

Catsoulis v Parcels

2009 NY Slip Op 33188(U)

October 1, 2009

Supreme Court, Suffolk County

Docket Number: 06-28164

Judge: Joseph C. Pastorella

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INDEX No. 06-28164
CAL. No. 09-00983-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 6-15-09
ADJ. DATE 9-4-09
Mot. Seq. # 003 - MG
004 - XMotD

-----X	
EVANGELOS A. CATSOULIS and HELEN CATSOULIS,	:
Plaintiffs,	:
- against -	:
:	
PATRICK LOUIS PARCELLS, ANNBETH ESCHBACK, JUDITH A. KARLIK, EDWARD T. KARLIK, KENNETH TROPIN, KATHLEEN TROPIN and COSTELLO MARINE CONTRACTING CORPORATION a/k/a COSTELLO'S MARIE CONTRACTING CORPORATION,	:
Defendants.	:
-----X	

MITCHELL & INCANTALUPO
Attorneys for Plaintiffs
98-20 Metropolitan Avenue
Forest Hills, New York 11375
CURTIS, VASILE P.C.
Attorneys for Defendants Parcels & Eschback
2174 Hewlett Avenue, P.O. Box 801
Merrick, New York 11566-0801
PAGANINI GAMBESKI CIOCI, ESQ.
Attorneys for Defendant Costello Marine Corp.
1979 Marcus Avenue, Suite 220
Lake Success, New York 11042

Upon the following papers numbered 1 to 32 read on this motion and cross motion for summary and declaratory judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-14; Notice of Cross Motion and supporting papers (004) 15-27-untabbed; Answering Affidavits and supporting papers 28-29; 30-31; Replying Affidavits and supporting papers 13 -16; Other 32-Pltff's Mem/Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the plaintiffs, Evangelos A. Catsoulis and Helen Catsoulis, pursuant to CPLR 3212 for summary judgment declaring the 1907 Dock Agreement is in full force and effect and controls the rights and responsibilities of the parties to this action with reference to the subject dock. is granted; and it is further

ORDERED that this motion (004) by the defendants, Patrick Louis Parcels and Annbeth Eschbach w/s/h Eschback, pursuant to Real Property Actions and Proceedings Law §1951 declaring that the defendants retain all rights of access to and possession of the boat landing, dock and cabana irrespective of the existence of enforceability of the 1907 Dock Agreement, is granted only to the extent of those rights of access and possession provided pursuant to the 1907 Dock Agreement; for summary judgment dismissing the complaint as asserted by Evangelos Catsoulis is denied; for summary judgment dismissing the fourth cause of action for Helen Catsoulis' claims of personal injury is granted and the fourth cause of action is dismissed with prejudice; and for summary dismissing the fifth cause of action asserted by Evangelos Catsoulis for loss of services is granted and the fifth cause of action is also dismissed with prejudice.

This is an action wherein the plaintiffs, Evangelos A. Catsoulis and Helen Catsoulis seek a judgment declaring that the Dock Agreement of 1907 is in full force and effect and controls the rights and obligations of the parties; damages against the Parcels defendants (Parcels and Escbach) for private nuisance, breach of implied covenant of good faith and fair dealing, negligence and loss of service and society for expenses relating to the physical, medical, and emotional pain and suffering of Mrs. Catsoulis; and damages against Costello Marine Contracting Corporation a/k/a Costello's Marine Contracting Corporation (Costello Marine) for breach of contract, negligence, breach of fiduciary duty and fraud.

The adduced testimony establishes that Helen Catsoulis is the owner of two acres of property located at 4 Sylvester Road, Shelter Island, upon which the home she shares with her husband is located. She also owns the waterfront property, Lot 12, at 3 Sylvester Road upon which half of a structure that serves as a cabana is located. Lots 10, 11, and 12 are subject to the 1907 Dock Agreement. Lot 12 is contiguous to lot 11. The subject dock and boat landing were constructed on lot 11. Patrick Parcels and Annbeth Escbach are the current owners of lot 11. The boat landing, the dock and the cabana can only be accessed by stairs located on lot 11 as the rough terrain on lots 10 and 12 do not allow access to the dock, boat landing and cabana.

