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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1673CV00139

HUGH A. TRIPP, JR.,
Plaintiff

vs.

RICHARD L. DEMONTIGNY, and another,[1]
Defendant

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

This case arises out of a land dispute between the plaintiff, Hugh A. Tripp, Jr., who owns a small island located at 262 Plain Street in Mansfield (the "Property"), and the defendants, Richard and Annmarie DeMontigny, whose property encompasses a strip of land (the "Parcel") primarily used to access the Property. The plaintiff contends that the Parcel has been adversely possessed by the plaintiff and his predecessors in title and now moves for summary judgement on the grounds that he has established non-permissive use of the Parcel that is actual, open, notorious, exclusive, and adverse since November 19, 1970. For the reasons that follow, the plaintiff's motion for summary judgment is **ALLOWED**.

BACKGROUND

The following is derived from the parties' consolidated statement of undisputed material facts.

The Property is a small island located in Greenwood Lake.[2] It contains a house and consists of approximately 3,332 square feet of land. The Property is connected, via a wooden footbridge, to the Parcel, which contains approximately 1,045 square feet of land abutting Plain Street. There

[1] Annmarie M. DeMontigny.
[2] Greenwood Lake is also known as Bungay Lake.

is no other access to the Property, except for this bridge. Residents of the Property, current and past, use the Parcel primarily to access their home and to park their vehicles.

The history of the Property's ownership is as follows: On September 5, 1963, the Property was conveyed to William J. Battersby and Robert H. Battersby (the "Battersbys"). The Battersby Deed was recorded with the Bristol County Registry of Deeds (the "Registry"). On December 11, 1981, the Battersbys conveyed the Property to James W. Pritchard. The Pritchard Deed was recorded with the Registry. On November 25, 1985, Mr. Pritchard conveyed the Property to Andrew L. Chrisman and Elizabeth M. Chrisman (the "Chrismans"). The Chrisman Deed was recorded with the Registry. On September 23, 1988, the Chrismans conveyed the Property to Waldo B. Fish, III. The Fish Deed was recorded with the Registry. In 1988, a Land Court petition[3] was filed, seeking a declaration that the owner of the Property also owned the Parcel.

The Battersby Deed, the Pritchard Deed, the Chrisman Deed, and the Fish Deed each describe the Property as only consisting of the island with no reference or description of the Parcel. By two deeds, dated December 29, 1994, Mr. Fish conveyed both the Property and the Parcel to Kimberly A. Storch. The Storch Deeds were recorded with the Registry. The deed referring to the Parcel was a release deed, conveying nothing more than any rights Mr. Fish might possibly own. Mr. Fish made no guaranty and explicitly crossed out reference to quitclaim covenants in that deed. On May 16, 1995, Ms. Storch filed a motion for substitution in the Land Court action but made no further effort to pursue the case. On March 29, 2005, Ms. Storch conveyed the Property and the Parcel to James and Linda Valentine (the "Valentines"). The Valentine Deed was recorded with the Registry. On November 26, 2014, an attorney called the Land Court clerk's office and stated that he would come in and speak to the Chief Land Court Examiner about getting the case going again; but the case did not go forward. On June 11, 2015, the Valentines conveyed the Property and the Parcel to the plaintiff. The plaintiff's deed is recorded with the Registry.

[3] Land Court Miscellaneous Action No. 88 REG 42383. The petition claimed that some abutters were "unknown."

According to David Picard, a neighbor, the Property and the Parcel have been connected by a wooden bridge supported by the Parcel since at least November 1970, when Mr. Picard purchased his property at 50 Oak Ridge Avenue. He asserted that owners of the Property have always used the Parcel for access and for parking. And, since the area is surrounded by many houses in close proximity, their use has been "obvious to all." Roger and Joyce Bergeron (the "Bergerons"), who had owned neighboring property at 285 Plain Street since 1988, echoed these comments. The Bergerons attested that the Parcel has been "continuously used by all the occupants of" the Property.

In 1997, when Ms. Storch owned the Property, she continued to use the Parcel consistent with the use of the prior owners. During her ownership, she and her husband parked vehicles on the Parcel and used the Parcel to access their home. Ms. Storch also landscaped the area, placing large decorative pots on the land.

In 2005, when Ms. Storch conveyed the Property to the Valentines, the Valentines continued to use the Parcel consistent with the use of the prior owners. The Valentines used the Parcel to park their vehicles and to access the Property over the footbridge. At no time during their eleven-year ownership of the Property did anyone challenge the Valentines's ownership of the Parcel or make any claim of rights in and to the Parcel.

