

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FRANK E. ACIERNO,)
)
Plaintiff,)
)
v.) Civil Action No. 20056
)
LAWRENCE GOLDSTEIN, BARBARA)
GOLDSTEIN, RONALD GOLDSTEIN,)
STEVEN GOLDSTEIN and)
KAREN LIPSY,)
)
Defendants.)

MEMORANDUM OPINION

Date Submitted: March 9, 2004
Date Decided: June 25, 2004
Date Revised: June 29, 2004

Richard L. Abbott, Esquire of The Bayard Firm, Wilmington, Delaware, Attorneys for Plaintiff.

Neal C. Belgam, Esquire of Blank Rome LLP, Wilmington, Delaware, Attorneys for Defendants.

PARSONS, Vice Chancellor

The five Defendants are the beneficiaries of the residuary estate of Jacob Goldstein. The estate included record title to certain land located in New Castle County, Delaware. Plaintiff, Frank E. Acierno (“Acierno”) claims that he has acquired that land by adverse possession and seeks an order declaring that he therefore holds title to the land in fee simple absolute. Three of the Defendants (the “Counterclaimants”) filed counterclaims for trespass to land, to chattels, and to timber, and for conversion, ejectment, a mandatory injunction compelling Acierno to return the property to its original condition and a declaratory judgment quieting title. Acierno then moved for judgment on the pleadings and to dismiss the counterclaims. The Counterclaimants responded and moved for summary judgment on Acierno’s claim for adverse possession.

This is the Court’s opinion on those motions. For the reasons stated below, the Court will deny both Acierno’s motions for judgment on the pleadings and to dismiss and Counterclaimants’ motion for summary judgment.

I. BACKGROUND

In 1958, Jacob Goldstein acquired land in White Clay Creek Hundred, New Castle County, Delaware. The deed was duly recorded with the New Castle County Recorder of Deeds. The land consisted of a 5.015 acre unsubdivided portion of New Castle County Tax Parcel 09-030.00-030, including a right of ingress and egress along a 50 foot wide

right of way leading to a public road known as Brown's Lane.¹ It appears, however, that only 3.65 acres of land are in dispute in this action (the "Disputed Land").²

Jacob Goldstein died on October 3, 1979. Under his will, he left all of his rights, title and interest in the Disputed Land to Lawrence Goldstein, Barbara Goldstein, Ronald Goldstein, Steven Goldstein and Karen Lipsy (collectively, "Defendants" or the "Goldsteins") through his residuary estate.³

Acierno owns land located in White Clay Creek Hundred, comprising 137.57 acres, known as tax parcels 09-030.00-030 and 09-0303.00-002 (the "Christiana Town Center Property"). The Disputed Land is surrounded by land within the Christiana Town Center Property. Acierno avers that he has "utilized [the Disputed Land] since at least 1972" in preparation for the development of the Christiana Town Center shopping mall as it is reflected on a plan recorded with the New Castle County Recorder of Deeds.

Acierno avers that since Defendants acquired the Disputed Land in October 1979, they have not made use of, taken possession of or exerted any control over the Disputed Land and have not made any improvements to it. Acierno also notes that Defendants have two judgments against them for failure to pay property taxes related to the Disputed Land.

¹ Verified Complaint ("Complaint" or "Compl.") ¶ 8.

² Compl. ¶ 8.

³ *In re Estate of Jacob Goldstein*, Register of Wills File No. 74651; Compl. ¶ 9.

