

SEAN

SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK

PRESENT:

HON. BRUCE D. ALPERT

Justice

TRIAL/IAS, PART 4

DENNIS BERNARDI and PAULINE BERNARDI,

Plaintiffs,

Motion Sequence Nos. 1-4

Index No.15949/05

Motion Date: January 23, 2006

-against-

MARIA R. SPYRATOS and ANTHONY
SPYRATOS,

Defendants.

The following papers read on these applications: 1) for preliminary injunctive relief
2-3) for dismissal
4) to compel acceptance

1)	Order to Show Cause	X
2-3)	Notices of Motion	XX
4)	Notice of Cross-motion	X
	Opposing Submissions	XX
	Reply Papers	XX
	Memoranda of Law	XXX

Upon the foregoing papers and for the reasons hereinafter articulated, it is ordered that plaintiffs' application for preliminary injunctive relief, their motion to dismiss the defendants' initial counterclaim, as well as their motion to dismiss the defendants' amended answer and counterclaim are denied, and the defendants' application to compel the acceptance of their amended answer and counterclaim is granted.

On or about January 29, 2003, the plaintiffs, Dennis Bernardi and Pauline Bernardi, purchased the residential premises located at 458 Nassau Avenue in Freeport, New York. The defendants, Maria R. Spyrtos and Anthony Spyrtos, own an adjoining property and have resided thereat for more than 34 years.

The parties' primary concern involves the boundary between their respective properties.

Numerous items of correspondence were exchanged between the parties in an effort to resolve their dispute. On January 15, 2004, the plaintiffs, through counsel, notified the defendants of a claimed encroachment of the plaintiffs' property. In a response dated January 31, 2004, the defendants, through their counsel, John A. Testaiuti, Esq., acknowledged that a fence post was located on the plaintiffs' property and promised to remove same.

On or about February 17, 2004, the plaintiffs' counsel corresponded with the defendants' attorney requesting the defendants to acknowledge, in writing, that their driveway encroaches upon the plaintiffs' property. The defendants allegedly failed to respond.

On or about April 1, 2004, plaintiffs' counsel, once again, corresponded with counsel for the defendants, requested the immediate removal of claimed encroachments and gave notice of the plaintiffs' intention to exercise self-help remedies upon the defendants' default. Again, it is asserted that the defendants failed to respond.

Plaintiffs efforts to remove the claimed encroachments were stymied by the local authorities. The plaintiffs were advised by the responding officers to pursue their remedy through proper channels.

On November 1, 2004 and January 4, 2005, additional requests to remove the claimed encroachments were transmitted to defendants' new counsel, Frank Naclerio, Esq., coupled with

a warning that in the event of a default, the plaintiffs would have them removed at the defendants' expense.

By correspondence dated January 21, 2005, counsel for the defendants advised: "Notwithstanding the results of any survey *** Ms. Spyratos makes claim to the property in question by reason of adverse possession of same." (OSC, Exhibit K)

Ultimately, this action was commenced on September 20, 2005, by the filing of process and the acquisition of an Index Number. Process was served under CPLR 308 (2) and issue was joined on or about November 8, 2005, by the interposition of an answer containing two affirmative defenses and a counterclaim.

By Notice of Motion dated and served November 27, 2005, the plaintiffs moved to dismiss the defendants' counterclaim pursuant to CPLR 3211 (a) (1) and (7) and CPLR 3013. Its service appears to have prompted the service of an amended answer and counterclaim, which pleading was served on December 6, 2005.

The amended answer and counterclaim were formally rejected on December 7, 2005.

By Notice of Motion dated December 26, 2005 and served the following day, the plaintiffs moved to dismiss the amended counterclaim on the same grounds as their initial application for dismissal. The subject application was also predicated upon the contention that the amended pleading was untimely under CPLR 3025 (a) and, therefore, impermissibly served without leave of the Court.

Although the amended pleading was seemingly served beyond the time frame contemplated under CPLR 3025 (a), it was, nonetheless, timely, as it was served during the pendency of the plaintiffs' initial challenge to its sufficiency under CPLR 3211 (a). (see, Aikens

Construction of Rome, Inc v Simons, 284 AD2d 946, 947 [4th Dept.]; Johnson v Spence, 286 AD2d 481, 483; STS Management Development, Inc. v New York State Department of Taxation and Finance, 254 AD2d 409, 410)

Consequently, the defendants' cross-motion to compel acceptance of the amended answer and counterclaim is granted.

Since the original answer was superseded by the amended pleading, plaintiffs' motion challenging the sufficiency of the initial counterclaim is denied as academic. (see, Weber v Goss, 18 AD3d 540)

Plaintiffs' remaining challenge concerns the sufficiency of the defendants' amended pleading is expressly premised upon CPLR 3211 (a) (1) and (7) and upon CPLR 3013.

Dismissal under CPLR section 3211 (a) (1) is warranted only if the "documentary evidence that forms the basis of the defense [is] such that it resolves all factual issues as a matter of law, and conclusively disposes of the *** claim." (Teitler v Max J. Pollack & Sons, 288 AD2d 302)

Plaintiffs argue that the documentary evidence submitted conclusively establishes a defense to the defendants' counterclaim of adverse possession. In support thereof, the plaintiffs rely on various items of correspondence by and between the parties, upon a title report, upon affidavits of the plaintiffs and a masonry worker and upon pictures of the property in question.

Although there have been an abundance of documents presented, the documentary evidence, in this Court's view, does not conclusively establish the counterclaim's paucity of merit.

Specifically, the plaintiffs rely on correspondence dated January 31, 2004, from the

defendants' then attorney which stated, in pertinent part, "my client is in agreement that a fence post is currently encroaching on Mr. Bernardi's property." The plaintiffs construe the foregoing as an admission.

