

**Sorbi v Fluger**

2012 NY Slip Op 32970(U)

December 11, 2012

Sup Ct, Suffolk County

Docket Number: 09-196

Judge: John J.J. Jones Jr

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INDEX No. 09-196  
CAL. No. 12-01033EQ

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 10-10-12 (#006)  
MOTION DATE 11-7-12 (#007)  
ADJ. DATE 11-21-12  
Mot. Seq. # 006 - MotD  
# 007 - XMG; CASEDISP

-----X  
KUROS SORBI and MOJGAN SORBI, :  
 :  
 : Plaintiffs, :  
 :  
 : -against- :  
 :  
STEPHEN FLUGER, SUSAN FLUGER and :  
MARLENE SCHNEIDER, :  
 :  
 : Defendants. :  
-----X

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LAVALLEE LAW OFFICE, PLLC  
Attorney for Defendants  
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Farmingdale, New York 11735

-----X  
STEPHEN FLUGER, :  
 :  
 : Plaintiff, :  
 :  
 : -against- :  
 :  
ACADEMY FENCE COMPANY and KUROS :  
SORBI, :  
 :  
 : Defendants. :  
-----X

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Action No. 2    Index No. 40218/10

-----X  
MARLENE SCHNEIDER, :  
 :  
 : Plaintiff, :  
 :  
 : -against- :  
 :  
ACADEMY FENCE COMPANY and KUROS :  
SORBI, :  
 :  
 : Defendants. :  
-----X

Action No. 3    Index No. 40217/10

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Upon the following papers numbered 1 to 34 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 23; Answering Affidavits and supporting papers 24 - 30; Replying Affidavits and supporting papers 31 - 34; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendants on the counterclaim, Stephen Fluger and Susan Fluger, for an order pursuant to CPLR 3212 granting summary judgment on the counterclaim is granted, and is otherwise denied; and, it is further

**ORDERED** that the cross motion by defendants, Stephen Fluger and Susan Fluger, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint is granted; and, it is further

**ORDERED** that defendants, Stephen Fluger and Susan Fluger, are directed to serve a copy of this order on the Clerk of the District Court of Suffolk, First District, Small Claims Part and upon the Clerk of this Court who shall transfer the court files (transferred to this Court pursuant to an Order dated August 28, 2009) in Action No. 2 above Index No. 40218/10 (Stephen Fluger, Plaintiff -against- Academy Fence Company and Kuros Sorbi, Defendants Index No.: CESC-3103-08) and in Action No. 3 above Index No. 40217/10 (Marlene Schneider, Plaintiff, -against- Academy Fence Company and Kuros Sorbi, Defendants Index No. CESC-9042-09) to the Clerk of the District Court of Suffolk, First District, Small Claims Part.

Plaintiffs commenced this action in or about December 2008 to recover damages and to obtain an injunction for trespass, negligence, and nuisance in connection with a triangular portion of real property owned by them and to which defendants Stephen Fluger and Susan Fluger claim ownership. The plaintiffs are the owners of real property known as 23 Wagon Wheel Lane, Dix Hills, New York and their adjoining neighbors, defendants Stephen Fluger and Susan Fluger, own real property know as 25 Wagon Wheel Lane, Dix Hills, New York. Defendants Stephen Fluger and Susan Fluger acquired title by deed to their property on November 10, 1987. Plaintiffs acquired title by deed to their adjacent property on June 8, 2000.

By their amended verified complaint, plaintiffs assert causes of action for trespass, negligence (in the installation of a black top driveway and basketball hoop and pole), trespass by defendant Marlene Schneider in the parking of her Lexus vehicle, and for nuisance. By their answer, defendants Stephen Fluger and Susan Fluger assert a counterclaim for title by adverse possession to a triangular piece of property as depicted on a certain survey.