The Complaint further avers that Defendants have “allowed Acierno to utilize the Disputed Land exclusively and without permission or objection.”⁴ Acierno claims that he has openly, exclusively, notoriously, continuously and adversely occupied, maintained, developed and improved the Disputed Land to the exclusion of all others, including Defendants, for a period in excess of twenty years. More specifically, Acierno asserts that he has: submitted several plans for improvement of the Disputed Land to New Castle County’s land use authorities and its Board of Adjustment, including development plans proposed in 1972 and 1985 for commercial buildings; used and possessed the Disputed Land to store building materials, vehicles and equipment; and cleared and altered the grade of the Disputed Land on multiple occasions to prepare it for commercial development.⁵ At argument on his motion for judgment on the pleadings, without notice to opposing counsel, Acierno presented an aerial photograph that had not been produced in discovery, purportedly showing that the land had been cleared by July 1979.⁶

⁴ Compl. ¶ 10. Acierno personally verified his Complaint.

⁵ Compl. ¶ 11; Acierno’s Response to Counterclaimants’ Interrogatory No. 1 (“Acierno’s Resp. to Int. No. 1”).

⁶ Filed with Acierno’s Ltr. to the Court, dated February 3, 2004. Counterclaimants objected to consideration of this photograph because it was not produced in discovery. The photograph allegedly came from the Delaware Department of Transportation or DelDOT. Counterclaimants do not dispute its authenticity. Moreover, because the argument on Counterclaimants’ motion for summary judgment had to be continued for several weeks, Defendants had adequate time and opportunity to address the photograph through supplemental briefing and discovery, if necessary. Therefore, the Court overrules Counterclaimants’ untimeliness objection.

Defendant and Counterclaimant Ronald Goldstein filed an action to partition the Disputed Land on April 8, 1998 in which he recited that the Goldsteins owned it in fee simple and as tenants in common.⁷ The parties dispute whether this public filing would terminate the adverse possession period.

Defendants also dispute Acierno's averments that he has openly, exclusively, notoriously, continuously and adversely used and possessed the Disputed Land for a period of twenty years. Defendants do not allege that they have made any improvements on the land. Rather, they note that the Disputed Land is the subject of an estate that still remains open in which five different heirs claim interests, thereby foreclosing normal use, and that the wooded and unimproved land was held for investment purposes.⁸

On April 3, 2003, Counterclaimants asserted counterclaims for trespass to land, to timber, and to chattels and for conversion, ejectment, injunctive relief and a declaratory judgment.

On April 11, 2003, Acierno moved for judgment on the pleadings and to dismiss the counterclaims. Acierno amended his motion on May 30, 2003 to assert additional grounds for dismissal.

⁷ Counterclaimants' Reply Brief ("CCRB") at 7-8 and Ex. F (the Civil Action number is not legible in the copy provided to the Court).

⁸ Counterclaimants' Answering Brief ("CCAB") at 10-11; *In re Estate of Jacob Goldstein*, Register of Wills Folio No. 74651; Defendants' Answer to Interrogatory No. 8, at 7.

On June 30, 2003, Counterclaimants moved for summary judgment on Acierno's claim for adverse possession. By that time, former Vice Chancellor Jacobs had joined the Supreme Court and the case was reassigned.

For reasons of judicial economy, this Court decided to consider both motions concurrently. By March 2004, the Court had heard oral argument on all the pending motions.

II. ANALYSIS

A. Acierno's Motion for Judgment on the Pleadings and to Dismiss

When deciding a motion for judgment on the pleadings pursuant to Court of Chancery Rule 12(c), the Court must view the facts and inferences in the light most favorable to the non-moving party.⁹ The Court may not grant the motion unless it appears beyond doubt that Counterclaimants can prove no set of facts in support of their claims which would entitle them to relief.¹⁰ The Rule 12(c) standard has been described as "almost identical"¹¹ to the 12(b)(6) standard and favors the claimant.¹²

⁹ *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

¹⁰ *Id.* at 1205 n.10.

¹¹ *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 1456494, at *4 (Del. Ch. Nov. 5, 2001).

¹² *McMillan v. Intercargo Corp.*, 762 A.2d 492, 501 (Del. Ch. 2000).

