

Bond v Brookview Ct., Inc.

2017 NY Slip Op 33115(U)

November 1, 2017

Supreme Court, Saratoga County

Docket Number: 2016-2124

Judge: Richard E. Sise

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This opinion is uncorrected and not selected for official publication.

PRESENT: HON. RICHARD E. SISE
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

PASCAL BOND and ROXANNE BOND,

Plaintiffs,

DECISION AND ORDER
Index No.: 2016-2124
RJI No.: 45-1-2016-1138

-against-

BROOKVIEW COURT, INC., d/b/a PIGLIAVENTO
BUILDERS, PIGLIAVENTO BUILDERS, MICHAEL
PIGLIAVENTO,

Defendants.

(Supreme Court, Saratoga County, Motion Term)

APPEARANCES: Donald Zee, P.C.
(By: Andrew Brick, Esq.)
Attorneys for Defendants
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Christopher C. Shambo, Esq.
Attorney for Plaintiffs
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Ballston Spa, New York 12020

Sise, J.

In January 2000 plaintiffs purchased real property located at 308 Stone Church Road,
Ballston Spa, Saratoga County. Sometime in late March or early April 2016 plaintiffs received a

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letter from defendants who claimed that the fence at the rear of plaintiffs' property encroached on defendants' adjoining property. Defendants expressed an intent to remove the fence so that they could proceed with work to develop their property. Plaintiffs sent a letter in response contending that they owned the disputed area and would consider any attempt to remove the fence a trespass. The fence was later removed by defendants and plaintiffs brought this action, pursuant to RPAPL article 15, to resolve title to the disputed parcel. Under RPAPL 1501 (1) a person who claims an interest in real property may bring an action to compel a determination of any claim adverse to that of plaintiff, made by defendant, or shown by the public records, or which appears from the allegations of the complaint. Here, plaintiffs assert in the complaint that any claim of defendants to the disputed parcel is barred by the deed to plaintiffs' property or alternatively, by their continued use and occupation of the parcel for a period in excess of that required by statute for the vesting of title through adverse possession.

Defendants have moved to dismiss the complaint based on a defense founded on documentary evidence (CPLR 3211 [a] [1]) and for failure to state a cause of action (CPLR 3211 [a] [7]). "On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference. At the same time, however, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Simkin v Blank*, 19 NY3d 46 [2012] [citations and internal quotations omitted]).

Initially, defendants argue that any claim of title to the disputed area acquired by deed fails as a matter of law because the deed to plaintiffs' property does not include the disputed

parcel. Plaintiffs allege in the complaint that the depth of their property is 163.93 feet on the southern boundary and 167.53 feet on the northern boundary. In addition, they attached to the complaint a copy of their deed and a map which shows their parcel, as of July 2016, and highlights the disputed area. The deed does not contain a metes and bounds description but instead makes reference to a schedule which describes the parcel as Lot 1 as shown on a map entitled "Stone Church Estates" filed December 17, 1966 in the Saratoga County Clerk's Office. Defendants included a copy of this map with their moving papers and argue that the subdivision map shows the depth of plaintiffs' lot to be 150 feet. The map provided by plaintiffs shows the depth of the disputed area to be approximately 16 feet and if, as defendants maintain, the depth of plaintiffs' lot is 150 feet, the disputed parcel would be outside the area conveyed by the deed. However, the subdivision map does not patently show the depth of Lot 1 to be 150 feet. The map shows the length of the line between Lots 5 and 6 to be 150 feet but it is not clear that this also represents the depth of Lot 1 as no such measurement is shown on the boundary lines for Lot 1. Inasmuch as the documentary evidence does not flatly contradict plaintiffs' assertion that the deed to their property includes the disputed area, the motion to dismiss that portion of the claim based on plaintiff's deed must be denied.

The claim based on adverse possession involves a different analysis. To plead a claim of adverse possession five elements must be alleged. "Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period" (*Walling v Przybylo*, 7 NY3d 228 [2006] [citations omitted]; RPAPL 501). In challenging the sufficiency of the allegations in the complaint to support a claim of adverse possession, defendants make two arguments. Initially, they contend that no claim of right is

shown. In addition, they maintain that the quality of the acts alleged to show occupancy and possession are statutorily inadequate.

In 2008 the legislature enacted amendments to the adverse possession statute (RPAPL article 5). Among those amendments, which apply to all actions commenced after the July 7, 2008 effective date of the legislation, is the requirement that a party asserting title by adverse possession have a reasonable basis for asserting a claim of right, i.e. the belief that the property belongs to the adverse possessor (RPAPL 501 [3]).¹ Here, defendants contend that any factual allegation made to show a reasonable basis for the claim of right is undermined by the deed to plaintiffs which, defendants argue, shows that the disputed area is not part of plaintiffs' parcel. The argument is undermined by the absence of a clear showing of the dimensions of Lot 1. Moreover, the statute allows for a claim of adverse possession not founded on a written instrument (RPAPL 521). It follows that a reasonable basis for a claim of right may be established despite the presence of a deed showing title in another.

The 2008 amendment of RPAPL article 5 also added section 543 which provides that "the existence of de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse" (RPAPL 543 [1]). The section further provides that "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse" (RPAPL 543 [2]). In the complaint plaintiffs assert that since purchasing Lot 1 in 2000 the disputed area has been enclosed by a fence, that they have

¹Prior to the 2008 amendment a claim of right could be established by showing that the party claiming through adverse possession occupied the parcel always claiming to be its owner (see *Walling v Przybylo*, 24 AD3d 1 [3d Dept2005] affd 7 NY3d 228 [2006]).

installed landscaping and performed lawn maintenance, used the area for social gatherings and recreational activities and that stone was placed in the area to assist in maintaining septic system laterals. All of these encroachments and uses are de minimis and therefore, permissive and non-adverse (RPAPL 543; *Sadowski v Taylor*, 56 AD3d 991 [3d Dept 2008], building fire pits, planting trees and adding fill are permissive activities). Plaintiffs also allege that they maintained a pool in the disputed area for two to three years after they purchased Lot 1. Even assuming that the presence of the pool was something more than a de minimis encroachment, it was maintained for a relatively short period of time. Inasmuch as the acts constituting plaintiffs' use and possession of the disputed area were permissive and non-adverse, the claim of adverse possession fails.


Accordingly, it is

ORDERED, that the motion to dismiss is granted with respect to so much of the complaint as is based on adverse possession and is in all other respects denied.

This constitutes the decision and order of the Court. The original decision and order is returned to the attorney for defendants. A copy of the decision and order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Albany, New York
November 7, 2017

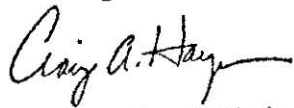

Richard E. Sise
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion date July 13, 2017;
2. Affidavit of Andrew W. Brick dated July 13, 2017 with Exhibits A-B annexed;
3. Affirmation of Christopher C. Shambo dated August 7, 2017 with Exhibits A-B annexed.

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 Craig A. Hayner

 Saratoga County Clerk