

**Seetaram v Barukh**

2008 NY Slip Op 33445(U)

December 3, 2008

Supreme Court, Queens County

Docket Number: 5012/2007

Judge: Orin R. Kitzes

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Plaintiff served a reply denying the material allegations of the counterclaims.

Plaintiff thereafter served an amended complaint, adding an allegation that any right of way claimed by defendants over his property has been extinguished, and alternatively, defendants have overburdened the right of way. Defendant Barukh served an amended answer without any counterclaims.

To the extent defendant Capital One Construction, Inc. (Capital) seeks summary judgment dismissing the complaint asserted against it, Capital has failed to demonstrate issue has been joined with respect to it (see CPLR 3212[a]). No copy of an answer by defendant Capital has been provided to the court. That branch of the motion by defendant Capital for summary judgment dismissing the complaint asserted against it is denied.

With respect to that branch of the motion by defendant Barukh for summary judgment in his favor against plaintiff, "[g]enerally, an amended complaint supersedes the original pleading, the defendant's original answer has no effect, and a new responsive pleading is substituted for the original answer (see Brooks Bros. v Tiffany, 117 App Div 470 [1907]; Rifkind v Web IV Music, 67 Misc 2d 26 [1971]; cf. Volpe v Manhattan Sav. Bank, 276 App Div 782 [1949]; see also 3 Weinstein-Korn-Miller, NY Civ Prac, ¶ 3025.12)" (Stella v Stella, 92 AD2d 589 [1983]). Defendant Barukh has failed to demonstrate that he interposed a counterclaim in his amended answer, or otherwise properly preserved those counterclaims interposed in his original answer (cf. Stella v Stella, 92 AD2d 589 [1983], supra).

That branch of the motion by defendants seeking a preliminary injunction is denied. Because the counterclaims have not been reasserted by defendant Barukh in his amended answer, there is no jurisdictional predicate for a preliminary injunction (see CPLR 6001, 6301; Seebaugh v Borruso, 220 AD2d 573 [1995]; Arvay v New York Tel. Co., 81 AD2d 600 [1981]).

With respect to that branch of the motion by defendant Barukh for summary judgment dismissing the amended complaint asserted against him, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Defendant Barukh asserts that he is the owner of the real property known as 141-08 Rockaway Boulevard, Jamaica, New York (Block #12056, Lot #19), having purchased the property on November 20, 1995. Defendant Barukh also asserts that plaintiff is the owner of the real property known as 141-06 Rockaway Boulevard, Jamaica, New York (Block #12056, Lot #18), and that Lot #18 and Lot #19 are separated by a middle lot, i.e. Lot #119, also owned by plaintiff and abutting both Lot #18 and Lot #19. Defendant Barukh further asserts that plaintiff's Lot #119 is burdened with an easement appurtenant created to benefit Barukh's lot (Lot #19), and therefore, Barukh's entry onto Lot #119 does not constitute a trespass. In addition, defendant Barukh asserts that he was entitled to "break down the gate and gate post" erected by plaintiff on Lot #119, to the extent such gate and gate post obstructed and impeded his use of the easement. Defendant Barukh also claims he was entitled to insert steel beams and construction materials on Lot #119, as a means of improving, repairing and maintaining the surface of Lot #119, and thereby maintaining the easement.

Defendant Barukh argues the evidence demonstrates that the easement appurtenant over Lot #119 was created by a declaration dated September 7, 1923, it benefits his lot (Lot #19) (and other lots), and has not been extinguished, overburdened or misused. In support of his motion, defendant Barukh offers his own affidavit, the affirmation of his counsel, and copies of various deeds, including his own deed to Lot #19, and plaintiff's deeds to Lots #18 and #119, a declaration of easement recorded in Liber 2543, page 385, and certain schedules prepared by a title insurance company for plaintiff regarding the purchase of Lot #119.

By means of the recorded declaration, F. & P. Realty Co., Inc., the original developer, created Lot #119 as a right of way in connection with the subdivision of the Fourth Ward of the Borough of Queens.

The declaration in relevant part, provides:

"WHEREAS, F. & P. REALTY CO., INC., ..., is the owner of a certain premises in the Fourth Ward of the Borough of Queens, .... WHEREAS, the said premises have been subdivided and six buildings erected thereon, and the said F. & P. REALTY CO., INC. Has reserved a portion of said premises for a right of way to pass on foot from Rockaway Boulevard to the rear of said premises;

[metes and bounds description of right of way]

NOW THEREFORE, the said F. & P. REALTY CO., INC., do hereby state and declare that the said described right of way shall be used for a means of ingress and egress for the said F. & P. REALTY CO., INC., and any purchaser from said corporation of any portion or portions of said premises and the holder of any mortgage on said premises or any portion thereof and their successors in interest. The said right of way to be a private right of way for the benefit of said F. & P. REALTY CO., INC. and the persons mentioned and no rights to the public therein are hereby dedicated or given. IT IS HEREBY EXPRESSLY STATED as part of this dedication that the said right of way shall be kept free and open and clear of obstructions and encroachments at all said premises or any part thereof. NOTHING HEREIN CONTAINED shall be construed to prevent the F. & P. REALTY CO., INC. from conveying portions of the said driveway with abutting land, but subject to the provisions of this declaration.

