

Cassandra L. Diponzio Revocable Trust v Smith

2009 NY Slip Op 32913(U)

December 14, 2009

Supreme Court, Wayne County

Docket Number: 66216/2009

Judge: Richard A. Dollinger

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF WAYNE

CASSANDRA L. DIPONZIO REVOCABLE TRUST,
NICHOLAS V. DIPONZIO and CASSANDRA DIPONZIO,
as Trustee and individually, and FLORENCE DIPONZIO,

Plaintiffs,

v.

**DECISION & ORDER
& PERMANENT
INJUNCTION**

GAIL M. SMITH,

Index No.: 62216

Defendant.

2009

Appearances: For Plaintiffs CASSANDRA L. DIPONZIO REVOCABLE TRUST,
NICHOLAS V. DIPONZIO and CASSANDRA DIPONZIO,
as Trustee and individually, and FLORENCE DIPONZIO
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Dollinger, J.

Both parties in this land dispute seek summary judgment and injunctive relief regarding access over a right-of-way known as Dove Street in the Town of Wolcott, Wayne County and a shared waterline.

The disputes in this case are not unique. In many instances during the last half century, longtime owners of resort and lakefront properties, often farmers, have subdivided large tracts of real property to create waterfront cottage sites. The owners of the dominant

parcels made hand-shake agreements with purchasers about interests that seemed insignificant at the time – a shared water line or a poorly demarcated right of access over a loosely defined right of way – and later owners find that these hastily conceived and ill-defined property rights blossom into bitter legal disputes. Because of the increase in value of these properties during the last few decades, the hand-shake deal between friendly neighbors in the past gives way to expensive litigation between owners who share only two traits: a substantial interest in lakefront property and the uncertain reliance on allegedly shared property rights. This case epitomizes that common occurrence.

FACTS OF THE CASE

Both sides agree that the material facts in this case are undisputed. Plaintiff Florence F. DiPonzio and her husband Nicholas DiPonzio purchased a cottage on the shores of Lake Ontario in the Town of Wolcott known as 7799 Dove Street in 1995. Later, Mrs. DiPonzio transferred the property into a family trust, which is among the plaintiffs in this action. The remaining plaintiffs are members of Mrs. DiPonzio's family (collectively "the DiPonzios").

1. Dove Street as a right of way and its path

Dove Street is a private right-of-way that intersects with East Port Bay Road, a public highway. Dove Street runs in a westerly direction from East Port Bay Road and abuts or crosses several adjacent properties, the owners of which are not parties to this litigation. After proceeding in a westerly direction for approximately 600 feet, Dove Street reaches a T-intersection and then runs in a north-south direction parallel to Lake Ontario.

The DiPonzio land is divided into three parcels. The largest parcel is located on the

east side of Dove Street and does not abut Lake Ontario . Two smaller parcels, one of which contains a cottage, are located on the west side of Dove Street and those two parcels front on Lake Ontario. Dove Street bisects the DiPonzio properties.

The property owned by Defendant Gail M. Smith borders the north side of the properties held by Plaintiff DiPonzio and comprises approximately 1.8 acres. The eastern boundary of the Smith property fronts on East Port Bay Road.

Dove Street, after traversing the properties owned by Diponzio, continues across the Smith property and deadends on northern boundary of the Smith property. The northern end of Dove Street does not connect to any other thoroughfare and does not access any public highway.

It is undisputed that both the Plaintiff's and the Defendant's title to the real properties in question devolve from a common grantor, who subdivided a much larger parcel. When the common grantor divided the parcels, the newly subdivided parcels, including all three parcels owned by DiPonzio and the parcel owned by Smith were granted a "right-of-way from highway to said lot as opened up by [the common grantor] to be used in common with other lot owners." This explicit language, creating a right of access to both Smith and Diponzio through Dove Street, is contained in deeds from the common grantor to the plaintiffs and defendant.