Defendants, on the counterclaim, Stephen Fluger and Susan Fluger now move for summary judgment dismissing plaintiffs' first, second, third, and fourth causes of action and granting their counterclaim against plaintiffs for adverse possession. Defendants, Stephen Fluger and Susan Fluger, cross move for summary judgment dismissing plaintiffs' claims in their entirety. In support of the motions, defendants submit, *inter alia*, affidavits of defendants Stephen Fluger and Susan Fluger, copies of the pleadings, the transcript of the examination before trial of plaintiff Kuros Sorbi, a survey dated June 1, 2012, a deed dated November 10, 1987 for premises known as 25 Wagon Wheel Lane, Dix Hills, New York from Bernard Kobb and Theresa C. Kobb to defendants Stephen Fluger and Susan Fluger, several color photographs, a May 18, 1988 work order form of Three Guys Fencing, and a consent to change attorney dated September 11, 2009. In opposition to the motions, plaintiffs submit an affidavit of plaintiff Kuros Sorbi, copies of a deed dated June 8, 2000 for premises known as 23 Wagon Wheel Lane, Dix Hills, New York from Nam G. Kim and O K

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Soon Hong Kim to plaintiffs Kuros Sorbi and Mojgan Sorbi, a survey inspection report dated April 21, 2000, and an undated survey “Guaranteed To: Kuros and Mojgan Sorbi”.

As a consent to change attorney was executed by defendants Stephen Fluger and Susan Fluger substituting the firm of Zaklukiewicz, Puzo and Morrissey, LLP as their attorneys in the defense of the claims asserted by plaintiffs, the motion for summary judgment (designated motion sequence # 006) interposed by Lavellee Law Offices, PLLC, which only represents Stephen Fluger and Susan Fluger in their status as defendants, is denied as to that portion which requests summary judgment dismissing plaintiffs’ first, second, third, and fourth causes of action since the Lavellee Law Offices, PLLC was without authority to seek such relief.

Based upon the submissions, it is clear that plaintiffs became the owners of the premises known as 23 Wagon Wheel Lane, Dix Hills, New York in June 2000. This property was adjacent to the premises known as 25 Wagon Wheel Lane, Dix Hills, New York, which was purchased by defendants Stephen Fluger and Susan Fluger in November 1987. Plaintiffs allege that defendants are committing a trespass upon their property in that they have installed a fence, asphalt paving, a basketball pole and hoop, and parked a car upon a triangular piece of property which belongs to them at their premises known as 23 Wagon Wheel Lane. Defendants Stephen Fluger and Susan Fluger each aver that their premises, 25 Wagon Wheel Lane, was improved by a blacktopped driveway at the time of their purchase and that in the spring of 1988 they installed a basketball pole and hoop in the corner of the driveway, a few weeks thereafter they had belgian blocks installed around the perimeter of the entire driveway, and, finally, on May 21, 1988 they had fencing placed on either side of the basketball pole outside of the belgian blocks by Three Guys Fencing. They avow that for a continuous period from the time of their purchase in 1987, they have maintained the driveway (including re-blacktopping twice and sealing it annually), maintained the grass surrounding the belgian blocks outside the driveway, and possessed the area within the fence exclusively, continuously, and openly with no one else having access to it (including parking cars and playing basketball on it). Plaintiffs have provided copies of photographs, which they attest were taken in or about 1988, which depict them in the driveway with the basketball hoop and fencing visible behind them, as well as a copy of a work order from Three Guys Fencing dated May 18, 1988 which states in pertinent part “Install Date: May 21, 1988...Saturday Place perimeter fencing on either side of basketball pole. Keep outside of blocks outlining driveway.”

Defendants Stephen Fluger and Susan Fluger claim that the triangular portion of the property which plaintiff Kuros Sorbi stated at his deposition was approximately 8 feet by 8 feet, but triangular in shape, has become their property through adverse possession. They now seek summary judgment dismissing plaintiffs’ complaint and granting their counterclaim for adverse possession.

With respect to adverse possession, in July 2008, Real Property Actions and Proceedings Law §§ 501, 522, and 543 were amended and the amendments applied solely to those actions commenced after July 7, 2008 (*see Asher v Borenstein*, 76 AD3d 984, 986, 908 NYS2d 90 [2d Dept 2010]). However, the 2008 amendments are not applicable where the property rights under an adverse possession claim vested prior to the 2008 enactment of the amendments (*Shilkoff v Longhitano*, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]; *see Sprotte v Fahey*, 95 AD3d 1103, 944 NYS2d 612 [2d Dept 2012]). Under the law as it existed prior to July 7, 2008, where a claim of adverse possession was not based upon a written document, the plaintiffs had to demonstrate that the disputed parcel was “usually cultivated or improved” or “protected by a substantial inclosure” (*see Bratone v Conforti-Brown*, 79 AD3d 955, 913 NYS2d 762 [2d Dept 2010]; Real

Property Actions and Proceedings Law former § 522 [1], [2], *cf.* L 2008, ch 269, § 5, as amended). In addition, the plaintiffs had to prove by clear and convincing evidence the following common-law requirements of adverse possession: that (1) the possession was hostile and under claim of right; (2) it was actual; (3) it was open and notorious; (4) it was exclusive; and (5) it was continuous for the statutory period of 10 years (*see BTJ Realty, Inc. v Caradonna*, 65 AD3d 657, 658, 885 NYS2d 308 [2d Dept 2009]; *Goldschmidt v Ford St., LLC*, 58 AD3d 803, 804-805, 872 NYS2d 493 [2d Dept 2009]).

