

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK - CIVIL TERM - PART 54

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3 JOHN GOLOBE,

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Plaintiff,

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Index No.

-against-

655854/2020

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6 IRA ALTCHER, as Trustee of the  
Emil Krause Revocable Trust,

7

Defendant.

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8

VIRTUAL PROCEEDING

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Motion

New York, New York

10

February 28, 2022

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B E F O R E:

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HONORABLE JENNIFER G. SCHECTER,

13

JUSTICE

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A P P E A R A N C E S:

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McLAUGHLIN & STERN, LLP

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ATTORNEYS FOR THE PLAINTIFF

17

1122 FRANKLIN AVENUE

GARDEN CITY, NEW YORK 11530

18

BY: JOHN M. BRICKMAN, ESQ.,

BENJAMIN KAPLAN, ESQ.,

19

DUANE MORRIS, LLP

20

ATTORNEYS FOR THE DEFENDANT

1540 BROADWAY

21

NEW YORK, NEW YORK 10036

BY: REBECCA AVRUTIN FOLEY, ESQ.,

LESLIE D. CORWIN, ESQ.,

22

23

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VINCENT J. PALOMBO, RMR, CRR

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OFFICIAL COURT REPORTER

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## Virtual Proceedings

1 THE COURT: We have got such an interesting case  
2 today, and I'll go through the facts, briefly. This is a  
3 situation where -- I think his name was Henry Golobe, Henry  
4 had three children, he had Dorothy, Zangwill, Yale. He left  
5 his property, by device, to -- or devices, to Dorothy.

6 Dorothy dies in 1992, leaving Zangwill and Yale,  
7 but the key thing here is there's no indication that anyone  
8 knew where Yale was at the time, so the property went to  
9 Zangwill, it went to Surrogate's Court, I think he declined,  
10 I'm not using the exact correct language, but he renounced  
11 his interest, and it went to Plaintiff John in 1992.

12 So, since -- I think there was a deed or an  
13 administrator's deed in November of 1992 that was recorded,  
14 and for years and years and years and years and years, John  
15 took care of the property in every way, shape and form. He  
16 took out a mortgage, he did the rents, he did improvements.

17 Ultimately, I think he wanted to sell the property,  
18 and in 2018 he finds out that Yale was alive at the time  
19 that Dorothy died, and I think Yale was more than ten years  
20 older than Dorothy, so they didn't know where he was, turns  
21 out he was in Orange County when they were in Surrogate's  
22 Court.

23 They printed something in Newsday, there was no  
24 response.

25 A lawyer friend of the family had testified that

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## Virtual Proceedings

1 Yale died, I think, in the 1980s, Surrogate's Court had  
2 bought that before coming to the conclusion that Zangwill  
3 would inherit -- but in any event, 2018, long, long after  
4 1992, John discovers, or his cousin and John discovers that  
5 Yale's decedents are out there, and I think this is  
6 actually maybe his brother-in-law's trust. Let me figure  
7 that it out, one second. It's his wife's, sister's, husband  
8 Emil, he created a trust.

9 So that's where we stand now. We have competing  
10 claims, and the question today is whether or not plaintiff  
11 should -- or both parties here are moving for summary  
12 judgement, I have motion sequence one and two. One is  
13 plaintiff's motion for summary judgement, and two is  
14 defendant's motion for summary judgement, and I've read the  
15 papers, and I've read the cases with tremendous interest,  
16 and I'm going to start off with you, Ms. Foley, and I'm  
17 going to be very up front and ask you: Why shouldn't I grant  
18 summary judgement to the plaintiff here, taking into account  
19 that -- and I accept, by the way, the proposition that  
20 neither party knew of the other, right? There's no evidence  
21 here that the plaintiff knew about the defendant or that  
22 Yale or that the defendant knew -- or any of defendant's  
23 predecessors knew of the interest.

24 My issue is this, right, we have section 541 of the  
25 RPAPL, which creates this 20 year rule for tenancy in

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1 common, usually it applies in situations where parties know  
2 that they're tenants in common, that's not even the case  
3 here, if anything, there was tenancy in common by operation  
4 of law without knowledge of any of the parties, but  
5 accepting that it applies, and taking this 20 year rule, and  
6 also accepting that the adverse possession would have to  
7 start ten years after, it's not an automatic rule, there  
8 still has to be adverse possession; in a situation where,  
9 here, there is zero acknowledgment of the parties'  
10 co-tenancy, never, ever, any acknowledgment during those 20  
11 years, why shouldn't the plaintiff win by summary judgement  
12 here, based on adverse possession?

