

Jewish Eltech Trust v Bronstein

2025 NY Slip Op 31152(U)

March 31, 2025

Supreme Court, Kings County

Docket Number: Index No. 515025/2020

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of March, 2025.

P R E S E N T :

HON. WAVNY TOUSSAINT,
Justice.

JEWISH ELTECH TRUST, ILYA MARDER,
TRUSTEE,

Index No.: 515025/2020

Plaintiff,

**DECISION AND
ORDER**

-against-

IRINA BRONSTEIN, IRINA BRONSTEIN as Trustee for
PRODYASTY TRUST, GENE BRONSTEIN, NATALIA
SHAPIRO and ARKADI SHAPIRO,

Defendants.

The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Affidavit (Affirmation)
Other Papers

Papers Numbered

183-209

213-230

232-235

Upon the foregoing papers, plaintiff moves (Seq. 05) for an order, pursuant to CPLR § 3212, granting summary judgment and declaring, among other things, that it is the owner in fee, by adverse possession, of a disputed 4-foot wide by 20-foot-long strip of land

adjoining plaintiff's property and abutting defendants' property. Defendants oppose the motion.

BACKGROUND

Ilya Marder (the original plaintiff herein) and Zoya Marder acquired 167 Beaumont Street, Brooklyn, NY, Block 8734, Lot 37 (Beaumont Street), on May 13, 2016 from Ronald Danner, the surviving tenant by the entirety of Marie Danner, his wife (the Danners). The Danners owned 167 Beaumont Street uninterrupted from March 12, 1978 until the date of plaintiff's acquisition, a period spanning thirty-eight years. On September 14, 2021, during the pendency of this matter, Ilya Marder transferred 167 Beaumont Street to the Jewish Eltech Trust allegedly as part of his estate plan. Ilya Marder is the sole trustee of the trust which was substituted as plaintiff in place of Ilya Marder.¹

Defendants Arkadi Shapiro and Natalia Shapiro, husband and wife, along with defendants Gene Bronstein and Irina Bronstein, husband and wife (the individual defendants), jointly as tenants in common, acquired 170 Coleridge Street, Brooklyn, NY, Block 8734, Lot 15, as it was then known (170 Coleridge Street), on March 3, 2004 from Diana Blumenthal, Executor of the Estate of Harry L. Cohen. On December 31, 2007, the individual defendants acquired a 4-foot easement adjoining the easterly side of 170 Coleridge Street from the Catherine Darpino, LLC. The transfer deed describes the easement as "being the easterly 4 feet of the easement adjoining the westerly side of Tax Lot 15 in Block 8734 as shown on the Tax Map of the City of New York, Borough of

¹ See the Court's order dated May 8, 2024 (NYSCEF Doc. No. 176) granting plaintiff's motion (Seq. 04) seeking leave to amend the complaint.

Brooklyn, County of Kings”. On March 3, 2008, the individual defendants acquired an additional 4-foot easement adjoining the westerly side of 170 Coleridge Street, also from the Catherine Darpino, LLC. The transfer deed describes the easement as “being westerly 4 feet of the 8 foot sewer easement adjoining the westerly side of Tax Lot 15 and the easterly side of Tax Lot 35 and the southerly 1/2 of the easterly side of Tax Lot 37 In Block 8734 as said Section 22 Block 8734 is shown on the Tax Map in the City of New York Borough of Brooklyn County of Kings as the same currently exists”.

On October 17, 2008, the individual defendants received a “Confirmatory Deed” (recorded on November 6, 2008, CFRN 2008000431034) from the Catherine Darpino, LLC “to confirm the title intended to be conveyed” by the two prior transfers from December 31, 2007 and March 3, 2008. A series of transfers among the individual defendants followed. On April 16, 2009, Natalia and Arkady transferred their 50% interest in 170 Coleridge Street to Natalia. Also on April 16, 2009, Gene and Irina transferred their 50% interest in 170 Coleridge Street to Irina.

