

Simon v Wells

2007 NY Slip Op 34165(U)

December 12, 2007

Supreme Court, Suffolk County

Docket Number: 0012088/2007

Judge: Emily Pines

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Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
 Justice Supreme Court

Original Motion Date: 05-31-2007
 Motion Submit Date: 10-11-2007
 Motion Sequence No.: 001 MG

<p>_____ X NEAL J. SIMON, GUSTAVO BESSALEL and AMENA ALI,</p>	<p>X</p>	<p>Eldridge & Langone, PLLC Thomas Ventura, Esq. 5720 Old Sunrise Highway Massapequa, New York 11758</p>
<p>Plaintiffs,</p>		
<p>-against-</p>		
<p>JOHN A. WELLS and JANET C. WELLS, _____ X</p>	<p>Defendants.</p>	<p>John G. Poli, III, PC 200 Laurel Avenue PO Box 59 Northport, New York 11768</p>

ORDERED, that the motion (motion sequence number 001) by plaintiffs for a preliminary injunction is denied for the reasons set forth herein; and it is further

ORDERED, that a preliminary conference is scheduled for January 11, 2008 at 9:30 a.m. before the undersigned.

Plaintiffs commenced this action by the filing of a Summons and Verified Complaint on or about April 19, 2007 and issue was joined by defendants' service of a Verified Answer with Cross-Claims on or about July 16, 2007. Plaintiffs served an Answer to the Counter-Claims on or about October 11, 2007. This is an action pursuant to **Article 15 of the Real Property Actions and Proceedings Law**, and **CPLR §3001** for a judgment determining conflicting claims to title and/or use and possession of certain real property located in the Village of Northport, Suffolk County, New York. Specifically, the property at issue is a dirt driveway located on plaintiffs' property at 229 Woodbine Avenue, Huntington, and described on the Suffolk County Tax Map as District 0400, Section 012.00, Block 01.00, Lot 021.000 (the "subject premises or lot 21"). Defendants are the owners of real property adjoining plaintiffs' property, located at 217 Woodbine Avenue and described on the Suffolk County Tax Map as District 0400, Section 012.00,

Block 012.00, Lot 020.000 ("lot 20"). Defendants purchased lot 20 on or about October 31, 1996 and plaintiffs acquired the subject premises by deed dated April 23, 2006.

Plaintiffs allege that, prior to their purchase of the subject premises, defendants enjoyed the use and benefit of a "revocable license", granted to them by plaintiffs' predecessor, McDonald, permitting them to utilize a small dirt driveway, located along the eastern portion of plaintiffs' property, for ingress and egress to their property and Beach Avenue. Plaintiffs allege that on or about January 23, 2006, McDonald sent a letter to defendants expressly revoking the license and demanding that defendants cease using the driveway as of that date. Plaintiffs state, that despite the written demand, defendants have continued to utilize the driveway to access their own property.

Plaintiffs now move for a preliminary injunction and by Order to Show Cause (FARNETI, J.) dated April 19, 2007, defendants were enjoined, restrained and prohibited from (i) accessing, trespassing upon, using, passing over, or in any other way entering upon the plaintiffs' property during the pendency of this application; (ii) taking any act to affect the condition or possession of the plaintiffs' real property during the pendency of this action; and (iii) commencing or continuing any activity, nuisance, or damage to, in, or upon the subject property, or otherwise interfering with plaintiffs' enjoyment, free access, and unfettered use of the property during the pendency of this action.

Plaintiffs argue that they meet the test for the issuance of a preliminary injunction; to wit, they can demonstrate a likelihood of success on the merits, irreparable injury if the injunction is not granted and a balancing of the equities in their favor. Specifically, they assert that defendants' only entitlement to use of the dirt driveway was the license that was previously granted by McDonald, and subsequently revoked. Thus, defendants cannot establish any right to use the dirt driveway on the subject premises. Regarding irreparable harm, plaintiff stated that they have invested substantial sums of money to prepare to develop the subject premises and that defendants' continued use of the dirt driveway prevents them from moving forward with their current building plans. Finally, plaintiffs argue that the balancing of equities tips in their favor in that they are merely seeking to develop the subject premises and the defendants have no further interest in the property since the license was revoked.

