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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Acting Supreme Court Justice

TIMOTHY ARCHDEACON,

Plaintiff,

-against-

ROBERT TREBLE, ANDREA TREBLE, and CITIBANK, N.A.,

Defendant.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 014354/11

MOTION SUBMISSION DATE: 1-19-12

MOTION SEQUENCE NO. 1

The following papers read on this motion:

Notice of Motion, Affirmation, and Memorandum of Law	X
Affidavit in Opposition and Memorandum of Law	X
Reply Affirmation and Memorandum of Law	X

Defendant moves for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's complaint and vacating the notice of pendency filed by the plaintiff. Plaintiff opposes the motion.

Defendant's motion is granted.

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008];

see also 511 W.232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be afforded a liberal construction (*see Leon v. Martinez*, 84 NY2d at 87 - 88, *supra*). It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations (*see Aberbach v. Biomedical Tissue Services,* 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.,* 5 NY3D 11 [2005]). While the allegations of the complaint are to be accepted as true, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Maas v. Cornell University*, 94 NY2d 87, 91 [1999]; *see also Garber v. Board of Trustees of State University of New York*, 38 AD3d 833, 834 [2nd Dept. 2007]).

The plaintiff and defendants own neighboring pieces of real property located in Oyster Bay Cove, County of Nassau, State of New York. The plaintiff purchased his lot on July 6, 2008 and the defendants purchased their lot in May of 2004. There is a portion of land (hereinafter "disputed area"), which is approximately one quarter acre, that is within the metes and bounds description of the defendant's property on the west side. This disputed area is located on the western side of a wooded area on the defendant's property adjacent to the plaintiff's property. The disputed area borders an area of the plaintiff's property described as a maintained lawn, and the plaintiff argues the disputed area has become part of the maintained lawn. According to the plaintiff, since approximately 1980 his predecessors in interest regularly used, maintained, improved, and cultivated the area and that area has been completely integrated into plaintiffs back yard area. The plaintiff argues that both he and his predecessors in

interest have actually, continuously, exclusively, openly, notoriously, and under a claim of right, regularly used, occupied, treated, cultivated, improved, and maintained the disputed area as an inseparable part of the plaintiff's property for well in excess of ten years and in a manner that was openly hostile to the alleged right, title, and interest of the defendants. The plaintiff alleges that this disputed area has been set apart from the defendants' lawn for well in excess of 10 years by a tree lined wooded buffer that has openly existed separating the two parcels. Plaintiff claims the defendants and their predecessors have acquiesced to the open and notorious mowing, seeding, planting, clearing, raking, watering and fertilizing of the disputed area. In 2011 the defendants removed trees and performed substantial re-grading and slope alteration in the deputed area which cause the plaintiff to file this action for adverse possession. The defendant's claim they are the owners of the disputed area.

In order to establish a claim to property by adverse possession, a petitioner must prove that the 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 period. In 2008, the Legislature amended RPAPL article 5 to apply to claims filed on or after the effective date of the amendments, which took effect on July 7, 2008 (see L. 2008, ch. 269 § 5). The new amendments to the RPAPL are not applicable to this case because the property right, as alleged, vested prior to the enactment of the new law (*see Shilkoff v. Longhitano*, 90 AD3d 891, 892 [2nd Dept. 2011]; *Hogan v. Kelly*, 86 AD3d 590, 592 [2nd Dept. 2011]; *Hamond v. Baker*, 81 AD3d 1288 [4th Dept. 2011]). Therefore, the version of the law in effect at the time the purported adverse possession

allegedly ripened into title is the law applicable to the claim, even if the action was commenced after the affective date of the new legislation.

Pursuant to CPLR § 212 (a), the period necessary to recover real property by adverse possession is ten years. If the person asserting a claim of adverse possession has not held the property himself for the statutory period, he may attempt to "tack" on the adverse possession of his predecessor in interest to satisfy the 10 year statutory period (*Brand v. Prince*, 35 NY2d 634 [1974]). "[S]uccessive adverse possessions of property omitted from a deed description, especially contiguous property, may be tacked if it appears that the adverse possessor intended to and actually turned over possession of the undescribed part with the position of the land included with the deed" *id* at 637.

The plaintiff, having owned the property less than four years, can only assert a claim of adverse possession by tacking on periods from his predecessors in interest. The plaintiff has attempted to meet the ten year statutory period by tacking on his predecessor's ownership. He has alleged that they too undertook the same activities as the plaintiff, and that going back as far as 1980, his predecessor in interest regularly used, maintained, improved, and cultivated the area and that area has been integrated into plaintiffs back yard area. Plaintiff has failed to provide this court any details regarding the specific dates and actions his predecessors in interest took to fulfill the statutory requirements to obtain the property by adverse possession.

Conversely, defendants have actually provided an affidavit from the petitioner's predecessor in interest Mr. Mormando. Although Mr. Mormando was not the immediate

predecessor in interest, he was the owner of the Archdeacon property up until 2004, at which time he sold the Archdeacon property to Dr. and Mrs. Mesbah. Although no affidavits were provided from the Mesbahs, assuming *arguendo*, that the Mesbahs provided affidavits supporting all of the allegations made by plaintiff, the time tacked on to the plaintiff's interest would only be four years. Those four years combined with the one day the plaintiff owned the Archdeacon property before the new law took effect, are insufficient to satisfy the statutory requirement of 10 years possession. Accordingly, in order to reach the statutory ten year period, the petitioner must be able to tack on a period of approximately six years that Mr. Mormando owned the Archdeacon property.[1]

