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AMENDED
SHORT FORM ORDER

COPY

INDEX No. 02-28766

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 36 - SUFFOLKCOUNTY

PRESENT:

Hon. PAUL J. BAISLEY, JR
Justice of the Supreme Court

MOTION DATE 11.20.02
ADJ. DATE 5-15-03
Mot. Seq. # 001 - MotD
002 - MD
003 - XMD

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J.C. TARR, Q.P.R.T.,

Plaintiff,

- against -

ELLIN DELSENER and BERKLEY BOWEN,

Defendants.

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Upon the following papers numbered 1 to 56 **read on this motion** for preliminary injunction; **motion for** summary judgment; **cross motion for** summary judgment **; Notice** of Motion/ **Order to Show Cause and supporting papers** 1 - 13 **; Notice of Cross Motion and supporting papers** 14 - 27; 28 - **40 ; Answering Affidavits and supporting papers** 41 - 47; 48 - 54**; Replying Affidavits and supporting papers** 55 - 56 **; Other** plaintiff's memorandum of law. plaintiff's reply memorandum of law; plaintiff's reply memorandum of law; defendants reply memorandum of law **; (~~and after hearing counsel in support and opposed to the motion~~) it is,**

ORDERED that this motion (#001) by the plaintiff for an order pursuant to CPLR 6311: (1) granting a preliminary injunction against the defendant Ellin Delsener (Delsener) ordering and directing her to remove and/or relocate split-rail fencing installed on or adjacent to plaintiffs right-of -way prohibiting, preventing, or impeding plaintiffs unfettered use and enjoyment of said right-of-way; and **(2)** granting **a** preliminary injunction restraining and prohibiting the defendants and their agents from erecting and maintaining any obstructions or impediments to plaintiffs unfettered use of the right-of-way during the pendency of this action, is decided **as** set forth herein; and it is further

ORDERED that the motion (#002) by the defendants for an order granting them partial *summary* judgment dismissing those portions of the plaintiffs complaint which set forth causes

of action asserting rights to an alleged prescriptive easement is denied; and it is further

ORDERED that the cross motion (#003) by the plaintiff for an order, ***inter alia,*** granting it *summary* judgment, in effect a mandatory injunction, and ordering the defendants to remove all obstacles or impediments on the right-of-way, declaring plaintiffs prescriptive right to two feet on either side of the right-of-way, for a total width of fourteen feet, a decree declaring defendant Berkley Bowen's (Bowen) reconfiguration of the right-of-way a private nuisance, and finally, a decree declaring Delsener's installation of speed bumps along the right-of-way a private nuisance, is denied.

Plaintiff trust is the fee owner of an 11-acre parcel of land located in East Hampton Village, New York. The parcel of property, purchased by the plaintiff in 1998, is benefitted by an easement by grant, the aforementioned right-of-way, and bears two addresses: 16 Hither Lane and 11 Middle Lane. The right-of-way at issue was created in 1954 and grants the plaintiff and its predecessors in interest, "a perpetual right-of-way and easement to pass and repass on foot or with animals and vehicles over and along a private roadway 10 feet wide." The right-of-way is delineated more specifically in the deed to the plaintiffs property by a metes and bounds description. That description indicates a straight roadway beginning on Middle Lane leading to the southern portion of the plaintiffs property, then eventually curving eastward. The defendants are the fee owners of the burdened properties located to the south of the plaintiffs parcel. Delsener's parcel is located adjacent to the plaintiffs, is landlocked, and is accessed by a driveway running from Middle Lane along the right-of-way to her property. Bowen's parcel is located between Delsener's and Middle Lane and is, by all indications, accessed only by the same right-of-way.

In August 2000, Bowen, in an effort to improve the aesthetic features of his property, began to renovate his driveway which included portions of the right-of-way. Bowen states in his affidavit that, due to safety concerns and after conversations with Mr. Jeff Tarr, Sr., the settlor of the plaintiff trust, he designed a curving driveway, thereby transforming the existing straight roadway. The curving driveway is almost twenty feet wide at the entrance of Middle Lane and allegedly narrows to no less than twelve feet for the length of Bowen's parcel. Bowen further improved his driveway and portions of the right-of-way by planting mature trees and by placing landscaping boulders along the driveway.

