2020-11-25

1982 W. 12th St. Holding LLC v. Lati

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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1982 EAST 12TH STREET HOLDING LLC, **DECISION / ORDER**
Plaintiff, **Index No.: 518587/2020**
-against- **Motion Seq. No.: 2**
MOUSA LATI,
Defendant.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of defendant's pre-answer cross motion to dismiss

Papers	**NYSCEF Doc.**
Notice of Cross Motion, Affirmation and Exhibits Annexed	16-25
Affirmation in Opposition, Affidavits and Exhibits	26-29

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

This is an action for adverse possession, trespass and damages, brought by plaintiff against the property owner who owns the property adjacent to plaintiff's property. Plaintiff claims they bought their property in 1995 as husband and wife, and built a new house on it, which was completed in 1998. They state that they transferred title to an LLC in 2015. They claim they are the managing members of the LLC. Their property is approximately 110 feet deep and 40 feet wide.

The plaintiff claims that in January of 1998, they put sod, a tree and bushes on a strip of defendant's property which is on the edge of their property, and also installed a connection to their in-ground sprinkler system under the soil. According to the photos, this created a visual barrier between plaintiff's property, a private house on East 12th Street in Brooklyn, NY, and the small parking lot behind defendant's property, an apartment building, which faces Avenue T, the adjoining street. Defendant bought the adjacent property in 1999, and according to the deed, (E-File Doc. 8), the property is approximately 34 feet wide and faces Avenue T, and 100 feet deep, along East 12th

Street. Neither party has provided a survey. Plaintiff claims they acquired title to the "disputed strip" of land by adverse possession over the twenty-two years, and brought this action when defendant tore it all up in September of 2020. This action was commenced by order to show cause, which sought a preliminary injunction preventing defendant from interfering with their "use" of the disputed strip for landscaping during the pendency of this action. The defendant has cross-moved pre-answer, to dismiss the complaint as failing to state a cause of action, or, in the alternative, for permission to file and serve a late answer to the complaint. The court heard oral argument on October 21, 2020 and reserved decision. Defendant claims the new law of adverse possession applies, while plaintiff claims the old law applies as their rights vested before 2008 when the new law came into effect. The court granted plaintiff a preliminary injunction pending further order of the court. The court also urged the parties to try to settle this matter.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, the court finds that, accepting every fact alleged as true, plaintiff does not state a valid claim for an adverse possession action. The law is clear, and the court will endeavor to set it out for the parties. The first issue is whether the matter falls under the old law or the new law.

Article 5 of the RPAPL, as amended in 2008, is applicable to all claims filed on or after July 7, 2008 (L 2008, ch 269, § 9). Under the current law, an "adverse possessor"

is defined as a person who "occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment" (RPAPL 501 [1]). The adverse possessor acquires title to the occupied real property upon the expiration of the 10-year statutory period (*see* CPLR 212 [a]) where the use "has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual" (RPAPL 501 [2]). With respect to an adverse possession claim not founded upon a written instrument or judgment, land "is deemed to have been possessed and occupied" only "[w]here there have been acts sufficiently open to put a reasonably diligent owner on notice," or "[w]here it has been protected by a substantial enclosure" (RPAPL 522).

RPAPL 543 provides, however, that "the existence of de [minimis] non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls," as well as "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse." (See *Hartman v Goldman*, 84 AD3d 734, 735-736 [2d Dept 2011]). Thus, under the new statute, RPAPL 543, plaintiff's complaint does not state a cause of action. Specifically, this is because "plantings of foliage and shrubbery, and landscaping and lawn maintenance are de minimis and deemed permissive and non-adverse" (*Bullock v Louis*, ___AD3d___, 2020 NY Slip Op 06484 [2d Dept 2020]; *Hartman v Goldman*, 84 AD3d 734, 736 [2d Dept 2011]; *see* RPAPL 543).

In pre-amendment cases, the existence of the kinds of non-structural encroach-ments and maintenance listed in RPAPL 543 were able to be considered in determining

whether the plaintiff had shown that he or she "usually cultivated, improved, or substantially enclosed the land, and the type of cultivation or improvement sufficient to satisfy the statute varied with the character, condition, location, and potential uses of the property" (*id.*; *Asher v Borenstein*, 76 AD3d 984, 986 [2d Dep 2010]).

