

**Kheel v Molinari**

2017 NY Slip Op 32058(U)

September 28, 2017

Supreme Court, Tompkins County

Docket Number: 2012-0691

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State  
of New York held in and for the Sixth Judicial  
District at the Tompkins County Courthouse, Ithaca,  
New York, on the 21<sup>st</sup> day of July, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TOMPKINS COUNTY

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THOMAS H. KHEEL,

Plaintiff,

-vs-

JOSEPH A. MOLINARI

Defendant.

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DECISION AND ORDER

Index No. 2012-0691  
RJI No. 2016-0589-M

APPEARANCES:

PLAINTIFF:

THOMAS H. KHEEL, ESQ.  
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COUNSEL FOR DEFENDANTS:

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**EUGENE D. FAUGHNAN, J.S.C.**

This case involves a property dispute between two neighbors, Plaintiff, Thomas H. Kheel, Esq. (“Kheel”) and Joseph A. Molinari (“Molinari”). Kheel commenced this action on October 25, 2016, under Article 15 of the Real Property Actions and Proceedings Law (“RPAPL”) seeking a declaratory judgment to compel determination of claims to real property, and RPAPL §641 to compel Molinari to remove a septic system on Kheel’s land. Molinari served an Answer to the Complaint on or about November 7, 2016, and also served a separate Verified Counterclaim on or about the same date, seeking an easement and a finding made of a nuisance by Kheel, and that Kheel cease and desist from certain conduct, and remove a fence that Kheel had erected in 2011.

Molinari filed a Motion for Summary Judgment, which included an Affirmation of Nino L. Lama, Esq., sworn to on March 23, 2017, and an Affidavit of Molinari, sworn to on April 4, 2017 with attached Exhibits, and a Memorandum of Law dated April 4, 2017. Defendant seeks an Order for adverse possession, prescriptive easement, and easement out of necessity. Kheel filed a Cross Motion, with an Affirmation dated July 11, 2017 (with Exhibits) and a Memorandum of Law dated July 12, 2017. The parties appeared for oral argument on the Motion and Cross Motion and the Court reserved Decision.

**BACKGROUND FACTS**

Kheel acquired his property in 1977, and Molinari has owned the property adjacent to Kheel since 2001. There is a driveway and septic tank that services Molinari’s property, but which is located on Kheel’s land. Kheel had a fence built that Molinari claims keeps him from accessing the septic system, and Molinari’s driveway.

Previously, in 2011, Molinari filed a summons and complaint (Index 2011-0578) seeking a finding of an easement and a nuisance. That action was dismissed by this Court as abandoned. Molinari also file another action in 2015 (Index 2015-0871), which was dismissed without prejudice on October 12, 2016 for Molinari's failure to obtain personal jurisdiction over Kheel. About three weeks after that dismissal, Kheel filed this instant action against Molinari.

Molinari claims that when he acquired the property, the listing said it included the paved driveway, which he has been using for more than 10 years. However, it appears the driveway is actually on the land owned by Kheel, who put up a fence that prevents Molinari from being able to use the driveway or access the septic system. During the course of the 2 prior actions, there was an Order permitting the draining of the septic system, which was completed. Molinari has submitted evidence that there is no area on his property where a septic system could be located, and thus, he needs access to the septic system which he has been using on Kheel's land. Molinari seeks an order to have Kheel remove the fence, and that he be allowed to access the septic service and have use of the driveway. Molinari claims he has satisfied the elements for a claim of adverse possession.

Kheel argues that Molinari cannot be granted adverse possession, because Molinari had no reasonable belief that the land belonged to him or that he had a "claim of right." The owner (Kheel) was on record through County Clerk's office, as well as surveys done on the properties.

## **LEGAL ANALYSIS AND DISCUSSION**

### **SUMMARY JUDGMENT**

"On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3<sup>rd</sup> Dept.

2014) [citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Walton v. Albany Community Dev. Agency*, 279 AD2d 93, 94-95 (3<sup>rd</sup> Dept. 2001)]. If the movant fails to make this showing, the motion must be denied. *Alvarez, supra*. Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007).

Here, Defendant has moved for Summary Judgment on his counterclaim, to grant him title based upon adverse possession, prescriptive easement and easement by necessity. In support of the Motion, Molinari provided his own affidavit stating that he has used the driveway for ingress and egress, as well as using the septic system, for more than 10 years. He further avers that when he bought the property, the listing stated that it included the paved driveway. He also contacted a septic company, and provided an affidavit from that individual (Gregory A. Cooper), stating there is no other place on his property where a septic system could be installed. That is due to set-back regulations from the road, as well as the fact there is insufficient area to install a leech field.

#### 1. Adverse Possession

The law of adverse possession, as it applied prior to the 2008 amendments, was stated by the Court of Appeals as follows:

Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely" (RPAPL former 521). To establish a claim of

adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years)... The character of the possession must be such "that [it] would give the owner a cause of action in ejectment against the occupier" (*Brand v Prince*, 35 NY2d 634, 636, 324 NE2d 314, 364 NYS2d 826 [1974]). In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was "usually cultivated or improved" or "protected by a substantial inclosure" (RPAPL [5] former 522). Because the acquisition of title by adverse possession is not favored under the law, these elements must be proven by clear and convincing evidence.

*Estate of Becker v. Murtagh*, 19 NY3d 75, 80-81 (2012) (citations and internal quotations omitted); *see also Robbins v. Schiff*, 106 AD3d1215 (3<sup>rd</sup> Dept. 2013).

“In 2008, the adverse possession statute (RPAPL art 5) was amended in its entirety (L 2008, ch 269) to, among other things, discourage people from claiming adverse possession over real property they know belongs to another with superior ownership rights. Among the changes, the Legislature defined the terms "adverse possessor," "acquisition of title," and "claim of right" (RPAPL 501), and altered the requirements that must be made out where the adverse possession claim is not based on a written instrument (RPAPL 522).” *Estate of Becker, supra*, 19 NY3d at 84, n.4. These changes included a definition for claim of right to mean “a reasonable basis for the belief that the property belongs to the adverse possessor, or property owner.” RPAPL §501(3). In addition, “[t]he 2008 amendments replaced the language ‘[w]here it has been usually cultivated or improved’ in RPAPL 522 (1) with ‘[w]here there have been acts sufficiently open to put a reasonably diligent owner on notice.’” *Franza v. Olin*, 73 AD3d 44, 46 (4<sup>th</sup> Dept. 2010). Specifically, RPAPL § 522 now provides that “[f]or the purpose of constituting an adverse possession not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others: 1. Where there have been acts sufficiently open to put a reasonably diligent owner on notice. 2. Where it has been protected by a substantial enclosure...”

The Amendments went into effect on July 8, 2008 and apply to all cases filed on or after that date. The amendments do not apply when the adverse possession ripened before the effective date of the amendments. *Estate of Vertley Clanton v. City of New York*, 2017 NY App. Div LEXIS 6219 (2<sup>nd</sup> Dept. 2017); see e.g. *Franza, supra*; *Barra v. Norfolk S. Ry. Co.*, 75 AD3d 821 (3<sup>rd</sup> Dept. 2010), *Estate of Becker, supra*. In the instant case, Molinari owned the property since 2001. Therefore, his adverse possession claim would not have ripened, or vested, by the time of the 2008 amendments, and accordingly, this action is governed by the amended statutes.

Molinari contends that he met the elements for adverse possession by the fact that he has used the driveway for maintaining his residence and accessing the septic system for more than 10 years. He also points out that when he acquired the property, the listing indicated that the driveway was included as part of his property. “The purpose of the hostility requirement is to provide the tile owner notice of the adverse claim though the ‘unequivocal acts of the usurper.’” *Estate of Vertley Clanton, supra* at 4, quoting *Monnot v. Murphy*, 207 NY 240 (1913). Hostility will be presumed if the use is open, notorious and continuous for the 10 year period. *2 N. St. Corp. v. Getty Saugerties Corp.*, 68 AD3d 1392, 1393 (3<sup>rd</sup> Dept. 2009) citing *Goss v. Trombly*, 39 Ad3d 1128, 1129 (3<sup>rd</sup> Dept. 2007), *Fatone v. Vona*, 287 AD2d 854 (3<sup>rd</sup> Dept. 2001). Molinari’s acts were sufficiently open to put a reasonably diligent owner on notice. Here, the parties are neighbors, and Kheel has been present to observe all the acts. Molinari also claims that he has used the driveway in connection with the residence, and also to access the septic system which serves only his property. As such, he claims it shows actual, open and notorious and exclusive use for more than 10 years. See e.g. *Reardon v. Broadwell*, 121 AD3d 1546 (4<sup>th</sup> Dept. 2014).

Those assertions, if true, would show that Molinari’s use was hostile, and under a claim of right because he had a reasonable basis for thinking he owned the property (by relying on the listing). While Kheel objects to the property listing as hearsay, and also argues that the recorded deeds and surveys undercut Molinari’s claim, the appropriate inquiry is Molinari’s belief, and

whether that belief was reasonable. The Court finds that Molinari has made out a prima facie case for summary judgment on his adverse possession claim.

The burden of proof is then shifted to Kheel to raise a triable issue. Again, as noted above, Kheel argues that there was no dispute in the recorded deeds and property descriptions as to the true ownership of the disputed land- this does raise a question as to whether Molinari had a reasonable belief that the lands encompassing the driveway and septic system belonged to him. Kheel also disputes that Molinari actually serviced the septic system between 2002 and 2016, and disputes if the septic system and leech field are still in use. He also contends that Molinari's property was vacant for several years and there were no occupants. Therefore, he claims that the Defendant has failed to establish the requisite time frame for an adverse possession claim.

At this juncture, the parties have submitted conflicting evidence, precluding summary determination. Based upon a review of all the factors, the Court concludes that a triable issue is presented on the adverse possession claim, and as such, Defendant's Motion for Summary Judgment on adverse possession must be DENIED.