However, plaintiffs' reliance thereon is misplaced because the subject correspondence refers only to a fence post, which was moved, and not the other areas that are in dispute including, inter alia, the chainlink fence, driveway, patio and driveway apron.

Furthermore, the submission of a title report is but of limited utility, as title to the plaintiffs' property will neither blunt nor overcome a valid adverse possession claim.

Lastly, plaintiffs' reliance on affidavits to support their challenge under CPLR 3211 (a) (1) is unavailing, as "an affidavit cannot qualify as 'documentary evidence' so as to support a dismissal based on paragraph 1 [of CPLR 3211 (a)]." (Siegel, Practice Commentaries, Mc Kinney's Cons. Laws of N.Y., Book 7B, C3211:10)

Accordingly, dismissal under CPLR 3211 (a) (1) is not available.

The burden in a motion to dismiss pursuant to CPLR 3211 (a)(7) is "expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced." (Foley v D'Agostino, 21 AD2d 60, 65 [1st Dept.]

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the [pleading] as true, accord [the pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Morone v Morone, 50 NY2d 481, 484; Rovello v Orofino Realty Co., 40 NY2d 633, 634)." (Leon v Martinez, 84 NY2d 83, 87)

Although the counterclaim is bare factually, it does not fail to state a cause of action.

From its four corners, factual allegations, although minimal, are discerned which taken together manifest a cause of action for adverse possession.

“Effective adverse possession requires the establishment of five essential elements: possession must be hostile and under claim of right, it must be actual, it must be open and notorious, it must be exclusive, and it must be continuous (*Belotti v Bickhardt*, 228 NY 296).” (*Nazarian v Pascale*, 225 AD2d 381, 382 [1st Dept.])

The counterclaim expressly alleges open, notorious, exclusive and continuous use of the property at issue for significantly longer than the statutory period.

“The element of hostile possession does not require a showing of enmity or specific acts of hostility (*Sinicropi v Town of Indian Lake*, 148 AD2d 799, 800); rather, it can be inferred simply from the existence of the other four elements, thus shifting the burden to the record owner to produce evidence rebutting the presumption of adversity (*City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 121).” (*Nazarian v Pascale*, supra at p 383)

Moreover, a claim of right may also be inferred in the context presented. (see, 2 NY Jur Adverse Possession and Prescription, § 40)

Based on the foregoing, plaintiffs’ prayer for dismissal under CPLR 3211 (a) (7) is denied.

Although statements in pleadings must be sufficiently particular to afford notice to the court and parties of the transactions or occurrences intended to be proved and delineate the material elements of the claim (see, CPLR 3013), pleadings are to be construed liberally and “[d]efects *** ignored if a substantial right of a party is not prejudiced.” (CPLR 3026)

In any event, the deficiency may be cured, as here, through the submission of a detailed

affidavit. (see, *Sopesis Construction, Inc. v Solomon*, 199 AD2d 491)

The amended counterclaim is sufficiently particular to provide the Court and parties with notice of the transactions or occurrences intended to be proved and alleges the material elements of the cause of action asserted.

It also merits mention that there is no indication that a substantial right has been prejudiced.

“The test of prejudice is to be given primary emphasis. ‘Thereby, we would invariably disregard pleading irregularities, defects or omissions which are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated or as to the nature and elements of the alleged cause or defense ****’ (*Foley v. D’Agostino*, supra, p. 66).” (*Catli v Lindenman*, 40 AD2d 714, 715)

Although the counterclaim, as noted, is factually bare, plaintiffs may acquire further detail through discovery proceedings and a demand for particulars.

Lastly, though the geographical parameters of the property the defendants claim to have acquired through adverse possession are not described in the counterclaim, the area in question is specified in plaintiffs’ complaint. It appears therefrom that there is no confusion on point.

Based on the foregoing, plaintiffs’ prayer for dismissal under CPLR 3013 is denied.

“To be entitled to a preliminary injunction, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant’s favor (see *Hightower v Reid*, 5 AD3d 440; *Evans-Freke v Showcase Contr. Corp.*, 3 AD3d 549). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment

ineffectual (cf. *Rattner & Assoc. v Sears, Roebuck & Co.*, 294 AD2d 346)." (*Ying Fung Moy v Hoho Umeki*, 10 AD3d 604)

Moreover, "[t]o sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, supra; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348). Where the facts are in sharp dispute, a temporary injunction will not be granted (see *Blueberries Gourmet v Aris Realty Corp.*, id.)." (*Matter of Related Properties, Inc. v Town Board of Town/Village of Harrison*, 22 AD3d 587, 591 [emphasis supplied])

Here, as noted, the documentary evidence submitted by the movants demonstrates that they own the property at 458 Nassau Avenue in Freeport. However, there are sharply disputed issues of fact concerning the defendants' acquisition of a portion thereof through adverse possession.

Due thereto, the plaintiffs have not demonstrated a likelihood of ultimate success on the merits.

Similarly, the plaintiffs have not established that they would sustain irreparable harm absent a grant of preliminary injunctive relief. On the contrary, plaintiffs' demands for money damages clearly suggests the adequacy of an available legal remedy. (see, *Matos v City of New York*, 21 AD3d 936)


Lastly, a grant of the relief sought will alter the status quo, and it does not appear that the withholding of such relief will undermine the effectiveness of any judgment to which the plaintiffs may be entitled.

Accordingly, plaintiffs' motion for a preliminary injunction is denied.

The time for joinder of issue with respect to the defendants' counterclaim shall be governed by CPLR 3211 (f).

In anticipation thereof, counsel for the respective parties are directed to appear for a Preliminary Conference before a member of the DCM staff (lower level) on April 18, 2006, at 2:30 p.m.

Dated: March 16, 2006



ENTERED
MAR 23 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE