New York State Supreme Court

Appellate Division : Third Department

-----------------------------------------------------------X Appellate Division Case # 519815

Mohonk Preserve, Inc., Ulster County Index # 04-0525

Plaintiff-Appellant

-against- **Affidavit in Support of**

**Reargument**

Karen Pardini and Michael Fink

Defendants-Respondents March 29, 2016

-----------------------------------------------------------X

State of New York) County of Ulster ) ss.:

MICHAEL FINK, being duly sworn, deposes and says:

(1) I am one of the pro se defendants in the above titled cause. I am

personally familiar with the facts and circumstances set forth below, and submit

this affidavit in support of the Defendants’ motion for reargument returnable

before this Court on April 25, 2016.

(2) The defendants move this Court for an order granting leave to reargue the

Court’s July 9th, 2015 order (Ex.1), which reversed the order and judgment of the

Supreme Court, Ulster County, the Honorable Christopher Cahill presiding, dated

December 19th, 2013 (Ex. 2), which had declared defendants to be the owners of

certain real property in the Town of Rochester, Ulster County, New York; and

(1)

upon reargument, for an order reversing the Appellate Division order and re-

affirming the Supreme Court’s prior decision, and again declaring defendants to

be the owners of said real property, upon the grounds that the Court overlooked

or misapprehended the facts and the law and mistakenly arrived at its earlier

decision.

(3) Procedural History:

1. Notice of entry of this Court’s July 9, 2015 order was served by

appellant by regular mail on July 23, 2015.

1. On the advice of counsel, defendants moved for permission to appeal to

the Court of Appeals on August 26, 2015. The Court denied leave on

November 23, 2015.

(c) On December 10, 2015, the Honorable Christopher Cahill, Supreme

Court, Ulster County, entered judgment in accordance with this Court’s

July 9, 2015 order. (Ex. 3)

(d) Defendants moved to reargue the leave application to the Court of

Appeals on December 23, 2015. The Court of Appeals denied reargument

on February 23, 2016.

(2)

(e) Appellant served a copy of the December 10, 2015 judgment, with notice of its entry, by regular mail on January 26, 2016.

(f) On March 1, 2016, defendants filed a Notice of Appeal from the

Judgment of the Supreme Court dated December 10, 2015, which was

derived from this Court’s order dated July 9th, 2015. (Ex. 4)

(4) That the normal statutory requirement that a motion to reargue be made

within 30 days of service of the order with written notice of its entry does not,

pursuant to CPLR 2221 (d) (3), apply to decisions in the Appellate Division, and the

Appellate Division Third Department lacks such a rule of its own limiting time to

reargue. (see: The Executive Committee of the New York State Bar Association

Report on Appellate Division Rules revised on April 4, 2014.)

(5) That this motion is made as soon as practicable after a timely (albeit

unsuccessful) pursuit of defendants’ rights in the Court of appeals, and while a

Notice of Appeal of the December 10, 2015 judgment derived from the July 9,

2015 Appellate Division order is pending before this Court. If this Court

determines that this application is not timely, the defendants ask for an

enlargement of time pursuant to CPLR 2004, and that their pursuit of leave to

appeal in the Court of Appeals, on the advice of counsel, be deemed sufficient

and good cause for any delay, and that the allegations of this affidavit be deemed

sufficient proof of the merit of their application.

(3)

(6) “A motion for reargument is addressed to the sound discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law” (Foley v Roche, 68 AD2d 558, 567 (1st Dept. 1979)). It is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision” (Peak vs. Northway Travel Trailers, Inc. 260 A.D.2d 840, 688 N.Y.S.2d 738, 3rd Dept. 1999).

(7) It is respectfully submitted that this Court misapprehended the following

facts in its July 9, 2015 decision:

(a) “…for over 100 years, their chain of title makes no reference and

contains no description of the property they now claim, as they rely merely upon

the general "being clauses" in the deeds.”

1. “…plaintiff's chain has included for over 100 years an actual description

of the 92 acres from which plaintiff's 73-acre parcel was purchased.”

1. “…the ‘prominent ridge’ that played a significant role in defendants’

analysis…does not remain prominent into the pertinent area”

1. “Defendants offered only vague, non-specific testimony regarding their

(4)

activities on the property.”

