Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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J.C. TARR, Q.P.R.T.,

Plaintiff,

-against-

ELLIN DELSENER and BERKLEY BOWEN,

Defendants.

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INDEX NO.: 28766/2002
CALENDAR NO.: 200702662EQ
MOTION DATE: 4/4/2008
MOTION NO.: 005 MOT D

PLAINTIFF'S ATTORNEY:
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DEFENDANTS' ATTORNEY:
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Riverhead, New York 11901

Upon the following papers numbered 1 to 49 read on this motion for summary judgment, preliminary injunction and permanent injunction: Notice of Motion/ Order to Show Cause and supporting papers 1-40 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 41-46 ; Replying Affidavits and supporting papers 47-49; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (motion sequence no. 005) by the defendants for dismissal of the plaintiff's second, fourth, seventh, eighth, tenth, twelfth, thirteenth, fourteenth, eighteenth, and nineteenth claims against defendant, Ellin Delsener on the basis that the plaintiff, J.C. Tarr, Q.P.R.T., does not have a prescriptive easement or any other right to use or traverse property owned by Delsener outside of the boundaries of a deeded ten foot wide right of way and on the basis that Delsener is permitted to maintain a split-rail fence along the deeded boundaries of the right of way; granting defendant Delsener summary judgment on the first counterclaim; and granting Delsener a permanent injunction, is decided as follows:

Plaintiff trust is the fee owner of 11 acres of land located in East Hampton Village, New York which bears two addresses: 16 Hither Lane and 11 Middle Lane. The property is benefitted by an easement by grant, a right-of-way, to former tax lot 16. The right-of-way at issue was created in 1954 and grants the plaintiff and its predecessors in interest "a perpetual right-of-way and easement to pass and repass on foot or with animals and vehicles over and along a private roadway ten feet wide." The right-of-way is delineated more specifically in the deed to the plaintiff's property by a metes and bounds description which indicates a straight roadway beginning on Middle Lane leading to the southern portion of the plaintiff's property, then eventually curving eastward. The defendants are the fee owners of the burdened properties located to the south of the plaintiff's parcel. Defendant Delsener's parcel is located adjacent to the plaintiff's property, is landlocked, and is accessed by a driveway running from Middle Lane along the right-of-way to her property. Bowen's parcel is located between Delsener's and Middle Lane and is, by all indications, accessed only by the same right-of-way.

Ronald Delsener and Ellin Delsener have set forth in their supporting affidavit that they are the owners of two adjacent parcels of real property on Middle Lane in the Village of East Hampton, which they have put in individual ownership to keep single and separate. The property

burdened by the right-of-way at issue is in Ellin Delsener's name, and the parcel directly to its east is in Ronald Delsener's name.

The plaintiff commenced this action against the defendants alleging, *inter alia*, that it is the beneficial owner of a prescriptive easement of an additional two feet of land on either side of the original 10-foot right-of-way due to the curves of the driveway, and that the installation of the split rail fence impeded and prevented its use and enjoyment of the right-of-way.

The plaintiff had previously filed a motion (motion sequence no. 001) seeking a preliminary injunction against Ellin Delsener ordering her to remove and/or relocate split-rail fencing installed on or adjacent to plaintiff's right-of-way and to restrain and prohibit defendants and their agents from erecting and maintaining any obstructions or impediments to plaintiff's unfettered use of the right-of-way during the pendency of this action. By order dated February 3, 2004 (Baisley, J.) plaintiff's motion for a preliminary injunction was granted to the limited extent that defendant Delsener was ordered to remove that portion of her split-rail fence which limits the width of the right-of-way to less than ten feet. In their cross motion (motion sequence no. 002), the defendants moved for partial summary judgment dismissing those portions of the plaintiff's complaint which set forth causes of action asserting rights to an alleged prescriptive easement, which motion was denied. Plaintiff cross moved (motion sequence no. 003) for an order, *inter alia*, granting summary judgment by way of a mandatory injunction and ordering defendants to remove all obstacles or impediments on the right-of-way to provide a total width of fourteen feet, and a decree declaring defendant Berkley Bowens' reconfiguration of the right-of-way a private nuisance, and finally a decree declaring Delsener's installation of speed bumps along the right-of-way a private nuisance. This Court denied both the plaintiff's cross motion for summary judgment and the defendants' cross motion for partial summary judgment as it determined that questions of fact existed regarding the "necessary element of continuous use for the ten-year prescriptive period."

