GEORGE MENDES v. WILLIAM P. BACHANT and PORCARO, LLC

Misc. Case No. 307351

MASSACHUSETTS LAND COURT

15 LCR 308*; *2007 Mass. LCR LEXIS 84

June 29, 2007, Decided

SYLLABUS
[**1]

Justice Charles W. Trombly, Jr., found that a Wareham Plaintiff had proved adverse possession only to those portions of his neighbor's land that were enclosed by a stockade fence and subjected to cultivation, the erection and maintenance of a shed, and construction of a trellis.

COUNSEL: Christopher M. Sheehan, Esq., for the Plaintiff.

Jon S. Barooshian, Esq., Cooley, Manion, Jones, LLP, for the Defendant.

JUDGES: Charles W. Trombly, Jr., Justice.

OPINION BY: TROMBLY, JR.

OPINION

[*308] **DECISION**

The case was filed by Plaintiff George Mendes ("Mendes") on March 10, 2005 pursuant to *G.L. c. 240, ßß 6 through 10* in order to remove a cloud on title. Mendes claims adverse possession over a portion of land titled in the name of Defendants William P. Bachant and Porcaro, LLC known as 6 Seed Street, Wareham ("Subject Property"). The plaintiff and the defendants share a common boundary at the rear of their properties and this litigation was precipitated by the defendants' clearing of the land and removal of the physical improvements made by Mendes on the disputed area. A "decision sketch" showing the disputed property and the surrounding area is attached.

Plaintiff claims that he has gained title to a large area of the land owned of record [**2] by the defendants under the doctrine of adverse possession, contending that he has erected and maintained a shed, fence, and garden on a portion of Defendants' property measuring approximately 14 feet by 70 feet. He also contends that Defendants trespassed upon his land and willfully cut down, damaged, and destroyed the plaintiff's trees, wood, and underwood and carried the same away, entitling him to treble damages under *G.L. c. 242 ß 7*. [1] Defendants, on the other hand, contend that Plaintiff has failed to establish what portion of Defendants' property has been adversely possessed. Defendants aver that Plaintiff, with respect to the disputed area, has not proven the elements of dominion and control or open and notorious possession sufficient to establish his claim of adverse possession.

1 Plaintiff, in Count IV and Count V of his complaint, claimed Intentional Infliction of Emotional Distress and Negligent Infliction of Emotion Distress, respectively. The Land Court Department of the Trial Court, pursuant to *G.L. c. 185, ß 1*, lacks subject matter jurisdiction to adjudicate these issues. Therefore, both counts are hereby dismissed.

This court (Trombly, J.) issued a temporary restraining [**3] order on March 10, 2005 enjoining the defendants from undertaking any construction or otherwise related activities on the disputed parcel of land ("the disputed area") until the Motion for Preliminary Injunction could be argued, and extended that order by a new order dated March 16, 2005, which set March 24, 2005 as the hearing date. At the hearing held on that date, the motion was argued by counsel for both parties and subsequently granted on March 25, 2006.

Trial was held on November 13, 2006. The court admitted 11 exhibits and 1 chalk, chalk A, into evidence. George Mendes and Anita Matthews testified. Plaintiff and Defendants filed Post-Trial Briefs on December 14, 2006 and on January 8, 2007, respectively.

Based upon the evidence and testimony submitted at trial and reasonable inferences therefrom, I find the following facts.

1. George Mendes is the owner of property located at 29 Tyler Avenue, Wareham, Plymouth County, by deed dated September 24, 1969 and recorded in the Plymouth County Registry of Deeds at Book 3550, Page 111. [2] Plaintiff's property is further described as lots # 2 and # 3 on a "Plan of Aberdeen Terrace, Belonging to Carrie E. Small, Wareham" ("the Plan"), recorded [**4] at Book 3550 Page 111. (Exhibit 8)

2 All recordings references herein are to this particular Registry of Deeds.

2. William P. Bachant ("Bachant") is the owner of 9 Tyler Avenue, Wareham, Plymouth County.

3. Porcaro, L.L.C. ("Porcaro") is a limited liability company established under the laws of the Commonwealth of Massachusetts. Its principal office is located at 9 Tyler Avenue, Wareham, Plymouth County, and it is engaged in the business of new home construction in the Commonwealth.

4. Defendant Porcaro is the owner of the property known as 6 Seed Street, Wareham, by deed dated December 28, 2004 and recorded at Book 29751 Page 264-265. 6 Seed Street, also known as Lot # 6 and # 7 described on the aforementioned Plan, borders Plaintiff's rear boundary. A large portion of the Subject Property had been undeveloped woodland until Defendants cleared it and a portion of the disputed area in March of 2005.

5. Defendant Bachant purchased the Subject Property from Charles Gleason, who had owned the land behind Plaintiff Mendes since 1964.

6. When Plaintiff purchased his property in 1969, a shed was standing in the disputed area within Lot # 7 of the Subject Property in the same location as the current [**5] shed. Plaintiff maintained the shed until 1978, at which time he reconstructed the shed increasing its dimensions to ten (10) feet by eight (8) feet.

7. Plaintiff was never given permission from Defendants, or their predecessor in title, to build on, cultivate, maintain, or otherwise possess the disputed area of the Subject Property.

8. In or about 1981, Plaintiff Mendes installed a stockade fence that enclosed an area extending onto the Subject Property approximately [*309] seventeen (17) feet from the rear of the shed and running easterly a distance of approximately forty (40) feet to Kathleen J. Andrews' [3] property.

3 Kathleen J. Andrews is the record title owner of Lot # 8 as depicted on chalk A and is not a party to this lawsuit. Therefore, Plaintiff's claim of adverse possession to that portion of the disputed area on Lot # 8, as depicted in chalk A, is dismissed.

9. Plaintiff Mendes constructed a trellis on the western side of the shed and planted and maintained a garden beginning in the late 1970s.

10. On or about March 2005, Defendant Bachant and his agents tore down Plaintiff's fencing, removed the cinder blocks and timber delineating the mulch bed, and cleared the disputed area up [**6] to, but not beyond, the rear of Plaintiff's shed.

* * *

1. Adverse Possession

The question in this case is whether Plaintiffs have exercised the requisite dominion and control that was open and notorious over the disputed woodland area described in Defendant's deed so as to establish title to it under the doctrine of adverse possession. "A party claiming title to land through adverse possession must establish actual, open, exclusive, and nonpermissive use for a continuous period of twenty years." *Totman v. Malloy, 431 Mass. 143, 145, 725 N.E.2d 1045 (2000)*. *See Ryan v. Stavros, 348 Mass. 251, 262, 203 N.E.2d 85 (1964)*. "The burden of proof extends to all necessary elements of such possession and includes the obligation to show that it was actual, open, continuous, and under a claim of right or title. If any of these elements is left in doubt, the claimant cannot prevail." *See also Lawrence v. Concord, 439 Mass. 416, 421, 788 N.E.2d 546 (2003)*; *Holmes v. Johnson, 324 Mass. 450, 453, 86 N.E.2d 924 (1949)*. "Acts of possession which are 'few, intermittent and equivocal' [are insufficient to] constitute adverse possession." *Sea Pines Condominium III Association v. Steffens, 61 Mass. App. Ct. 838, 847, 814 N.E.2d 752 (2004)*; *Kendall v. Selvaggio, 413 Mass. 619, 624, 602 N.E.2d 206 (1992)*, [**7] *quoting Parker v. Parker, 83 Mass. 245, 1 Allen 245, 247 (1861)*. "Whether, in a particular case, these elements are sufficiently shown is essentially a question of fact." *Kershaw v. Zecchini, 342 Mass. 318, 320, 173 N.E.2d 624 (1961)*.

Regarding actual use, "[a] judge must examine the nature of the occupancy in relation to the character of the land." *Peck v Bigelow, 34 Mass. App. Ct. 551, 556, 613 N.E.2d 134 (1993)*, *quoting Kendall v. Selvaggio, 413 Mass. 619, 624, 602 N.E.2d 206 (1992)*. Where a party claims adverse possession of woodlands, one must also demonstrate that the land at issue was either enclosed or reduced to cultivation. *See Kershaw, 342 Mass. at 321*; *Cowden v. Cutting, 339 Mass. 164, 168, 158 N.E.2d 324 (1959)*; *Senn v. Western Massachusetts Electric Co., 18 Mass. App. Ct. 992, 993, 471 N.E.2d 131 (1984)*. Therefore, title by adverse possession cannot be shown to wild or woodland that has always been, and remains, open and

unenclosed. *Dow v. Dow, 243 Mass. 587, 593, 137 N.E. 746 (1923)*.

