Pond House, Inc. v Incorporated Vil. of E. Hampton
2015 NY Slip Op 31163(U)
July 1, 2015
Supreme Court, Suffolk County
Docket Number: 31150/2013
Judge: Ralph T. Gazzillo
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.

[* 1]

SHORT FORM ORDER

Index No: 31150/2013

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Mot. Seq.: 001 MG

Hon. RALPH T. GAZZILLO
A.J.S.C.

X

The Pond House, Inc., Darji Properties II, LLC, and Katharine J. Rayner,

Plaintiff(s),

- against -

The Incorporated Village of East Hampton,

Defendant(s),

X

Upon the following papers numbered 1 to 43 read on this motion to dismiss pursuant to CPLR §3211, Notice of Motion and supporting papers numbered 1-11, Memorandum of Law in support of defendant's motion to dismiss numbered 12; Affirmation in Opposition and supporting papers numbered 13-41; Memorandum of Law in opposition to the motion numbered 42, Defendant's Reply Memorandum of Law numbered 43; it is

ORDERED that the motion is granted in its entirety and the complaint is dismissed, and it is further,

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days fo the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

This action was commenced by the plaintiffs seeking declaratory relief pursuant to RPAPL Article 15 and/or CPLR §3001 in order to establish the plaintiffs' right to maintain certain structures upon a parcel of real property owned by the Village of East Hampton (hereinafter the "Village"). The documentary evidence regarding the title to the subject parcel and its acquisition is not in dispute. Specifically, the property at issue is a 50 foot wide strip (SCTM #0301-015.00.-05.00–12.001) located in the Village of East Hampton. The 50 foot strip

(hereinafter "the Strip") of land runs north and south and connects Georgica Pond (on the north) to the Atlantic Ocean (on the south). The property was conveyed to the Village of East Hampton through a series of deeds all recorded in the Office of the Clerk of the County of Suffolk on May 12, 1979 from descendants of the Keck family. Each of the deeds conditioned the transfer as follows:

"TO HAVE AND TO HOLD the premises unto the Village of East Hampton so long as said premises are held for the benefit and use of the people of East Hampton as a memorial to Caroline S. Keck and Walter M. Keck. In the event that the premises are used for any other purpose, they shall revert in ownership to the grantor."

The plaintiffs each own a parcel of land adjacent to the western boundary of the Strip. Plaintiff Darji Properties II, LLC (hereinafter "Darji") owns a parcel (approximately 2.2 acres in size) that fronts the Atlantic Ocean which was acquired by deed dated August 17th, 2005 from Anne Cox Chambers. Plaintiff The Pond House, Inc. (hereinafter "Pond House") owns a parcel (approximately 12 acres in size) that fronts on Georgica Pond which it acquired by deed dated August 6th, 1985 from Betsy T. DeVecchi. Plaintiff Katharine J. Raynor, the daughter of Anne Cox Chambers, co-owns the Darji property. Although the Darji and Pond House parcels are separately owned, the plaintiffs repeatedly make it clear through their submissions that they are used together as a part of a "family compound" which utilizes a common driveway that runs from the Pond House property through a private gate (which is attached to stone pillars) onto West End Road. The property also utilizes a single address, to wit: 93 West End Road. In other words, although the parcels are legally "single and separate" the owners utilize them together as a single family residence. Together, the plaintiffs' properties run from Georgica Pond on the north to the Atlantic Ocean on the south. West End Road, which plaintiffs use to access their property, bisects the Strip and is a private road. A 6' 6" fence runs generally north and south along the easterly boundary of the Darji and Pond House properties (which is also the westerly boundary of the Strip) and connects up to both sides of the pillars that anchor a gate leading onto West End Road. The fence crosses over into the Strip in several places and it (along with the pillars that connect the gate to the fence and some mechanical equipment that services plaintiffs' properties and also encroach onto the Strip) is at the center of this dispute. It is significant to note that both parcels utilize the single access provided by the gate located on West End Road. In other words, the Darji/Raynor parcel has no independent access to West End Road. In addition, plaintiff has constructed a pool heater on the Strip. A survey of the boundary between the parties' properties shows the encroachments to be quite significant and probably nearly twenty (20) feet in some places.

Due to the numerous governmental regulations (federal, state and local) that impact the development of waterfront properties in the subject area, in 2004 plaintiffs Darji and Raynor's predecessor in title (Anne Cox Chambers) applied to the Village's Zoning Board of Appeals in 2004 to receive area variances to allow "the installation of drainage pools...installation of [a] retaining wall and swimming pool...pool mechanical equipment and enclosure and ...underground propane tanks." Pursuant to the 2004 determination of the Village's ZBA (adopted on June 11, 2004), the applicant received the variance approvals sought. However, the approvals were conditioned in part on the plaintiffs' removal of certain encroachments by plaintiff onto the Village's Strip. Specifically, that 2004 determination states as follows:

"The Board notes, however that the survey depicts certain encroachments on the Village-owned strip of land. Although the applicant is entitled to use the private road crossing the strip for access to the property, it appears that there are posts and possibly a gate across the private road within the Village-owned strip of land, outside the applicant's property boundaries. Likewise, a portion of the stone drive leading up to the applicant's house meanders into the Village-owned strip of land. These encroachments should be removed from Village property before the issuance of the certificate of occupancy or certificate of compliance for the pool and its related structures." (Emphasis added).

Although the plaintiffs' predecessor in title built the swimming pool and other improvements which were approved pursuant to the 2004 ZBA determination, for some unknown reason the conditions of that approval, namely the removal of the gate and other encroachments from the Strip, were never completed. In addition it is significant that the 2004 ZBA determination was never appealed by the then applicant/property owner.

Since the Pond House property is a single and separate parcel, in 2004 it also applied to the Village Zoning Boad of Appeals for an area variance to allow the maintenance of an underground emergency electrical generator which was built 13.6 feet from the rear property line and 7.9 feet from the side property line instead of the required 55 feet and setback area required for both. The variance was granted by the ZBA on June 11, 2004. The ZBA determination did not contain any conditions requiring the removal of the encroachments on the Strip.

Despite the non-compliance with the conditions of the prior ZBA approval, in 2013 plaintiffs Darji and Rayner applied to the ZBA for variances from the Coastal Erosion Hazard Area (which requires a minimum setback of 100 feet) and the Dune Setback Variances sections of the Village Code to permit them to construct and/or maintain additional structures (some of which it had apparently already constructed without Village approval) on the properties. Specifically, Darji and Rayner applied to allow: "(1) the continued maintenance of an enclosed frame porch of approximately 640 square feet to be maintained 60 feet north of the 15 foot contour, 2) the proposed construction of a 525 square foot basement at a setback of 81.2 feet north of the 15 foot contour, which will involve the excavation of 21 temporary 16 square-foot pits around the perimeter of the proposed basement area; (3) the construction of a proposed 677 square foot second story addition and elevated walkway between the existing residence and an attached building 89.2 foot north of the 15-foot contour; and (4) the continued maintenance of existing air conditioning units, a bin, and pool equipment vault 87.9 feet north of the 5 foot contour, all of which are seaward of the Coastal Erosion Hazard area line". Because the Pond House is technically on a separate parcel of real property, it too applied for these variances.

The plaintiffs' instant complaint asserts three cause of action (footnote that plaintiffs have two related Article 78 proceedings challenging the 2013 ZBA determinations which contained conditions requiring [as it did in 2004] that any encroachments to the Strip be removed). The first seeks declaratory judgment that the plaintiffs now own the fenced in portions of the Strip through adverse possession. The second cause of action asserts, alternatively, that the plaintiffs are entitled to maintain these structures in their present locations through prescriptive rights and the last cause of action seeks injunctive relief precluding the defendant Village from interfering with their rights in the Strip. Central to the plaintiffs' argument is the claim that since the Village has not maintained the Strip for public purposes, but rather in a proprietary manner, the

lands located within the Strip are subject to adverse possession. Alternatively, plaintiff claims a prescriptive right to the land it built upon. Further, plaintiff argues that since factual issues exist, dismissal of the action at this juncture is inappropriate.

Defendants move to dismiss the complaint pursuant to CPLR §3211(a)(1) and (7) asserting that the plaintiff has no cause of action since the Strip is owned by a municipality against which adverse possession may not lie. In addition, defendant argue that the plaintiffs cannot now assert that they are entitled to keep the encroachments and gain title to the real property by adverse possession since they received an approval for area variances from the ZBA which required the removal of the encroachments. According to the defendant, the plaintiffs have never before laid claim to the areas of encroachment contained in the Strip and never disputed the conditions contained in the 2004 approvals (although they never complied with them). As such, defendant argues that plaintiff has "vested" and acquiesced in the conditions contained in that approvals by failing to appeal the 2004 determination which contained the conditions and by availing themselves of those approvals by building the structures approved by the ZBA.

On a motion to dismiss a complaint for failure to state a cause of action, the challenged pleading is to be construed liberally (see CPLR 3026; ***Leon v. Martinez***, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972; ***Bernberg v. Health Mgt. Sys.***, 303 AD2d 348, 349, 756 N.Y.S.2d 96). Accepting the facts alleged as true, and according the plaintiff the benefit of every possible favorable inference, the court must determine only whether the facts alleged fit within any cognizable legal theory (see ***Leon v. Martinez***, 84 NY2d at 87-88; ***Bernberg v. Health Mgt. Sys.***, 303 AD2d at 349). However, where, as here, the moving party has submitted evidentiary material, the court must determine whether the proponent of the pleading actually has a cause of action, not whether he or she has stated one (see ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182; ***Pincus v. Wells***, 35 AD3d 569, 570, 826 N.Y.S.2d 423).

Since the essential facts regarding the history of title municipal approvals and the extent of the encroachments upon defendant's property are not in dispute, the sole question that needs to be answered is whether defendant has treated the Strip as a public property rather than in a proprietary fashion such that plaintiff could adversely possess it. A review of the documentary evidence and relevant case law requires that the Court grant defendant's motion herein.

In New York, a plaintiff must establish five elements to sustain a claim of adverse possession of real property. Specifically, possession of the property claimed my be 1)hostile and under claim of right, 2) open and notorious, 3) exclusive and 4) continuous for the statutory period of 10 years. "The elements of an easement my prescription are similar although a demonstration of exclusivity is not essential" (see, ***City of Tonawonda v. Ellicott Cr. Homeowners, Assn.***, 86 AD2d 118, 120; 449 NYS2d 116). However, it is well settled that adverse possession will not lie against property owned by a municipality and used for a municipal purpose (see, ***Monthie, et.al. v. Boyle Road Associates***, LLC, 281 AD2d 15, 724 NYS 2d 178). "Conversely, when a municipality holds real property in its proprietary capacity, there is no immunity against adverse possession (see, ***Monthie***, *Id.*). Accordingly, in order to prove its claim plaintiffs will not only have to establish all of the elements necessary to establish adverse possession, they most also prove by a preponderance of the evidence that the defendant Village held the Strip in its proprietary capacity rather than in a municipal capacity.

The documentary evidence provided by the plaintiff establishes that the plaintiff cannot maintain its claims for either adverse possession or a prescriptive easement.

Initially, the fact that the deeds to the Village contain a reverter poses a significant problem for plaintiffs. Specifically, the deeds for the Strip into the Village from the Keck family contain the following language: "TO HAVE AND TO HOLD the premises unto the Village of East Hampton so long as said premises are held for the benefit and use of the people of East Hampton....In the event that the premises are used for any other purpose, they shall revert in ownership to the grantor" (emphasis supplied). As such, since the Village is not entitled to hold the Strip in a propriety manner, the property could not be used in a propriety manner and is not subject to adverse possession. Moreover, plaintiff failed to name the grantors of the premises who retained the reverter as necessary parties to the action. "RPAPL 1511(2) provides that, in an action...where it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgement, the court ...on its own motion, may direct that such person be made a party." This section applies where there are title claims based upon adverse possession such as the matter at bar (see, ***Sorbello v. Birchez Associates, LLC***, 61 AD3dd 1225; 1226; 876 NYS2d 789, 790). Plaintiffs argue that the reverter is somehow "proof" that the property is alienable since it creates a potential for the Village to lose title to the property. This argument is nonsensical. The reverter mandates that the Village maintain the Strip for public use, it does not give the Village the right to alienate it in any way. "The language must be construed to effectuate the intent of the grantor" (see, ***Nichols v. Haehn***, 8 A.D.2d 405). Clearly, the descendants of the Keck family who deeded the premises to the Village for public use has an interest in the property and would be impacted by the outcome of the action if this Court were to determine that the Village failed to utilize the Strip in a proprietary rather than public manner since. Accordingly the action should be dismissed for this reason alone (see, ***Fila v. Angiolillo***, 88 A.D.2d 693; ***Netrosio v. Peteani***, 45 Misc.3d 1202(A).

Second, even if the deeds granting the Strip to the Village did not require that the premises revert to the grantors if not used for the public benefit, the Village's records unequivocally show that over the time period since it has owned the Strip, it has continually worked to allow the Strip to be used by the public, as intended by the grantors. Although it is apparent in the Village's records that the narrow shape and location of the property posed certain challenges in terms of allowing public access, it is clear from those records that the Village continually sought ways through which the purpose of the gift could be effectuated while giving due consideration to the potential for disruption of the other property owners along West End Road. A review of those records, including letters and other records of the defendant Village together with the determinations of the ZBA in 2004 and in 2013 establish that the Village held the property in its governmental capacity rather than in a proprietary capacity. For example, the minutes of the November 16, 1979 board meeting indicate that the Village Board was endeavoring to make the Strip accessible to the public by authorizing the construction of a small public parking area defined with a fence and a path to the Georgica with wooden walkways. In 1980, the Village allowed Baymen to access Georgica Pond using the Strip. Although the parking area was apparently later closed, a review of all of the minutes relating to the Village's management of the Strip indicates a clear recognition of the intent of the Keck grantors to have the Strip used for public purposes with an ongoing understanding and desire to allow that public access to it even though vehicular access has been an ongoing challenge due to the narrow width of West End Road and the fact that it is a private roadway. The premises were never offered for