1. Time Bar as to Counterclaims I-IV

Acierno claims that the counterclaims for trespass to land, trespass to timber, trespass to chattels, and conversion are barred by the statute of limitations. A court of equity is not bound by the legal statute of limitations.¹³ Because equity follows the law, however, the Court of Chancery generally applies the legal limitations period by analogy. The time fixed by an analogous statute of limitations is deemed to create a time period beyond which delay is presumptively unreasonable for purposes of laches. Delays of greater length may bar a claim absent circumstances that would make the imposition of the limitations period unjust.¹⁴

The relevant statute, 10 *Del. C.* § 8106, provides:

No action to recover for trespass, no action to regain possession of personal chattels, no action to recover damages for the possession of personal chattels . . . no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of action

By its terms, section 8106 applies to Counterclaimants' claims for trespass to land, trespass to chattels, trespass to timber and conversion.

¹³ *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

¹⁴ *See U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys.*, 677 A.2d 497, 502 (Del. 1996).

Counterclaimants alleged that “[i]n or about 1997 [Acierno knowingly and intentionally] physically invaded” and cleared the property,¹⁵ thereby giving rise to the claims for trespass and conversion.

A cause of action generally accrues at the moment of the wrongful act.¹⁶ There is an exception, however, when the injury is inherently unknowable and the claimant is “blamelessly ignorant” of her cause of action.¹⁷ In such situations, the claimant is deemed to have discovered the wrong when she becomes aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of the cause of action.¹⁸ Counterclaimants assert that the injury to their property was unknowable to them and that they were blamelessly ignorant of it. They argue that these issues present material questions of disputed fact.

Under the unique circumstances of this case and the standard for a motion for judgment on the pleadings, the Court cannot conclude that Counterclaimants cannot prove any set of facts in support of their claims which would enable them to prevail. Five heirs, all of whom reside out of state, claim an interest in the Disputed Land. Until recently, the parcel was unmarked, unimproved and wooded. The Disputed Land is

¹⁵ Counterclaim ¶ 3.

¹⁶ *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000).

¹⁷ *See, e.g., Mentis v. Del. Am. Life Ins. Co.*, 1999 WL 744430, at *8 (Del. Super. July 28, 1999); *Williams v. Law Firm of Cooch and Taylor*, 1994 WL 234000, at *2 (Del. Super. May 11, 1994).

¹⁸ *Id.*

surrounded by a larger parcel that is being developed. The general area nearby has been undergoing intense development for many years. Furthermore, although Jacob Goldstein passed away in 1978, his estate has not yet been completely distributed, and is the subject of ongoing litigation.¹⁹ With five individuals claiming an interest in the unimproved parcel, it is not surprising that Defendants simply have held it for investment, rather than attempting to use the parcel. The Court also would benefit from a more developed record.²⁰ There is a factual question, for example, as to whether a reasonably prudent person would have inquired into whether someone was trespassing on the property under these circumstances. Because factual disputes exist as to whether Counterclaimants timely discovered and asserted their trespass claims, Acierno's motion for judgment on the pleadings that those claims are time barred will be denied.

Furthermore, the alleged torts resulting from repeated entry on and clearing of the land, altering the topography and building a stormwater drainage basin on it all involve continuing wrongs.²¹ Acierno acknowledges that he is still using the Disputed Land today, albeit under a disputed claim of right. At a minimum, any tort that occurred after

¹⁹ *In re Estate of Jacob Goldstein*, Register of Wills Folio No. 74651.

²⁰ *See Fike v. Ruger*, 754 A.2d at 260.

²¹ *See, e.g., Gordon v. Nat'l R.R. Passenger Corp.*, 1997 WL 298320, at *7-*9 (Del. Ch. Mar. 19, 1997)(finding that deposit of contaminated fill material is a continuing trespass); *Amer v. NVF Co.*, 1994 WL 279981, at *7 (Del. Ch. June 15, 1994)(suggesting in granting permanent injunction that repeated use of access easement is a continuing trespass); *Vanderslice v. Shawn*, 27 A.2d 87, 90 (Del. Ch. 1942)(finding repeated low altitude airplane flights over a residence a continuing trespass).

