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Before buying check survey for boundaries

Taking the law into your own hands over a property line dispute can be dangerous to your bank account, as one Toronto homeowner discovered recently.

Sharon and Marino Zorz and Katherina Attard are neighbours on Baby Point Rd., near Jane and Annette Sts.

The two houses were built about 80 years ago, and the old fence separating them was not constructed on the property line, but 15 inches west of the actual boundary.

The original deed to the Zorz house included a right-of-way over that adjoining (or easterly) 15-inch strip of the Attard property. For about 80 years, the fence between the houses enclosed the strip of land making it appear that the Zorz land was 15 inches wider than what was shown on the paper title.

In 2001, the properties were converted by the government into the Land Titles system, which effectively froze any rights to adverse possession or squatter's rights as they existed on the date of conversion, but it did not end those rights.

In the fall of 2006, Attard renovated her home and constructed an addition. During this process she removed the old fence and replaced it with a new one on the property line east of where it had been for the previous 80 years.

As a result, the Zorz family could no longer access their garage, and sued Attard in November, 2006. Later that month they obtained a judge's order requiring Attard to remove the fence. Sometime afterward, the fence was removed and then reconstructed. In March, another court order required the second new fence to be removed until the case was heard.

The case came before Justice Ellen Macdonald in Ontario Superior Court in June last year.

Macdonald decided that the Zorz family had acquired adverse possession (squatter's rights) to the 15-inch strip of land east of the original fence line. The Zorzes and the previous owners of their home had demonstrated continuous, uninterrupted, open and "notorious" use of the disputed strip for many years, to the exclusion of Attard and the prior owners of her property.

Those rights existed in 1990 when the Zorzes bought the property. Even if they didn't acquire the rights at that time, the rights came into existence by their own occupation of the strip of land for more than 11 years from their purchase in 1990 to the conversion to Land Titles in 2001.

Taking all the facts into consideration, Macdonald awarded Sharon and Marino Zorz $7,500 in damages "on account of trespass, nuisance and invasion of privacy."

As well, she ordered the replacement of the fence at the same location as the original fence removed by Attard. Costs of $7,500 were awarded to the Zorzes in addition to the damages.

The case presents some valuable lessons for property owners who find themselves in a boundary line dispute.

Taking the law into your own hands to settle a boundary dispute is risky. Relocating a fence without agreement from the neighbouring owner or a court order is never a good idea.

Always review an up-to-date land survey when buying a house, so that you will know where your boundaries are, and aren't.

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Zorz v. Attard, 2008 CanLII 2760 (ON S.C.)

Date:	2008-01-29
Docket:	06-CV-321893PD1
URL:	http://www.canlii.org/en/on/onsc/doc/2008/2008canlii2760/2008canlii2760.html
Noteup:	Search for decisions citing this decision

Reflex Record (noteup and cited decisions)

Related decisions

- **Superior Court of Justice**

  Zorz v. Attard, 2008 CanLII 17314 (ON S.C.)

Legislation cited (available on CanLII)

- Courts of Justice Act, R.S.O., 1990, c. C.43

Decisions cited

- Gatz v. Kiziw, 1958 CanLII 12 (S.C.C.) (1958), [1959] S.C.R. 10

COURT FILE NO.: 06-CV-321893PD1

DATE: 20080129

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
SHARON ZORZ and MARINO ZORZ	)))	Bruce Baron, for the Applicants
	)	
Applicants	)	
	)	
- and -	)	
	)	
	)	
KATHERINA ATTARD	)))	Jack Copelovici, for the Respondent
	)	
Respondent	))	
	)	
	)	**Heard: June 14, 2007**

Ellen Macdonald J.

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REASONS FOR DECISION

[1] The Applicants and Respondent reside on Baby Point Road in the City of Toronto. Their properties adjoin each other. The Applicants are asking for an order requiring the Respondent to move a fence that the Respondent recently erected between the parties backyards and relocate it to its original location where it has been for approximately 80 years. The Applicants also request other relief including the repair of a gate, and flag stones, and the re-routing of a drain that causes water to spill onto the Applicants property. The Applicants also seek damages.