13 MS. AVRUTIN FOLEY: Sure, your Honor, I'm happy to  
14 answer that, and you know, I think this goes back -- as we  
15 discussed in our papers, the purpose of adverse possession  
16 or adverse possession can really only transfer title of the  
17 property, where there has been some kind of notice, and I  
18 understand, you know, neither party here had, you know, any  
19 knowledge of the co-tenancy, but the fact is the reason that  
20 there was no knowledge of the co-tenancy is because the  
21 plaintiff decided to do nothing, the plaintiff just,  
22 basically, when he was going through Surrogate's Court  
23 proceeding, he -- you know, he stuck his head in the sand  
24 he -- you know, did zero investigation, and the only reason  
25 that the parties didn't know of the co-tenancy is because

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## Virtual Proceedings

1 the plaintiff, you know, decided to take possession of the  
2 property and, you know, not do the research and ultimately  
3 not tell anyone about it and, you know, what the case law in  
4 New York, I believe it's the Trevisano case, which we cited  
5 in our brief said, that the -- while the statute says that  
6 ten years after -- you know, well, after the statutory 20  
7 years, there can be adverse possession, but it's certainly  
8 not automatic, you still have to prove all of the elements.

9 And I think that, you know, what's happened here is  
10 the plaintiff can't prove -- because of the way that he  
11 handled the situation, he can't prove the hostility  
12 requirement and he can't prove the open and notorious  
13 requirements.

14 THE COURT: So let's go through that, because I  
15 read Trevisano, I read Loveless Family Trust, both of those  
16 are cases that the defendant relies on to say it's not  
17 enough, there has to be this hostility.

18 In those cases, though, at some point there was a  
19 recognition of tenancy in common, there was a recognition  
20 that someone else had an interest.

21 This case, in stark contrast, there is never, ever  
22 any acknowledgment of a competing interest to the property,  
23 and it is always on notice, in terms of notice. What about  
24 all the unequivocal acts in situations where parties know,  
25 at some point that there's a tenancy in common, then acts

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## Virtual Proceedings

1 that are taken are presumed to be on behalf of the tenant in  
2 common, right?

3 MS. AVRUTIN FOLEY: Correct.

4 THE COURT: And that's certainly the basis for the  
5 presumption in the statute, but here, there is never, ever  
6 that recognition. Like -- I mean, we know that perhaps the  
7 statutory -- the presumption applies, right? Because they  
8 were, in fact, tenants in common. Here, forget about the  
9 ten years even after the presumption would be overcome, even  
10 the ten years before, there is never, ever any recognition  
11 of ownership that is coextensive, or an interest for anyone  
12 else, and in that regard, the plaintiff here is always  
13 adverse in every way, and hostile, and putting the whole  
14 world on unequivocal notice, I'm the only person you have to  
15 come to. It's not like there's an insurance policy out  
16 there with someone else's name or any recognition.

17 MS. AVRUTIN FOLEY: Your Honor, with all due  
18 respect -- well, first of all, I disagree that there was  
19 never any recognition. As you know, in 2018 the plaintiff  
20 discovered that there was a co-tenant --

21 THE COURT: So let's talk would that, because I  
22 know you're going to rely on Blanchard, right --

23 MS. AVRUTIN FOLEY: Sure. Yes.

24 THE COURT: But what about cases like Midgley and  
25 Galli that say that it has to be during the period where

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## Virtual Proceedings

1 there is an interest that it is acknowledged? It can't be  
2 that the adverse possession time has run, or the relevant  
3 period has run and then there's an acknowledgment, because  
4 that's just -- you know, I forget, there was a great phrase  
5 in one of the cases in terms of recognition after the period  
6 ends. I don't know if it was --

7 MS. AVRUTIN FOLEY: But it --

8 THE COURT: That's kind of like a fortuitous --  
9 whether or not you ask someone after that, doesn't matter.

10 MS. AVRUTIN FOLEY: Yes, your Honor, I understand  
11 your concern, and I think Blanchard addresses that, you  
12 know, it's not conclusive, but Blanchard said it certainly  
13 can inform, you know, whether there was adverse possession  
14 or not and I will -- you know, I'll go back to the facts  
15 that the only reason that the parties did not know about the  
16 co-tenancy is because the plaintiff did no investigation  
17 when he took over the property and I don't think that can be  
18 ignored, because if he had actually done any investigation,  
19 he would have known that there was a co-tenant and both  
20 parties would have known that there was a co-tenancy. The  
21 only reason that didn't happen is because the plaintiff  
22 ignored it and accepted the property and just moved on,  
23 pretended as if -- you know, there was no -- that he -- the  
24 property was his and his alone.

