[* 1]

SHORT FORM ORDER

INDEX No. 09-9933

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 6-25-12
ADJ. DATE 8-28-12
Mot. Seq. # 005 - MG CDISPSUBJ

WILLIAM S. MIDGLEY, JR.,

Plaintiff,

- against -

CHARLES L. PHILLIPS, ISABELLE PHILLIPS, SARAH PHILLIPS, DIANE SLAVONIK, ROBERT SAYRE, DONALD SAYRE, GENEVIEVE DUFFEE, LEONIE PHILLIPS CARPENTER, GILBERT PHILLIPS, SADIE L. BURGESS, DELLA PHILLIPS, EDRA V. PHILLIPS ELLINGTON, ETHEL A. PHILLIPS, MILDRED PHILLIPS EVANS, EDITH L. PHILLIPS, FRANK BURGESS, ERSHEL BURGESS, JUNIOR BURGESS, WANDA B. SQUIRE, ELLA PITT, NELLIE WOODBURY, BERTHA D. TERRY, EMMA BADEAU, ELAINE SMITH GRAHAM, LYDIA B. SMITH, FOREIGN & DOMESTIC MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, VIRGINIA BOURENFIEND, EMIL BOURENFIEND, ALICE L. DYER, EVELYN SEALE, NANCY VOLMER, BERTHA H. DAVIS, KENNETH DAVIS, SHARON KIO, ELMER DAVIS JR., FRANCIS P. DAVIS, THE TRUSTEES OF THE ESTATE BELONGING TO THE DIOCESE OF LONG ISLAND, if living, and if deceased, their respective representatives, executors, administrators, husbands, wives, heirs at law, next of kin, grantees, mortgagees, assignees, judgment creditors, receivers, trustees in bankruptcy, trustees, committees, lienors and successors in interest, and their respective husbands, wives or widows, if any, and all persons, parties, corporations, associations, joint stock companies, partnership or any other entity who have or may claim to have any right, title or interest in or lien or encumbrance upon the premises described in the complaint by, through or under any of them, if any, all of whom and whose names and locations are unknown to the plaintiff and each and every person or entity not specifically herein named and who may be entitled to or claim to have any right, title, or interest in the premises described in the complaint,

Defendants.

LARK & FOLTS
Attorney for Plaintiff
28785 Main Road, P.O. Bx 973
Cutchogue, New York 11935-0973

WICKHAM, BRESSLER, GORDON & GEASA, P.C.
Attorney for Defendants Diane Slavonik, Robert Sayre and Donald Sayre
13015 Main Road, P.O. Box 1424
Mattituck, New York 11952

LYNCH & LYNCH
Attorney for Defendant The Trustees of the Estate Belonging to the Diocese of Long Island
401 Franklin Avenue, Suite 311
Garden City, New York 11530

VIRGINIA BAURENFIEND NORCUTT
Pro Se Defendant
340 Tremont Street
Taunton, Massachusetts 02780

4-12-13

Upon the following papers numbered 1 to 40 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 30 - 35; 36 - 37 ; Replying Affidavits and supporting papers 38 - 40 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor is granted.

This action was commenced on March 18, 2009 by plaintiff to quiet title pursuant to RPAPL Article 15 to a parcel of vacant land containing 10.226 acres on the easterly side of Carroll Avenue, Peconic, New York. The property is currently deeded to William P. Buckingham, who died on October 24, 1924, who in his will provided for a life estate but did not devise the property. Since prior to the time of William P. Buckingham's death, the property has been continuously farmed and more recently has been operated as a nursery.