(8) It is respectfully submitted that this Court misapplied or misapprehended

the following legal principles in its July 9, 2015 decision:

(a) Rules of deed construction, priority of deed calls: Acreage was improperly

given priority over adjoining owners, absorbing, and eliminating defendant’s

predecessor in lot 1, William Chase, based on an acreage call of 92 acres in the tax

deed, and giving “key” weight to a scrivener’s tax roll entry as determinative of

the acreage of a parcel, and the priority of the call to go south west to the bounds

of Joseph Depuy was ignored on the Curran Farm description.

(b) Deference to the fact finder: This Court afforded insufficient deference to

the Trial Court’s credibility determinations, as well as the Trial Court’s substantial

investment of time and energy in mastery of the volume of evidence in this case,

and reversed or disregarded 80+ pages of findings of fact and conclusions of law

substantially without comment.

(c) Negative inference: This Court overlooked the significance of plaintiff’s

failure to call their employee, Norman Van Valkenburgh, who was in court every

day, assisting plaintiff, and who performed the survey of the disputed property

for Mohonk. He had previously given sworn testimony which agreed with

(5)

defendants’ theory of the case. Defendants were granted a negative inference

against Mohonk, which was unopposed at trial, and not addressed in plaintiff’s

appellate brief, or in this Court’s decision.

(d) Adverse possession: Defendants’ and their predecessor’s use of the

property was improperly characterized as evidence that “was insufficient as a

matter of law to establish their continuous possession and occupation of the

disputed property (see RPAPL former 511, 512)”.

(9) **Error of Fact:** “…for over 100 years, their chain of title makes no reference

and contains no description of the property they now claim, as they rely merely

upon the general "being clauses" in the deeds.”

Anyone searching the King’s Lane Lot today would immediately be put on

notice of defendants’ chain of title, because from 1873-1888,

William Chase was the record owner of Lot 1 of the Nineteen Partners Tract,

and named as the southerly adjoiner to the King’s Lane tax sale lot. He was paying

his taxes. Ambiguities that arise later in defendants’ chain of title, do not alter the

tax sale description, which became final in 1881. Defendants’ chain of title begins

in 1855 with the Stillwell/Harp deed that calls for 2 lots, including Lot 1 of the

Nineteen Partners tract. In 1862, the Harp/ Roosa Deed L 121/123 (R. 1803), also

(6)

calls for 2 lots, including Lot 1 of the Nineteen Partners tract. From 1865 on, 3 lots

are conveyed, the same previous 2, by direct reference to L 121/123, including Lot

1, and adding a third 17 acre parcel. The direct reference here is “those two lots

as conveyed by L 121/123”, and has the same effect as if the previous referenced

deed language was fully laid out. It is directing you to look at the previous deed to

determine what is being conveyed. …“those two lots” in the deed construction,

includes Lot 1. The direct reference to L 121/123 is still present when Chase buys

in 1873,( Ex. 58, R. 1808, 1809) and sells to Bloomer in 1888. It is “those two

lots, and that other lot”, making three lots, that flows forward through Selig

Brenner in 1920, and then ultimately “being the same premises conveyed to Selig

Brenner (which had been explicitly three lots) in later deeds. So the defendants

looked to the construction of the deeds, not just general being clauses, to identify

what was carried forward in their chain. In 1965, the reference to the same

premises as being conveyed to Selig Brenner is part of the text that is missing

from the defendants’ chain of title due to the loss of 2 pages from the deed

description. These 2 missing pages of deed description are the same missing

pages determined to be a scrivener’s error in Shawangunk vs. Fink (261 A.D.2d

692 (1999) 690 N.Y.S.2d 158).

(7)

“we, therefore, conclude that the omission of Parcels D and E from the 1965 and subsequent deeds was the result of either a scrivener's error or the recording office's loss of one or more pages of the deed.” (Shawangunk vs. Fink supra)

Defendants’ title expert explained their chain, deed by deed to the Court and how each and every deed transferred title and how he determined that they were the owners of the William Chase parcel.

Testimony of Arthur Freer (R. 972-3, 974)

Q: As part of your title search, did you come to an opinion that you can state with a reasonable degree of certainty as to whether the property in dispute in this case is within the chain of title of Karen Pardini and Michael Fink?

A: Yes

Q: Okay, what is your opinion?

A: I believe that they are the owners of the property.

This Court stated in its July 9, 2015 decision: “The parties agree that far less

than precise records and deeds were used for portions of Ulster County in the

nineteenth century — during a time key to resolution of ownership of the

property — and, thus, the use of extrinsic evidence was appropriate in this case.”

Extrinsic evidence: Defendants’ title expert looked to out sales by owners of

the disputed property to clarify the intention of the instruments that are in the

(8)

defendants’ chain of title, and found no out sales of the disputed property. (Art

Freer R. 1001-2)

Extrinsic evidence: Defendants were put into actual possession of the disputed

property by their predecessor in title, Wilbur Smith, who owned the property

since 1958. (Mike Fink R. 1325-7) Wilbur Smith had the property in dispute logged

in 1982-83 (Heinitz R.1218-21) The property in dispute was frequently accessed

on horseback by the road which entered the property in dispute on the east. Their

open and notorious possession included the cutting of over 250 large trees

(stumps depicted on Cross Map trial Ex. K, Attached Ex. 5), including frequently

running a log skidder over the property, and at least 5 timber cuttings, and cutting

hundreds of cords of firewood. Testimony of expert arborist witness Peter Landau

confirmed a 1991 logging operation and additional trees being dragged down

through the lands in dispute in 1995, 2000, 2003, and 2005, and piling up the logs

in plain view of the neighbors, without protest from Finger or Mohonk. (R. 1233-

1235)

(10) **Error of Fact:** “…plaintiff's chain has included for over 100 years an actual

description of the 92 acres from which plaintiff's 73-acre parcel was purchased”.

(9)

This “actual description” comes from an ancient 1881 tax deed adjoiner

description that calls for the defendants’ predecessor from 1873-1888, William

Chase, as the southerly adjoiner. (Chase deed Ex. 58, R. 1808, 1809) This period is

before, during, and after, the assessments, tax sale, and tax deed in plaintiff’s

chain. The deed into William Chase makes direct reference to those two

lots as conveyed by L 121/123. (Harp-Roosa deed, R. 1803) There are 2 lots

in L 121/123. The second lot is 1/6 part of the undivided tract being Lot 1 of the

Nineteen Partners Tract.

As this Court stated in its July 9, 2015 decision: “in the nineteenth century — during a time key to resolution of ownership of the property…”

Therefore this controversy is already settled in 1881, years before any ambiguities

creep into defendants’ chain of title. The King’s Lane Lot tax sale description is

only an adjoiner description, not a lot on a filed map., and specifically does not

even say it is in Lot 1. The 1876 assessment (R. 1556) says it is not in any tract or

patent. It was assessed to “Unknown owner”, not the heirs of John Depuy. It is

not a metes and bounds description. Here, the passage of over 100 years without

a change does not help plaintiff, because the William Chase adjoiner actually puts

appellant on notice of defendants’ chain of title, which was crystal clear before,

during, and after the tax sale and tax deed, and that the King’s Lane Lot

(10)

was not 92 acres, but contains only 26 acres within its adjoiners. Norman Van

Valkenburgh’s prior testimony in Shawangunk (Find. Of fact 161-163) (Ex. 6)

shows he was aware that the Curran Farm bisected Lot 1 of the Nineteen

Partners Tract in 1841, and that he knew Chase owned an interest in Lot 1.

Thus, the 73 acre parcel purchased by Mohonk followed the existing

1841 boundary line, and did not create a new one, because Finger did not own

the 73 acres, just the 30 acres to the north. The purchase of defendants’ land

from a stranger to title was similar to contemporaneous spurious purchases made

by Norman Van Valkenburgh and Robert Anderberg for Mohonk front

organization, Shawangunk Conservancy, Inc. (See Mary Lou Smith and Kelder and

Hagan deeds in Shawangunk vs. Fink (261 A.D.2d 692 (1999)690 N.Y.S.2d 158) In

this case Robert Anderberg, who had previously threatened to get the

defendants’ land (R. 1206), facilitated the purchase of the land that Finger did not

own in lot one, and was the witness, notary, and mail back address on the deed.

(R. 1604)

(11) **Error of Fact** “…the ‘prominent ridge’ that played a significant role in

defendants’ analysis…does not remain prominent into the pertinent area.”

In determining whether the ridge defining the southern boundary of the “Curran

Farm” extended into and bisected Lot One, creating a 70 acre southern lot and a

30 acre northern lot, the best authority would be the prior sworn testimony of

(11)

Mohonk’s surveyor, Norman Van Valkenburgh, in Shawangunk Conservancy vs. Fink (305 AD2d 902), of which the court took judicial notice (finding fact line 161).

Q : Okay. What did you do to locate the next adjoiner?

A : The 1851 deed into John Davis said it was bounded northwesterly by a lot lately owned by John Curren... I found a deed into John Curran, C-u-r-r-a-n. That was for a – it was an 1841 deed from Elijah Alliger, A-l-l-i-g-e-r, a 200 acre parcel which included the nine acres that had been left by John Depuy to his daughter Sarah Elizabeth in the 1828 deed probated, the will probated in 1828, and it was a partial metes and bounds and a partial adjoiner description that ran across Lots 1,2,3 and into 4. But the southwesterly adjoiner description was called along the top of the high rocks, and this is a long ridge of high rocks here, and the remainder of the 200 acres was to the northwest of that ridge of high rocks. That was an 1841 deed. (Shawangunk vs. Fink appeal R. 449 lines 6- 26)

Furthermore, this court overlooked the fact that the final call in the pertinent

southwesterly direction in the Curran Farm description is to a large pine tree

standing above Sander’s Spring on the bounds of Joseph Depuy; shown at an

elevation of 1000 feet on the said topo map. So at the beginning of the south

westerly course, the highest rocks in the distance are on ronde bar, and that is

where defendants’ expert surveyors end the south westerly course, at the bounds

of Joseph Depuy. Furthermore, the topo map shows that after the “ledges” peter

out in lot 2, the terrain does not flatten out, it rises 120+ feet to the edge of the

high rocks at ronde bar on the bounds of Joseph Depuy. So that the Curran Farm

description south westerly course starts on a cliff, goes along the cliffs, (where

there are cliffs) and ends on the highest cliff, at an elevation of 1000,’ at a stone

monument identified by 2 surveyors, and most importantly, “southwest to the

(12)

bounds of Joseph Depuy”, due to the priorities of direction and adjoining owner.

(12) **Error of Fact:** “Defendants offered only vague, non-specific testimony

regarding their activities on the property.” Defendants were put into actual

possession of the disputed property by their predecessor in title, Wilbur Smith,

who owned the property since 1958. (Mike Fink R. 1325-7) Their open and

notorious, exclusive, hostile, continuous possession under a claim of right

included the cutting of over 250 large trees (stumps) depicted on the Cross survey

map(Ex.5), including running a log skidder over the property, and at least 5 timber

cuttings, and the cutting of hundreds of cords of firewood, which were brought

down by dump truck on a regular basis for 17 years, in plain view, down the

access road which led to defendants’ other lands. Testimony of expert arborist

witness Peter Landau confirmed a 1991 logging Operation, and additional

trees being dragged down through the lands in dispute in 1995, 2000, 2003, and

2005. (R. 1233-1235) and piling up the logs in plain view of the neighbors, without

protest from Finger or Mohonk.

Smitty’s actual possession was confirmed by the testimony of Mark Heinitz

Q: At some point Mr. Heinitz, did you work on a logging crew?

A: Yes.

(13)

Q: Were you the foreman of the crew?

A: I was the supervisor, yes.

Q: Who’s logging operation was that?

A: M.L. Bloom and Son.

Q: During 1982 and 1983, did you work for the Bloom logging operation?

A: Yes

Q: At the time you did the logging operation, who were you logging for?

A: Smitty.

Q: … back at the time you did the logging, were you familiar with the area that you were working?

A: Yes, we had gone walked it over with Smitty. He showed us what he wanted to cut.

Q: Do you have an understanding that the property in dispute…involved in this case was part of Smitty’s ranch that you logged?

A: Right. It was the reason we were logging it.

