SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

DANIEL MERON and JENNIFER MERON,	TRIAL/IAS PART 13 NASSAU COUNTY
Plaintiffs,	INDEX NO. 14794/11
- against -	MOTION SUBMISSION DATE: 11/9/11
MARTIN SCHEPSMAN and ELLEN ZWALSKY,	MOTION SEQUENCE NO. 1
Defendants.	

The following papers read on this motion:

Order to Show Cause and Affidavits.....	X
Memorandum of Law in Support of Motion...	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X
Memorandum of Law in Support of Reply.....	X

The plaintiffs, by way of Order to Show Cause dated October 14, 2011, obtained a Temporary Restraining Order, (TRO), by the Honorable R. Bruce Cozzens, Jr., restraining and enjoining the defendants from removing the brick fire pit and plantings/trees located at the westerly property line of the defendants' property located at 47 Jefferson Boulevard, Atlantic Beach, New York, or in any way interfering with plaintiff's use and beneficial enjoyment of the plaintiff's property.

Plaintiffs submit a Memorandum of Law in support of the motion. The defendants submit opposition. The plaintiffs submit a reply affirmation and Memorandum of Law in support of plaintiffs' reply.

It is undisputed that prior to serving the defendants with the instant TRO, the defendants, on the same day that plaintiff obtained the TRO, *to wit*, October 14, 2011, the defendants removed the eight (8) foot high stucco wall adjacent to plaintiff's property.

BACKGROUND

The plaintiffs claim that from 1995, and up until today, approximately 16 years, the plaintiffs, and the prior owners of plaintiffs' property, expended money to maintain, landscape, and cultivate a strip of land, inclusive of an eight (8) foot high stucco wall and brick barbeque structure, (hereinafter referred to as the "BBQ"). The plaintiffs own and reside at property located at 40 Ithaca Avenue, Atlantic Beach, New York. The defendants own and reside at property located at 47 Jefferson Boulevard. The defendants' property is directly east of the plaintiffs' property. The plaintiffs provide that the BBQ is immediately adjacent to the concrete "stucco wall" that extends alongside the defendants' property. The plaintiffs maintain that the disputed parcel, approximately three (3) feet wide by seventy-six (76) feet long, is completely "walled off" from defendants' property, and contains the BBQ, as well as plants, trees and shrubbery planted and maintained by plaintiffs, and plaintiffs' predecessors.

The plaintiffs refer to a copy of a survey of plaintiffs' property dated October 27, 1961 showing the location of the stucco wall located three (3) plus feet easterly of the plaintiffs' property. The plaintiffs also refer to the Building Department of the Incorporated Village of Atlantic Beach 1941 survey of plaintiffs' premises showing the BBQ. Plaintiffs maintain that the stucco wall has been part of the plaintiffs' property, and plaintiffs' predecessor-in-title, for at least fifty (50) years, and the BBQ pit has been part of the plaintiffs' property, and plaintiffs' predecessor-in-title, for at least seventy (70) years.

The plaintiffs argue that the plaintiffs' use, and plaintiffs' predecessor-in-title's use of the subject strip of land, by planting trees, shrubbery and maintenance of the BBQ, all closed off by the stucco wall, for over seventy (70) years, was open, continuous, hostile and uninterrupted for more than ten (10) years. The plaintiffs submit that title to the disputed parcel was obtained by adverse possession no later than 2005.

The defendants submit that the three (3) feet located behind the concrete wall on the defendants' property was not used by defendants, or defendants' neighbors, as a result of an easement by Verizon, which the defendants successfully removed. As so, the defendants sought to enclose the easement portion of their property. The defendants contend that the plaintiffs never used the BBQ, that the disputed parcel was not cultivated by the plaintiffs, but rather, left to grow wild for years.

DISCUSSION

In order to obtain a preliminary injunction, the party seeking the relief must demonstrate a likelihood of success on the merits, that irreparable harm or injury will occur if the relief is not granted and that the balancing of the equities favor the party seeking the preliminary injunction. (*W.T. Grant Co. v. Srogi*, 52 NY2d 496; see also, *Town of East Hampton v. Buffa*, 157 AD2d 714). A prima facie showing of a reasonable probability of success is sufficient to obtain a preliminary injunction. (*Weissman v. Kubasek*, 112 AD2d 1086).

The existence of issues of fact for trial does not preclude the Court from issuing a preliminary injunction in the appropriate circumstance. (*Ma v. Lien*, 198 AD2d 186).

