

Houdek Real Estate Co., LLC v Bayport Postal Realty, LLC

2016 NY Slip Op 31945(U)

October 6, 2016

Supreme Court, Suffolk County

Docket Number: 13-4465

Judge: Joseph C. Pastoressa

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disputed property by adverse possession or prescriptive easement. Specifically, the complaint alleges that plaintiff has exclusively and continually cultivated, used and maintained the disputed area.

Defendant Bayport Postal Realty moves for an order granting summary judgment dismissing the complaint, arguing that plaintiff has failed to meet the threshold requirements for an adverse possession claim or for a prescriptive easement. In support of its motion, defendant submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, an affidavit of Arthur Herman, and surveys and deeds of the subject properties. Plaintiff opposes defendant's motion and cross-moves for summary judgment in its favor. It submits, among other things, an affidavit of Michael Houdek, a copy of the deed for its property, a title report and correspondence from Herman to Edward Houdek.

Herman, who was the sole member of Bayport Postal, LLC, states that Bayport Postal, LLC transferred title of property located on 860 Montauk Highway to defendant Bayport Postal Realty, LLC on November 21, 2012. He states that the subject property was purchased on April 22, 1981 with the intention of building a post office branch for the United States Postal Service (USPS) and then leasing the property to it. He states that the post office was constructed by his construction company in accordance with the requirements of the USPS, which required an 8-foot chain-link security fence running adjacent to the curbs of the asphalt surface located near the loading docks at the rear of the building. He states that in 1987, he was informed that customers of Ye Olde Spirit Shoppe, which is on plaintiff's property, damaged the security fence as they were backing out of the parking lot. He states that he permitted the occasional use of the disputed property by the neighbor and its patrons as long as it did not interfere with his tenant's use of the property. He states that he was never aware of any planting or gardening in the disputed area by the employees of Ye Olde Spirit Shoppe or Mr. Houdek.

At his examination before trial, Michael Houdek, President of Houdek Real Estate Company, LLC, testified that his company owns property known as 844 Montauk Highway in Bayport, New York, and that there is a liquor store located on the property known as Ye Olde Spirit Shoppe. He testified that the company was transferred to him in 2013, after his father, the previous owner, passed away. He testified that the disputed area is bounded by a chain-link fence and is located on plaintiff's side of such fence, which he believes was erected in 1987 by defendant's predecessor. With regard to the disputed area, Houdek testified that his father "planted bushes years ago," but does not recall when it was done. He testified that there is currently only one bush left as the other one has died. He testified that he thinks his father had a landscaper plant a tree in the disputed area around 1999. He testified that his father planted a garden, consisting of tomatoes, cucumbers, green beans, which he described as "very small." He also explained that the planting of the garden was "sporadic" and that he believes the planting covered a "couple of times in the mid 90s and then 2000," but said that "it's been a few years since there has been any sort of vegetables there." Houdek testified that his father planted grass in the disputed area, to supplement the existing grass, around 2001 and also installed an underground water faucet. He testified that the earliest date he mowed the grass was "probably early '90s," that his father also mowed the grass, and at times a landscaper was hired. When asked about the grass, Houdek stated that "it's kind of a crabgrass kind of a thing" and that it "goes down to just the dirt." He testified that when it snows, the landscaper would plow the disputed area. He also testified that at some point his father instructed employees of Ye Olde Spirit Shoppe to park in the disputed area, so that customers could park

on the asphalt, and that employees continue to park there to this day. However, he testified that there are no signs which state that the area is designated for employee parking only and that the customers also park in that area.

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*, *supra* at 81; *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]).

Defendant’s submissions were sufficient to establish a prima facie case that plaintiff will not be able to establish at trial that it had continuous and uninterrupted use of the disputed area for the 10-year prescriptive period, and that the use was open and notorious. Here, Houdek’s testimony concerning the time periods and the use of the disputed area was vague as he was unable to recall precisely when it was cultivated and improved (see *Mohonk Preserve, Inc. v Pardini*, 130 AD3d 1205, 15 NYS3d 235 [3d Dept 2015]; *Robbins v Schiff*, 106 AD3d 1215, 964 NYS2d 749 [3d Dept 2013]). Moreover, the minimal and sporadic planting of the garden and bushes on the disputed area is insufficient, as a matter of law, to constitute the requisite cultivation or improvement (see *Robbins v Schiff*, *supra*; *Mayville v Webb*, 267 AD2d 711, 699 NYS2d 532 [3d Dept 1999]). Furthermore, plaintiff cannot rely on the chain-link fence to demonstrate that the disputed area was protected by a substantial enclosure as the fence was not built by plaintiff or its predecessor, but by defendant’s predecessor (see *Silipigno v F.R. Smith & Sons, Inc.*, 71 AD3d 1255, 896 NYS2d 261 [3d Dept 2010]; *Mayville v Webb*, *supra*; *Mohawk Paper Mills, Inc. v Colaruotolo*, 256 AD2d 924, 681 NYS2d 868 [3d Dept 1998]). In opposition to defendant’s motion, plaintiff failed to raise a triable issue of fact.

As to plaintiff’s claim of an easement by prescription, this type of easement is established through 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]). Generally,

where the plaintiff demonstrates, by clear and convincing evidence, the open and notorious, continuous, and undisputed use of the subject property, it is presumed that such use was adverse, and the burden shifts to the opponent of the prescriptive easement to show that the use was permissive (*see Ducasse v D'Alonzo*, 100 AD3d 953, 954 NYS2d 615 [2d Dept 2012]; *315 Main St. Poughkeepsie v WA 319 Main*, 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 AD2d 805, 490 NYS2d 551 [2d Dept 1985]).

Here, defendant's submissions were insufficient to establish a prima facie case that plaintiff did not acquire a prescriptive easement over the disputed area. The testimony of Houdek demonstrates that employees of Ye Olde Spirit Shoppe have parked on the disputed area for the prescriptive period of 10 years. While defendant contends that the use of the disputed area was a neighborly accommodation, pointing to Herman's affidavit, this conflicts with the testimony and affidavit of Houdek, who states that no permission was ever given to use the disputed area. Thus, a triable issue of fact exists as to whether the use of the disputed property by plaintiff was permissive or hostile. Furthermore, defendant contends that because the disputed area was used for parking in common with the general public, it destroys the presumption of adversity and concludes that plaintiff has failed to establish any actual hostility. However, merely arguing that plaintiff cannot rely on a presumption of adversity is insufficient to establish a prima facie case that plaintiff did not acquire a prescriptive easement. Rather, as defendant is the proponent of this summary judgment motion, it must tender evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Plaintiff's cross motion is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

Although the statutory 120-day period for making a summary judgment motion in this case expired on December 19, 2015, plaintiff did not make their cross motion for summary judgment until March 3, 2016. As there is no explanation in the cross-moving papers for the delay in seeking summary judgment, the cross motion must be denied as untimely (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261; *Bivona v Bob's Discount Furniture of N.Y., LLC*, 90 AD3d 796, 935 NYS2d 605 [2d Dept 2011]; *Ofman v Ginsberg*, 89 AD3d 908, 933 NYS2d 103 [2d Dept 2011]; *Castillo v Valente*, 85 AD3d 1080, 926 NYS2d 304 [2d Dept 2011]; *Brewi-Bijoux v City of New York*, 73 AD3d 1112, 900 NYS2d 885 [2d Dept 2010]). Moreover, the issues raised on the cross motion were not identical to the issues raised by plaintiff's

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motion for summary judgment (*see Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 873 NYS2d 109 [2d Dept 2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]).

Dated: October 6, 2016



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

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