By his complaint, plaintiff alleges that he and his predecessors have been in continuous, actual, uninterrupted occupation and possession of the property as heirs at law and next of kin of William P. Buckingham, exclusive of any other right and that said possession has been and is hostile to defendants, who claim to have some estate or interest in the property, and their predecessors, under claim of right, actual, open, notorious, exclusive and continuous for more than 10 years prior to the commencement of this action. In addition, plaintiff alleges that during said 10 years and years prior thereto, the property has been occupied, controlled and possessed by plaintiff in an open manner to put any diligent third-party claiming to own the property on notice inasmuch as the property has been actively farmed for the growing of potatoes and grain and as a nursery for the growing of trees and plants. Plaintiff also alleges that none of the defendants or their predecessors were ever seized of or possessed the subject property or any part of it within 10 years prior to the commencement of this action and that plaintiff and his predecessors have resisted all rights of intrusion upon the property by defendants or their predecessors or third-parties. Plaintiff seeks a determination that he is the lawful owner and has vested and absolute title in fee simple in said property and that defendants and all persons claiming for or under them be forever barred from any and all claim to an estate or interest in the premises and barred from disturbing or interfering with plaintiff's quiet enjoyment of the property.

By stipulation dated July 20, 2009, defendant Foreign & Domestic Missionary Society of the Protestant Episcopal Church in the United States of America abandoned all right, title and interest that it might have in said action. The answer of defendants Diane Slavonik, Robert Sayre and Donald Sayre, the answer of defendant The Trustee of the Estate belonging to the Diocese of Long Island (Diocese), and the answer of pro se defendant Virginia Baurenfiend Nocutt s/h/a Virginia Bourenfiend all assert general denials to the allegations of the complaint. None of the remaining defendants have answered or appeared in this action. The Court's computerized records indicate that no note of issue has been filed in this action.

Plaintiff now moves for summary judgment determining that he is the owner of the subject property by adverse possession. Plaintiff asserts that the 2008 amendments to Article 5 of the Real Property Actions and Proceedings Law (RPAPL) are inapplicable herein inasmuch as title to the subject property vested in plaintiff in 1990, he having exclusively occupied the premises during the 20 year period after the death of his father. In addition, plaintiff asserts that under the doctrine of tacking, plaintiff and his mother and father before him were in exclusive possession and control of the subject property from the time of his grandfather's death in 1928 to the present. Plaintiff also asserts that there was an implied ouster of his brother-in-law, Robert E. Sayre, Sr., a non-possessing co-tenant.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

"When the entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner" (***Hinkley v State of New York***, 234 NY 309, 316, 137 NE 599 [1922]; *see* ***Vitale v Witts***, 93 AD3d 714, 715-716, 940 NYS2d 294 [2d Dept 2012]; ***Goldschmidt v Ford St., LLC***, 58 AD3d 803, 872 NYS2d 493 [2d Dept 2009]; ***Koudellou v Sakalis***, 29 AD3d at 640, 814 NYS2d 730 [2d Dept 2006]; ***Kings Park Yacht Club, Inc. v State of New York***, 26 AD3d 357, 809 NYS2d 551 [2d Dept 2006]; ***Forsyth v Clauss***, 242 AD2d 364, 661 NYS2d 1004 [2d Dept 1997]).

In a tenancy-in-common, under the common-law, each cotenant has an equal right to possess and enjoy all or any portion of the property as if each cotenant is the sole owner. It so follows that nonpossessory cotenants do not relinquish any of their rights as tenants-in-common when another cotenant assumes exclusive possession of the property (***Myers v Bartholomew***, 91 NY2d 630, 632-633, 674 NYS2d 259 [1998]). In New York, nonpossessory cotenants are protected from the inherent danger that a cotenant's exclusive possession could form the basis of an adverse possession claim by the common-law rule that presumes that a cotenant's possession is possession by and for the benefit of all other cotenants (***Myers v Bartholomew***, 91 NY2d 630, 633, 674 NYS2d 259). Due to this presumption, a tenant-in-common seeking to assert a successful claim of adverse possession is required to show more than mere possession; the cotenant must also commit acts constituting ouster (*id.*). While actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or to deny the rights of cotenants, the common law also recognizes implied ouster where the acts of the possessing cotenant are so openly hostile that the nonpossessing cotenants are presumed to know that the property is being adversely possessed against them (*id.*). The question of when courts should imply an ouster is not easily resolved under the common-law, and in an effort to address the difficulties inherent in the application of common-law principles, the Legislature enacted Civil Practice Act § 41-a which was later codified as RPAPL § 541 (*id.*).

