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SHORT FORM ORDER md

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

ROSLYN WINSON as TRUSTEE of the ROSLYN WINSON LIVING TRUST,

Plaintiff,

-against-

SEAN COFFIN and CORRINE COFFIN,

Defendants.

Motion Sequence #1
Submitted February 16, 2010

INDEX NO: 14319/07

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-5
Affs in Opposition.....6-9
Affs in Reply.....10&11
Memorandum of Law.....12&12a

Upon the foregoing papers, it is ordered that this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's amended complaint is denied.

Plaintiff, Roslyn Winson, is the trustee of the Roslyn Winson Living Trust and the owner of the premises knows as 319 East Penn St., Long Beach, N.Y. (the Winson premises or the dominant estate). The trust acquired title in June, 1994. Defendants Sean Coffin and Corrine Coffin are the owners of the premises known as 317 East Penn St., Long Beach, N.Y. (the Coffin premises or the servient estate). The Coffins acquired title

on June 28, 1999. The Coffin premises and the Winston premises are attached houses sharing a common boundary line on the east of the Coffin premises. By deed dated August 1, 1950, lots 49 and 50 and one half of lot 48 were subdivided and conveyed. Lot 50 and the easterly part of lot 49 became the property known as 319 East Penn St. (the Winson premises) and lots 48 and 49 became known as 317 East Penn St. (the Coffin premises). The deed in 1950 conveying the portion of the premises now known as 319 East Penn St. contained an easement. According to the easement, a dominant estate (319 East Penn St.) and a subservient estate (317 East Penn St.) were created. The easement contained in the deed to 319 East Penn St. stated:

> [317 East Penn St. grants to 319 East Penn St.] a license, privilege, easement and right of way to use for lawful egress and ingress of persons and automobiles, the westerly (8) feet of the easterly half of not no. 48 so as to permit them to use the easterly half o the garage as shown on the aforementioned survey, and also to the bungalow in the rear of lots number is 49 and 50. [317 East Penn St.] agree that such license, privilege, easement and right-of-way shall include the right to use that portion of the rear lot area of lots one half of 48 and 49 as may be required to effectuate ingress and egress of persons and automobiles to the aforementioned garage and bungalow.
>
> In the event the garage shall be removed or burned down, then the right to the parties of the second part, their heirs, and assigns, to use the easterly half of the said garage shall be deemed abandoned, without affecting, however, the right to use the passage to the bungalow or a structure in place thereof for persons and automobiles.

Since January 12, 1984 to the present, Roslyn Winson has been in title either jointly, individually or as a trustee.

Winson alleges the easement had been viable from 1950 when it was granted up to the date she acquired title in 1984, a total of 34 years and from 1984 to the present, an

additional 26 years, for a total of 60 years.

Plaintiff alleges that since acquiring title in January 1984, she used the westerly eight feet of the easterly half of lot 48 for ingress and egress and to drive automobiles to the garage then existing on the garage area of the disputed property. She parked an automobile in the garage then existing on the garage area of the disputed property since January, 1984 and continuously thereafter through and including the date that defendants removed the garage. Plaintiff also alleges she authorized all tenants of the premises at 319 East Penn St., Long Beach, N.Y. to use the disputed property in the same manner for ingress and egress and to park in the space designated as the garage area of the disputed property when she rented or leased the premises at 319 East Penn St., Long Beach, N.Y. and, in fact, plaintiff's tenants used the disputed property in the same manner for ingress and egress and parked their automobiles in the garage area of the disputed property. In addition, plaintiff asserts she maintained and repaired the garage covering the garage area of the disputed property so as to use the garage area of the disputed property as a parking space.

Plaintiff seeks a determination that she has an easement or, in the alternative, acquired right to the disputed property by adverse possession, as well as damages.

When a party prevails in action sounding in adverse possession, the court must issue a judgment declaring that the claimant has a fee simple absolute in the disputed property. An easement, on the other hand, is a non-possessary right that gives the claimant the right to cross over the disputed property without acquiring a fee interest. (See *Grafton v Moir*, 130 NY465 at 472; *Lewis v Young*, 92 NY2d 443). Plaintiff claims an express easement as a result of the language previously quoted and found in the deed.

The plaintiff also asserts she has an easement by prescription. "Generally, an easement by prescription is demonstrated by proof of the 'adverse, open and notorious, continuous and uninterrupted [use of the property] for the prescriptive period' (*DiLeo v Pecksto Holding Corp.*, 304 NY 505, 512; *Hrychowian v Pulaski*, 249 AD2d 511). It is well established that where an easement has been shown by clear and convincing evidence to be open, notorious, continuous and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive [citation omitted]." (*Frumkin v Chemtop*, 251 AD2d 449).

In support of their motion for summary judgment, the defendants cite *Witter v Taggart,* 78 NY2d 234 for the proposition that since the previously stated easement was not expressly set forth on the Coffins' deed of conveyance (servient estate), they are not bound to its terms. The Coffins submitted an affidavit in support of the motion in which they deny in general terms granting permission without specifically refuting any of the plaintiff's allegations in the complaint.

On a motion for summary judgment, the Court's function is identification not issue determination. (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. (*Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). The defendants herein have demonstrated a *prima facie* entitlement to summary judgment.

Once a movant demonstrates a *prima facie* entitlement to summary judgment, the burden shifts to the opposing party to demonstrate that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (*Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065). Conclusory statements are insufficient. (*Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see also Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660).

In opposition to the motion, plaintiff submits an affidavit from Richard Dupre, her tenant at 319 East Penn St. Richard Dupre has been a tenant at 319 East Penn St. since June 1, 1999. He stated in his affidavit that he used the driveway area to park his car in the back of the house he rented from Winson.