An adverse possession may be effectual for the statutory period by successive persons provided that such possession be continued by an unbroken chain of privity between the adverse possessors (*Belotti v Bickhardt*, 228 NY 296, 306, 127 NE 239 [1920]; *see Pegalis v Anderson*, 111 AD2d 796, 797, 490 NYS2d 544 [2d Dept 1985]). Since adverse possession is disfavored as a means of gaining title to land, all elements of an adverse possession claim must be proved by clear and convincing evidence (*see Best & Co. Haircutters, Ltd. v Semon*, 81 AD3d 766, 916 NYS2d 632 [2d Dept 2011]). Merely possessing land without any claim of right, no matter how long it continues, gives no title (*see Gerlach v Russo Realty Corp.*, 264 AD2d 756, 695 NYS2d 128 [2d Dept 1999]).

Here, where defendants Stephen Fluger and Susan Fluger have shown that they exclusively occupied the disputed property and have undertaken acts consistent with that ownership, including the paving, sealing, fencing in, playing upon, and parking upon the property since 1988, they have satisfied their burden of proof (*see Sprotte v Fahey, supra*; *Maya's Black Creek, LLC v Balbo Realty Corp.*, 82 AD3d 1175, 920 NYS2d 172 [2d Dept 2011]; *DMPM Property Mgt., LLC v Mastroianni*, 82 AD3d 1332, 918 NYS2d 243 [3d Dept 2011]). During the ten year period after they began the open and notorious possession, neither plaintiffs nor their predecessor in title, attempted to eject defendants Stephen Fluger and Susan Fluger or granted them permission to use the triangular portion of their property. The facts indicate that the usage was open and notorious, exclusive and continuous for a period of more than ten years, and hostile and under a claim of right (*see Best & Co. Haircutters, Ltd. v Semon*, 81 AD3d 766, 916 NYS2d 632 [2d Dept 2011]).

Plaintiffs suggest that an issue of fact exists because a survey inspection report allegedly prepared for them in April 2000 indicates that there were no encroachments upon the property they purchased in 2000 (*i.e.* 23 Wagon Wheel Lane, Dix Hills, New York). They maintain that “[a]t the very least, the Survey Inspection Report raises a question as to whether the area in dispute was enclosed by a fence or even existed at all in 2000.” However, this “report” is a copy which amounts to hearsay, and plaintiffs have submitted no affidavit of facts by the surveyor or by anyone else with knowledge, which would indicate that the fence did not exist and encroach upon the property in 2000. Plaintiffs have failed to raise a triable issue of fact (*see Shilkoff v Longhitano, supra*). Moreover, as defendants have established their right to the property by adverse possession as of 1998, plaintiffs’ submissions are not relevant to the issue.

Accordingly, plaintiffs’ actions, for trespass, negligence in the installation of the driveway and basketball hoop, trespass for parking the Lexus automobile in the driveway, and for nuisance are dismissed as the defendants have shown that they adversely possess the triangular portion of the property in issue; and, defendants are granted summary judgment on their adverse possession claim.


The Court notes that as a result of the within disposition, the only remaining matters pending before the Court are the small claims actions which had been transferred to this Court for a joint trial, while

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“preserving the integrity of each action,” pursuant to this Court’s order of August 28, 2009. Inasmuch as the remaining issues were previously pending in a small claims part, judicial economy would best be served by their transfer back to a small claims part. Accordingly, pursuant to NYS Const. Art. 6 § 19 (a), the remaining matters (*i.e.* Stephen Flugler v Kuros Sorbi and Marlene Schneider v Kuros Sorbi under Actions No. 2 & 3 above, the matters pending against Academy Fence Company having been discontinued) are transferred to the District Court of Suffolk, First District, Small Claims Part.

Submit judgment within sixty days (including a metes and bounds description of the triangular portion of the property which is the subject of the instant litigation).

Dated: 11 Dec. 2012

  
\_\_\_\_\_  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION