STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: January 24, 2012)

JOSEPH A. CASALI and DEBORAH CASALI	:	
VS.	:	**C.A. No. PC 05-5441**
GREEN ACRES REALTY	:	

DECISION

CARNES, J. This matter was tried before the Court without a jury on Plaintiffs' Complaint alleging a claim for adverse possession of a particular parcel of property and Defendant's claim for slander of title. Trial occurred on July 28, 2010. The Court heard live testimony from Plaintiff, Deborah Casali, Linda Weisinger and Alan Reedy. The Court also received a number of exhibits as evidence. At the close of evidence, the Plaintiffs moved to amend the Complaint to conform to the evidence by claiming only the disputed portion of the subject property that they actually possessed during the period described in their testimony.

I

FACTUAL AND PROCEDURAL BACKGROUND

Subsequent to receipt of post-trial memoranda from the parties, the Rhode Island Supreme Court issued an opinion in the case of Cahill v. Morrow, 11 A.3d 82 (R.I. January 20, 2011). This Court entered an order dated February 15, 2011, inviting parties to supplement the record in light of the Supreme Court's discussion in said case. The parties continued to attempt to negotiate a mutually agreeable settlement but were unable

to accomplish same. Thereafter, counsel for the respective parties met with the Court. Plaintiffs' counsel requested an opportunity to conduct a single deposition and file an additional memorandum to address the issues presented by the opinion in Cahill. Defendant objected maintaining that the trial record was sufficient for this Court to address said issues. This Court allowed Plaintiffs to conduct the single deposition and supplement the record. The deposition and supplemental memoranda were submitted to the Court during the week of January 15, 2012.

This Court has jurisdiction pursuant to G.L. 1956 §§ 8-2-13 and 14 and renders its decision in accordance with Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure.

II

STANDARD OF REVIEW

Super. R. Civ. P. Rule 52(a) provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. Ct. R. Civ. P. 52(a). In a non-jury trial, the trial justice sits as the trier of fact as well as of law. Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). "Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Id. A trial justice's findings of fact will not be disturbed unless such findings are clearly erroneous, the trial justice misconceived or overlooked material evidence, or unless the decision fails to do substantial justice between the parties. Opella v. Opella, 896 A.2d 714, 718 (R.I. 2006) (quoting Bogosian v. Bederman, 823 A.2d 1117, 1120 (R.I. 2003)). While the trial justice's analysis of the evidence and findings need not be exhaustive or "categorically

accept or reject each piece of evidence," the trial justice's decision must "reasonably indicate[] that [she] exercised [her] independent judgment in passing on the weight of the testimony and credibility of the witnesses." Notarantonio v. Notarantonio, 941 A.2d 138, 144 (R.I. 2008) (quoting McBurney v. Roszknowski, 875 A.2d 428, 436 (R.I. 2005)). Further, although the trial justice is required to make specific findings of fact, "[e]ven brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case." Hilley v. Lawrence, 972 A.2d 643, 651 (R.I. 2009) (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998)).

III

TESTIMONY OF WITNESSES

A.

1.
Plaintiffs' Case

Deborah Casali testified that she has lived at 27 Swanton Street, Providence, Rhode Island since 1998. Plaintiffs' address was identified as Lot 60 on that plat entitled, "Lakeview Park, Providence, R.I. belonging to The Providence Real Estate Improvement Co., By Edward E. Goff, September 1919." Said plat map was introduced by the parties as Joint Exhibit 2 (full exhibit). Ms. Casali also identified Lot 61 on the same plat map to the immediate East of her own lot. Lot 61 is the subject property of the case before the Court and hereafter will be referred to as "Lot 61," or simply the "subject property." Ms. Casali and her husband first occupied Lot 60 in 1998 when she rented the property from Kerri Breen, her predecessor in title. Ms. Casali and her husband purchased the property in October 2001 from Kerri Breen. Ms. Casali further testified that she knew she did not own Lot 61 during the time she lived on Lot 60. She testified that she did landscape the

area planting grass, flowers, and shrubs on the subject property. She also placed cobblestones on the subject property and made efforts to control the vermin there. She testified that she replaced the shed on the subject property in 2004 and also used a portion of the concrete slab next to the shed to park her vehicle on the subject property.

Ms. Casali testified credibly. She did not attempt to overstate any of the facts she described, and much of what she testified to is not in serious dispute.

