

**Marsh v Edmund**

2025 NY Slip Op 33337(U)

September 4, 2025

Supreme Court, Kings County

Docket Number: Index No. 514887/2021

Judge: Ingrid Joseph

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At an IAS Term, Part 83 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 4<sup>th</sup> day of September, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
CAROL MARSH,

Plaintiff,

Index No.: 514887/2021

-against-

**DECISION AND ORDER**

BERTIN EDMUND,

Mot. Seq. Nos. 3, 4

Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/ Affirmations in Support/ Statement of Material Facts/ Exhibits .....	68-83
Notice of Cross-Motion/ Affirmations in Opposition to Motion and in Support of Cross-Motion/ Exhibits/ Memorandum of Law in Opposition to Motion and in Support of Cross Motion/ Statement of Material Facts .....	85-93
Statement of Material Facts/ Affirmation in Opposition to Cross-Motion and in Further Support of Motion .....	95-96
Affirmation in Reply .....	97

Plaintiff Carol Marsh (“Plaintiff”) moves for an order, pursuant to CPLR 3212, granting summary judgment in her favor (Mot. Seq. No. 3). Defendant Bertin Edmund (“Defendant”) cross moves for an order (a) pursuant to CPLR 3212, granting summary judgment dismissing Plaintiff’s complaint, and on his counterclaim seeking a judgment declaring and adjudging Defendant the sole owner of the subject property; and (b) cancelling the Notice of Pendency filed in this action (Mot. Seq. No. 4).

This action concerns real properties located at 1077 Sterling Place in Brooklyn, New York on Block 1243 Lot 52 (“Lot 52”) and 1044 Park Place in Brooklyn, New York on Block 1243 Lot 24 (“Lot 24”). The rear property line of Lot 52 abuts part of the rear property line of Lot 24. Carol

and Edna Marsh inherited Lot 52 from Arthur Marsh, their father and husband, respectively, who owned the property from January 31, 1950, until his death in 1994. Plaintiff states that Mr. Marsh's title is reflected in deeds from 1950 and 1972<sup>1</sup> and they came into title of Lot 52 pursuant to a 1995 deed.<sup>2</sup> Defendant came into title of Lot 24 pursuant to a 1974 deed.

Defendant alleged, in a letter to Carol and Edna Marsh dated May 21, 2021 (NYSCEF Doc No. 76), that Lot 24 extended into their backyard, beyond a concrete wall (the "Wall") by approximately five feet and along the length of Lot 52 (the "Disputed Area"). Plaintiffs Carol and Edna Marsh commenced this action on June 18, 2021, seeking to obtain (1) a declaratory judgment that (a) they are the sole owners of the disputed land by adverse possession and (b) they are the rightful owners of the disputed land by virtue of deeds; and (2) a permanent injunction preventing Defendant from entering or claiming ownership of the Disputed Area.

Plaintiff Carol Marsh<sup>3</sup> now moves for an order pursuant to CPLR 3212, granting them summary judgment (Mot. Seq. No. 3). In her motion, Plaintiff first contends that she is entitled to summary judgment through adverse possession. Plaintiff avers that when she acquired title to Lot 52, she reasonably believed that she owned the entire backyard. Plaintiff bases this belief on the fact that the yard is enclosed by the Wall. Plaintiff was undisturbed in their possession and use of the Disputed Area, and others were not allowed to enter Lot 52 without Plaintiff's permission. Plaintiff argues that they, along with their predecessor, Mr. Marsh, have been in actual possession of the Disputed Area in a continuous, exclusive, hostile, open, and notorious manner for at least ten years. Plaintiff asserts that hostility is met because her possession of the Disputed Area is adverse and in opposition to Defendant's rights as the true owner. Plaintiff states that she improved the Disputed Area through use of a clothesline, a pole, and tree maintenance. Plaintiff further contends that because her backyard was fully enclosed, the Disputed Area was "protected by a substantial enclosure." Plaintiff avers that her adverse possession claim accrued in 2005, five years before the 2008 amendment to RPAPL Article 5.<sup>4</sup>

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<sup>1</sup> Mr. Marsh gained title to Lot 52 pursuant to a 1950 deed referenced in the 1972 deed (NYSCEF Doc No. 73). The 1972 deed reflected a change in title which added Edna Marsh onto the deed.

<sup>2</sup> Following Mr. Marsh's death, Plaintiff was added to the deed (NYSCEF Doc No. 72).

<sup>3</sup> When this action was commenced Edna Marsh was listed as a plaintiff, however, upon her passing the caption was amended to remove her name since Carol Marsh now has full title to the property (NYSCEF Doc No. 49).

<sup>4</sup> Effective July 7, 2008, RPAPL Article 5 was amended. As relevant here, section 501 was amended to add a definition of "claim of right" (RPAPL 501 [3]) and section 522 was amended to change "[w]here it has been usually cultivated or improved" to "[w]here there have been acts sufficiently open to put a reasonably diligent owner on notice" (RPAPL 522 [1]).

Plaintiff next argues that her use of the Disputed Area created an easement by prescription. Plaintiff asserts that she used the Disputed Area openly, notoriously, continuously, and exclusively for at a minimum of ten years. In support of her argument, Plaintiff avers that she used a clothesline and maintained the tree. Plaintiff also alleges that the Disputed Area was fully enclosed within their backyard.

In opposition to Plaintiff's motion and in support of his cross-motion, Defendant first contends that Plaintiff failed to establish that she is the rightful owner of the Disputed Area. Defendant maintains that Plaintiff failed to demonstrate through deeds, property surveys, expert opinion, or other evidence that the Disputed Area is part of Lot 52. Defendant alleges that Plaintiff failed to meet the hostility element because she did not assert any right to the Disputed Area until 2021 after Defendant notified Plaintiff of his intention to move the Wall. Defendant argues that Plaintiff failed to establish that adverse possession vested before the 2008 amendments to RPAPL were instituted, because she could not satisfy the substantial enclosure or improvement requirements. Defendant avers that Plaintiff's adverse possession claim fails under the current RPAPL 522 because (1) the Disputed Area is not protected by a substantial enclosure, (2) Plaintiff did not act in a manner that put Defendant on notice that Plaintiff used the land as her own, and (3) Plaintiff did not provide evidence that she occupied the Disputed Area for the statutory period. Defendant states that Plaintiff's alleged use of the Disputed Area was not an infringement on Defendant's rights due to (1) Plaintiff's failure to maintain the Disputed Area, (2) Plaintiff's deed, the tax map, and property surveys show that the Wall is within Lot 24, and (3) Plaintiff did not provide evidence that Mr. Marsh provided Plaintiff with possession of the Disputed Area. Defendant contends that because Plaintiff's adverse possession claim fails, her claims for declaratory relief and a permanent injunction should be denied. Defendant next argues that he is entitled to an order cancelling the Notice of Pendency. Defendant asserts that because the Notice of Pendency expired on June 18, 2024 without renewal, it is invalidated.

In opposition to Defendant's cross-motion and in further support of their motion, Plaintiff avers that she met the hostility and substantial enclosure elements. Plaintiff argues that she always believed the Disputed Area to be within Lot 52 and that Defendant never stepped foot on the Disputed Area. Plaintiff alleges that she is entitled to a permanent injunction and declaratory relief because her adverse possession claim vested in 2005.

In reply<sup>5</sup> to Plaintiff's opposition to his cross-motion, Defendant states that Plaintiff did not establish a claim of right under either the pre-2008 RPAPL 501 or the post-2008 RPAPL 501. Additionally, Defendant claims that Plaintiff did not prove hostility for the statutory period because she only asserted a right to the Disputed Area after Defendant informed Plaintiff of his plan to move the Wall.

"To establish a claim of title to real property by adverse possession, a party must prove, by clear and convincing evidence that the possession was (1) hostile and under claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years" (*Diaz v Mai Jin Yang*, 148 AD3d 672, 673 [2d Dept 2017]; see *Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]; see *Perillo v Charles*, 237 AD3d 984, 985 [2d Dept 2025]; RPAPL 501). The 2008 amendment to RPAPL 501 included a statutory definition of "claim of right" (see *Hogan v Kelly*, 86 AD3d 590, 591-92 [2d Dept 2011]; see *Perillo v Charles*, 237 AD3d 984, 985 [2d Dept 2025]). RPAPL 501(3) states that a claim of right is "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be" (RPAPL 501[3]; see *Buckheit v Aiken*, 232 AD3d 842, 843 [2d Dept 2024]). Prior to the 2008 RPAPL amendments, an adverse possession claim not based on a written instrument succeeded if the disputed portion was "usually cultivated or improved [or]...protected by a substantial enclosure" (RPAPL 522 [effective through July 6, 2008]).

