

**Spitzer v Husarsky**

2024 NY Slip Op 32817(U)

August 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 12898/2008

Judge: Peter P. Sweeney

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

Index No.: 12898/2008

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ESTHER SPITZER,

Plaintiff,

-against-

**DECISION/ORDER**

MORDECHAI D. HUSARSKY AND MALKA  
HUSARSKY,

Defendant.  
-----X

Martin Weiszberger in Trust commenced this action seeking, *inter alia*, injunctive relief as well as a declaration that it had a prescriptive easement over a 3-foot strip of land located on Defendants' Property. During the pendency of the action, Esther Spitzer was substituted in place of Martin Weiszberger in Trust.

A bench trial was held before the undersigned on October 5, 2021, November 17, 2021, November 18, 2021, May 16, 2022, May 17, 2022, and concluded on November 21, 2023. Following the trial, the parties submitted Post-Trial Memorandums of Law. Upon due deliberation and after careful review of the trial evidence and the Post-Trial Memorandums of Law, the court makes the following findings of fact and conclusions of law:

**Findings of Fact:**

By deed dated June 29, 1997, Irving Berk ("Berk") transferred the real property located at 1075 East 18th Street, Brooklyn, New York ("Plaintiff's Property") to "Martin Weiszberger in Trust." Following Martin Weiszberger's death, all interest in Plaintiff's Property was transferred to Esther Spitzer, Martin Weiszberger's daughter, who is now the Plaintiff in the action. Plaintiff is married to Mark Spitzer and he and his wife, along with their children, have been living at Plaintiff's Property since Martin Weiszberger in Trust acquired the property.

The defendants, Mordechai D. Husarsky and Malka Husarsky, are the owners of property located at 1079 East 18th Street, Brooklyn, New York ("Defendants' Property"), having acquired title thereto on November 29, 2006, from the late Sender Kleinbard ("Kleinbard"). Defendants'

property is located immediately adjacent to Plaintiff's property and the two properties are separated by a strip of land that is approximately 11 feet wide. An 8-foot portion of this strip is located on Plaintiff's Property while the remaining 3-foot portion is located on Defendants' Property. Plaintiff claims that she and her family regularly used the 11-foot strip of land, including the 3-foot strip of land on Defendants' Property, as a driveway. In April of 2007, the defendants erected a construction fence on their property along portions of the 11-foot strip of land which blocked plaintiff's access and use of the aforesaid 3-foot strip of land. Plaintiff commenced this action on April 8, 2008, claiming that she has a prescriptive easement over the aforesaid 3-foot strip of land.

### Conclusions of Law:

To acquire an easement by adverse possession or an easement by prescription, it must be shown that the use of land was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years (see *Isnady v. Walden Preserv., L.P.*, 208 A.D.3d 568, 570, 173 N.Y.S.3d 49, quoting *Panday v. Allen*, 187 A.D.3d 775, 777, 133 N.Y.S.3d 303; see *Kuzmicki v. Bentley Yacht Club*, 193 A.D.3d 710, 711, 148 N.Y.S.3d 128). "The elements of a prescriptive easement must be established by clear and convincing evidence" (*Panday v. Allen*, 187 A.D.3d at 777, 133 N.Y.S.3d 303 [internal quotation marks omitted]; see *Bolognese v. Bantis*, 215 A.D.3d 616, 619, 187 N.Y.S.3d 689; *Almeida v. Wells*, 74 A.D.3d 1256, 1258, 904 N.Y.S.2d 736).

"When the entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner" (*Bratone v. Conforti-Brown*, 150 A.D.3d 1068, 1071, 56 N.Y.S.3d 174, quoting *Hinkley v. State of New York*, 234 N.Y. 309, 316, 137 N.E. 599). "Such permission can be express or implied and 'if the first possession is by permission it is presumed to so continue until the contrary appears'" (*Bratone v. Conforti-Brown*, 150 A.D.3d at 1071, 56 N.Y.S.3d 174 [citations omitted], quoting *Hinkley v. State of New York*, 234 N.Y. at 317, 137 N.E. 599). Further, "hostility will be found lacking where use of the disputed property was 'permitted as a matter of [willing accord and] neighborly

accommodation” (*Bolognese v. Bantis*, 215 A.D.3d at 620, 187 N.Y.S.3d 689, quoting *Ryan v. Posner*, 68 A.D.3d 963, 965, 892 N.Y.S.2d 439; see *MJK Bldg. Corp. v. Fayland Realty, Inc.*, 181 A.D.3d 860, 862, 122 N.Y.S.3d 67).

