Lindbergh v Shlo 54 LLC
2012 NY Slip Op 33779(U)
August 22, 2012
Sup Ct, Kings County
Docket Number: 28985/11
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22th day of August, 2012.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

----------X

EDITH LINDBERGH,

Plaintiff,

-against-

Index No.: 28985/11

SHLO54 LLC, and ARON BISTRITZKY, member
ARON BISTRIZKY individually,

Decision and Order

Defendants.

----------X

The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	1-2,
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Memoranda of Law	5, 6

After oral argument and a review of all submissions herein the Court finds as follows:

Plaintiff moves this Court by Order to Show Cause for a determination of claims to real property pursuant to the provisions of Article 15 of the Real Property Actions and Proceedings Law.

Defendants oppose plaintiff's action pursuant to Article 15 of the Real Property Actions and Proceedings Law on the grounds that it is procedurally defective, and that plaintiff is in effect requesting that she be awarded summary judgment on the four causes of action asserted in her complaint, prior to issue being joined; that plaintiff fails to assert facts sufficient to establish an adverse possession claim in that there is "no claim by plaintiff that a substantial enclosure was ever erected on the LLC property by plaintiff or her predecessor"; that there is no claim that plaintiff ever improved the property. Defendant also opposes plaintiff's claims on the ground that the land strips at issue are not found in plaintiff's "legal description" or "deed", thus plaintiff has no claim for "adverse possession".

Defendants move the court by Cross-Claim to dismiss plaintiff's causes of action and claims for punitive damages.

Background

Plaintiff Edith Lindbergh has resided at 1346 East 27th Street, Brooklyn, New York (Block 7662 and Lot 70) since May of 1957 when she moved into the subject property with her Aunt (Mary P. Corcoran), the record owner. Plaintiff has stated under oath that the strips of property currently under dispute were in continual use and possession by plaintiff and her Aunt until 1972. On September 27, 1972, plaintiff acquired title to the property by a duly executed deed from Mary P. Corcoran and continued the same use and possession of the strips of property at issue.

Both of the disputed strips were incorporated as a portion of plaintiff's driveway and land on which the garage extends at some point before 1957. The disputed driveway strip is approximately six inches by eighty feet and adjoins the remaining portion of plaintiff's driveway. The second disputed strip is approximately three inches wide over which three inches of plaintiff's garage extends. Although defendants do not state in any of their papers the exact date of their purchase of the abutting property, defendants apparently purchased the abutting property in the year 2008.

Without plaintiff's permission or consent, defendants removed a portion of plaintiff's driveway and installed a fence preventing plaintiff from the full use of her driveway as demonstrated by photographs attached as exhibits to plaintiff's Order to Show Cause.

Plaintiff also contends that defendants removed a portion of her garage causing its eventual collapse. These actions by defendants took place in or around June 29, 2011. The sole allegation disputed by defendants is that they did not remove a portion of her garage, but contend that it was a heavy snowfall that caused the collapse of plaintiff's garage.

Discussion

First, defendants contend that plaintiff's action is procedurally defective and that plaintiff is seeking summary judgment before issue has been joined. Plaintiff moves the court by Order to Show Cause pursuant to Article 15 of the RPAPL, which is entitled "Action to Compel the Determination of a Claim to Real Property." A section of Article 15, entitled "Who may maintain an action," provides:

> **Where a person claims an estate or interest in real property; ...such person or municipal corporation, as the case may be, may maintain an action against any other person, known or unknown, including one under disability as hereinafter specified, to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make; provided, however, that where the estate or interest claimed by the plaintiff is for a term of years, the action may not be maintained unless the balance remaining of such term of years is not less than five.**

This provision clearly provides authority for plaintiff to bring such an action, and does not prohibit plaintiff from moving the Court for said relief by Order to Show Cause.

Second, plaintiff does not have any deadline to file an adverse possession claim. Adverse possession, by law, vests within ten years of the date possession began for the plaintiff, if plaintiff meets all of the elements of adverse possession.

> **It is well established that there are five essential elements necessary to constitute an effective adverse possession. Specifically, the possession must be:**
>
> **(1) hostile and under a claim of right;**
>
> **(2) actual;**
>
> **(3) open and notorious;**
>
> **(4) exclusive; and**
>
> **(5) continuous for the statutory period.**

2 N.Y. Jur. 2d Adverse Possession §8.

Defendants' contention is that plaintiff has failed to demonstrate the five essential elements of an adverse possession claim. In fact, defendants insist that because plaintiff's legal descriptions of the boundaries of her land indicate that she was deeded a forty by one hundred foot lot, instead of the forty-one by one hundred foot lot plaintiff contends that she owns, she has "stolen" one foot of land from defendant. However, the Court finds that defendants' contention that plaintiff has "stolen" an extra foot of land abutting defendants' property is the same as an admission that plaintiff has had continual possession and use of this land from the time the driveway and garage were constructed on these disputed strips of land.

This Court finds that by this admission defendants agree that plaintiff has adversely possessed both the strip of land at issue which constitutes a portion of her driveway and the three inches or so of defendants' land onto which her garage encroaches. Defendants have offered no evidence, testimony, or sworn statements to rebut plaintiff's claim of continuous possession of these strips of land for the 54 years during which plaintiff occupied the property, first as a tenant and in 1972, as the owner.