In 1907 William Schickel, Carl Pickhardt and Adolf Kuttroff were the owners of lots 10, 11, and 12 and entered into the 1907 Dock Agreement wherein they were to share the expenses and construct improvements to the land which included a dock, a boat landing with a float, and a cabana. The plaintiffs claim that they are the successors-in-interest to Adolf Kuttroff; the Parcels are successors-in-interest to Carl Pickhardt and purchased lot 11 on August 22, 2001 from Elizabeth R. Williamson and Susan R. Woodworth; and Judith Karlik and Edward Karlik are successors-in-interest to William Schickel for lot 10, known as 1 Sylvester Road which was purchased from Charlotte Beers and Sylvester Farm Properties on January 8, 1998. Kenneth Tropin and Kathleen Tropin later purchased lot 10 from the Karliks on September 15, 2006.

This 1907 Dock Agreement was to remain in effect for ten years, and thereafter from year-to-year thereafter, unless any party gave written notice of the intent to terminate the Dock Agreement, served by registered mail. It is claimed by the plaintiffs that the Dock Agreement has never been cancelled since its execution. The Parcels defendants assert that the 1907 Dock Agreement was properly terminated by Rachael C. Carpenter, as successor-in-interest to William Schickel, by letter dated July 24, 1980 addressed to Mrs. Laverne Hench and Mr. F. William Crandall as Executor u/w Florence S. McCormick.

The plaintiffs claim that all parties abided by the Dock Agreement until several months prior to the commencement of this action when the Parcels defendants claimed the Dock Agreement had been cancelled by an unsigned draft letter dated July 24, 1980, allegedly written by Mrs. Carpenter, a prior owner of lot 10 subject to the Dock Agreement and that the Parcels now contend that the dock, boat landing and cabana belong solely to them and that the plaintiffs and their successors-in-interest have no rights with regard to those structures or any portion thereof.

It is further asserted that beginning in 1980 and up to the recent time, the plaintiffs hired Costello Marine to obtain numerous permits from the Town of Shelter Island and the New York State Department of Environmental Conservation (DEC) for repairs and improvements to the dock, boat landing and cabana with the consent of the successors-in-interest to the Dock Agreement. However, when the plaintiffs last hired

Costello Marine to secure a permit from DEC for repairs to the dock, boat landing and cabana, and signed an authorization form for Costello Marine to do so, Costello Marine applied for the permit repairs in the name of Patrick Parcels rather than in the plaintiffs' names. However, the work was not conducted causing the dock, boat landing and cabana to remain in a state of disrepair.

It is asserted that the Karlik defendants and the Tropin defendants, successors-in-interest to lot 10, do not dispute the validity of the Dock Agreement and were named only as necessary parties as successor-in-interest to one of the three signatories of the Dock Agreement. The action has been discontinued against them.

In motion (003) the plaintiffs seek summary judgment declaring that the 1907 Dock Agreement is in full force and effect and controls the rights and responsibilities of the parties. In motion (004) the moving defendant seeks summary judgment declaring that they retain all rights of access to and possession of the boat landing, dock and cabana irrespective of the existence of enforceability of the 1907 Dock Agreement; summary judgment dismissing the claims of Evangelos Catsoulis; and summary judgment dismissing the fourth and fifth causes of action set forth in the complaint.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeraxon Prods.*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

Real Property Actions and Proceedings Law §1951(1) provides in pertinent part that no restriction on the use of land "shall be enforced by injunction or judgment compelling conveyance of the land burdened by the restriction or an interest therein, nor shall such restriction be declared or determined to be enforceable, if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished, or by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason. At section (2) it provides that when relief is sought to obtain a declaration with respect to enforceability of the restriction or to determine an adverse claim arising from the restriction...if the court shall find that the restriction is of no actual and substantial benefit to the persons

seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason, it may adjudge that the restriction is not enforceable by injunction or as provided in subdivision 2 of section 1952, and that it shall be completely extinguished upon payment, to the person or persons who would otherwise be entitled to enforce it in the event of a breach at the time of the action, of such damages, if any, as such person or persons will sustain from the extinguishment of the restriction.

