

Lombino v Neumann
2011 NY Slip Op 32682(U)
October 13, 2011
Sup Ct, Wayne County
Docket Number: 57132/2007
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

JOHN M. LOMBINO and
PAULETTE ANN LOMBINO,
Plaintiffs,

-vs-

CHARLES A. NEUMANN and
RUTH M. NEUMANN,
Defendants.

DECISION
AND
ORDER

Index No. 57132

2007

CHARLES A. NEUMANN and
RUTH M. NEUMANN
423 Ontario Drive
Ontario, New York 14519,
Third-Party Plaintiffs,

-vs-

SHARON NAIRY
991 Cane Patch Lane
Webster, New York 14580,
Third-Party Defendant

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The instant action arises out of a real property dispute. The

Plaintiffs (Lombino) are the owners of a single family residence located on lakefront property at 413 Ontario Drive, Ontario, New York, where they have resided since October 1982. The Defendants/Third-Party Plaintiffs (Neumann), own the adjoining premises located at 423 Ontario Drive, Ontario, New York. The Third-Party Defendant (Nairy) is the prior owner of 423 Ontario Drive, who had owned the property with her late husband since April 1989 and who conveyed the premises to Neumann by warranty deed dated September 24, 2008. (As a preliminary note, it has been alleged by the Neumanns that John Lombino is no longer a record owner of the subject premises, and therefore he should be dropped as a Plaintiff. Unless the Plaintiffs controvert this allegation, the Caption shall be amended accordingly.)

The Lombino Complaint sets forth three causes of action against Neumann, alleging claims based on adverse possession and private nuisance. Neumanns' Third-Party Complaint sets forth six causes of action against Nairy, including breach of warranty, breach of the covenant of quiet enjoyment, the covenant against encumbrances, and the covenant of seisin, together with claims for identification and contribution.

The Plaintiffs contend that they have acquired a portion of the

Neumann premises by adverse possession, which includes a hedgerow extending down to the lake and a cherry tree. The claim appears to have first been made in November 2004, at a time when the Neumanns decided to construct a 9 foot fence between the 2 parcels on the stretch of land to which Lombino lays claim. The relationship between the neighbors rapidly deteriorated, and Lombino commenced this action in May of 2005.

Neumann subsequently commenced the third-party action against Nairy in February of 2008, maintaining that Nairy had been aware of facts at the time of transfer which might be used to challenge their clear title to the premises, thus giving rise to Neumanns' claims regarding breach of various covenants and warranties.

The parties initially filed numerous motions and cross-motions relating to outstanding discovery issues, which will be addressed later in this decision, together with the Neumanns' motion to disqualify Mr. Calleri as attorney for Lombino. First, however, the Court will address the Neumann motion for an order granting summary judgment against the Plaintiffs, dismissing the Lombino Complaint.

In their motion, the Neumanns maintain that the Plaintiffs have failed to establish as a matter of law that they have acquired the property at issue

by adverse possession. It is axiomatic that a claim of adverse possession must be based on possession that is "hostile and under claim of right, actual, open, notorious, exclusive and continuous for more than ten years immediately preceding the commencement of the action." In the Lombino Complaint, as well as in the supporting affidavits submitted with this motion, the Plaintiffs set forth in detail their allegations regarding the respective contributions made by Lombino and Nairy regarding the use and maintenance of the property in question. The Plaintiffs maintain that they engaged in regular and continuous efforts as to the upkeep of the property, including mowing, raking, trimming, weeding as well as the purchase of recreational items involving the cherry tree. The Plaintiffs further maintain that they increased their efforts as to the care of the property after Mr. Nairy became seriously ill.

The Plaintiffs also rely heavily on two affidavits signed by Third Party Defendant Sharon Nairy, the long owner of the Neumann property. These affidavits were prepared as a result of a meeting to which Mrs. Nairy was invited by Lombino at their residence, which also included their attorney Mr. Calleri, who was allegedly an active participant in the discussion and prepared the affidavits in question. These affidavits appear to support the

Plaintiffs' contentions that they assumed the responsibility for the maintenance of the property at issue. Mrs. Nairy has subsequently indicated that she does not have a clear recollection of the substance of that conversation or the contents of the affidavits.

However, in their moving papers, Neumanns assert that the allegations made by Lombino are insufficient as a matter of law to support their adverse possession claims. The Neumanns have submitted affidavits from numerous individuals, the substance of which alleges that the Plaintiffs' use of the property was consensual and permissive, not hostile as required by law, and further, since the use was permissive, that does not meet the additional requirement that the use be hostile for a continuous period of ten years prior to commencement. Further, the Neumanns maintain that the Lombino assertion of adverse possession is not supported by any cognizable "claim of right".

