

Town of Riverhead v Silverman

2007 NY Slip Op 31877(U)

June 26, 2007

Supreme Court, Suffolk County

Docket Number: 0014988/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
TOWN OF RIVERHEAD,

Plaintiff,

-AGAINST-

HENRY B. SILVERMAN, MELISSA SILVERMAN,
WELLS CREEK HOME OWNER'S ASSOCIATION,
INC. and JP MORGAN CHASE BANK, N.A.,

Defendants.
-----x

CALENDAR DATE: April 18, 2007
MNEMONIC: MG

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Upon the following papers numbered 1 to 25 read on this motion to dismiss counterclaim _____;
Notice of Motion/Order to Show Cause and supporting papers 1-17 _____; Notice of Cross-Motion and supporting
papers _____; Answering Affidavits and supporting papers 18-22 _____; Replying Affidavits and
supporting papers 23-25 _____; Other _____; and after hearing counsel in support of and opposed to
the motion it is,

ORDERED that this motion by the defendant, Well's Creek Home Owner's Association, Inc. (hereinafter Wells Creek), seeking to dismiss the cross-claim interposed by co-defendant, Henry B. Silverman, pursuant to CPLR §3211 (a)(1) based upon documentary evidence is hereby granted in its entirety and the co-defendants Henry B. Silverman and Melissa S. Silverman's cross-claim seeking a declaration of fee ownership in themselves to a certain dock owned by the Wells Creek is dismissed.

This lawsuit originates as plaintiff Town of Riverhead (hereinafter Town), instituted an action seeking to enjoin and restrain the defendants, Henry and Melissa Silverman (hereinafter Silvermans), from occupying or using their two (2) story residence at 267 Peconic Bay Boulevard in Riverhead, Suffolk County until the Town Code violations previously identified by the Town are corrected and a certificate of occupancy for the premises has been issued by the Town. The plaintiff also complains that the Silvermans have changed the grade of a private road and easement to the Wells Creek dock causing neighborhood lands to flood, have changed the configuration of the Wells Creek dock to accommodate Silvermans' sailboat to the prejudice of the additional party defendant, Wells Creek, and have brought electric service onto such dock, all in violation of the Town Code. The Silvermans cross-claimed against the defendant Wells Creek asserting ownership of the dock and sought a declaration from the Court that the Silvermans are the fee owners of the dock.

Wells Creek now moves for dismissal of the cross-claim pursuant to CPLR §3211(a)(1) and also CPLR §3212 based upon the documentary evidence produced which shows the title history of both the dock and the Silvermans' property. The Silvermans, in opposition, make a procedural argument that the motion is untimely. However, CPLR §3211 (b) indicates otherwise. The Silvermans also argue substantively that they own the dock because the description of the floating dock as an appurtenance to a piece of property is incorrectly described. Wells Creek argues, in opposition, that the dock was always part of Wells Creek (a collection of 5 homes of which the Silvermans' property is only one), as specifically set forth in the deed to Wells Creek, and a correction deed issued when an erroneous metes and bounds description was discovered. Also the Silvermans' title has no reference to the dock in its title history and the Silvermans can't claim ownership of the dock, since the grantor of the parcel made clear it belonged to Wells Creek.

For the following reasons, Wells Creek's motion to dismiss Silvermans' cross-claim pursuant to CPLR §3211(a)(1) and 3212 is granted based upon the documentary evidence establishing that ownership of the dock resides with Wells Creek for the benefit of all five (5) homeowners.

A review of the documentary evidence and the title history of this parcel of land establishes title to the dock in Wells Creek. In 1986, this parcel of land located on Peconic Bay Boulevard and fronting on Reeve's Creek, also known as Wells Creek, a body of water leading into Peconic Bay, was owned by William J. Nohejl, Sr. (hereinafter Nohejl), who was granted subdivision rights to make five (5) lots for residential development. Nohejl, as part and parcel of the subdivision filed with the Suffolk County Clerk at Liber 10182, p. 186, included a Declaration of Covenants and Restrictions, dated December 3, 1986, setting forth the construction and maintenance of a floating dock and ramp at the end of a fifteen (15) foot easement and private road available for use by the owners of the five (5) lots within the subdivision. In fact, the declaration is extremely specific and sets forth in paragraph 4 (c) as follows:

"The property owner's association referred to shall be so organized as to assure each owner of the lots shown on said map a right to membership and of the right to use the floating dock and ramp and of the right to use the fifteen-foot wide road on area "A" in common with all others in title thereto."

The reservation within the Declaration of Covenants and Restrictions provided that the dock would be conveyed to a homeowner's association (Wells Creek) for the benefit of the five (5) home owners or would be dedicated to the Town of Riverhead. Nohejl conveyed the dock to Wells Creek on December 21, 1993 which conveyance was recorded on February 26, 1999 (Liber 11947, p. 858) and a correction deed by Nohejl, dated January 6,

2005, (Liber D00012364, p. 283), was provided after this lawsuit. The Silverman's claim was asserted based upon the erroneous description. Mr. Nohejl also filed an affidavit (Wells Creek papers, exhibit H) attesting to the fact that his intention was always that Wells Creek (the home owner's association) owned the dock (reflecting the common ownership with all the owners in the development) and it was not owned by one individual for that individual's personal use or to profit from renting the dock to others. The Declaration filed states conclusively in paragraph 3 on page 3 that

"Every owner, by acceptance of a deed to a lot and a plot, covenants and agrees to pay declarant, or the homeowners' association referred to herein, on the first day of January in each and every year an annual charge to be used by the declarant or the homeowners' association to pay all taxes or fees assessed upon said floating dock and walkway, if any and all costs, if any, of constructing, maintaining and repairing same."