[2] When I heard this application, I expressed concern that it would have been preferable if this matter proceeded by way of a trial. Disputes such as this between neighbours over property lines are not uncommon. They are usually highly charged with opposing parties committed to opposite views as to what is relevant in the determination of the issues raised in an application such as this. Subsequent to expressing this preference on June 14, 2007, I was given to understand that the parties wished to re-attend to make further submissions. I have not heard from them with the result that I am releasing these reasons. Having carefully considering all of the materials, I am now comfortable with disposing of this matter by way of application.

[3] The materials contain illustrations of the layout of the Applicants and the Respondent s property. Mr. Baron advised me that the diagrams illustrate the property as they existed for more than 80 years prior to the construction of the disputed fence by the Respondent in the fall of 2006.

[4] The Respondent s property encroaches into the Applicants driveway. In the fall of 2006, the Respondent renovated her home and constructed an addition. During this process, the Respondent removed the old fence and replaced it with a new fence. The new fence was erected on the Applicants right of way (at the Respondent s property line) and not at the western limit of the right of way where it had existed for the previous 80 years.

History of the Application

[5] The following is relevant history that forms the background of this application. The application was issued on November 9, 2006 and set down for a interim hearing on November 20, 2006. At the November 20, 2006 hearing, the Applicants sought a interim order that a certain portion of the fence in dispute be removed as it deprived the Applicants from accessing their garage. An order was granted by Justice Morawetz that the Respondent remove the disputed portion of the fence. He also ordered that the application be heard on March 9, 2007. I accept as true that despite the November 20, 2006 order, the Respondent re-erected a new fence contrary to the order of Morawetz J. Between November 2006 and January 2007 the Respondent failed to serve responding materials or to agree to cross-examinations.

[6] The result was that the Applicants moved to set a timetable for the service of responding materials and cross-examinations. The parties reached to consent which was incorporated into an order dated January 25, 2007 wherein they agreed to a timetable.

[7] The Respondent failed to produce herself in accordance with the consent order with the result that the Applicants brought a contempt motion which was heard on March 9, 2007 together with this application. On March 9, 2007, the Respondent requested an adjournment to permit her to file an additional affidavit. Justice Conway adjourned the hearing to June 13, 2007 and ordered the Respondent to serve a responding affidavit by March 23, 2007. Justice Conway also ordered the Respondent to remove the re-erected fence by March 21, 2007. The Respondent was also ordered by Justice Conway to pay the Applicants costs of $2,000.00 for disobeying the order of November 20, 2006. Justice Conway then ordered this application be heard on June 13, 2007 peremptory on the Respondent.

[8] The following factual background is relevant. The Applicants acquired their home in 1990. The Respondent acquired her home in 2002. Both properties were converted into land titles in November 2001. There was a fence separating the two parties backyards. It is not disputed that this fence has existed since the parties homes were constructed some 80 years ago. The old fence existed not on the registered property boundary dividing the properties; instead it existed 1 3 west of the actual boundary of the Respondent s property. The Applicants had a right of way over 1 3 of the Respondent s property. I accept as correct that the old fence was placed in this location because it corresponds exactly to the western limit of the Applicants right of way over the Respondent s property.

[9] It is not disputed that when construction was taking place in September 2006, the Respondent unilaterally removed the old fence and replaced it 1 3 to the east of the location of the old fence thereby annexing lands subject to the Applicants registered right of way and subject to what the Applicants allege is title by adverse possession. By taking the steps that she did during the construction process, the Respondent has deprived the Applicants of the use of their right of way and lands that they exclusively enjoyed to the exclusion of the Respondent since they acquired their property in August 1990.