The Court recognizes that, in the proper circumstances, the issue of adverse possession can be a proper subject of a summary judgment motion. However, having reviewed the affidavits of the parties, as well as the statements provided by their respective witnesses, this Court concludes that this action is replete with factual issues regarding the

Plaintiffs' use of the property which must await determination at trial. There are also issues as to claim of right raised by the documentary evidence, including conflicting survey maps.

As to Neumanns' motion to dismiss the Plaintiffs' private nuisance claim, based on the Neumanns' construction of the fence, the Court also finds that there are factual issues which must await trial. Based on the conflicting allegations of the parties, it is impossible to decide as a matter of law whether the structure at issue was erected solely in good faith for the improvement of the Neumanns' premises and for the protection of their privacy, or whether it was constructed in order to annoy and harass the Plaintiffs by blocking their "light, air and view" as "retaliation" - a so-called "spite fence".

Therefore, the Neumann's motion for summary judgment dismissing the Complaint is hereby denied. As a result, the motions and cross-motions made by the various parties in regard to discovery issues need to be addressed by the Court.

There are two motions made by counsel for Mrs. Nairy. One motion requests that the Court issue a protective order, declaring that Nairy need not respond to the Lombino Notice to Admit. The other motion seeks

disclosure of the unredacted statements/affidavits signed by Mrs. Nairy which were generated after her meeting at the Lombino residence with Mr. Calleri. Mr. Calleri subsequently moved for a protective order, directing that he need not comply with the Neumanns' Notice of Deposition. He also seeks a protective order which precludes the disclosure of any unredacted statements executed by Mrs. Nairy.

Both Lombino and Neumann have moved to conduct a deposition of Mrs. Nairy. Finally, in a related motion, Neumann has moved to disqualify Mr. Calleri as attorney for Lombino, based on his participation in the interview of the Third-Party Defendant and the preparation of the Nairy affidavits sought to be used in this litigation.

As to the above motions, the Court holds as follows:

- 1) The Nairy motion for a protective order as to the Lombino Notice to Admit is hereby granted, in that the Notice seeks an admission from Nairy that improperly addresses ultimate issues and conclusions at the core of the instant dispute;
- 2) The Lombino motion for a protective order prohibiting disclosure of the unredacted statements made by Nairy is denied; since the information contained in those statements

was obtained from a party who is not represented by Mr. Calleri, the documents are not protected by the attorney-client privilege, nor do any annotations appearing on the statements automatically constitute attorney work product unless they are shown to reveal the attorney's "legal research, analysis, conclusions, legal theory or case strategy." However, as a precaution, all unredacted statements shall be first submitted directly to the Court for *in-camera* review;

- 3) Counsel for both Lombino and Neumann seek to depose Nairy, which application is hereby granted;
- 4) The motion of counsel for Lombino seeking a protective order, relieving him of the need to appear for a deposition is granted only to the extent that the Neumann Notice to Take Deposition is vacated; Mr. Calleri is not a party to the action, and pursuant to the CPLR, the Notice cannot be used to secure his attendance at a deposition. However, the Court is compelled to conclude that Mr. Calleri's testimony is potentially material and relevant to the extent that he was present during an interview with Mrs. Nairy, resulting in affidavits the contents of

which are intended to be used to support claims made by Lombino. Therefore, the Court agrees to issue an Order directing Mr. Calleri to appear for a deposition, to the extent that the questions to be asked pertain to those issues which relate to the meeting and the preparation and execution of all affidavits;

- 5) All other outstanding discovery must be concluded within 45 days of the completion of depositions.

The most troublesome issue presented to the Court is the motion by the Neumanns to disqualify Mr. Calleri as attorney for the Plaintiffs, based on their allegations that he has made himself a witness as to "material representations at issue in this litigation". It is well-settled that a litigant is entitled to be represented by counsel of his or her choice. However, in this instance, the Defendants maintain that Mr. Calleri is the "central figure" in the debate regarding the making of the Nairy affidavits, which constitute an important basis for the adverse possession claim made by Lombino. Under the Code of Professional Responsibility, an attorney must withdraw as an advocate for his client if it becomes clear that he is likely to be called as a witness on a significant issue of fact in a proceeding.

This Court must express its serious concerns regarding the continued representation of the Plaintiffs by Mr. Calleri. However, the Court has directed Mr. Calleri to be deposed regarding the circumstances leading up to the execution of the two Nairy affidavits. Therefore, at this time the Court will deny the Neumann motion to disqualify Mr. Calleri without prejudice, subject to renewal after his deposition has been concluded.

This Decision constitutes the Order of the Court. If counsel for any party believes that a separate Order is necessary to effectuate any or all of the relief granted herein, he or she may submit a proposed Order to the Court for review within ten (10) days of the date of this Decision, upon notice to all counsel.

Dated: October 13, 2011
 Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice