| **Volk v Ostrower** |
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| 2016 NY Slip Op 32485(U) |
| December 19, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 14-15541 |
| Judge: Daniel Martin |
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[* 1]

SHORT FORM ORDER

INDEX No. 14-15541

CAL. No. 15-01800OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

***PRESENT:***

Hon. DANIEL MARTIN

MOTION DATE 2-23-16
ADJ. DATE 4-12-16
Mot. Seq. # 003 - MD

---------------------------------------------------------------X

JODI C. VOLK,

Plaintiff,

- against -

DANIEL OSTROWER and CHRISTINE OSTROWER,

Defendants.

---------------------------------------------------------------X

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 16-28 ; Replying Affidavits and supporting papers 29-30 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendants for summary judgment dismissing the complaint is denied.

This is an action for adverse possession pursuant to Article 5 of the Real Property Actions & Proceedings Law. Plaintiff alleges that she has obtained ownership over a strip of land within the defendants' deeded property by means of adverse possession. Plaintiff also seeks removal of a fence erected by the defendants upon the land which plaintiff claims.

Defendants now move for summary judgment dismissing the complaint. In support of their motion they submit their attorney's affirmation, the pleadings, excerpts of the transcripts from the depositions of plaintiff and Arthur Volk, the affidavit of Daniel Ostrower, dated February 1, 2016, and seven photographs. In opposition, plaintiff submits the affidavit of plaintiff, dated March 8, 2016, the affidavit of Lisa Anderson, dated November 9, 2015, excerpts from the deposition transcript of the plaintiff, the deposition transcript of Christine Ostrower, excerpts from the deposition transcript of

Daniel Ostrower, five photographs, advertisements for the sale of 6 Mill Lane and 10 Mill Lane, Cold Spring Harbor, New York, and records of All Island Irrigation, Inc.

In her testimony and affidavit in opposition to defendant's motion, plaintiff sets forth the facts she believes entitle her to adverse possession of the disputed property. Plaintiff states that the adversely claimed land is a triangular shaped grassy area, which she describes as the "east hill" or "rolling hill", and which appeared to be part of the front lawn of the residence when she and her husband purchased the property in 1991. Mr. Volk is no longer on the deed. Plaintiff maintains that from 1991 until the defendants fenced the property, the plaintiff's landscapers maintained the property, which included mowing, seeding aerating, spraying pesticides, fertilizing and irrigating the subject parcel. Plaintiff states that her sons frequently played on the hill, and has submitted video of her sons riding their sleds on the hill in the early 1990s. Plaintiff further states that, at some point, she and her husband had an "invisible fence" installed on the hill to help control their dog. Plaintiff also alleges that there were never any interruptions or lapses in their cultivation or use of the property, and that they had always believed that the hill was part of their front lawn. Plaintiff denies that she ever told defendant Daniel Ostrower that he had the right to install the fence consistent with the boundary markers in place or that she in any way acknowledged that defendants had a right to the disputed property. Plaintiff concedes that she does not claim and has never claimed to have any ownership rights to the wooded area that borders the "east hill," which is the subject of her claim.

Arthur Volk testified that the property being claimed by his wife is a rolling grass hill on the east side of the property, which is bordered on the east by woods. Mr. Volk testified that he and his wife have been using and cultivating the subject property for years. Mr. Volk further testified that their sprinklers watered the hill and their landscaper maintained it. He testified that he did not learn that some or all of the hill and wooded area were on the defendants deeded property until the property was surveyed and stakes were put in the ground in the spring of 2014. Mr. Volk testified that prior to the survey, he believed it was his property. He testified that believed that the trees to the east of the rolling grass hill were not on his property.

In his testimony and affidavit, defendant Daniel Ostrower states that he and his wife, defendant Christine Ostrower purchased the residential property known as 6 Saw Mill Lane, Cold Spring Harbor, New York, in July of 2013. Mr. Ostrower states that before taking title, he hired a surveyor to conduct a survey to stake out the property lines, because he and his wife intended to fence the entire property. The stakes were placed along the boundary lines including the boundary of the Volk Property. Defendants obtained a permit and began to remove some trees from their property. Mr. Ostrower alleges that in March of 2014 plaintiff voiced to Christine and himself displeasure over the tree removal. Mr. Ostrower states that in June 2014 he had the property re-surveyed and staked in anticipation of installing a fence. He alleges that plaintiff asked if she could remove the stakes separating their properties, but he declined. He states that plaintiff told him that she understood that the property up to the boundary markers belonged to him and that it "was not in question." Mr. Ostrower alleges that plaintiff did not want her view of the wooded area blocked by a fence, even though the wooded area is his property, and plaintiff acknowledged that he had a right to install a fence consistent with the boundary markers in place. Mr.

Ostrower further alleges that after advising the plaintiff of his plans to install the fence she said nothing to the effect of having or believing that she had any right to prevent him from doing so.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is noted that, based upon the testimony of both parties and the non-party witness and the relevant case law, the wooded area adjacent to the so called rolling grass hill is not part of the area claimed by plaintiff and, thus, not the subject of this action (*see* ***Robbins v Schiff***, 106 AD3d 1215, 1216, 964 NYS2d 749 [3d Dept 2013]; ***Mayville v Webb***, 267 AD2d 711, 712, 699 NYS2d 532 [3d Dept 1999]; ***Krol v Eckman***, 256 AD2d 945, 681 NYS2d 885 [3d Dept 1998]).