Plaintiff then appealed the February 3, 2004 decision and order to the Appellate Division, Second Department, which by order dated June 20, 2005, reversed the order insofar as appealed from, on the law, and the defendant's cross motion for partial summary judgment was granted dismissing those portions of the complaint alleging that the plaintiff has a prescriptive easement over the property consisting of an additional two feet of land on either side of the right-of-way in question. The matter was remitted to the Supreme Court, Suffolk County, for the entry of a judgment declaring that the plaintiff does not have a prescriptive easement over the property owned by the defendants consisting of an additional two feet of land on either side of the right of way.

In 2000 the plaintiff began construction of a pool house and swimming pool on the southern portion of its property. The defendants claim that during construction, large commercial trucks and other vehicles, rather than following the deeded right-of-way, created their own dirt roadway across Delsener's property and traversed the northwestern corner of Delsener's parcel,

proceeding straight toward the southern portion of the plaintiff's parcel.[1] The defendants assert that prior to the plaintiff building the pool house and pool, the Tarrs had not used the right of way from Middle Lane over the Delsener property. In September 2001, Delsener installed a wooden split rail fence that roughly followed the metes and bounds description of the deeded right-of-way, blocking the straight roadway created by the construction vehicles which deviated from the right-of-way across the Delsener property. The defendants claim they installed the fencing to protect their property and provide safety for their grandchildren. They also installed speed bumps. The defendants further assert that after the Tarr's construction of the pool and pool house ended, the Tarr's use of the right-of-way diminished considerably, to the point that the continuation of the driveway onto plaintiff's property had become totally overgrown.

The defendant Delsener asserts that in November, 2007, the plaintiff commenced two new construction projects near to their property and the contractors for the plaintiff began using the driveway again, allegedly causing major damage to defendants' property in removing, without permission, a large portion of the split-rail fence enclosing the right-of-way, and knocking down much of the rest of it. The defendants further claim that they tried to stop one of the plaintiff's contractors from cutting down a tree limb on one of defendant's trees so that he could bring a huge pay loader on a trailer through the defendants' driveway, but the contractor cut the limb anyway. Defendants also assert that the plaintiff's truck traffic has also created large ruts in the gravel driveway surface, and that the contractor, Ed Bulgin, erected a large builder's sign with his name and phone number on it at the entrance to defendants' driveway, without defendants' permission. The defendants assert that the only portion of the plaintiff's "compound" that the right-of-way over defendants' land was created to serve is a small, one-acre parcel in the southwest corner of plaintiff's land, formerly designated as tax lot 16, which is now the site of a new garage, and that the contractors have expanded the use of the driveway to access the pool house construction site and other areas of plaintiff's estate.

The defendants seek summary judgment dismissing the second, fourth, seventh, eighth, tenth, twelfth, thirteenth, fourteenth, eighteenth, and nineteenth causes of actions asserted against defendant Delsener on the basis that the plaintiff, J.C. Tarr, Q.P.R.T., does not have a prescriptive easement or any other right to use or traverse property owned by Delsener outside of the boundaries of the deeded ten foot wide right of way and on the basis that Delsener may maintain a split-rail fence along the deeded boundaries of the right of way; granting defendant Delsener summary judgment on the first counterclaim; and granting Delsener a preliminary injunction on her third counterclaim and permanently enjoining the plaintiff, its principals, agents, employees, contractors, servants, invitees, heirs, successors and assigns from using the right-of-way over the defendants' land to access any property other than former tax lot 16, barring plaintiff from using the right-of-way for ingress to or egress from the main house, pool house or gate house or any other areas or structures located on other portions of its land outside the boundaries of former tax lot 16.

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[1] See Decision and Order of February 3, 2004 (Baisley, J.) wherein the court found that "[t]he right-of-way at issue was created in 1954 and grants the plaintiff and its predecessor in interest, 'a perpetual right-of-way and easement to pass and repass on foot or with animals and vehicles over and along a private roadway 10 feet wide.' The right-of-way is delineated more specifically in the deed to the plaintiff's property by a metes and bounds description. That description indicates a straight roadway beginning on Middle Lane leading to the southern portion of the plaintiff's property, then eventually curving eastward." The court further found that "[i]n September 2001, Delsener had a split rail fence installed on her property leaving room for the ten foot right-of-way. However, the split-rail fence followed roughly the metes and bounds description of the deeded right-of-way, thereby cutting off the roadway created by the construction vehicles."

