

**Huang v Lobalbo Family Trust Dated Sept. 16, 1999**

2011 NY Slip Op 30188(U)

January 3, 2011

Sup Ct, Queens County

Docket Number: 18452/05

Judge: Augustus C. Agate

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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24  
Justice

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MIN S. HUANG and AURORA PATRICIA HUANG,

Index No.: 18452/05

Plaintiffs,

Motion Dated:  
August 24, 2010

-against-

Cal. No.: 21

THE LOBALBO FAMILY TRUST DATED SEPTEMBER  
16, 1999, AZZIMIRO LOBALBO, as TRUSTEE OF  
THE LOBALBO FAMILY TRUST DATED SEPTEMBER 16,  
1999, BENEDETTO LOBALBO, as CO-TRUSTEE OF THE  
LOBALBO FAMILY TRUST DATED SEPTEMBER 16, 1999,  
LI JUAN PENG, NORTH FORK BANK, AS SUCCESSOR BY  
MERGER TO HOME FEDERAL SAVINGS BANK, JP MORGAN  
CHASE BANK, WASHINGTON MUTUAL BANK, FA AND  
JOHN DOES 1 THROUGH 5,

M# 1

Defendants.  
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This Order to Show Cause by the plaintiff for an order vacating the stay herein and enjoining defendant Li Juan Peng from removing a stockade fence on the subject property and enjoin the defendant from entering upon, using and/or occupying certain real property and other relief is decided as follows:

At the outset, the court notes that the court's computer indicates that the stay herein has been vacated, and, thus, the branch of the Order to Show Cause to vacate the stay is moot.

Pursuant to a deed dated August 6, 1999 between plaintiffs and Helge Steen Steensen and Else Steensen, plaintiffs acquired premises located at 240-39 42<sup>nd</sup> Avenue in Douglaston, New York. In July 2005, plaintiffs were advised that a stockade fence

separating their property from the adjoining property, owned by the defendant The LoBaldo Family Trust, located at 240-17 42<sup>nd</sup> Avenue, Douglaston, New York actually encroached on defendants' property by 2.36 feet. The attorneys for the LoBaldo Family Trust demanded that the plaintiffs remove the fence. Plaintiffs thereafter advised the attorneys for the LoBaldo Family Trust that they had acquired the premises by adverse possession and demanded that the LoBaldo Family Trust cease and desist from removing the stockade fence. Subsequently, on December 5, 2005, the LoBaldo Family Trust conveyed the premises to defendant Li Juan Peng.

The decision to grant a preliminary injunction is a matter ordinarily committed to sound discretion of the court hearing the motion. (Dixon v Malouf, 61 AD3d 630, 630 [2009]; Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc., 50 AD3d 1072, 1073 [2008]; Nelson, L.P. v Jannace, 248 AD2d 448, 448-449 [1998].) In order to demonstrate entitlement to a preliminary injunction, the movant must establish (1) a probability of success on the merits, (2) the danger of irreparable injury in the absence of injunctive relief, and (3) a balancing of the equities in favor of the movant. (Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 [1990]; Doe v Axelrod, 73 NY2d 748, 750 [1988]; Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., 53 AD3d 612, 613 [2008].)

"A party seeking to obtain title by adverse possession on a

claim not based upon a written instrument must produce evidence that the subject premises was either "usually cultivated or improved" or "protected by a substantial enclosure." (RPAPL § 522[1], [2]; Orsetti v Orsetti, 6 AD3d 683, 684 [2004]; Samter v Maggiore, 309 AD2d 741, 741 [2003]; Rowland v Crystal Bay Constr., Inc., 301 AD2d 585, 586 [2003].) Further, the party must satisfy the common law requirements of adverse possession and demonstrate, by clear and convincing evidence, that the possession of the property was hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory period of ten years. (Orsetti v Orsetti, 6 AD3d at 684; Samter v Maggiore, 309 AD2d at 741; Giannone v Trotwood Corp., 266 AD2d 430, 431 [1999].) Although RPAPL § 543 was added in July 2008 and provides that "the existence of de minimis non structural encroachments including ... fences ... shall be deemed to be permissive and non-adverse", this statute applies to claims filed on or after its effective date of July 8, 2008. The instant action was commenced on August 23, 2005.

In the matter at hand, the court finds that plaintiffs have satisfied the requirements for a preliminary injunction. The plaintiffs would suffer irreparable harm if they were forced to remove the fence, which has existed since 1989 and was part of the property when the plaintiffs purchased it. (see Randisi v Mira Gardens, Inc., 272 AD2d 387, 388 [2000].)

Further, based on the law discussed above, there is a likelihood of plaintiffs' success on the merits. The evidence establishes that the fence has existed in its present location since at least 1989. In addition, both the prior owners, the Steensens, and the plaintiffs, have been in actual, continuous occupation of the premises since 1989 and such possession was open, notorious, hostile and exclusive. There is also evidence that the plaintiffs repaired and maintained the fence and have planted and cared for trees, flowers and shrubbery in the disputed area. (see Zeltser v Sacerdote, 52 AD3d 824, 824 [2008]; Katona v Low, 226 AD2d 433, 434 [1996].) Further, the equities lie in favor of preserving the status quo herein. (see Ryan v Dowicz, 306 AD2d 396, 396 [2003].)

Accordingly, this Order to Show Cause by the plaintiff is granted, and defendant Li Juan Peng, his agents, servants, employees and all persons acting on his behalf, are enjoined and restrained from removing any and all of the stockade fence on the subject property, from removing and/or damaging any trees, shrubs, screen plantings and ground cover in the disputed area and from interfering with plaintiffs' use, occupancy and enjoyment of the disputed area.

The foregoing relief is conditioned upon the plaintiffs providing an undertaking in accordance with CPLR 6312. Upon settlement of the order, the parties may submit proof and

recommendations as to the amount of the undertaking.

Settle Order.

Date: January 3, 2011

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AUGUSTUS C. AGATE, J.S.C.