A person can achieve dominion and control over premises, for example, by making "permanent improvements on the lot," or by making "significant changes to the land itself, like...by the transformation of whole-tree and brush-covered parcels into lawns..." *See Peck, 34 Mass. App. Ct. at 556*, [**8] and cases cited. The test is the degree of control exercised over the land by the possessors. *Shaw v. Solari, 8 Mass. App. Ct. 151, 156, 392 N.E.2d 853 (1979)*.

A. Did Plaintiff demonstrate the requisite dominion and control element of adverse possession over the disputed area?

Plaintiff asserts that since he purchased his property in 1969, he has adversely possessed a portion of the Subject Property by maintaining and reconstructing a shed on the property, erecting a fence, constructing a barbecue pit, and planting a garden, lawn, shrubs and trees over the past four decades in the disputed area. Specifically, Plaintiff contends that, as of 1989, he has adversely possessed the area within the boundaries of the shed and the original fence he placed on the Subject Property in 1969, and subsequently adversely possessed the remainder of the disputed area beginning in approximately 1981 with the installation of his stockade fence and continued gardening. According to Plaintiff, the stockade fence had remained in its location for at least 24 years, beginning as early as 1981 and continuing through March of 2005 when Defendants' agents removed it for the purpose of re-claiming the disputed strip of land. Therefore, [**9] Plaintiff contends, they have exercised sufficient dominion and control over the disputed area sufficient to grant him title to it.

Defendants, on the other hand, contend that Plaintiff has failed to established title to the disputed area that is currently in the name of Defendants because Plaintiff could not demonstrate that he exercised dominion and control over the disputed area. Defendants argue that since the disputed area was wild and woodland during the relevant adverse period, the Plaintiff was required, but failed, to prove that the entire disputed area was either enclosed or cultivated, making Plaintiff's activities of removing debris and cutting trees inadequate for an adverse possession claim. This court does not find Defendants' arguments to be persuasive.

Based on testimony and other evidence at trial, it appears that Plaintiff has successfully established that his possession of a portion of the disputed area has been actual, exclusive, and nonpermissive, exercising dominion and control for a continuous period of at least twenty years. Defendants have suggested that Plaintiff has failed in his burden to demonstrate that he exercised dominion and control over the disputed [**10] area based upon the heightened standard that is applied to adverse possession over a woodland parcel. I disagree.

As previously stated, where a party claims adverse possession of woodlands, one must also demonstrate that the land at issue was either enclosed or reduced to cultivation and, in contrast, title by adverse possession cannot be shown to wild or woodland that has always been, and remains, open and unenclosed. *See Kershaw, 342 Mass. at 321*; *Cowden v. Cutting, 339 Mass. 164, 168, 158 N.E.2d 324 (1959)*; *Senn v. Western Massachusetts Electric Co., 18 Mass. App. Ct. 992, 993, 471 N.E.2d 131 (1984)*; *Dow v. Dow, 243 Mass. 587, 593, 137 N.E. 746* [*310] *(1923)*. The reason for the "enclosure" and "cultivation" requirement applicable to adverse possession of woodlands is that both are unambiguous overt actions upon the land that asserts dominion and control on the part of the adverse possessor. *See Factor v. Ruping, Land Ct. Misc. Case No. 257907 [8 LCR 192] (2000)*.

In the case at bar, Plaintiff has demonstrated that a portion of the disputed area has been enclosed by a stockade fence since approximately 1981, that he has cultivated a vegetable garden within that enclosure, that he has placed a shed and trellis upon the land in the disputed [**11] area, built a barbecue pit, and that he has planted trees and shrubs in various locations. Aside from the enclosure or cultivation, Plaintiff's remaining activities upon the land constitute dominion and control over the area in that the shed, trellis and barbecue pit are "permanent improvements on the lot" and that the planting of trees and shrubs coupled with the clearing of the land are "significant changes to the land itself." *See Peck, 34 Mass. App. Ct. at 556*. Furthermore, Plaintiff has met the stricter standard imposed upon woodland parcels in the enclosure of a substantial portion of the disputed area with a stockade fence and the cultivation of a vegetable garden within the same enclosure, coupled with the aforementioned additional activities.