> 7. I also can confirm that Ros Winson parked her car in the garage when she left New York for Florida each November. Generally, the car would be on the premises from November until some time in either May or June when Ros returned to retrieve it.
> 8. While I cannot state that I saw Sean or Corrine Coffin view Ros' car in the garage, I do know that Sean was in the garage often while Ros' car was parked there and should have been able to see the car. He kept his own vehicle in the garage as well as a heavy bag. He never approached me, however, to determine whose car it was nor did, to the best of my knowledge, he ever have it towed or removed from the garage.
> 9. Ros also stored items in the garage. To the best of my knowledge she had a hot water heater, bicycles, hand tools, a ladder and some fishing equipment which she told me was from a prior tenant. (Dupre's Affidavit in Opposition sworn to January 28, 2010)

Plaintiff stated in her affidavit in opposition that she and her "tenants had been using the driveway to access the parking space in the garage in the rear yard for fifteen (15) years. This use was not objected to in any way by the Rubinsteins, although known to them, who occupied 317 East Penn St., when I purchased 319 East Penn St. in 1984, until they sold it in 1999. (emphasis added)

Defendant Coffin claimed that from the time he closed on the house on June 28, 1999 until he demolished the garage, he had sole use and occupancy of the entire garage. The first week he moved in he gave plaintiff's tenant "permission" to use the driveway on the westerly side of 317 East Penn St. Coffin testified he never gave Winson permission to drive on his property. Defendants purchased the premises from Rubinstein. Coffin testified that the Rubinsteins never told the Coffins that they allowed either Winson or a tenant to use the driveway and the right hand side of the garage.

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v Pomeroy*, 35 NY2d 361; *Mosheyev v Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust I,* 10 AD3d 656; *Rudnitsky v Robbins*, 191 AD2d 488, 489). Furthermore, the court must refrain from making credibility determinations (*see S.J. Capelin Assoc v Globe Mfg. Corp.*, 34 NY2d 338, 341; *Surdo v Albany Collision Supply Inc.*, 8 AD3d 655; *Greco v Posillico,*290 AD2d 532; *Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*Glover v City of New York*, 298 AD2d 428; *Perez v Exel Logistics,* 278 AD2d 213).

It appears that issues of fact exist as to whether the defendants had actual or constructive knowledge of the easement. The plaintiff has submitted a copy of the title insurance policy insuring title to the defendants house when defendants purchased the premises in June 1999. Exception No. 7 states "surveyor notes 8' wide right of way along westerly portion of premises. (no right of way found of record). Plaintiff contends exception No. 7 was notice to defendants of the 8' wide easement.

Plaintiff also submitted a copy of a contract dated March 24, 1971 wherein the defendants' grantors (Rubinstein) acquired title to the premises knows an 317 East Pen St. [the servient estate]. The legal description in the contract of sale contains a six (6) paragraph legal description of the servient estate. The last paragraph of the legal description contains the easement of which the defendants assert they lack knowledge.

Normally a purchaser is not required to search outside the chain of its own title in order to determine an easement. However, in *Witter v Taggart*, 79 NY2d 234, 239 relied on by defendants in support of their motion for summary judgment, the court stated that purchasers like the defendants herein are required to search "within their own tree trunk line and are bound by constructive or inquiry notice only of restrictions in deeds or other instruments of conveyance in that primary stem." Defendants' title company excepted from defendants title insurance policy the 8' right of way along the westerly portion of the premises. This exception in the title policy refutes defendants' claim that they were unaware of the easement. A grantor of land takes title subject to duly recorded easements that have been granted by his or her predecessors-in-title as well as to unrecorded easements of which he or she has actual or constructive notice. (*Breakers Motel Inc. v Sunbeach Montauk Two, Inc.*, 224 AD2d 473).

The record before the court does not contain a complete set of deeds so as to establish the merits of defendants claim that the easement is not actually "in their tree trunk line" or "stem." (*Witter v Taggart, supra*). At the very least, the legal description found in the contract of sale in which the defendants' grantors acquired title demonstrates that the easement was recorded at some period in the defendants chain of title.

Whether an easement by implication has been created depends on the intention of the parties at the time of the original conveyance, with the most important indications of the grantor's intent being the appearance of the subdivision map and the language of the original deed which in the within action refutes the assertions of the defendants. (See *Tarolli v Westvale Genesee, Inc.*, 6 NY2d 32; *B.J. 96 Corp. v Mester,* 222 AD2d 798). Moreover, the deed of conveyance from Rubinstein to Coffin dated June 28, 1999 states together with the "appurtenances" in the premises. The word "appurtenant" can properly be used to convey an easement already existing and apparent in connection with property conveyed but it is not sufficient to evidence a purpose of creating an easement when non existed prior to the time of the conveyance. (See *Heyman v Biggs,* 223 NY 118, 127; *Parsons v Johnson,* 68 NY62).

Plaintiff argues that the easement was not extinguished when the subject properties were subdivided and came under separate ownership, since it continued to the present and was, in fact, a necessity.

Finally, on or about November 28, 2983, the City of Long Beach issued a Certificate of Occupancy which noted that parking at the premises [319 East Penn St., dominant estate] was a "Detached one car garage." Plaintiff asserts the City of Long Beach, Code

of Ordinances, Zoning required one (1) off-street parking space for each single family dwelling in the City and a Certificate of Occupancy was granted based on the existence of the one off-street parking space as set forth in the easement. Therefore, the defendants have failed to rebut plaintiff's strong showing that the easement was a necessity, not a mere convenience, and indispensable to the reasonable rights of the dominant estate, especially in light of the City ordinance requiring one on-premise parking spot on the dominant estate. (*See Heyman v Biggs, supra*).

The defendants motion for summary judgment is denied.

Dated: April 8, 2010

UTE WOLFF LALLY, J.S.C.

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