Q: Where you did the logging, was it within the bounds of the parcel shown on this map.

A: That’s what I was under the impression.

Q: Since doing the job, did you go back and visit this property?

A: I met with Mike Fink a while back, and kind of walked on it, yes.

Q: Were you able to observe any roads or trails that you had been on?

A: You could still see the trails and stumps and whatnot.

Q: When you were you doing the logging operation for Smitty, was the logging operation visible from the road?

(14)

A: Oh yeah. It was. Right. That’s where our landing was. Heading right across the street from the bar there.

Q: Did anybody during that job come to you, and tell you that you weren’t on Smitty’s Ranch Lands?

A: No.

Q: Did anybody come and tell you that you were on their property?

A: No.

Improvement of roads and trails: The road and trails on the entire disputed property gave access and led only to defendants other property and did not access Finger. These roads and trails were constantly maintained and improved. Finding of facts and conclusions of law: Mark Heinitz 197,238,240, Jeffrey Smith 198, Defendants 201, Roger Lapp 219, Keith Douglas, Dave Douglas, 229,230,247 Dave Olsen 246 229,230,246, Ronnie, Richie, Roger Lapp,247, and others.

(13) **Error of Law:** Rules of deed construction, priority of deed calls: Acreage was improperly given priority over adjoining owners, and direction, absorbing, and eliminating defendant’s record predecessor in lot 1, William Chase, and giving “key” weight to an ambiguous scrivener’s tax roll entry as determinative of the acreage of a parcel. This Court’s July 9, 2015 order overstated the importance of the quantity of land contained in the assessment roll for the King’s Lane Lot:

“Third, upon our review of the purported "2" in "26" acres in the 1876 tax assessment, we find that the number was, in fact, a "9" for "96." This undercuts a **key** link in defendants' argument that the relevant property was never properly in plaintiff's chain of title.”

This Court offered no opinion as to how this 96 became a 92. In any event, the tax assessment could have said .26 acre , 96 acres, or 260 acres, or 920 acres, it does not matter, because the property is described and located by its adjoiners, not its

(15)

acreage, which is given little weight. (see Goff vs. Shultis [26 N.Y.2d 240](http://www.leagle.com/cite/26%20N.Y.2d%20240))

“…any…locative call of the premises, such as…the land of another person which is certain and notorious, must be adhered to in the location of the grant, although it does not correspond with the course, distance, or quantity, which all must give way to such known boundaries.” Wendall vs. Jackson, 8 Wend. 183 (N.Y. 1831)

The failure of Mohonk to follow the southwesterly direction in the Curran Farm

deed to the bounds of Joseph Depuy is also a violation of this principal.

This Court’s July 9, 2015 order also overstated the importance of the quantity

of land contained in the tax deed:

“…plaintiff's chain has included for over 100 years an actual description of the 92 acres from which plaintiff's 73-acre parcel was purchased”.

However, the actual description of the King’s Lane Lot is an adjoiner description,

and, when located by its adjoiners, it cannot be 92 acres, and was

determined by defendants’ expert surveyors to actually be 26 acres. In attempting

to hold the acreage at 92 acres, and then place the adjoiners that would

correspond to that size parcel, plaintiff did violence to the existing adjoiner

description, and to survey law, and had to argue that the record owner of lot 1

from 1873-1888, Willliam Chase, defendants’ predecessor, owned nothing in lot

1, and that the adjoiner call for south by William Chase was in error. Further, this

placement of 92 acres was lacking Kortright as a southerly adjoiner and Jacob S.

Roosa as an easterly adjoiner for 1900 feet, as well as Dubois Coddington.

(16)

Plaintiff’s own title expert and survey expert disagreed between themselves as

to the location of the adjoiners.

Therefore, the Trial Court had a survey as a basis for its finding that the

contested assessment roll acreage was 26, not 96; and not just its subjective

interpretation of a cursive numeral in a 130 year old assessment roll entry.

The fact that this Court could not agree with the Trial Court as to what

number was indicated in an ancient tax roll is another example of why

acreage has the lowest priority in a deed description, as the numbers on a

page are subject to smudges, scriveners errors, ambiguity, and subjective

interpretation. (see Goff vs Schultis*,* [26 N.Y.2d 240](http://www.leagle.com/cite/26%20N.Y.2d%20240))

(14) **Error of Law:** Deference to the fact finder: This Court afforded insufficient

deference to the Trial Court’s credibility determinations, as well as the Trial

Court’s investment of time and energy in mastery of the volume of evidence in

this case, and reversed or disregarded 80+ pages of detailed findings of fact and

conclusions of law substantially without comment. The question of credibility of

witnesses extends to the credibility of plaintiff’s case. When the plaintiff put forth

(17)

witnesses in attempt to rebut defendants’ adverse possession claim, the

witnesses were shown to be lying. (Gary Finger, Lewis Warush)

Otherwise the plaintiffs’ case was lacking any evidence of their use, care, or

possession of the disputed property. When the plaintiff attempted to place the

Curran Farm boundary (which subdivided lot 1 in 1841) other than along the ridge

in lots 1-4 as determined by defendants’ expert surveyors, and the prior sworn

testimony of Norman Van Valkenburgh, they undermined their credibility. First, in

summary judgment, Richard Brooks, plaintiff’s survey witness, claimed the Curran

boundary went around the perimeter of the southern bounds of lot 1. Then on

the last day of trial, over 15 years after the Van Valkenburgh survey, he did a 180,

producing a map claiming the boundary was north of the ridge line and down the

hill about 180 ft in elevation, with 2 additional turns not called for in the Curran

deed, and not following any rocks or ridge, and without justification. The

Court took judicial notice of this change of heart (Find. of fact 164) This

map showed the line going south west for 250 feet after the ledges peter

out in lot 2 in the exact same direction determined by defendants’ expert

surveyors, but then turning at the lot 1 line and heading north without

explanation. When plaintiff’s title expert claimed that William Chase owned other

land in the area, but not adjoining or in lot 1, the Fact finder could not hide his

(18)

disbelief that plaintiff’s position was that the William Chase adjoiner to the 1881

tax deed did not adjoin the tax sale property. The court found that theory to be

illogical, especially when the deed for those other William Chase lands in the area

also conveyed lot 1 explicitly. (Find. of fact 89-94 Ex. 2 attached)

**(15) Error of Law**: Negative inference: This Court improperly awarded plaintiff

title to the disputed premises after plaintiff failed to call their employee,

department head, and in house surveyor, Norman Van Valkenburgh, who

performed the survey of the disputed property for Mohonk; even as Van

Valkenburgh was in court daily, actively assisting plaintiff. Such testimony would

not have been cumulative, as Richard Brooks was never on the property in

dispute. (R.381) Van Valkenburgh had previously offered sworn testimony

which contradicted plaintiff’s, and agreed with defendants’ theory of the

case, and of which the Court took judicial notice (Finding of fact 161-163)(Ex 6)

Therefore, his testimony here would have been poisonous for Mohonk.

Defendants were granted a negative inference against Mohonk (Conclusions of

Law pg. 82-85, Ex. 2 attached), which was unopposed at trial, and not addressed

in appellant’s brief, or in this Court’s decision.

(16) **Error of Law:** Adverse possession: Defendants’ and their predecessor’s use

of the property was improperly characterized as evidence that “was insufficient as

a matter of law to establish their continuous possession and occupation of the

disputed property (see RPAPL former 511, 512)”.

(19)

As a threshold matter, defendants established color of title under their deed.

Testimony of Robert Cross Sr.:

Q: Did you form an opinion as to whether the lands depicted in ex. K were described in any deeds for Fink and Pardini in their chain?

A: Yes, I did.

Q: Did you review the deeds in the Fink and Pardini chain?

A: Yes I Did.

Q: Can you tell us what deeds you used to identify the Fink and Pardini chain.

A: Well, we had the property coming in. The first deed was Catharine Stillwell. We have a chain coming down through… It came into William Chase. And it’s described as that 1/6 undivided part of Lot Number One of the Nineteen Partners Tract.

Q: Now… can you tell us how you… located this 1/6 part into… this southern 70 acres shown on your map.

A: …everything to the north had been conveyed out. (R. 640-641)

Testimony of Arthur Freer (R. 972-3, 974)

Q: As part of your title search, did you come to an opinion that you can state with a reasonable degree of certainty as to whether the property in dispute in this case is within the chain of title of Karen Pardini and Michael Fink?

A: Yes

Q: Okay, what is your opinion?

A: I believe that they are the owners of the property.

“The instrument need not show a good title. The critical issue in a claim under the doctrine of adverse possession is possession and not record title. The

(20)

claim that one has an instrument to justify his possession differs from a claim for possession without assertion of interest shown by an instrument, in the kind of physical act which accompanies possession; and this is spelled out in a comparison of section 512 with section 521. A groundless or frivolous claim under a purported instrument would not justify reliance on the kind of possession described in section 512. But because the instrument arguably gives no sufficient title does not deprive one claiming title under it and possessing the land for the time, and in the manner prescribed, of the benefit of that section. (Goff vs. Shultis, 26 N.Y. 2d 240)

Although the description of the property contained in plaintiff's deed, which forms the basis of its claim of right (*see,*RPAPL 512), is not entirely clear, it is sufficient to defeat summary judgment because it is arguably valid (*see, Goff v Shultis,* [26 N.Y.2d 240](http://www.leagle.com/cite/26%20N.Y.2d%20240), 247-248; *Whipple v Trail Props.,* [235 A.D.2d 795](http://www.leagle.com/cite/235%20A.D.2d%20795); *McGuirk v Ferran,* [222 A.D.2d 943](http://www.leagle.com/cite/222%20A.D.2d%20943), 946, *lv dismissed*[88 N.Y.2d 1003](http://www.leagle.com/cite/88%20N.Y.2d%201003)), especially since plaintiff's surveyor identified the property based on this deed. (Shawangunk Conservancy vs. Fink 261 A.D.2d 692 (1999) 690 N.Y.S.2d 158)

Defendants offered evidence, unchallenged and accepted by the fact finder, of

the industrial level use of the disputed property by the defendants and their

predecessor for timber, fuel (fire wood), both for sale and the use of the

occupant, and stone, for their own use and for sale, as well as the improvement

of roads and trails, for well in excess of the statutory 10 year period.

Testimony of Karen Pardini: (R. 1268)

Q: How do you heat your home?

A: With wood.

Q: Has that been since you bought the place?

A: Yes, always.

(21)

Q: Do you get wood you burn in your home from the land you bought from

Smitty?

A: Yes.

Q: Does that include wood from the portion of your property that’s in dispute today?

A: Yes.

Q: Do you know whether the wood that you burn is …fallen down and were taken off there (the property in dispute) or live…?

A: Generally the wood we use is standing dead.

Testimony of Michael Fink (R. 1142)

Q: Since 1987, have you heated your house?

A: Exclusively with wood.

Q: And where do you get the wood that you heat your house with?

A: Off our property.

Q: Does that include the property in dispute in this case?

A: Yes especially there.

(R. 1344)

Q: Have you sold firewood off the property in dispute, either down, or standing dead trees?

A: Yes I have.

Q: From 1987 on?

A: Correct.

(22)

Q: How about stone? Have you sold stone that you have taken off your property in dispute?

A: Yes I have. It’s been ongoing and it started in very early nineties.

Testimony of Mark Heinitz: (R. 1218-1221)

Q: At some point Mr. Heinitz, did you work on a logging crew?

A: Yes.

Q: Were you the foreman of the crew?

A: I was the supervisor, yes.

Q: Who’s logging operation was that?

A: M.L. Bloom and Son.

Q: During 1982 and 1983, did you work for the Bloom logging operation?

A: Yes

Q: At the time you did the logging operation, who were you logging for?

A: Smitty.

Q: … back at the time you did the logging, were you familiar with the area that you were working?

A: Yes, we had gone walked it over with Smitty. He showed us what he wanted to cut.

Q: Do you have an understanding that the property in dispute…involved in this case was part of Smitty’s ranch that you logged?

A: Right. It was the reason we were logging it.

Q: Where you did the logging, was it within the bounds of the parcel shown on this map.

A: That’s what I was under the impression.

(23)

Q: Since doing the job, did you go back and visit this property?

A: I met with Mike Fink a while back, and kind of walked on it, yes.

Q: Were you able to observe any roads or trails that you had been on?

A: You could still see the trails and stumps and whatnot.

Q: When you were you doing the logging operation for Smitty, was the logging

operation visible from the road?

A: Oh yeah. It was. Right. that’s where our landing was. Heading right across the street from the bar there.

Q: Did anybody during that job come to you, and tell you that you weren’t on Smitty’s Ranch Lands?

A: No.

Q: Did anybody come and tell you that you were on their property?

A: No.

Improvement of roads and trails: The road and trails on the entire disputed property gave access and led only to defendants other property and did not access Finger. These roads and trails were constantly maintained and improved. Finding of facts and conclusions of law: Mark Heinitz 197,238,240, Jeffrey Smith 198, Defendants 201, Roger Lapp 219, Keith Douglas, Dave Douglas, 229,230,247 Dave Olsen 246 229,230,246, Ronnie, Richie, Roger Lapp,247, and others.

Testimony of expert arborist witness Peter Landau confirmed the 1991 logging operation and additional trees being dragged down through the lands in dispute in 1995, 2000, 2003, and 2005. (R. 1233-1235)

Q: With regard to wound-wood, are you able to make any observation about wound-wood and ascertain with a reasonable degree of certainty, the age of the wound-wood?

A: Oh yeah, that’s real easy.

Q: Can you explain how you do that?

(24)

A: You find the spot where the damage occurred. You will see the wound-wood start. From that point on, if you count the growth rings in that wound-wood, you would determine how many years ago that damage occurred.

Q: With regard to the wound-wood you found on the property in dispute, did you make a study with regard to the rings on the wound-wood?

A: When I was back there, I found one with about 13 years of wound-wood. I

found another with about 4 years. And I have 5 samples with me and they vary.

Q: What time period do they vary between?

A: Between …3 years and 14 years is what I have with me.

Q: Did you find any that dated back further than that?

A: We found one on a chestnut oak tree, and I believe that it was like 16 or 17 years.

Q: That wound to the tree had been created 16 or 17 years to your finding the sample?

A: Correct.

Q: You went on the property I believe in 2008?

A: Yes.

Q: Would you please pick up your bucket marked for ID as defendants’ exhibit JJJ. Can you tell us what’s in your bucket?

A: These are dissections. Here is a piece from a curb on that trail, it’s got several pieces of wound-wood formed.

Q: Tell us what the wound-wood shows on that particular piece.

A: If my eyes are correct, I am counting 13 years on this one. …Looks like there’s 3 years or 4 years on this one. …This one shows maybe about 4 years. I have one from way above. This one shows about 8 years. Shall I go further?

(25)

Q: Do you have more samples?

A: I think there’s 2 more in here. …This one has about 5 years. This one came from up above, really off the main trail, onto another trail and it has 3 growth rings on it.

Summary

It is respectfully submitted that this Court should not have disturbed the

carefully laid out findings of fact and conclusions of law of the Supreme Court.

Plaintiff’s title was not a legitimate competing claim to the 73 acre William Chase

parcel. The King’s Lane Lot, by definition, adjoined it to the north. The adjoiners of

the King’s lane lot fit like a glove for a 26 acre parcel to the north of the land in

dispute. Mohonk’s failure to call their own surveyor gave rise to the inference

that they knew they were only buying a lawsuit from Finger in 1994, much like the

“missing pages” Mary Lue Smith deed in Shawangunk vs Fink in 1994. It is telling

that Mohonk only bought what Finger did not own in lot 1. Whatever else Van

Valkenburgh would have testified about, it would have been bad for Mohonk.

Conclusion

Wherefore the defendants request leave to reargue this Court’s July 9, 2015

order, on the law and the facts, and upon reargument, for a reversal of the

Court’s July 9, 2015 order, and reaffirming the December 19, 2013 order of the

honorable Christopher Cahill, Ulster County Supreme Court, and again declaring

defendants to be the owners of the 73 acre disputed property in Ulster County.

(26)

Respectfully submitted,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Michael Fink, 600 Clove Valley Road, High Falls, NY 12440

Sworn to before me this 29 day of March, 2016

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Notary Public My Commission expires:

(27)