PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

KURT ROGERS and GINA ROGERS,

Plaintiffs,

-vs.-

DECISION AND ORDER

Index No. EFCA2017002497

PIETRO MELCHIORRE,

Defendant.

APPEARANCES:

Counsel for Plaintiffs:

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Binghamton, NY 13901-3310

Counsel for Defendant:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to resolve competing summary judgment motions. Defendant, Pietro Melchiorre, originally moved for summary judgment, which was then followed by a motion for summary judgment by Plaintiffs, Kurt Rogers and Gina Rogers. The Court conducted conferences with the parties in an attempt to resolve the matter amicably, and without the need to rule on the motions. Those efforts did not bear fruit, and thus, a decision must be rendered with respect to the two motions.[1]

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[1] All the papers filed in connection with the motion and opposition are included in the NYSCEF electronic case file, and have been considered by the Court.

BACKGROUND FACTS

This case arises out of a boundary dispute between owners of two parcels of property. Plaintiffs and Defendant own abutting property on Smith Drive in Endwell, New York. Plaintiffs own property which fronts on Smith Drive, while Defendant's property is located directly behind Plaintiffs' property, further from Smith Drive. There are two-family homes on both properties, and Defendant lives on his property, while Plaintiffs rent their property. Defendant purchased his property in approximately 2015-2016. Defendant has submitted a survey showing that he owns a sliver of land approximately 15 feet wide and 140 feet long giving him access to Smith Road from his house. Defendant's sliver of land is part of an overall area approximately 30 feet by 140 feet to the west of the Plaintiffs' and Defendant's properties, upon which there is a paved driveway. The driveway serves three duplexes- Plaintiffs' and Defendant's on the east, and another duplex to the western side of the driveway which is owned by a non-party, Earl Clark. Plaintiffs have an express easement in their deed to use the driveway to access a paved parking located in the rear of Plaintiffs' property, but in front of Defendant's property.

Defendant had his property surveyed in the summer of 2016 and again in April 2017. Plaintiffs allege that following those surveys, Defendant began to challenge the right of Plaintiffs and their tenants to park on the eastern portion of the driveway. Defendant argues that he owns the 15 feet on the east portion of the right of way, which includes part of the paved driveway and some grass area directly in front of Plaintiff's building. Clark owns a similar area to the west of the driveway. Essentially, Defendant maintains that the eastern portion of the driveway and the grass next to the driveway belong to him. Plaintiffs claim that they have maintained the driveway and grass area on the eastern side of the right of way since 2005 (since it is directly in front of their building), giving rise to a claim of adverse possession. Since at least 2017, Defendant has not permitted Plaintiffs to utilize the disputed portion of the driveway and the grass area. Moreover, per the complaint, Defendant has verbally abused and/or threatened Plaintiffs' prospective tenants and lawn maintenance workers, thereby impeding Plaintiffs' efforts to lease their property.

In 2017, Melchiorre erected a fence along the east side of the right of way, originally leaving a 4 foot opening in the fence, whereby Plaintiffs could access their building. Eventually,

however, that opening was also closed off by Defendant, who claims that tenants parking in front of Plaintiffs' building interferes with Defendant's use of the driveway.

Plaintiffs' complaint asserts five causes of action: adverse possession, easement by prescription, easement by estoppel, easement in gross and easement appurtenant. Defendant's motion seeks summary judgment on the grounds that Defendant is the true owner of the disputed property and that a claim for adverse possession cannot lie when Plaintiff acknowledges that he/she is not the true owner, nor even alleges to be the true owner. Similarly, Defendant claims that Plaintiffs are not entitled to an easement by prescription because they do not claim a right of use other than the express easement provided in their deed, which is limited to ingress and egress-parking is not part of the easement. Additionally, Defendant argues that easement by estoppel does not apply because Defendant did not make any statements that Plaintiffs could use the driveway for anything other than accessing the rear parking lot, and therefore there could be no detrimental reliance.

LEGAL DISCUSSION AND ANALYSIS

Plaintiffs claim a right to the disputed property through adverse possession. The acquisition of title by adverse possession is not favored under the law. *See, Ray v. Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 (1996). However, it "is a necessary means of clearing disputed titles and the courts adopt it and enforce it, because, when adverse possession is carefully and fully proven, it is a means of settling disputed titles and this is desirable." *Walling v. Przybylo*, 7 NY3d 228, 233 (2006) *quoting Belotti v. Bickhardt*, 228 NY 296, 308 (1920). To sustain a claim of ownership based on adverse possession, a plaintiff is required to show, by clear and convincing evidence, that its possession of the disputed property was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period." *Walling v. Przybylo*, 7 NY3d at 232 (citations omitted); *see also, Estate of Becker v. Murtagh*, 19 NY3d 75 (2012); *LS Mar., LLC v. Acme of Saranac, LLC*, 174 AD3d 1104 (3rd Dept. 2019); *2 N. St. Corp. v. Getty Saugerties Corp.*, 68 AD3d 1392 (3rd Dept. 2009).

The element of hostility 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.'" *Estate of Becker v. Murtagh*, 19 NY3d at 81, *quoting Walling v. Przybylo*, 7 NY3d at 232-233. The

proponent of the adverse possession must "come forward with affirmative facts to establish that the use was under a claim of right and adverse to the interests of [defendant]" *Albright v. Beesimer*, 288 AD2d 577, 578 (3rd Dept. 2001), *quoting McNeill v. Shutts*, 258 AD2d 695, 696 (3rd Dept. 1999) (other citations omitted).