As part of its case in chief, Plaintiffs submitted the deposition of Kerri Breen, Plaintiffs' predecessor in title (Joint Exhibit 1). The deposition was taken May 27, 2009. During deposition testimony, Ms. Breen said she owned Lot 60 before the Plaintiffs. She purchased Lot 60 in 1991 and rented said lot to the Plaintiffs from 1998 until she sold them the property in October 2001.

Ms. Breen said that there was no dwelling on Lot 61 when she purchased Lot 60. She described Lot 61 as a "mess" and said she and her husband got a backhoe to smooth the land while she undertook to clean it up. She said that in the spring of 1992 she raked, planted grass, spread seed and watered, and "installed a driveway" on Lot 61. She said that William Anthony Excavating put the driveway in at her husband's request.

She also testified that she had a shed built on the subject property in 1993. She testified that her husband was a carpenter and needed a place to store his ten (10) foot ladders. She stated that her husband purchased building materials and built the shed on the subject property. That shed was still on Lot 61 when she sold her home on Lot 60 to Plaintiffs in 2001.

Ms. Breen also described placing a small swimming pool on the property for her daughter and further, that her husband had built a swing set on the property.

Furthermore, Ms. Breen admitted during her deposition that she wrote a letter to the owner of the subject property saying she "was interested in purchasing the land." Ms. Breen stated that she wrote the letter sometime after she purchased her own property and began occupying and using said subject property in 1992. She could not offer the specific date of the letter and did not have a copy when questioned about it. While the Court did not have the opportunity to view Ms. Breen, it does not appear that any of the facts set forth in her deposition are seriously contested.

The Court also received Joint Exhibit 7, which was a lis pendens giving notice of Plaintiffs' adverse possession suit. The lis pendens indicates that it was recorded in the land evidence records of Providence on October 20, 2005 in Book 7634 at Page 136.

2.
Defendant's Case

Defendant called Linda Weisinger as a witness relative to its counterclaim for slander of title. Ms. Weisinger testified that she was the Deputy Director of a non-profit organization know as SWAP (acronym for Stop Wasting Abandoned Property). She testified that she had been at SWAP for seventeen years and been involved in over 150 transactions involving both vacant land and houses. Defendant sought to introduce a copy of a purchase and sale agreement through the witness. The purchase and sale agreement is purportedly embodied in Defendant's Exhibit E (identification only and not a full exhibit).

The purchase and sale agreement lists Green Acres Realty as the seller and SWAP as the buyer of the property identified as 51 Lakeview Drive, Assessor's Plat 126, Lot 120 in Providence, Rhode Island. It is uncontested that the parcel is Lot 61 on the recorded plat, which is the subject property of the instant action. The transcript indicates

that counsel incorrectly put a question to the witness about Lot 60, which is the Plaintiffs' home at 27 Swanton Street, Providence, Rhode Island.

Before the trial concluded, both parties, on the record, agreed to address the issue of the value of Lot 61 at a later time if it became relevant.

Defendant also called Alan Reedy. He has been associated with the Defendant entity since 1977, and has been president since 2004. He has also been associated with Suburban Land Company (Suburban) since 1977 and president of the entity since 2004. He testified that Suburban purchased the tax title to the subject property from the City of Providence initially in 1992, and then again in August of 1995. He testified that inspecting all of the properties owned by Suburban was difficult, but for properties such as the subject property, the normal practice would be to drive through the neighborhood and look at the property. He testified that over the years he had driven by the property six (6) or seven (7) times and was aware of the shed. He testified about and produced a document purporting to be a tracing of the Assessor's Plat map made by his father, previous president of the Defendant. The document, Defendant's Exhibit V (full exhibit), contains a notation indicating "small shed on lot." The drawing identifies Assessor's Lot 120 at the corner of Lakeview Drive and Swanton Street and depicts a small rectangle on the lot. Assessor's Lot 120 is the subject property of the instant matter. The record indicates that despite further questioning at trial, the parties were unable to put an exact date on when the tracing and notation about the shed occurred. However, Mr. Reedy indicated it was done by his father.

Mr. Reedy testified that he never foreclosed the tax title right of redemption between 1995 and 2005. He also testified that he did not put the shed on Lot 61. Mr.

Reedy further testified that he had not done any snowplowing on the property, nor had he cut the grass, done any landscaping, or treated the property for vermin. When asked if he ever attempted to remove the Casalis' shed, he responded "only in my letter to him." Defendant produced a letter dated October 14, 2005, signed by him as president of Green Acres Realty, and sent to Joseph Casali. Defendant's Exhibit D (full exhibit). The exhibit depicts it was sent by registered mail, return receipt requested, and the receipt was signed by Joseph Casali and stamped October 15, 2005.