RPAPL § 541 provides,

> Where the relation of tenants in common has existed, the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.

Thus, "[a]bsent ouster, a cotenant may begin to hold adversely only *after* 10 years of exclusive possession. RPAPL 541's statutory presumption, therefore, effectively requires 20 years-or two consecutive 10-year periods-of exclusive possession before a cotenant may be said to have adversely possessed a property owned by tenants-in-common" (***Myers v Bartholomew***, 91 NY2d 630, 634, 674 NYS2d 259).

Paying mortgage and taxes or maintenance expenses, and providing for upkeep of the property, do not constitute acts sufficient to establish a claim of right for purposes of adverse possession as against a cotenant (*see* ***Russo Realty Corp. v Orlando***, 30 AD3d 499, 819 NYS2d 265 [2d Dept 2006]). The mere recording of a deed without any change in possession or notice to allegedly ousted co-tenants, does not constitute an ouster for claim accrual purposes (*see* ***Bank of America, NA v 414 Midland Ave. Assoc., LLC***, 78 AD3d 746, 911 NYS2d 157 [2d Dept 2010]). Where the individual claiming adverse possession has not possessed the property for the statutory period, the owner may "tack his adverse possession to that of his predecessor to satisfy the applicable statutory period" (***Brand v Prince***, 35 NY2d 634, 637, 364 NYS2d 826 [1974]; *see* ***Stroem v Plackis***, 96 AD3d 1040, 1042, 948 NYS2d 90 [2d Dept 2012]; ***Ram v Dann***, 84 AD3d 1204, 1205, 924 NYS2d 482 [2d Dept 2011]).

To establish a claim to property by adverse possession, a claimant must prove, inter alia, that possession of the property was: (1) hostile and under a claim of right; (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period (*see* ***Walling v Przybylo***, 7 NY3d 228, 818 NYS2d 816 [2006]; ***Bratone v Conforti–Brown***, 79 AD3d 955, 913 NYS2d 762 [2d Dept 2010] ; ***Asher v Borenstein***, 76 AD3d 984, 908 NYS2d 90 [2d Dept 2010]; ***Gourdine v Village of Ossining***, 72 AD3d 643, 897 NYS2d 647 [2d Dept 2010]; *see also* ***Hogan v Kelly***, 86 AD3d 590, 591, 927 NYS2d 157 [2d Dept 2011]). Under longstanding decisional law applying these traditional common-law elements, a party seeking adverse possession could assert that he or she was acting under a "claim of right" regardless of whether he or she had actual knowledge of the true owner at the time of possession (*see* ***Walling v Przybylo***, 7 NY3d at 232-233; ***Asher v Borenstein***, 76 AD3d at 986; ***Merget v Westbury Props., LLC***, 65 AD3d 1102, 1105, 885 NYS2d 347 [2d Dept 2009]); see also ***Hogan v Kelly***, 86 AD3d 590, 591, 927 NYS2d 157). However, in 2008 the Legislature enacted changes to the adverse possession statutes contained in RPAPL article 5 (*see* L. 2008, ch. 269). These changes included rewriting RPAPL 501 to include, for the first time, a statutory definition of the "claim of right" element necessary to acquire title by adverse possession (*see* ***Hogan v Kelly***, 86 AD3d 590, 592, 927 NYS2d 157). Pursuant to RPAPL 501 (3), "[a] claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be" (*see* RPAPL 501 [3]). The 2008 amendments to RPAPL article 5, effective on July 7, 2008, apply to all claims filed on said date or thereafter (*see* ***Hartman v Goldman***, 84 AD3d 734, 924 NYS2d 97 [2d Dept 2011]; *see also* ***Hogan v Kelly***, 86 AD3d 590, 592, 927 NYS2d 157). "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" (***Best & Co. Haircutters, Ltd. v Semon***, 81 AD3d 766, 767, 916 NYS2d 632 [2d Dept 2011]; *see* ***Ray v Beacon Hudson Mtn. Corp.***, 88 NY2d 154, 159, 643 NYS2d 939 [1996]; ***Ram v Dann***, 84 AD3d 1204, 1205, 924 NYS2d 482).