It is undisputed that lots number 10, 11 and 12 were the subject of the June 6, 1907 Dock Agreement wherein the owners of those lots agreed to certain improvements consisting of, inter alia, a dock, boat landing with a float, and a bath pavilion with the necessary stairway therefrom from the shore front to the top of the bluff for their mutually agreed benefit. The improvements were to benefit the parties to the agreement and their successors-in-interest in the ownership of their respective plots of land and the members of the parties respective families and their servants and their invited guests so long as the residences continued to be used as private residences and not for boarding houses or otherwise. The improvements were to be kept in proper condition and repair during the duration of the agreement at an expense not exceeding one hundred dollars in any one year, and the expenses of so doing shall from time to time be borne in equal shares between the parties and their respective successors in interest. Annually during the month of October, there shall be rendered to each of the parties a statement of the amounts paid, laid out and expended up to that time in each year, or for an account of such improvements and each of the parties shall within one month after receipt of such statement pay and adjust the amount that may be properly contributable. If the expense exceeds one hundred dollars, the consent in writing to the increase shown above that sum, signed by all of the parties charged therewith, shall first be obtained. In addition to remedies set forth in the agreement, if one party should fail to pay, the agreement provided that the agreement and all the provisions contained therein shall remain in force during a ten year period next ensuing the date of the agreement, and thereafter from year to year unless three months prior to the expiration of such period of ten years, or three months prior to the expiration of each annual renewal period thereafter, any of the parties hereto or the successors-in-interest who may be desirous of termination the agreement shall give to the remaining parties or their successors-in-interest notice in writing. Such notice is to be sent by registered mail addressed to the person for whom the same is intended at the latter's place of residence, and in default of such places of residence being unascertainable, then addressed to such person or persons at Manhasset Manor, Suffolk County, New York. Upon the termination in the manner provided, if the parties or their successors-in-interest fail to agree upon a satisfactory disposition of such dock, boat landing and bathing pavilion, the same shall be entirely removable by any one of the parties or their successors-in-interest who shall have all necessary access for that purpose, and expense for the same shall be equally borne between the parties. The agreement was signed by Carl Pickhart, Adolph Kuttroff, and William Schickle.

In support of their motion, the plaintiffs have produced, inter alia, a copy of the June 6, 1907 Dock Agreement duly executed and notarized which demonstrates prima facie that the agreement was entered into between the parties thus establishing prima facie entitlement to summary judgment.

In opposition, the Parcels argue that the Dock Agreement of June 6, 1907 was properly terminated by Rachael C. Carpenter, as successor-in-interest to William Schickel, and have produced an unsigned letter dated July 24, 1980 addressed to Mrs. Laverne Hench and Mr. F. William Crandall as Executor u/w

Florence S. McCormick, but the letter is not in admissible form, no return receipt has been provided and there is no affidavit from anyone with knowledge confirming that the letter was actually sent by registered mail pursuant to the agreement. This unsigned copy of the letter dated July 24, 1980, allegedly sent from Rachel C. Carpenter, sets forth "that as successor-in-interest to William Schickel, I hereby give you notice of my intention to terminate said agreement so that it shall not again be renewed at the expiration of the current annual renewal period, June 5, 1981."

The Parcels defendants have submitted a copy of another letter dated March 6, 1981 which was allegedly sent to Dr. Catsoulis from Davidson, Dawson & Clark, attorneys for Mrs. Susan H. Woodworth and Mrs. Elisabeth R. Williamson, as successors in interest to Florence E. Hench's regarding the rights to the dock and bath house and certain parcels in Dering Harbor, Shelter Island subject to the 1907 Agreement. The letter continues that as successor-in-interest to William Schickle, Rachel Carpenter has given notice by letter dated July 24, 1980 of her intention to terminate the agreement so that it should not again be renewed at the expiration of the current annual renewal period of June 5, 1981. Counsel for Woodworth and Williamson sets forth in that letter that "Our clients would like to preserve the dock and the bath house and would like your thought with regard to the matter as soon as possible."

Along with a letter dated March 13, 1981, from Mr. William T. Buice of Davidson of Dawson and Clark, allegedly sent to Dr. Catsoulis, the estimate of King Terra-Marine was enclosed for the repairs to the bath house and cabana, along with the advisement that Mr. Woodworth or his wife of Mr. and Mrs. Williamson will call to discuss the repairs to the structure. He further states he looks forward to hearing from Dr. Catsoulis' attorney with his thoughts about the decision by Mrs. Carpenter to terminate the 1907 Agreement.

There is no affidavit from a person with knowledge authenticating any of these letters or attesting to whether they were mailed, or any follow up concerning their content. No additional agreement subsequent to the asserted termination has been demonstrated by the moving defendants in further support of the claim that the Dock Agreement was terminated. Nor have the Parcels defendants served a letter terminating the 1907 Agreement. It is noted that the purported letter was regarding Carpenter's rights relative to Lot 10 previously owned by William Schickle and not Lot 11 which is currently owned by the Parcels defendants.

