

Sassouni v Krim

2008 NY Slip Op 33412(U)

December 11, 2008

Supreme Court, Nassau County

Docket Number: 20411/06

Judge: William R. LaMarca

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ORDER AND JUDGMENT

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**RAFAEL SASSOUNI, BITA SASSOUNI,
ITZHAK KATAN and LILIYA KATAN,**

Plaintiffs,

-against-

MATHILDE KRIM,

Defendant.

**Motion Sequence #3
Submitted September 5, 2008
Motion Sequence #2, #4
Submitted September 19, 2008
XXX
INDEX NO: 20411/06**

The following papers were read on these motions:

Defendant's Notice of Motion (#3).....	1
Plaintiff's Affirmation.....	2
Defendant's Notice of Motion(#2).....	3
Memorandum of Law in Support.....	4
Plaintiffs' Notice of Cross-Motion (#4).....	5
Defendant's Reply Affirmation.....	6
Plaintiff's Reply Affirmation.....	7

Defendant, MATHILDE KRIM (hereinafter referred to as "KRIM"), moves for an order, pursuant to CPLR §4102, striking the plaintiffs' jury demand, striking the matter from the jury calendar and placing it on the non-jury calendar, on the ground that the action is purely one of equity rather than law, and for an order, pursuant to CPLR §3403(4) granting a trial preference based upon the age of defendant who is eighty-two (82) years old. Counsel for plaintiffs, RAFAEL SASSOUNI, BITA SASSOUNI, ITZHAK KATAN and LILIYA

KATAN, do not object to the requested relief. In a subsequently submitted motion, defendant KRIM moves for an order, pursuant to CPLR §3212, granting her summary judgment dismissing plaintiffs' complaint. Counsel for plaintiffs oppose said motion and cross-move for an order granting plaintiffs summary judgment declaring that a certain "right of way" does not grant defendant KRIM the right to use the dock or pier presently constructed on the premises owned by plaintiffs. The motions and cross-motion are determined as follows:

This litigation concerns the right of defendant and her heirs and assigns to have access to and the use of a pier which is located on and adjacent to property located on Dock Lane in Kings Point, New York, property that was previously owned by Jean Benjamin, now deceased. By affidavit, Mrs. KRIM asserts that said right was granted to her by Mrs. Benjamin in an Agreement, dated January 12, 1998, which by informal letter summed up their understanding about the mutual use of the Benjamin dock over many years. The letter recites, in pertinent part, the following:

Basically, I just want to make it clear to all interested parties (your family and mine) that the long-standing right to access and use the dock, which has been granted to your family ever since you and Arthur bought your Dock Lane property, will continue as long as you or your immediate heirs own the property immediately adjacent to it.

Of course, if you or your heirs sell all or part of your property adjoining the Benjamin property the right of way and the use of the dock will be terminated for that part of the property which is sold.

(Exhibit "G" to the moving papers on motion sequence #2).

Thereafter, it appears that Mrs. Benjamin and Mrs. KRIM entered into a more formal agreement prepared by counsel, dated February 14, 1998, entitled "AGREEMENT PERTAINING TO BOUNDARIES OF RIGHT OF WAY", which, in addition to setting forth

the metes and bounds of a “certain segment of a certain twenty-two (22’) strip of land sometimes referred to as a private road extending from Kings Point Road to the westerly shore of Manhasset Bay”, was intended to grant Mrs. Benjamin, the party of the first part, and Ms. KRIM, the party of the second part, “their heirs and assigns, severally and collectively, ingress and egress for any purpose along the right of way and to the pier that is presently constructed or which may hereafter be constructed on the property of the party of the first part”. The Agreement further provided that “[t]his right of way is intended to run with the lands of the party of the first part and the party of the second part” and “is more fully set forth on the survey prepared by the Sear Brown Group for the party of the first part and the party of the second part and dated July 23, 1997, and annexed hereto and made a part hereof”. (Exhibit “H” to the moving papers on motion sequence #2).