Plaintiff informs in his affidavit that he is 86 years old, that he resides at 200 Skunk Lane, Cutchogue, New York, and refers to the subject property as the "Buckingham Farm." He states that his maternal grandfather, Daniel V. Howell, was a farmer and a cousin of William P. Buckingham, and that when his grandfather died on October 29, 1928, his will left all of his property to plaintiff's mother, Alberta Midgley, who operated the farm and cared for the life tenants, the last of whom died in 1942. Plaintiff relates his childhood remembrances of the farm as well as conversations with his maternal grandmother and mother, who are now both deceased. In addition, plaintiff informs that his mother died on June 8, 1949 and left everything in her will to his father,

William S. Midgley, Sr., who took over operation of the farm and continued to rent it to Julius Krupski as plaintiff's mother had done during plaintiff's high school years. Plaintiff also informs that when his father died on October 12, 1970, by his will he named plaintiff executor and left one half of his residuary estate to plaintiff and one half to plaintiff's brother-in-law, Robert E. Sayre, Sr., the widower of plaintiff's sister, Adelaide Midgley, who had died on August 18, 1965. According to plaintiff, in the winter of 1971, Robert E. Sayre, Sr. refused to participate or contribute to plaintiff's efforts to obtain title to the property or in the renting or operation of the farm believing that it was foolish and plaintiff told him that he was excluding him as co-owner, denying him any rights of co-ownership, and that he was not to go on the property or interfere with plaintiff's possession or ownership of the farm, which he never did. Robert E. Sayre, Sr. died on January 18, 2005. Plaintiff also details his rental of the farm over the years, first with the existing tenants Julius Krupski and his son Albert Krupski in the spring of 1971, then to William Bauer in 1973, and thereafter to Henry Stepnowski from 1974 to 1975. Plaintiff explains that when he could not find a tenant in 1976, he farmed it himself hiring William Bauer to plow and "disc up" the property and grew a rye crop for two years, then in 1978 he leased the farm to Stanley Mokus through 1989. Plaintiff further explains that in January 1990 he entered into a lease with Frank Cichanowicz and his partner Donald J. Wilcenski, doing business as Holly Hollow Nurseries, which continued on a word of mouth basis until Mr. Cichanowicz died, and in 2009 plaintiff entered into a new lease with Donald J. Wilcenski, who continued the nursery business as Briarcliff Landscape Inc.

Plaintiff asserts that he ousted and excluded his brother-in-law, Robert E. Sayre, Sr., from the property and since that time in 1971, plaintiff has held himself out as the sole owner and possessor of the farm, and the farmers in the community as well as County and Town agencies that he has interacted with concerning the farm have recognized him as the owner of the property. He notes that since February 1996 he has applied to and renewed his application to the Southold Town Assessors to keep the property in an agricultural assessment program so as to maintain lower taxes on the property. His submissions include copies of the wills referred to in his affidavit as well as affidavits from Albert J. Krupski, Sr., William Bauer, Donald J. Wilcenski and his childhood friend who lived adjacent to the farm, Walter L. Courtenay.

Albert J. Krupski, Sr. recalls in his affidavit that when he graduated from high school in 1945, his father was renting the Buckingham farm from the Midgley family and that he and his father grew primarily potatoes and cauliflower on the farm. He described the boundaries, indicating that the northerly boundary bordered on the Long Island Railroad, the easterly and southerly boundaries were dirt farm roads separating the farm from adjacent potato farms owned at the time by Stanley Mokus and George Berkoski, and the westerly boundary was on Carroll Avenue, and the rear yards of three residential properties. He also recalls his father installing a six-point shallow well on the farm, paid by the Midgleys, for irrigation to grow the potatoes and his father's lease of the property until sometime in the 1970's.

William Bauer avers in his affidavit that he rented the subject farm from plaintiff for the growing of potatoes in the early 1970's, that in 1976 he plowed the land and sowed rye and grain and was paid by plaintiff for his work, and that it is known among local farmers that plaintiff owns the farm referred to as Buckingham Farm.

Donald J. Wilcenski attests in his affidavit that he was personally involved in the execution of leases on the subject property since 1990 for the purpose of establishing a nursery which was an extension of Holly Hollow Nursery and that the entire property has been used since 1990 for the growing of nursery items such as trees and shrubs. He recalls that in the early 1990's a privet hedge was planted on the easterly side of the property along Carroll Avenue to enclose the property to keep out thieves who had entered the nursery and stolen small trees

and shrubs and states that this privet hedge now completely encloses the property along Carroll Avenue. Mr. Wilcenski explains that the leases since 1990 have been renewed either by verbal extensions or written leases, and encloses copies of three written leases all signed by him from January 1, 1990 to December 31, 1993, January 1, 1996 to December 31, 2000, and from July 31, 2009 to December 30, 2010 and from year to year thereafter, and informs that the land is presently rented on a verbal year-to-year extension. He concludes by stating that since 1990 he has been involved in renting the subject property as a nursery from plaintiff who has always represented himself as the owner of the property.

The children of Robert E. Sayre, Sr. and the Diocese submit opposition to plaintiff's motion contending that the motion for summary judgment is premature inasmuch as no discovery other than two sets of document exchanges have been made. They contend that there has been no preliminary conference, no depositions have been conducted, witness statements have not been exchanged, and witnesses referred to in plaintiff's motion papers have not been cross-examined at non-party depositions. They add that plaintiff has exclusive knowledge of the information he presented and that there are numerous questions of fact concerning the identity of the co-tenants, when they were ousted, and whether all the heirs to the estate of William P. Buckingham have been properly served. They further contend that plaintiff's recitation of conversations with his grandmother, mother and Robert E. Sayre, Sr. are all inadmissible under the Dead Man's Statute, CPLR 4519. The Diocese explains that Irving M. Swezey was an heir and that when he died his will devised all the remainder of his real estate not specifically mentioned to the Diocese, which would include the subject property. Two of the children of Robert E. Sayre, Sr., Robert Sayre and Donald Sayre, submit affidavits in support of their opposition.

Donald Sayre avers in his affidavit that after plaintiff's wife died in 2007, he was approached by plaintiff in 2008 advising him that his father, Robert E. Sayre, Sr., had "signed off" in plaintiff's favor concerning certain other property that they had purportedly owned together consisting, in part, of wetlands on Skunk Lane in Cutchogue, New York but not as to the subject property, and that plaintiff then asked Donald Sayre to "sign over" the interest that his father had held in the property, which he refused to do, and that this action then ensued. He also attests that plaintiff failed to make his adverse possession claim until long after the death of Robert E. Sayre, Sr., which would have been met with insurmountable resistance by him, and after the death of plaintiff's wife, his aunt, who would never have permitted it during her lifetime since it would result in an unfair division of the property. Robert Sayre states in his affidavit that prior to the death of his father he was aware of his father's one-half interest in the property as his father had discussed it with him. According to Robert Sayre, his father indicated "in words or substance" that he was aware that the subject property was being used for farming and was content to have it rented out for taxes and was content to have plaintiff arrange the rental as long as taxes were covered and that he was never ousted or otherwise barred from the property. Robert Sayre adds that he was also content with this arrangement.

In reply, plaintiff submits his affidavit asserting that he never wanted to exclude his brother-in-law, Robert E. Sayre, Sr., as a one-half owner but that his brother-in-law basically eliminated himself by refusing to contribute any money for taxes, to retain a lawyer or to find any tenants, or to help with the operation of the farm. By his affidavit he also denies asking Donald Sayre to sign anything. Plaintiff notes that although defendant Diocese opposes based on incomplete discovery, it has not requested any additional discovery following plaintiff's responses to its Demand for Discovery and Inspection and First Set of Interrogatories nor has it provided any valid reasons for its need for additional discovery.

Upon the death of an intestate person, title to his or her realty vests automatically, by operation of law, in that person's distributees (*see* ***Kracker v Roll***, 100 AD2d 424, 474 NYS2d 527 [2d Dept 1984]). The vesting

of title occurs irrespective of any failure to appoint an administrator or to file new deeds (*id.* at 429, 474 NYS2d 527). When William P. Buckingham died intestate in 1924, title to the subject premises vested in his distributees, or heirs, who took such title as tenants-in-common (*see* ***Pravoto v MEF Blders., Inc.***, 217 AD2d 654, 629 NYS2d 796 [2d Dept 1995]; ***Kracker v Roll***, 100 AD2d 424, 474 NYS2d 527). If, as plaintiff presents, Mr. Buckingham had no children, and plaintiff's maternal grandfather was a cousin, plaintiff's grandfather would have been a distributee of Mr. Buckingham and a tenant-in-common with Mr. Buckingham's other distributees. The entry upon the subject property of plaintiff's grandfather and grandmother and mother was purportedly with the permission of William P. Buckingham and his permission terminated upon his death in 1924 (*see* ***Vitale v Witts***, 93 AD3d 714, 715-716, 940 NYS2d 294 [2d Dept 2012]). In any event, plaintiff has amply demonstrated the ripening of his adverse possession claim during the years that he obtained possession of the subject property such that the Dead Man's Statute and the doctrine of tacking need not be addressed.

Here, although the instant action was commenced after the effective date of the 2008 amendments to the adverse possession statutes in RPAPL article 5, the amendments cannot be retroactively applied to deprive a claimant of a property right that vested prior to their enactment (*see* ***Hogan v Kelly***, 86 AD3d 590, 592, 927 NYS2d 157). Therefore, the version of the law in effect at the time the purported adverse possession allegedly ripened into title, 1991, is the law that is applicable to plaintiff's claim (*see id.*). Plaintiff established adverse possession of the subject property by demonstrating through his own affidavit, lease documents, and the affidavits of his renters of the subject property that he hostilely, actually, openly, notoriously, exclusively and continuously possessed the subject property under a claim of right by farming, renting, maintaining, using and improving the subject property from 1971 onward with no monetary or other contributions from any of the defendants (*see* ***Article Ten Properties, Ltd. v Kocak***, 164 AD2d 448, 564 NYS2d 558 [3d Dept 1990]; *see also* ***Krol v Eckman***, 256 AD2d 945, 681 NYS2d 885 [3d Dept 1998]). Thus, plaintiff overcame the presumption of RPAPL 541 by showing that he adversely possessed the subject property for the statutory period required to expunge defendants' claims (*see* ***Article Ten Properties, Ltd. v Kocak***, 164 AD2d 448, 564 NYS2d 558). Notably, the children of Robert E. Sayre, Sr. do not deny or challenge in their affidavits plaintiff's claim and proof that he, solely, found renters, then rented, maintained, farmed, and improved the subject property continuously from 1971 onward, and they provide no indication of any affirmative involvement of their family with the property during said years. Defendants' mere contentment with their complete lack of involvement or monetary or other contribution in the maintenance, continuance, and improvement of the farm, particularly as its rental and viability became more difficult over the years, does not inure to their benefit nor raise a triable issue of fact.

Moreover, defendants have failed to demonstrate how discovery might reveal the existence of material facts within plaintiff's exclusive knowledge concerning adverse possession (*see* ***Djoganopoulos v Polkes***, 95 AD3d 933, 944 NYS2d 217 [2d Dept 2012]). Their speculation that the discovery process may yield evidence sufficient to defeat the motion is not enough to deny the motion as premature (*see* ***2 North Street Corp. v Getty Saugerties Corp.***, 68 AD3d 1392, 892 NYS2d 217 [3d Dept 2009], *lv denied* 14 NY3d 706, 899 NYS2d 755 [2010]).

Accordingly, the motion for summary judgment is granted. Submit judgment.

Dated: April 12, 2013

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**