

JOHN B. DYMOND and NANCY G. DYMOND, Plaintiffs,
v. GALFAM PROPERTIES, INC., GALFAM REALTY TRUST,
and WCN PROPERTIES, L.P., Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action, No. 2004-602

Action to quiet title; Action in ejectment; Determination of immediate right, title and interest of a party to possession of property

1. To succeed in an ejectment proceeding, the complaining party must have the right to immediate possession, but not presently be in possession. When possession is a disputed issue, the Court must first determine possession before an action in ejectment can be maintained.
2. When the plaintiffs, in an Action to Quiet Title, claim they acquired title in property and the issue of right to possession remains disputed, the defendants' action in ejectment is premature and must be dismissed.

Appearances:

Eileen C. Finucane, Esq., *Counsel for Plaintiffs*

James J. Jerecki, Esq., *Counsel for Defendants*

OPINION

Walsh, J., October 27, 2004

Introduction and Background

We have before us for decision Plaintiff's Preliminary Objections to Defendants' Counterclaim. Plaintiffs John B. Dymond and Nancy G. Dymond brought an Action to Quiet Title against Galfam Properties, Inc. and Galfam Realty Trust for a parcel of land adjacent to the western boundary of 1743 Lincoln Way East, Chambersburg, Pennsylvania. This parcel, identified in the Complaint as the "Disputed Property," is a parcel of ground identified as a "street" on a certain plan of lots laid out for Nelson Horn by W.H. Cunard R.S., dated October 22, 1937, recorded in the Franklin County Recorder of Deeds at Deed Book Volume 271, Page 242. The Plaintiffs filed their Complaint on or about March 12, 2004. On that date, Plaintiffs also filed a praecipe requesting that the Prothonotary index the action as a Lis Pendens against the Disputed Property. On April 28, 2004, upon the motion of Plaintiff, WCN Properties was joined as an indispensable party.[1]

Defendants filed an Answer, New Matter and Counterclaim on April 30, 2004. In their New Matter, Defendants asserted that Plaintiffs failed to state a claim and seek as their ultimate relief dismissal of Plaintiff's Complaint. Defendants' filing also contained a counterclaim in ejectment. On May 17, 2004, Plaintiffs filed a Reply to New Matter and a Preliminary Objection to Counterclaim.[2] Plaintiffs argue, by means of Preliminary Objection, that the Court lacks subject matter jurisdiction over an ejectment proceeding with respect to the Disputed Property. Plaintiffs assert that ejectment proceedings are premised upon the immediate right, title and interest of a party to possession of property, therefore the Court must first determine the issues of ownership of the Disputed Property pursuant to Plaintiffs' Action to Quiet Title. On or about May 25, 2004, Defendants, through their Answer to Preliminary Objection to Counterclaim, asserted that they have immediate right, title and interest in the Disputed Property and requested that the Court dismiss Plaintiff's Preliminary Objection. Defendants requested oral argument on the matter. The Court held argument on September 2, 2004.

Having considered the pleadings, the briefs, and the arguments of the parties, we make the following:

Findings of Fact

1. Plaintiffs own and possess a certain tract of real estate, being identified as Lot 9 and commonly known as 1743 Lincoln Way East, Chambersburg, Pennsylvania.[3]
2. Plaintiffs received the Adjoining Property from Judith E. Wagaman by deed dated October 16, 2003 and recorded in the Office of the Franklin County Recorder of Deeds at Deed Book Volume 2289, Page 386.
3. Judith E. Wagaman received title and possession of the Adjoining Property from Jack B. Crist, Executor of the Last Will and Testament of Jessie M. Crist, deceased, on or about September 23, 1981, by virtue of deed recorded in the Office of the Recorder of Deeds in Deed Book 846, Page 234.
4. Along the western boundary of the Adjoining Property is a parcel of ground, identified as a "street" on a certain plan of lots laid out for Nelson Horn by W.H. Cunard R.S., dated October 22, 1937, recorded in the Office of the Franklin County Recorder of Deed at Deed Book Volume 271, Page 242.[4]
5. The Disputed Property was offered to Guilford Township as a road by virtue of the laying out of the Disputed Property as a street on said plan of lots. Plaintiffs assert that it was never accepted as a street by the supervisors of Guilford Township, an assertion Defendants deny.
6. For some period of time, Judith E. Wagaman used at least a portion of the Disputed Property as a driveway. The exact duration and extent of her usage remains disputed.
7. Judith E. Wagaman filed a Claim of Adverse Possession to the Disputed Property pursuant to 68 P.S. §§ 81, 82 on February 25, 2004, and recorded in the Office of the Franklin County Recorder of Deeds, Record Book Volume 2383, Page 475.
8. Judith E. Wagaman executed and recorded a deed purportedly conveying title to the Disputed Property to Plaintiffs by deed dated March 5, 2004, and recorded in the Office of Franklin County Recorder of Deeds at Record Book Volume 2393, Page 528.
9. Plaintiffs assert title in the Disputed Property, claiming that it was acquired by adverse possession[5] or, in the alternative, they claim an easement by prescription and/or an easement by implication.
10. Defendants allege that they maintained the Disputed Property, paid taxes on the Disputed Property, and took other steps to evidence their control and ownership of the Disputed Property.
11. Plaintiffs brought this Action to Quiet Title based on the information and belief that Defendants were, and are, claiming an interest in the Disputed Property adverse to Plaintiffs.

Discussion

Plaintiffs claim title by adverse possession in the Disputed Property. Defendants dispute Plaintiffs' claim. Instead, Defendants assert that they have immediate right, title and interest in the possession of the Disputed Property and they seek to eject Plaintiffs from it. To the contrary, Plaintiffs argue that the Court lacks subject matter jurisdiction over an ejectment proceeding with respect to the Disputed Property because the Court must first determine ownership of the Disputed Property pursuant to Plaintiffs' Action to Quiet Title. Possession of the Disputed Property remains a disputed fact at issue, which must be resolved by the Court.

In an ejectment proceeding, one who has an immediate right of possession seeks to eject a wrongful possessor. 22 Standard Pennsylvania Practice § 120:1. To succeed in an ejectment proceeding, the complaining party must have the right to immediate possession, but not presently be in possession. Siskos v. Britz, 790 A.2d 1000, 1006 (Pa. 2002). When possession is a disputed issue, the Court must first determine possession before an action in ejectment can be maintained. Id. at 1009.

Defendants argue that Billig v. Skvarla, 853 A.2d 1042 (Pa.Super. 2004), stands for the proposition that a complaining party need not show exclusive possession in order to bring an action in ejectment; rather, the complaining party need only show paramount title. Based upon their reading of the case, Defendants assert that their allegations in their Answer, New Matter and Counterclaim are sufficient to allow them to proceed in ejectment. However, Plaintiffs contend that Billig answered the limited question of

whether "exclusive" right to possession must be established to maintain an action in ejectment. Further, Plaintiffs state that the decision in Billig neither conflicts with nor limits Siskos. We agree with Plaintiffs.

According to Siskos, we must first determine the issue of possession before an action in ejectment may proceed because the right of possession is the central disputed fact in Plaintiffs' Action to Quiet Title. In their Action to Quiet Title, Plaintiffs claim they acquired title in the Disputed Property by adverse possession or, in the alternative, an easement by prescription and/or an easement by implication. Because the issue of right to possession remains disputed, Defendants' action in ejectment is premature and must be dismissed.

Conclusion

The issue of right to possession of the Disputed Property remains a disputed fact in Plaintiffs' Action to Quiet Title. Therefore, we must determine the issue of possession before an action in ejectment may proceed. Defendants' action in ejectment is premature and must be dismissed because the issue of right to possession remains disputed.

ORDER OF COURT

Now this 27th day of October 2004, the Court having reviewed the pleadings, the briefs, the arguments of the parties, and the applicable law, it is hereby ordered that Plaintiffs' Preliminary Objections are sustained. Defendants' action in ejectment is stayed and the parties shall proceed on Plaintiffs' action to quiet title.

[1] On or about March 29, 2004, Defendants Galfam Properties, Inc. and Galfam Realty Trust transferred their interest in the Disputed Property to WCN Properties L.P.

[2] Plaintiffs amended their Reply to New Matter on July 6, 2004.

[3] Plaintiffs refer to this property as the "Adjoining Property." For the sake of clarity, we adopt this term for purposes of this Opinion.

[4] This is the property referred to as the Disputed Property in Section A of this Opinion. We will continue to employ that term when referring to this same parcel.

[5] Plaintiffs claim title by adverse possession by tacking their ownership of the Disputed Property to the ownership of Plaintiffs' predecessor in title, Judith E. Wagaman.