Here, Plaintiffs acknowledge that they are not the rightful owners of the property. Their complaint states at ¶ 19 "the Defendant is the true owner of the property in dispute." Just as importantly, Plaintiffs' use of the driveway is by virtue of an express easement, which permits Plaintiffs "the use of the driveway for ingress and egress to the rear of the premises...No portion of the easement herein granted shall be blocked at any time, including by vehicular parking." Thus, as Plaintiffs acknowledge they are not the true owners, and their use of the driveway is by the rights afforded them under the deed and easement, their use cannot be viewed as under a claim of right, or adverse to the Defendant. *See e.g. Albright v. Beesimer*, 288 AD2d 577 (3rd Dept. 2001). Accordingly, the adverse possession claim cannot be maintained.

With respect to prescriptive easement, "a plaintiff must show that the use of the servient property was open, notorious, continuous and hostile for the prescriptive period." *Barra v. Norfolk S. Ry. Co.*, 75 AD3d 821 (3rd Dept. 2010); *Sardino v. Scholet Family Trust*, 192 AD3d 1433 (3rd Dept. 2021). The elements for adverse possession and easement by prescription "depend on the same elements; adverse, open and notorious, continued and uninterrupted use of property for 10 years." *Pickett v. Whipple*, 216 AD2d 833, 833-834 (3rd Dept. 1995) (citations omitted). For the same reasons that the adverse possession claim fails (Plaintiffs acknowledge they are not the true owners and their usage is based on their right to use the driveway per the easement granted in their deed), the claim for prescriptive easement likewise cannot be sustained. In addition, Plaintiffs point out that they had a good rapport with Defendant's predecessor in title, and that there was never a dispute as to parking cars on the driveway. That would suggest a neighborly cooperation and accommodation that would negate hostility. *See, Barra v. Norfolk S. Ry. Co.*, 75 AD3d 821.

Plaintiffs next claim is for easement by estoppel, which "may arise when, among other things, a party reasonably relies upon a servient landowner's representation that an easement exists." *MJK Bldg. Corp. v. Fayland Realty, Inc.*, 181 Ad3d 860, 862 (2nd Dept. 2020). In the present case, Defendant has submitted evidence as to the applicable deeds, showing that there is an actual easement, permitting Plaintiffs to use the driveway. That easement also expressly

provides that Plaintiffs cannot use it for parking. Plaintiffs fail to allege that Defendants made any representations expanding on the rights specifically noted in the easement. In fact, Plaintiffs' allegations show that Defendant adamantly protested the parking of cars in the driveway. Plaintiffs have not submitted any evidence that would suggest they detrimentally relied on anything Defendant said or did. Therefore, summary judgment to Defendant on the claim for easement by estoppel is also appropriate.

Plaintiffs' fourth and fifth causes of action for easement in gross and easement appurtenant are not recognized causes of action. Rather, they describe particular easements. "[A]n easement in gross is a 'mere personal, nonassignable, noninheritable privilege or license'" *Niceforo v. Haeussler*, 276 AD2d 949, 950 (3rd Dept. 2000), *quoting Henry v. Malen*, 263 AD2d 698, 702, n 3. (3rd Dept. 1999). "It is a well-established principle of law that an easement in gross will not be presumed where it can fairly be construed to be appurtenant to land." *Wilson v. Ford*, 209 NY186 (1913). "[A]n easement appurtenant provides for a transferrable interest in land [...]. Specifically, an easement appurtenant is created when such easement is '(1) conveyed in writing, (2) subscribed by the person creating the easement and (3) burdens the servient estate for the benefit of the dominant estate'" *Niceforo v. Haeussler*, 276 AD2d at 950 (internal citation omitted), *quoting Strnad v. Brudnicki*, 200 AD2d 735, 736 [2nd Dept. 1994]). Whether the easement in this case is characterized as an easement in gross or easement appurtenant makes no difference. Plaintiffs' easement rights are not in dispute, and regardless of the category of easement, the Plaintiffs do not state any cause of action under these theories. As such, Defendant is entitled to summary judgment on those causes of action as well.

Lastly, the facts establish that the fence put up by the Defendant may actually be within the 15 foot wide easement area, and may technically deprive Plaintiffs (or the landowner to the west of the driveway), the full width of the easement area. However, as it does not interfere with Plaintiffs ability to utilize the driveway to access the back parking lot, the Defendant may install a fence. As noted by the Third Department, "a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired." *Sambrook v. Sierocki*, 53 AD3d 817, 818 (3rd Dept. 2008), *quoting Lewis v. Young*, 92 NY2d 443, 449 (1998). In the instant case, Plaintiffs do not allege that the fence prevents them from using the driveway to access their rear parking lot, and the express terms of the deed and right of way show that the easement is for ingress and egress,

not parking. Plaintiffs are not deprived of their ability to utilize the driveway for ingress and egress.

Plaintiffs have also filed a cross motion for summary judgment. However, as noted above, all the claims asserted by Plaintiffs are being resolved by summary judgment to Defendant. Therefore, Plaintiffs' motion for summary judgment must be denied.

CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED, that Defendant's motion for summary judgment is GRANTED; and it is further

ORDERED, that Plaintiffs' cross motion for summary judgment is DENIED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: September 28, 2021
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice