

St. Michael's Episcopal Church v Tiseo

2024 NY Slip Op 35098(U)

December 3, 2024

Supreme Court, Queens County

Docket Number: Index No. 721810/2021

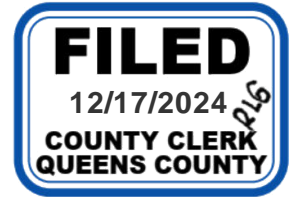
Judge: Nicole McGregor Mundy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: **HON. NICOLE MCGREGOR MUNDY**
Acting Justice

IA PART 7

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ST. MICHAEL’S EPISCOPAL CHURCH d/b/a
ST. MICHAEL’S CEMETERY,

Plaintiff(s),

-against-

TOM TISEO a/k/a TOMASO A. TICEO a/k/a
TOM TICEO and ABC CORPORATION,
a fictitious entity the identity of which is
not yet know,

Defendant(s).
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Index
No.: 721810/2021

Motion Date:
December 5, 2023

Motion
Seq. No.: 002 & 003

The following numbered papers read on this motion (seq. 2) by St. Michael’s Episcopal Church d/b/a St. Michael’s Cemetary (St. Michael’s) for an order pursuant to CPLR §3212, for summary judgment granting a declaratory judgment that plaintiff is the owner of the disputed portions of plaintiff’s property, and injunctive relief removing and prohibiting the encroaching fence erected, or to be erected, on its property; and separate motion (Seq 3) by the defendants Tom Tiseo a/k/a Tomaso A. Ticeo a/k/a Tom Ticeo (Tiseo) and ABC Corporation for an order: (a) amending the caption to identify ABC Corporation as 49th St Lot LLC, TLC Group LLC, Bowery Bay Assoc LLC and Astor Mgmt LLC (collectively “Owner Entities”), and (b) pursuant to CPLR §3212, granting summary judgment on defendants’ first counterclaim for a declaration that the defendants own the disputed area of the property by adverse possession.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion - Affidavits - Exhibits (plaintiff).....	EF48-EF74
Notice of Motion-Affids-Exhibs (defendants).....	EF75-EF78
Answering Affidavits - Exhibits (plaintiff).....	EF79-EF102
Reply Affid- Exhibs (defendants).....	EF108
Reply Affid- Exhibs (plaintiff).....	EF103-EF107

Upon the foregoing papers, it is Ordered that the motions are consolidated for purposes of disposition and determined as follows:

At the outset, the branch of defendant’s motion, (Seq 3), seeking to amend the caption to identify the defendant “ABC Corporation” as “49th St Lot LLC, TLC Group LLC, Bowery Bay Assoc LLC, and Astor Mgmt LLC” (collectively “Owner Entities”), is granted. The new caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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St. Michael’s Episcopal Church d/b/a
St. Michael’s Cemetery,

Plaintiff,

-against-

Tom Tiseo a/k/a Tomaso A. Ticeo a/k/a
Tom Ticeo and 49th St Lot LLC, TLC Group LLC,
Bowery Bay Assoc LLC and Astor Mgmt LLC,

Defendants.

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In this action, the plaintiff St. Michael’s Episcopal Church (St. Michael’s) is a church and cemetery, founded in 1852, located on the land described as Block 1016, Lot 550. It is alleged that the defendant had entered upon the plaintiff’s property and erected a fence beyond the boundary lines indicated by surveys made upon the property. The plaintiff seeks a declaratory judgment as to its ownership of the disputed property, and also seeks an injunction to order the defendant to remove the encroaching personal property, i.e. junk cars, parts, debris and any and all fencing installed by the defendant upon plaintiff’s property. The plaintiff relies upon the surveys submitted which describe the boundary lines between the two properties, and further identify two fence lines and encroachments upon plaintiff’s property. In opposition, the defendant asserts claims of adverse possession over the disputed property relying upon his use of the property up to and including the corrugated fence line, then, up to the buffer fence erected by the plaintiff, and to the 2021 survey fence line which he claims is built on the line he has claimed as his according to the corrugated fence line. Defendants claim this boundary has been used since 1988 when he built the corrugated fence after purchasing the property.

In support of its motion, the plaintiff submitted, among other things, a copy of the pleadings, it's attorney's supporting affirmation, the supporting affidavit of Dennis Werner (Werner), General Manager of St. Michael's, a copy of Werner's deposition transcript, a copy of Tiseo's deposition transcript, a copy of the deed to the property dating from 1883, a copy of the survey dated August 3, 2015 and the survey dated April 17, 2020, reflecting an update on July 6, 2021, by Alphonse Pesce, Jr, professional land surveyor, various images of fencing surrounding the property depicting a "corrugated fence" and a "chain link" fence, and various images of junked vehicles, tires and debris upon the disputed property. In opposition to plaintiff's motion, and in support of their motion, the defendants submitted, inter alia, a copy of their attorney's affirmation, his own supporting affidavit, a copy of a lease with Fed Ex for a portion of the disputed property in defendant's name as lessor, and copies of photographs depicting alleged re-grading of the land on Tiseo's side of the corrugated fence line.

At his deposition, defendant Tiseo testified that he purchased the property in 1988, and that immediately thereafter, built the corrugated fence directly where the previous "dilapidated" fence was located, intending it to be on the boundary line for the property he purchased. Werner, the plaintiff's general manager, indicated little opposition, if any, to the corrugated fence being placed where it was, and the defendant has always insisted that the corrugated fence line is where the true boundaries of the property are. The defendant further testified that he stored his "junk" cars and other miscellaneous car parts and debris, on his side of the corrugated fence from 1988 to the present. Werner testified at his deposition that in or about 1999, on behalf of the plaintiff, he demanded that the defendant "clean up his side of the corrugated fence", so that a new fence could be erected. Both parties acknowledge this conversation, and both parties agree that the defendant rejected the demand. A period of eleven (11) years elapsed from the date the corrugated fence was built and the time of this conversation. Thereafter, the plaintiff built its "buffer fence", intended to separate the two properties, but not meaning to be placed directly upon the property line, as it appeared the corrugated fence, being in disrepair, was an obstacle to doing so. Thus, according to the plaintiff, the buffer fence was installed approximately 3-5 feet in towards the plaintiff's property.

By declaring that the buffer fence is actually placed on the survey lines for the separation of the two properties, the defendant claims adverse possession of any disputed property beyond the survey lines, in the event of a discrepancy. The defendant further asserts an adverse possession claim due to the installation of the 2020 fencing which plaintiff claims is encroaching even more upon its property.

Turning to the defendants' motion for summary judgment on its claim of adverse possession (Seq 3), the evidence must be viewed in the light most favorable to the non-moving party (*See Vega v Restani Const. Corp.*, 18 NY3d 499 [2012]). In so doing, the

evidence submitted by the moving party must eliminate all material issues of fact (*Id.*). Since defendants' alleged ten-year period occurred prior to 2008, RPAPL §§ 501 and 522 statutes in effect at that time are controlling. To prove adverse possession under these statutes, the defendant must show, by clear and convincing evidence that possession of the disputed property was hostile, open and notorious, actual, exclusive, and continuous for the statutory period of ten (10) years (*See Walling v Przybylo*, 7 NY3d 228 [2006]; *Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647 [2d Dept 2014]). The defendant must also prove by clear and convincing evidence that the disputed area was either "usually cultivated or improved", or "protected by a substantial inclosure." (*Id.*; *Skyview Motel, LLC v Wald*, 82 AD3d 1081 [2d Dept 2011]). Proving adverse possession is the defendant's burden (*Id.*).

"Hostile possession does not require a showing of enmity or specific acts of hostility ...All that is required is a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights ... Consequently, hostility may be found even though the possession occurred inadvertently or by mistake" (Hall v. Sinclair, 35 A.D.3d at 663, 826 N.Y.S.2d 706 [internal quotation marks omitted]; see Gore v. Cambareri, 303 A.D.2d 551, 553, 755 N.Y.S.2d 728; Randisi v. Mira Gardens, 272 A.D.2d 387, 388, 707 N.Y.S.2d 204; Greenberg v. Sutter, 257 A.D.2d 646, 646–647, 684 N.Y.S.2d 571). Additionally, under the law as it existed when the plaintiffs commenced this action (see Asher v. Borenstein, 76 A.D.3d 984, 986, 908 N.Y.S.2d 90; see also L. 2008, ch. 269), "actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor" (*Walling v. Przybylo*, 7 N.Y.3d 228, 230, 818 N.Y.S.2d 816, 851 N.E.2d 1167). "Conduct will prevail over knowledge" (*id.* at 232, 818 N.Y.S.2d 816, 851 N.E.2d 1167)." (*See Kelly v Bastianic*, 93 AD3d 691 [2d Dept 2012]).

The record before this Court demonstrates an abundance of material issues of fact. Since over ten (10) years have elapsed since the corrugated fence was built by the defendant, in the event the corrugated fence "encroached" upon the plaintiff's property beyond the survey lines, it is subject to defendant's claim of adverse possession.

