

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 07-0544-FMICHAEL GEE<sup>1</sup> & another<sup>2</sup>

vs.

JOHN P. KOVALKO

Notice sent  
6/10/2009  
M. L. L.  
L. & L.  
E. A. G.FINDINGS OF FACT, RULINGS OF LAW  
AND ORDER FOR JUDGMENT

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INTRODUCTION

Plaintiffs Michael Gee (“Gee”) and Qi Ming Zhang (“Zhang”) (collectively, the “plaintiffs”) bring this action against defendant John P. Kovalko (“Kovalko”), claiming that Kovalko’s use of a narrow strip of land between their respective properties (the “disputed strip”) constitutes continuous ongoing trespass. Kovalko denies this allegation, asserting by counterclaim that he acquired ownership of the strip by adverse possession. After trial, the parties submitted proposed findings of fact, which the court has considered. To the extent they are not found by the court, they are deemed denied. For the following reasons, judgment shall enter on behalf of the plaintiffs.

FINDINGS OF FACT

Based on the credible evidence presented at trial, the reasonable inferences therefrom, and the parties’ stipulated facts, the court finds as follows:

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<sup>1</sup> f/k/a/ Wan Chen Gee

<sup>2</sup> Qi Ming Zhang

1. The plaintiffs reside at and are the owners of the property at 17 Ashford Street, Allston, MA ("17 Ashford").
2. Gee acquired title to 17 Ashford by a deed dated May 25, 1993, recorded in Suffolk County Registry of Deeds<sup>1</sup> in Book 18245, Page 57.
3. Gee conveyed the property at 17 Ashford to himself and Zhang as husband and wife as tenants by the entirety by a deed dated August 24, 1988, recorded in Book 22831, Page 187.
4. Kovalko lives at 175 Boston Post Road, Wayland, MA and is the owner of the property at 15 Ashford Street, Allston, MA ("15 Ashford").
5. Kovalko, Yolanta Kovalko and Stanley Wisniak acquired title to 15 Ashford as tenants in common by deed dated August 28, 1987, recorded in Book 14023, Page 274.
6. By deed dated September 15, 1989, recorded in Book 15947, Page 339, the tenants in common conveyed 15 Ashford to Kovalko and Yolanta Kovalko as husband and wife as tenants by the entirety.
7. Kovalko and Yolanta Kovalko conveyed title to 15 Ashford to Kovalko individually by deed dated September 20, 1999.
8. The properties at 17 Ashford Street and 15 Ashford Street are abutting properties. The easterly boundary of 15 Ashford constitutes the westerly boundary of 17 Ashford.
9. A chain link fence (the "fence"), running north and south, exists on 17 Ashford and is owned by the plaintiffs.
10. The fence runs generally parallel to the boundary line of record between 15 Ashford and

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<sup>1</sup> All title references are to the Suffolk County Registry of Deeds.

17 Ashford.

11. A strip of land of varying widths, running north and south, is located between the eastern boundary of 15 Ashford and the western side of the fence existing on 17 Ashford.
12. Debra MacIntosh (“MacIntosh”) resided at 15 Ashford from 1965 until Kovalko took title in 1987.
13. The chain link fence at 17 Ashford existed throughout MacIntosh’s residency at 15 Ashford.
14. There is no evidence that MacIntosh built, maintained, or controlled the fence under a claim of right.
15. There is no evidence that MacIntosh maintained or controlled the disputed strip. J ✓
16. From 1980 to 1987, the fence was owned, controlled, and maintained by Mr. Cappucci, the previous owner of 17 Ashford.
17. From 1980 to 1987, Cappucci regularly walked along the disputed strip during the spring and summer to prune vegetation growing along the fence and to remove vines growing on a garage located on the rear portion of 17 Ashford, without protest or objection by MacIntosh. ] ✓
18. MacIntosh was aware that Cappucci owned the disputed strip, and that the fence did not run along the boundary line of record between 15 Ashford and 17 Ashford. | ✓
19. The width between the house on 15 Ashford and the fence was insufficiently wide to allow access to the rear portion of the property by a full sized automobile. |
20. MacIntosh parked in the front part of the property in a partially paved area abutting the sidewalk on Ashford Street that did not extend to the fence.