[10] Ezio Da Dalt is the predecessor in title to the Respondent. He was cross-examined on January 25, 2007. He and his wife treated 8 Baby Point as their property exclusively and 6 Baby Point exclusively as the Applicants property despite how the properties were actually registered. The order of Morawetz J. required that the portion of the fence between the garage and the Applicants gate be removed forthwith. The order did not permit the fence to be re-located or re-erected. I agree that the intent of the order of Justice Morawetz is clear. It was that the controversial portion of the fence be removed and not be replaced until such time as there could be a full hearing.

[11] The Respondent aggravated matters in this dispute by constructing a large gate in the fence between the Applicants garage and the north east corner of the new addition to the Respondent s home. This opening permits the Respondent access directly to the Applicants backyard. Prior to the construction of this gate, there had never been an opening or gate in the fence between the Applicants backyard and the Respondent s yard.

[12] The Respondent was again ordered to remove the subject new fence at the hearing before Justice Conway dated March 9, 2007. Justice Conway s endorsement is attached to these reasons.

The Law

[13] The Applicants seek a declaration that they have acquired title by adverse possession of the 1 3 strip of land commencing at the far north east corner of the home known as 8 Baby Point Road and more particularly described in the Transfer Deed registered as Instrument Number E546240 in Land Registry Office #66 running north and ending at the north limit of the Respondent s property.

[14] They also seek a declaration that they have a registered right of way in, over, and along and upon the Respondent s property more particularly described at the westerly 1 3 of the southerly 78 of Lot 10 as outlined in the Transfer Deed registered as Instrument TB 711815 in the Land Registry Office #66.

[15] The Applicants also seek a declaration that the Respondent has trespassed on their property and has damaged their property and interfered with their registered right of way.

[16] The Applicants also seek damages in the amount of $50,000.00 and an order requiring the Respondent to remove the new fence erected by her along the westerly perimeter of the Applicants backyard. They seek an order that the Respondent replace the wooden wire fence unilaterally removed by her with a fence of equal or better quality but with no gate or opening and in the same location as the fence removed by the Respondent. Other relief is sought including an order that the Respondent remove all flagstones placed directly along the western edge of the Applicants driveway over the Applicants registered right of way in or about July 2006.

[17] The Applicants also seek an order that the Respondent be compelled to remove or brick over two windows installed by the Respondent during the renovations along the eastern face of the Respondent s home which are said to interfere with their privacy. The Applicants also seek an order compelling the Respondent to remove or re-route the downspout installed on the Respondent s home so that it does not direct rain water onto the Applicants property.

[18] Punitive, aggravated and/or exemplary damages in the amount of $25,000.00 are sought by the Applicants together with pre-judgment interest and post-judgment interest in accordance with the *Courts of Justice Act,* R.S.O. 1990 c.C. 43. Costs are sought on a full indemnity basis together with GST.

[19] On the issue of the declaration respecting adverse possession, this comes from the applicable provisions of the *Land Titles Act,* RSO 1990, c. L.5 and the *Real Property Limitations Act,* RSO 1990 c. L.15, s. 4.

[20] The Applicants may acquire adverse possession rights to the Respondent s property provided that the Applicants, or their predecessors in title, can demonstrate 10 years of continuous, uninterrupted, open and notorious possession of the Respondent s property, to the exclusion of the Respondent, for a period of 10 years prior to the Respondent s property being entered into Land Titles. See *Carrozzi v. Guo* [2002] O.J. No 3629 (Ontario Superior Court) and *Gatz v. Kiziw* 1958 CanLII 12 (S.C.C.), [1959] S.C.R. 10 (Supreme Court of Canada).

[21] The onus on the Applicants to prove adverse possession is a high one. I find that they have disgorged this onus. By virtue of the use of the Respondent s property east of the old fence by the Applicants predecessors in title, the Applicants acquired adverse possession rights to the Respondent s property when the property was conveyed to the Applicants on August 31, 1990.

[22] It comes from the use of the Respondent s property (east of the old fence) by the Applicants predecessor in title. The Applicants acquired adverse possession rights to the Respondent s property when the property was conveyed to them on August 31, 1990. I agree with the alternative argument of the Applicants to the affect that if they did not acquire adverse possession rights to the Respondent s property on August 31, 1990, they acquired these rights by reason of the Applicants open, notorious, continuous possession of these lands to the exclusion of the Respondent for in excess of 11 years prior to the Respondent s property entered into Land Titles. This 11 year period was from August 31, 1990 to November 26, 2001.

