

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

OS

JOAN MCMILLAN,

Index No. 29864/07

Plaintiff,

Motion
Date January 17, 2007

-against-

Motion
Cal. No. 27

VILLAGE PLAZA HOMES, INC., et al.,
Defendants.

Motion
Sequence No. 7

2007 FEB -2 A 11:00

QUEENS COUNTY CLERK
FILED

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-5
Cross Motion.....	6-10
Opposition.....	11-12

Upon the foregoing papers it is ordered that those branches of the motion by defendant Village Plaza Homes Inc. and cross motion by defendants Angella Hodges and Myrtle Figaro for summary judgment pursuant to CPLR 3212 seeking dismissal of plaintiff, Joan McMillan's claim of title to adverse possession to a parcel of land located in Queens, New York are hereby granted.

Via the Verified Amended Complaint, plaintiff, Joan McMillan claims to adversely possess an eleven (11) inch by one-hundred foot area of land.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence

of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

To establish ownership by adverse possession, the 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 (*Ray v. Beacon Hudson Mountain Corp.*, 88 NY2d 154 [1996]; *Oak Ponds, LLC v. Willumsen*, 295 AD2d 587 [2nd Dept 2002]). 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 (*Ray, supra.*)

Defendant, Village Plaza Homes Inc. moves for summary judgment dismissing the action for adverse possession as against them, arguing that there are no issues of fact in dispute. In support of the motion, defendant, Village Plaza Homes Inc. presents, inter alia, an affidavit of merit from Farhad Basal, President of defendant Village Plaza Homes Inc., wherein he avers that: his company at one time owned the disputed portion of real property to which the plaintiff claimed possession, his company purchased the property located at 116-38 Mexico Street, Queens, New York on February 6, 2006, his company subdivided the property into two smaller lots, one lot with an address of 116-38 Mexico Street, Queens, New York and the other lot with an address of 116-42 Mexico Street, Queens, New York, the lot with the address of 116-42 Mexico Street is adjacent to the plaintiff's property and is the subject of the adverse possession claim, on March 18, 2008, his company sold the property with the address of 116-42 Mexico Street, Queens, New York to defendants Angella Hodges and Myrtle Figaro, the disputed portion of land is less than one foot wide, upon information and belief the fence was erected by the

prior owner of the property he owned, he was not aware of any fence on the side of the property located at 116-42 Mexico Street, Queens, New York which he previously owned; a copy of the deed to the property located at 116-38 Mexico Street, Queens, New York dated February 6, 2006; a copy of the deed to the property located at 116-38 Mexico Street, Queens, New York dated March 18, 2008 which deed indicates that defendant Village Plaza Homes Inc. sold the subject property to defendants Angella Hodges and Myrtle Figaro on March 18, 2008; a copy of a survey showing the disputed portion of land; and plaintiff's own examination before trial transcript testimony wherein she testified that: she believed the disputed fence was on the property line, she saw workers at the adjoining property removing the fence and she did not ask the worker who told him to take the fence down and returned to her house, she did not make any calls or write letters to anyone as to why the fence was being taken down, she did not go around the corner to see if someone was living in the adjoining house so that she could discuss the fence with them, and she never tried to erect a new fence to replace the old one. Defendant, Village Plaza Homes Inc. established a prima facie case that the plaintiff's possession is not: hostile and under a claim of right, actual, open and notorious, and continuous and exclusive for the statutory period of ten years. Said defendant established that: the disputed portion of land is less than one foot wide, the disputed portion abuts the property owned by defendant Angella Hodges and Myrtle Figaro, not by defendant Village Plaza Homes Inc., the fence was erected by the prior owner of the property that defendant Village Plaza Homes Inc. owned, and defendant Village Plaza Homes, Inc. erected fences without any claim or dispute raised by plaintiff.

Defendants, Angella Hodges and Myrtle Figaro also established a prima facie case that the possession is not: hostile and under a claim of right, actual, open and notorious, and continuous and exclusive for the statutory period of ten years. In support of their cross-motion, defendants Hodges and Figaro submit, inter alia, an affidavit of defendant Angella Hodges herself, wherein she avers that: upon information and belief, it was a predecessor in their interest, Doris Fulton, who erected the fence, plaintiff was not the person who erected the fence, and the fence does not enclose the property in any fashion; a portion of plaintiff's own examination before trial transcript testimony, wherein she testifies that she was not the person who erected the fence; a copy of a photograph of the fence between defendant Hodges and Figaro's driveway and plaintiff's property, and copies of photographs of the area where the alleged cultivation took place. Defendants also established that plaintiff's contention in her examination before trial transcript

testimony that she planted flowers and vegetables along the fence is considered de minimis and pursuant to RPAPL 543(1): "the existence of de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed permissive and non-adverse" (see also, *Sawyer v. Prsuky*, 71 AD3d 1325 [3d Dept 2010]).

Since the moving defendants established a prima facie case that there are no triable issues of fact, the burden shifted to the plaintiff to produce prima facie evidence in admissible form to support her claims of adverse possession (*Lopez v. Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]). The plaintiff has not sustained such burden as plaintiff has not submitted any papers opposing the defendants' motion and cross motion, nor did plaintiff appear at the calendar call on the return date of the motion. As the motion is unopposed by plaintiff, there are no triable issues of fact and plaintiff's Complaint is dismissed.

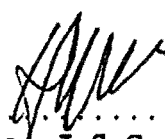
That branch of the motion by defendant, Village Plaza Homes Inc. for an order pursuant to CPLR 6514, directing the Queens County Clerk to cancel the Notice of Pendency against Section 45, Block 10382, Lot 23 filed by the plaintiff is hereby granted. It is Ordered that the County Clerk of Queens County is directed, upon payment of proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action on December 4, 2007, against property known as 116-38 Mexico Street, St. Albans, New York, Section 45, Block 10382, Lot 23 and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this order.

It is further ordered that the Clerk of the County of Queens be served with a copy of this order with Notice of Entry.

This constitutes the decision and order of the Court.

Dated: January 26, 2012

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Howard G. Lane, J.S.C.



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