## 2. Prescriptive Easement

Defendant also seeks Summary Judgment on his claim for prescriptive easement. "A party claiming a prescriptive easement must show, by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years." *Gulati v. O'Leary*, 125 AD3d 1231, 1233 (3<sup>rd</sup> Dept. 2015), citing *Ward v. Murariu Bros., Inc.*, 100 AD3d 1084, 1085 (3<sup>rd</sup> Dept. 2012); *Nixon v. Morris*, 91 AD3d 1170, 1171 (3<sup>rd</sup> Dept. 2012); *Estate Ct., LLC v. Schnall*, 49 AD3d 1076, 1077 (3<sup>rd</sup> Dept. 2008). The prescriptive easement claim is also governed by the 2008 amendments, as Molinari's claim for prescriptive easement had not vested as of 2008 since he was in possession less than 10 years. *See Barra, supra*. "The elements of an easement by prescription are similar [to those of an adverse possession claim] although



demonstration of exclusivity is not essential." *King's Ct. Rest., Inc. v. Hurondel I, Inc.*, 87 AD3d 1361, 1362 (4<sup>th</sup> Dept. 2011) citations omitted; *Almeida v. Wells*, 74 AD3d 1256 (2<sup>nd</sup> Dept. 2010); *Posnick v. Herd*, 241 AD2d 783 (3<sup>rd</sup> Dept. 1997).

The analysis for summary judgment on the prescriptive easement claim is much the same as it is for adverse possession, except for the exclusivity component. For the same reasons noted above with respect to the claim for adverse possession, the Court finds that Plaintiff has raised triable issues with respect to the claim for a prescriptive easement. Therefore, Defendant's Motion for Summary Judgment on the prescriptive easement claim is DENIED.

### 3. Easement by necessity

Molinari also seeks summary judgment on his claim for easement by necessity, and claims that Plaintiff's installation of the fence prevents him from using the driveway, and also from accessing the septic system.

To establish an easement by necessity, plaintiff must, by clear and convincing evidence, show that its property was at one time titled under the same deed as defendants' and, when severed, plaintiff's parcel became landlocked (*see Simone v Heidelberg*, 9 NY3d 177, 182, 877 NE2d 1288, 847 NYS2d 511 [2007]; *Meyer v Stout*, 45 AD3d 1445, 1447, 846 NYS2d 535 [2007]; *Thomas Gang, Inc. v State of New York*, 19 AD3d 861, 862, 797 NYS2d 583 [2005]; *Astwood v Bachinsky*, 186 AD2d 949, 949-950, 589 NYS2d 622 [1992]). In other words, "the existence and extent of an easement by necessity is determined based on the circumstances as they existed at the time of severance" (*Foti v Noftsier*, 72 AD3d 1605, 1608, 901 NYS2d 434 [2010]).

*Lew Beach Co. v. Carlson*, 77 AD3d 1127, 1129-1130 (3<sup>rd</sup> Dept. 2010).

Further, it must also be shown that at the time of severance, there was an easement over the subject property that was absolutely necessary. "Significantly 'the necessity must exist in fact and not as a mere convenience' ... and must be indispensable to the reasonable use for the adjacent property." *Simone v. Heidelberg*, 9 NY3d 177, 182 (2007) (internal citations omitted)

Defendant has submitted evidence showing that Kheel previously owned both of these properties, but in approximately 2001, lost title through foreclosure to the property now owned by Molinari. For his part, Molinari claims that the easement to utilize the septic system was absolutely necessary because a septic system cannot be located on Molinari's property. In support, Molinari provided an affidavit from Mr. Cooper, who is in the business of engineering and installing septic systems, and he stated that there is no space available to accommodate the installation of septic system, and highlights set back requirements. Further, Molinari contends that the usage of the driveway is necessary for ingress and egress to the property and for access to the septic tank.

Kheel argues that the driveway is not necessary for access to Molinari's property and that there are actually parking spaces on the Molinari property that are directly accessible from the road. Kheel also produced a 2001 septic permit allowing Molinari to place his own septic system on his own property. Kheel also contends that the permit did not require compliance with normal set back rules, and he produced another letter from Tompkins County Department of Health that set back requirements would not apply in this case.

The evidence submitted by the parties raises questions of fact which preclude a summary disposition at this time. Accordingly, Defendant's Motion for Summary Judgment on the claim for an easement by necessity is DENIED.

#### PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

In addition to filing papers in opposition to Molinari's Motion for Summary Judgment, Kheel has filed his own Cross Motion. He is seeking Summary Judgment on his Complaint, and a Declaratory Judgment (under RPAPL Article 15) that he is the true owner of the property; and an Order to enjoin Molinari from using the land, and also directing removal of the septic system. However, to resolve the question of proper title to the land, the issue of adverse possession and any easements will need to be resolved first. Since there are questions of fact which preclude determination on those matters, it also means that Kheel's Motion must be denied.

**CONCLUSION**

Accordingly, Defendant's Motion for Summary Judgment on his counterclaims is DENIED. Plaintiff's Cross Motion for Summary Judgment is also DENIED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: September 28, 2017  
Ithaca, New York

  
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HON. EUGENE D. FAUGHNAN  
Supreme Court Justice