

Gibson v Town of Schodack

2008 NY Slip Op 30002(U)

January 3, 2008

Supreme Court, Rensselaer County

Docket Number: 0218424/2008

Judge: George B. Ceresia

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF RENSSELAER

LESTER GIBSON and NANCY GIBSON,

Plaintiffs,

-against-

TOWN OF SCHODACK, NICHOLAS B.
FERRIERE and MARY BETH FERRIERE,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
Index No.: 218424 RJI No.: 41-0407-2006

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs and defendants Nicholas B. Ferriere and Mary Beth Ferriere (“defendants”)

are adjoining property owners in the Town of Schodack in Rensselaer County, New York. Plaintiffs maintain that they own a driveway which provides access to both parcels of real property, and have commenced the above-captioned action for a determination to that effect under Real Property Actions and Proceedings Law (“RPAPL”) Article 15. Defendants have counterclaimed for the same relief. Each side asserts fee title ownership to the property in question. They also assert, in the alternative, that they have acquired fee by adverse possession or that they have acquired an easement by prescription.

The defendants have submitted two applications. The first, by order to show cause, seeks to quash certain subpoenas and to preclude plaintiffs from taking the depositions of the defendants and certain non-party witnesses. The second, by notice of motion, seeks relief pursuant to CPLR 3126 by reason of defendants’ failure to comply with their discovery demand and the Court’s scheduling order dated February 6, 2007.

Before the Court proceeds, it must first address a very unfortunate circumstance which arose after the motions had been submitted for decision. The Court has been informed that plaintiff’s attorney, Mylo Eytina, Esq. passed away on December 2, 2007. As stated in Clark v MGM Textiles Industries, Inc. (307 AD2d 520[3rd Dept., 2003]) “[i]f an attorney dies while an action is pending, ‘no further proceeding shall be taken in the action against the party for whom he [or she] appeared, without leave of court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs’” (Clark v MGM Textiles Industries, Inc., supra, at 521, quoting

CPLR 321 [c]) . Because the motions were fully submitted at the time that Mr. Eytina died, the Court will proceed to address them, but will contour any relief in keeping with the protections of CPLR 321 (c).

Turning to the order to show cause to quash subpoenas served upon nonparty witnesses, plaintiffs have acknowledged that the subpoenas were defective in form. In addition, it is well settled that disclosure from a nonparty witness may only be granted upon a showing of special circumstances (see Cerasaro v Cerasaro, 9 AD3d 663, 665 [3rd Dept., 2004]; Fraser v Park Newspapers of St. Lawrence Inc., 257 AD2d 961, 962 [3rd Dept., 1999]; Sand v Chapin, 246 AD2d 876, 877 [3rd Dept., 1998]). In this instance no such showing of special circumstances has been made. Apart from the foregoing, under CPLR 3106 (c), unless the Court orders otherwise, the subpoena must be served at least twenty days before the examination. The only affidavit of service submitted by the plaintiff with respect to the service of the subpoenas indicates that nonparty William Villeneuve was served less than twenty days before the examination. Under all of the circumstances, the Court finds that the application should be granted to the limited extent that the subpoenas served upon William Villeneuve and Edward Dalbeck should be quashed, subject to plaintiffs' right to apply for proper subpoenas at any time. The Court discerns no grounds upon which it should preclude and/or prohibit the plaintiffs from serving such subpoenas in the future. Nor does the Court find that plaintiff is entitled to an award of costs, disbursements and attorneys fees.

With regard to the notice dated July 13, 2007 to take the deposition of the defendants

on July 23, 2007, the Court finds that the notice was untimely from the standpoint that it was served less than twenty days before the examination, as required under CPLR 3107. The Court will therefore vacate the notice, without prejudice.

In support of their motion for an order pursuant to CPLR 3126, the defendants point out that they served a notice for discovery and inspection and demand for interrogatories upon the plaintiffs on August 16, 2006. On February 6, 2007 the parties signed a preliminary conference stipulation (“so-ordered” by the Court) which set forth a discovery schedule. The discovery schedule required that responses to demands for discovery and inspection be served on or before April 1, 2007, with responses to interrogatories to be served on or before March 15, 2007¹. It is indicated that, to date, the plaintiffs have failed to comply with defendants’ demands other than to serve a list of witnesses on July 17, 2007. It is argued that plaintiffs have willfully and deliberately failed to comply with defendants’ discovery demands, as well as the parties’ preliminary conference stipulation and order. The defendants request that plaintiffs’ complaint be dismissed with prejudice, and that defendants be granted a default judgment against the plaintiffs. Plaintiffs do not controvert any of the foregoing, but rather seem to rely upon the strength of their cross-motion for summary judgment. Nonetheless, the Court’s policy in deciding a CPLR 3126 motion is not to award the most extreme form of relief on an initial application. The Court will grant the motion,

¹It also required the parties to complete pre-trial depositions on or before June 1, 2007, with all disclosure to be complete by July 1, 2007. The note of issue was to be filed on or before July 31, 2007.

but will award relief in the form of a conditional order of preclusion. The Court denies defendants' request for attorneys fees, costs and disbursements as it has not been sufficiently demonstrated that any such failure was willful.

