of the acts performed. He also admitted that he was out of the area, not living at the property adjacent to the disputed parcel, for numerous periods over the past forty years. While Plaintiff described numerous uses, activities and small improvements on the disputed parcel and its border, he again failed to precisely define their dates. These generalized allegations lack the requisite specificity and basis of knowledge necessary to demonstrate, as a matter of law, Plaintiff's continuous adverse possession of a specific parcel of property for the statutory period.

Similarly, Plaintiff's affidavit fails to clarify the "continuous" nature of his, and his predecessor in title's, possession. His affidavit claims that the survey submitted "discloses that the entire [disputed parcel] had been kept in a mowed, manicured condition." Such survey, however, "discloses" nothing other than the condition of the disputed parcel on the date surveyed. Plaintiff's broad qualifying statement that "[t]his was the condition it [(the disputed parcel)] has been kept in since 1968" again fails to provide the requisite specificity or details necessary to demonstrate his "continuous" use as a matter of law. Nor does his affidavit specify the dimensions of the specific parcel of property he, and his predecessor in title, have used with the corresponding dates of use for the defined lot.

The additional affidavits Plaintiff submitted likewise fail to demonstrate his entitlement to summary judgment. Plaintiff's mother's affidavit, like his own, does not sufficiently allege the dates of use and possession of the disputed parcel. Both Plaintiff and his mother's affidavits

alleged that the disputed parcel was “regularly” mowed or “always” used. Again, such undefined and nonspecific statements fail to demonstrate Plaintiff’s entitlement to judgment as a matter of law. Nor is the Plaintiff’s friend’s affidavit sufficiently detailed to cure the above defects in proof. Accordingly, Plaintiff’s motion for summary judgment is denied.

Turning to Amedore’s motion, they too failed to demonstrate their entitlement to judgment as a matter of law. Amedore acknowledges that Plaintiff’s claim must be analyzed under the adverse possession laws as they existed prior to July 7, 2008. (Barra, supra). Within such analysis, however, Amedore failed to demonstrate that Plaintiff did not usually cultivate or improve the disputed parcel. (RPAPL §522[2], version prior to L.2008, c. 269, § 5, eff. July 7, 2008.) Amedore submits no affirmative proof to demonstrate Plaintiff’s lack of usual cultivation or improvement for the years between 1968 and 2008. Instead, they point to gaps in Plaintiff’s proof and recent observations of disputed parcel. A patently insufficient showing. Moreover, considering the proof submitted in a light most favorable to Plaintiff, Amedore failed to demonstrate that Plaintiff’s usual cultivation or improvement was insufficient as a matter of law. (*compare* West Middlebury Baptist Church v. Koester, 50 AD3d 1494 [4th Dept. 2008]; Fatone v. Vona, 287 AD2d 854 [3d Dept. 2001]; 2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Wagman v. Village of Catskill, 213 AD2d 775 [3d Dept. 1995]).

Next, H&H similarly failed to demonstrated their entitlement to judgment dismissing Plaintiff’s complaint. Just as Amedore’s motion impermissibly relied on pointing to gaps in Plaintiff’s proof, H&H also base their motion, in part, on such argument. For the same reasons Amedore’s motion was denied, so too is that portion of H&H’s motion.

H&H also moved for summary judgment claiming that RPAPL §522(2) as modified

effective July 7, 2008 requires summary dismissal of Plaintiff's complaint. (L.2008, c. 269; *see* RPAPL §543). However, as the Lynch Decision and Order previously addressed and denied this claim, it is law of the case and will not be reconsidered. (Briggs v. Chapman, 53 AD3d 900 [3d Dept. 2008]; Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 40 AD3d 1177, 1179 [3d Dept. 2007]; *see also* People v. Evans, 94 NY2d 499 [2000]). As such, the remaining portion of H&H's motion seeking summary judgment of Plaintiff's complaint is denied.

Considering next H&H's motion for summary judgment dismissing Amedore's third party complaint, again H&H failed to demonstrate its entitlement to judgment as a matter of law. The third party complaint alleges H&H's professional malpractice in preparing a survey Amedore ordered, which includes the disputed parcel. H&H's attorney opines that the survey included all material information and did not exclude "the sort of thing that a surveyor would normally depict on a property line survey." Such opinion, however, was neither based upon personal knowledge nor was it properly offered as expert proof. (2 North Street Corp., *supra*). As such, it is of no probative value. Moreover, H&H's attorney's claim was specifically contradicted by defendant McCloskey; he admitted, at his deposition, that a specific fence line should have been included on the survey, but was not. Similarly, H&H proffered no probative evidence to demonstrate Amedore's non-reliance on the H&H survey or its lack of damages. (Id.)

Accordingly, H&H's motion is denied in its entirety.

Lastly, because Grossman and Ball demonstrated their entitlement to judgment as a matter of law dismissing Amedore's third party complaint and no triable issues of fact were raised, Grossman and Ball's motion is granted. The third party complaint alleges that Grossman and Ball breached their "warranty of title," contained in the deed which transferred the disputed

parcel to Amedore. However, “there can be no breach of the warranty of title until there is an eviction, actual or constructive, by which the grantee loses possession by process of law or yields possession to a title actually paramount.” (Shortt v. Chandler, 135 AD2d 932, 933 [3d Dept. 1987]). It is uncontested on this record, just as in Shortt, that no “eviction” has taken place as of yet because the underlying adverse possession / quiet title action is still ongoing. As such, Amedore’s breach of warranty of title claim is premature and must be dismissed. Accordingly, Grossman and Ball’s motion for summary judgment is granted.

This Decision and Order is being returned to the attorneys for Ball. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 16, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 6, 2010, Affirmation of Steven Farer, dated August 5, 2010, with attached Exhibits A-G; Affidavit of Robert Healy, Jr., dated May 28, 2010, with attached Exhibit A; Affidavit of Jeffrey Smithson, dated May 11, 2010, with attached Exhibit A; Affirmation of Kenneth Schwartz, dated August 4, 2010, with attached Exhibits A-B; Affidavit of Michael Zareski, dated July 26, 2010.
2. Affirmation of Steven Farer, dated August 21, 2010, with attached Exhibits A-B.
3. Affirmation of Steven Farer, dated August 25, 2010.
4. Affirmation of Steven Farer, dated August 25, 2010.
5. Notice of Cross Motion, dated August 27, 2010; Affirmation of Peter Coffey, dated August 27, 2010, with attached Exhibits A-F; Affirmation No. 1 of Peter Coffey, dated August 27, 2010; Affidavit No. 1 of John Bossalini, dated August 26, 2010, with attached unnumbered Exhibits; Affirmation No. 2 of Peter Coffey, dated August 27, 2010; Affidavit No. 2 of John Bossalini, dated August 26, 2010; Affirmation No. 3 of Peter Coffey, dated August 27, 2010.
6. Notice of Motion, dated August 11, 2010; Affirmation of Peter Lauricella, dated August 11, 2010, with attached Exhibits A-V.
7. Affirmation of Peter Lauricella, dated September 1, 2010.
8. Affirmation of Peter Lauricella, dated August 27, 2010, with attached Exhibits A-C.
9. Notice of Motion, dated August 13, 2010; Affidavit of Daniel Tyson, dated August 13, 2010; Affidavit of Keith Roland, dated August 12, 2010, with attached Exhibit unnumbered and 1-10.
10. Affidavit of Daniel Tyson, dated August 30, 2010; Affidavit of Keith Roland, dated August 27, 2010, with attached Exhibits 1-3.