Warren v Carreras
2013 NY Slip Op 33866(U)
December 6, 2013
Supreme Court, Rockland County
Docket Number: 7025/10
Judge: Robert M. DiBella

[* 1]

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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DAVID WARREN and DARA WARREN,

Plaintiffs,

-against-

BLANCA CARRERAS, a.k.a. BLANCA CARRERAS GURRIA, and JOHN DOE #1 through JOHN DOE #5,

Defendants.

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DECISION AND ORDER
Motion Seq. No. 007

INDEX NO. 7025/10

DIBELLA, J.

The following papers have been read and considered on this motion by defendant Blanca Carreras to reargue the Court's Decision and Order dated February 5, 2013:

1) Notice of Motion; Affidavit in Support of Lee S. Wiederkehr, Esq.; Exhibits A–D;
2) Affirmation in Opposition of John E. Finnegan, Esq.; and
3) Reply Affidavit of Lee S. Wiederkehr, Esq.

In this adverse possession action pursuant to Article 15 of the Real Property Actions and Proceedings Law, defendant Blanca Carreras moves to reargue the Court's Decision and Order dated February 5, 2013, pursuant to CPLR 2221. Plaintiffs oppose the motion. For the reasons set forth below, the motion is denied.

Plaintiffs commenced this action to claim title to certain property owned by defendant Carreras under a theory of adverse possession. Plaintiffs are the owners of real property located at 16 Melrose Lane, West Nyack, New York. Plaintiffs acquired title to the premises from Alex and Nancy Vursta by deed dated December 13, 2002. Defendant is the owner of adjacent real property located at 309 Strawtown Road, West Nyack, New

York. Defendant acquired title to her premises from the Estate of Antoinette Natuzzi by deed dated December 7, 2000. In this action, plaintiffs have alleged acquisition of title by adverse possession to a portion of the western boundary of the Strawtown Road premises owned by defendant Carreras.

Plaintiffs previously made a motion for summary judgment and defendant opposed the motion and cross-moved for summary judgment dismissing the complaint. In its Decision and Order dated February 2, 2013, this Court granted plaintiffs' motion and granted judgment in their favor and denied defendant's cross motion. The Court determined that plaintiffs demonstrated their *prima facie* entitlement to judgment as a matter of law on their claim for title to the disputed property by adverse possession by establishing by clear and convincing evidence that the possession of the disputed property was hostile and under a claim of right, actual, open and notorious, exclusive, continuous for the required period of ten years, and that it was either usually cultivated or improved or protected by a substantial enclosure.

Defendant now moves to reargue the Court's Decision and Order dated February 5, 2013. First, defendant contends that the existence of permissive neighborly accommodation and cooperation negates the element of hostility required for adverse possession. Second, defendant contends that the deposition testimony of Alex Vursta, plaintiff's predecessor-in-interest, describing his conversations with defendant's predecessor-in-interest concerning the construction of the fence, does not constitute hearsay and is admissible evidence of the nature of the claim of title. Third, defendant

contends that, since plaintiffs must rely on their predecessor's acquisition of the disputed area by adverse possession to meet the 10-year requirement, they must establish that the Vurstas intended to convey title to the disputed area, which they did not do. Fourth, defendant contends that an issue of fact exists as to the Vurstas' alleged construction of the fence along the disputed area based on defendant's surveyor's testimony that the fence was "in rather new condition." And fifth, defendant contends that her affidavit was not required to oppose the motion and in support of her cross motion.

Pursuant to CPLR 2221(d), a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion and shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. A motion to reargue is left to the sound discretion of the court and "may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision." *Carrillo v. PM Realty Group*, 16 AD3d 611 (2d Dep't 2005). A motion for leave to reargue may not include matters of fact or law not offered on the prior motion. *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 (2d Dep't 2005); *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 (2d Dep't 2004). A motion for reargument is not designed to afford the unsuccessful party with additional opportunities to reargue issues previously decided. *McGill v. Goldman*, 261 AD2d 593 (2d Dep't 1999).

The motion for leave to reargue is denied, as movant has failed to demonstrate that the Court overlooked or misapprehended matters of fact or law in determining that plaintiffs

satisfied their burden of establishing their entitlement to judgment as a matter of law and that no issues of fact existed.

First, the Court did not overlook but, instead, considered and rejected any claim that the element of hostility was not met due to an alleged friendly accommodation between the predecessors-in-interest as neighbors. The evidence does not establish that a friendly accommodation was made between the neighbors or that permission to use the disputed area was given. The cases cited in the Court's Decision and Order entered February 5, 2013, as well as the cases cited in plaintiff's original motion papers for summary judgment and in opposition to this motion to reargue, adequately support the Court's reasoning. *See Becker v. Murtagh*, 19 NY3d 75 (2012); *Sprotte v. Fahey*, 95 AD3d 1103 (2d Dep't 2012). Moreover, a motion for reargument does not afford the movant, as the unsuccessful party, an additional opportunity to reargue issues previously decided, which is precisely what defendant seeks to do herein. *McGill v. Goldman*, 261 AD2d 593 (2d Dep't 1999).

As to defendant's other arguments, they likewise fail. Again, the Court did not overlook or misapprehend the facts or law. In addition, some of the arguments made are raised for the first time here and were not raised on the original motions, which renders them impermissive to consider on a motion for reargument.

Even if the deposition testimony of Alex Vursta's conversation with the prior neighbor is determined not to be hearsay, the Court already determined it to be insufficient to find an issue of fact as to the element of hostility. Mr. Vursta indicated that, when he was putting up the fence, the prior neighbor told him that it was on her property, but she

did not say anything else with regard to it. As indicated above, this evidence does not establish that a friendly accommodation was made between the neighbors or that permission to use the disputed area was given.

With regard to defendant's argument that since plaintiff's claim of title is partially based on the Vurstas' prior claim of the disputed area to meet the 10-year continuous requirement, an affidavit from Mr. Vursta was needed. The Court notes that Mr. Vursta was deposed and his deposition testimony was supplied in support of the motion, which is sufficient proof and his affidavit was not necessary.

Also, contrary to defendant's assertions, the evidence sufficiently establishes the timing of the construction of the fence based on Mr. Vursta's testimony. Defendant's surveyor's observation that the fence appeared in fairly new condition for its age is speculative, inconclusive and insufficient to constitute evidence of a genuine issue of material fact.

The court has considered the movant's remaining arguments and finds them to be without merit.

In light of the above decision, the Court now turns to the proposed judgment submitted by plaintiff's counsel. Pursuant to the Court's Decision and Order dated February 5, 2013, plaintiffs' counsel was directed to submit judgment on notice. Entry of the judgment was stayed pending the resolution of this motion. As defendant's motion is denied, entry of a judgment in favor of plaintiffs is now appropriate. However, the proposed judgment submitted fails to include a metes and bounds description of the real

property to which title is being awarded to plaintiffs, as is required by the County Clerk's Land Records Division and, thus, is defective. Plaintiffs are directed to settle an amended proposed judgment within 45 days.

Accordingly, it is

Ordered that defendant's motion to reargue is denied; and it is further

Ordered that plaintiffs are directed to serve a copy of this Decision and Order with notice of entry upon defendant within 30 days.

This is the Decision and Order of the Court.

Dated: December 6, 2013
White Plains, New York

Hon. Robert DiBella, JSC

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