By its terms, the letter indicates that the last time Mr. Reedy spoke with Joseph Casali was August 10 of the "previous year." (August 10, 2004). The letter indicates that Mr. Reedy intended to sell the property to a non-profit organization and further contained a reference to permissive use of the property by specifically indicating:

> "I hope this news is not too upsetting to you knowing that you had inquired about purchasing the lot, and the fact that my father, and after his passing, myself, have given you permission for the use of the shed on the property for quite some time."

The letter further goes on to indicate that the City taxed the shed at $100 valuation and that it was not a significant increase to his property tax, so there was no reason to request removal of the shed. The letter next requested removal of the shed.

Defendant also offered another document in the form of a small scrap of spiral notebook paper with the name Joseph Casali and home and cell phone numbers written on it in blue ink. The paper also contained the notation "126/120 Lakeview" in blue ink. Other notations in black ink that appear on the paper include: "lives in lot 119;" "wants to buy;" "uses shed, is on land (mine);" "8-10-04;" and "02910." The document is identified as Defendant's Exhibit J (full exhibit).

B.

Post-Trial Deposition

Due to the Rhode Island Supreme Court's opinion in Cahill, the Court allowed the parties to supplement the record regarding the issue of any offer made by Joseph Casali to purchase the subject property. Joseph Casali was deposed on November 22, 2011. Mr. Casali testified at the deposition that he recalls an individual coming to him at his property shortly after he had an operation. The best he could remember with respect to the date at the deposition was that his operation was sometime around 2003. He said the person came onto his property and asked about his motorcycle and then both gentlemen began talking about motorcycles. Mr. Casali said he was sitting on his deck at the time. Mr. Casali further stated that the person who approached him asked who owned the land, referring to the subject property, Lot 61. Mr. Casali said that he remembers saying he didn't know who owned Lot 61 but asked if the person would like to buy it. Mr. Casali said the person told him, "Well, it's my land." Mr. Casali then said at the deposition that he asked, "Could we talk about this? Could we make a deal?" Mr. Casali said the person told him, "I'll get a hold of you." Mr. Casali said he gave him his telephone number and the person said, "I'll call you." Mr. Casali said at the deposition that he had never seen the person before. Mr. Casali acknowledged under cross-examination at the deposition that the event could have taken place on August 10, 2004. Mr. Casali was confronted with a survey affidavit but said at the deposition that he didn't understand what the word "encroachment" meant.

IV

ANALYSIS

A.

Adverse Possession

In Rhode Island, obtaining title by adverse possession requires actual open, notorious, hostile, continuous, and exclusive use of property under a claim of right for at least a period of ten years. Corrigan v. Nanjan, 950 A.2d 1179, 1179 (R.I. 2008) (Mem.); see also § 34-7-1. "The party who asserts that adverse possession has occurred must establish the required elements by strict proof, that is, proof by clear and convincing evidence." Corrigan, 950 A.2d at 1179 (citing Tavares v. Beck, 814 A.2d 346, 350 (R.I. 2003)); see also Carnevale v. Dupee, 783 A.2d 404, 409 (R.I. 2001); Cahill v. Morrow, 11 A.3d 82, 88 (R.I. 2011).

Clear and convincing evidence is defined in a variety of ways; for example, to establish a fact or an element by clear and convincing evidence a party must persuade the jury that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true. The clear and convincing evidence standard does not require that the evidence negate all reasonable doubt or that the evidence must be uncontroverted." 29 Am. Jur. 2d Evidence § 173 at 188-89 (2008). Cahill at 88.

Initially, Defendant moved to dismiss at the close of trial on the ground that Plaintiffs did not demonstrate that their possession of the entire subject property was exclusive. Plaintiffs, who had by their complaint claimed the entire parcel, were allowed to amend their complaint to conform to the evidence presented and, as a result, claimed

only that portion containing the shed and approximately one-half of the driveway in the amended complaint.

B.

