

**Stewart-Davis v Mizi, Inc.**

2011 NY Slip Op 33847(U)

June 1, 2011

Sup Ct, Bronx County

Docket Number: 13399/2007

Judge: Robert E. Torres

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 29  
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

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EILEEN STEWART-DAVIS as Executrix of the  
ESTATE OF ARNALDO G. FRANKLIN,

Plaintiff,

Index No. 13399/2007

- against -

DECISION AND ORDER

MIZI, INC.,

Defendant.

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In this action, plaintiff seeks the deed to a strip of land ("the disputed strip") that is at the edge of the premises located at 3771 Willett Avenue, Bronx County, New York, Block 4650, Lot 150, which plaintiff alleges Armando Franklin ("the deceased") acquired through adverse possession, and for damages for harm caused by defendant to the deceased's adjoining property at 3769 Willett Avenue and the disputed strip.

Plaintiff previously moved for summary judgment and an order awarding her title to the disputed strip as well as damages caused to 3769 Willett Avenue and the disputed strip by defendant's construction efforts at 3771 Willett Avenue.

In a decision dated July 26, 2010, the court (Williams, J.) denied that branch of plaintiff's motion seeking title to the disputed strip on the ground that plaintiff had not met her burden of proof of establishing that the decedent's use of the disputed strip was without the prior owner's consent. The court granted that branch of plaintiff's motion seeking damages for harm caused by defendant to decedent's property as to liability only, with the actual amount of damages to be determined at trial.

Plaintiff has moved pursuant to CPLR 2221(d) for leave to reargue the court's decision denying summary judgment. This matter was referred to this court pursuant to CPLR 9002.

Plaintiff asserts that the prior court erred in concluding that it was plaintiff's burden to prove that the use of the disputed strip was non-permissive. Plaintiff submits that once a party demonstrates open and continuous use for more than ten years, there is a presumption that the use was hostile, and the burden then shifts to the opposing party to show that the use was permissive, and cites to *Fatone v. Vona*, 287 AD2d 854 (3d Dept. 2001) and *Pickett v. Whipple*, 216 AD2d 833 (3d Dept. 1995) in support of this position.

Defendant maintains that the court was correct in finding that plaintiff failed to meet her burden of establishing entitlement to summary judgment as plaintiff's motion relied almost exclusively on hearsay and speculation and that plaintiff's testimony regarding conversations with the decedent were inadmissible under CPLR 4519, the dead man's statute. Defendant further asserts that numerous issues of fact exist regarding plaintiff's adverse possession claim, including the existence and/or location of a fence between the two properties.

Plaintiff is correct that the prior court erred when it stated that it was plaintiff's burden to demonstrate that consent to use the disputed strip was not obtained from the prior owners of 3771 Willett. See *Fatone v. Vona*, *supra*; *Pickett v. Whipple*, *supra*. However, this court's analysis does not end there as the court must still determine whether plaintiff has met her burden of establishing entitlement to summary judgment on the issue of adverse possession and whether defendant has raised any triable issues of fact in opposition.

A party alleging adverse possession must establish by clear and convincing evidence that its possession of the disputed parcel was "hostile and under a claim of right, actual, open and notorious,

exclusive and continuous” (*Joseph v. Whitcomb*, 279 AD2d122 [1<sup>st</sup> Dept. 2001]) for a period of more than ten years. *See, also, West Middlebury Baptist Church v. Koester*, 50 AD3d 1494, 1495 (4<sup>th</sup> Dept. 2008); *Fatone v. Vona, supra*. In addition, where the claim of right is not based upon a writing, plaintiff must establish the disputed parcel “has been usually cultivated or improved” or “has been protected by a substantial enclosure.” RPAPL 522<sup>1</sup>

In her original motion, plaintiff submitted a sworn affidavit stating that a wire fence ran along the far end of the disputed strip from the time the decedent purchased the property in 1977 until it was allegedly removed by defendant sometime in 2005 (Plaintiff’s Exhibit C), thereby meeting her burden of establishing that the disputed parcel was protected by a substantial enclosure. Plaintiff’s affidavit and/or deposition testimony regarding the fence is admissible as it is based on her own personal observations in addition to any conversations she had with the decedent.

However, in opposition, defendant has submitted the testimony of its owner, Joseph Cohen, that he did not recall seeing such a fence at the time he purchased the property. (Aff. In Op., Exhibit A). In addition, defendant submitted as part of its original opposition papers a 1977 survey which defendant maintains shows the existence of a fence on the exact property line, as well as a 1994 site plan prepared by the decedent which showed no fence at all. (Defendant’s original Aff. in Opp., Exhibits C, F). Based on this evidence, the court finds that the defendant has met its burden of establishing that triable issues of fact exist as to whether and when a fence separated the two properties and precisely where such fence was located.

Accordingly, plaintiff’s motion for leave to reargue is granted and, upon reargument, the

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<sup>1</sup>RPAPL 522 was amended in 2008 to delete the provision involving cultivation or improvement and replacing it with “acts sufficiently open to put a reasonably diligent owner on notice.” L. 2008, c. 269, § 5.

court adheres to the prior court's decision denying summary judgment for the reasons stated herein.

This constitutes the decision and order of the court.

Dated: June 1, 2011



ROBERT E. TORRES, J.S.C.

**ROBERT E. TORRES  
JUDGE**