[23] There shall be a declaration confirming the existence of the Applicants right of way and there shall be an order requiring the Respondent to remove the flagstones that she placed on and adjacent to the right of way because it interferes with the Applicants right of passage being the specific intent of the registered right of way. In view of all of the above findings, the Respondent has trespassed on the Applicants property. She has done so by removing the old fence and removing and damaging the Applicants gate. She installed a new fence in the Applicants backyard and she installed a large gate/opening as demonstrated by the pictures into the Applicants backyard.

[24] There are issues of nuisance wherein the Respondent is alleged to be liable to the Applicants on the basis of the tort of nuisance and interfering with the Applicants right to use and enjoy their home. The elements of the allegations of nuisance are that the Respondent unilaterally erected this fence in September 2006 then encroached into the Applicants backyard and driveway. In addition, there is the defiance of the intent of the order of Justice Morawetz of November 20, 2006. There are issue relating to the installation of the flagstones which interfere with the Applicants right of way and driveway. There is the installation of the downspout that directs water onto the Applicants property. There is the issue of the installation of the large opening in the re-located fence in or about December 2006 together with the installing of windows that look directly into the Applicants home.

[25] There are invasion of privacy issues. The Applicants allege that the Respondent is liable to them on the basis to them on the basis of invasion of privacy as a result of the acts described above. There is jurisprudence which supports, in appropriate circumstances, damage claims in the context of residential neighbours for trespass nuisance and invasion of privacy. See *Saelman v. Hill* [2004] O.J. No. 2122 (Ontario Superior Court of Justice) (*Saelman*) and *Lipiec v. Borsa* [1996] O.J. No. 3819 (Ontario Court General Division). In *Saelman*, Justice Hackland stated at para. 41:

> Most of the incidents were minor and not individually actionable. However, taken collectively, the defendants continued digging along the fence line, their channeling of water in order to destabilize the fence and distress the plaintiffs, the surveillance camera, floodlight, and no trespassing signs, the eavestroughing downspout directed onto the plaintiffs driveway, the personal confrontations and threatening behavior initiated by Mrs. Hill, all contributed to a loss of enjoyment of plaintiffs property. I find that an actionable nuisance has been established based on this unjustified harassment which the plaintiffs have been forced to endure.

Disposition

[26] There shall be a declaration of the Applicants to acquire title by adverse possession to the 1 3 inch strip of land commencing at the far northeast corner of the home municipally known as 8 Baby Point Road. There shall also be a declaration that the Applicants have a registered right of way in, over, and along and upon the Respondent s property more particularly described as the 1 3 identified in these reasons.

[27] There shall be a declaration that the Respondent has trespassed on the Applicants property and damaged the Applicants property and interfered with their registered right of way.

[28] I fix the damages on account of trespass, nuisance, and invasion of privacy in the amount of $7,500.00 There shall be an order requiring the Respondent to remove the new fence constructed by her along the westerly perimeter of the Applicants backyard.

[29] The Respondent shall replace the wood wire fence unilaterally removed by her with a fence of equal quality with no gate or opening and in the same location as the fence removed by the Respondent.

[30] The flagstones are to be removed and the downspout is to be removed or re-routed so that it does not direct rain water onto the Applicants property.

[31] I decline to order punitive, aggravated and/or exemplary damages as requested.

[32] There shall be pre-judgment interest in accordance with s. 128 of the *Courts of Justice Act* and post-judgment interest in accordance with s. 129 of the *Courts of Justice Act.*

[33] On the matter of costs, I decline to order costs on full indemnity basis as requested. Costs shall be on a partial indemnity basis and they shall be payable within 60 days by the Respondent to the Applicants. I fix these costs at $7,500.00.

Ellen Macdonald J.

Released: January 29, 2008