In order to establish a claim of adverse possession, the Court of Appeals held that the following five elements must be proved: possession must be (1) hostile under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the requisite period, ten years. (*Walling v. Przybylo*, 7 NY3d 228). The Court held that "[a]ctual knowledge that another person is the real title owner does not, in and of itself, defeat a claim of right by an adverse possession". (*Id.*) The Court stated that "[c]onduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors". (*Id.*)

Approximately two years later, in 2008, the New York State Legislature enacted Real Property Actions and Proceedings Law, (RPAPL), §543(1) which by statute, deemed certain encroachments and activities as "permissive and non-adverse", by stating encroachments, as per §543(1) (a) as "de minimus non-structural encroachments, including fences, hedges, plantings, sheds, and non-structural walls" and "acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowners property". (RPAPL §543(2)). In *Walling, supra*, the Court had ruled that the Wallings acquired title to the disputed parcel that belonged to the Przbylos by treating the property as their own, despite the Wallings' knowledge of the Przbylos' record ownership of the disputed parcel. Now, under RPAPL §501(3), the occupier who enters possession under a claim of right must have a "reasonable basis for the belief that the property belongs to the adverse possessor". Notably, the Act provides that "This act shall take effect immediately [July 7, 2008], and shall apply to claims filed on or after such effective date." (RPAPL §543; L. 2008, c. 269, §9).

Prior to the 2008 amendments, a claimant by adverse possession not based upon a written instrument must show actual occupation of the premises, requiring that the parcel be usually cultivated or improved, or protected by substantial enclosure. (*City of Tonawanda v. Ellicott Creek Homeowner's Association, Inc.*, 86 AD2d 118). Cultivating or improving the premises have been found to be sufficient notice on the owner. (*Beyer v. Patierno*, 29 AD3d 613). "[A]n inference of hostile possession or claim of right will be drawn when the other elements of adverse possession are established unless, prior to the vesting of title, the party in possession has admitted that title belongs to another." (*Id.*, quoting *Gerlach v. Russo Realty Corp.*, 264 AD2d 756).

After the 2008 amendments, "the existence of de minimus non-structural encroachments, including but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed permissive and non-adverse". (RPAPL §543(1)). A rock wall placed along a formerly recognized common boundary line of adjoining parcels of land was found to be a "non-structural encroachment" within the statute deeming "de minimus" non-structural encroachments permissive and non-adverse, and therefore, the building of the wall did not satisfy the adverse element of landowner's adverse possession claim, since the wall was not part of a structure providing support to something else. (*Sawyer v. Prosky*, 71 AD3d 1325). A landowner's maintenance of lawn, walkway, beach and plantings did not constitute adverse occupancy of the disputed strip of land along adjoining parcels. (*Id.*)

Here, the plaintiff's claim that title was acquired by adverse possession prior to the effective date of the amendments, and, therefore, the amendment does not apply to plaintiffs' claim. Plaintiffs rely on authority, including the Court in *Franza v. Olin*, 73 AD3d 44, which held that it would be unconstitutional to apply RPAPL §543 to the adverse possessor as title to the disputed property would have vested in plaintiff prior to the 2008 amendment. The 2008 amendments did not apply to a prescriptive easement that was alleged to have vested prior to the effective date of the amendments. (*Barra v. Norfolk Southern Railway Company*, 75 AD3d 821).

However, the Court in *Sawyer, supra*, applied the 2008 amendments and upheld the dismissal of plaintiffs' adverse possession.

In any event, recently, the Second Department in *Hogan v. Kelly*, 86 AD3d 590, held that "[a]mendments to Real Property Actions and Proceedings Law, (RPAPL), which included, for the first time, a statutory definition of the 'claim of right' element necessary to acquire title by adverse possession, cannot be retroactively applied to deprive a claimant a property right which vested prior to their enactment"; citing RPAPL §501. The Court in *Hogan, supra*, stated that it agreed with their "colleagues in the Third and Fourth Departments that the amendments cannot be retroactively applied to deprive a claimant of a property right which vested prior to their enactment", citing *Hammond v. Baker*, 81 AD3d 1288; *Perry v. Edwards*, 79 AD3d 1629; *Barra v. Norfolk S.Ry. Co.*, 75 AD3d 821; and *Franza, supra.*

Here, as plaintiffs claim that title was acquired by adverse possession prior to the effective date of the amendments will not be applied retroactively.

Upon the foregoing, the plaintiffs have demonstrated a likelihood of success on the merits, irreparable harm or injury should the preliminary injunction not be granted, and that the balancing of the equities favors the plaintiffs. The plaintiffs conduct of cultivating the disputed parcel which was enclosed by a stucco wall containing the BBQ indicates an inference of hostile possession or claim of right. The defendants have not disputed irreparable harm in their opposition.

In light of the foregoing, it is hereby

ORDERED that the plaintiffs are hereby granted a preliminary injunction whereby the defendants, Martin Schepsman and Ellen Zwalsky, their agents, servants, employees or any persons acting on their behalf, or at their direction, are restrained and enjoined from taking any action with respect to the removal of the brick fire pit and the plantings/trees referenced therein at the westerly property line of the defendant's properly located at 47 Jefferson Boulevard, Atlantic Beach, New York, or in any way interfering with plaintiff's use and beneficial enjoyment of the plaintiffs' properties, and it is hereby further

The parties are hereby directed to appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 18th day of January, 2012, at 9:30 A.M. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants. .

ENTER:

J.S.C.

Dated: December 14, 2011

cc: Minerva and D'Agostino, P.C.
Goldberg & Carlton, PLLC

ENTERED
DEC 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE