

Bolognese v Bantis

2019 NY Slip Op 33499(U)

November 26, 2019

Supreme Court, Kings County

Docket Number: 512070/17

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of November, 2019.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

-----X

RICHARD BOLOGNESE and ANITA BOLOGNESE,

Plaintiffs,

- against-

KALLIOPE BANTIS and SPIRO BANTIS,

Defendants.

-----X

DECISION / ORDER

Index No. 512070/17
Mot. Seq. # 5, 6 and 8

The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2</u>	<u>3-4</u>	<u>5-6</u>
Opposing Affidavits (Affirmations) _____	<u>7</u>	<u>6</u>	<u>8</u>
Reply Affidavits (Affirmations) _____	<u>9</u>		<u>9</u>

Upon the foregoing papers, defendants Kalliope Bantis and Spiro Bantis (Bantis Defendants) move (in motion sequence [MS] five), for an order, pursuant to CPLR 3212, granting them summary judgment on their counterclaim and directing that a permanent injunction be issued compelling plaintiffs, Richard Bolognese and Anita Bolognese (Bolognese Plaintiffs), to remove the retractable roller fence encroaching upon the Bantis Defendants' property at 17 Harbor Lane in Brooklyn (Bantis Property).

The Bolognese Plaintiffs move (in MS six), for an order: (1) granting them partial summary judgment on their first cause of action for a prescriptive easement and their additional claim for adverse possession,¹ pursuant to CPLR 3212; (2) granting them a permanent injunction barring and prohibiting the Bantis Defendants and their successors in interest from maintaining, erecting, placing, obstructing or building anything on the five-foot-wide section of the Bantis Property that forms the western boundary line adjacent to the Bolognese Plaintiffs' property at 15 Harbor Lane in Brooklyn (Bolognese Property); (3) declaring, pursuant to RPAPL Article 15, that: (a) the Bolognese Plaintiffs and future owners of the Bolognese Property have a prescriptive easement over the five-foot-wide section of the Bantis Property that forms the western boundary line adjacent to the Bolognese Property, and (b) the Bolognese Plaintiffs and future owners of the Bolognese Property are fee simple owners of the property located between the parties' garages.

The Bantis Defendants cross-move (in MS eight), for an order: (1) granting them summary judgment dismissing the complaint and the additional claim asserted by the Bolognese Plaintiffs for adverse possession, pursuant to CPLR 3212, and (2) granting them a permanent injunction compelling the Bolognese Plaintiffs to remove the retractable roller fence that encroaches on the Bantis Property.

¹ On August 11, 2017, the Bolognese Plaintiffs responded to the Bantis Defendants' counterclaim by filing an answer asserting a new claim for adverse possession, which they erroneously designated as a "counterclaim." The Bolognese Plaintiffs now seek summary judgment on that additional claim for adverse possession. There is no prejudice to the Bantis Defendants because they oppose that branch of the Bolognese Plaintiffs' motion *on the merits*. Therefore, the court, pursuant to CPLR 2001 and 3019 (d), deems the Bolognese Plaintiffs' additional claim for adverse possession to be an amendment to the complaint.

Background

The Instant Action

This action between the Bolognese Plaintiffs and the Bantis Defendants, the owners of two adjacent properties, involves their competing claims regarding a shared driveway. The Bolognese Property and the Bantis Property both consist of a 56 by 90-foot lot with a one-family house and a separate two-car garage in the rear which is accessible solely from the driveway at issue. However, the Bolognese Property was built with insufficient driveway space for the Bolognese Plaintiffs to access their garage without driving onto the Bantis Property. Further, in 1995, one year before the Bantis Defendants purchased the Bantis Property, the Bolognese Plaintiffs installed a roller fence between the two garages at the rear of the property. According to a 2017 survey of the Bantis Property, the roller fence encroaches five inches onto the Bantis Property.

The driveway is approximately seventeen feet wide, about ten feet of which is on the Bantis Property and seven feet on the Bolognese Property. Once you get past the houses, the driveway becomes wider and permits access into the two garages. However, on the Bologneses' seven foot wide strip of property between the houses, there are steps and "air grates" (Tr. page 6 of oral argument on February 8, 2018, motion for contempt) which cannot support the weight of a vehicle. On the Bantis' side, there are also steps. Thus, any vehicle must drive down the center of the driveway, as with these obstructions, the driveway has approximately twelve feet of driveable width. An average car is about six feet wide, not including mirrors. The Bolognese side of the driveway at its narrowest point, adjacent to the

air grates, is only four feet wide. The Bantis' side of the driveway, at its narrowest point, is approximately seven feet wide. Facing the houses from the street, the Bolognese Property is on the left (#15, Block 5975, Lot 214) and the Bantis Property is on the right (#17, Lot 217).

On June 20, 2017, the Bolognese Plaintiffs commenced this action by filing a summons and complaint asserting three causes of action, for: (1) a prescriptive easement; (2) an easement by necessity; and (3) a judgment declaring that they have an easement over the Bantis Property. Under the first and second causes of action, the Bolognese Plaintiffs seek an injunction “barring and prohibiting the [Bantis] Defendants and their successors in interest from interfering . . .” with their right to use the easement over the common driveway between their homes.

On June 29, 2017, the Bantis Defendants answered the complaint and asserted affirmative defenses, including that “[t]here is no common driveway” (answer at ¶ 15). The Bantis Defendants also asserted a counterclaim seeking an order requiring the Bolognese Plaintiffs to remove the retractable roller fence, which allegedly “encroaches 5 inches onto the[ir] property . . .” (*id.* at ¶ 19). On August 11, 2017, the Bolognese Plaintiffs responded to the counterclaim, and asserted an additional claim (the fourth cause of action) for adverse possession of the area of the driveway where the retractable roller fence was installed.

After issue was joined, discovery ensued. On June 18, 2018, the Bolognese Plaintiffs filed a note of issue and certificate of readiness, indicating that discovery was completed.

By an October 31, 2018 order, a December 26, 2018 deadline was imposed for summary judgment motions.

The Bantis Defendants' Summary Judgment Motion (MS 5)

On December 21, 2018, the Bantis Defendants timely moved for summary judgment on their counterclaim for an injunction directing the Bolognese Plaintiffs to remove the retractable roller fence that encroaches on the Bantis Property. According to the Bantis Defendants, deposition testimony reveals that the Bolognese Plaintiffs “intentionally and willfully built this fence on Defendants’ property without permission . . .” and that “[t]his was unknown by the [Bantis] Defendants . . .” until a survey of the Bantis Property was prepared in June 2017.

The Bantis Defendants argue that “[t]he covenant that runs with Plaintiff’s property prohibits building within five (5) feet of the property line . . .” The Bantis Defendants submit a copy of the certified chain of title for the Bolognese Property, which contains the following covenant running with the land:

“The grantee for himself, his heirs, executors and assigns covenanted and agree to and with the grantor, its successors and assigns that neither the said grantee nor his heirs, executors and assigns shall or will erect or maintain upon any portion of the within granted premises any building or erection or any part thereof . . . within five (5) feet of the sides or rear of the plot. This covenant shall be deemed to be a real covenant running with the land.”

The Bolognese Plaintiffs, in opposition, argue that the Bantis Defendants had knowledge of the encroachment when they purchased the Bantis Property in 1996 based on their November 2, 1995 survey. According to the Bolognese Plaintiffs, “[d]espite knowledge

of the encroachment, Defendants thereafter made no request to remove the fence for more than 20 years until a dispute over parking occurred between Plaintiffs and Defendants in 2017.” Essentially, the Bolognese Plaintiffs contend that they own that 5 inch wide portion of the Bantis Property by adverse possession because they have “continuously, openly, notoriously, exclusively, and hostilely operated the fence on a portion of Defendants’ property under a claim of right for more than 20 years . . .” The Bolognese Plaintiffs further argue that they cultivated and improved the disputed portion of the Bantis Property by removing snow and installing stone pavers and the roller fence as a “substantial enclosure.” The Bolognese Plaintiffs claim that “Defendants’ conscious acquiescence to the Plaintiffs’ use of the property . . . compels a finding of adverse possession.” Notably, the Bolognese Plaintiffs do not mention, or even address, the above-described restrictive covenant on the Bolognese Property.

