Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

ANOROC REALTY, INC.

- against -

HUNTERSPOINT REALTY, LLC, et al.

Index Number 19101 2009

Motion Date April 28, 2010

Motion Cal. Numbers 3 & 4

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 12 read on this motion by third-party defendant Carriero Associates, PLLC and third-party defendant J. James Carriero for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint against them, on this motion by plaintiff Anoroc Realty, Inc. and third-party defendant Tony Argento for, inter alia, an order pursuant to CPLR 3211(a)(7) dismissing the counterclaims and the third-party complaint against them respectively, and on this cross motion by defendant/third-party plaintiff Hunterspoint Realty, LLC for, inter alia, summary judgment dismissing the complaint against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-2
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Answering Affidavits - Exhibits.....	4-5
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Upon the foregoing papers it is ordered that (1) those branches of the motion by plaintiff Anoroc Realty, Inc. and third-party defendant Tony Argento which are for an order pursuant to CPLR 3211(a)(7) dismissing the counterclaims and the third-party complaint

against them respectively are granted; (2) that branch of the motion by plaintiff Anoroc Realty, Inc. which is for an order permitting it serve an amended complaint is denied without prejudice to renewal; the motion by third-party defendant Carriero Associates, PLLC and third-party defendant J. James Carriero for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint against them is granted; the motion by defendant/third-party plaintiff Hunterspoint Realty, LLC for, inter alia, summary judgment dismissing the complaint against it is denied.

Plaintiff Anoroc Realty, Inc. (AR) owns property located at 48-02 29th Street, Long Island City, New York. Defendant Hunterspoint Realty, LLC (HR) owns property located to the south at 29-55 Hunters Point Avenue, Long Island City, New York. The properties adjoin along the southern border of AR's property. The properties both front on a 40 foot wide strip of land to the east which is a right of way for the benefit of the Long Island Railroad and which is also known as 29th Street, although it is not a mapped public street. HR's property includes a strip of land approximately 25 feet wide that has been paved with asphalt (the asphalt strip), and the asphalt strip runs from the southerly edge of AR's property and along the westerly edge of 29th Street to Hunter's Point Avenue to the south. Plaintiff AR alleges that the public has used the asphalt strip as a street for more than ten years and that the City of New York has exercised dominion and control over it for more than ten years. Defendant HR denies these allegations.

J. James Carriero, an attorney representing AR, sent a letter to HR dated April 14, 2009 stating that his client had learned that HR had placed its property for sale and informing HR that AR claimed an easement over the asphalt strip since it "has been openly and continuously used by my client and numerous others as a driveway and passageway ***." AR, which had attempted several times to purchase HR's property, allegedly made the claim of an easement for the purpose of obstructing HR's sale of the property to others. Defendant HR denied that AR had an easement and notified AR that it had entered into a contract for the sale of its property to JLR Scott Avenue Properties (JLR) and would hold AR liable if the contract did not close because of the claim. AR abandoned its claim of an easement and instead asserted that the asphalt strip had become a public highway pursuant to Highway Law § 189. AR alleged that the city had exercised dominion and control over the asphalt strip because (1) it is paved, (2) a stop sign had been placed at the corner of the asphalt strip where it intersects with Hunterspoint Avenue, and (3) AR allegedly believed that the city had maintained and repaired the asphalt strip.

On or about July 17, 2009, plaintiff AR began this action for a judgment declaring that the asphalt strip is a public highway pursuant to Highway Law § 189. HR answered the complaint and asserted counterclaims for slander of title and tortious interference with contract. HR also began a third-party action against Tony Argento, a principal of AR,

Carriero Associates, the law firm representing AR, and J. James Carriero, an attorney with Carriero Associates, asserting causes of action for slander of title and tortious interference with contract.

Defendant HR served a set of interrogatories upon the city which responded that, inter alia, (1) it had no information that it had paved the asphalt strip, (2) it had no information that the city took any action to use the asphalt strip as a street from July 17, 1999 to the present, (3) it had no information indicating that the city had taken any actions to exercise dominion and control over the asphalt strip from July 17, 1999 to the present, (4) its "efforts had failed to locate any documents concerning any action taken by or on or behalf of the city with respect to any alleged exercise of dominion and control of any portion of [HR's] property or in connection with any actual or potential paving of that property for any period relevant to this action," (5) it had "installed one traffic control device, upon information and belief located on the asphalt strip as defined in the verified complaint since July 17, 1999," (6) it had installed a stop sign at the intersection of Hunters Point Avenue and 29th Street on or about July 7, 2009 because of a "disruption in local traffic patterns" due to road work, (7) it had installed the stop sign on the asphalt strip without permission, and (8) it had reinstalled the stop sign several times after its removal by unknown parties until it was finally relocated off the asphalt strip in or about September, 2009. The city based its answers to the interrogatories on information obtained from the Department of Transportation, Fire Department, Department of Sanitation, Department of Design and Construction, Department of Buildings, and the Topographic Bureau of the Office of the Borough President of Queens.

On the other hand, plaintiff AR made a Freedom of Information request for municipal records concerning "29th Street between 47th Avenue and Hunterspoint Avenue." The request produced a letter from the Corporation Counsel's Office dated November 14, 1991 which stated in relevant part: "*** it is the opinion of this office that 29th Street between the above described boundaries has been dedicated to public use as a public street, in accordance with subdivision 2 of Section 36 of the General City Law, for a width of approximately 40 feet and *irregular widths* as in use and subject to the rights, if any, of the Metropolitan Transportation Authority/Long Island Railroad." (Italics added.) The letter noted "that an opinion has been requested by the Department of Transportation in order that improvements may be made in said street." Other records pertaining to 29th Street mention the installation of the stop sign and pot hole repairs from 2007 to 2009.

The issues presented by AR's complaint are (1) whether for a period of ten years the asphalt strip was used by the public and (2) whether for a period of ten years the City of New York exercised dominion and control over the road. (*See, State of New York v Town of Horicon,* 46 AD3d 1287; *Whitton v Thomas,* 25 AD3d 996; *Nogard v Strand*, 38 AD2d 871.) Defendant HR's attempt to obtain summary judgment dismissing the complaint on the

ground that the City did not exercise dominion and control over the asphalt strip for ten years is premature before the conclusion of discovery. (*See*, *Barletta v Lewis*, 237 AD2d 238; *Welsh v County of Albany*, 235 AD2d 820; *Wee v City of Rome*, 233 AD2d 876.) It is true that the installation of a temporary stop sign for a few months does not by itself establish the element of dominion and control. Isolated incidents of municipal activity "hardly satisfy the requirement of assumption of control or continuance of maintenance and repair." (*Nogard v Strand*, *supra*, 871.) It is also true that the city's answers to HR's interrogatories purport to show a lack of knowledge concerning any other exercise of dominion and control. However, AR's Freedom of Information request produced the letter from the Corporation Counsel's Office stating that 29th Street is of "irregular width," and plaintiff AR has shown the need for further discovery on this point. AR's Freedom of Information request also showed that the city made repairs to 29th Street, and plaintiff AR has shown the need for further discovery concerning whether any of the repairs were made on the asphalt strip. The city also purports to have no information concerning who paved the asphalt strip, and plaintiff AR may be able to obtain evidence in that regard from the parties' predecessors in title. In sum, this is not a case where a party is seeking to have the determination of a summary judgment motion postponed upon the mere speculation and hope that discovery will reveal facts supporting a cause of action or defense. (*See*, *Keeley v Tracy*, 301 AD2d 502; *Baron v Newman*, 300 AD2d 267; *Hampton Living, Inc. v Carltun on the Park, Ltd.*, 286 AD2d 664; *Romeo v City of New York*, 261 AD2d 379.)

HR did not sufficiently state causes of action for slander of title and tortious interference with contract. HR alleges that "By virtue of the filing of a Notice of Pendency, title to the Subject Premises was slandered and rendered unmarketable." "The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages ***." (*Brown v Bethlehem Terrace Associates*, 136 AD2d 222, 224; *see*, *39 College Point Corp. v Transpac Capital Corp.*, 27 AD3d 454.) However, a notice of pendency is a true statement (*see*, *Brown v Bethlehem Terrace Associates*, *supra*), and the filing of "a notice of pendency does not give rise to a cause of action sounding in slander of title." (*Sopher v Martin*, 243 AD2d 459; *see*, *Alexander v Scott,* 286 AD2d 692; *35-45 May Associates v Mayloc Associates*, 162 AD2d 389.) The elements of a cause of action for tortious interference with contract include "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom ***." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424.) HR does not allege that there was an actual breach of contract by the vendees.

In regard to that branch of AR's motion which is for an order permitting it to serve an amended complaint, AR did not adequately show what specific language of General City

Law § 36 supports a claim to have the asphalt strip declared a public highway. The court also notes that the proposed amended complaint does not assert a cause of action pursuant to Highway Law § 189. The plaintiff's attorney asserts "By oversight, Anoroc alleged that the claim for declaration of a public street was based on Highway Law § 189. The Complaint should have alleged that the claim is based on a parallel provision of the General City Law § 36(2)." The purpose of General City Law § 36 is to require that a "proposed new building have reasonable access to a mapped street or highway in order to provide adequate means of coping with fires and other emergencies." (*American Nassau Bldg. Systems, Ltd. v Press,* 143 AD2d 789, 792.) The plaintiff did not adequately explain on the instant motion how General City Law § 36 provides a basis for a judicial declaration that the asphalt strip is a public highway, and the plaintiff's papers are ambiguous concerning whether it still seeks to assert a cause of action pursuant to Highway Law § 189.

Dated: July 15, 2010

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J.S.C.