To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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BGB REALTY LLC,

Plaintiff,

-against-

Index No. 50200/16
Motion Sequence No. 004
Decision and Order

AREC 13, LLC,

Defendant.

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EVERETT, J.

The following papers were read on the motion:
Notice of Motion/Affirmation in Supp/Exhibits 1-9/Memorandum of Law/Exhibit (docs 111-122)
Affirmation in Opp/Exhibits A-H/Aff of Serv (docs 126-135)
Reply Affirmation/Exhibits 10-12 (docs 137-140)

In this action sounding in adverse possession under Article 15 of the RPAPL, plaintiff BGB Realty LLC (BGB) moves for an order, pursuant to CPLR 3025 (b), granting it leave to amend its complaint to add a cause of action under the doctrine of practical location. Defendant AREC 13, LLC (AREC) opposes the motion on the ground that it would be prejudiced by this belated assertion of a new cause of action on the eve of trial. Upon the foregoing papers, the motion is denied.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on June 22, 2011, seeking a judicial declaration granting it sole possession of a parcel of land located at or near 1 Virginia Road in the Town of North Castle,

New York. Issue was joined by service of AREC's answer on August 4, 2011. No request for judicial intervention (RJI) or for a preliminary discovery conference was filed with the Court prior to defense counsel's filing of same on December 1, 2015. The parties then conducted discovery pursuant to the January 7, 2016 preliminary conference order and multiple follow-up compliance orders, and on July 19, 2017, BGB filed a note of issue and certificate of readiness attesting to the completion of all known discovery.

By order to show cause filed on May 15, 2018, BGB moved for an order substituting Americo Real Estate Company for defendant, and for a declaration that the complaint encompasses a claim for title by practical location, or for leave to amend the complaint to allege a claim based on the doctrine of practical location. By order of the Honorable Nicholas Colabella dated May 24, 2018, the motion by order to show cause was granted only to the extent of vacating the note of issue, and referring the case back to the compliance conference part. By notice of motion dated June 4, 2018, BGB filed, via NYSCEF, the instant notice of motion for leave to amend the complaint to add the additional cause of action. Thereafter, on July 31, 2018, the Honorable Joan B. Lefkowitz so ordered the trial readiness referee report of Court Attorney Referee Jeannette M. Millner dated July 30, 3018, directing BGB to file a note of issue and certificate of readiness within 20 days of entry of the order, and set forth the schedule for the filing of any summary judgment motions in this matter. BGB then filed the note of issue and certificate of readiness on August 22, 2018.

With respect to the motion, BGB contends that, while the complaint does not specifically allege that it acquired title to the disputed parcel by practical location, the doctrine of practical location is an offshoot of an adverse possession claim, and the factors supporting this additional

claim can be gleaned from the complaint as originally filed, and from deposition testimony. BGB also contends that AREC would not be seriously prejudiced by allowing the amendment. This, BGB explains, is because the doctrine of practical location – which recognizes the practical location of a boundary line and the acquiescence to that boundary line by the parties for a period of time in excess of the statutory period governing adverse possession – adds no new facts to the case, and because all issues related to the claim and the particular fence demarcating the border of the disputed parcel, have been addressed during discovery.

In its opposition to the motion, AREC points out that the action, as commenced in 2011,[1] did not allege a claim related to practical location, that BGB took no steps to prosecute the action between commencement and the preliminary conference, effectively abandoning it, and that, since the preliminary conference was held in January 2016 (as a result of AREC's filing of a request for judicial intervention), the parties have appeared in court some 28 times, without BGB ever raising the possibility of adding a claim based on practical location. AREC also points out that it would be prejudiced by this tardy, post note of issue amendment, as it has already conducted extensive and expensive discovery on issues relating to the adverse possession claim, but did not have an opportunity to conduct discovery on a practical location claim, which, contrary to BGB's assertion, encompasses elements which are separate and apart from an adverse possession claim.

Under CPLR 3025 (b), "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by

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[1] The action, originally assigned Westchester County Index No, 12381/11, was converted to electronic filing, under NYSCEF, and assigned Westchester County Index No. 50200/16, following completion of the preliminary conference stipulation.

stipulation of all parties. It is well settled that, while "[l]eave shall be freely given," and "mere lateness is not a barrier to the amendment," the question of whether to grant the proposed amendment is a matter of the court's discretion (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted]; CPLR 3025 [b]).

BGB's claim for adverse possession requires evidence that its possession has been hostile, actual, exclusive, open and notorious, and continuous for the 10-year statutory period (RPAPL Article 15). Unlike a claim for adverse possession, a claim based on practical location[2] requires proof that the claimed boundary line has been clearly marked, and that there has been mutual acquiescence to that boundary line by the adjoining owners/parties "such that it is definitely and equally known, understood and settled" by them for more than the statutory period (*Jakubowicz v Solomon*, 107 AD3d 852, 852-853 [2d Dept 2013] [internal quotation marks and citations omitted]). In view of the differing elements of proof with respect to these claims, the Court cannot find that AREC would not be prejudiced by the lack of discovery tailored to its defense to the proposed practical location claim.

An additional factor weighing in favor of denial of leave to amend, is the absence of an explanation for BGB's failure to: (1) prosecute the action for the immediate five year period after commencement; (2) prosecute the action until the defendant moved the case forward by filing the RJI and seeking a preliminary discovery conference; and (3) raise the possibility of pursuing a practical location claim until well over two years after discovery had commenced in January

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[2] Under "this doctrine, a practical location of a boundary line and an acquiescence therein for more than the statutory period is conclusive of the location of such boundary . . . although such line may not in fact be the true line according to the calls of the deeds of the adjoining owners" (*Hazen v Hazen*, 26 AD3d 696, 697-698 [3d Dept 2006]).

2015, and some 10 months after it attested to the completion of all known discovery when it filed a note of issue and certificate of readiness on July 19, 2017. Where, as here, "the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious" (*American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792, 794 [2d Dept 2009] [internal quotation marks and citations omitted]). Furthermore, "when . . . leave is sought on the eve of trial, judicial discretion should be exercised sparingly" (*id.*).

Upon review of the record on submission, and consideration of the parties' arguments, the Court finds that BGB has failed to provide a reasonable explanation for failing to seek leave to amend its complaint to add a claim based on factors, which it had knowledge of, or, with reasonable diligence, should have had knowledge of (the existing fence), but inexplicably waited until long after the case was certified for trial to make its application.

Accordingly, it is

ORDERED that plaintiff's motion is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 28, 2018

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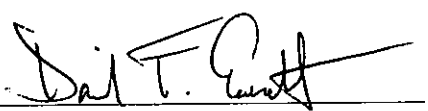

HON. DAVID F. EVERETT, A.J.S.C.

Filed via NYSCEF

William L. Barish, Esq.
Brand Glick & Brand, P.C.