In support of motion sequence no. 005, the defendants have submitted, inter alia, an attorney's affirmation; the affidavit of Ronald Delsener and Ellin Delsener; and the exhibits tabbed A through II, including, but not limited to the deed dated March 29, 2006 from Berkley Bowen to Bruce and Iris Klatsky; composite map of properties of Bowen, Delsener & Tarr; Walbridge survey dated April 22, 1995; deed dated June 7, 1999; Walbridge survey last dated May 21, 2002; photographs of right-of-way taken November 26, 20007; Village of East Hampton building permit dated November 1, 2007; and a partial copy of Tarr site plan on file at Village of East Hampton.

Plaintiff has opposed this motion, submitting, inter alia, an attorney's affirmation; the affidavit of Jeff Tarr, Jr.; a copy of the record on appeal; a copy of the decision and order for motions (001) and (002) and (003) dated February 3, 2004 (Baisley, J.) and the order on appeal dated June 20, 2005; and one page of the brief for defendants-appellants-respondents.

The court now turns to that part of the defendants' motion for summary judgment dismissing the second, fourth, seventh, eighth, tenth, twelfth, thirteenth, fourteenth, eighteenth, and nineteenth causes of action.

The plaintiff seeks a declaratory judgment on the second cause of action that the conduct and actions of Delsener are in violation of the written easement granting Tarr the right to utilize, access and enjoy the right-of-way for vehicular traffic, without impediment, and to establish Tarr's rights by prescription for the purposes of vehicular access for ingress and egress over the right-of-way.

The plaintiff sets forth a fourth cause of action premised upon Real Property Actions and Proceedings Law, Article 15, wherein the plaintiff seeks a determination that it is entitled to free, unfettered and unobstructed use and enjoyment of the right-of-way for access and egress to and from its premises over the right of way.

In the seventh cause of action the plaintiff asserts that the fencing, posts and restricted curve created constitute significant and material obstacles within the right-of-way thus defendants have withheld from the plaintiff the free and untrammeled right of ingress and egress over the right-of-way.

In the eighth cause of action the plaintiff asserts that the defendants have placed speed bumps in the right-of-way which constitute significant and material obstacles within the right of way which interfere with and impede the plaintiff's use and access of the right-of-way.

In the tenth cause of action the plaintiff asserts that the improvements, speed bumps and fencing installed along the right-of-way are improperly erected and maintain substantial barriers and obstacles making the roadway to and from Middle Lane impassable by persons in a wide range of vehicles, thereby depriving plaintiff's visitors, trades people and their utility vehicles of their right to pass over the right-of-way.

The twelfth cause of action asserts damages in the sum of $100,000.00 dollars.

In the thirteenth cause of action the plaintiff asserts that the speed bumps constructed by the defendants across the right-of-way constitute significant and material obstacles within the right-of-way which interfere with and impede plaintiff's ability to access, utilize and enjoy the right-of-way.

In the fourteenth cause of action the plaintiff asserts that one of the posts and/or rails encroaches upon and restricts the ten foot right-of-way.

In the eighteenth cause of action the plaintiff asserts that the defendants have intentionally and deliberately placed significant and substantial obstacles, obstructions and impediments within the right-of-way constituting a nuisance and depriving the plaintiff of the use and enjoyment of the right-of-way, creating a substantial and legitimate threat to the health, safety and welfare and comfort of the plaintiff and causing irreparable damage to the plaintiff.

The plaintiff asserts as a nineteenth cause of action that due to the tight radius of the curve leading onto the plaintiff's property, and the large size, length and nature of many of the vehicles passing over the defendant's property, portions of the vehicles using the driveway on and around the curve consistently utilized two or more feet of the Delsener property outside and beyond either side of the described ten foot wide right-of-way, and that the plaintiff has acquired a right-of-way over the defendants' property of at lease an additional two feet on either side of the existing right-of-way, constituting a prescriptive easement to access of at least fourteen feet in width.

