Owens v Andruschat
2015 NY Slip Op 30087(U)
January 26, 2015
Supreme Court, Wyoming County
Docket Number: 39094
Judge: Michael M. Mohun
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 26th day of January, 2015

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

ROBERT G. OWENS AND CONNIE G. OWENS,

Plaintiffs,

v.

DECISION AND ORDER
Index No. 39094

THOMAS E. ANDRUSCHAT AND PRESCOTT, HOWITT, MANCHESTER & ANDRUSCHAT,

Defendants.

By notice of motion dated June 26, 2014, the defendants having moved pursuant to CPLR §3212 for an order granting them summary judgment and dismissal of the plaintiff's complaint against them on the grounds that the plaintiff's causes of action are without merit, and said motion having duly come on to be heard.

NOW, upon reading the pleadings of the parties, and on reading and filing the notice of motion, supported by the affidavit of David M. Hehr, Esq., attorney for the defendants, sworn to on June 26, 2014, together with the annexed exhibits; the supporting affidavit of Howard S. Rosenhoch, Esq., sworn to on June 26, 2014; the affidavit of Michael J. Songin, CPA CVA, sworn to on June 26, 2014, together with the annexed exhibit; and the affirmation in opposition of Candace M. Curran, Esq., attorney for the plaintiffs, dated August 5, 2014, together with the annexed exhibits and the accompanying memorandum of law; the affirmation in opposition of Peter K. Skivington, Esq., dated August 4, 2014; the affidavit in opposition of Anthony H. Zientek, Certified General Real Estate Appraiser, sworn to on August 5, 2014, together with the annexed exhibit; the affidavit of Connie G. Owens, sworn to on August 5, 2014; the reply affidavit of David M. Hehr, Esq., sworn to on August 14, 2014, together with the annexed exhibit; the responsive affidavit of Howard S. Rosenhoch, Esq., sworn to on August 14, 2014, together with the annexed exhibits; and after hearing David M. Hehr, Esq., in support of the motion and Candace M. Curran, Esq., in opposition thereto, due deliberation having been had, the following decision is

rendered.

In 2003, Thomas Brahaney, an adjoining landowner, sued the plaintiffs in an action to quiet title to his property [the underlying action]. At the time, the plaintiffs owned a parcel of land of a little less than 50 acres in Arcade, New York, on which they had been operating a public golf course. Brahaney's similarly sized parcel lay immediately to the east. In the underlying action, the line that Brahaney claimed for his western boundary [the plaintiffs' eastern boundary] was some 70 feet west from the place where the plaintiffs believed it to be. Significantly, Brahaney's line encroached upon areas used by the plaintiffs for their golf course. Brahaney asked the Court to declare that he owned the disputed strip along the boundary line, and also that it award him damages for the plaintiff's timber cutting and other actions in the strip.

Both parties claimed to own the strip in the underlying action, the plaintiffs having interposed a counterclaim seeking a declaration in their favor. Notably, the deed descriptions of both parcels were entirely consistent with each other. It appears that the discrepancy in the placement of the boundary line was traceable to a large extent to a

difference of opinion among the surveyors. This is shown clearly on the Map and Survey of James L. Brown, dated February 27, 2003, which the plaintiffs have attached as an exhibit to their complaint in this action. Notations in Brown's map show both a "Deeded Division Line," and a "Division Line Between Owens and Brahaney per Gillen [a previous surveyor]." The "Deeded Division Line" on the map coincides with Brahaney's claim in the underlying action, and the line "per Gillen" coincides with the plaintiffs' claim. Brown's map also includes reference to the remnants of an old barbed wire fence running along part of the "per Gillen" line. The plaintiffs' surveyor, John Gillen, stated in his trial testimony that he viewed this fence as an important indicator of a longstanding line of occupation used by the property owners, and on this basis he concluded that the eastern boundary of the plaintiffs' property should be placed on the line near where the remnants of the fence were found. Gillen acknowledged, however, that the "deeded" lines on Brown's survey were accurately plotted as measured from reference points within the greater lot. He explained that "[i]n relationship to large acreage parcels like the one I was surveying, it is not uncommon for the recorded dimensions to not match up with the found occupation, i.e.,

fence lines, existing stakes by other surveyors. It is much more common for them not to match up."

The defendants, Thomas E. Andruschat, Esq., and his former law firm, represented the plaintiffs in the underlying action. After a non-jury trial, the Court found in favor of Brahaney, declaring him the owner of the disputed strip and awarding him damages. In their complaint, the plaintiffs allege that Mr. Andruschat committed malpractice by failing to raise the defense of adverse possession at the trial. The defendants deny that malpractice occurred and assert that adverse possession was not viable as a defense in the underlying action.

To establish legal malpractice, a plaintiff must demonstrate that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages" (Rudolf v. Shayne, Dachs, Stanisci, Corker and Sauer, 8 N.Y.3d 438, 442 [2007]). A viable malpractice claim must alleged more than a mere "error of judgment" on the part of the attorney, and "selection" by the attorney "of one among several reasonable

courses of action does not constitute malpractice" (Rosner v. Paley, 65 N.Y.2d 736, 738 [1985]). To establish causation in a malpractice case, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages were it not for the lawyer's negligence (Rudolf, supra). To prevail upon their motion for summary judgment, the defendants must establish by proof in admissible form that the plaintiffs are unable to prove at least one of the required elements of malpractice (Oot v. Arno, 275 A.D.2d 1023 [4th Dept., 2000]).

The defendants contend that Mr. Andruschat skillfully handled the trial of the underlying action, and that he correctly determined that an adverse possession defense lacked merit and would not succeed. They argue that Andruschat's decision to base the trial defense on the doctrine of practical location of a boundary line, rather than on the doctrine of adverse possession, was a reasonable strategic choice under the circumstances. They further argue that due to the fact that the plaintiffs later lost ownership of their entire parcel through foreclosure, they are unable to prove that they sustained actual ascertainable damages as a result of the alleged malpractice.

Notwithstanding their subsequent loss of ownership of the parcel, it seems clear that the plaintiffs did, in fact, sustain some quantifiable economic loss when the Court awarded ownership of the disputed strip to Brahaney at the conclusion of the underlying action. The extent of the loss remains in dispute, of course, but the Court simply cannot say on this record that plaintiffs incurred no ascertainable damage at all. Therefore, with respect to that limited point, the Court finds that the defendants have not met their burden upon the motion to show, prima facie, that they are entitled to judgment as a matter of law.

The Court reaches a different conclusion with respect to the other grounds for summary judgment raised by the defendants. Indeed, the Court finds that the defendants' submissions are sufficient to show, prima facie, that no malpractice was committed and that the outcome of the underlying action would not have been different had the defense of adverse possession been raised.

As noted above, Andruschat based his conduct of the defense in the underlying action on the doctrine of practical location. The doctrine holds that "the practical location of a boundary line and an acquiescence of

the parties therein for a period of more than [the statutory period governing adverse possession] is conclusive of the location of the boundary line" (Kaneb v. Lamay, 58 A.D.3d 1097, 1098 [3rd Dept., 2009]). "[A]pplication of the doctrine requires a clear demarcation of a boundary line and proof that there is mutual acquiescence to the boundary by the parties such that it is definitely and equally known, understood and settled" (Jakubowicz v. Solomon, 107 A.D.3d 852, 853 [2nd Dept., 2013] [internal quotation marks and citations omitted]). The doctrines of adverse possession (or "title by prescription") and practical location, while distinct, are closely related. It has been noted that, with respect to the doctrine of practical location, the "evidence of the agreement or acquiescence under which such location is established seems to be only another mode of proof of the adverse possession necessary to a title by prescription" (Eldridge v. Kenning, 59 Hun 615, 12 N.Y.S. 693 [Sup. Ct., Monroe, Co., January 23, 1891]).

At the trial of the underlying action, the plaintiffs attempted to prove that the fence line shown on Gillen's map was the understood and agreed boundary line between the properties. They contended that Brahaney shared this understanding with them from the time that they

purchased their parcel in 1972 until the dispute arose in 2002. Andruschat's trial presentation culminated with the introduction of the expert testimony of Thomas Whissel, Esq. Whissel explained the doctrine of practical location and its applicability to the facts of the case. He then cited the doctrine as the basis for his opinion that the plaintiffs possessed title to the property up to the fence line.

Whissel's testimony was received without objection, and there is no indication that it caused surprise or prejudice to Brahaney. The Court rejects the contention of plaintiffs' counsel that Andruschat waived the doctrine of practical location in the underlying action by failing to plead it as an affirmative defense in the answer to Brahaney's complaint (see, Gorham v. Arons, 306 N.Y. 782 [1954]; Wooten v. State, 302 A.D.2d 70, 75 [4th Dept., 2002]). On the contrary, the record shows that the doctrine, and the factual bases for invoking it, were fully presented to the Court during the trial. Also, Andruschat cited the doctrine in arguing in his written summation to the Court following the trial that Brahaney's causes of action should be dismissed, the plaintiffs should be granted judgment on their counterclaim for a declaration that they owned the disputed strip and the

fence line identified on John Gillen's survey should be recognized as the true boundary line between the parcels.

