

**Birch Tree Partners LLC v Windsor Digital Studio,
LLC**

2013 NY Slip Op 34146(U)

April 29, 2013

Supreme Court, Suffolk County

Docket Number: 09-25251

Judge: Joseph C. Pastoressa

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PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 004 - MG; CASEDISP
005 - XMD

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BIRCH TREE PARTNERS LLC,

Plaintiff,

- against -

WINDSOR DIGITAL STUDIO, LLC,
MARDERS PROPERTIES, LLC and MARDERS
THE LANDSCAPE STORE, INC.,

Defendant.

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MACLACHLAN & EAGAN, LLP
Attorney for Plaintiff
241 Pantigo Road
East Hampton, New York 11937

LAMB & BARNOSKY, LLP
Attorney for Defendant Windsor Digital
534 Broadhollow Road, P.O. Box 9034
Melville, New York 11747

ESSEKS, HEFTER & ANGEL, LLP
Attorney for Defendants Windsor Digital, Marders
Properties and Marders The Landscape Store
108 East Main Street, P.O. Box 279
Riverhead, New York 11901

Upon the following papers numbered 1 to 65 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31; Notice of Cross Motion and supporting papers 32 - 43; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 44 - 65; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is granted; and, it is further

ORDERED that the cross motion by plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment on its claim for adverse possession is denied.

The plaintiff commenced this action against defendant Windsor Digital Studio, LLC ("Windsor") on or about July 1, 2009 seeking a declaration of ownership of a certain parcel of land pursuant to Articles 5 and 15 of the RPAPL. On November 5, 2009, plaintiff filed an amended verified complaint

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adding Marders Properties, LLC and Marders the Landscape Store, Inc. ("the Marder defendants") as defendants, as well as two additional causes of action. In its amended complaint plaintiff's first cause of action seeks a declaration of ownership of the same parcel of land from defendant Windsor pursuant to RPAPL Articles 5 and 15; the second cause of action seeks damages from defendant Windsor; and the third cause of action seeks damages from the Marder defendants pursuant to RPAPL §861 for the alleged removal and/or destruction of plantings in the area over which they seek a declaration of ownership.

Plaintiff is the owner of real property known as 382 Further Lane, Amagansett, New York having acquired a bargain and sale deed with covenants from June de H. Weldon as specific devisee u/l/w/t Henry H. Weldon on November 8, 2004. Defendant Windsor is the owner of the adjoining real property known as 408 Further Lane, Amagansett, New York having acquired a bargain and sale deed with covenants from Stephen A. Schwarzman on December 13, 2005. Jane August Howell Lovejoy, a predecessor in interest to plaintiff, transferred by bargain and sale deed with covenants dated October 18, 1956, a portion of the property consisting of 0.106 acres along her eastern border, to Don Francisco and Constance L. Francisco, his wife, who were predecessors in interest to the Windsor defendants. Within this 1,333 square foot property, is the 1,240 parcel, approximately 19 feet wide by 86 feet long, being along the easterly border of plaintiff's property and the westerly border of defendant Windsor's property, to which plaintiff claims title by adverse possession.

Defendants request the court to grant summary judgment dismissing the complaint arguing that plaintiff cannot prove that it had continuous possession of the disputed portion of the property for a full ten years. In support of the motion they include, *inter alia*, copies of the pleadings, deeds, a letter of Peter and Jon Sobel dated August 14, 2007, surveys, and portions of deposition transcripts of Peter and Jonathan Sobel. Plaintiff opposes the motion and cross-moves for partial summary judgment on its adverse possession claim. In support thereof, the motion includes, *inter alia*, an affidavit of Jonathan Sobel, copies of portions of deposition transcripts of Peter and Jonathan Sobel, various photographs of the property in contention, as well as the pleadings.

Plaintiff's complaint and amended complaint refer in each and every instance relative to its claim for adverse possession that "for more than ten (10) years prior to August of 2007" plaintiff showed all the indicia of ownership of the property by adverse possession and that "[f]or more than ten (10) years prior to August of 2007, Weldon's and Plaintiff's actual, continuous and exclusive possession of the Possessed Area was at all times open, actual, notorious, hostile, continuous, exclusive and under claim of right." Peter and Jonathan Sobel are the two members of plaintiff Birch Tree Partners, LLC which was formed in 2004 to purchase the property known as 382 Further Lane, Amagansett, New York. On August 14, 2007 they sent a letter to the principals of defendant Windsor which stated in pertinent part:

In the 1950s, a portion of the property line between our parcels was modified ... [a]s a result, part of the property line juts into our property in the shape of a trapezoid. ... We offered to pay \$150,000 for the property (which is a rate of \$5 million dollars per acre). ... Although we came prepared to pay the \$150,000, ... [we were] advised that the payment was unnecessary as long as we would sign a document preventing a future claim to the parcel, which we agreed to do.

...
Regardless, nothing has changed our strong desire to accept all the terms of Gerald's letter proposal. ... we would like to immediately arrange to sign appropriate documents and remit payment.

In closing, if Lenny's advice that our payment was unnecessary was inaccurate, we can assure you that our intent since the day we spoke with Gerald has always been to pay you \$150,000 for the use of the parcel.

The survey of George Walbridge Surveyors, P.C. certified to Jonathan and Peter Sobel and plaintiff which was last revised on September 7, 2005, clearly depicts the plaintiff property with a "cut out" for the piece of property now in contention. From the survey it is readily observable that the plaintiff's parcel is not rectangular in shape in that a trapezoid shaped portion of the parcel near the pool is "cut out" of the parcel, fenced off, and part of the contiguous property.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

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]).

Plaintiff claims that the adverse possession claim accrued prior to August of 2007, thus the 2008 amendments to the RPAPL are inapplicable (see *Shilkoff v Longhitano supra*). Here, where plaintiff's principals acknowledged in a letter dated August 14, 2007 that they were and had been willing to pay defendant for the "use of the parcel" in contention, their claim fails, as an essential element of the adverse possession claim is that they continued to possess the property under a claim of right during the statutory period. Plaintiff's offer to pay for the use of the parcel constitutes an acknowledgment that the ownership rested in defendant and not in itself (see *Guariglia v Blima Homes, Inc.*, 89 NY2d 851, 652 NYS2d 731 [1996]; *Van Gorder v Masterplanned, Inc.*, 78 NY2d 1106, 578 NYS2d 126 [1991]; *Solow v Liebman*, 253 AD2d 808, 677 NYS2d 622 [2d Dept 1998]).

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted. (As the second and third causes of action rely upon the ownership of the property, the failure to prove ownership through adverse possession renders them moot.) Plaintiff's complaint is dismissed in its entirety and its cross motion for summary judgment on the adverse possession claim is denied.

Dated: April 29, 2013


HON. JOSEPH C. PASTORESSA, J.S.C.

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