The dock at issue is at the end of an easement and private road which runs across the Silverman property and it is the subject of this lawsuit by the Town based upon the Silvermans' apparent change of the grading of the road causing flooding on the neighbor's property, denying access to the easement/private road and the Silvermans' assertion of exclusive rights to the floating dock at the end of the road. Silvermans' arguments are without legal merit. The Silvermans attempt to argue that, as a result of the erroneous description in the first deeded rights to the dock, that, notwithstanding the failure of the Silvermans' title to reflect any ownership in the floating dock, they may now claim it as their own. Yet, all the documentary evidence produced establishes otherwise. Clearly, there would be no need for an easement/private road across Silverman's property, in favor of the other homeowner's constituting Wells Creek, if the easement did not end at the water where the floating dock is configured for use by all the homeowner's in this five (5) lot development. The grantor, Nohejl, has made clear by both a deed and correction deed, an affidavit of intent and the declaration of covenants and restrictions, that he intended the provision for an fifteen (15) foot easement/private road to the water. Also, his failure to provide ownership of the dock to the Silvermans' predecessor in title indicates that the floating dock was in common ownership through Wells Creek and, if not Wells Creek, then by dedication to the Town of Riverhead and, in any case, not to the Silvermans.

Silvermans' assertion and attempt to exercise dominion and control of the floating dock as an appurtenance to their land does not make them the owners of the floating dock to the exclusion of the other four (4) owners in the development. A review of the Silvermans' chain of title fails to make mention of or deed any floating dock into either the Silvermans' predecessor's title or theirs. Silvermans' Lot #5 was deeded from Nohejl to D'Aprile Inc., owned by Frank Renna, on February 29, 1988, and thereafter transferred

through Renna's various corporate entities until deeded by D'Aprile Development & Leasing Corp., to the Silvermans, dated December 29, 1998 and recorded on March 29, 1999. Significantly, none of the deeds in the chain of title to the Silvermans' property mentions ownership of the floating dock. Also Frank Renna does not submit or attest to his ownership of the dock in question and Wells Creek provides documentary evidence that Harold Nicholson, one of the Wells Creek homeowners, in August 1994 sought and received pro-rated repair bills for the dock from Wells Creek, including Frank Renna, to repair and maintain the floating dock, as previously set forth in paragraph 3 of the Declaration of Covenants and Restrictions filed on December 3, 1986. This occurred before the Silvermans came into title and possession.

One need only look at Silvermans' claims to establish the utter falsity of their arguments in support of their complete ownership of the dock to the exclusion of their neighbors in Wells Creek. The Silvermans merely argue that they own it because they want to own it and, of course, ownership to the floating dock would eviscerate the Town's arguments, at least, on the Town's claim involving the Silverman's illegal reconfiguration of the dock, and their bringing electric outlets and electric service to the Wells Creek dock as well as the dispute over the easement/private road running in favor of the homeowners over the Silvermans' property. Nothing the Silvermans assert to establish their ownership of the floating dock contradicts Wells Creek, as set forth in the deeds, the chain of title to and from Renna and then to the Silvermans, the Declaration of Covenants and Restrictions by Nohejl, and the conveyance of the dock to Wells Creek by Nohejl. To accept the Silvermans' claims would lead to the absurd result that the Wells Creek easement would provide access on the easement/private road to the water line but would not include a private dock owned by the Silvermans, so the homeowners could view the waterway but not use it, essentially, making it a private road/easement to nowhere. The grantor, Nohejl, has made clear on a number of occasions that was not, and is not, his intention. The Silvermans can not point to one piece of evidence in support of a factual claim or conclusion reaching a contrary result in their favor.

To succeed on a motion to dismiss pursuant to CPLR §3211 (a)(1) based upon documentary evidence as on a CPLR §3212 summary judgment motion, the documentary evidence must be such as to resolve all factual disputes as a matter of law and demonstrate the absence of any significant dispute on the facts presented. ***Dodge v. King***, 19 AD3d 359, 796 NYS2d 161 (2nd Dept. 2005); ***New York Community Bank v. Snug Harbor Square Venture***, 299 AD2d 329, 749 NYS2d 170 (2nd Dept. 2002); ***Teitler v. Max J. Pollack & Sons***, 288 AD2d 302, 733 NYS2d 122 (2nd Dept, 2001). Wells Creek proffers documentary evidence which establishes the falsity of the Silvermans' claims of ownership to the dock (as set forth in the Silvermans' cross-claim) and conclusively establishes that Wells Creek, as the representative homeowner's association for the five (5) homeowners, including the Silvermans, is the rightful owner of the floating dock as an appurtenance to the land at the end of the fifteen (15) foot easement/private road for access to it for the enjoyment of all the homeowners constituting Wells Creek. The Court, upon review of all the documentary

evidence submitted, finds no factual basis to support any legal conclusion that would provide the Silvermans with any indicia of ownership over the floating dock and, in fact, finds that the evidence expressly contradicts the allegations in the Silvermans' cross-claim of ownership of the floating dock to the exclusion of the other homeowners who make up the Wells Creek Homeowners Association.

Accordingly, Wells Creek's motion, pursuant to CPLR §3211 (1) (a), to dismiss the Silvermans' cross-claim as against it, based upon the documentary evidence submitted, is hereby granted in its entirety and the Silvermans' cross-claim asserting ownership of the floating dock against the interests of Wells Creek is dismissed.

The foregoing constitutes the decision of the Court.

Dated: June 26, 2007



J.S.C.