25 And he was aware, while Yale might not have been in

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1 touch with the family, he was aware of Yale's existence,  
2 Yale was his uncle, his father's brother. And the plaintiff  
3 relied on his father's friend, Howard Kozatsky(ph) was a  
4 friend of his father, played tennis with his father, so why  
5 would his father's friend have any more knowledge of the  
6 family than his father? He wouldn't.

7 And the fact remains that this was -- you know, a  
8 fraud on a family member and he can't -- you know, he can't  
9 just move forward and pretend as if there's no other  
10 interest in the property just because that's what, you know,  
11 he wants to do, spend years maintaining the property.

12 Of course, his uncle and his uncle's heirs and  
13 beneficiaries had no idea about the property, they didn't  
14 even have any reason to know that the property existed  
15 because, you know, they weren't in touch with his aunt  
16 Dorothy, but --

17 THE COURT: What about his father? Did he know --

18 MS. AVRUTIN FOLEY: His father --

19 THE COURT: One second.

20 Did his father know that the property existed?

21 MS. AVRUTIN FOLEY: Apparently not. Well -- no,  
22 the plaintiff knew, but Yale had no reason -- Yale didn't  
23 know and then Yale died several months after his sister. So  
24 he didn't -- Yale, presumably -- if they didn't know Yale  
25 was still alive, presumably Yale didn't know that his sister

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## Virtual Proceedings

1 had died because no one informed him, so while he might have  
2 known that the property was in the family, if he didn't know  
3 that his sister had died, then he didn't know that the  
4 property had passed, because no one bothered to contact him  
5 about it.

6 So I think -- you know, you might want to mention,  
7 you know, the Newsday article, but the fact is the Newsday  
8 article was published in Long Island, Dorothy died in  
9 Manhattan and Yale lived in Orange County. So if they're  
10 publishing in a newspaper in Long Island, that's certainly  
11 not appropriate notice

12 THE COURT: So that is certainly not the notice the  
13 adverse possession relies on, right? The notice that the  
14 adverse possession relies on is notice to the universe, that  
15 there is only one owner.

16 But let's focus on John and the Surrogate's Court  
17 proceeding. There is evidence from the lawyer, the family  
18 friend, who gets up, I don't see any indication of anything  
19 nefarious and Surrogate's Court was satisfied, so why  
20 shouldn't John Golobe, the plaintiff, rely on: There's an  
21 order from Surrogate's Court that establishes, this is mine.  
22 There is, again, no indication that he knew, or had reason  
23 to know that Yale is still alive in Orange County. The  
24 Surrogate's Court gives his father, and then consequently  
25 him, the title to the property. And decades and decades go

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1 by, he does absolutely everything, I just -- where is the  
2 issue here, in terms of isn't this exactly one of the things  
3 that adverse possession is supposed to do? It's supposed to  
4 encourage, allowing alienation of property. And here we  
5 have a situation, again, where he went to Surrogate's Court,  
6 he gets this administrator's title, he does absolutely  
7 everything, ten years go by, there isn't a peep. You know,  
8 another ten years go by and even a few more years go by,  
9 why -- and there's no indication that either one of them,  
10 Yale's family or the plaintiff's family, had any knowledge  
11 of each other.

12 So then we just begin to look to see, well, who  
13 owns the property, and I have a record that establishes that  
14 absolutely everything was done by the plaintiff, not in a  
15 hidden fashion without any recognition of anyone else,  
16 again, I just -- why wouldn't this be the scenario where  
17 adverse possession gives him title?

