

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Franklyn A. Morgan, et al. v. Larry Suco, et al.

2022 NY Slip Op 02404 (App. Div. 2022) · No. 2019-09125 · Decided April 13, 2022

SUMMARY

The Appellate Division, Second Department, affirmed dismissal of the plaintiffs' action, in effect under RPAPL article 15, seeking to quiet title concerning an alleged fence encroachment. The court held that the action was time-barred under CPLR 212(a) because the fence had been erected more than ten years before the action was commenced, and the plaintiffs failed to show that the limitations period was tolled or inapplicable.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Per curiam; Mark C. Dillon, J.P.; Colleen D. Duffy, J.; Francesca E. Connolly, J.; Linda Christopher, J.
JURISDICTION	New York
DECIDED	April 13, 2022
DOCKET	2019-09125
DISPOSITION	affirmed
PROCEDURAL POSTURE	The plaintiffs appealed from an order granting the defendants' CPLR 3211(a)(5) motion to dismiss the complaint as time-barred.
STANDARD OF REVIEW	Whether the complaint was properly dismissed as time-barred under CPLR 3211(a)(5), including whether the defendants established expiration of the applicable limitations period and whether the plaintiffs raised a factual issue concerning tolling or applicability.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Franklyn A. Morgan, et al. v. Larry Suco, et al.

TOPICS

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QUESTIONS PRESENTED

1. Whether an action effectively brought under RPAPL article 15 to quiet title and recover possession of real property was time-barred under CPLR 212(a).
2. Whether the plaintiffs raised a question of fact concerning tolling, inapplicability of the limitations period, or commencement of the action within the limitations period.

HOLDINGS

1. An action to recover real property or its possession, including the plaintiffs' action effectively brought under RPAPL article 15, was time-barred because the fence had been erected more than ten years before the action was commenced.
2. Dismissal under CPLR 3211(a)(5) was proper because the defendants established that the action was time-barred and the plaintiffs failed to raise a question of fact concerning tolling, applicability of the statute of limitations, or timely commencement.

KEY QUOTATIONS

"A person claiming title to real property, but not in possession thereof, must act, affirmatively and within the time provided by statute"

"[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action"

FACTUAL BACKGROUND

The plaintiffs and defendants were neighboring property owners, and the plaintiffs alleged that a fence on the defendants' property encroached on the plaintiffs' property. The fence had been erected more than ten years before the plaintiffs commenced the action in July 2018.

PROCEDURAL HISTORY

The plaintiffs commenced an action in July 2018 seeking, among other relief, to quiet title to real property based on an alleged fence encroachment. The Supreme Court, Westchester County, granted the defendants' motion to dismiss the complaint as time-barred, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- WPA Acquisition Corp. v. Lynch, 82 A.D.3d 1215, 1216
- Downes v. Peluso, 115 A.D.2d 454, 454
- Ford v. Clendenin, 215 N.Y. 10, 17
- Matter of Marini, 119 A.D.3d 584
- Nautilus Land Owners Corp. v. Gilbert, 253 A.D.2d 862
- Kotlyarsky v. Abrazi, 188 A.D.3d 853, 854
- Barry v. Cadman Towers, Inc., 136 A.D.3d 951, 952

OPINION

PER CURIAM.

Morgan v Suco (2022 NY Slip Op 02404) Morgan v Suco 2022 NY Slip Op 02404 Decided on April 13, 2022 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on April 13, 2022 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P.

COLLEEN D. DUFFY FRANCESCA E. CONNOLLY LINDA CHRISTOPHER, JJ. 2019-09125 (Index No. 60997/18) [*1]Franklyn A. Morgan, et al., appellants, vLarry Suco, et al., respondents. Percival A. Clarke, Mount Vernon, NY, for appellants. Neveen M. Nesheiwat, Yonkers, NY, for respondents. DECISION & ORDER In an action, inter alia, in effect, pursuant to RPAPL article 15 to quiet title to real property, the plaintiffs appeal from an order of the Supreme Court, Westchester County (Linda S. Jamieson, J.), dated July 3, 2019.

The order granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred. ORDERED that the order is affirmed, with costs. The plaintiffs and defendants are neighbors, and the plaintiffs allege that a fence on the defendants' property encroaches upon their property.

In July 2018, the plaintiffs commenced this action, inter alia, in effect, pursuant to RPAPL article 15 to quiet title to real property. The defendants moved, among other things, pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred. By order dated July 3, 2019, the Supreme Court granted that branch of the defendants' motion.

The plaintiffs appeal. "A person claiming title to real property, but not in possession thereof, must act, affirmatively and within the time provided by statute" (WPA Acquisition Corp. v Lynch, 82 AD3d 1215, 1216, quoting Downes v Peluso, 115 AD2d 454, 454; see Ford v Clendenin, 215 NY 10, 17). Pursuant to CPLR 212(a), "[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the

premises within ten years before the commencement of the action" (see *Matter of Marini*, 119 AD3d 584; *WPA Acquisition Corp. v Lynch*, 82 AD3d at 1216).

Here, the defendants met their initial burden of establishing the time in which to commence this action has expired by demonstrating that the fence was erected more than 10 years prior to the commencement of this action (see *Nautilus Land Owners Corp. v Gilbert*, 253 AD2d 862).

In opposition, the plaintiffs failed to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the plaintiffs actually commenced the action within the applicable limitations period (see *Kotlyarsky v Abrazi*, 188 AD3d 853, 854; *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952).

Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred. DILLON, J.P., DUFFY, CONNOLLY and CHRISTOPHER, JJ., concur. ENTER: Maria T. Fasulo Clerk of the Court