The SASSOUNI and KATAN plaintiffs collectively purchased Mrs. Benjamin’s property on Dock Lane, in September 2005, and commenced this action in September 2006 for a declaratory judgment declaring that the “AGREEMENT PERTAINING TO BOUNDARIES OF RIGHT OF WAY” “does not grant to defendant . . . the right to use the dock or pier presently constructed on the premises owned by the plaintiffs”. (Complaint, Exhibit “A” to the moving papers on motion sequence #2). Indeed, the plaintiffs have constructed a metal gate across the entranceway to the pier for the purpose of barring Mrs. KRIM and members of her family from having access to or use of the pier. (See, Exhibit “I” to the moving papers on motion sequence #2). It is essentially plaintiffs’ position that the February 14, 1998 Agreement does not limit the benefits to defendant, KRIM, and her immediate heirs, which counsel claims was the intention of Mrs. Benjamin as found in her letter of January 12, 1998, but rather extends the rights to “run with the land” which counsel

claims was not Mrs. Benjamin's intention. Counsel for plaintiffs states that the "AGREEMENT PERTAINING TO BOUNDARIES AND RIGHT OF WAY" was recorded on April 6, 1998, and after conveyance of the Benjamin property to the plaintiffs, counsel for plaintiffs, believing that defendant KRIM had a mere licence to use the dock on plaintiffs' property, prepared a document, dated September 21, 2005, which revoked any such license. Additionally, counsel for plaintiffs argues that a survey prepared for the SASSOUNIS, dated October 17, 2003 (hereinafter referred to as the "LaRue Survey"), shows that the twenty-two (22) foot right of way does not extend to the dock and, therefore, does not create an easement to use the dock located on plaintiffs land but only gives KRIM access to Manhasset Bay.

Defendant KRIM, a signatory to the February 14, 1998 Agreement, contends that the intention of the parties can be discerned from the long history of friendship between the Benjamins and the Krims. Mrs. KRIM relates that Arthur Krim and Robert Benjamin were law partners at the law firm of Phillips Nizer and business partners who at one time owned the movie company United Artists. The couples were very close friends for over forty (40) years and spent much time together socializing. In the 1950's, the Benjamins purchased approximately twenty-three (23) waterfront acres near Dock Lane in Kings Point and, shortly thereafter, the Krims purchased the adjacent 6.8 acres to the Benjamin property near Dock Lane. At the time of the purchase of the respective properties, a pier existed on the Benjamin property extending out into the waters of Manhasset Bay. Mrs. KRIM states that she learned that the pier had been originally built during the Prohibition Era to accept illegal boat deliveries of alcoholic beverages and was wide and sturdy to support the weight of trucks and larger boats. Initially, Mr. Benjamin maintained the pier and, in

1959, the husbands, together, purchased a cabin cruiser that could board passengers at the pier. Mrs. KRIM states that, as the men spent less time using the cabin cruiser, the boat was sold and Mr. Krim purchased a much smaller boat that he used by himself.

Mrs. KRIM further states that, thereafter, in the mid-1960's, the pier was maintained as a safe walkway by workers employed by the Krims. However, in the 1970's, a very strong storm hit the area and the pier was severely damaged. At that time, with the knowledge and consent of the Benjamins who rarely made use of the pier, Mr. Krim arranged for a workman to completely rebuild the deck of the pier and to replace the damaged pilings at a cost of \$100,000.00. This expense was completely borne by the Krims, who used the pier for Mr. Krims boat and for family recreational purposes. In the following years, with the knowledge and agreement of the Benjamins, the Krims paid the annual costs of maintaining the pier and the entire cost of installing electric power and floodlights to illuminate the pier and a red warning light. They also built a boardwalk on land for easy access to the pier and installed wooden benches, where, after the death of Mr. Benjamin, Mrs. Benjamin and her step-father loved to sit.

Mrs. KRIM states that, in 1994, after the death of her husband and after a large storm had ripped away portions of the pier, she decided to again repair the pier. After advising Mrs. Benjamin of her desire to rebuild the pier at her own expense, to which Mrs. Benjamin had no objection, the work was done by Mr. Falk of Nassau Dock Company at a cost of approximately \$160,000.00, under a construction permit obtained through the services of Mr. Charles Bauman, on the basis of detailed plans and drawings by an architect. Mrs. KRIM asserts that, throughout the project, Mrs. Benjamin, as owner of the property on which the pier was located, fully cooperated in signing papers to obtain a

building permit which was secured from the Village of Kings Point in 1995. Indeed, when the United States Army Corps of Engineers became involved with the project because of the construction of the pier in the waters of Manhasset Bay, Mrs. Benjamin regularly received correspondence from them concerning the project and was always "in the loop" as to the progress of the construction, which was completed in 2003.