At some point between Ms. Storch's ownership and the Valentines's ownership of the Property, significant improvements were made to the Parcel by the Property's owners, who paved the parking area and installed a retaining wall on the Parcel.

On December 15, 2010, the defendants acquired the property known as 10 Oakridge Avenue, North Attleboro ("10 Oakridge Ave."), which straddles the municipal boundary between North Attleboro and Mansfield. 10 Oakridge Ave. is bordered by Oakridge Avenue to the northwest and by Plain Street on the northeast. The intersection of the two streets is at the northernmost tip of the defendants' property. The southern border is Greenwood Lake. On the eastern part of the defendants' property, the land curves around to the south in a long thin strip between the lake and Plain Street. The Parcel is part of this long, thin strip.

The defendants' deed (the "DeMontigny Deed") describes 10 Oakridge Ave. as Lot 3 on Subdivision Plan 24988A (the "Plan"), registered with the Land Court on Certificate of Title No. 2777 and as "[b]eing the same property identified at Plat 37, Lot 12 in the Tax Assessor's records for the Town of North Attleboro, and Plat 4, Lots 83–85 in the Tax Assessor's records for the Town of Mansfield." The Parcel is included in the Town of Mansfield Tax Assessor's records as Plat 4, Lot 85. The Parcel is not included in Lot 3 as shown on the Plan and is not included in the defendant's Certificate of Title.

The defendants and the predecessor owners of 10 Oakridge Ave. have paid property taxes on the Parcel to Mansfield since at least 1959. The defendants also pay property taxes to North Attleboro for the portion of their property in that town. Defendant Richard deMontigny has had conversations with the plaintiff and with a tenant who lived in the plaintiff's home before the plaintiff purchased it. In those conversations, Mr. deMontigny told both of them that Mr. deMontigny and his wife owned the Parcel.

The defendants allege that they maintain the long, thin strip—including the Parcel—by cleaning up trash and litter there. They also state that they use the long, thin strip—including the Parcel—for dumping lake weeds and other yard waste. They contend that they frequently walk on the long, thin strip of land, including the Parcel. They also state that they give their permission to other people access that part of their property for parking while they fish or for launching kayaks.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper where no genuine issues of material fact exist and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating that no genuine issue of material fact exists for any relevant issue and that the moving party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting

evidence negating an essential element of the non-moving party's case or by demonstrating that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. See Flesner v. Technical Comm'n Corp., 410 Mass. 805, 809 (1991). Once this burden is satisfied, the party opposing summary judgment must allege specific facts establishing the existence of a genuine issue of material fact in order to escape summary judgment. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). While the court views the evidence in the light most favorable to the non-moving party, it does not weigh the evidence, determine witness credibility, or make its own findings of fact. Attorney Gen. v. Bailey, 386 Mass. 367, 370–371 (1982).

B. Analysis

To establish title by adverse possession to land owned by another, the claimant must show "proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for twenty years." Lawrence v. Town of Concord, 439 Mass. 416, 421 (2003); Kendall v. Selvaggio, 413 Mass. 619, 621-622 (1992); Ryan v. Stavros, 348 Mass. 251, 262 (1964); G. L. c. 260, § 21. The nature and extent of use required to establish title by adverse possession varies "with the character of the land, the purposes for which it is adapted, and the uses to which it has been put." LaChance v. Rubashe, 301 Mass. 488, 490 (1938). Applying this standard, the Court concludes that the plaintiff has established title by adverse possession to the Parcel as a matter of law and that the defendants are therefore barred from asserting any right to the Parcel.[4]

[4] The plaintiff has also established a claim for adverse possession under the doctrine of color of title; but because the plaintiff succeeds via his adverse possession claim, the Court addresses the color title claim only briefly. The doctrine of color of title arises when a person enters upon the land pursuant to an instrument of title, such as a deed, even though that document is defective and does not pass valid title. Norton v. West, 8 Mass. App. Ct. 348, 350–351 (1979). A successful adverse possession claim under color of title requires (1) successful adverse possession claim; and (2) proof that the claim of ownership is based on a document or writing. Long v. Wickett, 50 Mass. App. Ct. 380, 382 n. 3 (2000). In 1994, Mr. Fish conveyed the Parcel to Ms. Storch, which was recorded with the Registry. The Parcel Deed describes the Parcel as containing 1,045 square feet of land, bounded as follows: By Plain Street, 73.10 feet; Southeasterly: By land now or formerly of Owner's Unknown; 10 feet, more or less; Southwesterly: By Greenwood Lake; and Northwesterly: By land now or formerly of Owner's Unknown, 10 feet, more or less." However, because Mr. Fish did not hold record title to the Parcel, the Parcel Deed did not pass valid title to Ms. Storch. Under color of title doctrine, the adverse possessor is allowed to constructively possess the entire parcel described in the defective title, even though the claimant's actual possession may only have extended to a small portion of a larger parcel. Norton, 8 Mass. App. Ct. 350–351. Thus, although the plaintiff has proven that actual use and possession of