21. Prior to taking title to 17 Ashford, Gee visited the property and observed that the fence was standing straight.
22. When Kovalko and his tenants in common acquired title in 1987, the building at 15 Ashford was legally a one family dwelling. On or about December 4, 1987, Kovalko obtained a permit from the City of Boston to convert the building into a two family dwelling.
23. On July 17, 1988, Kovalko had the disputed strip and an area on the rear of 15 Ashford paved up to the fence.
24. In October 1988, Kovalko constructed an addition to the building, converting it to a two family dwelling.
25. During construction, tradesman drove trucks over the disputed strip.
26. Since 1989, Kovalko has rented apartments at 15 Ashford to tenants.
27. Kovalko's tenants use the disputed strip as a driveway, and park their vehicles on the paved area at the rear of the property. Some of the vehicles park alongside the western wall of the garage at 17 Ashford.
28. Shortly after taking title to 17 Ashford, Gee noticed that the fence's wire mesh was cut, that the connecting sleeve was displaced, and that the subsurface footing nearest to the street was visible.
29. The damage to the fence allowed more vehicle clearance along the disputed strip and the parking lot at the rear of 15 Ashford.
30. Since 1993, Gee's family have maintained the fence and vegetation growing on either side of it.

31. Kovalko frequently saw Gee's parents using the disputed strip to tend to the vegetation and did not object.
32. In 2006, Gee commissioned a survey to determine the boundary line of record between 15 Ashford and 17 Ashford.
33. After May 4, 2006, Gee began a course of action to assert his possession of the disputed strip. To this end, he pounded metal pipes into the asphalt and strung string around the property line. Later, he pounded pipes flush with the pavement and marked the boundary line with yellow tape.
34. Kovalko, his tenants, and visitors to 15 Ashford continued to drive over and park on the disputed strip.
35. According to the "Plan of Land in Boston, MA, 9/10/2008," prepared by Rober Survey, the fence is located on 17 Ashford, and runs parallel to the boundary line of record. The disputed strip is located on 17 Ashford.
36. This litigation commenced on February 6, 2007.

#### RULINGS OF LAW

Title to land is acquired by adverse possession through: (1) the possession of land in a manner that is (2) open and notorious; (3) exclusive; (4) adverse to the owner's interest (that is, without permission); and (5) continuous for twenty years. See e.g., G. L. c. 260, § 21; Kendall v. Selvaggio, 413 Mass. 619, 624 (1992). "If any of these elements is left in doubt, the claimant cannot prevail." Mendonca v. Cities Service Oil Co., 354 Mass. 323, 326 (1968).

To succeed on a claim for adverse possession, the claimant must have exercised "such a control and dominion over the premises as to be readily considered acts similar to those which

are usually and ordinarily associated with ownership.” LaChance v. First Nat’l Bank & Trust Co., 301 Mass. 488, 491 (1938). “[A]ttention should be centered on the [claimant’s] activities on the land, in distinction to his belief or state of mind about the matter.” Peck v. Bigelow, 34 Mass. App. Ct. 551, 552 (1993). The statutorily-required adverse possession period of twenty years may be achieved by tacking on a predecessor-in-title’s period of adverse possession, provided there is privity of estate between the adverse possessors. See G. L. c. 260, § 22; Abbott v. Mars, 277 Mass. 122, 124 (1931).

