

O'Brien v Krom

2011 NY Slip Op 30372(U)

February 17, 2011

Supreme Court, Greene County

Docket Number: 08-1844

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

JAMES O'BRIEN & KATHLYN E. O'BRIEN,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 08-1844
RJI NO. 19-10-5459

LEE KROM, GAIL KROM and
MID-HUDSON VALLEY, FCU,

Defendants.

Supreme Court Greene County All Purpose Term, February 1, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Stiefel & Winans
John Winans, Esq.
Attorneys for Plaintiffs
331 Main Street
Catskill, New York 12414

Matthews & Grieco
Robert C. Grieco, Esq.
Attorneys for Defendants
89 John Street
PO Box 3127
Kingston, New York 12402

TERESI, J.:

James and Kathlyn O'Brien (hereinafter collectively "the O'Briens") own a parcel of real property immediately to the west and adjacent to a parcel of real property owned by Lee and Gail Krom (hereinafter collectively "the Kroms").

The O'Briens commenced this action seeking a "decree" of the boundary line separating the two parcels, an injunction requiring the Kroms to remove their encroachments that extend

over such boundary line and an award of damages for trespass. Issue was joined by the Kroms, discovery is ongoing and no note of issue has been filed.

The O'Briens now move for summary judgment declaring the boundary line, requiring the Kroms to remove their encroachments and enjoining the Kroms from trespassing across such boundary line. The Kroms oppose the motion and cross move for summary judgment granting them title to the disputed parcel by adverse possession. The O'Briens oppose the cross-motion. Although the O'Briens demonstrated the common boundary line as a matter of law, because the Kroms raised a triable issue of fact, the O'Briens' motion for summary judgment is denied. Similarly, because the Kroms failed to demonstrate their entitlement to judgment as a matter of law, their motion is also denied.

“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 their respective motions, the movant “bears the initial burden of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form.” (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Quinn v. Depew, 63 AD3d 1425 [3 Dept. 2009]; Lavine v. Town of Lake Luzerne, 296 AD2d 793 [3d Dept. 2002], lv. denied 99 NY2d 501 [2002]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the non-movant to establish, with admissible proof, the existence of a genuine issue of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]; Gholizadeh v. Keifer, 66 AD3d 1209 [3d Dept. 2009]; Klotz v. Warick, 53 AD3d 976 [3d Dept. 2008]; Patterson v. Palmieri, 307 AD2d 668 [3d Dept. 2003], lv. dismissed 1 NY3d 546 [2003]).

Considering first the O'Briens' motion, they demonstrated their prima facie entitlement to a declaration of the boundary line separating the parcels herein.

The O'Briens properly submitted their surveyor's affidavit. The surveyor discussed the title history of the respective adjoining parcels, tracing their titles back to a common title and owner. He also performed a field survey of the original parcel, from which the parties' plots are derived (hereinafter "original parcel"). From such research he discovered discrepancies in the deeds. To resolve such discrepancies, he further researched the first plot that was divided from the original parcel. He analyzed the title to the first plot, and obtained an unrecorded survey of the first plot. Both the original deed to the first plot and its unrecorded survey were from 1951. With these documents, the surveyor determined that the first plot's survey established the "basis of bearing" for subsequently divided parcels. Because the Kroms' parcel was the second plot divided from the original parcel and the O'Briens' plot was third, the surveyor used the 1951 survey to establish the boundary line between the Krom and O'Brien parcels. He further provided a description for what he believes is the common boundary line. With such affirmative admissible proof, the O'Briens duly demonstrated the disputed boundary line as a matter of law. (Gholizadeh v. Keifer, supra).

With the burden shifted, the Kroms raised a triable issue of fact by submitting their own surveyor's affidavit.¹ The Kroms' surveyor reviewed the first plot's 1951 deed and survey, noting the readily apparent discrepancies. While he acknowledged the general intent of the survey to establish the first plot's boundary lines, because of such discrepancies he alleged that

¹ Contrary to the O'Briens' claim that such affidavit is inadmissible because such surveyor was not previously disclosed, the O'Briens did not demonstrate that the Kroms cannot supplement their earlier expert witness disclosure.

additional information was necessary to properly locate the parties' boundary line. In setting a boundary line between the parties' parcels, the Kroms' surveyor relied on the physical features described in the deeds, the boundary lines of other adjacent parcels, an adjacent creek and site improvements. Considering all of the above, the Kroms' surveyor located the parties' boundary line well to the west of where the O'Briens' surveyor located the boundary line. Thus, considering the proof in a light most favorable to the Kroms, a triable issue of fact exists as to the location of the parties' boundary line.

Accordingly, the O'Briens' motion for summary judgment, which was wholly dependent upon their establishing the common boundary line, is denied in its entirety.

Turning next to the Kroms' motion for summary judgment based on their adverse possession claim, they failed to demonstrate their entitlement to judgment as a matter of law.

"To prevail on their adverse possession claim, [the Kroms] were required to demonstrate that their possession of the property was adverse [hostile], under a claim of right, actual, exclusive, open and notorious, and continuous for a 10-year period." (Ziegler v. Serrano, 74 AD3d 1610 [3d Dept. 2010]; Walling v. Przybylo, 7 NY3d 228 [2006]).

Here, to establish their adverse possession, the Kroms submit only the affidavit of Gail Krom.² She alleges that, for more than the statutory period, she has cultivated a flower bed "in the northwesterly corner of the property." She did not describe the size of the flower bed, explain her "cultivation" activities, define "the property," or specify where on the disputed parcel

² Because the Kroms' attorney's affirmation is not based upon "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]). Their surveyors affidavits likewise offer no admissible proof of the Kroms' possession.

the flower bed is located. Rather, in conclusory fashion, she merely states that “according to the plaintiffs [the flower bed] is their property.” Additionally, although she alleged that she and her husband have cut grass “on the west side of [their] property,” for more than the statutory period, she did not explain the extent of the area cut or the frequency of the cutting. Nor did she allege that such cutting occurred on the disputed parcel of land. Similarly unavailing are her additional allegations about the O’Briens’ lack of objections to their use or her 1997 “understanding” of the property line location. Such minimal proof fails to establish, as a matter of law, the Kroms’ entitlement to adverse possession of the disputed parcel.

Accordingly, the Kroms’ motion is denied.

This Decision and Order is being returned to the attorneys for the Kroms. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene 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: February 17, 2011
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 20, 2010; Affidavit of James O'Brien, dated December 13, 2010, with attached Exhibits A-M; Affidavit of Sal Santonastaso, dated December 14, 2010, with attached Exhibits A-C.
2. Notice of Cross Motion, dated January 14, 2011; Affidavit of Thomas Romanchuk, dated January 14, 2011; Affidavit of Thomas Conrad, dated January 14, 2011; Affidavit of Gail Krom, dated January 13, 2011; Affirmation of Robert Grieco, dated January 14, 2011, with attached Exhibits 1-24.
3. Affidavit of John Winans, dated February 1, 2011, with attached Exhibits A-G; Affidavit of Sal Santonastaso, dated February 1, 2011; Affidavit of James O'Brien, dated January 28, 2011, with attached Exhibits A-B.