

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

Kennelty-Cohen v. Henry

62 A.D.3d 664, 879 N.Y.S.2d 481 (N.Y. App. Div. 2009) · Decided May 5, 2009

SUMMARY

The plaintiffs sought to establish title to a strip of land by adverse possession or, alternatively, an easement by prescription. The Appellate Division affirmed summary judgment for the defendants, holding that the plaintiffs’ use was not sufficiently exclusive, hostile, or under a claim of right to support either theory. The matter was remitted for entry of a declaratory judgment in favor of the defendants.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Mastro, J.P.; Skelos, J.; Santucci, J.; Hall, J.
JURISDICTION	New York
DECIDED	May 5, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed, as limited by their brief, from an order granting defendants' cross motion for summary judgment dismissing the complaint in an action seeking title by adverse possession or, alternatively, a prescriptive easement.
STANDARD OF REVIEW	Summary judgment is proper when the movant establishes entitlement to judgment as a matter of law and the opposing party fails to raise a triable issue of fact.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Kennelty-Cohen, Plaintiffs v. Henry, Defendants

TOPICS

- adverse possession
- prescriptive easements
- summary judgment
- quiet title
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether defendants established entitlement to summary judgment dismissing plaintiffs' claim of adverse possession.
2. Whether defendants established entitlement to summary judgment dismissing plaintiffs' claim of a prescriptive easement.
3. Whether the matter had to be remitted for entry of a declaratory judgment because the action sought declaratory relief.

HOLDINGS

1. Plaintiffs did not establish the elements necessary to acquire title to the strip by adverse possession under the law in effect when the action commenced, and defendants were entitled to summary judgment dismissing that claim.
2. Plaintiffs did not acquire a prescriptive easement because their use of the strip was not hostile to defendants' use, and defendants were entitled to summary judgment dismissing that claim.
3. Because the action was partly one for declaratory judgment, the matter had to be remitted to Supreme Court for entry of a judgment declaring that plaintiffs did not own the strip by adverse possession and did not acquire a prescriptive easement.

KEY QUOTATIONS

“The defendants failed to raise a triable issue of fact in opposition to the defendants' prima facie showing.” (665)

“Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Nassau County, for the entry of a judgment, inter alia, declaring that the plaintiffs do not own the strip by adverse possession and did not acquire an easement by prescription over the strip” (665)

FACTUAL BACKGROUND

Plaintiffs alleged that they had occupied and used a three-foot-six-inch-wide, fifty-foot-long strip of land owned by defendants for twenty-five years. A fence erected by defendants' predecessor allowed both parties access to the strip. After defendants removed that fence and erected a new fence closer to plaintiffs' house, plaintiffs claimed title by adverse possession or, alternatively, a prescriptive easement.

PROCEDURAL HISTORY

Plaintiffs sued seeking a declaration that they acquired title to a strip of defendants' land by adverse possession or acquired a prescriptive easement. Plaintiffs moved to compel removal of a newly erected fence, while defendants cross-moved for summary judgment. The Supreme Court, Nassau County, denied plaintiffs' motion and granted defendants' summary-judgment motion; the Appellate Division affirmed and remitted for entry of a declaratory judgment in defendants' favor.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

Remit to the Supreme Court, Nassau County, for entry of an appropriate declaratory judgment declaring that plaintiffs do not own the strip by adverse possession and did not acquire an easement by prescription over it.

CASES CITED

- *Giannone v Trotwood Corp.*, 266 A.D.2d 430 (1999)
- *Rowland v Crystal Bay Constr.*, 301 A.D.2d 585 (2003)
- *Matter of Perry*, 33 A.D.3d 704 (2006)
- *Beyer v Patierno*, 29 A.D.3d 613 (2006)
- *Hancock v Estate of Hancock*, 15 A.D.3d 620 (2005)
- *Morales v Riley*, 28 A.D.3d 623 (2006)
- *Susquehanna Realty Corp. v Barth*, 108 A.D.2d 909 (1985)
- *Lanza v Wagner*, 11 N.Y.2d 317, 334 (1962), appeal dismissed, 371 U.S. 74 (1962), cert. denied, 371 U.S. 901 (1962)

OPINION

PER CURIAM.

In an action, inter alia, for a judgment declaring that the plaintiffs acquired title to a strip of land by adverse possession or, alternatively, acquired an easement by prescription over the land, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Palmieri, J.), dated January 15, 2008, as granted that branch of the defendants' cross motion which was for summary judgment dismissing the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs, and the matter is remitted to the Supreme Court, Nassau County, for the entry of an appropriate declaratory judgment in favor of the defendants.

The plaintiffs allege that they have occupied and used a strip of land owned by the defendants, that is situated between their house and the defendants' house, for 25 years. The strip of land is 3 feet, 6 inches wide, and 50 feet long. A fence was erected by the defendants' predecessor-in-title which allowed access to the strip by both the plaintiffs and the defendants.

This action was commenced when the defendants removed the fence and erected a new fence significantly closer to the plaintiffs' house. The plaintiffs claim, inter alia, that they acquired title to the strip by adverse possession or, alternatively, that they acquired an easement by prescription over the strip.

The plaintiffs moved to compel the defendants to remove the new fence, and the defendants cross-moved, *inter alia*, for summary judgment. The Supreme Court denied the plaintiffs' motion and granted that branch of the defendants' cross motion which was for summary judgment.

The defendants established their entitlement to judgment as a matter of law with respect to the cause of action seeking title to the strip by adverse possession by submitting evidence demonstrating that, in accordance with the law in effect at the time this action was commenced (see RPAPL former 522; cf. L 2008, ch 269, § 5), the plaintiffs had not cultivated, improved, or substantially enclosed the land (see *Giannone v Trotwood Corp.*, 266 AD2d 430 [1999]; see also *Rowland v Crystal Bay Constr.*, *665301 AD2d 585 [2003]).

The defendants further demonstrated that the plaintiffs did not make exclusive use of the strip (see *Matter of Perry*, 33 AD3d 704 [2006]), that the plaintiffs were not acting under a claim of right (see *Beyer v Patierno*, 29 AD3d 613 [2006]), and that the plaintiffs' use of the strip was not hostile to that of the defendants (see *Hancock v Estate of Hancock*, 15 AD3d 620 [2005]).

The defendants also demonstrated that there was no prescriptive easement over the land by submitting evidence that the plaintiffs' use of the strip was not hostile to that of the defendants (see *Morales v Riley*, 28 AD3d 623 [2006]; see also *Susquehanna Realty Corp. v Barth*, 108 AD2d 909 [1985]).

The plaintiffs failed to raise a triable issue of fact in opposition to the defendants' *prima facie* showing. Accordingly, the Supreme Court properly granted that branch of the defendants' cross motion which was for summary judgment. Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Nassau County, for the entry of a judgment, *inter alia*, declaring that the plaintiffs do not own the strip by adverse possession and did not acquire an easement by prescription over the strip (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962], appeal dismissed 371 US 74 [1962], cert denied 371 US 901 [1962]).

Mastro, J.P., Skelos, Santucci and Hall, JJ., concur. [See 2008 NY Slip Op 30163(U).]