Despite the Plaintiff's varied activities and substantial enclosure of the disputed area, Plaintiff has not successfully demonstrated title by adverse possession to the entire disputed area delineated in chalk A. Both parties have conceded, and this court agrees, that the Subject Property was woodland at all times relevant to this litigation. Therefore, the stricter standard applied to adverse possession over woodland parcels must be applied [**12] to each activity of dominion and control over the disputed area. Pictorial evidence demonstrates that Plaintiff's mulch bed and three compost piles existed beyond the boundary of his stockade fencing and would therefore have been located close to the then existing tree line. A few scattered compost piles and activity hidden amongst the trees are insufficient to establish adverse

possession of a woodland parcel. *See Watson v. Bowen, Land Ct. Misc. Case No. 274328 [11 LCR 117] (2003)*. Thus, Plaintiff is not granted title to those portions of the disputed area where the activities engaged in did not amount to cultivation or where those activities were not enclosed by the stockade fence sufficient to demonstrate the requisite dominion and control of a woodland parcel.

B. Was Plaintiff's possession sufficiently open and notorious to establish adverse possession over the disputed area?

Plaintiff avers that his possession of the disputed area was sufficiently open and notorious and argues that Defendants, or their predecessor in title, would have entered upon the land to assert their rights had they supervised the Subject Property to any reasonable extent. Plaintiff argues that he made no attempt [**13] to conceal his possession of the land and that his activities would have alerted a diligent property owner. Thus, Plaintiff contends, Defendants' actual knowledge of Mendes's possession is immaterial where Mendes's actions were neither concealed nor would have been overlooked by a diligent landowner.

Defendants, on the other hand, contend that Plaintiff's actions were not sufficiently open and notorious because Dr. Gleason, the previous owner of the Subject Property, did not have means of ingress or egress to the disputed area unless he trespassed upon the property of Mendes. Defendants argue that the Subject Property was entirely wooded and riddled with poison ivy and other impediments that would make inspection hazardous. Therefore, Defendants argue, the actual possession of the disputed area engaged in by Plaintiff at the rear of his property was not open and notorious enough to put the previous owner of the property on notice of a potential claim in opposition to his own. This court does not find Defendants' arguments to be persuasive.

The arguments presented by Defendants against Plaintiff's open and notorious possession of the disputed area must be analyzed in light of the nature [**14] and character of the property and must have been such that would constitute "notice to all the world...of an adverse claim of title." *Sea Pines Condominium III Association v. Steffens, 61 Mass. App. Ct. 838, 848, 814 N.E.2d 752 (2004)*; *quoting Phipps v. Behr, 224 Mass. 342, 343, 112 N.E. 648 (1916)*. With regard to land that is wild and woodland, one must also demonstrate that the land at issue must either be enclosed or reduced to cultivation. *See Kershaw, 342 Mass. at 321*. The strict rule applicable to wild or woodlands is, in contrast to cleared parcels, but an application of the general rule to the circumstances presented by wild or uncultivated lands. *Sea Pines Condominium III Association, 61 Mass. App. Ct. at 848*. That is to say, the nature of the occupancy and use must be such as to place the lawful owner on notice that another person is in occupancy of the land but, in the circumstances of wild and unimproved land, a more pronounced occupation is needed to achieve that purpose. *Id.*

Plaintiff's occupation of the disputed area involved a continuous enclosure of a substantial portion of the disputed area and, within the boundaries of that enclosure, a small measure of cultivation by way of a vegetable garden. [**15] In addition to the enclosure and cultivation, a shed measuring eight (8) feet by ten (10) feet was maintained and rebuilt, a number of shrubs and trees were planted, and a trellis was constructed out of spare piping in the disputed area. Though Defendants suggest that these actions were not sufficiently open and notorious due to the "impediments that would make inspection hazardous," the court in *Boothroyd* [4] refuted this position in its explanation of the requirements and rationale of the "open and notorious" element of adverse possession stating:

