To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

---x

BGB REALTY, LLC

Plaintiff

DECISION AND ORDER
Index No. 50200/2016
Motion Sequence 5

-against-

AREC 13, LLC

Defendant.

---x

The following papers were considered on Plaintiff's motion seeking an order setting the jury verdict aside:

Notice of Motion/Affidavit/Affirmation/Exhibits 1-5	1-7
Affirmation/Affidavit in Opposition	8
Affirmation in Reply	9

Plaintiff moves for an order pursuant to CPLR 4404(a) vacating the verdict (and any judgment thereon) and directing a new trial in the interest of justice, since the verdict is contrary to the weight of the evidence and the jury's request for a definition of a portion of the Court's charge was denied.

This is an adverse possession action against a U-Hall company, whereby Plaintiff claims title to a triangular parcel, the T-Parcel, with a chain link fence at the southern border separating it from the remainder of U-Hall's property.

As is customary in this part, the Court requested proposed jury charges and verdict sheets from the parties. Both sides submitted a list of proposed charges and verdict sheets. The Court then conducted a charging conference where all the charges

and questions on the verdict sheet were discussed in detail. The Court and counsel for both parties had extensive discussions as to whether or not the term "substantial enclosure" would be included in the charge. At the charging conference, the Court agreed to a set of charges which included the term "substantial enclosure", but did not define the term and a series of questions on the verdict sheet which included the term "substantial enclosure" to be given to the jury. The parties were allowed to take exception to the charges after they were given to the jury. Prior to reading the charges to the jury both parties were provided with a hard copy. At the end of delivering the charges to the jury, neither Plaintiff nor Defendant's attorney took exception to the charges or to the questions on the verdict sheet.

During jury deliberations, the jury submitted a note requesting a definition of the term "substantial enclosure" and the time period of ten years. The original charge did not define "substantial enclosure." After conferencing with counsel for both parties, the Court concluded that the best way to handle the matter, in lieu of rewriting the charges, was to re-read the entire charge on the law of adverse possession. At this point, Plaintiff objected to the Court not specifically defining the term "substantial enclosure" as requested by the jury for the first time. It should be noted that Plaintiff did not object to the charges or verdict sheet after they were read to the jury after summation.

DISCUSSION

In order for a court to set aside a verdict pursuant to CPLR 4404(a), there must be no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial, and no rational process by which the jury could find in favor of the

nonmoving party (*see Piro v Demeglio* 150 A.D.3d 907 [2d Dept. 2017]). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*see Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556; *see Rumford v. Singh*, 130 A.D.3d at 1004).

Since Plaintiff failed to object to the alleged defects in the jury charge and the verdict sheet, these issues are not preserved for appellate review. Further, Plaintiff's contention is without merit, since Plaintiff has the burden of establishing for the jury that the parcel in question was substantially enclosed (*see Surjnarine v. Brathwaite*, 290 A.D.2d 436; *see also Calabrese v. Chan*, 244 A.D.2d 376, 665 N.Y.S.2d 541[2d Dept 1997[). However, the evidence presented at trial clearly established that Plaintiff did not erect the fence and there was always a gate or a passage way in the fence, which was used to access the U-Haul property and the fence was always in disrepair.

A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must produce evidence that the subject premises were either "usually cultivated or improved" or "protected by a substantial inclosure" (RPAPL 522[1], [2]); (*see also Birch Tree Partners, LLC v. Windsor Digital Studio, LLC*, 132 A.D.3d 932[2d Dept. 2016]). Here, Plaintiff has the burden of proving by clear and convincing evidence that the subject parcel was protected by a "substantial enclosure" for a period of ten years. The record will show that Plaintiff did not establish by clear and convincing evidence that the fence he relied upon constituted a "substantial enclosure." During the trial, Plaintiff elicited general testimony about the condition of the fence and its existence but no detailed testimony about the fence itself, in terms of being a substantial

enclosure. Plaintiff focused on the use of the parcel more than the enclosure itself. Moreover, the record is very clear that the fence was not erected by Plaintiff or Plaintiff's predecessor and such, cannot satisfy the enclosure requirement (*see Silipigno v. F.R. Smith & Sons, Inc.*, 71 A.D.3d 1255[3d Dept 2010]) ["the fence separating the disputed parcel from the remainder of the property cannot satisfy the enclosure requirement because, as [plaintiff] concedes, it was not erected by [plaintiff], but by [defendant's] predecessor in title..."] (*see Gallas v. Duchesne*, 268 A.D.2d at 729–730; *Yamin v. Daly*, 205 A.D.2d 870, 872 [1994]). "[S]ubstantial inclosure, and the language employed means that he shall erect an inclosure around the land, without relying upon a remote fence of a neighbor, enclosing that neighbor's land also" (*see Doolittle v. Tice*, 41 Barb. 181 (Supreme Court, Gen Term 1863).

Furthermore, based upon the record, the fence as existed at certain time intervals during the statutory period, allowed for unfettered access between the parcels by U-Haul employees and tenants of Plaintiff's property. Several of the occupants of the parcel operated auto body shops and did body work and other work for U-Haul which required a steady flow of individual back and forth between the parcel in question and U-Haul property. This arguably interrupted the ten consecutive years Plaintiff needed to prove the continuous existence of a substantial enclosure. Moreover, since the fence was described as being in disrepair during the period in question, the fence could not be regarded as a "substantial enclosure" (*see Meerhoff v. Rouse*, 4 A.D.2d 740[4th Dept. 1957])

Since Plaintiff did not establish during the trial by clear and convincing evidence that it constructed the fence or enclosure Plaintiff failed to meet its burden and the jury's

verdict, which was based upon a fair interpretation of the credible evidence, should not be set aside (*see Nicastro v. Park*, 113 A.D.2d 129 [2d Dept 1985]). The law requires Defendant be afforded every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to Defendant, (*see Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556). That being the case, not only did Plaintiff waive his right to object to the charge as given, Plaintiff also failed to offer evidence to support the existence of a "substantial enclosure".

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
October 31, 2019

HON. SAM D. WALKER, J.S.C.