New York County Clerk's Index No. 655854/2020
Appellate Division, First Department Case No. 2022-01026

Court of Appeals

STATE OF NEW YORK

JOHN GOLOBE,

Plaintiff-Respondent,

against

IRA ALTCHEK, as Trustee of the Emil Krause Revocable Trust,

Defendant-Movant.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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The defendant-movant ("Altchek") does not, because he cannot, explain how the issues in this case "are novel or of public importance, present conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4). Rather, Altchek is merely a dissatisfied litigant, seeking another bite of the appellate apple.

While obviously vital to the litigants, the issues here are neither novel nor of public importance, any more than any rule of law that resolves disputes affecting land ownership bears significance for others than the parties involved. Altchek seeks to overcome this failing by asserting that the questions presented are "likely to be repeated." (His motion for leave to appeal ["Motion"] at p. 4). Yet he cites no instance in which similar issues have been presented to this Court. Nor does he offer any prior decision of this Court, and research discloses none, that presents any conflict with any issue in our case.

We suggest that issues involving settled judicial findings from three decades earlier (the Surrogate's Court decision granting letters of administration to the plaintiff-respondent ["Golobe"]), or questions whether adverse possession applies

when both parties are ignorant of the facts, do not arise with the frequency that deserves treatment by this Court.

As to any conflict between or among the departments, again there is none. Rather, the analysis by the First Department in this case, and the outcome, are consistent with similar cases in the Second Department. *See, e.g., Katona v. Low*, 226 A.D.2d 433, 434 (2d Dep't 1996) ("hostility may be found even though the possession occurred inadvertently or by mistake"); *Gore v. Cambareri*, 303 A.D.2d 551 (2d Dep't 2003); *Greenberg v. Sutter*, 257 A.D.2d 646 (2d Dep't 1999).

Nor is it true, as Altchek claims (Motion at p. 15), that "there are no precedential New York cases that address the unique scenario where neither co-tenant was aware of the co-tenancy throughout the statutory period." *Katona*, *Gore*, and *Greenberg* are binding precedents in all four departments,[1] and make our case anything but unique. Here, the Appellate Division followed settled precedent.

[1] "The Appellate Division is a single statewide court divided into departments for administrative convenience and therefore the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule." *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) (internal citations omitted).

The holdings of the First Department here, and the Second Department in similar cases, are consistent with decisions in other states. As the Supreme Court observed in awarding summary judgment for Golobe, other jurisdictions have held that adverse possession is not precluded where both parties were unaware that a co-tenancy existed. *See, e.g., Pebia v. Hamakua Mill Co.*, 30 Haw. 100, 108 (1927) ("nor is there any reason why he should be held to hold in subordination to his co-tenant's rights, when he denies from the outset that there is a co-tenancy and when so far as appears the one out of possession who is a co-owner in fact does not know, any more than the one in possession does, that he is a co-owner and does not claim to be such"); *Roberts v. Decker*, 120 Wis. 102 (1903) ("To hold that the defendants must give notice of their adverse holding to one of whose claims they were in utter ignorance, and whose rights they had never acknowledged by word or deed, would be absurd"); *Bourne v. Wiele*, 159 Wis. 340 (1915) (since "all the evidence on the subject indicates that neither the widow nor the present defendants ever knew of the existence of the plaintiffs['] [co-tenancy], and hence never acknowledged that the plaintiffs had any interest in the premises," knowledge of the adverse claim was not necessary to establish adverse possession); *Kraemer v. Kraemer*, 167 Cal. App. 2d 291, 309 (1959) ("where a tenant in common enters into possession and claims under an invalid deed purporting to convey the property

to him, the recordation of the deed is notice to his cotenants of its existence and therefore of the adverse character of his claim so as to start the statute of limitations running, *at least where, as here, he knows nothing of the existence of the other cotenants"*) (internal citation and quotations omitted) (emphasis added).

Altchek continues to rely, (Motion at pp. 13-14), on *Blanchard v. Blanchard,* 4 Misc. 3d 1027(A), 2004 WL 2187604, at * 3 (Sup. Ct. Bronx Co. Sep't 8, 2004), to support his claim that the parties' negotiations after 2018 impaired Golobe's title. Even if this *nisi prius* decision were the only law on point at the time of its decision, in 2016 the Appellate Division for the Second Department held expressly that an adverse possessor was free to seek his former co-owner's putative interest because the adverse possessor could "fortify that title in any way [he] pleased, and [asking a potential claimant for a quitclaim deed] could not destroy that which had become perfected." *Midgley v. Phillips*, 143 A.D.3d 788, 791 (2d Dep't 2016), quoting *Knapp v. City of New York*, 140 A.D 289, 297 (1st Dep't 1910). That Golobe's initial counsel, apparently in ignorance of Golobe's rightful ownership by reason of adverse possession, sought to settle with Altchek cannot detract from Golobe's full title, since his sole ownership already had vested. Accordingly, *Blanchard* is irrelevant.

Altchek claims that this Court has not determined whether the elements of hostile, open, and notorious possession are satisfied when an adversely possessing party acquires title "by virtue of his own willful ignorance which resulted in a misrepresentation to the Surrogate's Court." (Motion at p. 10). Altchek also claims that this Court has yet to decide if a party has committed fraud when he "willfully and recklessly makes misrepresentations to the Surrogate's Court that he is the sole and rightful heir," or conceals from rightful co-tenants' their interest in real property for the party's own benefit. *Ibid.* But Altchek cannot present these issues to this Court, because in each instance, he asks this Court to assume facts that already have been found adversely to him by the two lower courts.

More than a century ago, this Court articulated the familiar rule that "findings of fact are binding upon this court." *Dunlap & Co. v. Young*, 174 N.Y. 327, 330 (1903). *See* N.Y. Const. Art. VI § 3. Here, the Appellate Division held that the Supreme Court "properly determined that plaintiff established by clear and convincing evidence that he actually, exclusively possessed the property under a claim of right, openly and notoriously, for a continuous period since 1992." _____ A.D.3d at _____, 2003 WL 104992 at * 1.

Moreover, Altchek makes factual arguments that the record belies. For example, Altchek asserts Golobe's "willful ignorance" and "misrepresentation to the Surrogate's Court." (Motion at p. 10). But the First Department held that "the record shows that [Altchek] failed to establish [Golobe's] scienter as to any misstatement or [Altchek's] reliance on any misstatement made to the Surrogate's Court." _____ A.D.3d ____, 2003 WL 104992 at * 2. Furthermore, the Appellate Division rightly characterized the burden that Altchek would put on Golobe here as an "extraordinary search to confirm the death of a potential distributee where none is ordered by the Surrogate's Court." (*Ibid.*).

Altchek then continues to rely on Golobe's purported fraud on the Surrogate's Court, a claim that involves third-party reliance that this Court rejected in *Pasternack v. Laboratory Corp. of Am. Holdings*, 27 N.Y.3d 817 (2016), noting that the reliance element of fraud fails when a third party is alleged to have relied on a misrepresentation to the injury not of the third party, but the plaintiff.

In his presentation to this Court, Altchek repeatedly ignores other factual findings of the Supreme Court and the Appellate Division. For example, Altchek says (Motion at p. 17) that Golobe merely engaged in the "mere upkeep" of the property." But the Appellate Division found that Golobe "constructed an open and

notorious wood deck and other observable improvements on the property. (Motion, Ex. B, at p. 2). Capital improvements are not mere upkeep.

Strikingly, Altchek attacks the quality and extent of John Golobe's 1992 inquiries into Yale Golobe's status (*see*, *e.g.*, Motion at p. 5), but ignores that John Golobe and the Surrogate's Court relied on the specific testimony of Harold Kozupsky, a practicing lawyer and long-time family friend, that Yale Golobe had died six or seven years before 1992 (*viz.*, in 1985 or 1986). (Appellate Division Record on Appeal at p. 71). Altchek also ignores that during the course of its hearing to determine John Golobe's application for letters of administration, the Surrogate's Court referee terminated the hearing, announcing that she had heard enough to establish John Golobe's entitlement to letters. (*Id.* at 72). And, of course, in his Motion, Altchek then concedes that neither John Golobe nor Zangwill Golobe, his father, knew that Yale Golobe was still alive. (Motion at p. 12).

DISCLOSURE STATEMENT

John Golobe is a natural person, not a corporation, so he has no corporate parents, subsidiaries, or affiliates.

CONCLUSION

Altchek's Motion should be denied.

Dated: Garden City, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: February 17, 2023

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Opposition to Motion for Leave to Appeal

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