

# COURT OF APPEAL FOR ONTARIO

CITATION: Friday Harbour Village Inc. v. 2138746 Ontario Inc., 2018 ONCA 1047

DATE: 20181219

DOCKET: C64844

Doherty, Miller and Paciocco JJ.A.

BETWEEN

Friday Harbour Village Inc.

Plaintiff/Defendant by counterclaim  
(Respondent/Appellant by cross-appeal)

and

2138746 Ontario Inc.

Defendant/Plaintiff by counterclaim  
(Appellant/Respondent by cross-appeal)

AND BETWEEN

2138746 Ontario Inc.

Objector/Appellant  
(Appellant/Respondent by cross-appeal)

and

Friday Harbour Village Inc.

Applicant/Respondent  
(Respondent/Appellant by cross-appeal)

Patrick Flaherty and Brendan Brammall, for the appellant 2138746 Ontario Inc.

Ronald Slaght, Kelly Hayden and Jeffrey Shankman, for the respondent Friday Harbour Village Inc.

Heard: December 11, 2018

On appeal from the judgment of Justice Margaret Eberhard of the Superior Court of Justice, dated December 15, 2017, with reasons reported at 2017 ONSC 7444, and from the costs judgment of Eberhard J., dated April 5, 2018, with reasons reported at 2018 ONSC 2104.

**Paciocco J.A.:**

[1] 2138746 Ontario Inc. (“213”) is the registered owner of Block C on Plan 1021. Block C is a strip of land, informally divided into two sections, the Western Strip and the Marina Strip. The Marina Strip stands between parcels of land owned by Friday Harbour Village Inc. (“Friday Harbour”) used for a marina and resort business on Lake Simcoe.

[2] 213 and Friday Harbour are engaged in a dispute relating to Block C. That dispute was brought before a judge (the “trial judge”). She heard together an appeal by way of a trial *de novo* by 213 of a decision of the Deputy Director of Titles, and an action brought by Friday Harbour concerning the property.

[3] 213 appeals the trial judge’s decision that Friday Harbour has acquired legal and beneficial ownership of the Marina Strip by adverse possession, has not abandoned its titled right of way over the Marina Strip, has a prescriptive easement over the Marina Strip, and that no action in trespass lies against Friday Harbour for its occupation and use of the Marina Strip.

[4] Friday Harbour is cross-appealing a finding that its right of way over the Western Strip has been abandoned.

[5] 213 also seeks leave to appeal the costs order made by the trial judge.

[6] I would dismiss all of the appeals.

[7] I see no errors with the trial judge's finding of adverse possession over the Marina Strip.

[8] The trial judge recognized there is a heavier onus on a party claiming adverse possession of property over which it also has a right of way. The party must prove that its use of the property was not simply an exercise of the right of way. She found, however, that the evidence demonstrated that the between 1963 and 1975, and since then, Friday Harbour's predecessors in title exercised such complete dominion, control and possession over the Marina Strip that they effectively, and with intention, excluded 213 and 213's predecessors in title from use of the Marina Strip.

[9] I do not agree with 213's submission that the trial judge misapprehended the evidence by failing to appreciate that the true owner was able to use the Marina Strip during the period of adverse possession. She was entitled on the evidence before her to conclude that the titled owner only used the Marina Strip in the same capacity as other marina patrons, and that the titled owner was excluded *qua* owner. She committed no legal errors in making these findings.

[10] I would also reject 213's submission that the evidence is incapable of supporting the trial judge's conclusion that there was an impassable barrier across Block C, depriving the titled owner of access to the Marina Strip. Ample evidence

supports this finding, including the gate that had been constructed across Block C, the adjoining fence, and the testimony of Mr. Williams that the whole gate area was overgrown and “it would be tough to get through” the vegetation.

[11] The other means of access to the Marina Strip relied upon by 213 to oppose the adverse possession finding are irrelevant. 213 cannot rely upon means of access that would have required trespassing over other Friday Harbour land to defeat Friday Harbour’s adverse possession claim. Nor does the fact that during the relevant time it was possible to climb over the gate or use water access defeat the claim. What is relevant is whether the titled owner was able to access the disputed land in the ordinary manner: *Marshall v. Taylor*, [1895] 1 Ch. 641 (Eng. C.A.), at p. 645.

[12] In my view, uncertainty over who had originally installed the gate across Block C does not undermine the trial judge’s conclusions: *Raso v. Lonergan* (1996), 13 O.T.C. 230 (Gen. Div.), at para. 5, aff’d (1998), 114 O.A.C. 335 (C.A.). On the evidence, at all relevant times all parties knew about and acquiesced to the impassable barrier that prevented 213’s predecessors in title from accessing the Marina Strip.

[13] Nor do I accept that the trial judge erred by finding adverse possession without making a finding about the intended use of the Marina Strip by 213’s predecessors in title. The trial judge was entitled to find that the dominion exercised by Friday Harbour’s predecessors would, by its nature, defeat any use that a titled

owner could make of the land. It necessarily follows from this finding that whatever uses 213's predecessors in title might possibly have intended would be defeated.

[14] In any event, there is merit in Friday Harbour's submission that given the right of way, the only permissible use the titled owner could make of the Marina Strip would be to gain access to the other lot owners' land and the water, and that this use was entirely defeated by the impassable barrier preventing access to the Marina Strip.

[15] Finally, I do not agree that the trial judge erred by not treating title documents executed by Friday Harbour or its predecessors as acknowledgements of title defeating the adverse possession claim. Certainly, the title documents do not constitute acknowledgements that deem the true owner to be in possession pursuant to *Real Property Limitations Act*, R.S.O. 1990, c. L.15, s. 13. The title documents, which include within the descriptions of title a right of way over Block C, were not executed for the purpose of acknowledging the title of another, nor were they delivered to 213 or its predecessors as an acknowledgment of title: *Grygorcewicz v. Agar*, 1998 CanLII 7141 (Ont. C.A.), at para. 3. To the extent that the common law allows the execution of these title documents to be relied on as evidence inconsistent with claimed adverse possession, the trial judge considered this evidence and was entitled to give it the weight she did.

[16] I would therefore deny 213's appeal from the trial judge's adverse possession finding.

[17] Given that Friday Harbour has acquired title by adverse possession, it necessarily follows that I would also deny the appeals from the trial judge's decision that Friday Harbour did not abandon its right of way over the Marina Strip, was entitled to a prescriptive easement, and did not commit an actionable tort of trespass. As 213 conceded before us, these outcomes follow automatically from a finding of Friday Harbour's acquisition of title by adverse possession.

[18] Nor would I accept Friday Harbour's cross-appeal from the trial judge's decision that its right of way over the Western Strip has been abandoned. While she does comment on the imbalance that would arise in finding otherwise, this was not the basis for her decision. In my view, she was saying no more than that given Friday Harbour's adverse possession claim over the Marina Strip, Friday Harbour and its predecessors cannot be found to have been exercising their right of way when using the Marina Strip.

[19] Her conclusion that Friday Harbour's right of way over the Western Strip has been abandoned is amply supported by evidence that Friday Harbour and its predecessors acquiesced for many years to the impassable barrier that prevented them from accessing and using the right of way over the Western Strip, and by the decision to build an alternative roadway. I would not allow the cross-appeal.

[20] Finally, I would not grant leave to 213 to appeal the costs order. The trial judge's conclusion that Friday Harbour emphatically won, and her interpretation of the scope of the offer to settle, were hers to make. Nor do I accept 213's

submission that even though it asked for almost as much in costs as were ordered against it, the stakes were higher for 213, making the costs claimed by Friday Harbour unfair and unreasonable.

[21] This is not an obvious case where there are strong grounds to believe the trial judge erred in exercising her discretion: *Brad-Jay Investments Ltd. v. Village Developments Ltd.* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 92; and *Feinstein v. Freedman*, 2014 ONCA 205, 119 O.R. (3d) 385, at para. 52.

## **DISPOSITION**

[22] I would therefore dismiss 213's appeal and deny it leave to appeal the costs order. For the reasons given, I would also dismiss Friday Harbour's cross-appeal.

[23] As agreed between the parties, I would fix costs of the appeal in favour of Friday Harbour in the amount of \$45,000, inclusive of disbursements and HST, and fix costs of the cross-appeal in favour of 213 in the amount of \$15,000, inclusive of disbursements and HST.

Released: December 19, 2018 ("D.D.")

"David M. Paciocco J.A."

"I agree. Doherty J.A."

"I agree. B.W. Miller J.A."