M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

ARGYRIS TSENESIDIS, et ano.,
Plaintiffs,

-against-

MALBA ASSOCIATION,
Defendant.

Index No. 6337/2007

By: **ELLIOT, J.**

Date: December 5, 2013

Motion Cal. No. 158

Motion Seq. No. 3

Motion Date: October 16, 2013

Oral Arg. Date: December 4, 2013

This is an action pursuant to Real Property Actions and Proceedings Law Article 15 to compel a determination to a certain portion of real property designated as Block 4416, Lot 18 ("the disputed parcel"), which abuts land owned by plaintiffs. On September 10, 2004, plaintiffs purchased from Dr. and Mrs. Karavidas a water view property in the community of Malba, known as 1 Point Crescent, which abuts the disputed parcel. The disputed parcel was not referenced in the deed into plaintiffs. Plaintiffs assert a claim to the disputed parcel by adverse possession. Defendant, record owner of the disputed parcel, contests plaintiffs' claims and, by counterclaim, seeks, *inter alia*, injunctive relief and damages for trespass.

By order of reference dated January 12, 2010, Justice Martin J. Schulman

referred to Court Attorney-Referee Elizabeth Anderson the matter to hear, try, and report all issues of fact and law. Referee Anderson sat through eight days of testimony and rendered her Report and Recommendation on May 28, 2013. Though the report had not yet been filed, the instant motion and cross motion – seeking an order, confirming in part and rejecting in part, the report – were made. By stipulation dated October 29, 2013, the parties agreed to deem the report filed for purposes of permitting disposition of the parties' respective motion and cross motion (*see* CPLR 4403). As such, any arguments by the parties in their papers submitted to the court regarding the timeliness or propriety of the motions with respect to the filing of Referee Anderson's report will be disregarded as moot. It is noted that said report shall be filed by the court herewith.

Part I - Adverse Possession

Following the trial, Referee Anderson determined that, since plaintiffs acquired their property in 2004 and commenced their action in 2007, they were required to "tack" seven years of adverse possession by their predecessors in title. Moreover, since the disputed parcel was not part of the deed, plaintiffs were also required to show that their predecessors, the Karavidases, intended to and actually turned over possession of the disputed parcel to plaintiffs. Referee Anderson concluded that plaintiffs failed to demonstrate by clear and convincing evidence that the Karavidases intended to and actually turned over possession of

the disputed parcel to plaintiffs.

She further concluded that assuming, *arguendo*, plaintiffs demonstrated the intent and actual transfer of possession of the disputed parcel, neither did they prove by clear and convincing evidence that the disputed parcel was "usually cultivated or improved" or "protected by a substantial enclosure" (RPAPL 522 [1] and [2]).

Based on the above, Referee Anderson recommended that plaintiff's complaint be dismissed in its entirety. Defendant moves to confirm this portion of the report; plaintiffs oppose that portion of the motion, and cross move to reject same.

It is well settled that "[t]he report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility" (*Stone v Stone*, 229 AD2d 388 [1996]; *see Nehmadi v Davis*, 95 AD3d 1181 [2012]; *Galasso, Langione & Botter, LLP v Galasso*, 89 AD3d 897 [2011]). Moreover, "[a] referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor" (*Last Time Beverage Corp. v F & V Distrib. Co.*, LLC, 98 AD3d 947 [2012]; *see Stone*, 229 AD2d at 388; *Kaplan v Einy*, 209 AD2d 248 [1994]).

Here, the factual findings of Referee Anderson are substantially supported by the record, and she clearly defined the issues and resolved matters of credibility. Though Referee Anderson began her analysis by determining whether plaintiffs established that the

Karavidases intended to and actually did transfer the disputed parcel, she, nevertheless, correctly determined that – even before one need consider intent to transfer – plaintiffs did not prove by clear and convincing evidence that the Karavideses actually held title to the disputed parcel by adverse possession in the first instance. Referee Anderson properly noted that Phil Karavidas, the Karavidases' son and attorney-in-fact for his parents, had limited knowledge of his father's activities with respect to the use of the disputed parcel. The Referee also noted that plaintiffs did not present any evidence that would suggest that the improvements to or alterations of (whether or not substantial) the disputed property were, *i.e.*, hostile or under a claim of right. It is noted that plaintiffs' point that nowhere in the Association's minutes does it appear that the Karavidases ever sought permission to do anything with respect to the disputed parcel is insufficient to prove by clear and convincing evidence that the Karavidases never sought the permission of defendant. Further, Referee Anderson properly took into account these circumstances in conjunction with the testimony of various witnesses who testified that they had unfettered access to the disputed parcel, said testimony also being consistent with defendant's stated intent with respect thereto. Consequently, whether or not Referee Anderson addressed in her report whether plaintiffs demonstrated that the property was "usually cultivated or improved" is of no import, absent proof of the other elements necessary to prove adverse possession.

Even assuming, *arguendo*, that plaintiffs proved by clear and convincing evidence that the Karavidases held title to the disputed property by adverse possession,

Referee Anderson properly concluded that plaintiffs did not prove that they intended to and actually turned over possession of same. Referee Anderson properly determined that the "affirmation" of Phil Karavidas was inadmissible hearsay and could not be introduced to prove the truth of the statements therein, since an attorney-in-fact does not have the power to swear to, or sign an affidavit in the name of the principal, facts about which he has no personal knowledge (*see* General Obligations Law § 5-1501; *Cymbol v Cymbol*, 122 AD2d 771 [1986]). There was sufficient evidence on the record to demonstrate that the "affirmation" – which was signed by the Karavidases by their son as attorney-in-fact, the contents of which swore and affirmed that the Karavidases had, *inter alia*, been in control of the disputed parcel since their purchase of the property in 1972 – was "nothing more than an ineffective concession to seal a deal." Referee Anderson properly determined that Phil Karavidas could not prove the intent of his parents by virtue of the "affirmation" for the reason set forth above (to wit: because he simply did not know his parents' intent).