sale and it appears that in 2014, the Village – along with the descendants of the Keck family – rededicated the Strip by opening it up and placing a monument on it to honor the Keck family. The Village records do not contain any indicia of an intent to sell, alienate or otherwise abandon the public access to the Strip. To the contrary, the records establish that no matter the challenges faced by the Village making the Strip useful due to its odd shape, size and location, the Village understood the value of the Strip as a public access to the waterfront and continually attempted to maximize public access to the Strip as was practical in light of its limitations. Accordingly, based upon the documentary evidence which shows that the defendant Village has always held title to the Strip in its governmental capacity, and because the law does not allow adverse possession agianst a municipality, plaintiffs' claims for adverse possession and prescriptive easements must be dismissed pursuant to CPLR 3211(a)(7)*(see,* ***City of Tonawonda v. Elliot Creek Homeowners Ass'n, Inc****., supra.*)

Third, and finally, even if plaintiffs had joined all necessary parties and assuming the Strip had been subject to adverse possession (which it is not), plaintiffs alleged "open and notorious" claims to the Strip were most certainly belied by there failure to appeal the 2004 ZBA determinations which granted area variance relief conditioned upon the requirement that the applicant to remove the encroachments into Strip. This determination was never appealed, objected to, or challenged in any way. Instead, the plaintiffs availed themselves of the approvals granted in it. While they never adhered to the conditions contained in it, those conditions were never waived, removed or amended in any way. It is disingenuous for plaintiff to now claim that it has a right to maintain the improvements constructed pursuant to the ZBA's 2004 approval while rejecting the conditions contained in it. Plaintiffs simply cannot have it both ways by relying on something they chose to disregard. If they objected to the conditions contained the ZBA approval and truly intended on making and open and adverse claim to the Strip, they had thirty days to challenge the determination pursuant to Village Law 7-712(1). They did not and as such, the conditions remain valid.

Moreover, the plaintiffs' failure to challenge that 2004 determination in any manner also eliminates any claim for adverse possession (if plaintiffs could have even maintained such a claim) since it demonstrates that plaintiffs' occupation of the Strip was without the requisite "claim of right" element (see, ***Brand v. Prince***, 35 NY2d 634). Specifically, "mere possession of land without any claim of right, no matter how long it may be continued, gives no title" (see, ***Gerlach v. Russo Realty Corp***., 264 AD2d 756, 757). Accordingly, plaintiffs' failure to make an affirmative claim of right (and not just occupy portions of the Strip) also requires the dismissal of any claims for adverse possession or prescriptive easement.

Furthermore and as a matter of law, plaintiffs' assertion that the conditions were outside the scope of the ZBA's authority is completely without merit. "In granting use and area variances the ZBA ... is expressly authorized to impose "such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property' that are consistent with the spirit and intent of the zoning ordinance or local law and shall minimize any adverse impact such variances may have on the neighborhood or community." (See, ***In the Matter of Charisma Holding Corp. v. Zoning Board of Appeals of the Town of Lewisboro***, 266 AD2d 540, 699 NYS2nd 89). Clearly, it was well within the authority of the ZBA, as a condition of allowing the plaintiffs to maintain certain improvements within the designated set back areas, to require the removal of encroachments onto the neighboring public property since such

encroachments could impair the public's use and enjoyment thereof and could have an adverse impact on the neighborhood or community.

Since the documentary evidence clearly and unequivocally shows that the plaintiffs 1) failed to name a necessary party to the action, 2) failed to establish that the Village held the Strip in a proprietary capacity and 3) plaintiff failed to establish the requisite "claim of right", it is abundantly clear that plaintiff cannot, under any of the facts provided, establish that it has adversely possessed the Strip or any portion thereof the complaint must be dismissed in its entirety pursuant to CPLR §3211(a)(7) and (a)(10).

Settle Judgement on notice.

Dated: 7/1/15
Riverhead, N.Y.

Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition

Esseks, Hefter & Angel, Esqs.
Attorneys for Plaintiff
108 East Main Street
P.O. Box 279
Riverhead, N.Y. 11901

Farrell Fritz, P.C.
Attorneys for Defendants
50 Station Road, Building One
Water Mill, N.Y. 11976