

Demino v Baron Estates, Inc.

2010 NY Slip Op 32805(U)

October 6, 2010

Supreme Court, Wayne County

Docket Number: 71629/2010

Judge: Daniel G. Barrett

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At a term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 22nd day of September, 2010.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

TRACEY AND VALERIE DEMINO,

Plaintiffs,

DECISION
Index No. 71629

-vs-

2010

BARON ESTATES, INC., ALVIN E. SHULTS,
CHRISTOPHER NYARADY, TINA A. BARTUCCA,
MAX W. STONER, and MARGARET A. STONER,

Defendants

Appearances: Plaintiffs - Valerie Demino personally and Douglas A. Foss, Esq. of counsel

Defendants - Christopher Nyarady and Tina Bartucca Nyarady personally and Richard Chase, Esq. attorney for all defendants

Plaintiffs, by their attorneys, Harris Beach, PLLC, Douglas A. Foss, Esq. of counsel having filed an Order to Show Cause seeking to enjoin the Defendants from entering the Plaintiff's property for any purpose until further Order of the Court. In support of said Order to Show Cause Valerie Demino having filed an Affirmation, Douglas A. Foss having filed an Affirmation and various exhibits mainly deeds and maps.

Defendant Christopher Nyarady and Tina Bartucca Nyarady having filed a Reply to the Order to Show Cause and also having appeared in Court personally. Said Reply includes exhibits again mainly deeds and maps. Said Nyaradys having agreed to have attorney Richard Chase speak for them on the return date of the Motion.

Richard Chase having filed a Reply Affidavit. Alvin E. Shults, Max W. Stoner and Margaret A. Stoner, not having appeared personally and having been represented by Mr. Chase.

The parties having presented oral argument, having referenced various information, research and exhibits throughout their oral arguments.

Plaintiffs have asked for a preliminary injunction. The general rule is that a preliminary injunction is a drastic remedy to be used cautiously and may be granted on the following:

- A. there is a likelihood of ultimate success on the merits;
- B. there is a prospect of irreparable injury if the relief is withheld at this time;
- C. a balance of equities favoring the Plaintiffs;
- D. granting the preliminary injunction is within the sound discretion of the trial court.

The Court finds that the issues are as follows:

- A. does the walkway easement exist for the residents of Lakewood Estates and the Defendants in particular;
- B. does the benefit extend only to the residents or does it extend also to the invitees or guests of Lakewood Estate residents;
- C. does the easement extend only to the bank of the lake or does it extend to the low water mark;
- D. do the Deminos own to the low water mark;
- E. does paragraph 22 of the original amended declarations and restrictions of the subdivision prohibit the changing of the natural state of the bank;
- F. does the easement, if it exists, allow for simply ingress and egress to the lake or are the residents able to use the beach for purposes other than going to and coming from the lake?

The issue in the request for a preliminary injunction is whether the Deminos are suffering irreparable harm and have no adequate remedy at law concerning the fact that parties differ over the extent and the allowed use of the easement.

The Court does find that the Plaintiffs do own to the low water mark despite the fact that the filed subdivision map portraying Lot 1 does not show the property line extending to the low water mark. It is contained in

the deed to the Plaintiffs from Defendant Shults and Baron Estates that they own to the low water mark.

New York is a jurisdiction that recognizes owners of lake property generally own to the low water mark.

The Supreme Court and the Commonwealth of Massachusetts v The State of New York, 271 U.S. 65 and The New York Supreme Court and Jefferson County and Wood v. Maitland, 169 Misc. 484 both cite the rule that New York has consistently refused to apply the high water mark rule to non-tidal waters, holding that a conveyance to the shore or along the shore of such waters carries to the waters edge at low water. Also in Samuel Stewart v. Harry Turney, 237 N.Y. 117 the Court of Appeals held that the title to land bordering on Cayuga Lake runs to the water thereof at the low water mark.

Lake Ontario is not a tidal body of water. Only in that instance would there be the possibility of owning to the high water mark versus the low water mark.

The residents of Lakewood Estates except those that actually border the lake each have in their deeds the following language:

“Together with the right of access to Lake Ontario for residents of Lakewood Estates on and over the walkway easement located on the west ten feet and the south ten feet of Lot 1 of Lakewood Estates as shown on the subdivision map.”

It is also established law in New York that the transfer of property

including an easement even though the easement may not be mentioned in the deed is sufficient if the deed refers to a subdivision map and the easement appears on the subdivision map. Defendants all have deeds which refer to the subdivision map which was filed in the Wayne County Clerk's Office and is also referred to in the Plaintiff's deed. This is map/project number 282-157 filed in the Wayne County Clerk's Office on July 26, 1988. All parties agree said map is accurate and applies to all properties within Lakewood Estates. Said map does in fact show a walkway easement on Lot 1 ten feet wide to the bank of Lot No. 1.

The law in New York State is the transfer of property including an easement even though the easement may not be mentioned in the deed is sufficient if the deed refers to a filed subdivision map and the easement appears on the subdivision map, Matter of New York City, 258 N.Y. 136, Erit Realty Corp. v. Seagate Association, 259 N.Y. 466, Matter of New York City, 180 N.Y. 588, Dalton v. Levy, 258 N.Y. 161 and Powllowski v. Mohawk Golf Club, 204 A.D. 200.