During the year 2000, the plaintiff began building a pool house and pool towards the southern portion of its property near the border with the Delsener property. During the construction phase of the project certain construction trucks and other vehicles utilized the right-of-way to gain access to the southern portion of the plaintiff s property. These trucks, however, established a dirt roadway that deviated from the deeded right-of-way as it reached the end of the Delsener parcel. In other words, rather than following the deeded right-of-way as it curved eastward, the trucks crossed over the northwestern corner of the Delsener parcel and proceeded straight to the southern portion of the plaintiffs parcel. In September 2001, Delsener had a split-rail fence installed on her property leaving room for the ten foot right-of-way. However, the split-rail fence followed roughly the metes and bounds description of the deeded right-of-way,

thereby cutting off the roadway created by the construction vehicles.

Plaintiff commenced this action seeking, ***inter alia,*** declaratory judgments directing Delsener and Bowen to repair and return the right-of-way to its original position, declaring the defendants to be in violation of the written easement, to wit: restricting the plaintiffs use of the ROW by obstructing same with landscaping, fencing and speed bumps, granting the plaintiff the unfettered right to utilize, access and enjoy the aforementioned right-of-way, and declaring the plaintiff to be the beneficial owner of an easement by prescription of an additional two feet of land on either side of the original ten foot right-of-way, thereby creating an easement with a total width of fourteen feet.

The impetus for the plaintiffs complaint appears to stem from the inability of Jeff Tarr, Jr. (the plaintiff trust's beneficiary) to navigate the improved, curving roadway with his sports utility vehicle to which he attaches a trailer for small go-carts. The plaintiff alleges that, due to the curves of the driveway and the installation of the split-rail fence, his cars, construction and landscaping trucks, emergency vehicles, delivery vans and other commercial vendors can no longer access his property via the right-of-way. Plaintiff also asserts that Delsener's installation of speed bumps interferes with Mr. Tarr's use of the right-of-way because the height of the bumps causes some of his vehicles to "bottom out" and sustain damage. Finally, the plaintiff maintains that the split-rail fencing encroaches onto the right-of-way in places and limits the passageway in places to less than the deeded ten feet.

Now plaintiff moves for a preliminary injunction ordering and directing Delsener to remove and/or relocate the split-rail fence described above and restraining both defendants from erecting or maintaining any obstructions or impediments on the right-of-way. The plaintiff submits, ***inter alia,*** affidavits from Jeff Tarr, Jr., a professional engineer, the nephew **of** the prior owner of the plaintiffs property, and the caretakers of the plaintiffs property. The gravamen of their testimony is that the easement has existed for approximately **fifty** years and has been continuously used during that period by landscapers, construction vehicles and other vendors. They claim that they can no longer access the plaintiffs property as they have in the past due to the winding nature of the roadway in its present transformed state.

The defendants oppose the application for a preliminary injunction and move for summary judgment with respect to plaintiffs causes of action asserting rights to a prescriptive easement. Defendants claim that the plaintiff has only been using the right-of-way since 2000 when it began construction of the pool house and pool. Furthermore, the defendants maintain that any use of their property by the plaintiff exceeding the deeded ten feet has not been open, notorious, hostile or under a claim of right for the statutory period. Therefore, the defendants claim that any cause of action asserting prescriptive rights must necessarily fail. The defendants submit, ***inter alia,*** their affidavits and an affidavit from a licensed engineer with attached surveys of the properties at issue.

The plaintiff has also submitted what it has termed a cross-motion to the defendant's motion. Plaintiff seeks an order granting it *summary* judgment on all of the claims asserted in

the complaint. However, upon examination of the papers submitted, the plaintiff has merely submitted further support of its motion for a preliminary injunction and opposition to the defendants' motion for *summary* judgment. Furthermore, plaintiffs emphasis on the perceived weaknesses of the defendants' case does not demonstrate its entitlement to summary judgment ***(see, Van Patten v U.S. Truck Body Company, Inc.***, 176 AD2d 1095, 575 NYS2d 299 [1991]). Accordingly, plaintiffs "cross-motion" for summary judgment is denied.

With respect to plaintiffs initial application, in order to obtain a preliminary injunction, a party must demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable harm unless the injunction is granted, and (3) that the equities are balanced in its favor ***(Harbor View Ass'n of North Haven, N.Y., Inc. v Sucher***, 237 AD2d 488, 655 NYS2d 97 [19971). Preliminary injunctive relief is a drastic remedy and will be granted only if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers (***Miller v Price,*** 267 AD2d 363, 700 NYS2d 209 [19991).

