

2020 WL 4436449

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Massachusetts Land Court,
Department of the Trial Court,
Norfolk County.

David R. GEIGER, Plaintiff,

v.

NEEDHAM MILLER, LLC, Defendant.

20 MISC 000269 (JSDR)

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Dated: August 3, 2020

**MEMORANDUM OF DECISION DENYING PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION AND ALLOWING PLAINTIFF'S MOTION FOR APPROVAL OF LIS PENDENS**

Jennifer S.D. [Roberts](#), Associate Justice

Introduction

*1 Plaintiff David R. Geiger (“Mr. Geiger”) owns and resides at the property at 22 Tanglewood Road, Wellesley, Massachusetts (“the Geiger Property”). Verified Complaint (“Complaint”) ¶ 1. Defendant Needham Miller, LLC (“the LLC”) owns and is currently developing the property at 16 Tanglewood Road, Wellesley, Massachusetts (“the LLC Property”). Complaint ¶ 2. The Geiger Property abuts the LLC Property along the Geiger Property's southeast and the LLC Property's northwest side lines. Plan And Profile Of Part Of Tanglewood Road Wellesley, Mass. Scale Horz. = 1 inch = 40 feet Vert. = 1 inch = 4 feet Jan. 5, 1957 Owner Wellesley Construction Co. Inc. 47 River Street, Wellesley, Mass. Engineer Joseph Selwyn 14 Linden Ave. Belmont, Mass. ¹ The Geiger Property and the LLC Property both abut Tanglewood Road. *Id.* At issue in this case is an approximately 270 square foot area of the LLC Property (“the Disputed Area”) ² over which Mr. Geiger claims ownership by virtue of adverse possession based on his use of the Disputed Area as an extension of his lawn.

Mr. Geiger filed the Complaint, Plaintiff's Ex Parte Motion For Temporary Restraining Order And Preliminary Injunction (“the PI Motion”), Plaintiff's Ex Parte Motion For Approval Of Lis Pendens (“the LP Motion”) and a memorandum of law in support of those motions on July 15, 2020. A hearing was scheduled for July 21, 2020 and subsequently rescheduled to July 28, 2020 by agreement of the parties. On July 27, 2020, the LLC filed a memorandum of law in opposition to the motions and the affidavits of John Bruno, Karen Petrucci, Stephen Petrucci and Roy Arruda. For the reasons set forth below, the PI Motion is **DENIED** and the LP Motion is **ALLOWED**.

Background

The following facts appear from the Complaint and the affidavits filed herein.

Mr. Geiger acquired the Geiger Property on October 20, 1989. Complaint ¶ 3 and Ex. 1. Mr. Geiger has resided continuously in a single-family home at the Geiger Property since approximately March 1990. Complaint ¶ 4. Since Mr. Geiger's acquisition of the Geiger Property, the boundary between the Geiger Property and the LLC Property in the area at issue has been marked

by a shrub, tree and planting bed on the LLC Property (“the Bed”). Complaint ¶ 6. Mr. Geiger alleges that, at all times during his ownership of the Geiger Property, “the owners of [the LLC Property] have occupied and maintained the [Bed] ... while Mr. Geiger has occupied and maintained all of the land to the right of the [Bed] to the exclusion of all others, including the owners of [the LLC Property].” Complaint ¶ 7. More particularly, Mr. Geiger alleges that “[a]t all times since [he] has owned and occupied [the Geiger Property], he has exclusively used, occupied, and maintained all of the land on his side of the [Bed].” Complaint ¶ 12.

*2 With respect to the use that he has made of the Disputed Area, Mr. Geiger alleges that he and his agents (professional landscaping services engaged by him) have engaged in the following acts: weekly mowing during the growing season; fertilizing and applying other lawn maintenance materials; periodic seeding; seasonal clearing of fallen leaves; removal of tree branches and other debris after storms; and seasonally watering multiple times each week with irrigation systems. Complaint ¶¶ 16, 19. Professional arborists engaged by Mr. Geiger have also had full access to and moved across the Disputed Area to tend to two trees in Mr. Geiger's yard. Complaint ¶ 17.

The abutting LLC Property was previously owned by Alice and Stewart Ward (“the Wards”). Complaint ¶ 11. The LLC purchased the LLC Property from the Estate of Alice Ward, Complaint ¶ 22, in March 2019. Bruno Aff. ¶ 3. In late 2019, Mr. Geiger observed orangecolored surveyors’ stakes in his front and side yard along the boundary between the Disputed Area and the Geiger Property. Complaint ¶ 20. Thereafter, Mr. Geiger learned that the LLC had purchased the LLC Property and notified the LLC of his claim of ownership by adverse possession of the Disputed Area. Complaint ¶ 22.³

According to the evidence offered by the LLC, its predecessors, the Wards, employed Petrucci Landscaping Co. Inc. (“Petrucci Landscaping”) from 2003 through 2018 to do landscaping work on the LLC Property. Affidavit of Karen Petrucci In Opposition To Plaintiff's Motion For Preliminary Injunction, sworn to on July 21, 2020 (“K. Petrucci Aff.”) ¶ 2; Affidavit of Steven Petrucci In Opposition To Plaintiff's Motion For Preliminary Injunction And Lis Pendens, sworn to on July 21, 2020 (“S. Petrucci Aff.”) ¶ 4. Petrucci Landscaping did a spring and a fall cleanup of the LLC Property every year during that period. K. Petrucci Aff. ¶¶ 2-3 and Exs. 1-2. That cleanup included the Disputed Area, where employees of Petrucci Landscaping blew leaves and picked up sticks and branches that had fallen. Affidavit of Roy Arruda, sworn to on July 23, 2020 (“Arruda Aff.”) ¶ 5; S. Petrucci Aff. ¶ 5.

After its acquisition of the LLC Property, the LLC employed a surveyor to establish the lot lines between the Geiger Property and the LLC Property. Bruno Aff. ¶ 8. Subsequently, the LLC razed the older home on the LLC Property and is currently building a new 6,874 square foot home in its stead. Bruno Aff. ¶ 3. As part of its landscaping for the new home, the LLC plans to install a line of evergreens along the boundary with the Geiger Property where the Disputed Area is located. Bruno Aff., Ex. 5.

According to Mr. Bruno and as shown in photographs submitted by both parties, “[t]here are no plantings, structures, fences or equipment including irrigation equipment (including no sprinkler heads) from [the Geiger Property] that is on any portion of [the LLC Property].” Bruno Aff. ¶ 5. The photographs of the Disputed Area show above ground roots, from what is presumably a nearby tree, and patches of grass. Complaint, Ex. 2; Bruno Aff., Ex. 3. The photographs also show that, prior to the LLC's recent alteration of the Bed, the Disputed Area could be reached from the remainder of the LLC Property by going on one or both sides of the Bed. Complaint, Ex. 2.

Analysis

The PI Motion

The Applicable Standard

*3 A preliminary injunction may issue only if Mr. Geiger demonstrates (a) a likelihood of success on the merits, (b) that he faces a substantial risk of irreparable harm if the injunction is not issued, and (c) that this risk of irreparable harm outweighs any risk of irreparable harm which granting the injunction would create for the defendant, the LLC. *GTE Prods. Corp. v. Stewart*, 414 Mass. 721, 722-723 (1993);  *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). In cases invoking

the public interest, the moving party must also demonstrate that the requested order promotes the public interest or will not adversely affect the public. [Commonwealth v. Mass. CRINC](#), 392 Mass. 79, 89 (1984). The public interest is not implicated in this case and, as is set forth below, Mr. Geiger having failed to establish a likelihood of success on the merits, this court need not undertake the irreparable harm analysis.

Likelihood Of Success On The Merits

“Title by adverse possession can be acquired only by proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for twenty years.” [Lawrence v. Concord](#), 439 Mass. 416, 421 (2003) quoting [Kendall v. Selvaggio](#), 413 Mass. 619, 621-622 (1992), which in turn quotes [Ryan v. Stavros](#), 348 Mass. 251, 262 (1964). “The burden of proof extends to all of the necessary elements of such possession ... If any of these elements is left in doubt, the claimant cannot prevail.” [Holmes v. Johnson](#), 324 Mass. 450, 453 (1949), citing [Gadreault v. Hillman](#), 317 Mass. 656, 661 (1945).

