

Phillips v Iadarola
2007 NY Slip Op 34591(U)
June 28, 2007
Supreme Court, Ulster County
Docket Number: 07-2187
Judge: Gerald William Connolly
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

ARLENE PHILLIPS and ALLEN G. PHILLIPS, JR.

Plaintiff,

-against-

CARMINE IADAROLA a/k/a CARMINE IADAROLA,
JR., a/k/a CARMINE R. IADAROLA, JR. and LORRIE
PLACE,

Defendants.

(Supreme Court, Ulster County, All Purpose Term)

APPEARANCES: Sean M. Kemp
Attorney for Plaintiffs
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DECISION AND ORDER

Index No. 07-2187 ✓
RJI No. 55-07-00869

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ULSTER COUNTY CLERK

Connolly, J.:

Plaintiffs have moved for a preliminary injunction by Order to Show Cause dated May 30, 2007, enjoining defendants from altering or developing the lands of plaintiff or the purported "right of way" to gain access to or develop lands of defendants and from connecting or installing power or utility wires, pipes, lines, or any other installation within or outside of a purported "right-of-way" located on plaintiffs' property for the duration of the action.

Plaintiffs own two parcels of land in the Town of Lloyd, Ulster County, New York. Defendant, Lorrie Place, is an owner of a land-locked parcel of land that lies to the southeast of plaintiffs' property.¹ Defendant Lorrie Place's deed grants her a "20 foot right-of-way" over plaintiffs' land. Defendants have been constructing a home on the land-locked parcel and have allegedly run power and utility lines to the house by running such lines both outside and within the boundaries of the "right-of-way". Plaintiffs allege that the defendants have used the "right-of-way" unlawfully, have expanded the "right-of-way" beyond 20 feet, thereby encroaching on the plaintiffs' property and destroying vegetation, damming the course of a free-flowing stream, and damaging plaintiffs' dry-well, well, and leach field. Plaintiffs allege that defendants' "right-of-way" provides only ingress and egress access and does not include a right to install or erect utility lines above or below the ground within or along the "right-of-way". Plaintiffs also allege that the utility lines run through property that is regularly submerged under water and that defendants' conduct threatens the health, safety, and welfare of the plaintiffs. Defendants oppose such a preliminary injunction.

With respect to the utility lines, Defendants' assert that the defendants' house (located within the land-locked parcel) is 99% complete and will be ready for a certificate of occupancy in two weeks provided that electric service is completed. Defendants assert that the "right-of-way" is the only means to obtain electric service to the house. Defendants further allege that the electric service is completely installed, approved and covered and no further work remains to be done on plaintiff's property with regard to the electrical service. Defendants allege that the electric utility line is connected to the Central Hudson utility pole but not to the electric power on the pole and such final

¹ According to plaintiff, "Defendant Carmine Iadarola is one of Defendant Lorrie Place's successors, employees, invitees, agents or assigns that has contributed and continues to the damages Plaintiffs complain of..."

connection is required in order to make the house habitable. Defendants additionally note that such remaining connection would occur outside of the plaintiffs' property. Defendants Defendants urge the court to determine that the term "right-of-way" grants defendants' broad rights with respect to such land as opposed to narrowly construing such term to solely provide rights of ingress and egress. Defendants further argue that even if the "right-of-way" does solely provide a right of ingress and egress, the defendants have an easement by necessity with respect to the electric cables.

In order to obtain a preliminary injunction, plaintiff must show a likelihood of success on the merits, a balancing of the equities in her favor, and irreparable injury in the absence of the injunction (Doe v. Axelrod, 73 NY2d 748).

Defendant Place's deed appears to convey an interest to her of a 20 foot right of way over Defendants' property. Plaintiffs' argue that while defendants have the right to ingress and egress, they have no right to use lands within the "right-of-way" for any other purpose. Defendants argue that the "right-of-way" language is not limited to ingress and egress or limited in any manner. While the court may determine at trial the scope of the term "right-of-way", there is a likelihood that a court would determine that the term "right-of-way" is limited to a right of ingress and egress. "Absent express language to the contrary... '[t]he grant of a mere right-of-way for ingress and egress does not ... include the right to install underground pipes or utility lines' Spiak v. Zeglen, 255 AD2d 754, 757 [3rd Dept., 1998] *quoting* U.S. Cablevision Corp. v. Theodoreu, 192 AD2d 835, 837 [3rd Dept., 1993]. Additionally, while the "right-of-way" may provide defendants the right of ingress and egress, such right does not provide defendants the ability to improve such "right-of-way" by removing portions of earth and vegetation from the land bordering it without obtaining plaintiffs' consent. *See* Karabatos v. Hagopian, 39 AD3d 930 [3rd Dept., 2007]. Therefore, the plaintiffs have

demonstrated that under the circumstances of this case they have a likelihood of success on the merits.

With respect to a danger of irreparable injury, as plaintiffs have shown that soil, rock, trees and other vegetation has been removed from their property with respect to the improvements being performed to the “right-of-way” and the laying of the utility lines, such removal is irreversible and threatening to the structural integrity of the property and as such plaintiffs have demonstrated a danger of irreparable injury if additional alterations are made to the plaintiffs’ property abutting the “right-of-way” and that the equities weigh in plaintiff’s favor with respect to such improvements. *See Karabatos v. Hagopian, supra* at 930. With respect to the electric utility line(s) however, defendants have indicated, and plaintiffs’ have not contested, that such service lines have already been installed, approved and covered. Defendants assert that the only remaining action that will occur with respect to such lines is their final connection to the electric pole which is outside of the plaintiffs’ property. While plaintiffs allege that the utility lines interfere with plaintiffs’ septic and leach field, interfere with their dry-well, have resulted in plumbing problems and will run through property that is regularly submerged in water to the detriment of plaintiff’s property, health, safety and welfare, such assertions are merely conclusory and the record is devoid of any evidence to support such assertions. As such, plaintiffs have not demonstrated a danger of irreparable injury with respect to the electric utility lines running through the property or being connected.

Therefore, the court will grant a preliminary injunction to the plaintiffs in part. The court notes that the defendant Lorrie Place’s deed provides for a “20 foot right-of-way” and plaintiffs have not disputed defendants’ right of ingress and egress with respect to such “right-of-way”. As such, this order does not enjoin the ability of the defendants from accessing Defendant Lorrie Place’s

property via such right-of-way.

The parties remaining contentions have been considered and found to be without merit.

Accordingly, it is

ORDERED, that Plaintiff submit an undertaking, as required by CPLR § 6312(b), with an appropriate surety in the minimum amount of \$10,000 and that evidence of such undertaking be provided to the court within seven (7) days of the signing of this order;

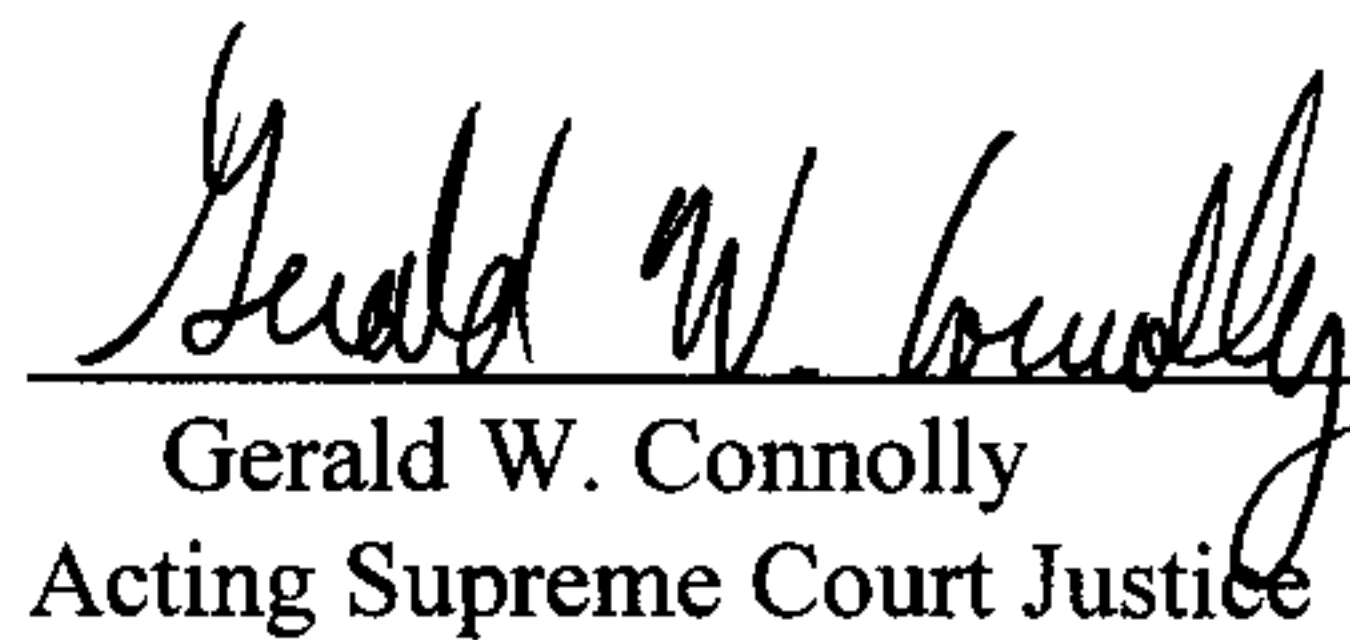
ORDERED, that Defendants, their successors, employees, invitees, agents and assigns are restrained and prohibited from altering or developing Plaintiffs' property to gain access to or improve Defendant Lorri Place's property.

This shall constitute both the decision and order of the Court. All papers, including this decision and order, are being returned to plaintiffs' counsel. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: June 28, 2007
Kingston, New York


Gerald W. Connolly
Acting Supreme Court Justice

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Papers Considered:

1. Order to Show Cause dated May 30, 2007. Affirmation of Sean M. Kemp dated May 29, 2007. Affidavit of Arlene Phillips dated May 25, 2007 and accompanying exhibits.
2. Affirmation in Opposition of J. Benjamin Gailey dated June 22, 2007. Affidavit in Opposition of Carmine Iadarola dated June 22, 2007. Affidavit in Opposition of Lorri Place dated June 22, 2007. Affidavit in Opposition of Anna Iadarola dated June 22, 2007 and accompanying exhibits.
3. Reply affirmation of Sean M. Kemp dated June 26, 2007 and accompanying exhibits.

NINA POSTUPACK
ULSTER COUNTY CLERK