Adverse possession may be established "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]; see *Stroem v Plackis*, 96 AD3d 1040, 1042 [2d Dept 2012]). For a party to "tack" their predecessor's time, that party must demonstrate that their 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 NY2d 634, 637 [1974]; *Ram v Dann*, 84 AD3d 1204, 1206 [2d Dept 2011]).

"To acquire an easement by prescription, it must be shown that the use was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years" (*Masucci v DeLuca*, 97 AD3d 550, 551 [2d Dept 2012]; *Aboulissan v Kingsland 79, LLC*, 179 AD3d 878,

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<sup>5</sup> Defendant requests that the Court deem his Counterstatement of Material Facts admitted even though Plaintiff failed to submit a response to Defendant's Counterstatement of Material Facts. This Court does not require parties to submit Statements of Material facts.

879 [2d Dept 2020]; 572 *Walt Whitman Road Holdings, LLC v Whitman Capital, LLC*, 237 AD3d 878, 881 [2d Dept 2025]). The hostility element provides the true owner with notice of the easement via “unequivocal acts of the usurper” (*Bratone v Conforti-Brown*, 150 AD3d 1068, 1070 [2d Dept 2017], quoting *Monnot v Murphy*, 207 NY 240, 245 [1913]; 572 *Walt Whitman Road Holdings, LLC*, 237 AD3d at 881).

Here, Plaintiff failed to establish her prima facie entitlement to summary judgment. Plaintiff established through the deeds (NYSCEF Doc Nos. 72, 73) that she possessed the property for the statutory period of 10 years in 2005 before the 2008 RPAPL amendments. Plaintiff’s belief that the Disputed Area is within Lot 52 is not reasonable, as the deeds and property surveys show that the Disputed Area is within Lot 24. The only way Plaintiff could claim title to the Disputed Area is through adverse possession or a prescriptive easement. However, Plaintiff did not provide evidence, outside of a self-serving affidavit, that the Disputed Area was possessed by Plaintiff, Carol Marsh or Mr. Marsh in a hostile, actual, open and notorious, or exclusive manner (*compare Munroe v Cheyenne Realty, LLC*, 131 AD3d 1141, 1142-43 [2d Dept 2015] [finding that two affidavits from neighbors stating that the claimant’s predecessor maintained the disputed portion as a garden was insufficient to support an adverse possession claim based on tacking], *with Estate of Becker*, 19 NY3d 75, 82-84 [2012] [finding that a plaintiff who constructed a dock and boardwalk on a disputed portion gained title via adverse possession]). Due to Plaintiff’s failure to provide evidence that their alleged possession of the Disputed Area was hostile, actual, open and notorious, or exclusive, their prescriptive easement claim fails as well (*Air Stream Corp v 3300 Lawson Corp.*, 99 AD3d 822, 827 [2d Dept 2012] [finding that a claimant who failed to establish their adverse possession claim due to a failure to meet the hostility element also failed to establish a claim for prescriptive easement]). Since Plaintiff’s claim to the Disputed Area is based solely on adverse possession and a prescriptive easement, and Plaintiff failed to establish her claim, Defendant is entitled to summary judgment dismissing Plaintiff’s complaint (*Diaz v Mai Jin Yang*, 148 AD3d 672, 674-75 [2d Dept 2017]).

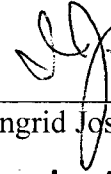
Accordingly, it is hereby

ORDERED, that Plaintiff’s motion for summary judgment (Mot. Seq. No. 3) is denied; and it is further

ORDERED, that Defendant’s motion for summary judgment dismissing the complaint and to cancel the Notice of Pendency (Mot. Seq. No. 4) is granted.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.



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Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**