In opposition, defendants argue that they are the owners of an easement "in the nature of a private, non-exclusive right of way," over a portion of lot 21, providing permanent northbound access to lot 20 from Beach Avenue. Although defendants admit that this "nonexclusive easement", as they call it, does not appear in the deeds in the chain of title for lots 20 and 21 since 1900, they argue that an easement by implication exists in favor of lot 20. Specifically, they detail the history of the subdivision of the larger parcel containing these two (2) lots and argue that they meet the test for an easement by implication because: (a) the lots are traceable to a common grantor; (b) during the period of unity of title, the owner established this use in which one part of the land was subordinated to another; (c) that this use was so continuous, obvious, and manifest at that time so as to indicate that it was meant to be permanent; and (d) that this use affected the value of the land at the time it was conveyed, and its continuation was reasonably necessary to the beneficial enjoyment of the land conveyed or retained.

Defendants assert that in 1878, Fannie Hart acquired title to a four acre tract of land that included what is now plaintiffs' and defendants' property, as well as tax lots 22.3 and 23. Defendants claim that the purported easement was developed initially in favor of lot 20 (as it is now developed) in or about 1883, when Fannie Hart's son built and began operating a boarding house on lot 20, and the easement or right of way was used to provide access from the boarding house to "Hartt Street", now Beach Avenue. Defendants have annexed deeds and abstracts of title demonstrating the history of the subdivision of the four acre parcel and argue that these submissions demonstrate the existence of a permanent easement or right of way in favor of lot 20. Specifically, the right of way is reflected in deeds dated April 28, 1900 from Fannie Hart to Frederick Hartt transferring lot 21 and deed also dated April 28, 1900 from Fannie Hart to Charles Dumont transferring lot 22.3. Although, by further deed dated June 7, 1900, it appears that Frederick Hartt released and transferred the right of way back to Fannie Hart, the right of way does appear referenced in several subsequent deeds contained within the abstract of title for the subject premises. Defendants also assert that, even if the Court finds that there is no express grant of an easement contained in the deeds, it is an implied easement by necessity as this right of way to and from Beach Avenue was necessary due to the steep grade of the parcel and providing an alternate route to the waterfront from Woodbine Avenue. Lastly, defendants claim that the open, uninterrupted and continuous use of this easement for access to

their property under a claim of right for more than the statutory ten (10) year period is sufficient to create a prescriptive easement.

In reply, plaintiffs reiterate that, in fact, defendants only right to use the dirt driveway was by virtue of a license that was revoked by their predecessor. Plaintiffs also argue that defendants' claim of an easement by necessity must fail because the property has frontage directly on Woodbine Avenue. Moreover, they argue that any easement was extinguished by the June 7, 1900 deed referenced above. Finally, plaintiffs assert that defendants cannot demonstrate a prescriptive easement because the use of the right of way was not open, notorious and continuous for more than ten years before the commencement of the action.

It is well settled that to obtain preliminary injunctive relief, the moving party must establish (1) a likelihood of success on the merits; (2) irreparable harm if the injunction is denied; and (3) a balancing of the equities in favor of the injunction. **Arm v. 2148 Ocean Ave., LLC.**, 31 A.D.3d 355, 817 N.Y.S.2d 500 (2d Dept. 2006); **Livas v. Mitzner**, 303 A.D.3d 381, 756 N.Y.S.2d 274 (2d Dept. 2003). Moreover, "preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant." **Hoeffner v. John F. Frank, Inc.**, 302 A.D.2d 428, 756 N.Y.S.2d 63 (2d Dept. 2003). When the facts are in sharp dispute, a temporary injunction will not be granted. **Blueberries Gourmet, Inc., v. Aris Realty Corp.**, 255 A.D.2d 348, 680 N.Y.S.2d 557 (2d Dept. 1998). **See also, Related Properties, Inc., v. Town Board of Town/Village of Harrison**, 22 A.D.2d 587, 802 N.Y.S.2d 221 (2d Dept. 2005).