Mrs. KRIM claims that, in 1997, she retained an attorney, Kenneth L. Robinson, to review certain title documents and surveys concerning Dock Lane in connection with the construction project and to determine the paths of the fifty (50) foot and twenty-two (22) foot rights of way over the Krim and Benjamin properties and other rights of way that existed for other properties. Mrs. KRIM states that Mr. Robinson found, *inter alia*, that "the path of Dock Lane does not appear to provide access to the pier extending from the Benjamin parcel". When brought to Mrs. Benjamin's attention, Mrs. KRIM received the January 12, 1998 letter from Mrs. Benjamin which promised her and her heirs access to and use of the dock. Mrs. KRIM states that, given the amount of expense that the Krims had incurred in the past and the current estimated expense to reconstruct the pier, she wanted an agreement with Mrs. Benjamin that guaranteed that she, her heirs and assigns, as well as anyone to whom she sold her property, would continue to have access to and use of the pier. To that end, Mr. Robinson prepared the "AGREEMENT PERTAINING TO BOUNDARIES AND RIGHT OF WAY", which was signed by both parties on February 14, 1998, in the presence of Mr. Robinson as witness and notary. It is Mrs. KRIM's position that said Agreement was meant to memorialize the arrangement which had existed for more than forty (40) years, that she and her heirs and assigns, as well as Mrs. Benjamin's heirs and assigns, would have unfettered access to and use of the pier, and that said right

would “run with the land” and be transferable to any subsequent owner of either the Benjamin or Krim property.

In support of the motion for summary judgment, counsel for Mrs. KRIM urges that, based upon the affidavit of Mrs. KRIM, the affidavit of John T. Kania, Esq., a Senior Vice-President and counsel for First American Title Company, and the authorities cited in the Memorandum of Law in support of the motion, Mrs. KRIM should be granted summary judgment dismissing plaintiffs complaint and declaring that Mrs. KRIM, her heirs and assigns, and any subsequent transferee of her property, has ingress and egress for any purpose to or from the pier including, without limitation, the right to go onto and use the pier, and directing plaintiffs to remove the gate presently on the pier or to otherwise provide defendant access to the pier. Mr. Kania opines that Mrs. KRIM has an easement, created by the express terms of the Agreement, over the twenty-two (22) foot strip “and to the pier”, which includes ingress and egress “for any purpose” to the pier, and that plaintiffs do not have any legal right to preclude the beneficiaries of the easement from having access to and use of the pier or to land beyond the high water mark, which is owned by the Town of North Hempstead, and not the plaintiffs.

Counsel for Mrs. KRIM points out that the affirmation of plaintiffs counsel, alone, who has no personal knowledge of any of the facts asserted by Mrs. KRIM, is insufficient to defeat defendant’s motion for summary judgment, much less to support or sustain plaintiffs’ cross-motion for relief. The Kania affidavit states that the express language of the “AGREEMENT PERTAINING TO BOUNDARIES AND RIGHT OF WAY” is susceptible of only one reasonable meaning– that the easement granting ingress and egress “to the pier” must be interpreted to include access and use of the entire pier. Counsel for Mrs.

KRIM points out that, although counsel for plaintiffs asserts that the twenty-two (22) foot right of way does not extend to the dock and therefore does not give Mrs. KRIM access to the dock, he ignores the express language of the easement that gives “ingress and egress for any purpose along the right of way and to the pier that is presently constructed or which may hereafter be constructed on the property of the party of the first part”. (emphasis supplied). Counsel asserts that the the “AGREEMENT PERTAINING TO BOUNDARIES AND RIGHT OF WAY”, executed one (1) month after the January 12, 1998 letter of Mrs. Benjamin’s, supercedes any “license” that may have been given to Mrs. KRIM, and creates an interest in land, ie. an easement, for the benefit of Mrs. KRIM and her heirs and assigns which ran with the land and was superior to any prior “licence” that may have been given. Counsel for Mrs. KRIM points out that the “AGREEMENT PERTAINING TO BOUNDARIES AND RIGHT OF WAY” was recorded long before the plaintiffs purchased the Benjamin property so they were on notice of the easement “that runs with the land” and which was binding on transferees of both Mrs. Benjamin and Mrs. KRIM. Counsel asserts that plaintiffs have not presented relevant or admissible evidence to defeat Mrs. KRIM’s motion or to demonstrate a triable issue of fact.