> "The requirement [of open and notorious] is intended only to secure to the owner [of the affected land] a fair chance of protecting" his or her property interests. *Foot v. Bauman, 333 Mass. 214, 218, 129 N.E.2d 916 (1955)*. To be "open," the use must be *without attempted concealment.* For a use to be found notorious, it must be sufficiently pronounced so as to be made known, directly or indirectly, to the landowner *if he or she maintained a reasonable degree of supervision* over the property. *See ibid.* "It is not necessary that the use be actually known to the owner for it to meet the test for being notorious." *Ibid.* It is enough that the use be of such a character [**16] that the landowner is deemed to have been put on *constructive notice* of the adverse use. *See Lawrence* [*311] *v. Concord, 439 Mass. 416, 421-422, 788 N.E.2d 546 (2003)*. (Emphasis added)

Boothroyd v. Bogartz, 68 Mass. App. Ct. 40, 44, 859 N.E.2d 876 (2007).

4 *68 Mass. App. Ct. 40, 859 N.E.2d 876 (2007)*.

To agree that Plaintiff's adverse possession claim could be defeated based on the theory that Subject Property's previous owner could not enter the woodland parcel because it was "entirely wooded" and riddled "with poison ivy" would effectively contradict every court de-

cision that granted title to woodland under the doctrine of adverse possession. As the court in *Pines Condominium III Association* [5] reasoned, the stricter standard for woodland parcels requiring a more overtly open and notorious possession is indicative of the character of that type of land. Thus, Plaintiff's enclosure and cultivation of a portion of the disputed area, coupled with his placement of physical improvements upon the land, was sufficiently open and notorious possession of woodland so as to give constructive notice to the previous landowner because any reasonably diligent landowner would have, and should have, learned of Plaintiff's adverse claim.

5 *61 Mass. App. Ct. at 848.* [**17]

2. Trespass

Under *G.L. c. 242, ß 7*, a person who without license cuts down and removes another's trees and timber shall be liable for treble damages, the statute stating, in pertinent part, that:

> A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the *defendant had good reason to believe* that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be *liable for single damages only.*

(Emphasis added)

G.L. c. 242, ß 7.

Plaintiff, in Count III of his Complaint, argues that he is entitled to treble damages under *G.L. c. 242, ß 7*, for the cutting down and carrying away Plaintiff's trees, wood, and underwood. He contends that Defendants unlawfully entered Plaintiff's land on or about March 14, 2005, and removed all of the wood, trees, and underwood up to, but not beyond, Plaintiff's shed. Defendants, on the other hand, contend that they were rightfully entitled to enter upon the land pursuant to [**18] their record title. This court does not find either argument persuasive.

G.L. c. 242, ß 7, allows for the awarding of treble damages when a trespasser enters upon the land of another and removes that person's trees, timber, wood, and underwood where the trespasser did not have "good reason to believe that the land on which the trespass was committed was his own." *G.L. c. 242, ß 7*. In the case at bar, Defendants' record title indicated that they owned the disputed area in which Plaintiff claims they trespassed. Thus, should this court conclude that monetary damages are appropriate, Plaintiff could receive only single damages pursuant to *G.L. c. 242, ß 7*.

However, I do not find that damages are appropriate in this instance. Defendants did enter upon that portion of the disputed area that Plaintiff has adversely possessed but did not clear and take away any trees, timber, wood, or underwood with respect to that portion of the disputed area. Since Plaintiff has only adversely possessed that portion of the disputed area that was enclosed and previously cleared of trees and underwood, the removal by Defendants of trees, timber, and underwood from beyond Plaintiff's fence line was a removal [**19] of Defendants' property. With respect to Defendants' trespass onto the land within the boundary of the stockade fence, Plaintiff presented no evidence in support of their damage request and presented no argument on the point in their post-trial brief. Therefore, I consider them to have waived their request for damages.

Conclusion

Pursuant to the above analysis, Counts I and II of the Complaint are granted and Counts III, IV, and V are hereby dismissed. Plaintiff has successfully established the requisite elements of adverse possession so as to divest Defendants of a portion of the disputed area. Consequently, I find and rule that ownership of that portion of the disputed area, as delineated in the decision sketch and lying within the former boundaries of Plaintiff's stockade fence, is vested in Plaintiff, George Mendes.

Judgment to enter accordingly.

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