Here, it is clear that the plaintiff is entitled to unfettered access to a ten foot wide easement across the defendants' properties as described in the plaintiffs deed. What is unclear is the degree to which the defendants have allegedly restricted this access. The only assertion, other than the implication that emergency vehicles can no longer access the plaintiffs property by way of the right-of-way, that would give rise to the necessity of awarding a preliminary injunction is that Delsener has limited the right-of-way to less than ten feet by installing the split-rail fence. To that end, it has been stated by our Court of Appeals that **"a** landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired" ***(Lewis v Young,*** 92 NY2d 443, 682 NYS2d 657 [1998]); therefore, plaintiffs allegation that Delsener limited the right-of-way to less than ten feet does no automatically determine the issue. Indeed, there are significant questions as to whether or not the transformation of the right-of-way has impaired the plaintiffs use and enjoyment of the right-of-way.

Nevertheless, because the right-of-way has been significantly altered from its original state and location, emergency vehicles may not be able to access the plaintiffs property via the right-of-way in its present condition. That, coupled with the fact that plaintiff alleges that the right-of-way has been decreased to less than the deeded ten feet establishes some likelihood of success on the merits. Still, that degree of success is limited only to that cause of action seeking restoration of the right-of-way to its original condition. Further, the fact that plaintiff merely asks that the split-rail fence be moved "a few feet" tips the balance of equities in the plaintiffs favor. Therefore, the preliminary injunction is granted. However, the preliminary injunction is granted to the very limited extent that Delsener is ordered to move the split-rail fence where it limits the right-of-way to less than ten feet, and is in all other respects denied.

Next, the sum fixed by the Court for the undertaking pursuant to CPLR 6312 [b] must be sufficient to compensate the party being enjoined for the damages and costs sustained by it as a result of the issuance of the preliminary injunction in the event that it is later determined that the requester was not entitled to the injunctive relief (CPLR 6312 [b]; ***Carter v Konstantatos,*** 156

AD2d 632,549 NYS2d 131 [1989]). To that end, the Court fixes the undertaking in the sum of five hundred ($500.00) dollars.

With respect to the defendants' application, on a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law, and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails in meeting this burden, summary judgment must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party, who must establish the existence of material issues of fact requiring a trial (see, ***Romano v St. Vincent's Medical Center,*** 178 AD2d 467,577 NYS2d 311 [1984]). In order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. Issue finding rather than issue determination is the key (see, ***Schulz v Esposito,*** 210 AD2d 307,619 NYS2d 774 [1994]).

To establish its right to a prescriptive easement the plaintiff is required to prove that its use of the roadway at issue was open, notorious and hostile under a claim of right for a continuous period of ten years ***(Gordon v Thomas,*** 177 AD2d 909,576 NYS2d 667 [19911, *citing* ***Brocco v Mileo,*** 144 AD2d 200,535 NYS2d 125 [1988]). The defendants assert that plaintiffs use of the alleged four extra feet in addition to the ten feet contained in the right-of-way has not been open, notorious and hostile. Plaintiff alleges that it and its predecessors in interest have used the right-of-way and additional land on either side of it for approximately **fifty** years.

The Court finds that there exist sufficient issues of fact necessitating the denial of summary judgment. The plaintiff has submitted several affidavits which attest to the fact that the plaintiff and its predecessors in interest have used the right-of-way, together with the extra four feet, for more than the requisite ten years and that use has been adverse to the interests of the defendants predecessors in interest. However, the defendants claim that the plaintiff had failed to use the right-of-way prior to the time they purchased their interests in their respective parcels. Further, the defendants have submitted aerial photographs and detailed surveys which, they assert, show that the plaintiff failed to use the right-of-way as far back as 1994. Therefore, questions remain as to the necessary element of continuous use for the ten-year prescriptive period.

Accordingly, plaintiffs motion for a preliminary injunction is granted to the limited extent that defendant Delsener is ordered to remove that portion of her split-rail fence which limits the width of the right-of-way to less than ten feet. The preliminary injunction shall be effective immediately upon service of a copy of this order upon defendants, together with proof of plaintiffs filing an undertaking, pursuant to CPLR 6312(b), in the sum of five hundred ($500.00) dollars. Defendants' motion for summary judgment and plaintiffs "cross-motion" for the same relief are both denied in their entirety.

PAUL J. BAISLEY, JR.

Dated: February 3,2004

J.S.C.