

Gowanus Industrial Park, Inc. v City of New York

2003 NY Slip Op 30134(U)

November 13, 2003

Supreme Court, New York County

Docket Number:

Judge: Faviola Soto

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. FAVIOLA SOTO
Justice

PART 52

Howanus Industrial Park

INDEX NO.

127160-02

MOTION DATE

10/13/03

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -

City of n.y.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Repeating ^{n/Supplemental} Affidavits _____

PAPERS NUMBERED

1	SCANNED
2	NOV 24 2003
3, 4, 5	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: November 13 2003

FAVIOLA SOTO
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 52

-----X
GOWANUS INDUSTRIAL PARK, INC.,

Plaintiff,

-against-

Index No. 127160/02

CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, and
THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION,

Defendants.

-----X
HONORABLE FAVIOLA SOTO, J.:

Defendants City of New York, the New York City Department of Parks and Recreation and the New York City Department of Transportation (collectively, the City) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss this action based upon documentary evidence and for failure to state a cause of action.

In this action, plaintiff Gowanus Industrial Park, Inc. (Gowanus) seeks an injunction to require the City to open portions of Halleck Street in Brooklyn, New York, which are mapped, but not open, as a public street, and to preclude the City from prohibiting plaintiff from using the complete length of Halleck Street. In its second and third causes of action, Gowanus seeks compensation for the alleged temporary and permanent taking of its property rights of ingress and egress to and from Halleck Street.

The portion of Halleck Street to which plaintiff seeks access is west of Clinton Street and adjacent to the Red Hook Recreational Area, a public park, and abuts a portion of upland property that plaintiff purchased from the Port Authority in

1997. That portion of Halleck Street is mapped, but was never opened by the City, as a public street.

Plaintiff wishes to convert a grain terminal located on its property for use as a cement plant and to develop a large unused area for commercial purposes, potentially for sale to a "big box" retailer. Although one side of plaintiff's property is accessible to Columbia Street, according to plaintiff, in order to develop its property in a manner consistent with its plans, it needs to be able to traverse the mapped, but unopened, portion of Halleck Street in order to reach Clinton Street.

HISTORY OF PROPERTY

The portion of Halleck Street in issue here is comprised of three separate lots which were derived from separate chains of title; the three parcels are described in the papers of the parties as Parcels C, D, and E.

Parcel C

Parcel C is part of Brooklyn Block 614, Lot 300. It includes the westerly 195 feet of Halleck Street and directly abuts plaintiff's property. In 1944, Parcel C was transferred from the State of New York to the Port Authority. L 1944, ch 410. In 1945, the State Legislature passed an amendment to the 1944 legislation, authorizing transfer of Parcel C from the Port Authority to the City "in trust for park, playground or other similar or connected purposes." L 1945, ch 899. The property was transferred to the City by deed dated June 4, 1945. The deed grants the property to the City "in trust for park, playground or other similar or connected purposes and for no other purpose or

purposes whatsoever." Recorded April 26, 1946, Liber 6898, p 84.

In 1946, the Board of Estimate (BOE) adopted resolutions accepting the property and mapping it (and Parcel D) as park land. Cal. No. 96 & No. 105.

In 1949, at the request of the City, and in order to enable the City to use a portion of Parcel C as a street, the State Legislature passed an act to authorize the conveyance of Parcel C for park or street purposes. L 1949, ch 432. The Port Authority and the City subsequently entered into an amendatory deed, transferring the property to the City "in trust for park, playground, street or other similar or connected purposes." Amendatory Deed, dated February 21, 1951, and recorded June 15, 1951 in Liber 7790, p 103. In 1950, following the recommendation of the City Planning Commission, the BOE passed a resolution modifying the City Map, to extend Halleck Street though Parcel C, mapping the lines and grades of Halleck Street from Clinton Street to a point 618 feet to the west, and eliminating park area lying within the proposed lines of Halleck Street. BOE Proceedings, dated February 9, 1950, Cal. No. 63.

On March 26, 1953, the BOE passed a resolution approving a proposed Local Law that would approve use of a portion of park land within the lines of Halleck Street for the purposes of a street. The proposed Local Law was passed by the City Council, purporting to amend the Administrative Code and to discontinue as park land the area of Halleck Street within Parcel C which was mapped as a street.

Parcel D

Parcel D consists of property that is on the easterly 200 feet of Brooklyn Block 614, Lot 300. Parcel D includes the central 200 feet of Halleck Street. Although ownership of the property was not conveyed to the City until 1947, the City filled the area, which was previously part of the Henry Street Basin, and improved it as a park, pursuant to a permit by the State in or about 1940. See BOE proceedings, October 11, 1945, Cal. No. 97.

Parcel D was transferred by the State to the City by Letters Patent, dated April 16, 1947, and recorded on July 10, 1947 in Liber 7154, p 717. The Letters Patent contained a condition that the land be used for park purposes only. The resolution of the BOE authorizing conveyance of the land to the City stated that it was accepted "...provided that the letters patent are issued upon condition that in the event the lands shall at any time cease to be used for park purposes the lands hereby granted shall revert to the State of New York." Proceedings of BOE, March 13, 1947, Cal. No. 191. In anticipation of receiving the conveyance, in 1946, the BOE mapped the parcel (along with Parcel C) as parkland.

On April 16, 1949, the New York State Legislature enacted a law permitting it to amend letters patent expanding the permissible uses of land adjacent to underwater land. See L 1949, ch 595.

In 1950, the City redesignated the Halleck Street portion of Parcel D (and Parcel C) as areas for street, rather than park

use. On March 26, 1953, the BOE passed a resolution approving a proposed Local Law providing that "all the park land within the lines of Halleck Street as laid out on the City Map from a point 223 feet westerly from Clinton Street to the westerly terminus of the street shall be discontinued as park lands and shall become part of the street lands of the City." BOE Proceedings, March 26, 1953, Cal. No. 97. The City Council thereafter approved a Local Law amending the Administrative Code, discontinuing the use of Parcels C & D as park land and designating them for use as a street. Local Law 57. The Letters Patent from the State regarding Parcel D were, however, never amended.

Parcel E

Parcel E, which consists of property comprising the entire Brooklyn Block 617, Lot 1, is adjacent to, and east of, Parcel D. The City obtained title to Parcel E in 1913, pursuant to the condemnation of property for a waterfront rail terminal, which was never built. In 1937, the BOE transferred jurisdiction of Halleck Street from Court Street to the easterly United States pierhead and bulkhead line of the Henry Street Basin, from the Commissioner of Docks to the Borough President "for improvement, maintenance and use as [a] street." That transfer included a 50 foot by 223 foot area of Halleck Street which was within Parcel E. BOE Proceedings, dated June 18, 1937, Cal. No. 63.

The next year, on September 22, 1938, the BOE transferred jurisdiction of Parcel E, excluding the land in the bed of Halleck Street, from the Commissioner of Docks to the Parks Department of Brooklyn. That transferred property was "assigned

to the Department of Parks for recreational purposes." BOE Proceedings, dated September 22, 1938, Cal. No. 47.

On April 8, 1943, the BOE approved a change in the City Map, mapping out a two-acre public park within the block bounded by Bay Street, Clinton Street, Halleck Street, and the New York State Barge Canal Terminal.

According to the City, the portions of Halleck Street in Parcels C, D, and E were never paved, and were never officially opened as a public street. Plaintiff contends, however, that aerial photographs of the property taken in 1962 and 1970 show an unpaved roadway, and that the unpaved roadway existed until 1997, when the City "hastily" extended the park over the roadway, before the grain terminal property was sold to plaintiff.

According to the City, however, in the 1970's and 1980's, the easterly 223 feet of Halleck Street (the portion in Parcel E) were leased to private tenants by the Department of Transportation.

The City contends that, while the City can lease out the bed of a proposed street, it cannot lease out land in a public street. See Letter of Arnold Gelman, the attorney for a lessee of property on Halleck Street, which states:

Halleck Street is contiguous to the side of the warehouse and is a deadend street completely surrounded by park area. My client is the only property owner on the block and the warehouse is the only improvement erected on the street. This street cannot be used for any vehicular traffic, nor is it an access route to the park so that there is no pedestrian traffic.

The street is being used as a dump and is covered with garbage ranging from decayed food to automobile parts and old furniture.

Letter of Arnold Gelman, to Commissioner, Department of Real Estate, dated January 23, 1978. *See also* Gelman letter dated March 6, 1972, stating that his client seeks to purchase the easterly portion of Halleck Street, and attaching a sketch of the area which shows a fence between Halleck Street and the adjacent property in Block 614, Lot 1, which is now owned by plaintiff; Statement of Malcolm Engoron (Principal Title Examiner, Title Bureau, Tax and Bankruptcy Division, New Yprk City Law Department) regarding lease of bed of Halleck Street, west of Clinton Street to AID Trucking Corporation in mid 1980's.

The City also submits a letter from Charles R. Kamps, Chief Appraiser, Department of General Services, to Philip Tugendrajch, Director of Acquisitions, dated November 1, 1990, concerning Brooklyn Block 614, Lot 1, the property later purchased by plaintiff, which states:

The subject's upland is "L" shaped. Most of the lot's value resides in that portion of the upland which fronts on, and is accessible from, Columbia Street. The land under the grain terminal building has frontage on a paper street and runs to the land underwater. Independent street access to this segment does not physically exist and its eventual creation is doubtful, due to the legal and political controversy.

see also Letter from Lucius J. Riccio, Commissioner of DOT, dated June 14, 1993 which describes Halleck Street as "mapped but unimproved."

Finally, the City's title search of the property in question revealed no grants of private easements burdening the bed of Halleck Street.

DISCUSSION

1. Plaintiff's Cause of Action for Injunctive Relief for Access to Halleck Street

The City argues that, under the public trust doctrine, in the absence of explicit approval of the State, the westerly and central portions of Halleck Street contained in Parcels C and D, which are currently in use as park land, cannot be utilized as a public street. *Angiolillo v Town of Greenburgh*, 290 AD2d 1 (2d Dept 2001); *Ackerman v Steisel*, 104 AD2d 940 (2d Dept 1984), *affd* 66 NY2d 833 (1985); *Aldrich v City of New York*, 208 Misc 930 (Sup Ct, Queens County 1955), *affd* 2 AD2d 760 (2d Dept 1956).

Plaintiff contends that the use of Halleck Street for ingress and egress to its property is not barred, because the Legislature has, in fact, authorized the use of Halleck Street for the purposes of a public street, and because the cases enforcing the public trust doctrine have not explicitly prevented the use of park land for the purpose of a street to provide access.

According to plaintiff, the City concedes that the Legislature has already given consent to use the western portion of Halleck Street (Parcel C) as a street. The City does indicate that the original deed transferring the property from the State to the City included use as a street as well as use for park land. Relying on the case of *City of Buffalo v Day* (8 Misc 2d 14 [Sup Ct, Erie County 1957]), however, the City contends that, having used the property as park land, it must now obtain permission from the State to cease using the property as a park.

City of Buffalo v Day does state that when property is dedicated to use as a public park, it may be condemned (or, presumably, used for another purpose) only under a special statute authorizing that procedure. The decision does not, however, address whether additional permission must be obtained where, as here, the initial grant of permission from the State provided not merely for use as a park, but for use as a street as well.

Contending that no additional State approval for Parcel C need be obtained, plaintiff focuses on Parcel D. Plaintiff argues that the description of Parcel D in the legislation permitting the sale of Parcel D to the City reflects the permission of the State that the property may be used as a street. The legislation describes the property as follows:

Beginning at the point of intersection of the easterly side of Henry Street Basin ... with the southerly side of Halleck Street as now laid out upon the map of the city of New York; thence ... along said westerly side of Henry Street Basin ... to a point in the United States pierhead and bulkhead line ... *which point is in the prolongation of said southerly side of Halleck Street*, as now laid out aforesaid, distant four hundred seventy feet southwestwardly from the southerly side of Bay street ... thence southeastwardly, along said southerly line of Halleck Street as prolonged.

L 1945, ch 899, [emphasis supplied by plaintiff].

Plaintiff contends that the language "prolongation of said southerly side of Halleck Street" indicates that the State intended that Halleck Street would be extended through Parcel D. However, the Letters Patent transferring the property to the City in 1947 explicitly limit the use of the property to park land.

Where the State intends to permit the municipality to use the property for other than park purposes, that intention must be

clear and plain. *Gewirtz v City of Long Beach*, 69 Misc 2d 763, 775 (Sup Ct, Nassau Couty 1972), *affd* 45 AD2d 841 (2d Dept 1974); *see also Aldrich v City of New York*, 208 Misc at 939 (the legislative authority must be clear to enable a municipality to sell its public park land).

Given the explicit language in the Letters Patent transferring Parcel D to the City in 1947, which limits the use of the property to park purposes only, the descriptive language in the 1945 legislation authorizing the transfer is not sufficiently clear to constitute State authorization to use Parcel D as a street.

Nor can plaintiff rely on the 1949 legislation which generally permitted certain changes in the of use of granted lands which are under water. *See* L 1949, ch 595. For, although that legislation indicated that changes were possible, the Letters Patent were never amended for Parcel D, and as evidenced by the amended deed filed regarding Parcel C, the State clearly knew how to evidence the clear intention to change permitted uses.

Furthermore, although, in 1953, the BOE and the City Council both authorized the change of the Halleck Street portion of Parcel D from park land to use as a street, the express permission of the State was never obtained. Nor did the fact that the City re-mapped the portions of Halleck Street in Parcels C & D as a street, rather than park land, alter the legal status of Parcel D, absent explicit State permission.

Plaintiff next argues that cases interpreting the public

trust doctrine have not been construed as barring the use of park land to lay out a street for access purposes.

Plaintiff fails, however, to cite any cases which explicitly permit the use of park land for the purposes of a street without State authorization. Rather, plaintiff merely indicates that none of the cases cited by defendant relate directly to the use of park property as a street, and that several of those cases relate to the sale of park property, rather than a mere change of use.

Plaintiff is, therefore, essentially arguing that the public trust doctrine does not apply where park land is to be used for a street. Without explicit authority in support of such a principle, this court is not prepared to carve out such an exception to the public trust doctrine. Because the court concludes that the State has not given permission to use Parcel D as a street, it is not necessary to reach the question of whether the City must renew its permission from the State to use Parcel C as a street.

Relying on the 1962 and 1970 aerial photographs, plaintiff next argues that, although Halleck Street might not have been an official public street, it existed as an unpaved street **for** many years, and that, as an abutting property owner, plaintiff has acquired the right to use Halleck Street, and is entitled to have access to the street.

Plaintiff's arguments are unavailing. Although there might well have been an unpaved roadway in the area of Halleck Street for some years prior to 1997, that does not mean that it was a

public road, to which abutting property owners were entitled to have access. The fact that a roadway is mapped, does not make it a public street.

To be a public street, there must be a formal opening of the street by the public authorities or a user. *Bayer v Pugsley*, 13 Misc 2d 610 (Sup Ct, Monroe County), *affd* 7 AD2d 828 (4th Dept 1958). Here, as in *Pugsley*, the City has not opened, laid out, improved, or maintained the contested portion of Halleck Street, and therefore, it did not become a public street.

Nor do the cases relied on by plaintiff relating to use of a private road within a subdivision establish plaintiff's right to use the formerly unpaved road owned by the City. *See for example Borducci v City of Yonkers*, 144 AD2d 321 (2d Dept 1988) (where an owner of subdivision property sells property with reference to a subdivision map which shows that the land abuts a street in the subdivision, in absence of express reservation, the conveyance of the lot also conveys the fee to the center of the street abutting the lot). In contrast to the purchaser of private subdivision property, plaintiff did not acquire title to the center of Halleck Street. Furthermore, there is no evidence that even the Port Authority, as prior owner of the grain terminal property, had access to Halleck Street. As the new owner of the property, plaintiff did not obtain greater rights of access than the Port Authority may have had.

The photos, on which plaintiff relies, merely show that Halleck Street was an unpaved roadway during the 1960's and 1970's, a fact which **is** not contested by the City. The photos do

not establish that the property purchased by plaintiff, in fact, had access to the unpaved roadway, particularly in the face of the evidence submitted by the City, which suggests that, at least in the 1970's, there was a fence between the property later purchased by plaintiff and Halleck Street, and that Halleck Street was basically used as a dumping ground.

Moreover, regardless of whether, as plaintiff alleges, the reversion to park use was "hasty," as plaintiff concedes, *prior* to its purchase of the grain terminal property, the City expanded the park over the unpaved roadway. Thus, even assuming that Halleck Street appeared on City maps as a mapped street, that unpaved road ceased to exist prior to plaintiff's purchase of the property. Therefore, if plaintiff truly believed that it could not utilize the property for its intended economic use without access to Halleck Street, it could have refrained from purchasing the property when Halleck Street reverted to park land.

Finally, plaintiff argues that because defendant failed, as a result of its own inaction, to obtain explicit State authorization to use the unpaved portions of Halleck Street as a road, it is estopped from using that lack of authorization as a defense.

The doctrine of estoppel may apply, in certain circumstances, where the other party relied to its detriment on positive acts of the municipality, or on omissions by the municipality, where it had a duty to act. *Bender v New York City Health & Hospitals Corp.*, 38 NY2d 662, 668 (1976). Here, however, although the City failed to seek authorization from the

State for the use of Parcel D as a street after the BOE and City Council had approved such use, it cannot be said that it had a *duty* to do so. Furthermore, this is not a question of whether a procedural defense, such as a notice of claim, is available to the City, as in *Bender*. Rather, at issue is whether the City **has** the authority to utilize park land for the purposes of a road, without obtaining explicit State approval. The application of the doctrine of estoppel is inappropriate under these circumstances.

2. Plaintiff's Causes of Action for Compensation for Taking of Property

Plaintiff contends that, because it cannot utilize its property as it intended without access to Halleck Street, it is entitled to compensation for a taking of its property without due process.

To have viable cause of action for a "taking," a property interest must exist. *Gazza v New York State Dept. of Env'tl. Conservation*, 89 NY2d 603, 613 (1997). The portion of Halleck Street at issue here was never an open public road, and there is no evidence that access from plaintiff's property to the unpaved portion of Halleck Street ever actually existed. Furthermore, a taking claim may not be based upon property rights that have already been taken away from a landowner. *Id.* Since the unpaved portion of Halleck Street was converted back into use as park land prior to plaintiff's purchase of its property, even if there had been a right to its use by the Port Authority as an abutting property owner, that right was lost before the property was sold

to plaintiff.

For these reasons, plaintiff cannot establish the investment-backed expectation which it alleges, and, therefore, has no basis for claiming a taking of its property.

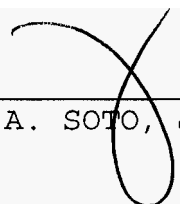
Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
November 13, 2003

ENTER :



FAVIOLA A. SOTO, J.S.C.

Copies mailed