It is well settled that

[a]n instrument creating an estate or interest in real property must be construed according to the intent of the parties, insofar as the intent can be gleaned from the instrument as a whole (see, *Village of Larchmont v. City of New Rochelle*, 100 Misc.2d 463, 465-466, 418 NYS2d 966). A grantor of an easement may create an extensive or a limited easement (see, *Morgan v. Bolsan Realty Corp.* 48 AD2d 331, 333, 369 NYS2d 544). The extent of an easement claimed under a grant is generally determined by the language of the grant (see, *Phillips v. Jacobson*, 117 AD2d 785,786, 499 NYS2d 428). Moreover, the terms of the grant are to be construed most strongly against the grantor in ascertaining the extent of the easement (see, *Circuit City Stores v. Muss*, 151 AD2d 714, 715, 543 NYS2d 147; *Phillips v. Jacobson*,

supra).

Mandia v King Lumber and Plywood Co., Inc., 179 AD2d 150, 583 NYS2d 5 (2nd Dept. 1992).

Moreover, it is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party must establish the existence of material facts of sufficient import to create a triable issue of fact. See, *Hellinger v Law Capital, Inc.*, 124 AD2d 182, 509 NYS2d 50 (2nd Dept. 1986); *Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975).

After a careful reading of the submissions herein, it is the judgment of the Court that defendant KRIM has established her *prima facie* entitlement to summary judgment dismissing plaintiffs' complaint and that plaintiffs have failed to demonstrate a triable issue of fact that requires a trial or sufficient evidence to entitle them to judgment as a matter of law on the cross-motion. Counsel's affirmation is, among other things, conclusory and fails to raise a triable issue of fact (*Fox v Watermill Enterprises, Inc.*, 19 AD3d 364, 796 NYS2d 697 [2nd Dept. 2005]; *Rosario v Trump Management, Inc.*, 7 AD3d 504, 755 NYS2d 578 [2nd Dept. 2004]). The Court rejects counsel for plaintiffs suggestion that the intent of the parties was not known because Mrs. Benjamin was not represented by counsel when she signed the Agreement and that the Agreement should be construed against Mrs. KRIM and her attorney who prepared the Agreement. There is no evidence, whatsoever, presented of any overreaching on the part of Mr. Robinson, and the record reflects that he met with Mrs. Benjamin prior to executing the agreement and provided her with a copy of the

Agreement well before she signed it on February 14, 1998. It is clear to the Court that, based on the long history and friendship of the Krims and the Benjamins and the plain language of the Agreement, that the signatories to the Agreement intended that Mrs. KRIM, her heirs and assigns, were to have unfettered access to and use of the pier, and that said right and obligation ran with the land and was to be transferred to subsequent owners. Indeed, the rights given to defendant under the Agreement were recorded against the Krim and Benjamin properties in 1998, and operated for many years before the Benjamin property was sold to the SASSOUNIS and the KATANS in 2005. The plaintiffs had notice of the easement over their land to the pier at the time they took title and they cannot extinguish same. *Cf., Corrarino v Byrnes*, 43 AD2d 421, 841 NYS2d 122 (2nd Dept. 2007). Based on the foregoing, it is hereby

ORDERED, that defendant's motion for summary judgment dismissing the complaint (#2) is granted and it is declared that the "AGREEMENT PERTAINING TO BOUNDARIES AND RIGHT OF WAY", dated February 14, 1998, grants defendant KRIM, her heirs and assigns and any subsequent transferees of the property, ingress and egress for any purpose to or from the pier including, without limitation, the right to go onto and use the pier; and it is further

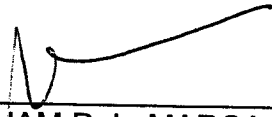
ORDERED, that the plaintiffs' cross-motion for summary judgment (#4) is denied; and it is further

ORDERED, that defendant's motion for a trial preference on the non-jury calendar (#3) is denied as moot.

All further requested relief not specifically granted is denied.

This constitutes the decision and judgment of the Court.

Dated: December 11, 2008



WILLIAM R. LaMARCA, J.S.C.

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