

**Yu Ping Wang v Chavez**

2020 NY Slip Op 35760(U)

November 4, 2020

Supreme Court, Queens County

Docket Number: Index No. 709719/20

Judge: Darrell L. Gavrin

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**FILED**

NEW YORK SUPREME COURT - QUEENS COUNTY

**12/29/2020**

**10:46 AM**

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

**COUNTY CLERK  
QUEENS COUNTY**

YU PING WANG and YU LIN DONG,

Index No. 709719/20

Plaintiffs,

Motion

Date August 18, 2020

- against-

SAUL CHAVEZ and GUSTAVO G. CHAVEZ,

Motion

Cal. No. 62

Defendants.

Motion

Seq. No. 2

The following papers numbered EF39 to EF59 read on this Order to Show Cause by plaintiff for a preliminary and permanent injunction enjoining and restraining defendants from trespassing onto plaintiffs' property, directing defendants to remove the concrete wall encroaching plaintiffs' property, pursuant to RPAPL 871, and granting plaintiffs a license to enter defendants' property to remove said wall, pursuant to RPAPL 881; and cross motion by defendants for summary judgment in their favor dismissing the complaint, pursuant to CPLR 3212.

Papers  
Numbered

Order to Show Cause - Affirmation - Exhibits.....	EF39-EF46
Notice of Cross Motion - Affirmation - Exhibits.....	EF47-EF58
Reply Affirmation.....	EF59

Upon the foregoing papers it is ordered that the motion and cross motion are determined herein as follows:

This is a trespass action. Plaintiffs and defendants are owners of adjoining residential properties. Defendants purchased their property on November 5, 2009 from Alberto Aguilar. At the closing, defendants' attorney gave them a survey prepared by Joseph Nicoletti dated January 14, 1980, indicating a fence extending onto the abutting landowners property, now owned by plaintiffs who purchased the abutting property on January 16, 2013. In 2016, defendants removed the wooden fence and replaced it with a brick wall. Plaintiffs contend that the previous wooden fence and the land on which it was situated (disputed property) encroaches on their property. Defendants contend that they acquired the fence and the disputed property by adverse possession.

By the instant Order to Show Cause, plaintiffs seek a preliminary injunction and the relief included therein including to demolish the wall erected by defendants. Defendants who claim title to the wall and land upon which it sits as their property, oppose the Order to Show Cause, and cross-move for summary judgment in their favor dismissing the complaint. The cross motion is opposed by plaintiffs.

### Facts

Defendants purchased the premises located at 94-15 41st Road, in Elmhurst, Queens, on November 5, 2009, from Alberto Aguilar. At that time there were in fact two fences in the backyards of each property running parallel to each other. One of the fences was an “old rickety” wooden fence depicted in the Nicoletti survey which had been on the lot since at least 1980 and was still in existence when defendants purchased the property in 2009. In 2016, defendants removed the old wooden fence and installed a cement wall. Defendants contend that the second wooden fence referred to by plaintiffs still stands and is on plaintiffs’ property parallel to defendants’ new cement wall (previously the site of removed wooden fence). Defendants submitted a photograph of the remaining wooden fence on plaintiffs’ property.

Defendants further contend that there was a concrete curb and two fences existing when defendants purchased the premises. The survey prepared by Nicoletti indicates a “fence.” The concrete curb also shown in the Nicoletti survey was erected by Aguilar to direct the water flow onto Aguilar’s property from the land of plaintiffs’ predecessor. Defendants aver that they removed that concrete curb when they erected the new concrete wall to replace the old wooden fence shown on the survey since the concrete curb was no longer needed to direct the water flow from plaintiffs’ property. The new concrete wall serves that purpose. Defendants assert that the original wooden fence depicted in the 1980 survey was their property because title had vested after the proscribed time expired on July 5, 2007. Defendants do not identify a specific measurement or distance of the fixed boundary of the wooden fence. Defendants only state that it existed from 1980 to 2016, when they replaced it with the cement wall. The remaining post of the original wooden fence still exists showing the location of the old fence which was removed and replaced with the cement wall and which abuts plaintiffs’ remaining second fence.