April 3, 2000 is actionable.²² Thus, counterclaim Counts I-IV would not be time barred, even if there were no factual dispute as to when the applicable laches or statute of limitations periods began to run with respect to them.

2. Subject Matter Jurisdiction

Acierno asserts that the counterclaims for ejectment, for an injunction compelling Acierno, among other things, to return the property to its prior condition, for a declaratory judgment, as well as the trespass and conversion claims (if they are not time barred), all must be dismissed for lack of subject matter jurisdiction. But these arguments run counter to well established law regarding this Court's jurisdiction. Counterclaimants asserted their counterclaims in response to Acierno's action to quiet title. The counterclaims include a request for an injunction, a well recognized equitable remedy. It has long been the law in this State that if the Court of Chancery has jurisdiction over part of a controversy, it has discretion to hear the remaining part of the controversy under the "clean-up doctrine."²³

²² At argument, Acierno's counsel contended that the counterclaims are pled as a single act of trespass and not a continuing trespass. Although that reading is plausible, the Court considers the counterclaims sufficient for purposes of notice pleading to support a reasonable inference that a trespass occurred in or about 1997 and is continuing. Nevertheless, Counterclaimants should clarify this by amending their counterclaims or setting forth their contentions in greater detail in a discovery response.

²³ *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978), *aff'd*, 407 A.2d 533 (Del. 1979); *see also Pepsi-Cola Bottling Co. v. Handy*, 2000 WL 364199, at *6-7 (Del. Ch. Mar. 15, 2000); *Giordano v. Marta*, 1999 WL 350493, at *1 (Del. Ch. Apr. 28, 1999)(holding that the Court has jurisdiction over legal counterclaims even when the original claims were dismissed and the counterclaims were challenged for lack of subject matter jurisdiction).

[W]hen equity obtains jurisdiction over some portion of the controversy it will decide the whole controversy and give complete and final relief, even though that involves the grant of a purely legal remedy such as a money judgment.²⁴

Counterclaimants advance two separate grounds for the Court to exercise its discretion under the clean-up doctrine to assert jurisdiction over their legal counterclaims. First, it is undisputed that Acierno's request for a declaratory judgment to quiet title to the Disputed Land based on his claim of adverse possession is properly before the Court of Chancery. Because the Court has jurisdiction over that part of the controversy, it can decide the legal counterclaims as well, in order to resolve the whole controversy and provide complete and final relief. Second, Counterclaimants have requested injunctive relief, both in terms of ordering Acierno to return the property to its prior state and prohibiting further encroachment. This request for equitable relief provides an independent basis for equity jurisdiction over at least a portion of the controversy.

Each of these grounds provides a sufficient basis for this Court to assert jurisdiction over the counterclaims under the clean-up doctrine. In determining whether to exercise its discretion in that regard, the Court has addressed below Acierno's arguments to the contrary.

Ignoring his underlying claim, Acierno contends that the counterclaim for a mandatory injunction cannot result in equitable relief because he cannot bring the vegetation back to life or, due to legal restraints, modify the physical changes he has

²⁴ *Wilmington Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964); *Giordano v. Marta*, 1999 WL 350493, at *1.

made. In Acierno's view, the injunction counterclaim really seeks damages. His recharacterization of that claim (in part through the liberal use of ellipses) is not persuasive. Acierno himself alleges that he has made significant changes to the Disputed Land. Specifically, he has created a stormwater management basin on the property. If Acierno fails to establish that he has acquired title to the Disputed Land by adverse possession, Counterclaimants may be entitled to injunctive or other equitable relief based on the altered state of the property. The Court cannot say at this preliminary stage that there is no conceivable set of facts consistent with the pleadings under which Counterclaimants would be entitled to any injunctive relief (mandatory or prohibitory) related to the stormwater management basin and other encroachments.²⁵