In this case, the parties dispute whether Mr. Geiger's lawn maintenance activities, standing alone, suffice as a matter of law to constitute an open and adverse use of the Disputed Area. Mr. Geiger points to [Miller v. Abramson](#), 95 Mass. App. Ct. 828, 829 (2019) for the proposition that “mowing, fertilizing, and occasional trimming of trees and shrubs” is sufficient to establish adverse use as a matter of law. The LLC contends instead that, although lawn maintenance has been a factor in finding adverse possession, the cases have generally relied on more than lawn maintenance standing alone, citing [Shoer v. Daffe](#), 337 Mass. 420 (1958); [Collins v. Cabral](#), 348 Mass. 787 (1965) (rescript); and [Shaw v. Solari](#), 8 Mass. App. Ct. 151 (1979). As noted by this court in [Mullins v. HD/MW Randolph Ave., LLC](#), 25 LCR 221, 224 (2017) [Mullins v. HD/MW Randolph Ave., LLC](#), 25 LCR 221, 224 (2017) (Speicher, J.), “the peculiar characteristics of a particular area, such as its size (usually its rather small size), may render more routine cultivation and maintenance sufficient despite the lack of accompanying structures or major landscape alterations.” However, in every case that this court reviewed, including those cited in [Mullins](#), factors in addition to lawn maintenance supported the adverse possessor's claim. See [Shoer](#), *supra* (the lawn at issue was enclosed with a privet hedge); [Miller v. Abramson](#), *supra* (there was a natural boundary of trees and shrubs and the appendix shows that a patio was constructed in part on the disputed area); [Pedonti v. Fantasia](#), 2011 Mass. App. Unpub. LEXIS 286 (disputed area was set off by a retaining wall, concrete blocks, a stone pillar and a hedge); [Thomas v. DiPinto](#), 2008 Mass. App. Unpub. LEXIS 352 (the disputed area was bounded by thick impenetrable brush on one side and a fence or hedge on another); [McNeill v. Miller](#), 2007 Mass. App. Unpub. LEXIS 437 (the disputed area was set off by a fence); [MacDonald v. McGilvary](#), 35 Mass. App. Ct. 902 (1993) (the disputed area was set off by a fence). Accordingly, this court concludes that Mr. Geiger's use of the Disputed Area, consisting solely of lawn maintenance, was not open and adverse.

On that ground alone, Mr. Geiger is unlikely to succeed on the merits of his claim. On this record, Mr. Geiger has also failed to establish that his use was exclusive, which provides an additional ground for denying injunctive relief.

*4 To be exclusive, “[s]uch use must encompass a ‘disseisin’ of the record owner. And this means exclusion not only of that owner but of all third persons to the extent that the owner would have excluded them.” [Peck v. Bigelow](#), 34 Mass. App. Ct. 551, 557 (1993) (citations omitted). Accord [Brandao v. Docanto](#), 80 Mass. App. Ct. 151, 158 (2011) (“A claimant's use is ‘exclusive’ for 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.’”) quoting [Peck](#), 34 Mass. App. Ct. at 557. “Acts of enclosure or cultivation are evidence of exclusive possession.” [Labounty v. Vickers](#), 352 Mass. 337, 349 (1967). “[A] use or possession which is not adverse to the owner, or which is concurrent with that of others, or which does not exclude a similar use or possession by others, will not confer a title in fee, however long continued.” [Eastern R. Co. v. Allen](#), 135 Mass. 13, 16 (1883).

Here, Mr. Geiger did not fence off or take any other steps that would preclude use of the Disputed Area by others, such as erecting structures or planting trees or shrubs. He did not incorporate the Disputed Area into his irrigation system by placing any portion of his system within its boundaries. And, on this record, others, in the form of the Wards' landscaping service, in fact continued to go on the Disputed Area seasonally to undertake the Wards' own lawn maintenance activities.

Because the court has concluded that, on this record, Mr. Geiger is unlikely to succeed on the merits of his adverse possession claim for failure to establish that his use was open, adverse or exclusive for twenty years, it is unnecessary to weigh the irreparable harm to each party in determining whether a preliminary injunction should issue. The court also notes that it has made no determination as to whether Mr. Geiger has provided satisfactory proof of the other elements of his claim.

The LP Motion

Pursuant to G.L. c. 184, § 15, the statute governing the issuance of a lis pendens, “[u]pon motion of a party, if the subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof or buildings thereon, a justice of the court in which the action is pending shall make a finding to that effect and endorse the finding upon the memorandum.” Here, Mr. Geiger has filed the LP Motion, his complaint asserts a claim of a right to title to the Disputed Area, and he has satisfied the procedural requirements of § 15(b).

Conclusion

For the foregoing reasons, the PI Motion is DENIED and the LP Motion is ALLOWED. The endorsement on the memorandum of lis pendens and required findings will issue separately.

All Citations

Not Reported in N.E. Rptr., 2020 WL 4436449

Footnotes

- 1 The court takes judicial notice of this plan, recorded in the Norfolk Registry of Deeds as Plan No. 553 of 1957 in Plan Book 204. Mass. G. Evid. Rule 201.
- 2 Affidavit of John Bruno, sworn to on July 24, 2020 (“Bruno Aff.”) ¶ 6 and Ex. 2.
- 3 Both parties address communications between counsel and between Mr. Geiger and the LLC's manager, Mr. John Bruno (“Mr. Bruno”), during January through June 2020. Because those communications are not germane to the issue of whether Mr. Geiger has established a likelihood of success on the merits of his adverse possession claim, they are not further addressed in this memorandum of decision.