Prescriptive Easement and Post and Rail Fence

The nineteenth cause of action was previously dismissed by the Appellate Division which set forth in its order of June 20, 2005 that the evidence submitted on the parties' cross motions established, as a matter of law, that the plaintiff failed to acquire an easement by prescription to use two additional feet on either side of the deeded 10-foot wide easement providing ingress and egress from Middle Lane (*see Wechsler v People*, 13 AD3d 941, 944 [2004]; *Aubuchon Realty Co. v Cohen*, 294 AD2d 738, 739-740 [2002]), and that the plaintiff failed to make a competent showing of hostile use of an additional two feet on either side of the 10-foot wide deeded easement, and that any such use was open and notorious (*see Frumkin v Chemtop,* supra; *Mandia v King Lbr. & Plywood Co.*, 179 AD2d 150 [1992]). The Court set forth that the affidavits submitted by the plaintiff did not allege that the large commercial vehicles using the right-of-way for "over 50 years" actually deviated from, or exceeded the deeded 10-foot wide area. It stated further that, "where an easement is created by express grant and its sole purpose is to provide ingress and egress, but where it is not specifically defined or bounded, 'the rule of construction is that the reservation refers to such right of way as is necessary and convenient for the purpose for which it was created' " (*Mandia v King Lbr. & Plywood Co.,* supra at 158, quoting *Village of Larchmont v City of New Rochelle*, 100 Misc 2d 463, 465-466 [1979]; *see Minogue v Kaufman*, 124 AD2d 791, 792 [1986]), and includes "any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant" (*Phillips v Jacobsen*, 117 AD2d 785, 786 [1986]; *see Mandia v King Lbr. & Plywood Co.,* supra). The Appellate Division also set forth that the record does not support the plaintiff's contention that, as a matter of law, the split rail fence erected by the defendant Ellin Delsener along the 10-foot wide easement impaired its use and enjoyment of the right-of-way (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Robinson v Eirich*, 2 AD3d 617, 618 [2003]).

Accordingly, the second, seventh, fourteenth and nineteenth causes of action, and those parts of the tenth and eighteenth causes of action referring to the post and rail fence are hereby dismissed as a matter of law based upon the prior determinations and findings by the Appellate Division in its order

of June 20, 2005 that plaintiffs failed to demonstrate a prescriptive easement beyond the ten foot wide easement, and further failed to demonstrate that the split rail fence erected by defendant Delsener along the ten foot wide easement impaired plaintiff's use and enjoyment of the right-of-way within that ten foot right-of-way.

Speed Bumps and Obstacles

In motion sequence no. 003 the plaintiff cross-moved for summary judgment (in effect a mandatory injunction) ordering, *inter alia*, the defendants to remove all obstacles or impediments on the right-of-way, a decree declaring defendant Berkley Bowen's reconfiguration of the right-of-way a private nuisance, and finally, a decree declaring Delsener's installation of speed bumps along the right-of-way a private nuisance. In the decision and order of February 3, 2004 (Baisley, J.), the court denied the plaintiff's application. Upon appeal, the Appellate Division affirmed the lower court's denial of a permanent injunction directing the defendants to remove all obstructions on the right-of-way in question..., and a declaration that the defendants'...installation of certain obstructions on, in, and along the right-of-way constituted a private nuisance."

In response to the defendants' instant application, the plaintiff has merely submitted the copy of the joint record on appeal upon which its previous application was denied and which denial was then affirmed on appeal. It is noted that the affidavit of Daniel Falsco, an engineer licensed in the State of New York, submitted on behalf of the plaintiff, sets forth that he is not aware of any express statute regulating the size of speed bumps in New York. The affidavit of John J. Raynor, an engineer licensed to practice in the state of New York, submitted on behalf of the defendant Delsener, sets forth that he has had occasion to view dozens, if not hundreds, of speed bumps in private driveways, public roads, parking lots and other locations and finds the size and height of the speed bumps on the Delsener property to be consistent with the size and height of the other speed bumps he observed. The defendant contends that the speed bumps have now worn down from plaintiff's use and are virtually non-existent. Plaintiff has not disputed this.

This court determines that there are no factual issues concerning whether defendant Delsener is violating any applicable code or statute with regard to the speed bumps. "[A] landowner burdened by an express easement of ingress and egress could narrow it, cover it over, gate it, or fence it off, so long as the easement holder's right of passage was not impaired" (*Lewis v Young*, 92 NY2d 443, 682 NYS2d 657 [1998]). In *Lewis v Young*, supra, the court stated that "[a]s a rule, where the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder." It is therefore determined as a matter of law that the speed bumps do not constitute a private nuisance or obstruction to the passage of vehicles as it has not been demonstrated that such speed bumps violate any applicable statutes, laws or rules. Further, the plaintiff has not refuted that the speed bumps have worn down and are virtually non-existent. The plaintiff has only demonstrated the inability to utilize the right of way beyond the ten foot deeded width, as demonstrated by the application for a prescriptive easement beyond the ten foot area within the post and rail fence, which prescriptive easement the Appellate Division denied, and has not demonstrated an inability to access the right-of-way within the ten foot easement.

Accordingly, the defendant's application is granted dismissing the second, eighth, tenth, thirteenth and eighteenth causes of action as a matter of law.

In that the remaining causes of action are asserted against defendant Bowen, who has sold his property to Bruce and Iris Klasky who have not been substituted in this action, those remaining causes of action have been rendered academic.

Accordingly, the complaint is dismissed in its entirety and is severed from the counterclaim.

