SHORT FORM ORDER INDEX NO. 15624/2003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JACK INGOLD, JERILYN INGOLD, STEVEN ZAMICHOW, ELLEN ZAMICHOW, EDWARD BEERS, DOLORES BEERS, JOHN SUTER, MELISSA SUTER, ROBERT RUCKEY, JANICE RUCKEY, DOUG MEYER, MARY MEYER, RONALD YOUNG, ELIZABETH YOUNG, CARL SAITTA, CHRIS SAITTA, and NICHOLAS DIBENEDITTO,

Plaintiffs,

-against-

UNIQUE DESIGN HOME BUILDERS, INC.,

Defendant.

UNIQUE DESIGN HOME BUILDERS, INC.,

Plaintiff,

-against-

TOWN OF ISLIP, COMMISSIONER OF PUBLIC WORKS OF THE TOWN OF ISLIP, JACK INGOLD, JERILYN INGOLD, STEVEN ZAMICHOW, ELLEN ZAMICHOW, EDWARD BEERS, DOLORES BEERS, JOHN SUTER, MELISSA SUTER, ROBERT RUCKY, JANICE RUCKY, DOUGLAS MEYER, MARY MEYER, RONALD YOUNG, ELIZABETH YOUNG, CARL SAITTA, CHRIS SAITTA, and NICHOLAS DIBENEDITTO,

Defendants.

ORIG. RETURN DATE: JANUARY 25, 2007
FINAL SUBMISSION DATE: FEBRUARY 8, 2007
MTN. SEQ. #: 005
MOTION: MD

ORIG. RETURN DATE: JANUARY 25, 2007
FINAL SUBMISSION DATE: FEBRUARY 8, 2007
MTN. SEQ. #: 006
MOTION: MOT D

Index No. 15624/2003 - Action No. 1

Index No. 3308/2006 - Action No. 2

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Upon the following papers numbered 1 to 9 read on this motion FOR A PROTECTIVE ORDER, TO COMPEL AND TO AMEND PLEADING. Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Opposing Affirmation and supporting papers 7; Reply Affirmation and supporting papers 8, 9; it is,

ORDERED that this motion by the plaintiffs in Action No. 1 for a protective order, pursuant to CPLR 3103(a), precluding the defendant in Action No. 1 from deposing each and every one of the plaintiffs in Action No. 1, on the grounds that such depositions would constitute unreasonable annoyance and expense for the plaintiffs, is hereby **DENIED** for the reasons set forth herein.

ORDERED that this cross-motion by defendant in Action No. 1 for an Order, pursuant to CPLR 3124 and 3103: (1) compelling each of the plaintiffs in Action No. 1 to appear for a deposition outside the presence of any other plaintiff; (2) compelling plaintiffs in Action No. 1 to produce responsive documents; and for leave to serve an amended answer in Action No. 1, pursuant to CPLR 3025(b), adding the defenses of implied easement/easement by estoppel and Highway Law § 189, is hereby determined as provided herein.

The plaintiffs in Action No. 1 ("plaintiffs") are a group of homeowners who live on Huntting Lane, a cul-de-sac located in the Town of Islip. Huntting Lane is a private road over which plaintiffs have right-of-way easements. The defendant in Action No. 1, UNIQUE DESIGN HOME BUILDERS, INC. ("defendant"), purchased undeveloped property at the end of Huntting Lane and thereafter filed plans to build a number of homes. Although defendant's property can also be accessed from Blackmore Lane, the proposed subdivision sought

ingress and egress access via Huntting Lane. After a public hearing, the Town of Islip Planning Board approved the subdivision.

Plaintiffs commenced this action and sought a determination that defendant never acquired a right-of-way easement over Huntting Lane since no such easement had ever been granted to defendant's predecessors-in-title. Defendant had previously moved to dismiss the complaint, arguing that the complaint failed to state a cause of action. The Court granted the motion by Order dated February 27, 2004 (Werner, J.), concluding that all parties had a right-of-way easement over Huntting Lane and that "[s]ince the interests of the parties are equivalent and not adverse as required by statute . . . plaintiffs have failed to state a cause of action under RPAPL 1501." The Order was then appealed by plaintiffs, and the Appellate Division, Second Department reversed and reinstated the complaint insofar as asserted against defendant UNIQUE (*Ingold v Tolin*, 12 AD3d 407 [2004]).

In its decision reinstating the complaint, the Second Department held in pertinent part:

> An examination of the chain of title of the affected properties from the common grantor reveals that the [defendant's] parcels were not granted an easement over Huntting Lane. Indeed, the [defendant's] parcels always had access via Blackmore Lane, and Huntting Lane was not even in existence when the common grantor conveyed the builder's parcels. Therefore, contrary to the Supreme Court's conclusion, all of the parties do not have "right-of-way easements which afford the right of passage" over Huntting Lane, and thus their interests are not equivalent. Instead, under the circumstances presented, the interests of the plaintiffs may be deemed to be adverse to those of the [defendant].

Ingold v Tolin, 12 AD3d 407, 408.

In the instant application, plaintiffs move for a protective order, pursuant to CPLR 3103(a), precluding defendant from deposing each and every one of the plaintiffs, on the grounds that such depositions would constitute

unreasonable annoyance and expense for the plaintiffs. In support thereof, plaintiffs' counsel alleges that he "believes" plaintiff JACK INGOLD can adequately answer defendant's questions at a deposition. Further, plaintiffs allege that the plaintiffs acquired title to their respective properties by mesne conveyances and are far removed in the chain of title from the common grantor. As such, plaintiffs allege that none of the plaintiffs can testify regarding the creation of Huntting Lane nor do they have any information that Huntting Lane has become a public highway. Plaintiffs contend that they would have to take time off from work or other activities to prepare for and to attend such depositions.

In opposition, defendant argues that the testimony of each of the plaintiffs is relevant and necessary to the defense of this action. Defendant specifically argues that defendant is entitled to depose the plaintiffs with respect to what each homeowner knows and believes about their individual parcel's rights to Huntting Lane; what they know and believe about defendant's rights to Huntting Lane; and what they know and believe about the use and maintenance of Huntting Lane and surrounding roads since their purchase. In addition, defendant alleges that it is entitled to learn what communications each individual homeowner had over the years concerning Huntting Lane, whether with title companies, governmental entities, other homeowners, and/or defendant. Further, defendant submits that it has no intention of conducting seventeen "full-length" depositions; instead, defendant seeks to depose three plaintiffs first, with the hope that the remaining depositions could be completed more quickly, i.e., in two-hour intervals over a few days.

Initially, as this motion relates to disclosure, plaintiffs were required to submit an affirmation indicating that plaintiffs' counsel has conferred with defendant's counsel in a good faith effort to resolve the issues raised in the motion (22 NYCRR § 202.7[a]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055 [2006]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [2006]; *Cestaro v Mun Yuen Roger Chin*, 20 AD3d 500 [2005]; *Diel v Rosenfeld*, 12 AD3d 558 [2004]). Such affirmation must indicate the time, place and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with defendant's counsel was held (22 NYCRR § 202.7[c]). As plaintiffs have failed to annex such an affirmation of good faith, the Court finds that the instant application is procedurally defective. However, the Court notes that plaintiffs have specifically reserved the right to make the instant application in the within preliminary conference stipulation and order dated November 16, 2006.

As the homeowners are all named plaintiffs herein, they must provide defendant with "full disclosure of all matter material and necessary in the . . . defense of [this] action" (CPLR 3101[a]). CPLR 3103(a) provides in pertinent part, "[t]he court may at any time . . . on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]). Generally speaking, with respect to the expenses relative to the taking of depositions, CPLR 3116(d) provides that "[u]nless the court orders otherwise, the party taking the deposition shall bear the expense thereof" (CPLR 3116[d]). A court may vary this general approach and require one party to defray another's expenses (*see e.g. Buffone v Aronson*, 45 Misc 2d 454 [Sup Ct, Westchester County 1965]). However, a court may also direct that the expenses borne initially by a party be taxable as costs in the event that party prevails in the action (*Fairchild Camera & Instrument Corp. v Barletta*, 21 AD2d 768 [1964]; *Pakter v Eli Lilly & Co.*, 19 AD2d 810 [1963]).

Here, the Court finds that defendant is entitled to take the depositions of all the plaintiffs, in the absence of allegations of undue hardship or that defendant is the wealthier litigant or has some economic advantage (*Fairchild Camera & Instrument Corp. v Barletta*, 21 AD2d 768, *supra*; *Brown v University of Rochester Strong Memorial Hospital*, 77 Misc 2d 221 [Sup Ct, Monroe County 1974]). In the instant application, plaintiffs have not made such allegations, but instead object to the numerous depositions as interfering with work or other routine activities. As such, plaintiffs' motion is denied, and that branch of defendant's motion to compel the depositions of each plaintiff is granted.

However, that branch of defendant's motion seeking to exclude the presence of the other plaintiffs during the depositions of each co-plaintiff is denied. CPLR 3113(c) establishes a party's right to be present at an examination before trial (*see Perez v Time Moving & Stor.*, 28 AD3d 326 [2006]; *Carlisle v County of Nassau*, 64 AD2d 15 [1978]); *Lunney v Graham*, 91 AD2d 592 [1982]). Pursuant to CPLR 3103(a), a court may exercise its discretion to exclude a party from a deposition if a showing of "unusual" circumstances is made (*Lunney v Graham*, 91 AD2d 592, *supra*). In the case at bar, the Court finds that defendant has not established such "unusual" circumstances to exclude plaintiffs from attending the depositions of the co-plaintiffs. Although defendant argues that plaintiff JACK INGOLD may influence the testimony of the co-plaintiffs, the Court

finds that this allegation does not sufficiently establish "unusual" circumstances to exclude the plaintiffs from attending the depositions of the co-plaintiffs.

Defendant also seeks an Order, pursuant to CPLR 3124, compelling plaintiffs to produce documents responsive to its Notices for Discovery and Inspection dated March 8, 2005 and May 2, 2006, including documents concerning Huntting Lane; documents concerning the homeowners' purchases of their individual parcels bordering Huntting Lane; and documents concerning communications among the homeowners about Huntting Lane. Inasmuch as plaintiffs (defendants in Action No. 2) have already agreed to produce most of the documents requested in their response to the May 2, 2006 demand "as soon as they can be assembled," plaintiffs shall produce the documents they have already agreed to produce in their response dated May 25, 2006, within thirty (30) days of service of a copy of the within decision and Order with notice of entry.

Finally, defendant seeks leave to serve an amended answer in Action No. 1, pursuant to CPLR 3025(b), adding the defenses of implied easement/easement by estoppel and Highway Law § 189. CPLR 3025(b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (CPLR 3025[b]). Leave to amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 2007 NY Slip Op 5247 [2d Dept]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 2007 NY Slip Op 5234 [2d Dept]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]). In view of the foregoing, defendant's application for leave to serve an amended answer is granted. The proposed amended verified answer annexed to defendant's moving papers (Exh. 11) shall be deemed served upon service of a copy of the within decision and Order with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: June 26, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court