Sometime after the April 16, 2009 transfers, 170 Coleridge Street was sub-divided into two separate property lots. The first was designated as 168 Coleridge Street, Brooklyn, NY, and assigned the same prior block and lot, being Block 8734, Lot 15 (168 Coleridge Street). The second was designated as 170 Coleridge, Brooklyn, NY, and assigned Lot 17, being Block 8734, Lot 17. Then, in a deed dated April 21, 2010, Natalia and Irina transferred their interest in 168 Coleridge Street to Irina. On October 18, 2018, Irina transferred 168 Coleridge Street to defendant Irina Brownstein as Trustee of the ProDynasty Trust.

Plaintiff filed suit on August 14, 2020 alleging defendants illegally and improperly terminated plaintiff's use of the 4-foot wide by 20-foot long strip of land, which plaintiff asserts was acquired by adverse possession. Plaintiff alleged that on or about October 5, 2017, defendants removed the existing chain link fence maintained by plaintiff and erected a new fence enclosing the strip of land. The new fence encroached 4-feet onto plaintiff's property. Plaintiff sought relief asserting claims for adverse possession, removal of encroachment, quiet title, trespass and private nuisance.

Defendants interposed an answer with counterclaims on September 8, 2020, asserting fifteen affirmative defenses and denying, among other things, the allegation that the disputed strip of land had been enclosed by a chain link fence since 1978, as alleged by plaintiff. As the basis for their quiet title, adverse possession, declaratory judgment, and permanent injunction counterclaims, defendants alleged title to the disputed strip of land was acquired by them as of October 17, 2008 under the deed recorded on November 6, 2008 (now held by defendant ProDynasty Trust as of October 18, 2018).

Plaintiff filed a reply to defendants' counterclaims on September 28, 2020, asserting eight defenses and refuting the allegations serving as the basis for the counterclaims. Plaintiff specifically denied, among other things, the validity of the alleged November 6, 2008 conveyance to defendants or that same would in any way impede or deprive plaintiff of its rights to the disputed strip of land. Plaintiff seeks dismissal of the answer and counterclaims and seeks recovery based on the affirmative relief requested in the complaint.

THE PARTIES' CONTENTIONS

Plaintiff moves (Seq. 05) for an order, among other things, declaring it the owner, by adverse possession, of the disputed 4-foot wide by 20-foot-long strip of land. Plaintiff argues it met all the elements of adverse possession, asserting compliance with the former version of Real Property Actions and Proceedings Law § 522 (RPAPL§ 522), in that a chain link fence was erected by the Danners in 1978 enclosing the disputed strip of land. Under the doctrine of tacking, plaintiff argues its adverse possession time calculations date back to 1978 and ripened after ten years of continuous enclosure in 1988, long before defendants' acquisition of 170 Coleridge Street on March 3, 2004. Plaintiff further argues defendant ProDynasty Trust contradicts itself when it too asserts ownership of the disputed strip of land by adverse possession based on the deed dated October 18, 2018, as a deed, plaintiff argues, in and of itself, cannot serve as a basis for adverse possession.

In opposition, defendants rely, among other things, on the affirmation of Trustee Irina Bronstein and contend the motion should be denied as plaintiff does not meet the elements of adverse possession. Among other things, Trustee Irina Bronstein asserts defendants maintained "dominion and control" over the disputed strip of land and that the purported fence cited by plaintiff was "not a permanent or complete enclosure as it was a hastily erected chain link fence". Defendants also contend the May 13, 2016 deed conveying title to plaintiff does not include the disputed strip of land and that, in any event, plaintiff cannot "tack" the claimed adverse possession time period to plaintiff's predecessor, the Danners, who did not use the property in an adverse manner. Defendants next contend the disputed strip of land was continuously and exclusively occupied by them

in an actual, open, hostile notorious, exclusive, and continuous manner, and under claim of right since December 31, 2007 (when the easements were first acquired), and then in the same manner by the ProDynasty Trust since October 18, 2018; thereby giving rise to their adverse possession claim.

In reply, plaintiff argues the self-serving affidavit of Trustee Irina Bronstein should be disregarded as it is not supported by objective, credible, persuasive, and admissible evidence. In particular, plaintiff refutes Trustee Irina Bronstein's assertion that Ilya Marder had agreed to remove what was described as a "temporary" fence erected by the Danners and that he further "acknowledged" defendants' ownership of the disputed strip of land. Plaintiff further points to the supporting non-party affidavits of Ora Lidsky, the owner of 173 Beaumont Street (Lidsky), and Jerry Greenwald, the owner of 163 Beaumont Street (Greenwald), who both dispute defendants' assertions of adverse possession and who further confirm the existence of the chain link fence and the Danners' use of the disputed strip of land, dating back to 1978.