Turning to plaintiff's cross-motion for summary judgment the Court is cognizant of the procedural objection raised by the defendants concerning the timeliness of plaintiffs' cross-motion for summary judgment. It is argued that the defendants were not afforded sufficient time under the CPLR to oppose the cross-motion. According to the defendants the notice of cross-motion, which has a return date of August 20, 2007, was received by them on September 19, 2007, "two days" before the return dates of defendants motions². Under CPLR 2215, where (as here) a cross-motion is served by mail, and where the original notice of motion contained a seven day demand pursuant to CPLR 2214 (b), the notice of cross-motion must be served a total of ten days before the return date. Notably, plaintiff has failed to submit an affidavit of service of his cross-motion. Under all of the circumstances the Court finds that the cross-motion, which contained an incorrect return date and appears to be untimely served, was procedurally defective and must be denied without prejudice (see CPLR 2215, L 2007, ch 185, § 2, eff July 3, 2007).

Lastly, by reason of the recent death of plaintiffs' counsel Mylo Eytina, Esq., the Court will direct that the action be stayed for a period of thirty (30) days pursuant to CPLR

²While counsel for plaintiffs indicated that plaintiffs' order to show cause and notice of motion were returnable on September 21, 2007, this is not correct, as they were returnable on September 20, 2007.

321 (c).

Accordingly it is

ORDERED, that the motion of defendants Nicholas B. Ferriere and Mary Beth Ferriere to quash subpoenas served upon non-parties is hereby granted to the limited extent that the subpoenas served upon non-parties Edward Dalbeck and William Villeneuve are hereby quashed, without prejudice, but is otherwise denied; and it is further

ORDERED, that the notice of deposition dated July 13, 2007 to take the pre-trial depositions of the defendants be and hereby is vacated without prejudice; and it is further

ORDERED, that defendants' motion for sanctions pursuant to CPLR 3126 is granted to the limited extent that unless the plaintiffs comply with all outstanding discovery demands within thirty days after the expiration of the stay imposed herein pursuant to CPLR 321 (c), plaintiffs will be precluded from offering any evidence in support of their complaint; and it is further

ORDERED, that defendants' request for an award of costs, disbursements and attorneys fees be and hereby is denied; and it is further

ORDERED, that plaintiffs' cross-motion for summary judgment is denied without prejudice; and it is further

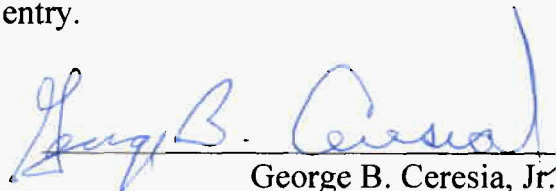
ORDERED, that the action be and hereby is stayed for a period of thirty days following service upon the plaintiffs of a notice advising plaintiffs that they must retain new counsel within thirty days following receipt of said notice, or they will henceforth be deemed

to be self-represented; and it is further

ORDERED, that the defendants are directed, within thirty (30) days of the date hereof, to serve said notice upon the plaintiffs pursuant to CPLR 321 (c) by ordinary first class mail, and to submit an affidavit of service of said notice to the Court.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorney for the defendants Nicholas B. Ferriere and Mary Beth Ferriere who is directed to enter this Decision/Order without notice and to serve all other counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
January 3, 2008



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Defendant's Order To Show Cause dated August 20, 2007, Supporting Papers and Exhibits
2. Defendant's Notice of Motion dated August 20, 2007, Supporting Papers and Exhibits
3. Plaintiffs' Notice of Cross-Motion dated August 13, 2007, Supporting Papers and Exhibits
4. Attorney Affirmation of April A. Ziegler, Esq., dated September 26, 2007 in Reply To Opposition to Order To Show Cause For Protective Order and Exhibits
5. Attorney Affirmation of April A. Ziegler, Esq., dated September 26, 2007 in Reply To Opposition to Order To Show Cause For Protective Order and Exhibits
6. Attorney Affirmation of April A. Ziegler, Esq., dated September 26, 2007 in Opposition to Plaintiffs Cross-Motion For Summary Judgment and Exhibits
7. Attorney Affirmation of April A. Ziegler, Esq., dated September 27, 2007 in Reply To Plaintiff's Opposition to Motion Under CPLR § 3126

cc.:

Lester and Nancy Gibson
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