

Watson v Ewing

2007 NY Slip Op 30314(U)

March 20, 2007

Supreme Court, Suffolk County

Docket Number: 0020694

Judge: Arthur G. Pitts

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Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS

JUSTICE OF THE SUPREME COURT

PHILIP N. WATSON, JILL WATSON and
 ACTION TRUSSEL HOLDINGS, LLC.

Plaintiffs,

-against-

JODY R. EWING and SUSAN J. EWING,

Defendants.

ORIG. RETURN DATE: 12/5/06

FINAL SUBMIT DATE: 1/4/07

MOTION SEQ. NO.: 001-MG

PLTF'S/PET'S ATTY:

LEWIS JOHS AVALLONE AVILES, LLP
 425 Broadhollow Road, Suite 400
 Melville, New York 11747

DEFT'S/RESP'S ATTY:

LAZER, APTHEKER, ROSELLA & YEDID, P.C.
 225 Old Country Road
 Melville, New York 11747

Upon the following papers numbered 1 to 17 read on this motion /dismissal _____
 Notice of Motion/OSC and supporting papers 1-6; Notice of Cross-Motion and supporting papers ____; Affirmation/affidavit in
 opposition and supporting papers 7-15; Affirmation/affidavit in reply and supporting papers 16-17 Other _____; ~~(and after~~
~~hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that the defendants Jody R. Ewing and Susan J. Ewing's motion to dismiss
 plaintiffs Philip N. Watson, Jill Watson and Acton Trussel Holdings, LLC's complaint pursuant to
 CPLR 3211 (a) (1), (2), and (7) is determined as follows:

The matter at bar is one sounding in breach of contract. Defendants Jody R. Ewing and Susan
 J. Ewing are the owners in fee simple of the premises located at 130 West Neck Road, Southampton,
 Suffolk County, New York. They acquired title from plaintiff Acton Trussel Holdings, LLC ("Acton")
 on January 29, 2003. Plaintiffs Philip N. Watson and Jill Watson are the owners in fee simple of a
 landlocked parcel located at 132 West Neck Road, Southampton, Suffolk County, New York which is
 adjacent to the defendants' property. On September 5, 2002 plaintiff Acton, by plaintiff Jill Watson a
 member as grantor, executed an easement agreement with plaintiffs Philip and Jill Watson as grantees
 which burdened the Ewing property with an easement allowing the Watson's use of a driveway to give
 access to their landlocked property.

On November 19, 2002 plaintiff Acton and the defendants executed a contract of sale as to the property at 130 West Neck Road. Simultaneously therewith the parties entered into a separate agreement which set forth their duties and obligations with regard to the easement as well as the creation of the driveway allowing for access to the plaintiffs' landlocked parcel. Incorporated by reference in this agreement is a memorandum dated January 16, 2002 from Edward J. McCarthy, P.E., Director of Engineering for the Town of Southampton to the Town's Planning Board specifying the materials and the dimensions of the driveway. The agreement further provided that the defendants were to construct and install all driveway improvements, pay for the primary electrical service to both parcels of land and to clear the portion of the land the Watson house was to be built and where the access driveway was to be located.

Defendants' motion to dismiss the plaintiff Acton Trussel Holding LLC's complaint on the grounds that it lacks standing.

It is well settled that standing requires a party plaintiff to have an actual legal stake in the outcome of an action. (*Society of Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761, 570 N.Y.S.2d 778 [1991]) It is undisputed that plaintiff Acton conveyed the subject parcel to plaintiffs Philip and Jill Watson on January 29, 2003. Upon review of the agreement between plaintiff Acton and the Watsons conveying the subject easement, it is apparent that the easement is appurtenant to the land and not an easement in gross and the plaintiff have failed to proffer any proof which would rebut this presumption. (*Strnad v. Brudnicki*, 200 A.D.2d 735, 606 N.Y.S.2d 915 [2nd Dept 1994]) Accordingly, plaintiff Acton does not have a legal stake in this action and as such the defendants' motion to dismiss as to plaintiff Acton is granted.

Defendants' motion to dismiss plaintiffs cause of action for breach of contract

The defendants aver in support of the instant motion that the subject contract is not enforceable because it relies upon a memorandum from Southampton Town Engineer Edward J. McCarthy to the Southampton Town Planning Board which was absent from both the contract and the plaintiffs' complaint. Although it is well settled that a complaint for breach of contract "must set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract," (*Chrysler Capital Corp., v. Hilltop Egg Farm, Inc.*, 129 A.D.2d 927, 514 N.Y.S.2d 1002 [3rd Dept. 1987] "pleadings should be liberally construed so as to afford a plaintiff every possible favorable inference on the basis of the facts alleged (see *Leon v. Martinez*, 84 N.Y.2d 83, 87; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635) A complaint will not be dismissed for failure to state a cause of action under CPLR 3211 (a) (7) where affidavits or other documentary evidence submitted by the plaintiff demonstrate that a cause of action may exist (see *Leon v. Martinez*, supra, at 88; *Silberman v. Flaum*, 225 A.D.2d 985, 986)." (*Johnson City Cent. Sch. Dist. v. Fidelity & Deposit Co.*, 263 A.D.2d 580, 581, 693 N.Y.S.2d 669 [3rd Dept. 1999]) Herein, the complaint clearly sets forth the terms of the contract allegedly breached by expressly referencing the McCarthy memorandum and

by subsequent production of that document. Accordingly, the defendants' motion to dismiss the plaintiffs' breach of contract claim is denied.

Defendants' motion to dismiss the plaintiffs' cause of action
for injunctive relief

Upon review of the affirmation of counsel for the defendants in support of their motion to dismiss the plaintiffs' cause of action for injunctive relief it is apparent that the grounds wherein they seek such relief is without merit and not support by law. Accordingly, the motion to dismiss such cause of action is denied.

Defendants motion to dismiss the plaintiffs' second, third, fourth
and fifth causes of action

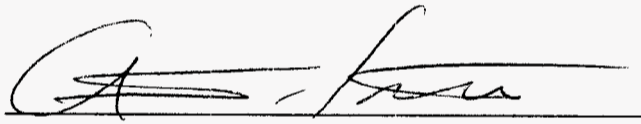
The defendants have moved to dismiss the second, third, fourth and fifth causes of action of the plaintiffs' complaint pursuant to CPLR 3211 (a) (7) on the grounds that each fail to state a cause of action. The plaintiff have not opposed such motion and accordingly, the motion as to said causes of action is granted.

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

**Dated: Riverhead, New York
March 20, 2007**



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION ____ DO NOT SCAN