Offers to Purchase the Subject Property

Due to the Supreme Court's recent opinion in Cahill v. Morrow, 11 A.3d 82 (R.I. 2011), the resolution to the instant case turns on the Court's analysis of the offers to purchase the subject property. This Court believes Ms. Breen's deposition testimony, and the Court finds as a fact that Ms. Breen sent a letter to the property owner of the subject parcel offering to purchase the land sometime after Ms. Breen began to clean up and use the subject property in 1992. Significantly, this Court also finds that there was no ongoing dispute or outstanding claim at the time Ms. Breen sent the letter to the owner of the subject property. Ms Breen's communication negates the requisite claim of right that the doctrine of adverse possession requires and interrupts the accrual of the instant claim.[1]

Accordingly, it would be error to consider any incidents of ownership exhibited by Ms. Breen after her letter to the property owner relative to actions on and related to the subject parcel because her offer to purchase interrupted her claim. See Cahill at 93.

At this point in the analysis, the running of the requisite period would need to begin again in 1998 when the Plaintiffs began to rent Lot 60 from Ms. Breen, and then to commence their own adverse use of Lot 61. The Court believes and finds as a fact that Joseph Casali also made a verbal offer to purchase on August 10, 2004. Under the

[1] It is important to note that Ms. Breen's activity is crucial to Plaintiffs' claim of adverse possession. Plaintiffs need to tack on to Ms. Breen's period of activity in order to arrive at the requisite ten years of adverse possession. "Tacking" is defined as the joining of consecutive periods of possession by different persons to treat the periods as one continuous period." Black's Law Dictionary 1465 (7th ed.1999). Tacking is permitted under G.L.1956 § 34-7-1 and has been recognized by the Rhode Island Supreme Court. See Taffinder v. Thomas, 119 R.I. 545, 549, 381 A.2d 519, 521 (R.I. 1977).

holding in Cahill, this offer to purchase would serve to negate Mr. Casali's claim of right and further interrupt the running of the requisite period. Id.

Plaintiffs, in a recent supplemental post-trial memorandum invited by this Court subsequent to the Cahill opinion, suggested that "[A]t no time did Mr. Casali (or Kerri Breen or Mrs. Casali for that matter) ever forward an unsolicited offer to purchase the subject property to the Defendant in this case." See Pls.' Supp. Mem., p. 2. A reading of the deposition of Kerri Breen (Joint Exhibit 1, p. 19) reveals that such a statement is false with respect to Ms. Breen. While Ms. Breen could not testify as to the name of the owner of the subject parcel, she did testify at the deposition that she got the name of the property owner from the City of Providence. A reasonable inference would be that Ms. Breen's letter was sent to either Green Acres Realty or Suburban Land Company. Plaintiffs cannot make out their claim by strict proof to the satisfaction of the Court in light of such evidence.

Plaintiffs further suggest that under Tavares v. Beck, 814 A.2d 346, 351 (R.I. 2003), a claim of right may be proven through evidence of open, visible acts or declarations, accompanied by use of the property in an objectively observable manner that is inconsistent with the rights of the record owner. See Pls.' Supp. Mem., p. 4. Plaintiffs go on to argue that under Tavares, with regard to establishing hostility and possession under a claim of right, the pertinent inquiry centers on the claimant's objective manifestations of adverse use rather than on the claimant's knowledge that they lacked colorable legal title. See Pls.' Supp. Mem., p. 4.

Plaintiffs suggest that in light of their own, as well as Ms. Breen's, lack of specific knowledge as to the identity of the owner of the subject property, their objective

manifestations should be accorded a greater weight than the Cahill plaintiff, given the relative activity on the subject property in the respective cases. See Pls.' Supp. Mem., p. 5-7. The Rhode Island Supreme Court appears to have preempted such an analysis as the Plaintiffs suggest when it specifically stated, "[H]owever, to the extent that Tavares's reference to "black-hearted trespassers" suggests that this Court endorses an invade-and-conquer mentality in modern property law, we dutifully excise that sentiment from our jurisprudence." Cahill at 91.

V

CONCLUSION

Based upon the foregoing, the Court finds that most of the facts and testimony in the case are not in serious dispute. The only exception to the Court's finding is related to a reference contained in a letter sent to Joseph Casali by Alan Reedy on October 14, 2005. Defendant's Exhibit D (full exhibit, supra). Writing at that time Mr. Reedy makes a slight and passing reference to his father, former president of Defendant entity, allowing Mr. Casali to have permissive use of the subject property. The letter is self-serving, and there is no admissible evidence that Mr. Reedy's father ever gave permission to Mr. Casali for any purpose related to the subject property. However, it is not necessary to resolve this particular issue in light of this Court's analysis.

The Court finds that due to the offers to purchase by Kerri Breen and Joseph Casali discussed above, Plaintiffs have not made out their claim on the elements of adverse possession by strict proof.

Counsel shall confer and submit an appropriate Order and Judgment.