



167 A.D.3d 860, 90 N.Y.S.3d 267, 2018 N.Y. Slip Op.  
08637

**\*\*1** Maguid Megalli et al., Respondents,  
v  
Scott Yeager et al., Appellants.

Supreme Court, Appellate Division, Second  
Department, New York  
2016-08691, 60397/12  
December 19, 2018

CITE TITLE AS: Megalli v Yeager

#### HEADNOTE

Adverse Possession  
What Constitutes

Tennis Court Creation

Meyer, Suozzi, English & Klein, P.C., Garden City, NY  
(Kevin Schlosser and Lynn M. Brown of counsel), for  
appellants.

Maker, Fragale & DiCostanzo, LLP, Rye, NY (**William  
Maker, Jr., of counsel**), for respondents.

In an action pursuant to RPAPL article 15 to determine  
claims to real property, the defendants appeal from a  
judgment of the Supreme Court, Westchester County  
(Sam D. Walker, J.), entered July 18, 2016. The  
judgment, insofar as appealed from, upon a decision of  
the same court dated July 14, 2015, made after a nonjury  
trial, declared that the plaintiffs had acquired title by  
adverse possession of the portion of the disputed property  
that is encroached by a tennis court.

Ordered that the judgment is affirmed insofar as appealed  
from, with costs.



The plaintiffs and the defendants are owners of adjoining  
\*861 lots in Rye, New York. Each lot is more than one  
acre. A tennis court has been located along the entire  
width of the western portion of the plaintiffs' backyard  
since prior to the plaintiffs' acquisition of the property in

1977. A survey prepared in connection with the marketing  
of the property by the defendants' predecessors-in-interest  
indicated that 1,948 square feet of the southern portion of  
the tennis court, approximately 22%, was located on the  
defendants' property. In 2002, after the plaintiffs declined  
the offer of the defendants' predecessors-in-interest to  
enter into an agreement regarding the use/ownership of  
the tennis court, the defendants acquired the property,  
which was subject to the encroachment. Thereafter, the  
defendants, with the plaintiffs' permission, enjoyed the  
use of the tennis court until 2012, when the defendants  
refused to allow a contractor hired by the plaintiffs to  
resurface the portion that was on the defendants' property.  
The plaintiffs commenced this action, alleging, inter alia,  
that they had acquired title to the disputed portion of the  
tennis court in 2002 through adverse possession. After a  
nonjury trial, the Supreme Court determined that the  
plaintiffs met the requirements to obtain title to the  
disputed property by adverse possession.

In reviewing a determination made after a nonjury trial,  
this Court's power to review the evidence is as broad as  
that of the trial court, and this Court may render the  
judgment it finds warranted by the facts, taking into  
account that, in a close case, the trial judge had the  
advantage of seeing and hearing the witnesses (*see  
Northern Westchester Professional Park Assoc. v Town of  
Bedford*, 60 NY2d 492, 499 [1983]; *Bratone v  
Conforti-Brown*, 150 AD3d 1068, 1070 [2017]; *Air  
Stream Corp. v 3300 Lawson Corp.*, 99 AD3d 822, 825  
[2012]).

In 2008, the Legislature enacted changes to the adverse  
possession statutes (*see* L 2008, ch 269; § 5262 *Kings  
Hwy., LLC v Nadia Dev., LLC*, 121 AD3d 748, 748  
[2014]; § Hogan *v Kelly*, 86 AD3d 590, 591-592  
[2011]). Here, since title allegedly vested in the plaintiffs  
by adverse possession in 2002 at the latest, the law in  
effect prior to the amendments is applicable (*see Warren  
v Carreras*, 133 AD3d 592, 593 [2015]). Accordingly, the  
plaintiffs were required to demonstrate that their  
possession was (1) hostile and under a claim of right, (2)  
actual, (3) open and notorious, (4) exclusive, and (5)  
continuous for the statutory period of 10 years, and that  
the subject parcel was "usually cultivated or improved" or  
"protected by a substantial inclosure" (*Estate of Becker v  
Murtagh*, 19 NY3d 75, 81 [2012]; *see Walling v  
Przybylo*, 7 NY3d 228, 233 [2006]; *Estate of Clanton v  
City of New York*, 153 AD3d 787, 789 [2017]; *see also*  
RPAPL former 501, 522).

\*862 The purpose of the hostility requirement is to

provide the title owner notice of the adverse claim through the “unequivocal acts of the usurper” (*Monnot v Murphy*, 207 NY 240, 245 [1913]; see  *Walling v Przybylo*, 7 NY3d at 232; *Estate of Clanton v City of New York*, 153 AD3d at 789). “Hostility can be inferred simply from the existence of the remaining four elements, thus shifting the burden to the record owner to produce evidence rebutting the presumption of adversity” (*Bratone v Conforti-Brown*, 150 AD3d at 1070 [citations omitted]; see  *United Pickle Prods. Corp. v Prayer Temple Community Church*, 43 AD3d 307, 309 [2007]).

Here, the plaintiffs established that their possession was actual, open and notorious, exclusive and continuous for the statutory period of 10 years, and that the subject parcel was usually cultivated or improved and protected by a substantial inclosure (see *Estate of Becker v Murtagh*, 19 NY3d at 83; *Air Stream Corp. v 3300 Lawson Corp.*, 99 AD3d at 825). Accordingly, the burden

shifted to the defendants to produce evidence rebutting the presumption of adversity (see *Estate of Clanton v City of New York*, 153 AD3d at 789; *Barra v Norfolk S. Ry. Co.*, 75 AD3d 821, 824 [2010]). Contrary to their contention, the defendants failed to establish that the plaintiffs used the disputed property with the permission of the defendants’ predecessors-in-interest during the prescriptive period (see *Estate of Becker v Murtagh*, 19 NY3d at 82-83; *Sprotte v Fahey*, 95 AD3d 1103, 1105 [2012]; *Hall v Sinclair*, 35 AD3d 660, 663 [2006]). Thus, we agree with the Supreme Court that the plaintiffs satisfied all the prerequisites for a finding of adverse possession. Leventhal, J.P., Chambers, Cohen and Barros, JJ., concur.

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