According to the signed and notarized affidavit provided by Mr. Frank Mormando, annexed to the defendant's reply, he is the previous owner of the property located at 5 Woodward Drove, Oyster Bay, New York and is the predecessor in interest to the petitioner, Timothy Archdeacon. He purchased the property in 1970 and sold the property to the Mesbahs at some time after 2003. For a majority of the time that Mr. Mormando owned the Archdeacon property, the neighboring parcel, 60 Sunken Orchard Lane, Oyster Bay Cove, New York was owned by James and Joan Crumlish. He states that during the time he owned the Archdeacon property he would at times mow portions of the Treble property that abutted his property, including the disputed

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[1] Plaintiff's claim that the adverse possession dated back to 1980 required that the court analyze the facts of this case under the law as it existed prior to the amendment of the RPAPL. Even if this court were to analyze the facts based on the date of filing (on or about October 6, 2011) under the amended RPAPL, which took effect on July 7, 2008, it is still impossible for the plaintiff to satisfy the statutory requirement of ten years possession without tacking on at least two years of the period of Mr. Mormando's ownership.

area. He stated that before he ever did that he received the explicit permission of the Crumlishs to cross the property line and mow the grass. Specifically he states, "I never did any mowing or maintenance on any of the Treble Property under any sort of claim of right or with any hostility to their ownership interest" and "I certainly never had exclusive occupancy of the disputed area, as the Crumlishs always had access to the entirety of their property, and in fact I never actually occupied the disputed area". Finally, and most importantly Mr. Mormando says he "did not pass any sort of ownership of the disputed area to the Mesbahs, and I made it clear to them when they purchased my property where the line between the Archdeacon and Treble properties was located. The deed granting the property to the Mesbahs did not include any reference to the disputed area precisely because I had never been under the impression that it was part of my property and therefore had no intention of passing it to the Mesbahs or any other successor".

In addition to the affidavit provided by Mr. Mormando, the defendant has provided this court with two additional affidavits from James and Joan Crumlish, the predecessors in interest to the Trebles. The Crumlishs confirm all of what was sworn to in Mr. Mormando's affidavit. Specifically, that they bought the Treble property in 1981 and sold it to the Trebles in 2004. During the period that they owned the Treble property there were two different owners of the Archdeacon property. The first was Mr. Mormando, who owned the Archdeacon property prior to the Crumlishs purchasing the Treble property and sold it in 2004. The second were the Mesbahs who bought the Archdeacon property in 2004 prior to the Crumlishs selling the Treble property to the

Trebles. The Crumlishs both confirm that at times Mr. Mormando did mow the disputed area, but that all mowing was done with permission and that it was not hostile to the Crumlish's ownership interests. At no time did the Crumlishs acquiesce to anyone's use, possession, or maintenance of the disputed area or any other portion of the Treble property.

Moreover, the affidavits of all three predecessors in interest provide information about a land swap that they entered into in 2003 shortly before each of them had sold their respective properties. Although the land swap had nothing to do with the disputed area it is of note because at that time the predecessor's in interest to both the Archdeacon property and the Treble property executed a land swap to make the tennis court on the Archdeacon property more easily accessible. As part of that process new surveys were completed and small portions of land were swapped between the properties to create a lane between the Archdeacon property and the tennis court. The new deeds acknowledging the land swap were duly recorded, and all parties were familiar with the boundaries of he property as described in the surveys done contemporaneous to the land swap. According to all three of the prior owners the disputed area was, as it always had been, remained part of the Treble property.

Finally, the affidavits of James and Joan Crumlish recount an experience that they had with the petitioner's predecessor in interest, Dr. and Mrs. Mesbah. In 2004, prior to the Trebles purchasing the Treble property the Mesbahs tried to fence in a portion of the disputed area while building a fence around their pool. The Crumlishs both state that they immediately requested that the Mesbahs remove the fence from

their property. The Mesbahs complied with the Crumlishs request once they were informed that the fence crossed into a disputed area which was actually part of the Treble property that was then owned by the Crumlishs.

A party seeking to obtain title by adverse possession must prove by clear and convincing evidence that the possession was continuous for the statutory period of ten years (*Skyview Motel, LLC v. Wald*, 82 AD3d 1081 [2nd Dept. 2011])

In considering a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Dana v. Malco Realty, Inc.,* 51 AD3d 621 [2nd Dept. 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2nd Dept. 2006]). The court must determine whether factual allegations are discerned from the pleadings' four corners which, taken together, manifest any cause of action cognizable at law (*see 511 W. 232nd Owners Corp. V. Jennifer Realty Co.*, 98 NY2d at 151-152, *supra*). Under the circumstances, and applying that standard, no cause of action for adverse possession is cognizable because the plaintiff's fails to satisfy the statutory requirement of ten years under both prior and current law.

Thus, in accepting plaintiff's facts as true and according plaintiff every favorable inference, the facts alleged in the complaint and in the affidavit in opposition with supporting memorandum of law fail to state a cause of action for declaratory judgement pursuant to Article 15 of the Real Property Actions and Proceeding Law, declaring the

plaintiff to be the owner in fee simple absolute or to be the holder of a prescriptive easement over the disputed area and fails to state a cause of action for an injunction enjoining and restraining the defendants from trespassing on the disputed area and awarding damages caused by the defendants trespass upon and interference with the disputed area.

Accordingly, defendant's application to dismiss plaintiff's complaint pursuant to CPLR § 3211(a)(7) is GRANTED. Defendant's application to vacate the notice of pendency filed by the plaintiff is GRANTED. Defendant's motion to convert the motion to dismiss into a motion for summary judgement, first raised in defendant's reply, is DENIED.

This constitutes the Decision and Order of the Court.

Dated: March 1, 2012

JAMES P. McCORMACK, A.J.S.C.