Kovalko argues that his use of the disputed strip as a driveway and parking meets the necessary elements of adverse possession. However, Kovalko cannot show that he has used the disputed strip continuously for 20 years. Kovalko acquired title to 15 Ashford on August 28, 1987. This lawsuit was filed on February 6, 2007. See Hewitt v. Peterson, 253 Mass. 92, 94 (1925) (holding land for nineteen years and some months insufficient to establish adverse possession). Thus, the only way that Kovalko could establish possession for the statutory period would be through tacking. Abbott, 227 Mass. at 124; Ryan v. Stavros, 348 Mass. 251, 264 (1964). MacIntosh was the predecessor in interest to Kovalko, however there is no evidence that MacIntosh ever used the disputed strip in any way adverse to the owner’s interests.

Evidence was introduced at trial showing that MacIntosh maintained a friendly relationship with Cappucci, the plaintiffs’ predecessor-in-interest. Cappucci cultivated plants along the fence, and would come onto the disputed strip to prune the plants that had protruded to the other side of the fence and remove vines growing on the western wall of his garage. MacIntosh never objected to Cappucci’s use of the disputed strip. There is no evidence to suggest that MacIntosh ever used the disputed strip in any way adverse to Cappucci’s interest, and

therefore tacking is not available to Kovalko.

Kovalko also cannot show that his use of the disputed strip constituted exclusive possession of the property. Relying on Bucella v. Agripino, 257 Mass. 483 (1926), Kovalko argues that Gee's actions to establish his dominion over the disputed strip in 2006 were insubstantial and did not interrupt his exclusive use. In Bucella, neighboring parties disputed a passageway between the abutting properties located on the record owner's property. Id. at 484. The petitioners sought a declaration that they adversely possessed the passageway, which they had used to carry away ashes and garbage. Id. On one occasion, the record owner attempted to prevent the petitioner from using the passageway but became too scared. Id. at 485. The court held that her mere objection, without more, was insufficient to interrupt the petitioner's adverse possession Id.

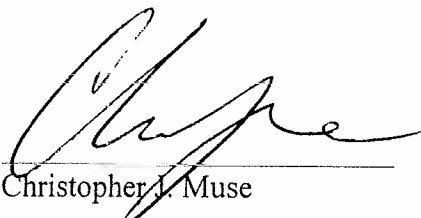
Here, Gee made his objections known when he demarcated the disputed strip with metal pipes, string, and later, yellow tape in order to assert possession of the disputed strip. These actions were sufficient to put Kovalko on notice of the record boundary of the two properties, but "insufficient to establish such an exercise of dominion over the disputed area as to interrupt adverse possession." Pugatch v. Stoloff, 41 Mass. App. Ct. 536, 542 (1996). However, credible evidence presented at trial also showed that Gee and other members of his family used the disputed strip to tend to vegetation growing on both sides of the fence. Therefore, Kovalko cannot show that his use of the strip constituted exclusive possession. Peck, 34 Mass. App. Ct. at 557 (To satisfy the element of exclusive possession, "[t]he adverse possessor's use of the

property must “must encompass a ‘disseisin’<sup>2</sup> of the record owner[.]”). Therefore, Kovalko fails to meet this element.

Kovalko cannot show exclusive possession of the disputed strip for 20 years, and therefore cannot establish ownership by adverse possession. There is no dispute that the disputed strip was located within the record boundary of Gee’s property. Because Kovalko cannot show lawful possession of the strip, either by actual title or by adverse possession, his use of the strip constitutes trespass upon Gee’s property. See New England Box Co. v. C&R Const. Co., 313 Mass. 696, 707 (1943).

**ORDER**

Based on the foregoing, the court finds and declares that Kovalko did not acquire title to the disputed area by adverse possession, and that his use of the disputed area is contrary to the rights of plaintiffs, and constitutes trespass. Kovalko is **ORDERED** to pay Gee \$1 in damages, and to cease trespass upon the plaintiffs’ property. Judgment shall be entered on behalf of the plaintiffs, and against Kovalko.

  
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Christopher J. Muse  
Justice of the Superior Court

DATED: June 5, 2009

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<sup>2</sup> “Disseisin” is defined as “The act of wrongfully depriving someone of the freehold possession of property.” Black’s Law Dictionary 485 (7th ed. 1999).