Plaintiff's evidence of her possession of these strips of land is clear. In her affidavit she states that the subject property existed in the same condition as when she first occupied it in 1957, and as when the property was deeded to her in 1972. The driveway and garage were both on the property in 1957 and remained on the property until partially or totally destroyed by actions of the defendants in 2011.

Further, as defendants have already pointed out, plaintiff's possession of the subject strips of property has been adverse as "founded upon a written instrument" since 1961 as well as plaintiff's deed, dated 1972. Accordingly, plaintiff need not prove that the disputed property "was either 'unusually cultivated or improved' or 'protected by a substantial inclosure' ". See, *BTJ Realty, Inc. V. Caradonna*, 65 A.D. 3d 657, 885 N.Y.S. 2d 308 (2nd Dept. 2009); *Goldschmidt v. Ford St., LLC*, 58 A.D. 3d at 805, 872 N.Y.S. 2d 493 (2nd Dept. 2009). If, however, plaintiff had not possessed this property "founded upon a written instrument", the facts presented by defendants

that a garage ("a substantial inclosure") and a driveway (an improvement) encroached upon defendants property, still meet the five elements necessary to show "adverse possession".

Indeed, all that is required to meet the element of "hostile" is a showing that possession constitutes an actual invasion of, or infringement upon the owner's right. *2 N.Y.Jur. 2d Adverse Possession §32.* Hostility may be found even though possession occurred inadvertently or by mistake. *2 N.Y.Jur. 2d Adverse Possession §38.* "'Adverse possession requires very obvious and overt acts which unmistakably repudiate the nonpossessory owner's right by the one possessing the property". *Trevisano v. Giordano*, . 202 A.D. 2d 1071, 609 N.Y.S. 2d 122 (4th Dept. 1994). Plaintiff's driveway and garage having encroached on defendant's property for some 54 years is very open and obvious, and in repudiation of the nonpossessory owner's rights as found in the deed to plaintiff's property as well as the 1961 survey.

Finally, defendants contend that new legislation enacted in July 2008 which amended the RPAPL sections on adverse possession, should apply to a lawsuit filed in 2011. Plaintiff contends that the July 2008 amendments do not apply since her rights vested prior to July 2008. The Court finds that plaintiff's rights vested in 1982, ten years after her continuous possession of property in repudiation of the nonpossessory owner's rights. As ten years is the statutory period in New York, plaintiff's adverse possession of the property at issue vested in 1982. The Appellate Division, Second Department has already held that the 2008 amendments to the adverse possession statutes contained in RPAPL article 5 are not applicable where a plaintiff's property rights vested prior to the enactment of those amendments. *Shilkoff, et al v. Longhitano*, 94 A.D. 3d 974, 943 N.Y.S. 2d 144 (2d Dept. 2012). See also, *Hogan v. Kelly*, 86 A.D. 3d 590. 927 N.Y.S. 2d 157 (2d Dept. 2011); *Hammond v. Baker*, 81 A.D. 3D 1288, 916 N.Y.S2D 702 (4TH Dept. 2011); *Perry v. Edwards*, 79 A.D.3d 1629, 913 N.Y.S.2d 460 (4th Dept. 2010); *Barra v. Norfolk S. Ry Co.*, 75 A.D. 3d 831, 907 N.Y.S.2d 70 (3rd Dept. 2010); and *Franza v. Olin*, 73 A.D. 3d 44, 897 N.Y.S. 2d 804 (4th Dept. 2010).

In support of defendants' claims that plaintiff has not continually and/or exclusively possessed the property in dispute, defendants provide an affidavit from a Yitzchok Fuchs who alleges that he resided in a house on the abutting plaintiff's property during 2006-2008, and at

some time he and other family members exited the side door of his residence and walked to the street via the plaintiff's driveway. As the Court has already found that plaintiff's title to this property vested in 1982, Mr. Fuchs' affidavit has no relevance to this matter whatsoever.

Conclusion

Accordingly, it is hereby **Ordered** that plaintiff has demonstrated a prima facie entitlement to a declaration and judgment by this Court and defendants have failed to rebut said entitlement or raise any material fact or facts as to the plaintiff's entitlement to said declaration and judgment.

It is further **Ordered** that the plaintiff is declared and adjudged to be the owner in fee simple absolute of that disputed portion of the real property described in the instant complaint, and that Plaintiff is hereby awarded exclusive possession of the real property and the disputed portion described in plaintiff's complaint together with all of the rights and privileges attending thereto.

And it is furthered **Ordered** that any instrument of record that purports to create any estate or interest in the defendants with respect to the real property or the disputed portion heretofore described is hereby cancelled;

And it is furthered **Ordered** that defendants' Cross-Claims are denied in their entirety and with prejudice.

And it is further **Ordered** that a hearing shall be held to determine the nature and amount of damages to be awarded to the plaintiff on September 27, 2012 at 2:00 p.m. in IAS Part 66, Courtroom 524.

This constitutes the Decision and Order of the Court.

ENTER:

RICHARD VELASQUEZ, J.S.C.

AUG 22 2012

SO ORDERED

Hon. Richard Velasquez