There is no dispute that the "right of way" referenced in the deed language refers to Dove Street and that the highway mentioned in the deed is East Port Bay Road. Thus, both parties agree that they each have a non-exclusive right to access over Dove Street from East Port Bay Road to their properties that abut Lake Ontario. *See Kallen v. Feldi*, 192 A.D. 2d 1015, 1017 (3rd Dep't 1993)(the intent of the parties in creating an easement by express

grant should be given effect and if that intent can be readily ascertained by an examination of unambiguous language in the agreement, then the easement is established); *Serbalik v. Gray*, 268 A.D. 2d 926, 927 (3d Dep't 2000)(a man who owns land subject to an easement has the right to use the land in any way not inconsistent with the easement and the extent of the easement can be determined by examining the "circumstances surrounding the estate and the parties which have any legitimate tendency to show the intention of the parties").

As evidence of the rights of the parties over this easement, both the DiPonzios and Smiths and their respective predecessors in title, during an approximately decade-long period, used Dove Street as a means of access to their properties. Both properties owners would proceed west on Dove Street from East Port Bay Road and then take a right turn onto the continuation of Dove Street and proceed in a northerly direction until arriving at their respective properties.

2. The Property Lines that Cross Dove Street

The property lines between the Smith and DiPonzio properties follow unusual courses. The southern boundary of the Smith's property crosses Dove Street and intersects with eastern boundary of the northern most DiPonzio parcel, which contains a cottage ("the cottage lot"). The property line then proceeds north approximately 37 feet and turns almost directly west to the shores of Lake Ontario. This jogging property line has the practical effect of cordoning off approximately three-quarters of the cottage lot from access to Dove Street. Because of the jagged property line, the DiPonzios are unable to use Dove Street to access an elevated parking area for their cottage lot unless they traverse a portion of Dove Street located on the Smith's property. Conversely, in order to access their

property through Dove Street , the Smiths are required to traverse a portion of Dove Street located on the DiPonzio property.

3. The Waterline “Agreement”

Apart from the property line complication, the properties also share a common waterline as a means of supplying water to cottages on both properties. The water line is currently the sole means of accessing municipal water from the Wolcott Water Department for both the Smith and DiPonzio's cottage lot. The waterline runs in a westerly direction from East Port Bay Road, the public highway, across the property of Smith and actually enters the cottage owned by Smith.

The water supply for the DiPonzio's lakefront cottage then runs from the Smith's cottage in a southerly direction across the Smith's property and onto the property of DiPonzio. The water supplied to the DiPonzio cottage is separately metered and billed to the DiPonzios.

The Smiths, in their papers before the Court, confirm that their predecessors in title installed the water line from the public highway to their cottage. The motion papers before this Court allege that the Smiths, in an unwritten agreement, accepted \$825 from the plaintiffs to permit the plaintiffs to connect the plaintiff's cottage to the Smith's waterline. The Smiths allege that this “private agreement” was to only be in effect until the plaintiffs could obtain water from the municipal provider. The DiPonzios have provided the Court with a check, payable to the defendant, in the amount of \$825, which appears to be the payment for the connection to the Smiths water supply. The check is dated June 13, 2001. Piecing together these facts, the Court concludes that the DiPonzios have had access to the waterline for at least eight years. In addition, there is also evidence, undisputed at this

point, that the DiPonzios paid the Wolcott Water Department \$271.02, prior to the payment to the Smiths. The DiPonzios claim this payment was advanced for repairs to the waterline. The defendant claims the DiPonzio payment on June 5, 2001 was simply for the installation of their own waterline. For the reasons that follow, this Court does not need to resolve the dispute over what service were purchased by the DiPonzios from the Wolcott Water Department in 2001. However, as a factual matter, this Court finds that the DiPonzios did pay the Smith a fee to permit the cottage lot to tap into the Smith's water supply in 2001.

4. The Current Dispute – Erection of the Fence the Shut off of the Water

The dispute in this case arises because prior to May 2008, the Smith family had complained to the DiPonzios about the parking of vehicles on Dove Street that, according to the affidavits from the defendants before this Court, blocked the access of the Smiths across Dove Street to their property to the north. According to the information before the Court, the parking of vehicles on Dove Street on 2007 and early in 2008, apparently by members of the Diponzio family, did prohibit the Smiths from traversing Dove Street and accessing their property. There was an exchange of correspondence between representatives of the two owners arguing over access through Dove Street and the rights of the respective parties.