Additionally, Referee Anderson noted that the other testimony and evidence belied any assertion that the Karavidases themselves believed to have had a claim of right to the disputed parcel or that they intended to transfer it.[1] Moreover, Referee Anderson also correctly determined that plaintiffs' reliance on GOL § 5-1502-A was misplaced. While an attorney-in-fact may certainly dispose of any interest in land, a successive adverse possessor

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1. For example, Referee Anderson noted that, when plaintiffs brought up the potential issue of the property line prior to the sale, Phil Karavidas stated: "take it or leave it; you want the property, you want the house, yes or no. . . .accept it as is; take the property as is, or move on."

must not only prove such disposition but also must demonstrate the element of *intent*. The affidavit of the Karavidases' son simply cannot, as discussed above, prove intent of the Karavidases. [2] As such, that portion of the report is confirmed.

Part II - Counterclaims

As a preliminary matter, it should be noted that there are three retaining walls separating the water from plaintiffs' property line, located in the disputed parcel, going landward: (1) the sea wall, separating the land from the sea; (2) a second wall built by the Karavidases; (3) a final, third wall, constructed by plaintiffs. Defendant's focus is plaintiffs' retaining wall, the construction of which it alleges constitutes a trespass.

Referee Anderson made a determination that defendant did not prove a trespass. Specifically, she concluded that defendant did not demonstrate that plaintiffs intended to repair and replace an already-existing collapsing retaining wall – for which plaintiffs received Department of Buildings violations – without justification or the tacit permission of defendant. Further, Referee Anderson noted that "restoration" would be uneconomical and the most expensive remedy. However, noting that it was plaintiffs' intention to totally block access to the disputed parcel, it was recommended that plaintiffs,

2. It should be noted that an attorney-in-fact cannot convey land which is not owned by the principal (*see Forman v Berry*, 163 AD 594 [1914]).

i.e., restructure the "fence wall" to allow Malba Association residents access to the disputed parcel from the "great lawn,"[3] subject to the formal approval of the Association.

Finally, having concluded that there was no trespass, Referee Anderson concluded that an award of punitive damages would fail; further, absent an agreement between the parties, defendant was not entitled to recover counsel fees.

The court finds that Referee Anderson's conclusions of law regarding the necessity of the third Tsenesidis retaining wall to prevent erosion and damage to the sea wall were unsupported by the record.[4] Notwithstanding, the court agrees with the Referee's general proposition that plaintiffs had defendant's tacit permission to, *inter alia*, build/repair a retaining wall. The record before the court demonstrates that use of, and improvements/changes to, Malba property, to large extent, was "invariably granted" since it was generally consistent with defendant's purpose, to wit: maintaining the property and the landscape abutting the waterfront in good condition. To that end, the court finds that defendant granted plaintiffs a limited license by implication – *i.e.*, based on the neighborhood's custom and historical usage of the disputed parcel – to both enjoy the disputed parcel and make repairs thereto (including whatever repairs were required as a result of the condition of the Karavidas wall), but that such license was violated when plaintiffs

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3. The Malba "great lawn" is a grassy area abutting plaintiffs' property that Malba residents may use for their enjoyment; it also is a means of ingress and egress to the disputed parcel.

4. When considering the evidence, it would appear that the Referee concluded that the third retaining wall was necessary as it existed simply due to the fact that plaintiffs reconfigured the topography of their back yard so as to make it necessary.

constructed a massive retaining wall which was clearly constructed to completely change, *inter alia*, the landscape of the disputed parcel and others' access thereto, which, as built, was inconsistent with the historical intent of the Association (*see e.g. Roman Catholic Church of Our Lady of Sorrows v Prince Realty Mgt., LLC*, 47 AD3d 909 [2008]).

Accordingly, that portion of the report regarding trespass is rejected, and the court finds that the way in which plaintiffs constructed the third retaining wall exceeded the scope of the license they were granted, thereby constituting a trespass. Notwithstanding, the court agrees that an award of punitive damages or counsel fees is unwarranted *(see e.g. UA-Columbia Cablevision of Westchester v Fraken Bldrs.*, 114 AD2d 448 [1985])..

Conclusion

Accordingly, the branch of defendant's motion confirming Part I of Referee Anderson's report is granted; the branch of plaintiff's cross motion rejecting same is denied. Plaintiffs' complaint is dismissed. The branch of defendant's motion rejecting Part II of the report is granted to the extent that this court finds that defendant proved that the third retaining wall, as constructed, constitutes a trespass. Defendant is awarded judgment on its counterclaim to that end. The branch of plaintiff's cross motion confirming same is denied.

Upon settlement of the judgment regarding liability with respect to the complaint and the counterclaims, to be submitted hereon, the parties are directed to submit

evidence – *i.e.*, proposals or plans – for the construction/reconstruction of a retaining wall that is structurally sound and consistent with defendant's historical intent regarding the disputed parcel.

Settle Interlocutory Judgment. If, in light of the above determination, counsel for the parties would find it helpful to conference the matter further with the court, they may contact Chambers to schedule same.

J.S.C.