A party claiming a proscriptive easement may establish adverse use for the statutory 10-year period by ‘tacking’ the time that the party adversely used the property onto the time that the party’s predecessor adversely used the property (see *Munroe v. Cheyenne Realty, LLC*, 131 A.D.3d 1141, 1142, 16 N.Y.S.3d 842; see *Diaz v. Mai Jin Yang*, 148 A.D.3d at 674, 48 N.Y.S.3d 485; *Ströem v. Plackis*, 96 A.D.3d 1040, 1042–1043, 948 N.Y.S.2d 90; *Yee v. Panousopoulos*, 176 A.D.3d 1142, 1144, 110 N.Y.S.3d 116, 118). The right to rely on “tacking” to satisfy the prescriptive 10-year must also be established by clear and convincing evidence (see *CSC Acquisition-NY, Inc. v. 404 Cnty. Rd. 39A, Inc.*, 96 A.D.3d 986, 988, 947 N.Y.S.2d 556, 559).

Martin Weiszberger in Trust, Plaintiff’s immediate predecessor in interest, acquired title to Plaintiff’s Property on June 27, 1997. Plaintiff’s use of the 3-foot strip, whether permissive or adverse, an issue that need not be addressed, was interrupted by Defendants’ erection of a “construction fence” in April of 2007. From when Weiszberger in Trust purchased the property to when the fence was erected, a period of approximately 9 years and 10 months elapsed. Plaintiff therefore did not demonstrate, by clear and convincing evidence, that she and Martin Weiszberger in Trust adversely used the 3-foot strip for a period of 10 or more years.

Plaintiff’s counsel contends that Plaintiff adverse use of the 3-foot strip for more than the 10-year prescriptive period was demonstrated because “[i]t cannot be disputed that the Plaintiff [the Trust] purchased the Property in 1997, and more than 10 years prior to the commencement of the instant action in 2008.” This argument is totally devoid of merit. Again, any period of possible adverse use by the Plaintiff ended in April of 2007, when Defendants blocked her use of the 3-foot strip by erecting the construction fence. The date when the action was commenced is irrelevant to the calculation of the 10-year prescriptive period.

Since Plaintiff did not establish that she and the Martin Weiszberger in Trust adversely used the 3-foot strip for the 10-year prescriptive period, to prevail in the action, Plaintiff had to demonstrate adverse use of the 3-foot strip for the 10-year prescriptive statutory period by “tacking” on time that Berk adversely used the strip. As stated above, Berk sold Plaintiff’s

Property to Martin Weiszberger in Trust on June 29, 1997. More specifically, Plaintiff had to demonstrate by clear and convincing evidence that for at least two months before Berk sold Plaintiff's Property to Martin Weiszberger in Trust, he was using the 3-foot strip adversely to the interests of Sender Kleinbard, the owner of Defendants' Property at the time. No such showing was made. Absolutely no admissible evidence was introduced demonstrating that Berk ever adversely used the 3-foot strip. For this reason, the action must be dismissed (*Munroe v. Cheyenne Realty, LLC*, 131 A.D.3d at 1142, 16 N.Y.S.3d 842; see *CSC Acquisition-NY, Inc. v. 404 County Rd. 39A, Inc.*, 96 A.D.3d 986, 988, 947 N.Y.S.2d 556; *Reis v. Coron*, 37 A.D.3d 803, 804, 830 N.Y.S.2d 589; *Diaz v. Mai Jin Yang*, 148 A.D.3d 672, 674, 48 N.Y.S.3d 485, 487).

**Conclusion:**

In sum, since the Plaintiff did not establish by clear and convincing a cause of action for a prescriptive easement, it is hereby

**ORDRED** and **ADJUDGED** that Plaintiff's complaint is dismissed.

This constitutes the decision, order and judgment of the Court.

Dated: August 6, 2024



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

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

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