[4] I must be attentive to the expressions of our appellate courts concerning the quantum and quality of evidence inflexibly prescribed to escort a claim of adverse possession. A few examples will suffice. "Beyond a reasonable doubt," Rowland v. Updike, 28 N.J.L. 101; "positive evidence of the continuity and territorial extent of the possession," Baldwin v. Shannon, 43 N.J.L. 596; "clear and positive proof", Shields v. Ivey, 52 N.J.L. 280, 282, 19 A. 261, 262; Northern R. Co. of New Jersey v. Demarest, 94 N.J.L. 68, 108 A. 376; "made out, clearly and positively, by a preponderance of the evidence." Mason v. Home Real Estate Co., 90 N.J.Eq. 455, 456, 108 A. 4.

[5] My conclusion in the present case is that the defendants have failed to prove by the requisite degree of relevant and credible proof an adverse occupation embracing all of the essential elements of a substantial claim of adverse possession.

Judgment for the plaintiff.

TOTH et ux. v. VAZQUEZ et al.

No. C–307.

Superior Court of New Jersey
Chancery Division.
April 28, 1949.

1. Judgment ⇐183

Defendant's motion to strike complaint on ground that it fails to state claim upon which relief can be granted, accompanied by affidavits submitted by the parties, is regarded as application for summary judgment for defendants. Rules of Civil Practice, Superior Court, rule 3:12–2.

2. Reformation of Instruments ⇐20, 25

Grantees under deed of conveyance which was one of bargain and sale without covenants or warranties were not entitled to legal or equitable relief against grantor on ground of alleged mutual mistake and of material misrepresentations, where grantees did not rely on any representation made by grantor but caused title search and survey of premises to be made, and grantor was not aware of any encumbrances or encroachments, and judgment of reformation would be futile inasmuch as grantor did not have title to strip of land in controversy.

3. Judgment ⇐185

Assertions of fact on information and belief without revealing source of information and grounds of belief and without affidavit of any person having actual knowledge of the facts are not efficacious in affidavits presented on applications for summary judgment. Rules of Civil Practice, Superior Court, rule 3:12–2.

4. Attorney and client ⇐109

An attorney who is retained to examine title to realty must make reasonably diligent and zealous investigation of public records and impart to his client all of the observable defects, deficiencies and imperfections of title and must exercise ordinary care, knowledge and skill in so doing, but he is not required to use personally a theodolitic transit to discover the terrestrial characteristics of the property. N.J.S.A. 45:8–27.

5. Attorney and client ⇐109

In procuring survey of premises at request of client, attorney did not impliedly warrant precision and accuracy of survey.

Syllabus by the Court.

1. A motion on behalf of a defendant to strike the complaint on the ground that it fails to state a claim upon which relief can be granted which is accompanied by affidavits submitted by the parties, may now be regarded by the court as an application for summary judgment for the defendant. Rule 3:12–2.

2. Assertions of fact on information and belief without revealing the source of the information and the grounds of belief, and without the affidavit of any person having actual knowledge of the facts, are not efficacious in affidavits presented on applications for summary judgment.

3. It is the duty of an attorney who is retained to examine the title to real estate to make a reasonably diligent and

zealous investigation of the public records and to impart to his client all of the observable defects, deficiencies, and imperfections of the title. In this pursuit he is under a professional duty to exercise ordinary care, knowledge, and skill.

4. In procuring a survey of the premises at the request of his client, the attorney does not thereby impliedly warrant the precision and accuracy of the survey.

Civil action by John Toth, Jr., and Victoria Toth, his wife, against Edward Vazquez and others.

Summary judgments entered in favor of certain defendants.

David Mandel, of Perth Amboy, for plaintiffs.

David I. Stepacoff, of Perth Amboy, for defendants Galinsky and Wolpin.

Arthur A. Wolpin, of Perth Amboy, for defendant Coyne, executor.

JAYNE, Judge.

[1] Motions are made on behalf of the defendants John H. Coyne, executor of the estate of Peter Coyne, deceased, Samuel Galinsky, and Arthur A. Wolpin to strike out the alleged causes of action against them respectively in that such allegations are insufficient in law. Since the motions are accompanied by affidavits, the motions will be regarded as applications for summary judgments. Rule 3:12-2.

[2] Unless the allegations of mutual mistake or unilateral mistake proximately occasioned by the elements of misrepresentation are made evident, I am unable to perceive any cause of action for legal or equitable relief against the defendants Coyne and Galinsky.

The averments of mutual mistake and of material misrepresentations are not supported by the affidavit of the plaintiff. The defendant Galinsky is specific in his denials. Moreover he discloses that the plaintiffs did not rely upon any representation by him, but to the contrary caused a title search and a survey of the premises to be made. It is not evident that Galinsky was aware of any encumbrances or encroachments with respect to lot No. 13, and that he demonstrated the delineations of the property to the plaintiffs, as alleged but not now verified. The Galinsky deed of conveyance to the plaintiffs was one of bargain and sale, without covenants or warranties. Neither Coyne nor Galinsky have title to the strip of land in controversy, and a judgment of reformation of the conveyance would be vain and futile.

The alleged cause of action against the defendant Arthur A. Wolpin is contained in the amended second count of the plaintiffs' complaint. Mr. Wolpin is an attorney and counsellor at law of this state who was engaged by the plaintiffs to examine the record title and to procure for them a survey of the premises preliminary to the consummation of the conveyance. It is charged that he is culpable in that he failed and neglected to obtain an accurate survey.

It will be expedient to quote the following paragraphs of Mr. Wolpin's affidavit:

"2. Prior to September 1, 1945, I was retained by the plaintiffs to make a title search of the premises known as Lot 13 on Block 12 of the Map of South Amboy, New Jersey.

"3. I carefully and diligently examined the record title of said premises and furnished the plaintiffs with an abstract of title certified by me to be a true copy of the record title as it existed in the Middlesex County Clerk's Office, the United States District Court, the New Jersey Supreme Court and the Tax Collectors Office of the City of South Amboy, New Jersey.

"4. I furnished plaintiffs with an accurate abstract of said title certified by me and expressly subject to such state of facts as an accurate survey would disclose.

"5. Acting for, and in behalf of, the plaintiffs I did obtain a survey from Morgan F. Larson, a duly licensed and practicing civil engineer and surveyor of the State of New Jersey.

"6. In selecting said Morgan F. Larson to survey said premises I did rely upon the excellent reputation for accuracy and professional skill as well as upon the high personal integrity enjoyed by said Morgan F. Larson.

"7. The plaintiffs well knew at that time that I was a practicing attorney at law of the State of New Jersey; that I am not, nor have I ever held myself to be a civil engineer or surveyor.

"8. I examined the survey made by said Morgan F. Larson and said survey showed no encumbrance or encroachment thereon, whereupon I did deliver the same to the plaintiffs.

"9. The plaintiffs at that time knew that the said Morgan F. Larson was to make the survey of said premises, and did not at that time or at any time, subsequent thereto, raise any objection to the employment of his services in their behalf."

The substance of the foregoing affidavit remains uncontroverted. The plaintiff Mr. Toth indicates that he has "been informed" (by whom is not divulged) that the survey was not made on his behalf at the request of his attorney, Mr. Wolpin, but "for another party," and that consequently he "may have no recourse" against the surveyor.

[3] Assertions of fact on information and belief without revealing the source of the information and the grounds of belief, and without the affidavit of any person having actual knowledge of the facts, are not efficacious in affidavits presented on applications for summary judgment. Township of Maplewood v. Margolis, 102 N.J. Eq. 457, 141 A. 564, affirmed 104 N.J.Eq. 207, 144 A. 715; Union County Savings Bank v. Kolpenitsky, 125 N.J.Eq. 125, 4 A.2d 413; In re Kuser, 132 N.J.Eq. 260, 269, 26 A.2d 688; Hand v. Nolan, 136 A. 430, 1 N.J.Misc. 428.

But why should the plaintiffs feel vanquished by that information? There was apparently either a contract between the plaintiffs and the surveyor made through the agency of the attorney for the plaintiffs, or perhaps an agreement of like employment between the attorney and the surveyor made for the benefit of the plaintiffs. Anent that branch of the case I express no present opinion. Vide, Economy B. & L. Ass'n v. West Jersey Title Co., 64 N.J.L. 27, 44 A. 854. See, however, Styles v. Long Co., 70 N.J.L. 301, 57 A. 448; Herbert v. Corby, 124 N.J.L. 249, 11 A.2d 240, affirmed 125 N.J.L. 502, 17 A.2d 541; National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833, 34 A.L.R. 63, 67.

[4] It ought to be immediately acknowledged that it is the duty of an attorney who is retained to examine the title to real estate to make a reasonably diligent and zealous investigation of the public records and to impart to his client all of the observable defects, deficiencies, and imperfections of the title. In this pursuit he is under a professional duty to exercise ordinary care, knowledge, and skill. Economy B. & L. Ass'n v. West Jersey Title Co., supra; Jacobsen v. Peterson, 91 N.J.L. 404, 103 A. 983, affirmed 92 N.J.L. 631, 105 A. 894; Bayerl v. Smyth, 117 N.J.L. 412, 189 A. 93; Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1, 118 A.L.R. 211; Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205, 5 A.L.R. 1389. Cf. McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102, 43 A.L.R. 928; Mezzaluna v. Jersey Mortgage, etc., Co., 109 N.J.L. 340, 162 A. 743.

In the rendition of such services there is no implied duty imposed upon the attorney to use personally a theodolitic transit to discover the terrestrial characteristics of the property. The latter performance belongs to another profession. See R.S. 45:8-27, N.J.S.A. And so, as here, attorneys uniformly declare in their certificates that their opinions concerning the record title are "subject to such state of facts as an accurate survey would disclose."

[5] It is not here alleged that this defendant was negligent in his inspection of the records or that his report of the record title to the premises was erroneous. Nor is it evident that this defendant in acting for the plaintiffs failed to exercise reasonable care and precaution in the selection of a competent surveyor, even assuming a duty so to do. Assuredly, this defendant did not expressly agree to warrant the precision and accuracy of the survey. Cf. McCullough v. Sullivan, supra; Sullivan v. Stout, supra, 120 N.J.L. on page 308, 199 A. 1, 118 A.L.R. 211.

The conclusion is that summary judgments of no cause of action should be entered in favor of the defendants Coyne, Galinsky, and Wolpin.