Where claimants allege in their verified complaint that they gained title to disputed property by adverse possession prior to 2008, the former version of Real Property Actions and Proceedings Law (RPAPL) that was in effect prior to amendments applies to claimants's adverse possession claim (***Olivieri v Colosi***, 129 AD3d 1540, 11 NYS3d 758 [4th Dept 2015]; ***Hogan v Kelly***, 86 AD3d 590, 927 NYS2d 157 [ 2d Dept 2011]). Both parties agree that this action is subject to the RPAPL prior to its 2008 amendment.

To establish a claim of adverse possession, the following five elements must be proved: possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period (former RPAPL 521; ***Estate of Becker v Murtagh***, 19 NY3d 75, 945 NYS2d 196 [2012]; ***Walling v Przybylo***, 7 NY3d 228, 818 NYS2d 816 [2006]; ***Galli v Galli***, 117 AD3d 679, 985 NYS2d 373 [2d Dept 2014]). So long as possessor's use of property claimed by adverse possession is open, notorious, and continuous for the 10–year period, hostility will be presumed (***Millington v Kenny & Dittrich Amherst, LLC***, 124 AD3d 1108, 2 NYS3d 273 [3d Dept 2015]; ***2 N. St. Corp. v Getty Saugerties Corp.***, 68 AD3d 1392, 892 NYS2d 217 [3d Dept 2009]). Where, as here, the adverse possession claim is not based upon a written instrument, the party asserting the claim "must establish that the land was 'usually cultivated or improved' or 'protected by a substantial inclosure' " (***Estate of Becker v Murtagh***, 19 NY3d 75, 81, 945 NYS2d 196; *see* ***Bergmann v Spallane***, 129 AD3d 1193, 10 NYS3d 670 [3d Dept 2015] ). Because the acquisition of title by adverse possession is not favored under the law, these elements must be proven by clear and convincing evidence (*see* ***Estate of***

***Becker v Murtagh***, *supra;* ***Ray v Beacon Hudson Mtn. Corp.***, 88 NY2d 154, 643 NYS2d 939 [1996]; ***Wilcox v McLean***, 90 AD3d 1363, 935 NYS2d 220 [3d Dept 2011]).

Defendants have failed to establish their prima facie entitlement to summary judgment, since they have failed to eliminate all issues of fact.

The defendants argue that the plaintiff has failed to describe the land with "common certainty" as required by RPAPL 1515. Subdivision 2 of section 1515 provides, insofar as pertinent:

> The complaint must describe the property claimed with common certainty, by setting forth the name of the township or tract and the number of the lot, if there is any, or in some other appropriate manner, so that from the description possession of the property claimed may be delivered where the plaintiff is entitled thereto...

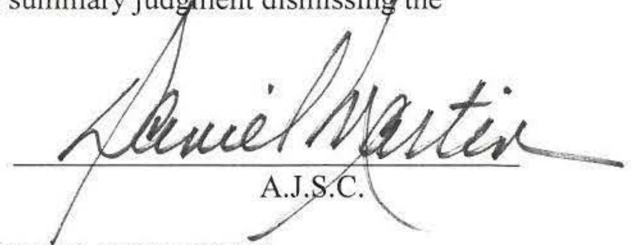
There is little case law on this issue. In ***Tesone v Hoffman***, 84 AD3d 1219, 923 NYS2d 704 [2d Dept 2011], the Appellate Court held that common certainty standard for practical location of a boundary line is met if, from the complaint's description of the disputed property location, it may be delivered to the party entitled to possession. The Court further held that plaintiffs' complaint seeking judgment declaring them to be lawful fee owners of strip of disputed land adequately described the land fixtures and monuments forming the alleged boundary line. In ***Mandel v Estate of Frank L. Tiffany***(263 AD2d 827, 693 NYS2d 759 [3d Dept 1999], the Appellate Court held that plaintiff's deed to the claimed property and various surveys were sufficient to describe the disputed property. In ***Valentine v Smith***(90 AD2d 919, 457 NYS2d 929 [3d Dept 1982], the Appellate Court held that the deed by which plaintiff alleged to have obtained title to the disputed property, together with the testimony of a surveyor was sufficient to comply with RPAPL 1515. In this matter, plaintiff has submitted an existing survey with a a shaded triangle shaped area added and has submitted a description of the claimed property alleging that it is 37 feet, 5 inches by 46 feet by 74 feet. Plaintiff further alleges that a survey of the property could not be completed due to defendants' fence. Thus, there is an issue of fact as to whether plaintiff can establish the location of the property which she claims ownership of by adverse possession.

Defendant has alleged that plaintiff plaintiff admitted to him that she understood that the property up to the boundary markers belonged to him and that it "was not in question." Plaintiff strongly denies this allegation. "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (***Stukas v Streiter***, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011], quoting ***Kolivas v Kirchoff***, 14 AD3d 493, 493, 787 NYS2d 392 [2d Dept 2005]; *see* ***Diaz v Brentwood Union Free School Dist.***, 141 AD3d 556, 36 NYS3d 161 [2d Dept 2016]). The Court finds that there are issues of credibility which will have to be resolved at trial.

Defendants having failed to satisfy their prima facie burden, the papers submitted in opposition to the motion need not be considered (*see* ***Midfirst Bank v Agho***, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Cendant Car Rental Group v Liberty Mut. Ins. Co.***, 48 AD3d 397, 852 NYS2d 190 [2 Dept 2008]).

In light of the foregoing, the motion by defendants for summary judgment dismissing the complaint is denied.

Dated: December 19, 2016



A.J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**