Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Marie D. Wiese and Richard Wiese,
as Trustees, of the Marie D. Wiese Living Trust
and Marie D. Wiese, individually,

Plaintiffs,

-against-

John Lapham,

Defendant.

Index No.: 15716/2009

Motion Sequence No.: 001; MD
Motion Date: 6/30/10
Submitted: 8/25/10

Motion Sequence No.: 002; MG
CDISPO
SETTJ
Motion Date: 6/30/10
Submitted: 8/25/10

Clerk of the Court

Attorney for Plaintiffs:

Herbert L. Haas, Esq.
34 Dewey Street, P.O. Box 1850
Huntington, NY 11743

Attorney for Defendant:

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969 Jericho Turnpike
Saint James, NY 11780

Upon the following papers numbered 1 to 35 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 10; Notice of Cross Motion and supporting papers, 11 - 31; Answering Affidavits and supporting papers, 32 - 33; Replying Affidavits and supporting papers, 34 - 35.

The plaintiffs commenced this action pursuant to Real Property Actions and Proceedings Law article 15 to quiet title based on a claim of adverse possession to a portion of real property owned by the defendant which lies at the boundary line between their respective properties, which are

located on Harbor Road in Saint James, also known as Head of the Harbor, in the Town of Smithtown. The real property in question is located on the easterly border of the defendant's property and consists of approximately 6200 square feet abutting the westerly property line of the plaintiffs. The property includes an irregular shaped piece of the plaintiff's driveway, a portion of a 15- foot wide stone planter, part of a timber curb and a surrounding area of grass.

The defendant moves for an order granting summary judgment dismissing the complaint, granting him judgment on his counterclaim for trespass and granting him judgment declaring that he is the owner of the disputed property. In support of his motion the defendant submits the pleadings, a survey of the plaintiffs' property and the deposition of the plaintiff Richard Wiese (Richard).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see, Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). If such initial burden is met, the burden shifts to "the party opposing the motion, which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact" (Rebecchi v. Whitmore, 172 AD2d 600 [2nd Dept., 1991]; see, Roth v. Barreto, 289 AD2d 557 [2nd Dept., 2001]; O'Neill v. Fishkill, 134 AD2d 487 [2nd Dept., 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co., 168 AD2d 610 [2nd Dept., 1990]). The Court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn therefrom are to be accepted as true (see, Roth v. Barreto, 289 AD2d 557 [2nd Dept., 2001]; Rennie v. Barbarosa Transport, Ltd., 151 AD2d 379 [1st Dept., 1989]; O'Neill v. Fishkill, 134 AD2d 487 [2nd Dept., 1987]).

In his deposition, Richard testified that his wife, the plaintiff Marie D. Wiese (Marie), installed a gravel driveway on their property in 1960 and that the driveway was paved in 1970. A stone border was added to the driveway in approximately 1995. He indicated that, shortly after his purchase of the property, the prior owner's father-in-law planted a row of pine trees to mark the border between the two properties and that he has improved the area up to those trees by installing the driveway, the planter and planting grass and trees. In addition, a fence was installed from the driveway straight out eight or nine feet to the dense shrubbery on the westerly side of the property to keep children from entering the backyard. Richard further testified that the improvements to the disputed area were not done with the permission of the prior owners, that he believed the area to be his property and that he is not claiming entitlement to the entire area from his property line to the row of tress, but that he would be happy with an easement for the driveway.

Under RPAPL §522, as amended L. 2008, c. 269, §5, effective July 7, 2008, a party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel was possessed and occupied "[w]here there have been acts sufficiently open to put a

reasonably diligent owner on notice" (RPAPL §522 [1]) or "protected by a substantial enclosure" (RPAPL §522 [2]). The predecessor to 522 [1] required the claimant to show that the parcel was either "usually cultivated or improved" (RPAPL §522 [1]; see, Almeida v. Wells, 74 AD3d 1256 [2nd Dept., 2010]; Walsh v. Ellis, 64 AD3d 702 [2nd Dept., 2009]). The type of cultivation or improvement sufficient under the statute will vary with the character, condition, location and potential uses for the property and need only be consistent with the nature of the property so as to indicate exclusive ownership (see, City of Tonawanda v. Ellicott Cr. Homeowners Assn., 86 AD2d 118 [4th Dept., 1982]). Additionally, a party must also satisfy the common-law requirement of demonstrating that the possession of the parcel was hostile, under claim of right, open and notorious, exclusive, and continuous for a period of 10 years or more (see, Walling v. Przybylo, 7 NY3d 228 [2006]; Walsh v. Ellis, 64 AD3d 702 [2nd Dept., 2009]; DeRosa v. DeRosa, 58 AD3d 794 [2nd Dept., 2009]; Franzen v. Cassarino, 159 AD2d 950 [4th Dept.,. 1990]; City of Tonawanda v Ellicott Cr. Homeowners Assn., 86 AD2d 118 [4th Dept., 1982]).

Here, the defendant has failed to establish his entitlement to summary judgment irrespective of whether or not the amended statute is applied herein. Despite the defendant's contentions, Richard's deposition testimony raises material issues of fact regarding the plaintiffs' adverse possession of the disputed property. The defendant's contention that the plaintiffs' claim is defeated by Richard's deposition testimony, wherein he states that he is not claiming the entire disputed area, is without merit. The complaint alleges facts indicating that the plaintiffs' have adversely possessed the 6200 square foot area since the early 1980's. Accepting those allegations as true for the purposes of this motion, the plaintiffs' have adversely possessed the disputed property for the statutory period and they cannot be ousted from title by Richard's subsequent statement. It has been held that, once title is so vested, an admission by the party that the property does not belong to him or her is not sufficient to destroy title thereto, nor does it reinvest title in the original owner (see, Taitt v. Snelling, 74 AD3d 1827 [4th Dept 2010]; Ahl v. Johnson, 272 AD2d 965 [4th Dept., 2000]; City of Tonawanda v. Ellicott Cr. Homeowners Assn., 86 AD2d 118 [4th Dept., 1982]). In addition, the defendant's contention that RPAPL §543 defeats the plaintiffs' claim is unavailing. That statute, added L. 2008, c. 269, §8, and effective July 7, 2008, removes from the ambit of RPAPL Article 5 minor, non-structural encroachments and property maintenance matters, such as are relevant herein, by stating that they will be hereafter be "deemed permissive and non-adverse." However, it has been held that, once vested by virtue of adverse possession, title may be divested only by a transfer complying with the formalities prescribed by law (see, Valkenburgh v. Lutz, 304 NY 95 [1952]; Casa Del Mar Club Holding Co. v. Town Bd. of Hempstead, Nassau County, 124 NYS2d 731 [Sup Ct, Nassau County 1953]), and that title "may not be disturbed retroactively by newly enacted or amended legislation" (see, Barra v. Norfolk S. Ry. Co., 2010 NY Slip Op 6036 [3rd Dept., 2010]; Franza v. Olin, 73 AD3d 44 [4th Dept., 2010]; Baker v. Oakwood, 123 NY 16 [1890]).

Accordingly, the defendant's motion for summary judgment is denied.

The plaintiffs' cross-move for summary judgment in their favor. In support of their motion, the plaintiffs submit, *inter alia*, the pleadings, an affidavit from Richard, a survey including the disputed property and miscellaneous documents. In his affidavit, Richard swears that his wife,

Marie, took title to their property by deed dated May 11, 1960 and recorded in the Office of the County Clerk on May 17, 1960. He indicates that the property was transferred to Marie D. Wiese and Richard Wiese as Trustees of the Marie D. Wiese Living Trust on March 2, 2000. He further swears that their driveway was roughed in 1961, that it was paved on May 5, 1970, that it was re-coated on October 3, 1971 and that it was re-paved on April 4, 1986. He indicates that Marie added the timber curb in 1979 and that she planted a hedgerow of evergreens on the easterly portion of the defendant's property that same year. Richard states that the 15-foot wide stone planter was built in 1985 and that the fencing was first installed in 1994. He further swears that Marie planted a large area of grass in the early 1980s, which has been mowed, fertilized, manicured and maintained by them continuously since that time.

Here, the plaintiffs have demonstrated their entitlement to summary judgment by proffering clear and convincing evidence that they have cultivated and improved the claimed property in a manner consistent with its nature so as to indicate exclusive ownership of the property for a period well beyond the required statutory period (see, Sievernich v Sidorowicz, 281 AD2d 616 [2nd Dept., 2001]; Gaglioti v. Schneider, 272 AD2d 436 [2nd Dept., 2000]; Katona v. Low, 226 AD2d 433 [2nd Dept., 1996]). In addition to the affidavit in which Richard stated that the driveway has been in existence since 1961 and that his wife had planted and maintained the surrounding area of grass in the early 1980s, the plaintiffs submitted a survey delineating the disputed area and documentation of their improvement to the property.

In opposition, the defendant submits the affidavit of his attorney who has no personal knowledge of the facts herein, which is insufficient on a motion for summary judgment (see, Sanbria v. Paduch, 61 AD3d 839 [2nd Dept., 2009]; 9394, LLC v. Farris, 10 AD3d 708 [2nd Dept., 2004]). In addition to its hearsay nature, the attorney's affidavit also fails to address the factual allegations in the complaint, as well as the facts asserted in Richard's deposition testimony and his sworn affidavit. Where key facts appear in a moving party's papers and the opposing party fails to refer to them, they are deemed admitted (see, Matter of Giliya v. Warren, 30 AD3d 420 [2nd Dept., 2006]; Mascoli v. Mascoli, 129 AD2d 778 [2nd Dept., 1987]).

Accordingly, the plaintiffs motion for summary judgment is granted. The plaintiff Trust is entitled to entry of judgment declaring that it is the sole title holder of the real property in dispute by adverse possession.

ORDERED that this motion by the defendant pursuant to CPLR §3212 for summary judgment dismissing the complaint and granting him summary judgment on his counterclaims, is denied; and it is further

ORDERED that this cross motion by the plaintiffs pursuant to CPLR §3212 for summary judgment declaring that they are title owners of the real property in dispute by adverse possession and striking the defendant's verified answer including the affirmative defense and counterclaims therein, is granted; and it is further

ORDERED that the plaintiff shall settle judgment (see, 22 NYCRR §202.48).

Dated: October 7, 2010

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION