

Ellis v Town of East Hampton, N.Y.
2020 NY Slip Op 34227(U)
December 21, 2020
Supreme Court, Suffolk County
Docket Number: 39825/2010
Judge: Sanford Neil Berland
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SHORT FORM ORDER

INDEX 39825/2010
CAL. No. 201901894RP

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 3/11/20 (006)
MOTION DATE 4/17/20 (007)
ADJ. DATE 7/7/20
Mot. Seq. # 006 MD
007 MG

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HARRY J. ELLIS, in his capacity as Managing
Partner o/b/o THE ELLIS FAMILY
PARTNERSHIP,

Plaintiff,

- against -

TOWN OF EAST HAMPTON, NEW YORK ,
WILLIAM WILKINSON IN HIS OFFICE
EXECUTIVE CAPACITY AS EAST
HAMPTON TOWN SUPERVISOR, LARRY
PENNY IN HIS OFFICE CAPACITY AS
ENVIRONMENTAL PROTECTION
DIRECTOR OF EAST HAMPTON TOWN
NATURAL RESOURCES DEPARTMENT and
EAST HAMPTON TOWN NATURAL
RESOURCES DEPARTMENT AS AN
INTERESTED PARTY,

Defendants.

JORDAN & LEVERRIER, P.C.
Attorney for Plaintiff
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East Hampton, New York 11937

DEVITT, SPELLMAN, BARRETT, LLP
Attorney for Defendant Town of E. Hampton
50 Route 111, Suite 314
Smithtown, New York 11787

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 25; and Notice of Cross-Motion and supporting papers, 26 - 30, it is

ORDERED that the motion by plaintiff for summary judgment in his favor is denied; and it is

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ORDERED that the cross-motion by defendants for, *inter alia*, summary judgment in their favor is granted.

Plaintiff Harry Ellis, in his capacity as managing partner of the Ellis Family Partnership, commenced this action pursuant to article 15 of the Real Property Actions and Proceedings Law for a determination of ownership of certain property in the Town of East Hampton. The Ellis Family Partnership is the owner of real property known as 341 East Lake Drive in Montauk. The complaint alleges that from 1976 until the present, the only route used for ingress to and egress from the property has been a 200-foot driveway that crosses a 100 foot-wide and 300 foot-long vacant, heavily-vegetated wetland adjacent to the property; that plaintiff and his family have used this driveway daily for many years; that such use has been hostile, actual, open and notorious and exclusive and is continuing; and that defendants never interfered with plaintiff's use of this strip of land – which he characterizes as a “paper road” – until 2010, when the Town of East Hampton sent a letter demanding removal of the driveway. The complaint further alleges that there was only a brief period, in the mid-1980s, when the Town asserted an interest in the subject property by attempting to dump fill and to install a metal drainage pipe but was stopped from doing so by the New York State Department of Environmental Conservation. The complaint seeks judgment determining the property interests of the parties with respect to the disputed strip of land.

Plaintiff now moves, pursuant to CPLR 3212(a), for summary judgment quieting title in the disputed strip of land and determining that the family partnership has adversely possessed it since 1976. In support of his motion, plaintiff submits, among other things, copies of the pleadings, aerial photographs of the East Lake Drive property, his own affidavit and the transcript of his deposition testimony and transcripts of the depositions of Town Supervisor Peter Van Scoyoc, Town Engineer Thomas Talmage and Town Assessor Jeanne Nielsen.

Defendants oppose plaintiff's motion and cross-move for summary judgment declaring that the Town of East Hampton is the sole owner of the disputed strip of land, described in their papers by its metes and bounds, which they maintain is a publicly dedicated road that provides public access to the beach and shore of Lake Montauk, a navigable body of water, and in which strip of land plaintiff has, and can have, no ownership or prescriptive easement interest. Defendants contend that the land over which plaintiff seeks to assert ownership by adverse possession is government land held for a public purpose, title to which, as a matter of well-settled law, cannot be acquired by adverse possession and that, in any event, plaintiff has not actually “occupied” the road. In support of their cross-motion and in opposition to plaintiff's motion, defendants submit, among other things, a series of aerial photographs of the area taken in 1962, 1978, 1984, 2001, 2004 and 2010; an “Application” and a “Release,” both executed on behalf of the Montauk Beach Company, Inc. on December 31, 1941 and recorded in the highway records mainlined by the Town Clerk of the Town of East Hampton, the first requesting that the Superintendent of Highways of the Town of East Hampton lay out certain specified “highways” that will pass through their properties, the second granting, releasing and conveying “in fee to the Town of East Hampton” the lands for those highways, including the strip of land that is in dispute in this action, “to have and to hold . . . forever”; a “Consent” by the Town Board of the Town of East Hampton, also dated December 31, 1941, to the Town Superintendent of Highways making an order laying out the conveyed and released lands as Town highways; and an “Order” of the Town Superintendent of Highways of the Town of East Hampton, also dated December 31, 1941, laying out those lands,

including the strip of land that is the subject of the current motion and cross-motion, "as and for highways in said Town described lands as highways.

Ellis states in his affidavit that the property owned by the family partnership was purchased by his parents in 1974 and that in 1976, his father cleared a 200-foot long driveway that "completely transects a paper road." He claims that the driveway has been utilized for ingress and egress to the family's property since that time. He states that he and his family have been "open, adverse, hostile and continuous" in their use of the driveway and purported paper road since 1976. He explains that since 1996, his family has made significant improvements to the disputed strip of land by trimming the vegetation and hedges that the family has planted over the years. He states that since 1996, his family has used the strip of land to store massive amounts of firewood, construction equipment, a boat, boat trailer, log splitter and utility trailer. He further states that he has maintained the disputed strip, which crosses his driveway, by resurfacing and regrading the "locus of [his] driveway to prevent flooding in [his] basement and parking area."

On a motion for summary judgment, the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

As a threshold matter, to the extent plaintiff seeks to establish ownership by operation of adverse possession or prescription of land deeded to and held by the Town for public use, his claim must fail. Although adverse possession may be established against a municipality where the real property at issue is owned by it in a purely proprietary capacity (*see Vaccaro v Town of Islip*, 181 AD3d 751, 121 NYS3d 96 [2d Dept 2020]; *Mazzei v Metropolitan Transp. Auth.*, 164 AD3d 1227, NYS3d 590 [2d Dept 2018]), government land held for public purposes, including roadway use, cannot be adversely possessed (*see Litwin v Town of Huntington*, 208 AD2d 905, 617 NYS2d 888 [2d Dept 1994]). Thus, it is well settled that:

"Title to real property may be acquired by a municipality by dedication and acceptance" (13 Warren's *Weed*, New York Real Property § 136.37 [5th ed]; *see Scarborough Props. Corp. v Village of Briarcliff Manor*, 278 NY 370, 377-378 [1938]; *Cook v Harris*, 61 NY 448, 453-454 [1875]; *Perlmutter v Four Star Dev. Assoc.*, 38 AD3d 1139, 1140 [2007]; *Matter of Fusaro v D'Angelo*, 41 AD2d 567 [1973]). "Dedication of a street . . . 'is essentially of the nature of a gift' by a private owner to the public and it becomes effective when the gift is accepted by the public" (*Matter of City of New York [Sealand Dock & Term. Corp.]*, 29 NY2d 97, 101 [1971], quoting *Scarborough Props. Corp. v Village of Briarcliff Manor*, 278 NY at

377; see *Zebrowski v Trustees of Town of Brookhaven*, 128 AD2d 704, 705 [1987]). Once established, the dedication is irrevocable (see *Cook v Harris*, 61 NY at 453; *Riverview Partners v City of Peekskill*, 273 AD2d 455 [2000]).

(*Romanoff v Vil. of Scarsdale*, 50 AD3d 763, 764 [2d Dept 2008]. See generally *Driggs v Phillips*, 103 NY 77, 83 [1886].) Even if never improved, “as a matter of law, ownership of” land so acquired and held by a municipality “remains vested” in the municipality (*id.*, 50 AD3d at 764). Hence, Highway Law § 205[1], which “sets forth a six-year limitation on the life of an unused public easement” . . . does not apply where a town has acquired a fee to the land in question” (*No-Dent Properties, Inc. v Commr. of Town of Hempstead Dept. of Highways*, 138 AD3d 702, 703 [2d Dept 2016], quoting *Perlmutter v Four Star Dev. Assoc.*, 38 AD3d 1139, 1141 [2007]). Here, in any event, the record, including the aerial photographs, shows that the roadway has been used for access to Lake Montauk notwithstanding what defendants characterize as plaintiff’s efforts to discourage public access to the beachfront.

Moreover, even if the strip of land at issue could somehow be deemed to be held by the Town for other than a public purpose, plaintiff’s claim to ownership by adverse possession would still fail. 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*, 19 NY3d 75, 81, 945 NYS2d 196; *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 provides that after July 7, 2008, a party without a claim of title based upon a written instrument asserting a claim of title to land based on adverse possession must establish either that the land at issue has 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 effective date of the 2008 legislation (see *Shilkoff v Longhitano*, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]; *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]).

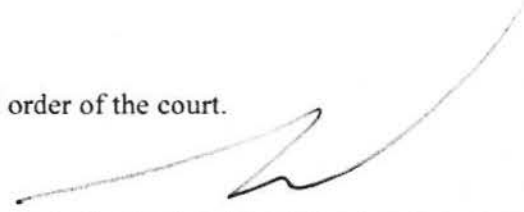
Notably, plaintiff cannot show that his use of the strip of land was open and notorious (see *Robbins v Schiff*, 106 AD3d 1215, 964 NYS2d 749 [3d Dept 2013]; *J.C. Tarr, Q.P.R.T. v Delsener*, 19 AD3d 548, 800 NYS2d 177 [2d Dept 2005]), that he was unaware of the Town's ownership of it (see April 4, 1985 *East Hampton Star* article annexed to his moving papers), or that his or his family's use for access or egress of a roadway open to the public was hostile. Further, the mere planting and trimming of vegetation and the storage of assorted things on it, or the claimed regrading or paving of a transected portion of it, are insufficient to constitute its adverse possession (*City of Tonawanda v Ellicott Cr. Homeowners Ass'n, Inc.*, 86 AD2d 118, 123 [4th Dept 1982]; see *Krol v Eckman*, 256 AD2d 945, 681 NYS2d 885 [3d Dept 1998]; cf. *Heumann v Old Forge Props., Inc.*, 34 AD3d 1204, 824 NYS2d 700 [4th Dept 2006]; *Wintemberg v Kowal*, 235 AD2d 999, 653 NYS2d 178 [3d Dept 1997]). Thus, even if the land in question were owned by the Town in a proprietary capacity – which is not the case – and not for public use – which is – plaintiff would not be able to establish ownership by adverse possession.

For all of the foregoing reasons, the plaintiff's motion for summary judgment in his favor is denied, and the defendants' cross-motion for summary judgment in their favor, declaring their ownership of the disputed strip of land and dismissing the claims against them, is granted.

Settle judgment.

The foregoing constitutes the decision and order of the court.

Dated: 12/21/2020
Riverhead, New York


HON. SANFORD NEIL BERLAND, A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION