Winnegar v Rios
2012 NY Slip Op 32529(U)
September 20, 2012
Supreme Court, Suffolk County
Docket Number: 11-34766
Judge: Hector D. LaSalle
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SHORT FORM ORDER

INDEX No. 11-34766

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 5-3-12 (#001)
MOTION DATE 5-15-12 (#002)
ADJ. DATE 6-15-12
Mot. Seq. # 001 - MD
002 - XMD

JOHN F. WINNEGAR and MAUREEN V. WINNEGAR,

Plaintiffs,

- against -

LINDA RIOS,

Defendant.

BRODY, O'CONNOR & O'CONNOR
Attorney for Plaintiffs
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Northport, New York 11768

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP
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Upon the following papers numbered 1 to 53 read on this motion for summary judgment; cross motion for leave to serve an amended answer : Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers 18 - 48 ; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers 49 - 51; 52 - 53; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the cross motion by defendant for an order granting leave to serve an amended answer is denied; and it is

ORDERED that the motion by plaintiffs for an order granting summary judgment in their favor on the complaint is denied; and it is further

ORDERED that the parties' attorneys shall appear before the undersigned at **9:30 a.m. on October 23, 2012** for a preliminary conference.

Plaintiffs John Winnegar and Maureen Winnegar commenced this action for a declaration that they are the owners of a triangle-shaped parcel of land located between adjoining residential properties in Northport, New York, known as 1A Lori Court and 3 Lori Court. John Winnegar allegedly has resided continuously at 1A Lori Court since he and his prior wife, Patricia Winnegar, acquired title to the property in 1979. Patricia Winnegar passed away in 1995 and, by bargain and sale deed dated October 2, 2000, fee

simple title in the premises allegedly was transferred from John Winnegar to John Winnegar and Maureen Winnegar, his present wife. Subsequently, in 2009, defendant Linda Rios allegedly purchased the property known as 3 Lori Court. Thereafter, in October 2011, defendant installed a vinyl post and rail fence on the disputed parcel. Plaintiffs allege that in addition to running through a grass lawn and railroad tie planter boxes in the front of their residence, the fence terminates at the curb, over a portion of their driveway, and blocks street access to their front door.

The complaint contains a single cause of action claiming title to the disputed parcel by adverse possession. It alleges, in relevant part, that plaintiffs have been in continuous possession of the subject property for more than ten years; that they have "cultivated, improved, maintained, occupied, possessed, constructed upon and used" the property without interruption since May 1979; and that their control and use of the property has been open and notorious. More particularly, the complaint alleges that plaintiffs' use of the subject parcel has included the planting of grass, the installation of a sprinkler system, and the construction of a planter. It alleges that for 32 years plaintiffs were the only people to possess, use and maintain the subject property, and that their actions were premised on a good faith belief they owned the property. It also alleges that the fence installed by defendant will prevent plaintiffs from accessing their yard and will result in "financial and overall living hardships." Although it asserts only a claim for adverse possession, the "wherefore" clause of the complaint seeks a judgment "awarding damages, an injunction, and ejectment of defendant Linda Rios from plaintiffs' property located at 3 Lane Court, Northport." Defendant's answer denies nearly all of the allegations in the complaint and asserts as an affirmative defense that plaintiff's use of the subject parcel was "permissive."

Plaintiffs now move for an order granting summary judgment in their favor on the complaint and declaring that they are the sole owners of the disputed parcel of property. They also seek an order directing defendant to remove the fence and enjoining her from "moving, removing, or adding anything onto the disputed property . . . from harassing or threatening the plaintiffs, and from interference or attempted interference with the disputed property." Plaintiffs' submissions in support of the motion include copies of the pleadings, an affidavit of John Winnegar, and various photographs allegedly depicting the fence installed by defendant.

Defendant opposes the motion and cross-moves for an order granting her leave to serve an amended answer. The proposed amended answer annexed to the cross-moving papers, which is unsigned, asserts as a second affirmative defense that plaintiffs failed to join necessary parties, "including the holders of recorded mortgage(s) encumbering the real property located at 3 Lori Court." It also includes a counterclaim for an injunction prohibiting plaintiffs from parking their vehicles in the street "in such a manner so as to impede, impair and obstruct defendant's ability to freely access her home and driveway." As to plaintiffs' motion, defendant argues that the application for summary judgment is premature, since no disclosure has occurred in the action. She also asserts that plaintiffs' submissions fail to establish the requisite elements of a claim for adverse possession, and fail to establish entitlement to injunctive relief.

Defendant's motion for leave to serve the proposed amended answer is denied. Generally, leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit, or there is evidence it would prejudice or surprise the

opposing party (*see* ***Trystate Mech., Inc. v Macy's Retail Holdings, Inc.***, 94 AD3d 1095, 943 NYS2d 158 [2d Dept 2012]; ***Fusco v A & S Constr., LLC***, 84 AD3d 1155, 924 NYS2d 463 [2d Dept], *lv dismissed* 18 NY3d 837, 938 NYS2d 837 [2011]; ***Lariviere v New York City Tr. Auth.***, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). A party may seek dismissal of a complaint on the ground that the court should not proceed in the absence of a person who should be a party (CPLR 3211 [a], [10]). CPLR 1001 (a) provides that parties are necessary and should be joined in the action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." Here, the proposed second affirmative defense is patently without merit, as the holders of the mortgages on 3 Lori Court do not have a direct or possessory interest in such property and will not be inequitably affected by a judgment herein (*see* ***Cortellini v City of Niagra Falls***, 258 AD 778, 14 NYS2d 910 [4th Dept 1939]; *see also* ***Grasso v Schenectady County Pub. Lib.***, 30 AD3d 814, 817 NYS2d 186 [3d Dept 2006]; ***Matter of Hutton Devs. v 346-364 Washington Ave. Corp.***, 17 AD3d 977, 794 NYS2d 157 [3d Dept 2005]).

Furthermore, the allegations in the proposed answer that plaintiffs, her neighbors, are parking their vehicles in the street so as to "impede, impair and obstruct" defendant's ability to access her home and driveway are palpably insufficient to make out a claim for injunctive relief (*cf.* ***Severino v Classic Collision, Inc.***, 280 AD2d 463, 719 NYS2d 902 [2d Dept 2001]; ***91st St. Co. v Robinson***, 242 AD2d 502, 662 NYS2d 497 [1st Dept 1997]). A permanent injunction is an extraordinary remedy that will not be granted absent a clear showing by the party seeking such relief that irreparable injury is threatened and that no other adequate remedy at law exists (*see* ***Gaynor v Rockefeller***, 15 NY2d 120, 256 NYS2d 584 [1965]; ***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; ***McDermott v City of Albany***, 309 AD2d 1004, 765 NYS2d 903 [3d Dept 2003], *lv denied* 1 NY3d 509, 777 NYS2d 19 [2004]; ***Staver Co. v Skrobisch***, 144 AD2d 449, 533 NYS2d 967 [2d Dept 1988], *appeal dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]). Here, assuming the conclusory statement in the proposed amended answer supporting the counterclaim that "[p]laintiff has not adequate remedy at law" is a typographical error, defendant does not allege any facts in the proposed amended answer to substantiate such a claim. Rather, the facts as alleged indicate the enforcement of laws or town ordinances relating to parking on public streets is an available remedy for the complained-of parking situation on Lori Street.

Plaintiffs' motion for summary judgment in their favor on the complaint is denied. A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

To establish a claim to property based on adverse possession, a plaintiff must prove the common law

requirements that possession of the subject property was hostile, under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory 10-year period (*see* ***Estate of Becker v Murtagh***, 19 NY3d 75, 945 NYS2d 196 [2012]; ***Walling v Przybylo***, 7 NY3d 228, 818 NYS2d 816 [2006]; ***Brand v Prince***, 35 NY2d 634, 364 NYS2d 826 [1974]; ***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]). Stated differently, for title to vest under the doctrine of adverse possession "there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (***Brand v Prince***, 35 NY2d 634, 636, 364 NYS2d 826). As the acquisition of title to land by adverse possession is not favored under the law, the elements of such a claim must be proven by clear and convincing evidence (***Estate of Becker v Murtagh***, 19 NY3d 75, 81, 945 NYS2d 196; ***Ray v Beacon Hudson Mtn. Corp.***, 88 NY2d 154, 159, 643 NYS2d 939 [1996]). Also, "[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 portion of the land included in the deed" (***Brand v Prince***, 35 NY2d 634, 637, 364 NYS2d 826; *see* ***Eddyville Corp. v Relyea***, 35 AD3d 1063, 827 NYS2d 315 [3d Dept 2006]; ***Gjokaj v Fox***, 25 AD3d 759, 809 NYS2d 156 [2d Dept 2006]).

Furthermore, prior to July 2008, a party seeking to establish title by adverse possession on a claim not based upon a written instrument had to show that the land was "usually cultivated or improved" or "protected by a substantial enclosure" (RPAPL 522). The type of cultivation or improvement sufficient under the statute varied with the character, condition, location and potential uses for the property (*see* ***Zeltser v Sacerdote***, 52 AD3d 824, 860 NYS2d 624 [2d Dept 2008]; ***Blumfeld v DeLuca***, 24 AD3d 405, 807 NYS2d 99 [2d Dept 2005]; ***Barnett v Nelson***, 248 AD2d 656, 670 NYS2d 326 [2d Dept 1998]; *see also* ***Ramapo Mfg. Co. v Mapes***, 216 NY 362, 110 NE 772 [1915]), and only needed to be consistent with the nature of the property to indicate exclusive ownership (*see* ***Gaglioti v Schneider***, 272 AD2d 436, 707 NYS2d 239 [2d Dept 2000]; ***Katona v Low***, 226 AD2d 433, 641 NYS2d 62 [2d Dept 1996]; ***City of Tonawanda v Ellicott Creek Homeowners Assn.***, 86 AD2d 118, 449 NYS2d 116 [4th Dept 1982], *appeal dismissed* 58 NY2d 824, 1983 WL 190627 [1983]). Amended by the Legislature in 2008, RPAPL 522 now states that, after July 7, 2008, a party without a claim of title based upon a written instrument making a claim of ownership of land based on adverse possession must establish either that the land at issue had been "protected by a substantial enclosure" or that "there have been acts sufficiently open to put a reasonably diligent owner on notice." RPAPL 501, also amended by the Legislature in 2008, now defines the common law element of "claim of right" as meaning "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case might be." However, like the Third and Fourth Departments, the Appellate Division, Second Department, has ruled that the Real Property Actions and Proceedings Law as amended cannot be applied retroactively to deprive a claimant of a property right that vested prior to the commencement date of the new legislation (*see* ***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144; ***Hogan v Kelly***, 86 AD3d 590, 927 NYS2d 157 [2d Dept 2011]; *see also* ***Hammond v Baker***, 81 AD3d 1288, 916 NYS2d 702 [4th Dept 2011]; ***Barra v Norfolk S. Ry. Co.***, 75 AD3d 821, 907 NYS2d 70 [3d Dept 2010]; ***Franza v Olin***, 73 AD3d 44, 897 NYS2d 804 [4th Dept 2010]).

Here, the complaint alleges that for more than 30 years plaintiffs have continuously possessed and used the disputed property located between 1A Lori Court and 3 Lori Court. An affidavit of John Winnegar submitted in support of plaintiffs' motion avers, in part, that, since taking title to 1A Lori Court in 1979, he

has installed sprinklers and sod, cut the grass, and maintained three large planters on the subject property. It states that he had a portion of the disputed property covered with asphalt for use as part of the driveway for his residence. It also avers that his former wife, Patricia, planted shrubs, perennials and annuals in the planters, and that no one else performed maintenance on or demanded that he seek permission to use the land "until recently." Although plaintiffs included a copy of the October 2000 deed transferring ownership of 1A Lori Court from John Winnegar to John Winnegar and Maureen Winnegar, they failed to submit a deed or other documentary proof showing the date when John Winnegar actually took title to 1A Lori Court. There also is no evidence showing that John Winnegar exclusively possessed the disputed parcel since 1979. Absent such evidence, plaintiffs' submissions are insufficient to establish as a matter of law their claim that the instant action is governed by the former RPAPL 522, because John Winnegar adversely possessed the subject property continuously since May 1979, and that such possession ripened into title as of May 1989 (*see* ***Matter of Perry***, 33 AD3d 704, 823 NYS2d 413 [2d Dept 2006]; ***Pegalis v Anderson***, 111 AD2d 796, 490 NYS2d 544 [2d Dept 1985]; *see also* ***H.S. Farrell, Inc. v Formica Constr. Co., Inc.***, 41 AD3d 652, 838 NYS2d 628 [2d Dept 2007]; ***Moll v Feldt***, 289 AD2d 462, 734 NYS2d 630 [2d Dept 2001]; *cf.* ***Oistacher v Rosenblatt***, 220 AD2d 493, 631 NYS2d 935 [2d Dept 1995]). Accordingly, the motion for summary judgment in plaintiffs' favor is denied.

Finally, as the Court's computerized records indicate a preliminary conference has not been held in this action, the parties' attorneys are directed to appear before the undersigned at **9:30 a.m. on October 23, 2012** for such a conference.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 20, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION