

Zhengzhi Zhang v Coritsidis

2010 NY Slip Op 31555(U)

May 28, 2010

Sup Ct, Suffolk County

Docket Number: 07-12896

Judge: Melvyn Tanenbaum

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

P R E S E N T :

Hon. MELVYN TANENBAUM
Justice of the Supreme Court

MOTION DATE _____
ADJ. DATE _____
Mot. Seq. _____

-----X	
ZHENGZHI ZHANG AND JIAHUA XU,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
GEORGE N. CORITSIDIS and DEBRA M.	:
CORITSIDIS,	:
	:
Defendants.	:
-----X	

Upon the following papers numbered 1 to 46 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 36 ; Notice of Cross Motion and supporting papers 37 - 44 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other 45 - 46 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED ADJUDGED AND DECREED that this motion by the plaintiffs for an order dismissing the defendants' affirmative defenses and counterclaims, and for summary judgment, declaring that the plaintiffs have a deeded easement over the westerly five feet of the defendants' property from Marion's Lane to the Long Island Sound, and enjoining the defendants from interfering or preventing plaintiffs' use of their easement over defendants' property, is granted; and it is further

ORDERED ADJUDGED AND DECREED that the defendants' Fifth Counterclaim, for intentional infliction of emotional distress is withdrawn on consent; and it is further

ORDERED ADJUDGED AND DECREED that the defendants' cross motion for summary judgment is denied.

The parties are neighbors. Plaintiffs purchased their residence in May, 2006. Defendants purchased their water-front home, which is located across the street from the plaintiffs' residence, in November, 1993. Plaintiffs' deed contains an easement encumbering defendants' premises which measures five feet wide and more than 750 feet long, extending from (Marion's Lane) to Long Island Sound. Plaintiffs seek a judgment declaring that they own a valid easement over defendants' property and enjoining the defendants from interfering with access. Defendants' answer raises five affirmative defenses based upon statute of limitations, abandonment, adverse possession, waiver, and documentary evidence. Their answer also raises six counterclaims based upon intentional tort, negligence, trespass, injunctive relief, intentional infliction of emotional distress, and provisional remedies.

Plaintiffs move for summary judgment and submit documentary evidence consisting of the relevant 1950 subdivision map, deeds establishing the claim of title to the five foot easement, alleging that such documents establish the chain and their claim of title over the five foot easement.

In addition, plaintiffs submit the deposition testimony of defendants George N. Coritsidis and Debra Coritsidis who testified when they purchased their property in November, 1993, there was already a fence along the street, and some bushes. Mr. Coritsidis acknowledged the existence of the easement at the time of their purchase and that the easement was to benefit Pellicane, plaintiffs predecessor in title. He stated that after moving into their home, the Pellicanes, during a phone conversation, asked if they could walk down the defendants' paved driveway and walkway to get to the water, upon calling the defendants for permission, rather than clearing vegetation in the easement area. He stated that he discussed the easement with the successor in title Ian and Danielle Goldstein advising that they could call and walk down the driveway, or they could clear a pathway. He indicated that the Goldsteins without objections decided to clear a pathway and hired and paid a landscape company to clear a strip along the western border of the property. Coritsidis alleged that the landscaper did not clear completely from the street to the water, but rather started the clearing approximately twenty yards in from the street; that the Goldsteins would walk a short distance on his driveway and then cut over to the west and then walk on the cleared path and they did not call him when they used it. He testified that at some point he installed a fence and a locked gate along the beach area, and gave the combination to the Goldsteins.

Mr. Coritsidis also testified that he had numerous conversations with the plaintiffs offering the same choice given to the Goldsteins, either to clear a path or call and walk down the driveway, and that plaintiffs chose to clear the path, hired and paid a landscaper to clear the easement vegetation and that plaintiffs were given the gate lock combination. He stated that the plaintiffs utilized the easement, but approximately four months later he told the plaintiffs that they could no longer use it. Mr. Coritsidis explained that his neighbor a Mr. Pitch who borders on the other side of the easement, expressed his disappointment with the clearing of the pathway and told the defendants that he did not appreciate people walking past his bedroom. Mr. Coritsidis alleged that he then told the plaintiffs that he was not happy with their clearing and that plaintiff Zhengzhi Zhang responded that he was going to cut more. He maintained that Mr. Zhang became angry and then damaged the post fence at the road in order to get over it and cut bushes. Mr. Coritsidis alleged that the plaintiffs cut limbs and hedges just north of the fence on Marion's Lane, damaging them. Mr. Coritsidis additionally testified to the effect that the plaintiffs walked on ground cover, and that the plaintiffs also damaged another section of fence which was installed further north to block the plaintiffs' pathway. He complained that the plaintiffs then decided to walk down his driveway without permission and cut into the

pathway at another point. He stated that on another occasion the plaintiffs trespassed well into his property to take pictures. Lastly, Mr. Coritsidis acknowledged that neither the Pellicanes, the Goldsteins, nor plaintiffs ever told the defendants, either in writing or orally, that they were relinquishing their rights to use the easement.

Plaintiffs also submit portions of the deposition testimony of plaintiff Zhengzhi Zhang who testified about discussions with Mr. Goldstein, his predecessor in title, about the Goldsteins use of the defendants' driveway rather than the exact entrance of the easement. Mr. Zhang also testified that he delayed clearing all of the overgrowth from street to beach at the request of defendants who wanted to install a gate.

Plaintiffs also submit portions of the deposition testimony of Goldsteins, their predecessors in title. The Goldstein's testified that their use of the easement varied; and that Coritsidises advised that a gate at the beach was a good idea to protect everyone's privacy and security. They were provided with the combination and they had full access to the beach. Mrs. Goldstein testified that when they used the easement, they would go onto the Coritsidis driveway, turn and go through shrubbery, and then turn and walk to the beach.

The affidavit of plaintiff Zhengzhi Zhang, asserts that when he and his wife met with the defendants, they agreed that the easement needed to be cleared at plaintiffs expense. Mr. Zhang alleges that the defendants did not suggest, during this meeting or subsequent clearing process, that the easement had been abandoned or terminated. Mr. Zhang stated that he later paid to clear the vegetation and submits the contractor's invoice as proof. He alleges that from June of 2006 to late October of 2006, he and his wife used the easement without incident or complaint from the defendants. He explains that in late October of 2006, the defendants' neighbors to the west, the Pitches, erected a fence, and when he tried to have a survey of the easement performed to verify the location of the Pitches' fence, defendant George Coritsidis refused to allow surveyors on the property. Mr. Zhang alleges that at this point, defendants stopped cooperating with their use of the easement and accused them of trespassing. He claims that neither he nor his wife have trespassed on the defendants' property and that they have stayed within the easement area. Mr. Zhang alleges that a survey was finally completed in May 2008 in connection with this action, and that according to the survey, the so called damaged ground cover was within in the easement itself.

Plaintiffs argue that the easement over the western five feet of the defendants' property was a specific, deeded and recorded easement used by their predecessors and never abandoned or divested through adverse possession.

Defendants oppose the plaintiffs' motion and cross-move for summary judgment in their favor. In support, the defendants submit, *inter alia*, the affidavit of defendant Debra M. Coritsidis who alleges that as long as she and her husband have owned the property there has been a split fence, as well as thick vegetation, which blocked the easement from the fence; that no owners of plaintiffs' property have had access to the easement that defendants have expressly denied the right to have obstructions to be removed. In addition, Ms. Coritsidis maintains that consent was given to the plaintiffs to clear some underbrush, at a small footpath, whose location was at least 75' north of the Marion's Lane entrance to the easement. She asserts that this footpath required her guests to enter from her driveway and was not five feet wide as claimed.

In further support of their application, the defendants also submit a portion of Mrs. Goldstein's deposition testimony that when she and her husband purchased the house, they had discussions with the Coritsidis, they agreed that, when the path was cleared, they would preserve the appearance of a small area near the driveway. Mrs. Goldstein also testified that the fence at the edge of the easement was there for as long as they owned their property. The defendants further submit a portion of Mr. Goldstein's deposition testimony that when he and his wife discussed clearing the easement with the Coritsidis, it was agreed that for appearance purposes they would not destroy the bushes near the street.

Defendants contend that the easement was voluntarily and intentionally abandoned and waived by the plaintiffs' predecessors at least ten years prior to the plaintiffs' purchase of their home. They claim that each of the plaintiffs' predecessors agreed to forego their right to the easement and instead comply with their revocable offer to use their driveway. They maintain that the Pellicanes, Goldsteins, and the plaintiffs all saw the fence and the overgrowth each time they went to the beach. They assert that the plaintiffs' actual access to the entrance of the easement, was blocked anywhere from 25 feet to 30 yards, by the fence and overgrown vegetation. Defendants argue that their possession was hostile, even if it was not uncivil.

As to the remaining counterclaims, the defendants point to the portions of their depositions covering plaintiffs' alleged trespass and damage to their property. In addition, defendants point to a portion of Ms. Xu's deposition that on at least two occasions, she and her husband walked the full length of the defendants' driveway, which is not part of the easement, and that Mr. Coritsidis came out and yelled at them that they were trespassing. Defendants have agreed to withdraw their Fifth Counterclaim.

Plaintiffs have made a prima facie showing by their deed, their predecessors' deeds, survey and by the filed subdivision map, that they have a deeded easement over the western five feet of the defendants' property from the street to the Long Island Sound. It is well settled that an easement created by grant can only be extinguished by abandonment, conveyance, condemnation, or adverse possession (*Gerbig v Zumpano*, 7 NY2d 327, 197 NYS2d 161 [1960]). As to the defendants' Second Affirmative Defense of abandonment, "It is clear that nonuser alone, no matter how long continued, can never in and of itself extinguish an easement created by grant. In order to prove abandonment it is necessary to establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement" (*Gerbig v Zumpano*, 7 NY2d 327, 331; 197 NYS2d 161, 164 [1960][internal citations omitted]). Furthermore, acts demonstrating an intention to abandon the easement must be unequivocal and must clearly indicate the permanent relinquishment of all right to the easement (*Spier v Horowitz*, 16 AD3d 400, 791 NYS2d 156 [2005]; *Wallkill Farms Homeowners Association, Inc. v Velazquez*, 205 AD2d 681, 613 NYS2d 641 [1994]).

In this case, the defendants have failed to offer evidence of any act on the part of the plaintiffs or their predecessors which would indicate an intent to abandon the easement (*see Filby v Brooks*, 105 AD2d 826, 481 NYS2d 865 [1984], *affd* 66 NY2d 640 [1984]). The fact that the plaintiff's predecessors did not object to the fence and the vegetation at the easement's entrance, does not clearly demonstrate a permanent relinquishment of all rights to the easement, particularly since the plaintiffs and plaintiffs' predecessors continued to use most of the easement and simply took an alternate route around the fence (*see Del Fuoco v Mikalunas*, 118 AD2d 980, 500 NYS2d 84 [1986]; *Clausi v Meddaugh*, 116 AD2d 850, 498 NYS2d 267 [1986];). Nor does the fact that one of the plaintiffs' predecessors, the Pellicanes, accepted the defendants'

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offer of calling and using the paved driveway evince an unequivocal intent to abandon the easement. “[A]n owner may hardly be presumed to have abandoned a legal access in favor of an alternate right of way existing only by sufferance” (*Consolidated Rail Corp. v MASP Equipment Corp.*, 67 NY2d 35, 40; 499 NYS2d 647, 650 [1986]). Moreover, defendants admitted that the plaintiffs and their predecessors never indicated that they were renouncing or giving up the easement (*see Gold v Di Cerbo*, 41 AD3d 1051, 837 NYS2d 787 [2007], *lv denied* 9 NY3d 811 [2007]). Contrary to the defendants’ claim of abandonment, the proof clearly establishes that the plaintiffs and their predecessors continued to clear and use the easement area and walk to the water. There has been no showing of abandonment.

Defendants also allege adverse possession. A party seeking to extinguish an easement by adverse possession to show by clear and convincing evidence, “the five elements of adverse possession: that the use of the easement has been (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for a period of 10 years” (*Koudellou v Sakalis*, 29 AD3d 640, 641; 814 NYS2d 730, 731 [2006]; *see also* RPAPL 501). The acts of the adverse possessor must be of such character that a titled owner would recognize the acts as manifesting a claim to the property that was hostile to his own, and that the titled owner needed to take action in order to preserve his property rights (*see RSVL Inc. v Portillo*, 16 Misc3d 1137A, 851 NYS2d 61 [Sup Ct, Nassau County, 2007]).

The split rail fence and some vegetation, do not establish a use that is hostile and under a claim of right. Based upon the proof submitted, the plaintiffs’ predecessors clearly consented to the fence and the vegetation at the entrance of the easement as a matter of neighborly accommodation and cooperation (*see Kelly v Schwend*, 15 AD3d 450, 789 NYS2d 723 [2005]). In addition, the plaintiffs and their predecessors simply walked around these obstacles. Thus, defendants failed to establish that they effectively interfered with the plaintiffs’ or their predecessors’ use and enjoyment (*Seven Springs LLC v Nature Conservancy*, 48 AD3d 545, 855 NYS2d 547 [2008]; *McGinley v Postel*, 37 AD3d 783, 830 NYS2d 588 [2007]). Additionally, the defendants repeatedly acknowledged the easement, giving plaintiffs and their predecessors the combination to the gate and allowing a path to be cleared. As such, prior to the fall of 2006, defendants’ acts were not of such character that the plaintiffs and their predecessors would recognize that the defendants were making a hostile claim to extinguish the easement. The element of hostility did not exist until the fall of 2006, when the defendants accused the plaintiffs of trespassing and defendants tried to interfere with plaintiffs’ use of the easement. As this action was commenced approximately six months later, defendants have failed to prove adverse possession for the requisite ten-year period (*Koudellou v Sakalis*, 29 AD3d 640, 814 NYS2d 730 [2006]).

In addition defendants allegation that this action is barred by the statute of limitations (CPLR 213(1)), is without merit. Since plaintiffs’ causes of action accrued in the fall of 2006, their claims were interposed in a timely manner (*see Filby v Brooks*, 105 AD2d 826, 481 NYS2d 865 [1984]).

All of defendants’ defenses and counterclaims are without merit and are dismissed. Accordingly it is,

ORDERED ADJUDGED AND DECREED that plaintiffs’ motion for summary judgment is granted and defendants cross motion for summary judgment is denied; and it is further

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ORDERED ADJUDGED AND DECREED that a declaratory judgment in favor of plaintiffs be entered against defendants as follows:

- 1) plaintiffs easement over the most westerly five feet of defendants' property, extending from Marion's Lane to the Long Island Sound, as recorded at page 357 of Liber 8457 of Deeds in the Office of the Suffolk County Clerk continues in full force and effect and has not been extinguished.
- 2) the defendants are permanently enjoined from interfering with the use of said easement by plaintiffs and their successors.
- 3) defendants are directed, at their own expense, to remove any and all fences and shrubbery they may have installed which obstruct the plaintiffs' access to the easement, and upon their failure to do so, the plaintiffs may remove the fences, at the expense of the defendants (*see De Jong v Abphill Associates*, 121 AD2d 678, 504 NYS2d 445 [1986]);

The Clerk is directed to enter judgment accordingly together with a judgment for an award of costs and disbursements in favor of plaintiffs ZHENGZHI ZHANG AND JIAHUA XU, residing at 52 Brookfield Road, Fort Salonga, New York and against defendants GEORGE N. CORITSIDIS and DEBRA M. CORITSIDIS, residing at 10 Marion's Lane, Fort Salonga, New York, to be taxed and inserted by the Clerk in the sum of \$_____ and that plaintiffs have execution therefor.

Dated: May 28, 2010

MELVYN TANENBAUM

J.S.C.