Among their submissions in support of the motion, the defendants have offered the affidavit of Howard S. Rosenhoch, Esq., an expert in the law of malpractice. Based upon his review of the case, it is Mr. Rosenhoch's opinion that Mr. Andruschat correctly determined that a defense based upon adverse possession would not have been successful in the underlying action. Rosenhoch notes that such a defense would have required the plaintiffs to prove, by clear and convincing evidence, that for a period of at least 10 years prior to the lawsuit (CPLR §212[a]; RPAPL §501[2]) they had possessed the disputed strip under circumstances such that their occupation would qualify as "(1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period" (Walling v. Przybylo, 7 N.Y.3d 228, 232 [2006]). In addition, since their claim was not based upon a written instrument (as noted above, the plaintiffs' own surveyor admitted during the trial that strictly accurate measurements made from the reference points stated in the deed description supported Brahaney's claim, not the plaintiffs'), they would

also have had to prove that the property "has been usually cultivated or improved" or that it "has been protected by a substantial inclosure" (RPAPL former §522). Rosenhoch concluded from the trial record and the deposition testimonies that the plaintiffs would have found it impossible to prove all of these required elements, had they attempted to establish title to the strip by adverse possession. In his estimation, their use of the strip prior to 1989 was minimal, consisting of little more than occasional "walking in the woods, hiking, cross country skiing, hunting, camping, picnicking and winter bonfires," as well as limited firewood cutting. These activities did not rise to the required level of the sort of actual, open, exclusive and continuous possession of the strip necessary for adverse possession. After 1989, when the plaintiffs began building their golf course, more extensive timber cutting occurred on the plaintiffs' property. But, as Rosenhoch notes, Robert Owen's testimony at the trial made it clear that there were only two occasions after 1989 when he removed trees from within the strip. Thus, the plaintiffs would not have been able to show actual possession of the strip after 1989, either. Moreover, at no time, either before or after 1989, did the plaintiffs activities within the strip fulfill the added requirement of former

RPAPL §522 that the property in question must be either "usually cultivated or improved," or "protected by a substantial inclosure."

Lastly, the fact that the plaintiffs offered the buy Brahaney's entire parcel in May of 1996 presented an insurmountable obstacle to any attempt to raise at trial an adverse possession defense premised on the plaintiffs use of the strip after 1989. The purchase offer made within the limitations period constituted an "overt acknowledgment of title in another" which negated the element of hostility required to establish adverse possession (Walling, supra; Larsen v. Hanson, 58 A.D.3d 1003, 1004 [3rd Dept., 2009]).

The Court notes that the plaintiffs have countered by arguing that the evidence showed that the parties did not consider the disputed strip to be included in the parcel that they offered to purchase in 1996, and therefore the offer ought not to be construed as an overt acknowledgment of Brahaney's superior title. This argument assumes that the plaintiffs' right to title of the strip pursuant to the doctrine of practical location has already been proven. The offer did not destroy the element of hostility because, the plaintiffs assert, the offer did not include the strip, but their basis for

asserting that the offer did not include the strip is that there was a longstanding, mutual understanding and agreement between the landowners that the boundary line was located at the fence line – which is simply another way of saying that they already had title to the strip pursuant to the doctrine of practical location. This argument makes the viability of the post-1989 adverse possession claim dependent on the success of the practical location claim, and effectively concedes that no viable adverse possession defense could have been mounted except in conjunction with a successful defense based on practical location. In view of this, it was clearly a reasonable strategic decision by Andruschat to forego the raising of an adverse possession defense. More importantly, given the evident dependence of the alleged adverse possession claim on the success of the practical location claim, the conclusion is inescapable that the outcome of the trial would not have been different had the adverse possession claim been raised – since the Court in the underlying action rejected the practical location claim in finding against the plaintiffs.

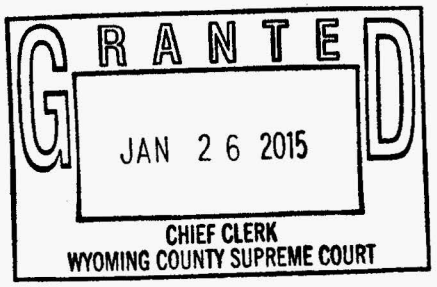
The defendants have shown, prima facie, that they are entitled to judgment as a matter of law. The plaintiffs submissions, in response, fail to

show that material issues of fact remain to be determined. Accordingly, the defendants' motion shall be granted.

NOW, THEREFORE, it is hereby

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed.

DATED: January 26, 2015
Warsaw, New York



HON. MICHAEL M. MOHUN
Acting Justice of the Supreme Court