DISCUSSION

Standard of review

"To obtain summary judgment it is necessary that the movant establish his [or her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept. 2015], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "On

the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact” (*id.*). If there are triable issues of fact as to how the alleged accident occurred, then the motion should be denied (*Lima v HY 38 Owner, LLC*, 208 AD3d 1181, 1183 [2d Dept. 2022]). “Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Murray v Community House Development Fund Company, Inc.*, 223 AD3d 675, 677 [2d Dept. 2024]).

Additionally, “[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party [and] where conflicting inferences may be drawn, it must draw those most favorable to the nonmoving party” (*Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002, 1005 [2d Dept. 2016]). “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Khutoryanskaya v Laser & Microsurgery, P.C.*, 222 AD3d 633, 635 [2d Dept. 2023]).

Adverse Possession

In 2008, the New York State legislature enacted amendments to the adverse possession statutes set forth in RPAPL Article 5 (*see* L 2008, ch 269, §§ 5, 8; *Salzberg v. Sena*, 204 AD3d 853, 856 [2d Dept 2022]; *SLC Coram, LLC v. 543 Middle Country Rd. Realty, LLC*, 161 AD3d 1122, 1123 [2d Dept 2018]; *Franza v Olin*, 73 AD3d 44, 46 [4th Dept 2010]). However, since title to the disputed strip of land allegedly vested in the Danners by adverse possession as of 1988, and then to plaintiff by tacking (*see infra*), the

law in effect prior to the amendments is applicable (*see* RPAPL § 522; *Bursky v Gerratano*, 184 AD3d 796, 797 [2d Dept 2020]; *5262 Kings Hwy., LLC v Nadia Dev., LLC*, 121 AD3d 748, 749 [2d Dept 2014]).² Accordingly, to establish a claim to property by adverse possession under the pre-amendment law, a claimant must prove by clear and convincing evidence “that possession of the property was (1) hostile and under [a] claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required [10-year] period” (*Salzberg*, 204 AD3d at 856; *SLC Coram, LLC*, 161 AD3d at 1123).

Where, as here, the claim of right is not founded upon a written instrument or a judgment or decree, plaintiff must additionally establish possession and occupancy of the strip of land by proving either that the land “has been usually cultivated or improved” or that “it has been protected by a substantial inclosure [sic]” (RPAPL § 522). “By their nature, regular cultivation, improvement and inclosure [sic] of another’s land constitute open and notorious acts of possession that would place record owners on notice of an adverse claim to the property” (*Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 160 [1996]; *see also Bursky*, 184 AD3d at 798). Adverse possession of property for the statutory period vests title to the property in the adverse possessor (*Stroem v Plackis*, 96 AD3d 1040, 1042 [2d Dept 2012]), cuts off the true owner’s remedies, and divests the

² “Under the law as it existed prior to July 7, 2008, a plaintiff asserting an adverse possession claim was required to demonstrate, *inter alia*, that the disputed area was either “usually cultivated or improved” or “protected by a substantial inclosure [sic]” (former RPAPL 522 [1], (citation omitted). Legislation effective July 7, 2008, replaced the “usually cultivated or improved” language in RPAPL 522 (1) so as to require a demonstration of “acts sufficiently open to put a reasonably diligent owner on notice” (RPAPL 522[1], (citation omitted) (*Houdek Real Estate Company, LLC v Bayport Postal Realty, LLC*, 180 AD3d 761, 762 [2d Dept 2020]).

owner of his or her estate (*Franza*, 73 AD3d at 47). Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor (*id.*).

Moreover, "[a] party claiming adverse possession may establish possession for the statutory period by tacking the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property" (*Munroe v Cheyenne Realty, LLC*, 131 AD3d 1141, 1142 [2d Dept 2015]; *Stroem*, 96 AD3d at 1042-1043). In order for tacking to be applicable, a party must show that its' predecessor "intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed" (*Diaz v Mai Jin Yang*, 148 AD3d 672, 674 [2d Dept 2017] citing *Brand v Prince*, 35 NY2d 634, 637 [1974]).

Plaintiff's Motion (Seq. 05)

Plaintiff's proof submitted in support of the motion consisted of two surveys dated April 27, 2016 and May 18, 2016, respectively; affidavits from adjoining property owners Lidsky and Greenwald, both claiming to have known the Danners and both attesting to the Danners' use and enclosure of the disputed strip of land; a deed dated June 23, 2006 purporting to show certain 4-foot easements running along the back of fifty seven properties of various blocks, including Block 8734, Lot 15, acquired by the Catherine Darpino, LLC from Joshua F. Greenberg and Elaine G. Erichson, as Executors of the Estate of Belle Greenberg; a Madison Title Agency title report dated July 1, 2021; various tax maps; and photographs, among other things.

The two 2016 surveys show the existence of a chain link fence extending the full depth of plaintiff's property as it existed before defendants allegedly removed the 4-foot

by 20-foot portion and erected the new fence on or about October 5, 2017. Lidsky states, in part, that:

The north side of [my property] adjoin premises owned by Ilya and Zoya Marder . . . as of May 13, 2016, and for a period extending thirty (30) years prior to the purchase by Marder, the premises were held by Ronald and Marie Danner ("DANNER" premises) . . . For decades, a chain link fence separated the eight (8ft) foot utility easement; four (4ft) feet of which form part of [my property] and four (4ft.) forming part of the SHAPIRO/BRONSTEIN premises. This fence continued the one which ran across what was the DANNER and the neighbors to north, Greenwald, premises. . . For a continuous period of more than thirty (30) years, my neighbors Ronald and Marie Danner made open use of the four (4ft) foot easement. Until October 2017 when I received a notice from SHAPIRO/BRONSTEIN regarding their intention to relocate the fence I was not aware of the existence of the easement as no sales record of the easement appears in the city database. . . On or about August 2008, while the Danner's were still owners, the existing fence was removed and reconstructed by SHAPIRO/ BRONSTEIN. The new fence which included a 10-inch cinderblock wall was erected on the same line the prior fence ran. On or about October 2017 Irina Bronstein removed the fence adjoining the easterly side of the Marder premises and re-established its location four (4ft) feet south of her property and onto the Marder's premises claiming they were the owners of the entire eight (8ft.) easement.

Similarly, Greenwald states, in part, that:

The south side of our premises adjoin the premises owned by Ilya and Zoya Marder ("MARDER" premises) as of May 13, 2016. For a period exceeding thirty (30) years prior to the purchase by MARDER, the MARDER premises were held by Ronald and Marie Danner ("DANNER" premises). The DANNER'S and my family were on great friendly and neighborly terms, between 1978 and 2016. and I am fully familiar with their property, and specifically the chain link fence separating the eight (8ft.) foot utility easement, that was in place throughout their ownership. . . From many conversations with Ronald Danner, the DANNER'S purchased the four (4ft.) foot easement from the owner of the easement, Joshua Greenberg, around the same time my wife and I purchased the four (4ft.) foot easement abutting our property, sometime in the year 1990. . . For the duration of my 40 year ownership, my neighbors, including the DANNERS made open use of the four (4ft.) foot easement. On or about October 2017. BRONSTEIN removed the fence adjoining the eastern side of the now MARDER owned premises,

annexing the four (4ft.) foot parcel west of her property previously part of the Marder's premises, claiming they were the legal owner of the entire eight (8ft.) easement.

The June 23, 2006 deed indicates that no portion of 167 Beaumont Street was ever acquired by the Catherine Darpino, LLC constituting the easement acquisitions reflected therein. From this evidence, it appears defendants could not have acquired the easements as set forth in their deeds dated December 31, 2007, March 3, 2008 or October 17, 2008. Indeed, the Madison Title Agency title report states: "[The] records do not show a deed into Catherine Darpino, LLC for the westerly 4 feet of the easement adjoining the southerly half of Lot 37". Further, the tax maps confirm the 20-foot frontage between 167 Beaumont Street and 170 Coleridge Street, as it was then known, and as thereafter indicated when the property was split and designated as 168 Coleridge Street. Finally, the photographs show the chain link fence installed by defendants, visually indicating the 4-foot encroachment onto plaintiff's property.

