STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

STACEY RUSSELL and SUSAN RUSSELL,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 10-1707
RJI NO. 19-10-5395

MARK R. ADAMS; RAYMOND E. ADAMS; VINCENT MELAPIONI; ANNA MELAPIONI; SANTO ASSOCIATES LAND SURVEYING AND ENGINEERING, P.C.; ALTON P. MACDONALD, JR.;

Defendant.

Supreme Court Greene County All Purpose Term, November 10, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Simon & Schneider, PLLC
Sarah Schneider, Esq.
Attorneys for Plaintiffs
6193 Main Street
PO Box 908
Tannersville, New York 12442

James F. Keefe, Esq.
Attorneys For Defendants
Mark R. Adams and Raymond E. Adams
527 Main Street
PO Box 1136
Cairo, New York 12413

Deily & Schaefer
Attorneys For Defendant
Alton P. Macdonald, Jr.
One Bridge Street
PO Box 489
Catskill, New York 12414

Meyers Tersigni Feldman & Gray LLP
Attorneys For Defendants Vincent Melapioni and Anna Melapione
14 Wall Street, 19th Floor
New York, New York 10005

TERESI, J.:

On October 28, 2010, Plaintiffs commenced this action by filing their summons with notice and complaint with the Greene County Clerk's office. The complaint sets forth six causes of action. All are premised upon Plaintiffs' assertion that Defendants Mark and Raymond Adams (hereinafter collectively "the Adams Defendants") do not possess an easement over their property located at 102 High Ridge Villa Road, Cairo, New York (hereinafter "the premises"). Prior to serving their complaint, Plaintiffs move, by Order to Show Cause, for a preliminary injunction restraining all defendants from entering or otherwise accessing the premises. All Defendants oppose the motion. Because Plaintiffs demonstrated their entitlement to a preliminary injunction, with exceptions, their motion is granted.

It is well settled that in order to prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." (Green Harbour Homeowners' Ass'n, Inc. v. Ermiger, 67 AD3d 1116 [3d Dept. 2009] quoting Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Cooperstown Capital, LLC v. Patton, 60 AD3d 1251 [3d Dept. 2009]; Karabatos v. Hagopian, 39 AD3d 930 [3d Dept. 2007]; CPLR §6301). Even though "[p]reliminary injunctive relief is a drastic remedy" (Marietta Corporation v. Fairhurst, 301 A.D.2d 734, 736 [3d Dept. 2003]), such relief may be granted "[n]otwithstanding [a] question of fact." (Green Harbour Homeowners' Ass'n, Inc. v. Ermiger, supra at 1117; Cooperstown Capital, LLC v. Patton, 60 AD3d 1251 [3d Dept. 2009]).

On this record, Plaintiffs sufficiently demonstrated their likelihood of success on the merits. Plaintiffs duly established their ownership of the premises, by submitting their deed. Such deed does not explicitly grant or reserve a specific easement or right of way. Plaintiffs framed the Adams Defendants' express easement claim by submitting two letters, one issued by the Adams Defendants and one by their surveyor. The Adams Defendants' alleged easement is based upon the language of an 1836 deed, recorded at Liber "W", Page 436 (hereinafter "1836 deed"). "The existence of [this] express easement depends upon the language of the instrument itself." (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821 [3d Dept. 2010], quoting Wechsler v. New York State Dept. of Envtl. Conservation, 193 AD2d 856 [3d Dept. 1993], lv. denied 82 NY2d 656 [1993][internal quotation marks omitted]).

The 1836 deed states: "...excepting and reserving out of the above granted premises the privilege of passing and re-passing with horses, wagons, carts... at all times to and from the lands of the parties of the first part lying south of the above described lands." The 1836 deed's "above granted premises" did not specifically encumber Plaintiffs' 13.118 acre parcel, but rather applied to a larger 100 acre tract. The larger 100 acre tract includes, as per the Adams Defendants' surveyor's letter, both Plaintiffs' premises and property owned by Sara Schneider.

Running through the lands of Schneider and bounding the East side of the premises is High Ridge Villa Road. Plaintiffs submit a 1971 certified survey indicating that High Ridge Villa Road is a "right of way." The surveyor's affidavit is also submitted. He alleges that such "right of way" was based upon the 1836 deed, and allows parties to the south to travel through Plaintiffs' and Schneider's property (the subject 100 acre tract). Such proof directly contradicts the Adams Defendants' claim that the right of way runs through, not adjacent to, the premises.

Plaintiffs also demonstrated that their driveway is part of the 1836 deed's right of way, contrary to the Adams Defendants' contention. Plaintiffs claim that their driveway was formerly a logging road. The submitted affidavit of Charlie Van Etten (hereinafter "Van Etten") establishes that he was the individual who constructed the logging road. He alleges that he built the road, which is now Plaintiffs' driveway, in approximately June, 1976. Prior to his putting in the road, according to Van Etten, the area of the road was "impassable... due to the grade of the hill." There was "no road... path, trail, nor any other access point in [the driveway/logging road's] location before [he] put in the aforementioned logging road." Such un-refuted proof of the logging road/driveway's creation, significantly undermines Defendant Alton Macdonald's (hereinafter "Macdonald") claim that the right of way, created in 1836, follows "an existing unimproved roadway" which was not created until 1976. At most, Macdonald's right of way assertions create issues of fact, which do not preclude the issuance of a preliminary injunction. (Lew Beach Co. v. Carlson, 57 AD3d 1153 [3d Dept. 2008]).