In a recent Third Department Decision the Court in Clochessy v. Gagnon, 58 A.D. 3d 1008, decided January 15, 2009 upheld the legal principle that an easement set forth on the filed subdivision map cannot be extinguished by purchase, abandonment or adverse possession.

However, if in fact the Plaintiffs own to the low water mark the easement itself does also extend to the low water mark. The filed subdivision map does not show the easement going any further than the top of the bank, however, in the deeds to the Defendants and the other residents of Lakewood Estates, they were granted access to the lake by the easement. There is no other language for the Court to consider

because nothing else exists. It would make no sense to have an easement granting them right of access to the lake and have that easement stop at the top of the bank.

In addition, the language of the easement certainly provides it is only for ingress and egress. There is no language anywhere indicating it is for any other purpose and nothing indicating the grantor intended otherwise.

Therefore, the Court finds the easement is only for ingress and egress. The Defendants and the Lakewood residents have no right to use the beach within the easement for their own purposes. It simply allows them to have access to the water and exit from the water.

In addition, the language is plain from the deed that the easement is only for the benefit of the Defendant and the residents of Lakewood Estates. There is nothing indicating that they have the right to have guests or invitees accompanying them across the easement to the lake. The easement was obviously to be used exclusively by the residents of Lakewood Estates.

During oral argument the attorney for the Defendant acknowledged that the easement is only for ingress and egress and only for the residents of Lakewood Estates. And, in addition, that the beach is not to be used for any other purpose except to allow access to and from the lake.

Plaintiffs also make a point that the Defendants, the Nyaradys and the Stoners, have violated Article 22 of the Lakewood Estates Declarations and Restrictions.

Paragraph 22 of the original subdivision of Declarations and Restrictions states as follows:

the lake bank shall be kept in its natural state, no debris of any kind shall be placed on or over the lake bank.

There was an amendment of said Article 22 on October 1, 2004, the original having been filed in August, 1990 and the amendment states as follows:

The lake bank shall be kept in its natural state. No debris of any kind shall be placed on or over the lake bank. Only proper ground cover not unsightly or offensive or not causing offensive odors shall be allowed in those instances where erosion has occurred. Any trees, shrubs or growth on the lake bank shall not be higher than the top of the lake bank.

It is undisputed that the Defendants, the Nyaradys and Stoners and perhaps others that have come at times have rearranged the stones on the bank to the low water level to offer easier access to the lake and, in fact, have erected a wooden stairway. Neither Plaintiffs nor Defendants are to rearrange anything or disturb the natural state. Defendants certainly cannot build and/or use a stairway to the water. Deminos do own the property from the location of the easement to the bank and over the bank to the water. The Defendants rearranging the stones and/or building the stairway in fact does cause disruption and/or damage to the Demino property and it certainly violates Article 22 of the subdivision Declarations and Restrictions.

The Court concludes as follows:

1. The defendants and the residents of Lakewood Estates are allowed to use the walkway easement as shown on the subdivision map, Lot 1 filed in the Wayne County Clerk's Office which encumbers the property currently owned by the Plaintiffs at 4797 Lakewood Drive, Williamson, New York. However, said easement is only for use of the residents of Lakewood Estates and not the guests or invitees of those residents.
2. The easement is for ingress and egress only and that said easement extends to the bank and over the bank and to the low water level. However, said easement does not allow for the use of the beach within easement dimensions to the lake for any purpose except to travel to and from the lake and certainly not for such activities as picnics, fires, recreational activities, etc..
3. That Article 22 of the Subdivision Declarations and Restrictions as originally set forth and amended prohibit the Defendants and the Residents of Lakewood Estates from disturbing that natural state of the beach and certainly does not allow the rearranging of stones and/or the building of a stairway to offer easier access to the lake water.

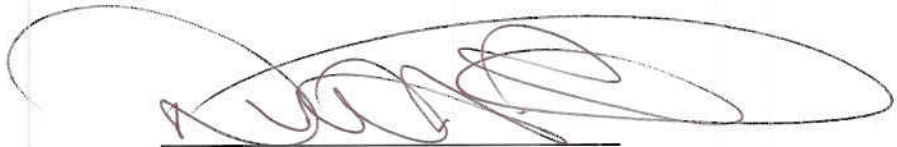
Therefore, the Court's Decision is as follows:

1. Defendants are enjoined from using said walkway easement except for ingress and egress and said Defendants are enjoined from allowing guests or invitees to use said easement with them.

2. The Defendants are enjoined from using the beach within the dimensions of said easement to the lake water except for ingress and egress to the lake.
3. Defendants are enjoined from disturbing the natural state of the beach to allow for easier access to the lake water. Defendants are hereby ordered to remove the wooden stairway. The same is to be done within sixty (60) days of service of the filed Order upon the attorney for the Defendants.
4. The Plaintiffs are enjoined from disturbing the natural state of walkway easement as defined in this Decision including the area in the easement from the bank to the low water mark.

This constitutes the Decision of the Court. Counsel for Plaintiff to prepare the appropriate Order with notice to Defendants' attorney.

Dated: October 6, 2010
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT
WATER SUPPLY COURT