I. Actual Use

The plaintiff has satisfied the actual use element by using the Parcel in the same manner that the average owner of the Parcel would use and enjoy it. See Shaw v. Solari, 8 Mass. App. Ct. 151, 156–157 (1979) (actual use satisfied where possessor utilizes land in the same way an average owner of similar property would). The character of the Parcel, a 1,045 square foot area directly abutting Plain Street, makes for limited use. The plaintiff and the plaintiff's predecessors have utilized the Parcel as the only access point to their Property and as parking spaces. They have also improved the Parcel. See Lyon v. Parkinson, 330 Mass. 374 (1953) (creating and maintaining a lawn satisfies actual use element); LaChance, 301 Mass. at 490–491 (filling in part of the land in connection with the erection of a stone wall satisfies actual use element); Lutz v. Bauman, 2017 WL 3754823 *5 (Mass. Land Ct. 2017) (improving and maintaining pathway and planting bed area sufficient to constitute actual use).

II. Open and Notorious Use

The plaintiff has satisfied the open and notorious element by visibly using the Parcel. The open and notorious elements of adverse possession require that the occupancy of the land be conducted in a manner that would reasonably put the true owner "on notice" and, therefore, elicit a response. See Ottavia v. Savarese, 338 Mass. 330, 333 (1959). It is undisputed that the plaintiff's and the plaintiff's predecessors' occupancy of the Parcel has been sufficiently visible and open to put the defendants (and their predecessors) on notice. Since 1970, the plaintiff and the plaintiff's predecessors have used the Parcel to park their vehicles and access their Property, which was attested to by three neighbors. Between 1994 and 2015, the owners of the Property also paved the Parcel, built a retaining wall, left personal property on the Parcel, and used the Parcel to access their Property daily. Such open and obvious conduct, lasting over forty-seven years, is sufficient to constitute notice of an adverse claim to title.

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the Parcel was maintained for over twenty years, the plaintiff has further established actual use and possession of the Parcel under color of title by virtue of its description in the Parcel Deed.

III. Exclusive Use

The plaintiff and the plaintiff's predecessors' use of the Parcel has been exclusive. This element is satisfied for the purposes of establishing title by adverse possession if such use excludes not only the record owner but "all third persons to the extent that the owner would have excluded them." Peck v. Bigelow, 34 Mass. App. Ct. 551, 557 (1993). "The actual use and enjoyment of the property as the average owner of similar property would use and enjoy it, so that people residing in the neighborhood would be justified in regarding the possessor as exercising the exclusive dominion and control incident to ownership, establishes adverse possession." Solari, 8 Mass. App. Ct. at 156–157.[5] Since 1970, the plaintiff and the plaintiff's predecessors have used the Parcel for parking and as the sole access point to their Property. The defendants attempt to defeat the exclusive element by claiming that they cleared trash from and allowed others to park on and launch kayaks from the strip of land, in which is included the Parcel. However, this argument is unsuccessful because the defendants are relying on conduct outside of the twenty year statute of limitations. If property owners do not assert their rights to property within twenty years of the commencement of an adverse possession, their opportunity to challenge another's assertion of rights to the property will be barred. Murphy v. Commonwealth, 187 Mass. 361 (1905); Luther v. Winnisimmet Co., 63 Mass. 171 (1851). The defendants did not become owners of their until December 15, 2010, and the defendants have put forth no information alleging that their predecessors performed such actions on the Parcel. In fact, the affidavits from the neighbors show otherwise.