Acierno next argues that Count V for ejectment is an action at law that can *only* be tried in the Superior Court. If this counterclaim stood alone, it would be tried in Superior Court. In fact, Counterclaimants brought Count V as a counterclaim to Acierno's action for adverse possession and in connection with a claim for injunctive relief, both of which provide independent grounds for subject matter jurisdiction.²⁶ This Court has exercised

²⁵ See *Gordon v. Nat'l R.R. Passenger Corp.*, 1997 WL 298320, at *7,*9 (noting distinction between a party's entitlement to equitable relief and the question of whether the Court should award that equitable relief and finding equitable jurisdiction where plaintiff sought removal of contaminated fill material). "[T]his Court exercises jurisdiction over matters where an injunction is sought." *Clark v. Teeven Holding Co.*, 625 A.2d 869, 875 (Del. Ch. 1992).

²⁶ E.g., *Justice v. McGinn*, 1998 WL 229436, at *2 (Del. Ch. Apr. 21, 1998) (noting that the Court has subject matter jurisdiction over adverse possession actions under its historical equitable powers to quiet title to land); *Suplee v. Eckert*, 120 A.2d 718, 719 (Del. Ch. 1956).

jurisdiction over ejectment claims in similar situations.²⁷ Acierno has presented no valid reason why the Court should not do so in this case. Nor has he cited any authority for the proposition that the Superior Court has *exclusive* jurisdiction over ejectment claims.

Acierno contends that this Court lacks independent subject matter jurisdiction over the counterclaim for a declaratory judgment (Count VII). Specifically, he argues that the Declaratory Judgment Act “expressly limits the authority of courts to entertain declaratory judgment actions to situations where the claim otherwise falls within the jurisdiction of the Court.”²⁸ This argument overlooks Court of Chancery Rule 13²⁹ and the clean-up doctrine.

Acierno further contends that, even if Counts I-IV are not time barred, they, too, should be dismissed for lack of subject matter jurisdiction. Again, he overlooks Rule 13 and the clean-up doctrine.

In exercising its discretion to entertain ancillary legal claims, this Court considers whether retention of the claims will: 1) resolve a factual issue which must be determined in the proceedings; 2) avoid a multiplicity of suits; 3) promote judicial efficiency; 4) do

²⁷ *E.g., Justice*, 1998 WL 229436, at *2 n.9 (asserting jurisdiction over an ejectment claim where the court had subject matter jurisdiction over an adverse possession claim).

²⁸ Plaintiff’s Opening Brief (“POB”) at 15.

²⁹ In his Reply Brief, Acierno argues that the counterclaims are not compulsory, and that if they were, he would waive his right to assert that fact. PRB at 10 n.1. Whether the counterclaims are compulsory is fairly debatable, but not dispositive in any event. For the reasons stated above, the Court would retain jurisdiction over the counterclaims even if they were merely permissive.

full justice; 5) avoid great expense; 6) afford complete relief in one action; or 7) overcome insufficient modes of procedure at law.³⁰

Counterclaimants contend that the counterclaims are simply the flip-side of Acierno's claim for adverse possession. He either has acquired the Disputed Land by adverse possession or is a trespasser who has altered the property and destroyed and hauled away vegetation. In the latter case, the Court should quiet title in Defendants' favor.

Rather than focus on the factors noted above, Acierno emphasizes his right to a jury trial. He argues that this Court's exercise of jurisdiction over counterclaims I-VII it would violate his constitutional right to a jury trial.

Delaware law has long recognized the Court of Chancery's ability to hear legal claims, which, if brought alone, could be tried to a jury in Superior Court.³¹ Thus, a litigant is "*not* entitled to a Superior Court jury trial of claims that are cognizable in this Court."³² Recognizing that the law is against him on this point, Acierno blithely and conclusorily states: "[p]revious decisions which have held that the Court of Chancery has discretion to retain jurisdiction over purely legal claims for which the right to trial by jury attaches have been wrongly decided."³³ Yet, Acierno has presented no serious

³⁰ *Clark*, 625 A.2d at 882.

³¹ *See, e.g., Pepsi-Cola*, 2000 WL 364199; *Getty Ref. & Mktg. Co.*, 385 A.2d at 150.

³² *Pepsi-Cola*, 2002 WL 364199, at *7 (emphasis in original).

³³ POB at 21.

argument as to why this Court should rewrite long established precedent and work a sea-change to its equity jurisprudence that likely would result in wastefully duplicative litigation and inhibit the Court's ability to try all aspects of a controversy in one action.

The counterclaims are factually and legally related to one another and to Acierno's claim to quiet title. Thus, the Court will exercise its discretion to hear the counterclaims in this case to promote judicial efficiency, avoid a multiplicity of suits, do full justice in one action and avoid unnecessary expense.³⁴

B. Counterclaimants' Motion for Summary Judgment

Counterclaimants moved for summary judgment against Acierno's adverse possession claim on the ground that his discovery responses fail to adduce sufficient evidence of adverse possession to meet his burden of proof at trial. Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.³⁵ On a motion for summary judgment the Court must view all facts in the light most favorable to the non-moving party.³⁶

³⁴ The Court agrees with Counterclaimants that it is premature at this stage to determine whether any matters of fact at issue in this action should be submitted to a jury pursuant to 10 *Del. C.* § 369.

³⁵ Court of Chancery Rule 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

³⁶ *See, e.g., Weber v. Kirchner*, 2003 WL 23190392, at *2 (Del. Ch. Dec. 31, 2003) (denying motion for summary judgment where verified complaint, treated as an affidavit, created a factual issue). The Court also must consider the burden of proof for the claim in making its determination. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“a party opposing a properly supported motion for summary judgment “may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.”). *Burkhart*, 602 A.2d at 59 (the nonmoving party must make a

[T]he function of the judge in passing on a motion for summary judgment is not to weigh evidence and to accept that which seems to him to have the greater weight. His function is rather to determine whether or not there is any evidence supporting a favorable conclusion to the nonmoving party.³⁷

The Court has the discretion to deny summary judgment where additional factual development would clarify the law or its factual application.³⁸

In order to prove his claim for adverse possession, Acierno must adduce evidence that he has openly, exclusively, notoriously, continuously, and adversely, possessed the Disputed Land for a period of twenty years.³⁹ It is Acierno's burden to prove that the

sufficient showing on essential elements of her case with respect to which she has the burden of proof to create a triable issue of fact). On their motion for summary judgment, Counterclaimants rely solely on Acierno's failure of proof; they present no evidence to rebut Acierno's verified complaint.

³⁷ *Gordon*, 1997 WL 298320, at *3 (quoting *Continental Oil Co. v. Pauley Petroleum Inc.*, 251 A.2d 824, 826 (Del. 1969)).

³⁸ *In re Dairy Mart Convenience Stores, Inc.*, 1999 WL 350473, at *11 (Del. Ch. May 24, 1999); *Fike v. Ruger*, 754 A.2d at 260.

³⁹ *Stellar v. Woodkeeper*, 257 A.2d 391, 394-95 (Del. Super. 1969); *Cox v. Lakshman*, 1989 WL 90713, at *1 (Del. Supr. July 24, 1989). The parties disagree on the evidentiary standard required to prove an adverse possession claim. Plaintiff asserts that the standard is proof by a preponderance of the evidence, while Counterclaimants maintain that a clear and convincing evidence standard applies. For purposes of Counterclaimant's motion for summary judgment, the Court need not decide this issue; even assuming the standard is clear and convincing evidence, Counterclaimants' motion fails for the reasons discussed in the text.

elements of adverse possession are satisfied.⁴⁰ Defendants need not disprove the existence of those elements.

