

Gibson v Town of Schodack

2010 NY Slip Op 30505(U)

January 7, 2010

Supreme Court, Rensselaer County

Docket Number: 218424

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

LESTER GIBSON and NANCY GIBSON,

Plaintiffs.

-against-

TOWN OF SCHODACK, NICHOLAS B.
FERRIERE and MARY BETH FERRIERE,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
Index No.: 218424 RJ1 No.: 41-0407-2006

Appearances: Mary Beth Ferriere and
Nicholas B. Ferriere
Defendants, Pro Se
160 Morey Park Road
Nassau, NY 12123

DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs¹ and defendants Nicholas B. Ferriere and Mary Beth Ferriere (“defendants”) are adjoining property owners in the Town of Schodack in Rensselaer County, New York. The plaintiffs, who maintain that they are the exclusive owners of a common road or driveway, commenced the above-captioned action for a determination of title under Real Property Actions and Proceedings Law (“RPAPL”) Article 15. The defendants interposed counterclaims in which they assert that they are the owners of the disputed road. In March

¹At the time of commencement of the action the plaintiffs were represented by attorney Mylo Eytina. Mr. Eytina, unfortunately, passed away on December 2, 2007. Pursuant to CPLR 321 the Court, by order dated January 3, 2008, stayed the action for a period of thirty days to allow the plaintiffs to retain new counsel. The Court directed the defendants to serve notice upon the plaintiffs that they should retain new counsel within thirty days, or they would be deemed to be self-represented. The defendants indicate that they sent plaintiffs such notice on January 29, 2008, together with a copy of the Court order. The plaintiffs have not informed either the defendants or the Court that they have retained new counsel. Under the circumstances, the Court deems the plaintiffs to be self-represented.

2008 the defendants made a motion for summary judgment. By order dated May 15, 2008 the Court granted the motion to the extent of dismissing plaintiffs' complaint, but denied the motion (without prejudice) with respect to granting judgment on defendants' counterclaims. Defendants have now made a second motion for summary judgment on their counterclaims.

Turning to a threshold procedural issue, the Court observes that the defendants initially appeared in the action by and through their attorneys, the law firm of Maney, McConville & Liccardi, P.C. Notwithstanding this fact, the instant motion was made by the defendants, pro se. The Court has received no notice that the law firm of Maney, McConville & Liccardi, P.C. has formally withdrawn as counsel for the defendants in accordance with procedures set forth in the CPLR 321. As such, they remain the attorneys of record for the defendants. The Court further observes that under CPLR 321 (a) "[i]f a party appears by attorney such party may not act in person in the action except by consent of the court" (see CPLR 321 [a]). No such consent having been given the Court finds, on this basis alone, that the motion must be denied, inasmuch as defendants have not demonstrated that they have authority to proceed pro se.

Turning to the merits, 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 in admissible form to demonstrate the absence of any material issues of fact (see Ferluckaj v Goldman Sachs & Co., 12 NY3d 316 [2009]; Smalls v AJI Industries, Inc., 10 NY3d 733 [2008] Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993];). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency

of the opposing papers" (Smalls v AJI Industries, Inc., *supra*, citing Alvarez v Prospect Hosp., *supra*). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, *supra*; Alvarez v Prospect Hosp., *supra*; see also Wahila v. Kerr 204 AD2d 935, 936-937 [3rd Dept., 1994]). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [3rd Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 726 [3rd Dept., 1998]). In addition, a party's burden on a motion for summary judgment is not satisfied by merely pointing to gaps in its adversary's proof. To succeed, there must be affirmative evidentiary proof demonstrating the movant's right to judgment as a matter of law. Until that condition is met, the strength of the opponent's proof is immaterial (see Antonucci v Emeco Industries, Inc., 223 AD2d 913, 914 [3rd Dept., 1996]; Rothbard v Colgate University, 235 AD2d 675, 678 [3rd Dept., 1997]; Clark v Globe Business Furniture Inc., 237 AD2d 846, 847 [3rd Dept., 1997]; Moffett v Harrison and Burrowes Bridge Contractors Inc., 266 AD2d 652, 654 [3rd Dept., 1999]). "[A] movant's failure to satisfy his or her burden on a summary judgment motion requires denial of the motion, regardless of the sufficiency of the opposing papers'" (Ames v Paquin, 40 AD3d 1379 [3rd Dept., 2007], quoting Serrano v Canton, 299 AD2d 703, 705 [2002]).

"Generally, the movant's failure to include a copy of the pleadings in the papers supporting a motion for summary judgment 'require[s] summary denial of the motion'"

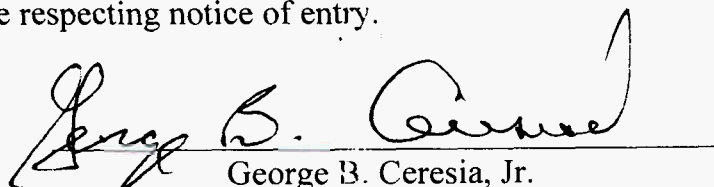
(Greene v Wood, 6 AD3d 976, 977 [3rd Dept., 2004], quoting Welton v Drobnicki, 298 AD2d 757, 757 [2002], and citing CPLR 3212 [b] and Bonded Concrete v Town of Saugerties, 3 AD3d 729, 730 [2004]; see also Bonded Concrete, Inc. v Town of Saugerties, 3 AD2d 729, 730 [3rd Dept., 2004]). The pleadings which the defendants have submitted in support of the motion are incomplete in that they fail to contain copies of exhibits which were annexed to the pleadings, including copies of deeds of the parties' respective parcels of real property. The foregoing provides, in the Court's view, a second reason why the motion must be denied. In addition, unless an accurate discernable description of the disputed area is presented to the Court, the Court could not and would not grant judgment to either party. The Court concludes that the motion must be denied without prejudice.

Accordingly it is

ORDERED, that the motion of defendants Nicholas B. Ferriere and Mary Beth Ferriere for summary judgment against the plaintiffs is denied without prejudice.

This shall constitute the decision and order the Court. All papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. The parties are not relieved from the applicable provisions of that rule respecting notice of entry.

Dated: Troy, New York
January 7, 2010


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated July 30, 2009, Supporting Papers and Exhibits

cc.:

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