Evangelos A. Catsoulis testified at his examination before trial on January 30, 2008 that he is eighty years old and a retired medical doctor licensed in the State of New York and that his wife owns the two acres of property on Shelter Island where his home and bathhouse are located and he held title to the property from August 5, 1986 until June 1999. It was his understanding that when he purchased the property in 1980 that he had ownership interest in the dock and bathhouse, and for ninety nine years the three families used the structures. A copy of the 1907 Dock Agreement was annexed to his deed when he purchased the property and he and his wife used those structures continuously over the years. The Fiske¹ grandson also used the structures for a couple summers. He testified that he maintained the bathhouse from 1980 through 1986 and Ms. Fiske contributed half the expenses for the dock, then told him she wanted nothing to do with the dock and he should take her part. From 1986 to 1999 he and his wife were the only ones who used the dock except for the Fiske daughters who would come with their children and fish, but

¹ Previous owner of Lot 11.

they never used the cabana. Within a week of purchasing the property, he met with Mrs. Carpenter who lived next door, and she said she wanted nothing to do with the dock and bathhouse. She died in 1999. Thereafter, all the billing for repairs was between him and Ms. Fiske and he never obtained her approval when he felt repairs had to be made. However, Mr. Woodworth came to him right after he purchased the property (Lot 11) with a bill for \$1,500, which represented his half for the cost of the piling replaced on the dock by Woodworth and Dr. Catsoulis paid it. He testified he always maintained the dock with the contribution from Ms. Fiske. Dr. Catsoulis further testified that he never received the letter dated June 24, 1980 from Mrs. Carpenter and the first time he saw it was when Mr. Parcels handed it to him after the Parcels purchased Lot 11, and in any event, the property that the Parcels purchased was a different property than the property owned by Mrs. Carpenter.

Based upon the foregoing, the defendants have not raised a triable factual issue by submitting evidence in admissible form to preclude summary judgment declaring that the 1907 Dock Agreement is in full force and effect and controls the rights and responsibilities of the parties to his action.

Additionally, Mr. Parcels testified at his examination before trial on April 14, 2008, that his deed to the property from Williamson Woodworth makes reference to the Dock Agreement, but he testified that he did not speak to anyone from the Fiske family concerning why the Dock Agreement was included as part of the deed. He has not requested that the deed be amended to remove the reference to the dock since the time of closing and no one has ever asked him to amend the deed to remove reference to the Dock Agreement.

It is further determined that because both the plaintiffs and the Parcels defendants both utilize the subject structures on a regular basis, as supported by the testimonies, that enforcement of the agreement is of actual and substantial benefit to them (see, Real Property Actions and Proceedings Law §1951).

Accordingly, motion (003) by the Catsoulis plaintiffs, pursuant to CPLR 3212 for summary judgment declaring the 1907 Dock Agreement is in full force and effect and controls the rights and responsibilities of the parties to this action with reference to the subject dock is granted.

Accordingly, that part of motion (004) by the defendants, Patrick Louis Parcels and Annbeth Fishbach pursuant to Real Property Actions and Proceedings Law §1951 declaring that the defendants retain all rights of access to and possession of the boat landing, dock and cabana irrespective of the existence of enforceability of the 1907 Dock Agreement is granted only to the extent provided by the 1907 Dock Agreement.

The Parcels defendants seek an order granting summary judgment dismissing the complaint as asserted by Evangelos Catsoulis on the basis that he does not own the property upon which a part of the cabana is constructed upon. Here the admissible proof establishes that the plaintiff Dr. Catsoulis was an owner of the property from 1986 until 1999 when Helen Catsoulis became the sole owner of the property upon which a portion of the disputed subject cabana is located. Therefore, Dr. Catsoulis does not currently own the property. However, the Dock Agreement of 1907 provides that the improvements consisting of the dock, boat landing and cabana were to benefit the parties to the agreement and their successors-in-interest in the ownership of their respective plots of land as well as the members of the parties respective families and their servants and their invited guests so long as the residences continued to be used as private residences and not for boarding houses or otherwise.

“In order to be a successor-in-interest a party must continue to retain the same rights as the original owner without a change in ownership. There must be a change in form only and not in substance. It does not include a transfer from one party to another (*see, City of New York v Turnpike Development Corp.*, 36 Misc2d 704 [Supreme Court of New York, Special Term, Kings County 1961]). “In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law, and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied (*Torsiello Capital Partners, LLC v Sunshine State Holding Corp.*, 2008 NY Misc Lexis 2879 [Supreme Court of New York, New York County 2008]). Here the admissible proof demonstrates that the agreement is clear on its face and capable of being interpreted from the document itself. The Catsoulis’s property is used as a residence, Evangelos and Helen Catsoulis are married, that the agreement is for the benefit of the successor-in-interest, namely Helen Catsoulis as current owner, and Evangelos Catsoulis has a right to benefit from the agreement a member of the family pursuant to the agreement, namely as the husband of Helen Catsoulis. Therefore, as a beneficiary of the agreement and as spouse and family member of Helen Catsoulis, Evangelos Catsoulis has standing in this matter.

Accordingly, that part of motion (004) which seeks an order granting summary judgment dismissing those causes of action asserted on behalf of Evangelos Catsoulis in the first, second, and third causes of action are denied.

The Parcels defendants seek further order granting summary judgment dismissing the fourth cause of action premised upon Helen Catsoulis’ claims of personal and emotional injury and for summary judgment dismissing the fifth cause of action asserted by Evangelos Catsoulis for loss of services premised upon the claims asserted in the fourth cause of action.

In the fourth cause of action sounding in negligence, it is claimed that the Parcels defendants breached their duty owed to the plaintiffs when they interfered with the plaintiffs’ use and enjoyment of the dock, boat landing and cabana in contravention of the Dock Agreement, causing Helen Catsoulis to suffer undue stress exacerbating her coronary artery disease causing her to undergo angioplasty and other medical care and treatment entitling her to money damages for her injuries, losses, pain and suffering.

Mr. Parcels testified that he owns the quarter of an acre property with his wife, Annbeth Eschbach, purchased directly from the Fiske daughters, Susan Woodworth and Elizabeth Williamson. He first saw the Dock Agreement of 1907 when Mr. Woodworth and the Fiske family first determined they would sell the property to him, and provided him a set of documents which included the Agreement. Mr. Woodworth also advised him that the Dr. and Mrs. Catsoulis shared in the expenses of the dock. Prior to receiving the documents from Woodworth, he was made aware by Woodworth and the real estate agent Ketcham that Dr. Catsoulis and his wife used the dock. He stated Woodworth advised him there was no existing formal agreement for the Catsoulis’ to use the dock, but advised him that they did share in the dock expenses. Mr. Parcels testified that he sent a letter to Dr. and Mrs. Catsoulis advising them that he was in contract on the property and they should clean up any outstanding debts or whatever else they might have with respect to it. He also advised Dr. and Mrs. Catsoulis that once they have had a chance to review the dock agreement that

they will agree that it should be updated. He testified that he wanted them to enter into a new agreement with him. He denied ever depriving the Dr. or Mrs. Catsoulis the use of the subject structures.

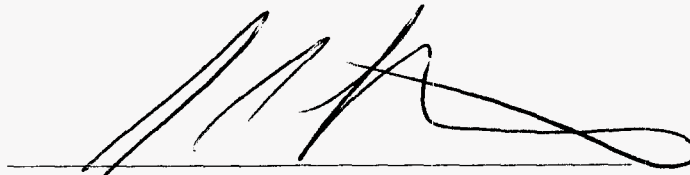
The testimony by Helen Catsoulis at her examination before trial on April 7, 2008 establishes that she was never prevented from using the cabana, dock or boat landing, although it is claimed in the complaint that the defendants interfered with her use and enjoyment of the dock, boat landing and cabana in contravention of the Dock Agreement.

Here the Parcels defendants have established prima facie entitlement to summary judgment on the fourth cause of action in that it has been established that Helen Catsoulis was not deprived of use or enjoyment of the dock, boat landing or cabana. Therefore, it is determined that there was no breach of the duty to abide by the Dock Agreement and there was no deprivation of use the dock, boat landing or cabana suffered by Helen Catsoulis. Therefore the Parcels defendants have demonstrated prima facie entitlement to dismissal of the fourth cause of action.

In opposing this motion, the plaintiffs have failed to raise a triable issue of fact with the submission of evidentiary proof in admissible form to demonstrate that they were precluded use and enjoyment of the aforementioned amenities to preclude summary judgment from being granted on this fourth cause of action. Additionally, there is no supporting affidavit or affirmation from a medical expert to establish proximate cause of the claimed injuries to any actions by the defendants. It is further determined that the fifth cause of action, premised upon a derivative claim on behalf of Dr. Catsoulis, relating to Mrs. Catsoulis' claimed injuries therefore fails as well.

Accordingly, the fourth and fifth causes of action premised upon personal injury, emotional distress and the need for medical care and treatment, and the derivative claim associated therewith are dismissed with prejudice.

Dated October 1, 2009



HON. JOSEPH C. PASTORESSA

FINAL DISPOSITION NON-FINAL DISPOSITION