18 MS. AVRUTIN FOLEY: Your Honor, I understand -- you  
19 know, I understand what you are saying, but I don't see how  
20 the plaintiff can be rewarded, actively rewarded, and how,  
21 you know, the decades and, you know, centuries of adverse  
22 possession law in New York State would want to reward  
23 someone who does no investigation when he takes over the  
24 property, you know, makes reckless statements to Surrogate's  
25 Court -- you know, Surrogate's Court, whether the

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1 Surrogate's Court was right to accept the plaintiff's  
2 statements which, you know, it seems to me like Surrogate's  
3 Court should have ordered a bit more investigation than it  
4 did, but the plaintiff basically --

5 THE COURT: That ship had sailed.

6 MS. AVRUTIN FOLEY: Exactly. There's nothing I can  
7 could about that now, but I will point out that the  
8 plaintiff never bothered to correct the record before the  
9 Surrogate's Court when he did find out that there was -- you  
10 know, there was another heir to Dorothy's estate, but that's  
11 another story, because the plaintiff also had, you know, for  
12 all of these years, hidden the fact that Yale and his heirs  
13 and beneficiaries had an interest in this property from  
14 them. And you know, he was completely reckless. He knew  
15 that he did not know, he knew that his father made no  
16 investigation, he knew that he relied on his father's friend  
17 before Surrogate's Court, and so I find it very hard to  
18 believe that, you know, that this is the kind of  
19 plaintiff -- this is the kind of situation that adverse  
20 possession law is meant to protect in New York State. I  
21 find that very difficult to believe.

22 Like what this -- with all due respect, your Honor,  
23 if you were to decide against us today, I think what it  
24 would be telling people is if they hide from family members  
25 the fact that they have an interest in property for years

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1 and years, and then get away with it, then all of a sudden,  
2 after a certain amount of time, the property will be come  
3 exclusively theirs and I can't --

4 THE COURT: Ahh, I don't know, Ms. Foley, because  
5 the critical thing there is the hiding --

6 MS. AVRUTIN FOLEY: Uh-hum.

7 THE COURT: -- if I believe he hid, in any way, his  
8 ownership, then I wouldn't be convinced that he had open and  
9 notorious possession. He did not hide it in any way. It  
10 was open to absolutely anyone; and again, whether Yale knew  
11 that his father had this property or Yale didn't know his  
12 father had this property, what is clear is that it was  
13 always on record and in behavior that the plaintiff held  
14 himself out as the owner in every way, shape and form to the  
15 entire world, loud and clear, that this is my property.

16 Let me hear -- if there's anything you want to add,  
17 Ms. Foley, then I'll hear from Mr. Brickman.

18 MS. AVRUTIN FOLEY: Sure, I would just like to add  
19 one thing, your Honor. If you look back at the Blanchard  
20 case, what it said in a co-tenancy, in order for possession  
21 to be hostile and open and notorious, then you have to show  
22 ouster, there has to be some kind of ouster. So whether  
23 they knew about it or not, there still was a co-tenancy and  
24 there was no ouster.

25 The Blanchard case specifically says that

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1 generally, in order to show ouster there is some kind of  
2 written or oral communication of the intent to possess  
3 adversely, and there simply was nothing like that in this  
4 case, your Honor. There just wasn't.

5 THE COURT: Well, was Blanchard the case with the  
6 father and the children and the mother and competing  
7 interests to the property? And then, I think, 30 years  
8 later he made overtures to her and the courts there said  
9 there's a question.

10 The point is, in Blanchard, there was always some  
11 type of recognition that someone else had an interest. That  
12 is not the case here.

13 In this case -- if you look at ouster, technically,  
14 it's almost impossible because he never even knew he had to  
15 oust anyone, because there was zero recognition of the  
16 interest.

17 And also, ouster comes into play more with  
18 lessening the time for the presumption of RPAPL 541, but  
19 this is a situation where after that period ends, there is  
20 ten years of completely uninterrupted -- more than ten  
21 years, to be clear -- exclusive possession, payment of  
22 taxes, every single decision is made without consultation,  
23 without recognition. All improvements are made by the  
24 plaintiff. There is never any recognition of a competing  
25 interest in the property whatsoever.

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1 I mean, that is what distinguishes this case from  
2 Loveless and Trevisano and Blanchard and, really, all the  
3 cases; Perez, all the cases that are cited by the defendant.

4 Let me hear from you, Mr. Brickman.

5 MR. BRICKMAN: Your Honor.

6 THE COURT: Go ahead.

7 MR. BRICKMAN: Your Honor, I'm not sure there's  
8 anything I can add at this point, unless the Court has any  
9 question or specific area that your Honor wishes me to  
10 address.

11 THE COURT: No, I really do think that I set it  
12 forth on the record, but I'll do it again.

13 To prevail on summary judgement, the plaintiff must  
14 establish by clear and convincing evidence adverse  
15 possession. Applying the 20 year period applicable by  
16 virtue of RPAPL 541, plaintiff satisfies that burden here.

17 Plaintiff has proven that he had actual possession  
18 of the property, that it was open and notorious, exclusive  
19 and continuous since 1992, that's well over the 20 years,  
20 and in the 20 continuous years, there was never any  
21 acknowledgment of another interest whatsoever.

22 Hostility, moreover, is inferred. Hostility  
23 doesn't have to be enmity, as established by the case law,  
24 it's inferred, unless prior to vesting, and the key is prior  
25 to vesting, there is an admission that valid claim to title

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1 lies with someone else, and that did not happen here.

2 And the cases that establish that are Vaccaro, 181  
3 AD3d 751, a 2020 Appellate Division case; Midgley, 143 AD3d  
4 788, a Second Department, 2016 case; and Galli, 117 AD3d,  
5 679, a Second Department case from 2014.

6 And the lack of a requirement of any -- you know,  
7 like enmity, I should say, that's established in -- I think  
8 the case is Katonah versus Lowe, 226 AD 2d 433 at 434, a  
9 1996 Second Department case, and there, like here, there was  
10 a misapprehension in terms of lack of any interest and the  
11 Court still found that there could be adverse possession and  
12 hostility, and the Court says: All that is needed is that  
13 possession constitutes an actual invasion or infringement of  
14 the owner's rights, and then hostility could be found.

15 And the case of Greenberg versus Sutter, 257 AD2d,  
16 646, that's a Second Department case from 1999.

17 Here, unlike in Loveless and Trevisano, there was  
18 never, ever any acknowledgment of another interest during  
19 the 20-year period. The plaintiff had exclusive possession,  
20 paid all the taxes, made all the decisions constantly, made  
21 all the improvements, collected all the rents, entered into  
22 all the leases, took out and repaid a loan, all without any  
23 recognition or consultation of another, and did this open  
24 and obviously to the world, in terms of holding itself out  
25 as the landlord.

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1           These unequivocal acts were so open and public,  
2           that notice to the co-tenant is presumed under the  
3           circumstances; and to be clear, there is never any  
4           permission, ever, from Yale or his decedents here.

5           And just to add, too, that I did find compelling  
6           the reasoning from out-of-state cases that seem to be  
7           squarely on point, too, in terms of why there is adverse  
8           possession here, and the cases that I'm referring to are  
9           Bourne, from the Wisconsin Supreme Court, that's 159 WIS,  
10          340 a 1915 case; and there is also a Hawaii case, that is  
11          reported at 30 HAW 100, but I am missing the name of the  
12          case. It is cited -- it's okay, it is cited in the papers,  
13          in plaintiff's papers, but I found those reasonings  
14          compelling, in terms of situations where neither side knew  
15          of the existence of the interest, and just in general, the  
16          public policy in favor of alienability of property.

17          So for those reasons, I am granting plaintiff's  
18          motion for summary judgement.

19          Both parties are movants here, I'm going to ask  
20          that the transcript -- they share the cost of the transcript  
21          and that it be uploaded no more than 45 days from today.

22          MR. BRICKMAN: Will your Honor be issuing a  
23          separate short form order? Or should we simply submit the  
24          transcript to you to be so ordered?

25          THE COURT: I will submit a very short form order

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1 that for the reasons stated on the record, I am granting the  
2 motion, so that will incorporate the reasoning in the  
3 transcripts. I don't need to so order the transcript, but  
4 you do need to e-file it.

5 MR. BRICKMAN: Very well. We'll speak to  
6 Mr. Palombo and, perhaps, you could give us your number your  
7 e-mail address, Mr. Palombo.

8 THE COURT: I'll let you handle all that, but with  
9 that, I will tell you that you did present a very  
10 interesting case and you all did a very good job on your  
11 papers, really, both of you.

12 MS. AVRUTIN FOLEY: Thank you, your Honor.

13 MR. BRICKMAN: Thank you for your interest. We  
14 appreciate the careful analysis, Judge.

15 THE COURT: Okay, be well everyone. Take good  
16 care.

17 MR. BRICKMAN: You, too. Bye-bye.

18 THE COURT: Thank you, bye-bye.

19 \* \* \*

20 CERTIFIED THE FOREGOING IS  
21 A TRUE AND ACCURATE TRANSCRIPTION  
22 OF THE PROCEEDINGS, THIS DATE.

23 Vincent J Palombo

24 VINCENT J. PALOMBO, RMR

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