On its initial claim regarding the corrugated fence line, the defendant's claim of adverse possession comes down to whether the corrugated fence line diverts in any way, from the survey lines indicating the boundaries of the disputed properties. Exactly where, and whether the corrugated fence line diverges from the survey lines, has not been shown by clear and convincing evidence. Furthermore, there has been little, or no, evidentiary proof offered as to how long the corrugated fence was relatively intact so as to constitute a sufficiently substantial inclosure for ten continuous years, pursuant to statute (*See Skyview Motel, LLC v Wald*, 82 AD3d 1081 [2d Dept 2011]). In addition, Tiseo has raised an issue of fact regarding whether he re-graded his side of the "corrugated fence line", as an open, hostile, exclusive demonstration of ownership of that side of the fence, in the event this diverges from the

survey line boundaries. However, the evidence submitted is insufficient to show when this re-grading took place, and whether it was permissive or hostile.

As to the claim of adverse possession regarding the area up to the “buffer fence” line, which was built in 1999, this claim is subject to the amended RPAPL statutes in that the defendant’s claimed ten years had not elapsed from 1999, when the fence was built, to 2008, when the statute was amended. The amended statute requires that the possession be “adverse, under claim of right, open and notorious, continuous and actual.” The amended statute states, “A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner as the case may be.” The plaintiff contends the border fence was built within its own property, and not, along the survey line. The plaintiff describes its location as approximately 3-5 feet within its own property from the proper boundary lines. To the extent that the defendant is claiming adverse possession up to the buffer fence line, the defendant has consistently stated that all attempts of delineating the boundary lines has been to conform to the boundary lines that he bought in 1988. Teseo acknowledged that the corrugated fence that he built, was to be built along the prior fencing, and that such was intended to be along the survey lines for the property he purchased. He exhibited no intention to claim property beyond the survey lines. His main objections were that he believed that the “buffer fence” built by the plaintiff was built along his own corrugated fence line, which in turn, was built upon the survey lines. The Court finds that, to the extent that the “buffer fence” does not adhere to the survey lines, any claim regarding the “buffer fence”, was not by “claim of right” as statutorily required, and therefore, is without merit. Furthermore, according to the 1988 enacted RPAPL § 543, a fence is to be considered a *de minimus* factor when considering adverse possession. For these reasons, the “buffer fence line” can not be considered as a factor in determining adverse possession by the defendant.

As to the 2021 fencing, there is no question that it was built within ten years and does not meet the basic requirement of the statute. For this, and other reasons, if it is determined that it is within the plaintiff’s side of the corrugated fence line, or if the corrugated fence line is impossible to be ascertained, then within the plaintiff’s side of the survey line, it will be an encroachment and subject to removal by court order.

With regards to plaintiff’s motion for a declaration of ownership and injunctive relief, there are still issues to be determined at trial as to defendant’s claim of adverse possession with regard to the corrugated fence line versus the survey lines, so that the plaintiff’s claims of trespass, and encroachment can not be determined on this motion.

As to plaintiff’s claim for nuisance, the elements of a private nuisance cause of action are: an interference substantial in nature, intentional in origin, unreasonable in character, with a person’s property right to use and enjoy land, caused by another’s conduct in acting or

failure to act (*Harris v Miranda*, 219 AD3d 1498 [2d Dept 2023]). On this motion, the plaintiff has submitted insufficient evidence and did not meet its prima facie burden for its claim of nuisance.

Accordingly, the motion by the plaintiff for summary judgment on its claims for encroachment and trespass are granted as to the 2021 fencing erected or installed by the defendant that is located on plaintiff's side of the corrugated fence line. The buffer fence found to be within plaintiff's side of the corrugated fence line shall not inure to the benefit of defendant's adverse possession claim. That branch of the plaintiff's motion seeking summary judgment on its claim for nuisance is denied, as insufficient evidence was submitted to meet its prima facie burden. The defendant's motion for summary judgment is denied to the extent that issues of material fact remain unresolved, such as, among other things, whether the corrugated fence line diverged to defendant's benefit from the survey lines, and if so, whether the corrugated fence was "hostile" or "permissive". The defendant's claim for adverse possession involving the buffer fence line is denied. The defendant's claim that the 2021 fence establishes adverse possession is denied as it failed to meet the statutory requirement that it be continuous for a ten year period, and under a claim of right. That branch of defendant's motion seeking to amend the caption is granted.

Dated: December 3, 2024



NICOLE MCGREGOR MUNDY
A.J.S.C.