Plaintiffs purchased their property located at 94-17 41<sup>st</sup> Road, in Elmhurst, Queens, on January 16, 2013. When they bought the property, the neighboring property had a wooden fence in the back yard. Plaintiffs contend that there was a concrete curb that was completely inside their property line with an additional (approximate) four inches from the curb to the property line. On or about March of 2016, defendants erected a wall in place of the fence. Defendants allege that one of the fences is still standing. In any event, plaintiffs contend that defendants built a concrete wall that sits completely inside plaintiffs’ property. Around June of 2019, plaintiffs hired a surveyor to make a survey of their property to corroborate that defendants had trespassed and encroached on their property by building the concrete wall inside plaintiffs’ property line. Plaintiffs aver that the survey showed that the wall was completely inside their property line and took away approximately thirteen inches from plaintiffs property.

After hiring their own surveyor, defendants erased the markings placed by plaintiffs' surveyor on or about May 31, 2020, by pouring concrete where the markings were on the floor and painting the wall to cover the markings. After allegedly confirming that the wall built by defendants was encroaching on plaintiffs' property, plaintiffs hired Pinto Studio, Inc., to file an application to the New York Department of Buildings ("DOB") to remove the "illegal" wall and to rebuild their own wall along their property line. To meet the DOB requirements, plaintiffs also filed an application to build a dry wall on their property. On November 1, 2019, the DOB approved the demolition of defendants' wall and the construction of the new wall along plaintiffs' property line and pavement repair as well as the plan for the construction of a dry wall.

In short, plaintiffs contend that the evidence demonstrates that the new wall is encroaching now over a foot of land onto their property. Defendants, on the other hand, allege that the wall is completely on their land, some of which was acquired by adverse possession. Plaintiffs commenced the instant action, and now move by Order to Show Cause, for an injunction in relation to said wall. Defendants oppose the Order to Show Cause, and cross-move to dismiss plaintiffs' complaint.

#### Motion by plaintiffs

"It is well-established that the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]). In exercising that discretion, however, the Supreme Court must consider several factors, including whether the moving party has established (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of the injunction (*see* CPLR 6301, 6312 [a]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Merscorp, Inc. v Romaine*, 295 AD2d 431, 432 [2d Dept 2002]). Further, where the moving party has an adequate remedy at law by "which his or her rights can be protected and properly conserved," an injunction will not be granted (67A NY Jur 2d, Injunctions § 24; *Gaynor v Rockefeller*, 15 NY2d 120, 132 [1965]).

The burden of proof is on the movant to demonstrate a likelihood of success on the merits, the prospect of irreparable injury if the relief is withheld, and a balancing of the equities in the movant's favor (*see Doe v Axelrod*, 73 NY2d at 750). To sustain this burden, the movant must demonstrate a clear right to relief which is "plain from the undisputed facts" (*Family Affair Haircutters v Detling*, 110 AD2d 745, 747 [2d Dept 1985]). Where the facts are in sharp dispute, a temporary injunction will not be granted (*see Blueberries Gourmet, Inc. v Aris Realty Corp.*, 255 AD2d 348, 349-50 [2d Dept 1998]). While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that "subvert the plaintiff's likelihood of success on the merits ... to such a degree that it cannot be said that the plaintiff established a clear right to relief" (*Milbrandt & Co. v Griffin*, 1 AD3d 327, 328 [2d Dept 2003]; *see County of Westchester v United Water New Rochelle*, 32 AD3d 979, 980 [2d Dept 2006]).

Guided by these principles, the court finds that plaintiffs have failed to establish their likelihood of success on the merits. Defendants purchased their property on November 5, 2009. Their predecessor in interest, Alberto Aguilar, purchased that property on June 7, 1997. A survey dated January 14, 1980 tendered to defendants on their purchase indicated a fence on the property now owned by plaintiffs. Plaintiffs conceded that a fence dating back to the 1980 survey existed on the property owned by plaintiffs' predecessor and now plaintiffs. Defendants aver that the fence existed on plaintiffs' property for over 33 years, allegedly establishing title to defendants by adverse possession. Specifically, defendants' predecessor, Aguilar, was in title from June 7, 1997 to November 5, 2009, when he sold it to defendants. On June 6, 2007, title to the disputed property vested in Aguilar since the proscribed period of time to bring an action to recover land taken by adverse possession had lapsed. At that time, the right of plaintiffs' predecessor to title to the disputed property was allegedly extinguished.