The land affected by this instrument lies in Section 33, Block 8091 on the land map of the County of Queens. Recorded September 10, 1923 at 12:20 P.M. at the request of The East New York Savings Bank, Atlantic Ave. at Pennsylvania, Brooklyn, N. Y."

Although the deeds in defendant Barukh's chain of title do not contain an express mention of the right of way, where, as here, the declaration was made with a metes and bounds description and reference to a map upon which streets and ways are shown, the easement applies at least to those lots which abut it (see e.g. Markusfeld v Huguenot Stations, Inc., 15 Misc 2d 174 [1958]). Defendant Barukh has established he is the record owner of Lot #19 pursuant to his deed, which abuts Lot #119, and that by virtue of the declaration, defendant Barukh obtained an easement of access over Lot #119, for the purpose of allowing ingress and egress from Rockaway Boulevard, to the rear of his premises.

In opposition to the motion, plaintiff asserts that as the owner of the alleged "servient" estate, i.e. Lot #119, the purported easement had to be contained in his direct chain of title for him to be charged with notice of the encumbrance, and that the

easement was not recited in various deeds in his chain of title for Lot #19. In addition, plaintiff asserts that summary judgment is premature because discovery is necessary to ascertain whether Lot #19 and Lot #119 were ever both owned by the same owner, i.e. the City of New York, since the making of the declaration, thereby extinguishing the easement by the doctrine of merger. Plaintiff alternatively asserts that his predecessors in title extinguished the easement by virtue of adverse possession. Lastly, plaintiff argues that to the extent defendant Barukh has a right of way over Lot #119, defendant Barukh has overburdened it, by driving vehicles on it, storing materials and equipment on it, and excavating and occupying the lot.

"[A]n owner of a servient estate will be bound only if the encumbrance is recorded in his or her chain of title (see Puchalski v Wedemeyer, 185 AD2d 563, 565 [1992]). On the other hand, '[w]hen a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is presumed ... to have made the inquiry and ascertained the extent of such prior right' (Kingsland v Fuller, 157 NY 507, 511; see Cambridge Val. Bank v Delano, 48 NY 326, 336 []; 14 Warren's Weed, New York Real Property, Title Examination, § 1.02 [4th ed]; see also Real Property Law § 291-e [1],[2])" (Russell v Perrone, 301 AD2d 835 [2003]). In this instance, the title search performed for plaintiff in connection with his purchase of Lot #119 listed the subject right of way as an exception to the title insurance coverage, thus alerting plaintiff of the existence of some right in conflict with the title with which he was about to purchase. Under such circumstances, that various deeds appearing in the chain of title for Lot #119 did not make mention of the right of way is of no moment. If plaintiff had made inquiries, he would have learned of the recorded declaration appearing in the chain of title for Lot #119, and thus, of the right of way inuring to the benefit of the abutting lots.

"It is fundamental that where the title in fee to both the dominant and servient tenements become vested in one person, an easement is extinguished [by merger]" (Castle Assoc. v Schwartz, 63 AD2d 481, 486 [1978]). To the extent plaintiff asserts that discovery is necessary to determine whether the City of New York simultaneously owned both Lots #19 and #119, such assertion is without merit. Plaintiff was free to obtain title searches for both such lots (see Chas. H. Sells, Inc. v Chance Hills Joint Venture, 163 Misc 2d 814 [1995]), and makes no showing that he needed additional time to conclude such searches to respond to defendant Barukh's motion. In addition, it does not appear from the submissions offered by the parties that title in fee to both

the dominant and servient lots were ever vested in the City of New York at the same time.

Plaintiff has failed to raise a triable issue of fact as to whether the easement was extinguished by virtue of adverse possession. His attorneys' conclusory statement that plaintiff's predecessors in title "adversely" used Lot #119 is without personal knowledge (see Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338, 342 [1974]), and therefore is of no probative value in opposing the motion (see Spearmon v Times Square Stores Corp., 96 AD2d 552 [1983]). Plaintiff has offered no other proof to substantiate his claim of extinguishment by adverse possession (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986], supra).

Plaintiff, however, has raised a triable issue of fact as to whether defendant Barukh has used the easement for purposes other than ingress and easement by foot (see O'Hara v Wallace, 52 AD2d 622 [1976]; see also Collins v Arancio, 72 AD2d 759 [1979]), and whether the purported repairs to the right of way have been consistent and reasonable in relation to the rights of plaintiff as the owner of Lot #119 (see Wells v Tolman, 156 NY 636 [1898], rearg denied 158 NY 676 [1899]; McMillan v Cronin, 75 NY 474 [1879]). Thus, summary judgment is unwarranted as to whether defendant Barukh has overburdened or misused the easement (see Karlin v Bridges, 172 AD2d 644 [1991]; see also Noll v Weinman, 253 AD2d 742 [1998]). Defendant Barukh also has failed to demonstrate a prima facie case entitling herein to summary judgment dismissing the cause of action for slander of title (see generally 39 College Point Corp. v Transpac Capital Corp., 27 AD3d 454, 455 [2006]).

That branch of the motion by defendant Barukh for summary judgment dismissing the amended complaint asserted against him is denied.

Dated: December 3, 2008

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J.S.C.