MKG Georgica LLC v Popcorn
2015 NY Slip Op 30255(U)
February 18, 2015
Supreme Court, Suffolk County
Docket Number: 14-3195
Judge: Jr., Andrew G. Tarantino
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ORIGINAL WHEN BLUE

SHORT FORM ORDER

INDEX No. 14-3195

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 7-11-14
ADJ. DATE 9-9-14
Mot. Seq. #001 - MG; CASEDISP

MKG GEORGICA LLC,

Plaintiff,

- against -

FAITH B. POPCORN,

Defendant.

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Upon the following papers numbered 1-59 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-26 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 29-40 ; Replying Affidavits and supporting papers 41-57 ; Other Memo of Law 27 - 28; Reply Memo of Law 58-59 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order granting summary judgment in its favor on the complaint and the counterclaims is granted; and it is further

ADJUDGED and ***DECLARED*** that plaintiff has fee simple ownership of the property that is the subject of this action.

In December 2013, Marjorie Chester and Michael Insel, as successor trustees of the Marjorie Chester Revocable Trust, transferred ownership of a two-acre parcel of undeveloped real property on Georgica Pond known as 11 Association Road, Wainscott, New York, to plaintiff MKG Georgica, LLC. Adjoining such property on its northwestern boundary is a parcel of real property known as 9 Association Road, which also overlooks Georgica Pond. Improved with a single-family residence and detached garage, the property known as 9 Association Road was acquired by defendant Faith Popcorn in October 2012 from Alan Tackman acting in his capacity as administrator of the estate of Franc Vitale. The improved real property known as 7 Association Road, which lies adjacent to the western boundary of 9 Association Road, also is owned by defendant, who allegedly obtained an ownership interest in such property nearly 30 years ago.

Subsequently, in February 2014, plaintiff commenced this action under Real Property Actions and Proceedings Law Article 15 to quiet title to an irregular strip of land located on the northwestern border of its property that had been cleared of brush and landscaped. The disputed strip of land, also referred to as the "cleared area," contains part of the driveway for 9 Association Road, a slate pathway, a lawn area with bushes, a wood pile, a section of fencing, a propane gas tank, and a drainage pipe emptying into Georgica Pond. In addition to the cause of action to quiet title, the complaint asserts claims for trespass, ejectment, and injunctive relief. Defendant's answer raises various affirmative defenses, including adverse possession and statute of limitations, and interposes counterclaims for adverse possession and a prescriptive easement over the cleared area.

Plaintiff now moves for an order granting summary judgment in its favor on the complaint and counterclaims, arguing, in part, that documentary evidence and affidavits submitted in support of the motion establish that it holds title to, and is entitled to immediate possession of, the disputed property. In addition to declaratory relief, plaintiff seeks an order ejecting defendant from the disputed property, directing defendant to remove the encroachments from the disputed property, and enjoining defendant from using the disputed property. As to the counterclaims asserted against it, plaintiff argues defendant cannot demonstrate continuous possession of the disputed property for the 10-year period required for both adverse possession and a prescriptive easement. More particularly, plaintiff asserts that, as defendant's predecessor-in-interest, Vitale, passed away in 2010, defendant is unable to establish that Vitale intended to turn over possession of the disputed property along with the property known as 9 Association Road; hence, she is unable to tack any possible period of adverse possession to her two years of ownership. Plaintiff's submissions in support of the motion include certified copies of the deeds transferring title of 9 Association Road and 11 Association Road to the parties; a survey of plaintiff's property prepared in 2014 that delineates the cleared area; photographs of the cleared area; and an affidavit of Mark Gormley, a member of plaintiff. Plaintiff also submits an affidavit of David Saskas, a land surveyor, who surveyed the property at 11 Association Road in 2012 and 2014, and reviewed the deeds for the subject properties issued by Chester and Insel and by Tackman.