Moreover, even if the premises is burdened by the Adams Defendants' alleged right of way, "[u]nder certain circumstances and in the absence of a demonstrated intent to provide otherwise, a landowner burdened by an express easement of ingress and egress may [change it]." (Sullivan v. Woods, 70 AD3d 1286 [3d Dept. 2010], quoting Chekijian v. Mans, 34 AD3d 1029 [3d Dept. 2006], lv. denied 8 NY3d 806 [2007][internal quotation marks omitted]). As the right of way at issue here is such an "express easement of ingress and egress," it appears that if Plaintiffs' premises is burdened by a right of way, Plaintiffs may be able to move such right of way from the Adams Defendants' proposed location.

Additionally, the Adams Defendants' contention that Plaintiffs are precluded from

preliminary injunctive relief because they have not commenced an action, is unsupported. (Hart Island Committee v. Koch, 150 AD2d 269 [1st Dept. 1989]). Commencement of an action occurs upon filing not service (CPLR §304[a]), and Plaintiffs demonstrated that their summons with notice and complaint were properly filed.

Plaintiffs also demonstrated irreparable injury. The Adams Defendants' letter unequivocally announces that their contractor will cross Plaintiffs' premises with excavation equipment, to install a stream culvert and a metal gate. Plaintiffs contend that their lot is heavily wooded, and that the Adams Defendants' proposed work will require trees to be cut down. Such modification of real property constitutes an "irreparable injury." (Karabatos v. Hagopian, 39 AD3d 930 [3d Dept. 2007]; Wiederspiel v. Bernholz, 163 AD2d 774 [3d Dept. 1990]).

Lastly, the equities balance in Plaintiffs' favor. While Plaintiffs demonstrated their potential irreparable injury, the Adams Defendants have not alleged that they would be harmed by maintenance of the status quo. However, on this record, it appears that the status quo includes the Adams Defendants limited use of the disputed right of way. The Adams Defendants allege that they have previously used their property for hunting purposes only, accessing it by crossing Plaintiffs' premises with a "recreational vehicle." As Plaintiffs have not controverted such allegation, or demonstrated that they would be irreparably injured by such use, the preliminary injunction granted herein excludes such access.

While Plaintiffs demonstrated their entitlement to a preliminary injunction, as set forth above, they failed to demonstrate its applicability to defendants Vincent and Anna Melapioni (hereinafter "the Melapionis"). Plaintiffs proffered no proof that the Melapionis intend to access or injure Plaintiffs' premises. Moreover, Mr. Melapioni specifically denied seeking any access

whatsoever. As such, Plaintiffs failed to demonstrate that they would be irreparably injured by the Melapionis or that the equities balance in their favor as opposed to the Melapionis. Accordingly, the preliminary injunction granted herein is not applicable to the Melapionis.

Similarly, Plaintiffs made no showing of their entitlement to a preliminary injunction prohibiting "the right of entry for professional land surveyor[s] performing surveying services" in derogation of General Obligations Law §9-105. As such, the preliminary injunction issued herein does not preclude any Defendants, or their agents, from accessing the premises in accord with General Obligations Law §9-105.

Accordingly, Plaintiffs' motion for a preliminary injunction is granted to the extent set forth below.

It is hereby ORDERED that the Adams Defendants, Santos Associates Land Surveying and Engineering, PC and Macdonald are enjoined and restrained from going upon or accessing the Plaintiffs' premises; except, the Adams Defendants may access the premises for the sole purpose of traversing it, by use of a recreational vehicle or on foot, to hunt on their own property; except further, the Defendants, or their agents, may access the premises to the extent General Obligations Law §9-105 permits.

Due to the foregoing exceptions and the lack of any proof of potential damages Defendants will incur by this preliminary injunction, Plaintiffs shall give an undertaking in the amount of $1.00 prior to the preliminary injunction going into effect. (CPLR §6312[b]).

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
December 6, 2010

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated October 29, 2010; Affirmation of Sarah Schneider, dated October 28, 2010; Affidavit of Susan Russell, dated October 29, 2010; Affidavit of Harold Morrill, dated October 25, 2010; Affidavit of Charlie Van Etten, dated October 20, 2010; Affirmation of Patricia Schneider, dated October 28, 2010; Affidavit of Sally Schneider, dated October 28, 2010, with attached Exhibits A-I.
2. Affidavit of Vincent Melapioni, dated November 8, 2010.
3. Affidavit of Alton P. Macdonald, dated November 9, 2010, and attached unnumbered exhibit.
4. Affidavit of James Keefe, dated November 8, 2010; Affidavit of Raymond Adams, dated November 8, 2010, and attached unnumbered exhibit.
5. Affidavit of James Keefe, dated November 8, 2010.
6. Affirmation of Sarah Schneider, dated November 15, 2010; with attached Exhibit A.