Here, when taken together, plaintiff's evidence demonstrates its *prima facie* entitlement to judgment as a matter of law, declaring it owned the disputed strip of land by adverse possession. The submitted evidence established that the disputed strip of land had been enclosed by substantial fencing since at least 1978 when purchased by predecessor owners, the Danners (*Asher v Borenstein*, 76 AD3d 984, 987 [2d Dept 2010]; *Morris v DeSantis*, 178 AD2d 515, 516 [2d Dept 1991]; *Birnbaum v Brody*, 156 AD2d 408, 409 [2d Dept 1989]). Plaintiff also established through the affidavits that the Danners "made open use of" the disputed strip of land during their decades-long ownership, including the adverse possession period running from 1978 to 1988. Additionally, the doctrine of tacking

applies to support the foregoing 10-year calculation, inuring to the benefit of the plaintiff (*Munroe*, 131 AD3d at 1142).

Having met its burden, defendants were obligated to present admissible proof to raise a triable issue of fact in opposition to plaintiff's *prima facie* showing (*Zuckerman*, 49 NY2d at 562). Defendants submit their various deeds; plaintiff's deed dated May 13, 2016; a survey dated January 20, 2004; various property tax records; and the affidavit of Trustee Irina Bronstein, among other things. The Confirmatory Deed shows that defendants acquired the disputed strip of land as of October 17, 2008, which thereby evidenced defendants' ownership beginning at least as of this date and, in addition, established their legal title to same (*see* RPAPL § 311; *Diaz*, 148 AD3d at 674). In contrast, upon inspection by the Court, plaintiff's acquisition deed does not reference any easement as being part of the transfer from the Danners.

While the affidavits of Lidsky and Greenwald purport to establish the existence of the chain link fence erected by the Danners since 1978, this assertion is contradicted by Trustee Irina Bronstein, who states, in part:

At the time we purchased our property, there was no fence running between our backyard and the Danners' backyard. It was a completely open space such that there was no division between our two (2) properties in that location. At the time we purchased our property, the Danners did not use, cultivate or improve the parcel of land that constituted the utility easement. In fact, the easement land was in such a location that it could not have any meaningful use because it was blocked by the Danners' garage . . . With respect to the portion of the easement land that abutted the Danners' property, the Danners did not so much as plant grass in that area and it remained in a barren state at all times.

The foregoing raises questions of fact regarding whether the disputed strip of land was substantially enclosed by the Danners and whether the Danners' use of the property was sufficient to satisfy the statutory requirement of RPAPL § 522. While the collective assertions by Lidsky and Greenwald that the Danners "made open use of" the disputed strip of land, defendants' evidence indicates that the Danners' purported use, or lack thereof, is insufficient to satisfy the "usually cultivated or improved" requirement set forth under RPAPL § 522. The use ascribed to the Danners is simply too vague to meet this statutory burden (*Kagan v Kropp*, 228 AD3d 920, 922 [2d Dept 2024] citing *Houdek Real Estate Co., LLC*, 180 AD3d at 762; and *Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 650 [2d Dept 2014]).³

Moreover, the survey and property records include the disputed strip of land as part of defendants' property since at least October 17, 2008, raising a further question of fact whether the land was intended to be transferred to plaintiff by the Danners, a necessary element of plaintiff's adverse possession claim (*see Diaz*, 148 AD3d at 674). Together, defendants' proof raise questions of fact surrounding whether plaintiff established the requisite elements for adverse possession, requiring the denial of the motion (*see CPLR 3212 [b]*; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

³ Even if considered by the Court, the reply affidavits of Greenwald and Ilya Marder, submitted in part to bolster the Danners' use of the disputed strip of land, nonetheless fail to establish the requisite detail needed to satisfy the "usually cultivated" requirement of RPAPL § 522, as the additional assertions state the Danners merely used the disputed strip of land "to store equipment and tools" (see, e.g., NYSCEF Doc. No. 233 at par. 9 and NYSCEF Doc. No. 234 at par. 6).

CONCLUSION

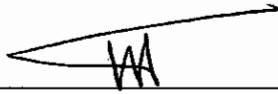
Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment (Seq. 05) is denied.

The parties' remaining contentions, to the extent not expressly set forth herein, have been considered and are denied.

This constitutes the decision and order of the Court.

E N T E R



J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
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