Defendant opposes the motion, arguing that the "improvements" at issue "are functional parts of [her] use and occupation of 9 Association Road," and that "the disputed area and attendant improvements were in fact turned over to her at the time she purchased the 9 Association Road property from Vitale." She does not, however, contest plaintiff's evidence that the disputed property is included in the metes and bounds descriptions on the deeds issued by Chester and Insel for the property at 11 Association Road, and that the disputed property is not included in the deed description for the property at 9 Association Road. Defendant further asserts that plaintiff did not meet its burden on the motion of showing as a matter of law that she is not entitled to tack her adverse possession of the disputed property onto an adverse possession period belonging to Vitale. In opposition, defendant submits, among other things, a copy of the administrator's deed transferring ownership of 9 Association Road to her, a survey of such property prepared in 2012, and her own affidavit.

In her affidavit, defendant alleges the disputed area is "the natural extension of the 9 Association Road property," and that she has "first-hand knowledge of both the actions of Vitale in exclusively and continuously using, occupying, improving, cultivating and maintaining the disputed area since at least 1982 . . . and first-hand knowledge that Vitale intended to and did in fact turn over possession of the

disputed area and attendant improvements at the time of her purchase of 9 Association Road in 2012." She alleges that based on her " continuous ownership of the adjacent 7 Association Road property for nearly 30 years" and her "knowledge of both Vitale and the area in question," she is "qualified to attest to Vitale's outward acts of exclusive ownership of the disputed area," and is "intimately familiar with the 9 Association Road property, including the long-standing existence of the drainage pipe, landscaping, driveway, lawn, propane tank, wood pile, and brick and slate decorative structures" on the cleared area.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence 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]). 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 such a showing has been made, 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; mere conclusions and unsubstantiated allegations are insufficient to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a claim to property based on adverse possession, a party must prove the common law requirements that possession of the subject property was hostile, under a claim of right, actual, open and notorious, exclusive, and continuous for a 10-year period (*see* ***Estate of Becker v Murtagh***, 19 NY3d 75, 945 NYS2d 196 [2012]; ***Walling v Przybylo***, 7 NY3d 228, 818 NYS2d 816 [2006]; ***Brand v Prince***, 35 NY2d 634, 364 NYS2d 826 [1974]; ***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]; ***Ram v Dann***, 84 AD3d 1204, 924 NYS2d 482 [2d Dept 2011]). For title to vest under the doctrine of adverse possession "there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (***Brand v Prince***, 35 NY2d 634, 636, 364 NYS2d 826). As the acquisition of title to land by adverse possession is not favored under the law, the elements of such a claim must be proven by clear and convincing evidence (***Estate of Becker v Murtagh***, 19 NY3d 75, 81, 945 NYS2d 196; ***Ray v Beacon Hudson Mtn. Corp.***, 88 NY2d 154, 159, 643 NYS2d 939 [1996]).

Prior to July 2008, a party seeking to establish title by adverse possession on a claim not based upon a written instrument had to show that the land was "usually cultivated or improved" or "protected by a substantial enclosure" (RPAPL 522). The type of cultivation or improvement sufficient under the statute varied with the character, condition, location and potential uses for the property (*see* ***Zeltser v Sacerdote***, 52 AD3d 824, 860 NYS2d 624 [2d Dept 2008]; ***Blumenfeld v DeLuca***, 24 AD3d 405, 807 NYS2d 99 [2d Dept 2005]; ***Barnett v Nelson***, 248 AD2d 656, 670 NYS2d 326 [2d Dept 1998]; *see also* ***Ramapo Mfg. Co. v Mapes***, 216 NY 362, 110 NE 772 [1915]), and only needed to be consistent with the nature of the property to indicate exclusive ownership (*see* ***Gaglioti v Schneider***, 272 AD2d 436, 707 NYS2d 239 [2d Dept 2000]; ***Katona v Low***, 226 AD2d 433, 641 NYS2d 62 [2d Dept 1996]; ***City of***