Even if the defendants had offered such information, the actions would not be enough to strip the plaintiff of his claim. "Not every act by the owner on the land interrupts actual adverse possession." AM Props., LLC v. J&W Summit Ave., LLC, 91 Mass. App. Ct. 150, 158 (2017), citing Rothery v. MacDonald, 329 Mass. 238, 241 (1952) (noting that owner's intermittent

[5] The defendants make much of the fact that the Parcel was never enclosed. See Sheriff's Meadow Found, Inc. v. Ramsey, 2014 WL 1319432, at *14 (Mass. Land Ct. 2014) ("Activities involving 'enclosure or cultivation are evidence of exclusive possession.'"). However, this ignores the character of the Parcel. It is obviously nonsensical to enclose a sliver of land that acts as a small driveway.

inspections of the adversely disputed property were not sufficient to exercise dominion and control over that disputed piece of property). A neighbor picking up trash and walking on the strip of land in which the Parcel is included, or people fishing or kayaking from the strip of land (not the Parcel itself), in light of the location and the nature of the Parcel, is conduct that would not be excluded by a typical owner.

Citing Peck, the defendants also emphasize that regular tax payment over a period of many years by the record owner, as occurred here, "strongly militates" against adverse possession claims. See Peck, 34 Mass. App. Ct. at 556. However, Peck is inapt because the Appeals Court held that regular tax payment is most persuasive against adverse possession claims "where the [party] claims the whole lot, not just part of it." Id., at 556–557, citing Bernard v. Nantucket Boys' Club, 391 Mass. 823, 826 (1984). It is undisputed that the plaintiff only claims the Parcel, not the defendants' entire property. Accordingly, the defendants cannot negate the exclusivity element.

IV. Adverse Use

The plaintiff and his predecessors' use of the Parcel has been hostile. Adverse use means that the putative adverse possessor "must use and enjoy the property continuously for the required period as the average owner would use it, without the consent of the true owner and therefore in actual hostility to him." Sheriff's Meadow Found, Inc. v. Ramsey, 2014 WL 1319432 at *14 (Mass. Land Ct. 2014). That adverse use must be sufficient that "people residing in the neighborhood would be justified in regarding the possessor as exercising the exclusive dominion and control incident to ownership." Solari, 8 Mass. App. Ct. 151, 156–157 (1979). The defendants argue, without any evidence, that the plaintiff and the plaintiff's predecessors' use was not adverse; but the neighbors' affidavits directly contradict this assertion. The defendants also contend that because the plaintiff has failed to enclose the Parcel, erect a "no trespass" sign, or block the use of the Parcel, this requirement has not been satisfied. However, there is no requirement for an adverse possessor to enclose the disputed parcel, to erect a "no trespass" sign, or to completely block use of the disputed parcel in order to establish the hostile/adverse element of an adverse possession.

See Lyon, 330 Mass. at 380 (adverse possession established where the claimant cleared land, formed rock garden, and installed rip-rap; no evidence of a fence or "no trespass" sign); Collins v. Cabral, 348 Mass. 797, 798 (1965) (adverse possession established where claimants maintained disputed lawn area, cleared land of poison ivy, filled and graded property, and installed septic system; no evidence of a fence or "no trespass" sign). The defendants cite to no evidence that indicates that the plaintiff or the plaintiff's predecessors were using the Parcel with permission from any of the defendants' predecessors.

V. Continuous Use for Twenty Years

The plaintiff and the plaintiff's predecessors' use of the Parcel has been continuous for far more than twenty years. G. L. c. 260, § 21 establishes that adverse possession of land must continue for at least twenty years. "If such right or title first accrued to an ancestor or predecessor of the person who brings the action . . . the twenty years shall be computed from the time when the right or title first accrued." G. L. c. 260, § 22. This "tacking" of the transfer of possessory interests from one adverse possessor to another through an oral transfer, written deed, bequest, or inheritance applies here. See Ryan v. Stavros, 348 Mass. 251, 264 (1964). The record reflects that the Parcel was utilized by all record owners of the Property: Mr. Battersby, Mr. Pritchard, the Chrismas, Mr. Fish, Ms. Storch, the Valentines, and the plaintiff between November 19, 1970 and the present day have used the Parcel to access their Property and to park their vehicles. In addition to this, between 1994 and 2015, the Parcel was paved and a retaining wall was installed. These periods of adverse possession are properly tacked onto the plaintiff's claim because privity exists between each of the owners by virtue of the deeds recorded at the Bristol County Registry of Deeds.

ORDER

For the foregoing reasons it is hereby **ORDERED** that the plaintiff's motion for summary judgment is **ALLOWED**.

Raffi N. Yessayan
Justice of the Superior Court

DATED: May 4, 2018