Here, the plaintiff's predecessor in interest, the husband and wife who transferred title to plaintiff LLC, claim they are the managing members of the plaintiff LLC, and both provide affidavits in connection with this motion. Thus, the prior owners' transfer to an LLC is of no consequence to the issues before the court. Plaintiff is entitled to" tack any period of adverse possession enjoyed by their predecessor in title onto its own period of adverse possession" (*see Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 650 [2d Dept 2014]*; Brand v Prince*, 35 NY2d 634, 637, 324 NE2d 314, 364 NYS2d 826 [1974]; *Stroem v Plackis*, 96 AD3d 1040, 1042, 948 NYS2d 77 [2012]).

In addition, as the plaintiff's predecessor owned the property since 1995, and claim they began the "adverse use" in January of 1998, which defendant does not dispute, the "adverse use" continued for ten years before July 7, 2008, the date the amendment to the statute went into effect.

The court concludes that on the facts of this case, the plaintiff's use of the disputed strip must be analyzed under the old law, not the new law. An analysis of the law of adverse possession for the time period prior to the 2008 amendment still requires the conclusion that plaintiff fails to state a claim.

Even under the "old law," adverse possession could not be obtained by planting grass and mowing it. Adding a bush or a young tree does not tip the balance in plaintiff's favor. Nor does running a hose and a few sprinkler heads. Keeping an

unfenced strip of land on the border of plaintiff's property "in presentable condition" was found to be "inadequate to satisfy the requirement that the real property in dispute was usually cultivated or improved" (*see Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 650 [2d Dept 2014]; *see also Walsh v Ellis*, 64 AD3d 702, 704, 883 NYS2d 563 [2009]; *Giannone v Trotwood Corp*., 266 AD2d 430, 431, 698 NYS2d 698 [1999]; *Simpson v Chien Yuan Kao*, 222 AD2d 666, 667, 636 NYS2d 70 [1995]; *Yamin v Daly*, 205 AD2d 870, 871, 613 NYS2d 300 [1994]). The same result obtains here.

Under the prior law, former RPAPL 522, "the party seeking title must demonstrate that he or she usually cultivated, improved, or substantially enclosed the land. Additionally, the party must demonstrate, by clear and convincing evidence, the five common-law elements of the claim. First, the possession must be hostile and under a claim of right, second, it must be actual, third, it must be open and notorious, fourth, it must be exclusive, and fifth, it must be continuous for the statutory period of 10 years" (*Walsh v Ellis*, 64 AD3d 702, 703 [2d Dept 2009]). Here, the plaintiff's use was not exclusive, nor was it hostile and under a claim of right. Indeed, in plaintiff's affidavit (E-File Doc 4) plaintiff Bettina Avidan states at Paragraphs 13-14:

> "On or about January 1998, Plaintiff without Defendant's permission and consent entered unto the portion of 1123 [defendant's] Property consisting of approximately five (5) feet by twenty (20) feet (the "Property") which is located immediately adjacent to the 1982 [plaintiff's] Property. . . . Upon entering the Property twenty-two (22) years ago, my husband and I have used the Property as its own, cultivating and making significant improvements thereto."

In her second affidavit (E-File Doc 27), she states at Paragraph 7: "As set forth in my moving Affidavit, since 1998, we have continuously used the Property without objection from Defendant." This negates any claim of right, as she clearly knew it was

not her property. There is no claim that it was indicated to be her property on any survey, nor does she claim that she ever fenced it or enclosed it before this action was commenced.

To be clear, under the prior law, when a party sought to obtain title by adverse possession on a claim not based upon a written instrument, he or she had to ”produce evidence that the subject premises were either "usually cultivated or improved" or "protected by a substantial enclosure" ([old] RPAPL 522 [1], [2]). That party also had to establish, by clear and convincing evidence, [not a preponderance of the evidence] the common-law requirements of hostile possession, under a claim of right, which was actual, open and notorious, and exclusive, and continuous for the statutory period” (*see Giannone v Trotwood Corp.*, 266 AD2d 430, 431 [2d Dept 1999]).

Accordingly, the defendant’s cross motion is granted and the complaint is dismissed. Plaintiff’s stated activities on the disputed strip, as set forth in the complaint, do not constitute a claim of adverse possession, and therefore defendant did not trespass on plaintiff’s property and does not owe plaintiff damages for removing the sod so the area may be paved. The preliminary restraining order contained in this court’s order which decided Mot. Seq. #1, dated October 21, 2020, is hereby vacated.

This shall constitute the decision and order of the court.

Dated: November 17, 2020 **E N T E R :**

Hon. Debra Silber, J.S.C.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., by Glenn Berezanskiy, Esq., for Plaintiff 1982 EAST 12TH STREET HOLDING LLC;
Brian K. Payne, Esq. for Defendant Mousa Lati