Based on the submissions, it cannot be said that the petitioner established a clear right to preliminary injunctive relief (*see Omakaze Sushi Rest., Inc. v Ngan Kam Lee*, 57 AD3d 497 [2d Dept 2008]; *Matter of Related Props. Inc. v Town Bd. of Town/Vil. of Harrison*, 22 AD.3d 587, 590 [2d Dept 2005]).

#### Cross Motion by defendants

The cross motion by defendants for summary judgment in their favor, is granted. In 2008, the Legislature enacted amendments to Article 5 of the Real Property Actions and Proceeding Law (*see* L 2008, ch 269, § 5) “to, among other things, discourage people from claiming adverse possession over real property they know belongs to another with superior ownership rights” (*Estate of Becker v. Murtagh*, 19 NY3d 75, 81 [2012]). In particular, the amended RPAPL 543 narrowed the circumstances in which an adjoining landowner can claim ownership by adverse possession of a bordering portion of his or her neighbor's property. RPAPL 543(1) now provides:

“Notwithstanding any other provision of this article, 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” (emphasis added).

This amendment to RPAPL 543, enacted on July 7, 2008, is not retroactive, however (*see Shilkof v Longhitano*, 94 AD3d 974 [2d Dept 2012]; *see Estate of Clayton v City of New York*, 153AD3d 787 [2d Dept 2017]). The pre-2008 law was in place when defendants were vested with title and which pre-amendment did not include a *de minimus* provision relating to fences and non-structural encroachments, nor was it deemed to be permissive and non-adverse.

Defendant contend that their title to the disputed property vested by adverse possession in 2007 at the latest, and thereby the law in effect prior to the 2008 amendment applies (*see Kings Hwy., LLC v Nadia Dev., LLC*, 121 AD3d 748, 748–749 [2d Dept 2014]; *Pakula v*

*Podell*, 103 AD3d 864 [2d Dept 2013]). To establish title by adverse possession where the claim is based upon adverse possession in 2007, defendants are required to demonstrate that their possession was “(1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years” (*Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 649 [2d Dept 2014]; see *Ram v Dann*, 84 AD3d 1204, 1205 [2d Dept 2011]). “Since adverse possession is disfavored as a means of gaining title to land, all elements of an adverse possession claim must be proved by clear and convincing evidence” (*Ram v Dann*, 84 AD3d at 1205 [internal quotation marks omitted]; see *Best & Co. Haircutters, Ltd. v Semon*, 81 AD3d 766, 767 [2d Dept 2011]).

In the case at bar, defendants submit evidence that the disputed piece of property had been occupied by fencing since at least 1980, and that both defendants and their predecessor in interest maintained a fence between their property and plaintiffs’ property until 2016, when defendants replaced one of the fences with a cement wall. The fence existing on plaintiffs’ property from at least January 14, 1980 was a five-foot high structure constructed with multiple wooden posts on a residential property, that was located in a heavily populated area in Queens New York and was situated between two residential family dwellings. Such structure was clearly open, hostile, exclusive, with a claim of right and existed for the continuous proscribed time period evidencing defendants’ compliance with the requirement of adverse possession. The other fence on plaintiffs’ property remains. The defendants’ possession of the piece of land at issue was not contested by plaintiffs until 2016. In opposition, plaintiffs failed to raise any triable issues of fact as to whether defendants’ occupation of the disputed property was under a claim of right, open and notorious, or continuous (see *Warren v Carreras*, 133 AD3d 592, 593-94 [2d Dept 2015]).

Accordingly, that branch of defendants’ cross motion which is for summary judgment in their favor dismissing the complaint, is granted.

#### Conclusion

In summary, plaintiffs’ motion for a preliminary injunction and for related relief, is denied. Defendants’ cross motion for summary judgment to dismiss, is granted and the complaint is hereby dismissed.

Dated: November 4, 2020




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DARRELL L. GAVRIN, J.S.C.

**FILED**

**12/29/2020**

**10:47 AM**

**COUNTY CLERK  
QUEENS COUNTY**