Tonawanda v Ellicott Creek Homeowners Assn., 86 AD2d 118, 449 NYS2d 116 [4th Dept 1982], *appeal dismissed* 58 NY2d 824 [1983]). Amended by the Legislature in 2008, RPAPL 522 now states that, after July 7, 2008, a party without a claim of title based upon a written instrument making a claim of title to land based on adverse possession must establish either that the land at issue had been "protected by a substantial enclosure" or that "there have been acts sufficiently open to put a reasonably diligent owner on notice." RPAPL 501, also amended by the Legislature in 2008, defines the common law element of "claim of right" as meaning "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case might be." Under RPAPL 543, the presence of "de minimis non-structural encroachments," like fences, shrubs and sheds, is now deemed permissive, as are certain acts of routine maintenance and cultivation, like mowing the lawn. However, the Real Property Actions and Proceedings Law as amended cannot be applied retroactively to deprive a claimant of a property right that vested prior to the commencement date of the new legislation (*see* ***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144; ***Hogan v Kelly***, 86 AD3d 590, 927 NYS2d 157 [2d Dept 2011]; *see also* ***Hammond v Baker***, 81 AD3d 1288, 916 NYS2d 702 [4th Dept 2011]; ***Barra v Norfolk S. Ry. Co.***, 75 AD3d 821, 907 NYS2d 70 [3d Dept 2010]; ***Franza v Olin***, 73 AD3d 44, 897 NYS2d 804 [4th Dept 2010]).

Moreover, "[s]uccessive adverse possessions of property omitted from a deed description, especially contiguous property, may be tacked if it appears that the adverse possessor intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed" (***Brand v Prince***, 35 NY2d 634, 637, 364 NYS2d 826; *see* ***Eddyville Corp. v Relyea***, 35 AD3d 1063, 827 NYS2d 315 [3d Dept 2006]; ***Gjokaj v Fox***, 25 AD3d 759, 809 NYS2d 156 [2d Dept 2006]). Stated differently, "[a]n 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" (***Pegalis v Anderson***, 111 AD2d 796, 797, 490 NYS2d 544 [2d Dept 1985]; *see* ***Belotti v Bickhardt***, 228 NY 296, 306, 127 NE 239 [1920]). Thus, where a party claiming adverse possession has not possessed the property for the statutory period, such party may "'tack his [or her] adverse possession to that of his [or her] predecessor to satisfy the applicable statutory period'" (***Stroem v Plackis***, 96 AD3d 1040, 1042, 948 NYS2d 90 [2d Dept 2012], *quoting* ***Brand v Prince***, 35 NY2d 634, 637, 364 NYS2d 826; *see* ***Pritsiolas v Apple Bankcorp, Inc.***, 120 AD3d 647, 992 NYS2d 71 [2d Dept 2014]). Conversely, absent evidence the predecessor in title intended to transfer possession of land not included in the deed description, there is no chain of privity between adverse possessors, and the party asserting title based on adverse possession is precluded from tacking on to the predecessor's occupation time (*see* ***Stroem v Plackis***, 96 AD3d 1040, 948 NYS2d 90; ***Ram v Dann***, 84 AD3d 1204, 924 NYS2d 482; ***East 13th St. Homesteaders' Coalition v Lower E. Side Coalition Hous. Dev.***, 230 AD2d 622, 646 NYS2d 324 [1st Dept 1996]). Furthermore, a party will not be permitted to tack a predecessor's alleged adverse use to his or her claim of adverse possession if there is no evidence the predecessor asserted made an adverse possession claim against the disputed property (*see* ***Garrett v Holcomb***, 215 AD2d 884, 627 NYS2d 113 [3d Dept 1995]; ***Meerhoff v Rouse***, 4 AD2d 740, 163 NYS2d 746 [4th Dept 1957]).

Similar to adverse possession, an easement by prescription is established by clear and convincing proof of the adverse, open and notorious, continuous, and uninterrupted use of property for a 10-year period (*see* ***Martin Weiszberger in Trust v Husarsky***, 114 AD3d 731, 979 NYS2d 851 [2d Dept 2014];

Ducasse v D'Alonzo, 100 AD3d 953, 954 NYS2d 615 [2d Dept 2012]; ***315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC***, 62 AD3d 690, 878 NYS2d 193 [2d Dept 2009]). A party seeking a right of use by prescription, however, need not establish that such use was exclusive (*see* ***Almeida v Wells***, 74 AD3d 1256, 904 NYS2d 736 [2d Dept 2010]), and may tack on his or her predecessors' prior use to establish the requisite prescriptive period (*see* ***Mihaly v Mahoney***, 126 AD2d 791, 510 NYS2d 826 [3d Dept 1987]; ***Warwick Materials v J.K. Produce Farms***, 111 AD3d 805, 490 NYS2d 551 [2d Dept]).

"Trespass is an intentional entry onto the land of another without justification or permission" (***Woodhull v Town of Riverhead***, 46 AD3d 802, 804, 849 NYS2d 79 [2d Dept 2007]). "The essence of trespass is the invasion of a person's interest in the exclusive possession of land" (***Zimmerman v Carmack***, 292 AD2d 601, 739 NYS2d 430 [2d Dept 2002]). An unlawful encroachment on another's real property is considered a continuous trespass and gives rise to successive causes of action (*see* ***509 Sixth Ave. Corp. v New York City Tr. Auth.***, 15 NY2d 48, 255 NYS2d 89 [1964]; ***Wright v Sokoloff***, 110 AD3d 989, 973 NYS2d 743 [2d Dept 2013]; ***CSC Aquisition-NY, Inc. v 404 Country Rd. 39A, Inc.***, 96 AD3d 986, 947 NYS2d 556 [2d Dept 2012]).

Here, plaintiff's submissions, particularly the deeds to the parties' respective properties, the survey of 11 Association Road, and the affidavit of the land surveyor, Saskas, establish a prima facie case that it is entitled to a declaration that it holds fee simple title to the disputed property, and that it is entitled both to immediate possession of such property and to injunctive relief (*see* ***Bergstrom v McChesney***, 92 AD3d 1125, 938 NYS2d 663 [3d Dept 2012]; ***Skyview Motel, LLC v Wald***, 82 AD3d 1081, 919 NYS2d 191 [2d Dept 2011]). Plaintiff's submissions further make out a prima facie case of trespass and entitlement to injunctive relief preventing defendant's continuing trespass (*see* ***CSC Acquisition-NY, Inc. v 404 County Rd. 39A, Inc.***, 96 AD3d 986, 947 NYS2d 556; ***Long Is. Gynecological Servs. v Murphy***, 298 AD2d 504, 748 NYS2d 776 [2d Dept 2002]). Plaintiff also demonstrated that defendant could not establish possession or use of the disputed property for ten years as required to establish her counterclaims for adverse possession and for a prescriptive easement (*see* ***CSC Acquisition-NY, Inc. v 404 County Rd. 39A, Inc.***, 96 AD3d 986, 947 NYS2d 556; ***Reis v Coron***, 37 AD3d 803, 830 NYS2d 589 [2d Dept 2007]).

The burden, therefore, shifted to defendant to raise a triable issue of fact (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923). Here, the vague, conclusory statements in defendant's affidavit are insufficient to raise factual issues as to whether Vitale adversely possessed the disputed property for the requisite period. Moreover, there is no evidence that Vitale, who passed away two years before defendant took ownership of 9 Association Road, ever asserted an adverse possession claim to the disputed property and intended to pass such a claim to defendant (*see* ***Ram v Dann***, 84 AD3d 1204, 924 NYS2d 482; ***Reis v Condon***, 37 AD3d 803, 830 NYS2d 589; ***Garrett v Holcomb***, 215 AD2d 884, 627 NYS2d 113; ***Berman v Golden***, 131 AD2d 416, 515 NYS2d 859 [2d Dept 1987]). Likewise, there is no evidence Vitale claimed a right to use the disputed property for his driveway or for any of the other encroachments on plaintiff's property, and that he intended to transfer that right to a successive owner of 9 Association Road (***CVS Acquisition-NY, Inc. v 404 Country Rd. 39A, Inc.***, 96 AD3d 986, 947 NYS2d 556).

[* 6]

Accordingly, summary judgment is granted in favor of plaintiff on its cause of action to quiet title to the disputed property, on its causes of action for trespass and injunctive relief, and on the counterclaims for adverse possession and a prescriptive easement. The Court declares that plaintiff is the fee simple owner of the disputed property, and that it is entitled to possession of such property and to removal of the encroachments thereon.

Dated: FEB 18 2015

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION