

Kelly v Bastianic

2010 NY Slip Op 33309(U)

November 15, 2010

Supreme Court, Suffolk County

Docket Number: 08-20167

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-3-10
ADJ. DATE 9-16-10
Mot. Seq. # 002 - MD
003 - XMD

-----X			
MARK KELLY and MAUREEN KELLY,	:	ERIC S. PILLISCHER, ESQ.	
	:	Attorney for Plaintiffs	
Plaintiffs,	:	1787 Veterans Highway, P.O. Box 9003	
	:	Islandia, New York 11749-9003	
- against -	:		
	:	DEVITT SPELLMAN BARRETT, LLP	
ROSEMARY BASTIANIC and	:	Attorney for Defendants	
CATHLEEN POTTER,	:	50 Route 111	
Defendants.	:	Smithtown, New York 11787	
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Upon the following papers numbered 1 to 16 read on this motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers 6 - 10; Answering Affidavits and supporting papers 11 - 13; Replying Affidavits and supporting papers 14 - 16; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Rosemary Bastianic and Cathleen Potter for summary judgment dismissing the action is denied; and it is further

ORDERED that the cross motion by plaintiffs Mark Kelly and Maureen Kelly for summary judgment on the first cause of action, to dismiss defendants' affirmative defenses, and award plaintiffs injunctive relief is denied.

In this action, plaintiffs Mark Kelly and Maureen Kelly assert a claim of adverse possession to a strip of land that is one foot wide by one hundred twenty-five feet long at the eastern end of their property, which adjoins the property owned by defendants Rosemary Bastianic and Cathleen Potter. The record reveals that plaintiffs purchased the premises located at 43 Edgewater Drive, in the Town of Brookhaven, in 1989,¹ and that defendants purchased the premises located at 41 Edgewater Drive

¹ The property was purchased by deed dated December 19, 1989, recorded in the office of the Clerk of the County of Suffolk on January 8, 1990 under Liber D00010994 page 504.

sometime in 2003.² A survey, dated October 20, 2003, which was prepared for defendant Bastianic, reveals a fence situated within one foot inside defendants' western boundary, which adjoins plaintiffs' property. Plaintiffs seek a judgment declaring that they are the rightful owners of the one foot by one hundred twenty-five foot strip of real property located on their side of the fence; that defendants are permanently enjoined from claiming any right or title in the strip of property; that defendants are permanently enjoined from trespassing on plaintiffs' property; for damages related to motion activated flood lights and surveillance cameras; and for an order directing defendants to remove the flood lights and surveillance cameras.

Defendants now move for summary judgment dismissing the action. Plaintiffs cross-move for summary judgment on their cause of action seeking a declaration of plaintiffs' ownership in fee simple by adverse possession; barring defendants from claiming any right, title or interest in the subject real property and dismissing defendants' affirmative defenses by which they allege ownership in said property; and awarding plaintiffs injunctive relief restraining any continued trespass by defendants on the plaintiffs' premises.

Initially, the Court notes that inasmuch as the action was commenced on July 1, 2008, it is not subject to the amendments to the New York Real Property Actions and Proceedings Law in relation to adverse possession, which went into effect, and apply only to actions filed on or after July 7, 2008.

In support of the motion, defendants contend that plaintiffs did not assert a hostile claim of right to the property owned by defendants for ten years. The fence in issue was originally installed by defendants' predecessor one foot on defendants' property, and was replaced by defendants with the consent and approval of plaintiffs. Defendants further assert that plaintiffs did not assert a hostile claim of right until 2007 after their relationship with defendants soured. In support, they submit, inter alia, the pleadings, the bill of particulars, a survey dated October 10, 2003, and the deposition testimonies of the parties.

Plaintiff Maureen Kelly testified that she and her husband Mark Kelly rented the premises at 43 Edgewater Drive from 1986 through 1989. There was a stockade fence between the property at 43 Edgewater Drive and 41 Edgewater Drive. In 1989 they purchased the premises. In late 1989 she and her husband replaced a fifty-foot section of the fence in the backyard between the two properties, which she thought straddled the property line. They also extended the fence to completely surround the backyard for a new pool. In the 1990's she stated that defendants' predecessor in title extended the fence from the backyard to the curb. She recalled thanking him. Sometime in 2000, she and her husband had their property surveyed in order to apply for a building permit, which revealed that the fence and the property line were in different places.

Plaintiff stated that after defendants moved into 41 Edgewater Drive, they asked her if they could replace parts of the fence between their back yards. She refused twice and later consented on the condition that they take down her plants on her side of the fence and replace them on the new fence.

² The Court notes that no deed was submitted for the purchase of defendants' premises.

Plaintiff stated that defendants removed the old fence and replaced it using the same posts as before and treated her plants well. Plaintiff further stated that in 2007, defendants sued plaintiffs in District Court for overgrown bushes that seeded in defendants' yard. After that time, defendants began placing stakes and string marking the one foot from the fence. Each time plaintiffs removed the stakes and string and placed them in defendants' yard. Plaintiff also stated that defendants installed surveillance cameras that are pointed at her back yard and inside her home. In addition, she stated that motion sensitive flood lights were placed on the side and rear of defendants' home which shine into the bedrooms of her home.

Defendant Rosemary Bastianic testified that she and defendant Cathleen Potter purchased the house at 41 Edgewater in November, 2003. She was not aware that the fence between her property and plaintiffs' property encroached on her property. She had no recollection of conversations with plaintiff Maureen Kelly regarding replacing the fence. She had surveillance cameras installed after she observed plaintiff Maureen Kelly dig out a monument that defendant had placed. She further stated that there were never any surveillance recordings from the camera at the rear of her house. In total there are two cameras on the west side of the house, one under the gutter in front and one under the gutter in the back. There is also one dummy camera in the office window to deter strangers. She further stated that Maureen Kelly never complained to her regarding the cameras or the flood lights.

In opposition, plaintiffs claim that they have continuously possessed the subject strip of land for the statutory period. In addition, plaintiffs assert that defendants' statement that the fence was erected by their predecessor in title is mere speculation. The plaintiffs contend that they fenced in their back yard, maintained a lawn, fences, shrubs and hedges in the strip of land along the fence. In support, they submit, *inter alia*, their deposition testimonies, their personal affidavit which supports plaintiff Maureen Kelly's deposition testimony, and a survey dated January 13, 1981. The survey reveals a map of the property at Mastic Acres and shows plaintiffs' residence in lots 188 and 189. However, the description of the fence on the east side of the property is not clearly written.

Adverse possession must be proven by clear and convincing evidence and five (5) elements must be proven in that possession must be hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the required period of 10 years (RPAPL § 521; *Walling v Przybylo*, 7 NY3d 228, 818 NYS2d 816 [2006]; *Beyer v Patierno*, 29 AD3d 613, 815 NYS2d 194 [2d Dept 2006]). Here, the Court finds that the credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662, 839 NYS2d 773 [2d Dept 2007]; *Pedone v B & B Equipment Co.*, 239 AD2d 397, 662 NYS2d 766 [2d Dept 1997]).

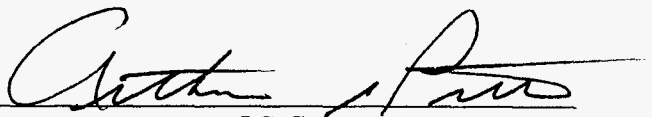
As to the property allegedly adversely possessed, plaintiffs have requested an injunction. In order to obtain a preliminary injunction, a plaintiff has the burden of demonstrating a likelihood of ultimate relief on the merits, irreparable injury if provisional relief is withheld, and a balancing of the equities in plaintiff's favor (*Aetna Insurance Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]; *Quinones v Bd. of Managers of Regalwalk Condominium I*, 242 AD2d 52, 673 NYS2d 450 [2d Dept 1998]). Bare conclusory allegations are insufficient to support a motion for preliminary injunction (*Kaufman v International Business Machines*, 97 AD2d 925, 470 NYS2d 720 [3d Dept 1983], *affd.* 61

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NY2d 930, 474 NYS2d 721 [1984]). Here, plaintiffs do not discuss the irreparable harm which would or even might occur. There has been no showing that the plaintiffs would not be adequately compensated by money damages (*Leo v Levi*, 304 AD2d 621, 759 NYS2d 94 [2d Dept 2003]). Plaintiffs have not set forth a reason why a pecuniary standard might not be applied to measure plaintiffs' damages, if plaintiffs are ultimately successful. Also, the facts in the record are in such sharp dispute, and, therefore, that it cannot be concluded, from an objective point of view, that the plaintiffs have established a clear right to preliminary injunctive relief (see, *Matter of Advanced Digital Security Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612, 862 NYS2d 551 [2d Dept 2008]; *Digestive Liver Disease, P.C. v Patel*, 18 AD3d 423, 793 NYS2d 7732d Dept 2005]). For all of the above reasons, the plaintiffs' request for a preliminary injunction must be denied.

Accordingly, the motion and cross motion are denied.

Dated: November 15, 2010



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION