

Gerace v Back Glenn Assoc., LLC

2010 NY Slip Op 33957(U)

June 4, 2010

Sup Ct, Queens County

Docket Number: 8408/10

Judge: Robert J. McDonald

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 34

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KATHLEEN R. GERACE and SANTO GERACE, **BY: McDONALD, J.**

Plaintiffs, Index No. 8408/10

- against - Motion Date: 6/03/10

BACK GLENN ASSOCIATES, LLC., Motion Cal. No.: 17

Defendant. Motion Seq. No.: 1

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Upon the foregoing papers it is ordered that this motion is determined follows:

The plaintiff Kathleen R. Geraci avers that she and her husband are owners of the premises pursuant to a deed recorded July 20, 1998. That the defendant acquired a deed to an "adjoining parcel of real property" by a deed dated August 10, 2006. The adjacent parcel is a large vacant and undeveloped lot with a shed which contains asbestos.

The premises were previously owned by Ronald Agliere who "represented that the fenced in patio behind the plaintiff's garage was his property" having purchased it from the prior owner.

The plaintiff avers that they have been "in actual possession of a portion of the" adjacent parcel for almost twelve years. That they have held "numerous family functions in the fenced area of the patio" on the adjacent property.

The plaintiffs claim that they are owners of the premises and the adjacent property (hereafter "claimed premises") collectively for a period over twenty-five years.

The plaintiffs aver that they have expended money in order to maintain and keep the claimed premises on a continuous basis since May 25, 1998 to the present and have done so "openly and notoriously" for their own personal use and enjoyment.

The plaintiff alleges that the defendant "acquired title in the property through fraudulent means and/or not in accordance with the laws of the State of New York".

The affirmation in opposition of Robert Scheer, President of the

defendant corporation, recites that there came a time when he noticed that the plaintiff had "begun to erect some sort of wall on a portion" of the disputed premises. He "politely" knocked on the plaintiffs' door to advise her not to spend money to build on his property because it would ultimately have to be removed. She closed the door on him.

The defendant submits that there are five basic elements necessary for the proponent of adverse possession must demonstrate. The possession must be hostile and under a claim of right; actual; it must be open and notorious; it must be exclusive; and it must be continuous.

The plaintiffs have stated: "The disputed subject premises is a large vacant and undeveloped lot with the exception of an old shed which is believed to contain asbestos." She adds "we have held numerous family functions in the fenced in area on the patio of the 'disputed subject premises.'" "The patio and fence have been maintained on the disputed subject premises continuously for over TWENTY-FIVE (25) YEARS." The plaintiffs state that they "have expended certain sums of money in order to maintain and upkeep a portion of the 'disputed subject premises.'" That the previous owner of the plaintiffs' property, which he had purchased in 1984, represented to them that the disputed property was owned by him. When the plaintiffs took title to the property it had a "fenced in patio area" the prior owner of the premises represented that "the prior owner had claimed ownership to the fenced in patio area."

There is an affidavit of Ingrid Broderick dated May 20, 2010. Her affidavit, which refers to her husband's property, alleges that he bought the property, 78-21 Woodhaven Boulevard, December 9, 2002 where she has lived since that date. She states: "That I can personally attest that since December of 2002 (a period of over 7 years) the GERACES [*sic*] have had a patio surrounded by a fence behind their garage on the vacant lot."

As plaintiffs' exhibit shows pictures of the alleged area which appears to be flagstone flooring surrounded by a wooden fence. Of course, there is no way to determine when they were erected.

There are five essential elements necessary to constitute an effective claim for adverse possession: (1) The possession must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and, (5) continuous for the statutory period (*Belotti v Bickhardt*, 228 NY 296; *Fitzgerald v Conroy*, 15 AD3d 534). Further, the elements of adverse possession must be demonstrated by clear and convincing evidence (*Walling v Przybylo*, 7 NY3d 228, 232; *Russoff v Engel*, 89 AD2d 587; *Oak Ponds v Willumsen*, 295 AD2d 587).

The adverse possession under the theory espoused by the plaintiffs dates from the time that is purchased by Mr. Algieri on June 18, 1984. There is no deed attached, but it appears that the property was owned by Ronald Algieri and Lynn McCafferty Algieri. The plaintiffs have owned the property for nearly twelve years.

It appears from Ms. Gerace's affidavit that the fence around the

property was not constructed by the plaintiffs but existed when the plaintiffs took title from its previous owners Ronald Algieri and Lynn McCafferty Algieri, and it was Mr. Algieri who "represented that the fenced in patio behind the plaintiff's [sic] garage was his property." (*Harbor Estate Limited Partnership v May*, 294 AD2d 399). While the fact that the fence was not constructed by the plaintiffs does not impede their claim, it does mean that the alleged adverse possession commenced at an uncertain time after they first affirmatively used the premises and not before.

The notion of title acquired by adverse possession is derived from early English statutes limiting the actions to recover land (*Brand v Prince*, 35 NY2d 634, 636; see, *Post v Pearsall*, 22 Wend 425 [1839]). This common-law right requires that in order to invoke its protection the plaintiff is required to demonstrate "actual possession by demonstrating that the property had been 'usually cultivated or improved'" and the use of the land must be continuous and distinct. (*Franzen v Cassarino*, 159 AD2d 90).

The plaintiffs must also demonstrate a "continuity of possession" which would in effect announce the adverse possessors' physical possession claim to the land (*Ray v Beacon Hudson Mountain Corp*, 88 NY2d 154,160). In the instant one of the ways the plaintiffs demonstrated their use is set out in the Geraci affidavit:

The [sic] we have held numerous family functions in the fenced area for almost TWELVE (12) YEARS. That we have held numerous family functions in the fenced in area on the patio on the "disputed subject premises," including but not limited to seven birthday parties for their grandson, numerous barbecues and the like.

A preliminary injunction is warranted only upon a showing of (1) a likelihood of success on the merits or underlying claim; (2) irreparable injury absent the granting of the injunction; and (3) that a balancing of the equities weighs in favor of the injunction. This is because the granting of such relief must be reserved for those cases in which the party claiming such relief is clearly entitled to such relief (*Aetna Insurance Co v Capasso*, 75 NY2d 860). When the basis for the underlying claim is based upon a theory of adverse possession, the party seeking such relief must "show actual, not constructive, possession to establish the requisite temporal element" (*East 16th Street Homesteaders' Coalition v Lower East Side Coalition Housing Development*, 230 AD2d 622).

The validity of the plaintiffs' claims are in sharp dispute. However, in the absence of injunctive relief staying any future development by the defendant a later judgement in plaintiffs' favor may be rendered ineffectual (see, *Masjid Usman, Inc v Beech 140, LLC*, 68 AD3d 942; *Ruiz v Meloney*, 26 AD3d 485). Under these circumstances, the equities lie in favor of preserving the status quo (see, *Dixon v Malouf*, 61 AD3d 630; *S. P. Q. R. Company, Inc v United Rockland Stairs, Inc*, 57 AD3d 642; *Weinreb Management, LLC v KBD Management, Inc.*, 22 AD3d 571).

Accordingly, a preliminary injunction is granted to the extent that the defendant corporation is stayed with regard to any improvement on the subject disputed property. The plaintiffs are required to file an undertaking in accordance with CPLR 6312, in an amount to be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof and recommendations as to the undertaking. All other monetary issues shall be determined at the conclusion of this matter.

Settle Order.

Dated: Long Island City, N.Y.
June 4, 2010

ROBERT J. McDONALD
J.S.C.