

**Astor v Pollack**

2021 NY Slip Op 30903(U)

March 22, 2021

Supreme Court, Kings County

Docket Number: 6886/2016

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 6886/2016  
Motion Date: 12-7-20  
Mot. Seq. No.: 3

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GEORGE L. ASTOR,

Plaintiffs,

-against-

**DECISION/ORDER**

AMELIA POLLACK as Administrator of the Estate of  
ELAINE MURAD BREZINSKI,  
ALEXIS BREZINSKI,

Defendants.

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The following papers were read on this motion:

<b>Papers:</b>	<b>Numbered:</b>
Notice of Motion/Order to Show Cause	
Affirmations/Affidavits/Exhibits/Memo of Law.....	1-2
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	3-17
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	20-24

Upon the foregoing papers, the motion is decided as follows:

This Court hereby recalls and vacates its March 2, 2021 decision/order for failing to consider the papers filed in opposition and reply to this motion.

The plaintiff GEORGE L. ASTOR commenced this action for a declaration pursuant to Article 15 of the RPAPL that he has a prescriptive easement in the driveway between 232 79th Street (block 5978, lot 22) and 236 79th Street (block 5978, lot 24), Brooklyn, NY. The defendants, AMELIA POLLACK, as Administrator of the Estate of ELAINE MURAD BREZINSKI, and ALEXIS BREZINSKI now move for summary judgment pursuant to CPLR 3212 dismissing plaintiff’s amended complaint in its entirety.

An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period which is 10 years (*see 315 Main St. Poughkeepsie, LLC v. WA 319 Main, LLC*, 62 A.D.3d 690, 878 N.Y.S.2d 193; *Weir v. Gibbs*, 46 A.D.3d 1192, 1193, 849 N.Y.S.2d 97; *Frumkin v.*

*Chemtop*, 251 A.D.2d 449, 674 N.Y.S.2d 409). “ ‘The right acquired by prescription is commensurate with the right enjoyed’ ” (*Thury v. Britannia Acquisition Corp.*, 19 A.D.3d 586, 587, 797 N.Y.S.2d 132, quoting *Prentice v. Geiger*, 74 N.Y. 341, 347; see *Zutt v. State of New York*, 50 A.D.3d 1133, 856 N.Y.S.2d 245). “Where the use has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the alleged prescriptive easement to show that the use was permissive” (*315 Main St. Poughkeepsie, LLC v. 319 Main, LLC*, 62 A.D.3d at 690, 878 N.Y.S.2d 193). Unlike a claim sounding in adverse possession, a party seeking to acquire a right by prescription need not demonstrate that use of the property was exclusive (see *Levy v. Morgan*, 31 A.D.3d 857, 818 N.Y.S.2d 335).

Here, while the defendants demonstrated their prima facie entitlement to summary judgment dismissing plaintiff’s claim of a prescriptive easement in the driveway since the plaintiff was not in possession of the real property adjoining the driveway for the required 10 year period prior to the commencement of the action, plaintiff’s submissions in opposition were sufficient to create a triable issue of fact. Plaintiff established triable issue of fact that his adverse use of the subject driveway for purposes of accessing his backyard, tacked on to such use of the driveway by his predecessors in title, was open and notorious, continuous, and uninterrupted for the requisite statutory period (*Vitiello v. Merwin*, 87 A.D.3d 632, 633, 928 N.Y.S.2d 581, 583).

The Court rejects defendants’ contention that tacking does not apply as a matter of law. For tacking to apply, a party must show that the party’s predecessor “intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed” (*Brand v. Prince*, 35 N.Y.2d 634, 637, 364 N.Y.S.2d 826, 324 N.E.2d 314; see also *Munroe v.*

*Cheyenne Realty, LLC*, 131 A.D.3d 1141, 1142, 16 N.Y.S.3d 842, 843). The Court of Appeals in *Brand v. Prince*, 35 N.Y.2d at 637, 364 N.Y.S.2d 826, 324 N.E.2d 314 stated the rule as follows:

that successive adverse possessions of property omitted from a deed description \* \* \* may be tacked if it appears that the adverse possessor intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed \* \* \*. Because the possessory title is entirely an incident of the adverse holder's possession, transfer of that possession, even by parol, effects a transfer of the possessory interest [*citations omitted*].

While Luisa Sessa did not state in her affidavit that she intended to convey an easement in the driveway to the plaintiff, plaintiff averred in his affidavit that when he purchased the property from Sessa, he was told the property had a common drive way with defendants' property and that when he was shown the door on the fence leading from the driveway to his backyard, he was told he had the right to utilize the driveway as a means of ingress and egress to his backyard and for parking cars or anything else he wished to use it for. Thus, the plaintiff sufficiently created a triable issue of fact as to whether Sessa "intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed" (*Brand v. Prince, supra., Diaz v. Mai Jin Yang*, 148 AD3d 672). For the above reasons, defendants' motion for summary judgment must be denied.

The Court need not address plaintiff's claims of an easement by necessity and an easement by implication. By this court's order dated May 22, 2017, the plaintiff was only granted leave to amend his complaint to include a cause of action alleging entitlement to a prescriptive easement in the subject driveway. To the extent that plaintiff's amended complaint alleges additional causes of action, the amended complaint is a nullity.

Accordingly, it is hereby

**ORDERED**, this court's prior decision/order on this motion is recalled and vacated; it is further

**ORDERED**, the defendant's motion for summary judgment dismissing plaintiff's claim for a prescriptive easement is **DENIED**.

This constitutes the decision and order of the Court.

Dated: March 22, 2021



**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020