First Counterclaim and Third Counterclaim for Preliminary Injunction

Defendant Delsener seeks an order granting summary judgment on the first counterclaim, a preliminary injunction on the third counterclaim and also seeks a permanent injunction enjoining plaintiff, its successors, agents, principals, contractors, employees, servants, invitees, and assigns from using the subject right-of-way for access except to the parcel known as former tax map parcel 16.

Here it is determined that the subject easement is an easement appurtenant, which is defined as "one that is (1) conveyed in writing, (2) subscribed by the person creating the easement, which (3) burdens the servient estate for the benefit of the dominant estate (citations omitted). Thereafter, when the dominant estate is transferred, the easement passes to the subsequent owner through appurtenance clauses even though there is no specific mention of it in the deed" (*Green v Mann,* 237 AD2d 566, 567, 655 NYS2d 627, 628 [2nd Dept 1997]). Once an easement appurtenant is created, it is inviolate and can only be extinguished by "abandonment, conveyance, condemnation, or adverse possession" (*id.*).

The first counterclaim asserts that the only portion of the Tarr's current compound that was part of the Middle Lane Corp.'s property when the easement was created in 1954 is former tax map parcel 16, the approximately 1 acre parcel located in the southwest corner of the Tarr's property, and that no property owned by Tarr other than the former tax map parcel 16, is part of the dominant estate or is benefitted by or has any rights in connection with the subject ten-foot-wide right-of-way over the former Bowen parcel and the Delsener parcel.

Defendant Delsener has established that none of the buildings erected upon the property by the plaintiff are located on the parcel known as former tax map parcel 16 and therefore claims the plaintiff only has a right to use the subject right-of-way for the benefit of former tax map parcel 16, the approximately one acre parcel in the southwest corner of Tarr's property. The plaintiff argues that the entire eleven acres should be made accessible by the subject easement.

In *Zehr v Karker et al,* 43 AD2d 881, 351 NYS2d 478 [3rd Dept 1974], the property owner had acquired title to four contiguous lots in the development belonging to the developer. The deed had granted the property owners a right to use a right-of-way 33 feet in width. The property owners then became the record owners of 5.99 acres of land located south of the developer's development. When the developer objected to the property owner's use of the right of way on the later purchased land, the property owners filed a complaint for injunctive relief. The trial court dismissed the action, and the property owners appealed. The court stated that from the language of the deed, it was clear that the property owners had no right to use the right of way from the later purchased land because such travel was unnecessary for either ingress or egress. In so doing, the property owners were improperly

attempting to enlarge the right of way to uses foreign to the grant. The court issued a judgment that affirmed the denial of the property owner's complaint for injunctive relief. (*See also, H.H. Apartments, Inc v Beachcliff Realty Corp.*, 8 AD2d 966, 190 NYS2d 861 [2nd Dept 1959]). It is well settled that a right-of-way granted in connection with one parcel may not be used for the benefit of any land other than that to which it was made appurtenant when it was granted (*Tamburo v Murphy*, 72 Misc2d 120, 339 NYS2d 693 [Sup. Ct. Cayuga County 1970]).

It is undisputed that in 1995 the plaintiff acquired three separate tax lots on the Suffolk County Tax Map, which three parcels were subsequently merged into an 11 acre tax lot numbered 22.1 which was transferred into the family trust in 1999. Thereafter, the main house was removed and a new main house was relocated, and a gate house, a pool house, pool, and free-standing garage were erected, all accessible from Hither Lane. The affidavit submitted by Jeff Tarr indicates that the pool house was built for his sister, he has a separate residence, and his parents have another residence.

Based upon the admissible evidence submitted, it is determined that the defendant has not demonstrated *prima facie* entitlement to summary judgment and a preliminary injunction determining plaintiff has a right to use the subject right-of-way for the benefit of former tax map parcel 16 only. The application for the building permit submitted to the Incorporated Village of East Hampton indicates the address of the property upon which the improvements are to be made is 16 Hither Lane, East Hampton. Jeff Tarr, Sr. testified during his examination before trial that his address is 11 Hither Lane, East Hampton and all three residences have separate driveways. Although these properties are part of a trust, there has been no testimony and/or admissible evidence submitted to demonstrate to this court whether the lots have merged or maintained single and separate identity within the trust.

Accordingly, summary judgment and a preliminary injunction on the first and third counterclaims are denied and a determination with regard to the permanent injunction shall abide the trial of this action.

Dated: 1/3/08

HON. PAUL J. BAISLEY, JR.
J.S.C.

____ **FINAL DISPOSITION** __X___ **NON-FINAL DISPOSITION**