The Bantis Defendants, in reply, argue that the Bolognese Plaintiffs do not satisfy the essential elements for adverse possession, including hostility. The Bantis Defendants contend that the Bolognese Plaintiffs “have no claim of right” because “[m]ere occupancy for an extended period of years, even when coupled with conduct consistent with ownership, does not ripen into ownership by adverse possession absent an initial claim of right.” The Bantis Defendants deny that they had notice of the encroachment because their November 2, 1995 survey erroneously depicts that the roller fence is located on the Bolognese Property.

The Bolognese Plaintiffs' Summary Judgment Motion (MS 6)

On December 26, 2019, the Bolognese Plaintiffs timely moved for summary judgment on their first and fourth causes of action for a prescriptive easement and adverse possession, respectively. In addition, the Bolognese Plaintiffs seek an injunction prohibiting the Bantis Defendants from erecting any barrier on the five-foot-wide section of land at the Bantis Property that “forms the Western boundary line adjacent to” the Bolognese Property.

The Bolognese Plaintiffs contend that they are entitled to a prescriptive easement “[g]iven the undisputed testimony of the parties that Plaintiffs’ use of [the Bantis Property] for the purposes of parking vehicles was open, notorious, continuous and uninterrupted from 1995 to the present . . .” The Bolognese Plaintiffs also argue that they “have acquired ownership of the area of the retractable fence by adverse possession.”

The Bantis Defendants, in opposition, argue that the Bolognese Plaintiffs’ claim for a prescriptive easement is “unsupported by the record, based on a false premise that the [Bolognese] Plaintiffs cannot access their garage and seeks to penalize the [Bantis] Defendants for their *neighborly accommodation* of the [Bolognese] Plaintiffs for the past twenty years” (emphasis added). The Bantis Defendants also contend that the Bolognese Plaintiffs cannot prove hostility, based on the Bolognese Plaintiffs’ deposition testimony that the Bantis Defendants were “neighborly” regarding the use of the driveway.

Regarding the adverse possession claim, the Bantis Defendants contend that the Bolognese Plaintiffs have not proven the required elements by clear and convincing evidence, including a claim of right. In addition, the Bantis Defendants assert that the

installation of the retractable roller fence violates a covenant running with the Bolognese Property that prohibits building anything within five feet of the property line.

The Bantis Defendants' Summary Judgment Cross Motion (MS 8)

On February 21, 2019, the Bantis Defendants cross-moved for summary judgment dismissing the complaint and an order granting them an injunction compelling the Bolognese Plaintiffs to remove the retractable roller fence that encroaches on the Bantis Property.² Regarding the first cause of action for a prescriptive easement, the Bantis Defendants argue that dismissal is warranted because the Bolognese Plaintiffs cannot prove that their use was hostile and without consent, since the Bolognese Plaintiffs concede that there has been a “neighborly accommodation over the years.” The Bantis Defendants contend that the second cause of action for an easement by necessity is defeated by the original deeds, which confirm that each party had sufficient access to their land when the properties were separated. The Bantis Defendants reiterate that the fourth cause of action for adverse possession fails because the Bolognese Plaintiffs cannot prove a claim of right, hostility or that the disputed property was protected by a substantial enclosure.

The Bolognese Plaintiffs, in opposition, argue that the Bantis Defendants’ *second* summary judgment motion (styled as a cross motion) is untimely because it was filed two months after the December 26, 2018 deadline to file summary judgment motions. They further argue that “[s]uccessive motions for summary judgment are discouraged without a showing of newly discovered evidence or other sufficient cause.” The Bolognese Plaintiffs

² This relief is duplicative of the relief that the Bantis Defendants already seek in their December 21, 2018 summary judgment motion.

also challenge the Bantis Defendants' summary judgment cross motion on the merits on the same grounds previously described.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that a party has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562). Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

The court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v*

United Rubber Supply Co., 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assocs.*, 263 AD2d 478 [1999]). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). If there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

A. *The Retractable Roller Fence*

The Bantis Defendants move for summary judgment on their counterclaim for an injunction directing the Bolognese Plaintiffs to remove the retractable roller fence that they installed between the parties’ garages, which encroaches five inches onto the Bantis Property. The Bolognese Plaintiffs move for summary judgment on their fourth cause of action for adverse possession, and seek a declaration that they are fee simple owners of the five-inch portion of the Bantis Property where they installed the retractable roller fence. The Bantis Defendants cross-move for summary judgment dismissing the Bolognese Plaintiffs’ fourth cause of action for adverse possession.

In 2008, the Legislature enacted changes to the adverse possession statutes in RPAPL article 5. Here, however, since title to the disputed property allegedly vested in the Bolognese Plaintiffs by adverse possession in 2005, ten years after the Bolognese Plaintiffs

erected the rolling fence in 1995, the law in effect prior to the amendments is applicable (*Warren v Carreras*, 133 AD3d 592, 593 [2015]; *5262 Kings Highway, LLC v Nadia Dev., LLC*, 121 AD3d 748, 748-749 [2014]; *Pakula v Podell*, 103 AD3d 864, 864 [2013]).

The Appellate Division, Second Department has held that a party seeking to obtain title by adverse possession must prove by clear and convincing evidence the following common-law requirements of such a claim:

“(1) that the possession was hostile and under claim of right; (2) that it was actual; (3) that it was open and notorious; (4) that it was exclusive; (5) and that it was continuous for the statutory period of 10 years” (*Goldschmidt v Ford St., LLC*, 58 AD3d 803, 804 [2009]).

“Since the acquisition of title to land by adverse possession is not favored under the law, these elements must be proven by clear and convincing evidence” (*Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996] [citations omitted]).

Here, the record reflects that the Bolognese Plaintiffs’ did not have the legal right to encroach upon Bantis Property based on the restrictive covenant on the Bolognese Property, which prohibited the Bolognese Plaintiffs from building anything within five feet of the property line. The Bolognese Plaintiffs, therefore, cannot assert a claim of right to the disputed area encroached by their retractable rolling fence, let alone demonstrate such right by clear and convincing evidence (*see 1380 Madison Ave., L.L.C. v 17 E. Owners Corp.*, 2003 NY Slip Op 51309[U] [Sup Ct, New York County 2003], *aff’d*, 12 AD3d 156 [2004]). “Mere possession, no matter how long continued, gives no title by adverse possession unless under claim of right” (*Harbor Estates Ltd. P’ship v May*, 294 AD2d 399, 400 [2002]).

Consequently, the Bolognese Plaintiffs cannot establish adverse possession of the disputed portion of the Bantis Property, and their summary judgment motion regarding the fourth cause of action is denied. The Bantis Defendants are entitled to summary judgment on their counterclaim for an injunction compelling the Bolognese Plaintiffs to remove the retractable roller fence and dismissing the fourth cause of action for adverse possession.

B. The “Common” Driveway

(1) Prescriptive Easement

The Bolognese Plaintiffs move for summary judgment on their first cause of action for a prescriptive easement over the five-foot-wide section of the Bantis Property that forms the western boundary line adjacent to the Bolognese Property. The Bantis Defendants cross-move for summary judgment dismissing the Bolognese Plaintiffs’ first cause of action for a prescriptive easement.

“An easement by prescription is demonstrated by proof of the *adverse*, open and notorious, and continuous use of the subject property for the prescriptive period” (*Ducasse v D’Alonzo*, 100 AD3d 953, 953 [2012] [emphasis added]). Here, the Bolognese Plaintiffs are not entitled to a prescriptive easement because they have failed to prove that their use of the portion of the driveway on the Bantis Property was hostile. Indeed, the Bolognese Plaintiffs admitted at their depositions that the Bantis Defendants afforded them a neighborly accommodation over the years. Thus, the Bolognese Plaintiffs’ motion for summary judgment on their first cause of action for a prescriptive easement is denied, and the Bantis Defendants’ summary judgment cross motion dismissing the first cause of action is granted.

(2) *Easement by Necessity*

The Bantis Defendants move to dismiss the Bolognese Plaintiffs' second cause of action for an easement by necessity. To establish an easement by necessity, a party must demonstrate that "their use of the disputed strip [of property] was absolutely necessary for the beneficial enjoyment of their property" (*Asche v Land & Bldg. Known as 64-29 232nd St.*, 12 AD3d 386, 387 [2004]). The Bantis Defendants' contention that the second cause of action for an easement by necessity is defeated by the original deeds, which confirm that the Bolognese Plaintiffs had sufficient access to "their land" is not supported by the record. The record reflects that the Bolognese Plaintiffs cannot access the garage in the rear of their property without entering and accessing the Bantis Defendants' portion of the "common" driveway. Consequently, the Bantis Defendants have failed to establish that they are entitled to summary judgment dismissing the second cause of action for an easement by necessity.

As plaintiffs have not moved for summary judgment on this cause of action, whether the plaintiffs are entitled to a judicial declaration that they are entitled to an easement by necessity is left for the justice who is assigned to serve as the trier of the facts in the trial on this claim.

Conclusions of Law

Based on the foregoing, that branch of the Bolognese Plaintiffs' summary judgment motion seeking an injunction prohibiting the Bantis Defendants from maintaining, erecting, placing, obstructing or building anything on the five-foot-wide section of property at the Bantis Property that forms the western boundary line adjacent to the Bolognese Property is

granted. Accordingly, it is

ORDERED that the Bantis Defendants' summary judgment motion (in MS five) on their counterclaim for a permanent injunction directing the Bolognese Plaintiffs to remove the retractable roller fence that encroaches five inches onto the Bantis Property is granted, and the Bolognese Plaintiffs must remove the retractable roller fence within 30 days after service of this decision and order with notice of entry; and it is further

ORDERED that the branch of the Bolognese Plaintiffs' motion (in MS 6) for partial summary judgment on their fourth cause of action for adverse possession and a declaration that they are fee simple owners of the five-inch strip of the Bantis Property where they installed the retractable roller fence is denied; and it is further

ORDERED that the branch of the Bolognese Plaintiff's motion for partial summary judgment on their first cause of action for a prescriptive easement over the five-foot section of property at the Bantis Property that forms the western boundary line adjacent to the Bolognese Property is denied; and it is further

ORDERED that the branch of the Bolognese Plaintiff's motion for a declaration that the Bolognese Plaintiffs and future owners of the Bolognese Property have a prescriptive easement over the five-foot-wide section of the Bantis Property that forms the western boundary line adjacent to the Bolognese Property is denied; and it is further

ORDERED that the branch of the Bolognese Plaintiff's motion for a permanent injunction barring and prohibiting the Bantis Defendants from maintaining, erecting, placing, obstructing or building anything on the five-foot-wide section of the Bantis

Property that forms the western boundary line adjacent to the Bolognese Property is granted; and it is further

ORDERED that the Bantis Defendants' summary judgment cross motion (in MS 8) is granted only to the extent that the Bolognese Plaintiffs' first (prescriptive easement) and fourth (adverse possession) causes of action are hereby dismissed, and the cross motion is otherwise denied, and it is further

ORDERED that the preliminary injunction granted in the order dated May 5, 2018 shall continue as modified herein, pending the decision and judgment following the trial in this matter, to wit:

All parties shall comply with all applicable laws, rules and regulations, including § 25-15 of the New York City Zoning Resolution which provides that no more than three cars may be parked off-street on a lot containing a single family detached residence. All parties are prohibited from parking on or otherwise obstructing the common driveway, which runs from the curb cut in the sidewalk for approximately sixty feet toward the back of the property and in between the houses known as 15 and 17 Harbor Lane, so vehicles may enter or exit the garages at the back of the property.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**