Preliminarily, the parties disagree as to the date from which the Court must look back to determine whether Acierno can demonstrate twenty years of adverse possession. Counterclaimants argue that Ronald Goldstein's filing of a partition action on April 8, 1998 publicly asserting ownership of the Disputed Land cut off any adverse possession period that might have been running, noting that Acierno did not seek to intervene in the action or otherwise assert or preserve his claim of title. CCRB at 7-8. Counterclaimants have not shown, however, any involvement of Acierno in the partition action or that the action was brought to oust Acierno or any similar facts to buttress their argument that April 8, 1998 marks the end of the adverse possession period for purposes of their motion for summary judgment.⁴¹ The Court will reserve judgment on this issue in anticipation of a more complete record. In evaluating Counterclaimants' motion, the Court has assumed that the end date could be as late as November 22, 2002 – the filing date of Acierno's Complaint.

⁴⁰ *City of Wilmington v. Wilmer*, 1997 WL 124151 (Del. Ch. Feb. 20, 1997)(citing *Marvel v. Barley Mill Road Homes, Inc.*, 104 A.2d 908 (Del. Ch. 1954)).

⁴¹ Generally speaking, in order to interrupt the adverse possession period, the true owner must oust the adverse possessor, either by obtaining a judgment against the possessor or by entering the disputed property in a way that excludes him. 16 Richard R. Powell, *Powell on Real Property* ¶ 91.07[2], at 43 (Michael Allen Wolf, ed., 1999). The owner's action must be such as to put a reasonably prudent person on notice that he has been ousted. 3 Am. Jur. 2d *Adverse Possession* § 107 (2003). An action that merely alerts the adverse possessor of a superior title, and does not attempt to oust him, has been found insufficient to toll an adverse possession statute. *See Woycik v. Woycik*, 537 A.2d 541 (Conn. App. Ct. 1988).

The Complaint avers that Acierno has met the required elements for adverse possession. Counterclaimants propounded interrogatories requesting the specific factual bases for the allegations as to each element. Acierno's responses comport with the verified complaint but provide little more in terms of specific evidence. The responses state that at "various times since 1972, [Acierno] or his agents" entered the land, stored equipment and materials on the property, processed plans for approvals to improve the property, performed soil testing, and cleared the property.⁴² Acierno states that "at various times" he has stored construction equipment on the property,⁴³ and that he cleared the property of all natural vegetation and growth "during the 1980's and 1990's."⁴⁴ Despite the precision of the discovery requests, he failed to identify any more specific facts on these points. Likewise, Acierno produced no documents responsive to Counterclaimants' requests for production to support his claim other than some aerial photographs.

At argument Acierno's counsel presented an aerial photograph that purportedly shows that the Disputed Land was cleared by July 1979.⁴⁵ If the requisite adverse possession period is found to run from November 1982 to November 2002, this photograph would support Acierno's claim. The Court is hesitant to rely too heavily on

⁴² Acierno's Resp. to Int. No. 1.

⁴³ Acierno's Resp. to Int. No. 5.

⁴⁴ Acierno's Resp. to Int. No. 6; *see also* Acierno's Resp. to Int. No. 15.

⁴⁵ *See* note 6, *supra*.

this belatedly produced evidence. Nevertheless, it does provide some corroboration for Acierno's averments and his interrogatory responses.

On a motion for summary judgment, the Court must take all facts and reasonable inferences in the light most favorable to the nonmoving party. Viewing all of the facts and inferences in the light most favorable to Acierno, as it must, the Court concludes that he has produced sufficient evidence of adverse possession to create a genuine issue of material fact for trial. Therefore, summary judgment is not warranted at this juncture.

III. CONCLUSION

For the reasons stated above, Acierno's motion for judgment on the pleadings and to dismiss the counterclaims is denied. Counterclaimants' motion for summary judgment is denied.

IT IS SO ORDERED.