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Scott E. Mollen

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Adverse Possession Claim Dismissed—RPAPL 543(1)—De Minimis Non-Structural Encroachments Deemed to be Permissive

This case involved a claim of ownership by adverse possession. To establish such claim, a movant must

demonstrate that the possession is hostile and under a claim of right; that it is actual, open and notorious, continuous and exclusive for the statutory period of ten years.... Further, if such claim is not based upon a written instrument, the movant must demonstrate that it cultivated and improved the land or protected it by a substantial enclosure (see, RPAPL 522). Since the acquisition of title to land by adverse possession is not favored under the law, the movant must demonstrate its entitlement by clear and convincing evidence....

The defendant had moved for summary judgment dismissing the action. The plaintiff asserted that a disputed fence was on the property line, she had seen workers at an adjoining property removing the fence and she did not ask the worker who had told them to take the fence down. Rather, the plaintiff had returned to her home and did not call or write to anyone as to why the fence was being removed. The plaintiff never tried to erect a new fence to replace the old fence.

The court held that the defendant had established a prima facie case that the plaintiff's possession was not "hostile and under a claim of right, actual, open and notorious, and continuous and exclusive for the statutory period of ten years." The court explained that the disputed portion of the land was less than one foot wide, it abuts property owned by co-defendants, the fence was erected by a prior owner of property that the defendant

had previously owned and the defendant had erected fences without any claim or dispute raised by the plaintiff.

Co-defendants had also established a prima facie case that the possession was not "hostile and under a claim of right, actual, open and notorious and continuous and exclusive for the statutory period of ten years." The co-defendants testified that their predecessor in interest had erected the fence and it was not the plaintiff who had erected the fence. The co-defendants testified that the fence did not enclose the disputed property in any manner. The plaintiff had asserted that she had "planted flowers and vegetables along the fence."

The court found that planting flowers and vegetables along a fence is "de minimis and pursuant to RPAPL 543(1) 'the existence of de minimis non-structural encroachments including, but not limited to, fences, hedges, scrubbery, plantings, sheds and non-structural walls, shall be deemed permissive and non-adverse....'" Accordingly, the court granted the motion for summary judgment dismissing the claim against the defendant.

Comment: Adam Leitman Bailey, counsel for certain defendants, stated that "this case affirms that under RPAPL 543(1), the mere planting of flowers and vegetables along a fence is de minimis and must be deemed to be permissive and non-adverse."

McMillan v. Village Plaza Homes, Sup. Ct., Queens Co., Index No. 29864/2007, dated Jan. 26, 2012, Lane, J.