

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

CHARLES EDWARDS, et al.,

INDEX NO. 25851/2005

Plaintiffs,

MOTION

DATE November 20, 2007

- against -

BEBE R. KHAIRULLAH, et al.,

MOTION

CAL. NO. 7

Defendants.

MOT. SEQ.

NUMBER 1

The following papers numbered 1 to 18 read on this motion by the plaintiffs, Charles Edwards and Maritza Edwards, for summary judgment on their first, second, third and fourth causes of action. The defendant Citibank, NA cross-moves for summary judgment dismissing the plaintiffs' complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Notice of Cross Motion/Affid(s)-Exhibits.....	5 - 8
Answering Affid(s)-Exhibits.....	9 - 12
Reply Affidavits.....	13 - 15
Other.....	16 - 18

Upon the foregoing papers the motion and cross-motion are determined as follows:

The plaintiffs commenced this action pursuant to Article 15 of the Real Property and Proceedings Law to quiet title to an area of real property constituting less than ninety square feet (Disputed Area). The Disputed Area is a portion of a lot, located at 87-45 191st Street, Holliswood, New York, the recorded owners of which are the defendants Bebe R. Khairullah and Ameer Khairullah ("Khairullahs"). The Khairullahs acquired the deed to their premises on or about February 6, 2002. The plaintiffs own a parcel of real property directly adjacent to the Khairullahs which is located at 191-03 Foothill Avenue, Holliswood, New York. The defendant Citibank, NA ("Citibank") holds a mortgage on the parcel of property owned by the Khairullahs.

The plaintiffs assert that they have adversely possessed the Disputed Area beginning when they acquired their premises on July 29, 1988. The plaintiffs argue that they have maintained a substantial enclosure around the Disputed Area and have, via the efforts of a

landscaper they purportedly hired, improved and cultivated the Disputed Area.

The Khairullahs aver that the plaintiffs have not established the requisites for adverse possession including that the Disputed Area although enclosed, was only accessible from their property and that the Disputed Area was neither exclusively possessed by the plaintiffs nor substantially enclosed for the statutory period.

The defendant Citibank cross-moves for summary judgment dismissing the plaintiffs' complaint claiming that the plaintiffs have admitted in their moving papers that their possession of the Disputed Area was not hostile.

It is each movants' burden to establish, prima facie, entitlement to summary judgment as a matter of law (See, Alvarez v Prospect Hosp., 68 NY2d 320). Upon making a showing of entitlement to summary judgment, the burden then shifts to the opponents to produce evidence, in admissible form, demonstrating the existence of a material issue of fact which requires a trial of the action (Id.).

In order for title to vest by means of adverse possession not based upon a written instrument, the possession must be hostile and under claim of right, actual, open and notorious, exclusive, and continuous for the statutory period of 10 years. Further, the property is deemed to have been possessed when the possessor has "usually cultivated or improved" the property or "protected [it] by a substantial inclosure." (RPAPL §522[1] and [2]; DuMaurier v Lindsay-Bushwick Associates, L.P., 39 AD3d 460; see also, Walling v Przybylo, 7 NY3d 228; Groman v Botar, 228 AD2d 412). The common law elements of adverse possession must be demonstrated by clear and convincing evidence (See e.g., Casini v Sea Gate Ass'n, 262 AD2d 593).

As to the element of hostility in particular, "an inference of hostile possession or claim of right will be drawn when the other elements of adverse possession are established, unless, prior to the vesting of title, the party in possession has admitted that title belongs to another" (Gerlach v Russo Realty Corp., 264 AD2d 756, 757). In other words, when "permission can be implied from the beginning, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner" (Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp., 192 AD2d 501, 503; see also, Beyer v Patierno, 29 AD3d 613).

Here, the plaintiffs failed to establish, prima facie, entitlement to judgment as a matter of law. Contrary to the plaintiffs' protestations, the statement in the affidavit submitted in support of the motion by the plaintiff Charles C. Edwards that the plaintiffs and the owner of the Khairullahs' premises during the time when the statutory period allegedly transpired "were in agreement" concerning the location of the common property line between the two parcels of property, defeats the plaintiff's motion. A trier of the fact could

decide that the plaintiffs' possession of the Disputed Area was done with the permission of the owner at that time (See, Koudellou v Sakalis, 29 AD3d 640, 641), especially considering the "clearly and convincingly" burden of proof the plaintiffs are required to meet under the circumstances.

There is also insufficient proof proffered by the plaintiffs to demonstrate that the plaintiffs "usually cultivated or improved" the Disputed Area for the prescribed statutory period (Compare Blumenfeld v DeLuca, 24 AD3d 405; see also, Giannone v Trotwood Corp., 266 AD2d 430). While the plaintiff Charles C. Edwards states in his affidavit that the plaintiffs hired a landscaper to tend to the Disputed Area for at least the past 10 years, the only documentary evidence submitted to support same was copies of two checks dated December 13, 1990 and July 30, 1990, evidencing payment to the landscaper, and there is no accompanying affidavit from plaintiffs' landscaper annexed to the motion.

Any evidence contained in the plaintiffs reply papers, including an affidavit from the landscaper, in a belated attempt to establish a prima facie case is improper and may not be considered by the court (See, CPLR §2214; Furth v Elrac, 11 AD3d 509; Doda v City of New York, 6 AD3d 490; Canter v East Nassau Med. Group, 270 AD2d 381; Fischer v Weiland, M.D., P.C., 241 AD2d 439).

Since the plaintiffs have not established a prima facie case, it is not necessary to consider the sufficiency of the defendants' opposition papers (See, Alvarez v Prospect Hospital, supra at 325). Accordingly, after considering the evidence in a light most favorable to the non-moving parties (Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the branch of the plaintiffs' motion for summary judgment on its causes of action pursuant RPAPL Article 15 are denied.

The branches of the plaintiffs motion for summary judgment on its claims pursuant to RPAPL §861 and §871 are denied as claims under both sections may only be asserted by an "owner" of property and the plaintiff has not established, as of yet, that it owns the Disputed Area.

The cross-motion by the defendant Citibank to dismiss the plaintiffs' complaint is denied. Citibank's motion is premised solely on the theory that the plaintiff Charles C. Edwards' affidavit definitively negates any claim by the plaintiffs that their possession of the disputed area was hostile. Although the statement in Mr. Edwards affidavit was not legally sufficient to establish the plaintiffs' prima facie claim on their motion for summary judgment, it, by the same token, is not sufficiently specific to establish, as a matter of law, that the plaintiffs' possession of the Disputed Area was with the express or implied permission of the owner at the time.

In any event, even accepting defendants' interpretation of Mr. Edwards statements in the manner sought, the affirmation from Mr.

Edwards submitted in response to defendants' cross motion would raise an issue of fact. In that affidavit, Mr. Edwards attempts to clarify his earlier statement by averring that the plaintiffs and the former owner of the Khairullahs' premises "always believed that [the Disputed Area] belonged to [the plaintiffs]". Thus, a determination by the trier of fact that the plaintiffs and the former owner of the Khairullahs' premises were under a misapprehension that the Disputed Area was owned by the plaintiffs would not defeat the plaintiffs adverse possession claim since "hostility may be found even though the possession occurred inadvertently or by mistake" (Greenberg v Sutter, 257 AD2d 646, citing Katona v Low, 226 AD2d 433, 434).

Dated: March 24, 2008

Peter J. Kelly, J.S.C.