

**1424 Sheepshead Realty, Inc. v 4800 Holdings LLC**

2020 NY Slip Op 31263(U)

May 6, 2020

Supreme Court, Kings County

Docket Number: 508534/17

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 41 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 6<sup>th</sup> day of May, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,  
Justice.

-----X  
1424 SHEEPSHEAD REALTY, INC.,  
Plaintiff,

DECISION and ORDER

- against -

Index No. 508534/17

4800 HOLDINGS LLC AND 8800 HOLDINGS LLC,

Motion Sequence 4

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion/Cross Motion,	
Affirmation (Affidavit), and Exhibits Annexed	<u>43,44</u>
Affirmation (Affidavit) in Opposition and Exhibits Annexed	<u>72</u>

Defendants 4800 Holdings LLC and 8800 Holdings LLC (defendants) move (in motion sequence [MS] four, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the first, second, and third causes of action asserted in the amended complaint of plaintiff 1424 Sheepshead Realty, Inc. (1424 Sheepshead).

***Background***

This dispute between neighboring property owners relates to, among other items, 1424 Sheepshead’s access to its easement over defendants’ property. 1424 Sheepshead owns certain real property located at 1418-1424 Sheepshead Bay Road (plaintiff’s parcel); defendants own an adjacent property located at 1414 Sheepshead Bay Road (defendants’ parcel). The easement, created in 1980, grants the holder a right-of-way over a triangular portion of defendants’ parcel to enter and exit to and from Sheepshead Bay Road and the westerly wall of the building located on

plaintiff's parcel and access to subsurface oil tanks located below the same portion. Specifically, the easement makes defendants' parcel:

“SUBJECT to an easement of right of way over the portion of the premises herein described fronting on Sheepshead Bay Road and not presently occupied by a building, for ingress and egress to and from Sheepshead Bay Road and the westerly wall (including without limitation the doors and the hoist located at or on such wall) of the building on the premises immediately adjoining the said unoccupied portion of the premises herein described on the east, and also

“SUBJECT to an easement for the maintenance on said unoccupied portion of the premises herein described of tanks below the surface of the ground for the storage of oil to be supplied for consumption in the building on said premises adjoining on the east, and also

“SUBJECT to an easement of access to and from said tanks and Sheepshead Bay Road for the purpose of filling, emptying and repairing said tanks or any other necessary acts in connection therewith” (affirmation of Defendants' counsel, exhibit L at 3).

1424 Sheepshead acquired its parcel in 1990, while defendants acquired their parcel in 2015. In 1998, 1424 Sheepshead removed the subsurface oil tanks and converted to a gas-based heating system. Before 2001, the westerly wall referenced in the easement, maintained an access point to enter the structure located on 1424 Sheepshead's parcel. However, between 2000 and 2001, 1424 Sheepshead performed renovation work, removing the access point and placing a solid wall in its stead. In 2003, defendants' predecessor-in-interest, World International Import Export (WIIE), constructed a one-story structure, operating a supermarket out of the building. The supermarket, composed of steel beams, an illuminated/removable roof, and faux brick interior, occupied the portion of defendants' parcel subject to the easement. It was fronted by metal roll-down gates which permitted entry from Sheepshead Bay Road when rolled up and enclosed the aforementioned portion of defendants' parcel.

In 2012, the supermarket ceased its operations, but the structure remained until 2013 when WIIE performed certain demolition work, which included demolishing portions of the supermarket. Between 2013 and 2015, the fronting gates impeding access from Sheepshead Bay Road remained intact. In 2015, defendants began, and soon thereafter completed, construction of a new structure, currently occupying the portion of defendants' parcel subject to the easement.

In 2017, 1424 Sheepshead commenced this action, seeking, among other relief, a declaratory judgment decreeing its easement valid, a permanent injunction enjoining defendants from interfering with the easement, and a money damages award for defendants past interference with the easement. Defendants answered, asserting general denials and counterclaims. Defendants now move for an order granting summary judgment dismissing the first, second, and third causes of action seeking the declaratory judgment, permanent injunction, and monetary damages.

### *The Parties' Positions*

Defendants argue that they are entitled to summary judgment dismissing the above causes of action as the easement was extinguished by 1424 Sheepshead's abandonment and defendants' adverse possession. They support their motion by presenting, among other evidence, deposition testimony of 1424 Sheepshead's managing agent, Jonathan Dessner, defendants' principal, Joe Levy, and nonparties Alex Gershovich, Robin Shaprio, and Albert Aranbeav. Defendants also offer 1424 Sheepshead's responses to interrogatories and printouts from the New York City Department of Buildings concerning issued permits to remove tanks and structural improvements at 1424 Sheepshead Bay Road.

Initially, defendants assert that, in 1998, 1424 Sheepshead received a permit to remove, and subsequently removed, any subsurface oil tanks. Further, defendants highlight that, in

response to certain interrogatories, 1424 Sheepshead admitted the oil tanks were last used at or about the time when 1424 Sheepshead converted its heating source to gas. Also, defendants point to Dessner's testimony where he avers he was unaware of any oil tanks at 1424 Sheepshead Bay Road (*see* Dessner deposition tr at 63-64). Hence, defendants maintain that 1424 Sheepshead's affirmative conduct eliminated the easement's specific purpose regarding the oil tank provisions and thus that portion of the easement has been extinguished by abandonment.

Similarly, defendants contend that, in 2000 and 2001, plaintiff completed work on the westerly wall, removing any access point (door, gate or hoist) that existed when the easement was created. They contend that Dessner's deposition testimony likewise confirms that there is no door on the westerly wall (*see id.* at 67-68). Therefore, defendants argue that, as with the oil tanks, plaintiff's affirmative conduct eliminated the easement's specific purpose regarding the ingress-egress provision and extinguishing the entire easement by abandonment.

Defendants address their adverse possession position by recounting that their predecessor-in-interest, WIIE, constructed a supermarket in 2003, which occupied the entire portion of their parcel where the easement existed. They maintain that, during the whole period from 2003 to the present, either they or WIIE have occupied this portion of their parcel and such occupation has been open, notorious, hostile, actual, and for the requisite number of years (*see* Gershovich deposition tr at 45, 72; Levy deposition tr at 36-38). Further, defendants highlight portions of Dessner's deposition and 1424 Sheepshead's interrogatory responses which demonstrate that 1424 Sheepshead has not used the easement since the supermarket's construction (*see* Dessner's deposition tr at 70-71; affirmation of defendant's counsel, exh. O at 6). Consequently, defendants argue that their adverse possession extinguished the easement.

In opposition, 1424 Sheepshead limits its arguments to address only the ingress-egress provision. It argues that it neither abandoned this portion of the easement nor did defendants' adverse possession extinguish it. Initially, it notes that when defendants' predecessor-in-interest operated the supermarket, the structure was freely accessible by the public and access to the easement was therefore not exclusive. 1424 additionally contends that the structure constituting the supermarket was merely cosmetic, not permanent in nature, and that its westerly wall was exposed. Further, 1424 Sheepshead asserts that various witnesses attested to the supermarket being demolished before defendants' acquisition of the parcel and for a time after demolition the easement area was exposed and freely accessible (*see* Gershovich deposition tr at 72; Aranbeav deposition tr at 41-42; Shaprio deposition tr at 67-68). 1424 Sheepshead posits that it was not until 2015, when defendants acquired their parcel, that their easement access was frustrated.

1424 Sheepshead also argues that defendants failed to demonstrate with clear and convincing evidence that it unequivocally acted to abandon the easement. It contends that the ingress-egress provision provides access to the westerly wall and that, while it may include accessing any doors or hoists, the easement is not restricted to accessing such entry points. 1424 Sheepshead thus contends that the work completed on the westerly wall, removing such access points cannot be deemed an overt act evidencing an intent to abandon the easement.

In reply, defendants principally reassert their contentions entitling them to judgment as a matter of law. Additionally, they argue that 1424 Sheepshead's contentions fail to raise any triable factual issues. Defendants acknowledge that while the supermarket was demolished, the front gates remained, blocking access from Sheepshead Bay Road and thereby preventing the easement's use. Further, defendants maintain that 1424 Sheepshead's removal of access points on the westerly wall constitutes an overt act resulting in the easement's abandonment. Finally, they reject 1424 Sheepshead's position as to adverse possession. They argue, among other points,

that the evidence fails to support 1424 Sheepshead's description of the supermarket as being merely cosmetic, 1424 Sheepshead's contention that it could not access the westerly wall from Sheepshead Bay Road at any point after construction of the supermarket and that it did not attempt to use the easement. Hence, defendants argue granting them summary judgment dismissing the first three causes of action as they have established the easement was extinguished and 1424 Sheepshead failed to raise any material factual issues.

### ***Discussion***

On a summary judgment motion, courts determine whether triable issues of fact exist or whether a party can be granted judgment as a matter of law on the proof submitted (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Movant 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 issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Only when movant presents a prima facie case does the burden shift to the nonmoving party to produce evidentiary proof in admissible form sufficiently establishing the existence of a material factual issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Further, the party opposing summary judgment is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties (*see Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept 2003], citing *Myers v Fir Cab Corp.*, 64 NY2d 806, 808 [1985]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). The court's function on a summary judgment motion is to determine whether material factual issues

exist, not resolve such issues (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

“Once created, [a] easement runs with the land and can only be extinguished by abandonment, conveyance, condemnation, or adverse possession” (*Djoganopoulos v Polkes*, 95 AD3d 933, 935 [2d Dept 2012]). “[A]bandonment occurs through the holder’s nonuse, combined with the holder’s intention to abandon. Moreover, the party asserting abandonment must demonstrate such intention by clear and convincing evidence” (*Janoff v Disick*, 66 AD3d 963, 966 [2d Dept 2009]). However, “abandonment does not result from nonuse alone, no matter how long, inasmuch as owners are not required to make use of their property” (*id.*). “[T]o prove an abandonment it is necessary to establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement” (*Gerbig v Zumpano*, 7 NY2d 327, 331 [1960]).

Here, regarding the easement’s subsurface oil tank provision, defendants have established their prima facie case entitling them to judgment as a matter of law. They demonstrated, by clear and convincing evidence, principally Dessner’s deposition and the New York City Department of Building record concerning the issued permit, that this easement provision was extinguished by 1424 Sheepshead abandonment. The proffered evidence established that 1424 Sheepshead intended to abandon that easement provision by removing the subsurface oil tanks and by switching to a gas heating system. 1424 Sheepshead’s opposition does not specifically address those branches of defendants’ motion seeking extinguishment of this easement provision. Accordingly, the easement, to the extent it grants access to subsurface oil tanks, is hereby extinguished.

However, defendants failed to establish their prima case demonstrating that 1424 abandoned the ingress-egress portion of the easement. The easement's plain language permits access from Sheepshead Bay Road to the westerly wall of the premises located on 1424 Sheepshead's parcel. It envisions the possible use of a door or hoist system to grant access to the premises, but it does not require use of such door or hoist as a condition for the easement. Removal of an access point on the westerly wall therefore does not demonstrate a clear intent to abandon the easement. Hence, defendants failed to establish that the entire easement was extinguished by abandonment.

A party seeking to extinguish an easement by adverse possession" must establish that the use of the easement has been adverse to the owner of the easement, under a claim of right, open and notorious, exclusive and continuous for a period of 10 years" (*Spiegel v Ferraro*, 73 NY2d 622, 625 [1989]). "Thus, an easement may be lost by adverse possession if the owner or possessor of the servient estate claims to own it free from the private right of another, and excludes the owner of the easement, who acquiesces in the exclusion for the prescriptive period" (*id.* at 626 [internal quotation marks and citation omitted]). "A party claiming adverse possession may establish possession for the statutory period by 'tacking' the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property" (*Diaz v Mai Jin Yang*, 148 AD3d 672, 674 [2d Dept 2017] [internal quotation marks and citations omitted]). Additionally, exclusivity does not require the adverse possessor be the only individual using the property; however, it does require the claimant's use "is separate and exclusive from the general use" (*Air Stream Corp. v 3300 Lawson Corp.*, 99 AD3d 822, 826 [2d Dept 2012], *lv denied* 21 NY3d 852 [2013][internal quotation marks and citations omitted]).

“A party claiming title by adverse possession is not required to show enmity or specific acts of hostility in order to establish the element of hostility. This element is satisfied where an individual asserts a right to the property that is adverse to the title owner and also in opposition to the rights of the true owner. A rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership, and this presumption continues until the possession is shown to be subservient to the title of another. However, hostility is negated by seeking permission for use from the record owner. Further, where there is a close and cooperative relationship between the record owner and the person claiming title through adverse possession, the presumption of hostility may not apply. Thus, in order to establish the hostility element, the party asserting the adverse possession claim must come forward with affirmative facts to establish that the use of the property was under a claim of right and adverse to the interests of the true owners” (*Estate of Becker v Murtagh*, 19 NY3d 75, 81-82 [2012] [internal quotation marks and citations omitted]).

Here, defendants have established their prima facie case that the right-of-way provision of the easement was extinguished by adverse possession. They proffered deposition transcripts of Dessner, Gershovich and Levy, along with 1424 Sheepshead’s responses to interrogatories and a sales deed between WIIE and defendant 480 Holdings LLC. The proffered evidence demonstrates that, since 2003, the triangular portion of defendants’ parcel, over which 1424 Sheepshead held an easement, has been occupied by a supermarket and, subsequently, defendants’ newly constructed building. Further it shows that 1424 Sheepshead has not had access nor used the ingress-egress portion of the easement since construction of the supermarket in 2003. There is no dispute that, after 2012, the supermarket was demolished. The proffered evidence reveals that the parcel has remained encumbered since 2003 with metal gates barring access from Sheepshead Bay Road thus preventing the easement’s use. Consequently, defendants demonstrated, by clear and convincing evidence, that they, through tacking, adversely possessed

1424 Sheepshead's easement under a claim of right, and did so openly, notoriously, exclusively, and for a continuous 10-year period.

In opposition, 1424 Sheepshead failed to raise a triable factual issue defeating defendants' prima facie case. The proffered deposition testimony upon which 1424 Sheepshead relies fails to raise factual questions as to whether the chain of continuous adverse possession was broken when the supermarket was demolished. Both Aranbaev and Gershovich aver that, between 2003 and the construction of defendants' new building, the parcel was enclosed by gates fronting Sheepshead Bay Road, thereby preventing access across the parcel (*see* Gershovich deposition tr at 89-90; Aranbeav deposition tr at 83). Further, Shapiro's testimony fails to raise a triable issue of fact as she repeatedly testifies that she did not remember or could not recall anything regarding the storefront (*see* Shapiro deposition tr at 65-71). 1424 Sheepshead's arguments concerning the public's access to the supermarket defeating defendants' adverse possession claim is equally unavailing. Use of the parcel by defendants' predecessors-in-interest was separate and exclusive from the general use, as it improved the parcel with a commercial structure i.e. a supermarket operating for profit. The general public, when accessing the parcel, occupied the premises as business invitees. Therefore, defendants' exclusive control was uninterrupted by the commercial use of the premises, and the easement's ingress-egress provision is extinguished by defendants' adverse possession claim. The parties' remaining contentions, to the extent not specifically addressed herein, were considered and are deemed moot. Accordingly, it is

**ORDERED** that defendants' summary judgment motion, MS four, is granted, and the first, second, and third causes of actions are hereby dismissed.

This constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, appearing to be "J.S.C.", written in a cursive style.

J. S. C.