In the case at bar, the Court finds that plaintiffs are unable to satisfy the first prong of the three-part test and thus are not entitled to a preliminary injunction. Here, there is a sharp dispute as to whether an express written easement still exists in favor of defendants or their permission to use the dirt driveway was solely by virtue of a revokable license.¹ A "right of way" is referenced in deeds dating back to 1900 between Fannie Hart and Frederick Hart, and while another deed from 1900 appears to extinguish the right of way, it is subsequently referred to on both a filed map and other recorded deeds. Thus, it is unclear, at this

¹An easement implies an interest in land ordinarily created by grant, and is permanent in nature whereas a license is a "mere personal privilege to commit some act or series of acts on the land of another without possessing any estate therein." **Hunt v. Smith**, 249 A.D.2d 281, 670 N.Y.S.2d 907 (2d Dept. 1998).

early stage of this litigation, that plaintiffs can establish a likelihood of success on the merits of their claim.

Similarly, with regard to defendants' claim of an implied easement by use, the documentary submissions raise serious issues of fact as to whether such exists. Specifically, it is clear that defendants can establish that the subject parcels were held in common ownership and that the use of the dirt driveway was established for the benefit of the parcel now owned by defendants. What is uncertain is whether such use was so obvious and continuous as to manifest an intent of the grantor that it be permanent and whether such use was reasonably necessary for the beneficial enjoyment of the property. **See, *MacVicar v. Aerodrome Development Corp.***, 7 A.D.3d 762, 776 N.Y.S.2d 851 (2d Dept. 2004). A mere convenience is insufficient to justify entitlement to such an easement. ***Glennon v. Mayo***, 221 A.D.2d 504, 633 N.Y.S.2d 400 (2d Dept. 1995). Based on the foregoing, the Court cannot determine that plaintiffs are likely to succeed on the merits of their claims and the preliminary injunction must be denied.

However, the Court notes, that defendants claims of either a prescriptive easement or easement by necessity must be rejected. An easement by prescription requires proof that the use of the property was adverse, open, notorious, continuous and uninterrupted for the prescriptive period. ***J.C. Tarr, v. Delsener***, 19 A.D.3d 548, 800 N.Y.S.2d 177 (2d Dept. 2005). Where permission can be implied from the beginning however, no adverse use may arise until there is an assertion of a hostile right which is made known to the property owner. ***Van Deusen v. McManus***, 202 A.D.2d 731, 608 N.Y.S.2d 569 (3d Dept. 1994). Here, since plaintiffs' predecessor in title permitted defendants to use the dirt driveway prior to the sale of the subject premises to plaintiffs, their use of the driveway was not hostile until they continued to do so after revocation of the permission. Thus, they cannot meet the criteria for a prescriptive easement.

Similarly, defendants cannot prevail on a claim based upon an easement by necessity. To succeed on such a claim, defendants are required to demonstrate that the easement is "strictly necessary" for the beneficial enjoyment of the subject premises. ***Sharper Properties, Inc., v. Hubbard Sand & Gravel, Inc.***, 12 A.D.3d 494, 785 N.Y.S.2d 89 (2d Dept. 2004). **See also, *Silvercrest v. St. Christopher-Ottile***, 194 A.D.2d 720, 600 N.Y.S.2d 95 (2d Dept. 1993). Since defendants' parcel has frontage on

Woodbine Avenue, an improved roadway, they are unable to establish the strict necessity of using the dirt driveway for ingress and egress to their property. **See, Turner v. Baisley**, 197 A.D.2d 681, 602 N.Y.S.2d 907 (2d Dept. 1993).

For the reasons set forth herein above, plaintiffs motion for a preliminary injunction is denied in its entirety. This matter is set down for a preliminary conference on January 11, 2008 before the undersigned.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: December 12, 2007
Riverhead, New York



EMILY PINES
J. S. C.