The dispute between the parties simmered during the summer of 2007. On or about May 17, 2008, defendant Smith, apparently frustrated by the lack of access over Dove Street, installed a fence across the right-of-way on Dove Street. The fence was located on the southern boundary between the Smith and DiPonzio properties and ran in an east-west direction and blocked vehicular traffic northerly on Dove Street. The fence also cut off the DiPonzios from access to approximately three-quarters of the eastern border of their

cottage lot. The fence completely prohibited the DiPonzios from accessing a parking area on the cottage lot. The consequence of the fence was that the DiPonzios did not have vehicle access the cottage lot. On the same day, the Smiths unilaterally terminated the water supply to the cottage lot.

5. Litigation Begins – the Complaint and Answer

When negotiations to resolve this dispute failed, the Plaintiffs' filed an action on September 8, 2008. The complaint asserted claims for wrongful obstruction of the Diponzio's easement rights, along with claims for negligence, intentional infliction of emotional harm and *prima facie* tort. Plaintiffs sought a permanent injunction to prohibit the defendant's from terminating the water supply, and to permanently restrain the defendants from obstructing their access across Dove Street to utilize the cottage lot. In addition to injunctive relief, the Plaintiffs sought monetary damages for the violation of the waterline and right of way easements.

In the answer, the Defendants asserted a series of defenses, including a claim that the waterline agreement was not in writing and, therefore, barred by the statute of frauds. The Defendants also asserted a counterclaim seeking injunctive relief to bar the Plaintiffs' from obstructing their access over Dove Street by parking vehicles in the right-of-way.

After issue was joined, both parties brought motions for summary judgment. CPLR 3212. Both parties acknowledge that there are no disputed material facts and hence, summary judgment is appropriate. *Brill v. City of New York*, 2 N.Y. 3d 648 (2004).

OBSTRUCTION OF THE EASEMENT BY PLAINTIFF DIPONZIO

First, it is undisputed that both parties have an absolute right of access over the right-

of-way known as Dove Street. The deeds held by the parties contain identical language that define the right of access. The deeds transfer a fee simple interest to each grantee “together with right-of-way from the highway to said lot as laid out by [the common grantor] to be used in common with other landowners.” The Court finds this language to be unambiguous and vests in both property owners the right to use Dove Street to access their respective properties on Lake Ontario. *Lewis v. Young*, 92 N.Y. 2d 443 (1998); *Butts v. Moreno*, 24 Misc 3d 1230A(Kings Cty. 2009)(a co-owner of an easement in common must not interfere with the reasonable use of the easement by his or her co-owners)

Because this right of access exists, neither property owner may undertake any action that thwarts the rights of adjacent property owners to traverse this roadway. *Sedor v. Wolicki*, 206 A.D. 2d 854 (4th Dep’t 1994)(party may not erect fence across easement). Neither the DiPonzios – nor any of the other adjacent property owners that utilize Dove Street – can take any action to obstruct the right-of-way in such a fashion as to deny the Smiths access to their property. Both parties, in their submission to the Court, acknowledge that there is no reservation in the deed held by either party which permits them to deny the other access across the road.

The evidence in this case establishes that the DiPonzios, during the summer of 2007, parked vehicles in the right of way in such a fashion as to deny the Smiths vehicular access to their property. Under these circumstances, the DiPonzios conduct violates the terms of the access easement and the plaintiffs, their invitees or any other party under their control should be enjoined from taking any action which at any time obstructs the right of way in such a fashion as to deny reasonable vehicular access by the Smiths, their invitees or any party under their control to their property. Reasonable access would include access by

motor vehicle or any utility or service vehicles customarily seeking access to the Smith's property.

OBSTRUCTION OF THE EASEMENT BY SMITHS PREVENTING DIPONZIOS FROM ACCESSING THEIR COTTAGE ON THE NORTHERN PARCEL

Similarly, DiPonzios have established their right to summary judgment on their first cause of action against Smith for violation of the DiPonzios right of access over Dove Street to access the cottage lot. The fence erected by defendant Smith, while running along defendant's property line, prohibits DiPonzio from accessing three-quarters of cottage lot's frontage on Dove Street. The erection of the fence, even though located on the Smith property line, has the practical effect of denying DiPonzios vehicular access to the lot created by the original grantor's subdivision of the parcel. In the grant of the easement, the common grantor extended the right of access ". . . from the highway to said lot . . ." (*Emphasis added*). The language unambiguously extends the right of vehicular access to the cottage lot.

The Court further finds that the easement can only be interpreted as permitting reasonable vehicle access to the cottage lot for all reasonable and necessary purposes, including accessing parking for vehicles on the lot. The common grantor must have envisioned that in order to fully enjoy the beneficial ownership of the cottage lot, the owner of the lot would need to have a right to vehicle access to the entire frontage of the lot on Dove Street and furthermore, the right to use any portion of Dove Street beyond the cottage lot property line to back vehicles out of the property. The fence erected by the defendant precludes the DiPonzios from parking vehicles on the cottage lot, especially in the parking area created by the retaining wall. Because the fence interferes with the DiPonzios right

of access, the fence, even though erected on the Smith's property line, cannot be maintained. *Lewis v. Young*, 92 N.Y. 2d 443, 449 (1998); *Butts v. Moreno*, *supra* at 9-10. The fence must be removed in order to permit the DiPonzios vehicular access to their cottage lot.¹

However, the prohibition against the erection of a fence on the Smith's property line with the DiPonzios does not finally resolve the access rights of the respective parties over Dove Street . The right of access granted to the Diponzios extends to provide them reasonable vehicular access to the cottage lot and no further. However, the right of way adjacent to the cottage lot is narrow and, based on the dimensions in the map before the Court, reasonable access to the lot would require vehicles to be able to back out of the parking space to turn around. Based on the map and the language in the easement, the Court concludes that the DiPonzios right of access must include their ability to drive in and back out of the parking area defined by the retaining wall on the eastern edge of their cottage lot. *Bonnieview Holdings Inc. v. Allinger*, 263 A.D. 2d 933 (3d Dep't 1999). In order to accommodate vehicles that would usually and customarily traverse the right-of-way, including automobiles, trailers, and service vehicles, the Court concludes that the DiPonzios' right of access extends 20 feet beyond the northern most boundary of the cottage lot with the Smith's property. The DiPonzios have the right, under the easement, to travel in a northerly direction on Dove Street for a distance of 20 linear feet north of the boundary line.

¹ The Court notes that the evidence before the Court indicates that the DiPonzios can park vehicle in the parking area off Dove Street on the northern most lot without interfering with the Smith's access over dove Street to their property. The Court notes that any parking by the DiPonzios in the parking area on the northern-most lot may not interfere with the Smith's access over Dove Street to their property.

In addition, in only special emergency or cases of extreme necessity, the DiPonzios have a limited right to travel beyond the 20 foot “access right” set forth in this opinion. This Court can envision rare instances – fire trucks or large delivery trucks – in which the right of access granted to the DiPonzios may require use of Dove Street beyond the 20 foot “access right” set forth in this decision. This right of access will permit the DiPonzios to park on their property and to back out of their property and utilize Dove Street to obtain the full access right granted in the easement.

Thus, the plaintiff’s motion for summary judgment on its first cause of action is granted to the extent of declaring that the easement right of access over Dove Street allows the plaintiffs, their invitees and others under their control to traverse Dove Street:

- (a) as a normal access right, to a point 20 feet beyond the cottage lot;
- (b) in an emergency or in case of extreme necessity, to a point beyond the 20 foot limitation set forth above; and,
- (c) the plaintiffs are entitled to a permanent injunction barring the Smiths from blocking their access rights as set forth in this decision.

THE SMITH’S MOTION TO EXTINGUISH THE EASEMENT ON ITS PROPERTY

Defendant Smith also move for summary judgment to extinguish the rights of the DiPonzios to utilize the easement north of its access rights. The Court notes that Dove Street extends into the Smith property for a distance of approximately 143 north of the Smith-DiPonzio property line. As detailed earlier, the Court finds that the DiPonzios can traverse 20 feet of that distance to fully accommodate its “access rights” to the cottage lot and beyond that point in an emergency. However, the Smiths, in their motion, seek a judicial declaration extinguishing the DiPonzios right to use the easement north of their access

rights.

The Court finds, based on the map before the Court, that Dove Street terminates on the northern most boundary of the Smith property. Therefore, the only parties that would utilize that portion of Dove Street from the northern most boundary of the DiPonzio property to its terminus on the northern most boundary of the Smith property would be owners or guests of the Smith property. There is no language in the easement that suggests that the DiPonzios easement rights extend beyond a right to travel from the highway to “said lot,” which the Court interprets to be the cottage lot. This limiting reference in the grant of the easement restricts the DiPonzios right of access only to that portion of the easement necessary to access the cottage lot. There is no indication that the DiPonzios rights under the easement extend to that portion of the easement that exclusively services the Smith property.

Under these circumstances, the Court declares that the plaintiffs DiPonzio have no rights to traverse the right of way north of their access rights as defined by this decision – 20 foot in all circumstances and further only in an emergency or cases of extreme necessity. The Court expressly holds that the Smiths may erect a gate across Dove Street at a distance of twenty feet from the northern most property line of the DiPonzio property. The gate could prohibit any traffic from further traveling north on the Smith property. The only instance in which the DiPonzios could insist on the opening of the gate would be in emergency or cases of extreme necessity to allow the DiPonzios access to their cottage lot.

Based on all these circumstances, the Court holds that Smith’s are entitled to partial summary judgment on their counterclaim to extinguish DiPonzios rights to traverse Dove Street and the DiPonzios are enjoined from traversing that portion fo Dove Street on the

Smith's property north of the 20 foot access right set forth in this opinion and the emergency/extreme necessity extension of those rights as further set forth herein.

**PLAINTIFFS MOTION FOR SUMMARY JUDGMENT
ON ACCESS TO THE WATERLINE**

With respect to the waterline, the Court finds that the DiPonzios benefit from a water access easement granted by the Smith's either by the express purchase of the easement rights from the Smiths for the amount of \$825 or by an easement by estoppel. Under the Smith rendition of the facts, the DiPonzios paid \$825 to purchase the connection rights. Having sold the right to connect and having permitted the Diponzios to rely on the water supply for more than eight years, the Smiths are estopped from now terminating the right to use the waterline, especially when there is evidence that the loss of the access to the waterline would waste available assets (the current water connection) and replacing access to other municipal sources would be costly. Equitable estoppel is appropriately invoked in this case, "where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's reliance upon the former's words or conduct." Kosakow v. New Rochelle Radiology Ass. P.C., 274 F. 3d 706, 725 (2d Cir. 2001); Syracuse Ready-Mix Concrete Co. V. State of New York, 43 A.D. 2d 800 (4th Dep't 1973). In this case, the waterline connection from the Smith cottage to the DiPonzio cottage does not, in any way, disrupt or impact the Smith property. The DiPonzios pay for their water use. In view of the disparities in impact to the two owners in terminating the water access, it would be manifestly unjust and inequitable to require the DiPonzios, who paid for the connection, to now be required to abandon it and seek another water source. Reynolds v. Groton, 30 Misc 2d 216 (Oneida Cty. 1960)(estoppel is an equitable doctrine which rests upon a word or deed of one

party upon which another rightfully relies and so relying changes his position to his injury).

As further support for the invocation of equitable estoppel, the Court further holds that:

(a) the DiPonzios are responsible for the maintenance and upkeep of the water connection from the junction of their waterline with the waterline on the Smith property across any portion of the Smith property and onto their own property;

(b) the Smiths must permit the DiPonzios access on the Smith property to repair or replace the waterline running from their connection to the Smith property when such access is required to maintain the water connection and such access shall be granted after reasonable notice by the DiPonzios to the Smiths and the DiPonzios shall repair any damages to the Smith property caused by its repair of its waterline on the Smith property ; and,

(c) the DiPonzios and the Smiths shall be equally responsible for the maintenance and repair of the shared waterline that runs from East Port Bay Road across the Smith property to the junction with the DiPonzios' water supply.

OTHER CAUSES OF ACTION AND MONETARY DAMAGES

The Court notes that the plaintiff, in the complaint, raises causes of action for negligence, intentional tort and prima face tort. There is simply no evidence to support these claims: the legal consequences in this case arise from differing interpretations of the easement and not from any other culpable conduct. Therefore, the Court on its own motion, dismisses these claims.

With respect to the claims for damages by both parties, the Court finds that the injunctive granted to all parties in this case resolves the outstanding issues before the Court. The Court notes that there is no evidence of any monetary damage sustained by either party

as a consequence of the actions of the other. Aggravation, anger at a next-door neighbor and disrupted use of their respective lakefront properties during the summer are the real inconveniences which bring these parties before the Court. In the absence of evidence of monetary losses or other out-of-pocket costs occasioned by either parties conduct, the Court declines to grant monetary relief to either party.

CONCLUSION

Under all these circumstances, the Court holds as follows:

Plaintiffs' motion for summary judgment on its first cause of action is:

- (1) GRANTED to the extent of declaring that the Defendant Smith's installation of a fence or gate on its property line in such a fashion to obstruct access by the DiPonzios to the cottage lot violates the DiPonzios easement rights; and, further
- (2) GRANTED to the extent that defendant Smith is ORDERED to remove the fence currently erected on the property line within 10 days of this order; and, further
- (3) GRANTED to the extent that defendant Smith is permanently enjoined from obstructing the DiPonzios right of access to their property along the extent of Dove Street to a point 20 feet north of DiPonzios northern most property line and is further permanently enjoined from obstructing the DiPonzios right of access along Dove Street to a point beyond 20 feet from the northern most property line in emergency or cases of extreme necessity; and, further
- (4) GRANTED to the extent that defendant Smith is permanently enjoined

from obstructing or terminating the water connection which services the DiPonzio's cottage lot, subject to the DiPonzios obligation to pay all costs associated with the water connection that services their property and to equally share with Smith all costs for the joint waterline from the public highway to the site of the connection;

- (5) plaintiff's motion for summary judgment on its remaining causes of action are DENIED and any claim for monetary damages is also DENIED.

Defendant's motion for summary judgment is:

- (1) GRANTED to the extent of dismissing the second, third and fourth causes of action in the plaintiff's complaint and denied with respect to the first cause of action.

Defendant motion for summary judgment on its counterclaim is:

- (1) GRANTED to the extent of declaring that the Plaintiff DiPonzios have no right to park vehicles on the roadway or to take any action that obstructs the Smiths access over Dove Street to their property and further that the DiPonzios are prohibited from taking any actions that interfere with the Smiths right to use Dove Street to access their property; and, it is further
- (2) GRANTED to the extent that the DiPonzios are permanently enjoined from parking any vehicles on the roadway to block the Smiths access over Dove Street to their property and further that the DiPonzios are permanently enjoined from taking any actions that interfere with the

Smiths right to use Dove Street to access their property; and, it is further

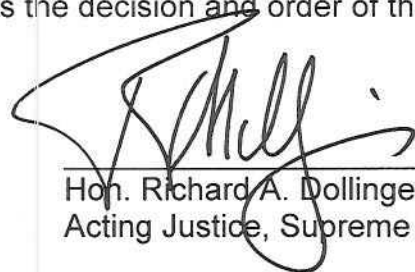
(3) GRANTED to the extent of extinguishing any right of access by the DiPonzios over Dove Street over the land of Smith at a point in excess of 20 feet from the northern most boundary of DiPonzio property with the Smith property except in emergency or cases of extreme necessity and DiPonzios are permanently enjoined from traversing that portion of Dove Street north of their access rights as set forth in this decision; and it is further

(iv) GRANTED to the extent that the Smiths may erect a gate at such location and further that the Smiths shall only be required to open such gate for the DiPonzios in cases of emergency or extreme necessity; and it is further

(iii) DENIED to the extent that it asserts any claims for monetary damages

This opinion constitutes the decision and order of this Court.

SO ORDERED.

 12/14/09

Hon. Richard A. Dollinger
Acting Justice, Supreme Court

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SUPREME AND COUNTY COURT
WAYNE COUNTY
MICHIGAN