Saladino v Martin
2011 NY Slip Op 30017(U)
January 6, 2011
Supreme Court, Greene County
Docket Number: 10-1016
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

VINCENT J. SALADINO
and SUSAN SALADINO,

Plaintiffs,

-against-

ANTONIA MARTIN,

Defendant.

DECISION and ORDER
INDEX NO. 10-1016
RJI NO. 19-10-5338

Supreme Court Albany County All Purpose Term, December 14, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs commenced this declaratory judgment action seeking an easement for the placement of utilities over Defendant's adjacent real property. Their first cause of action is for construction of an express easement, while their second cause of action is for an implied easement of necessity. Defendant joined issue, and discovery is ongoing.

Plaintiffs now move for summary judgment granting both of their causes of action. Defendant opposes the motion and cross moves for summary judgment dismissing the complaint.

Because Plaintiffs failed to demonstrate their entitlement to judgment as a matter of law, their motion is denied. Similarly, Defendant failed to demonstrate her entitlement to dismissal of Plaintiffs' implied easement by necessity cause of action. However, on this record, Defendant did establish her entitlement to summary judgment of Plaintiffs' express easement claim.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law" (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821 [3d Dept. 2010], quoting Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]), "by proffering evidentiary proof in admissible form." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). "The evidence is viewed in the light most favorable to the party opposing summary judgment." (Renwick v. Oneonta High School, 77 AD3d 1123 [3d Dept. 2010]).

Considering first Plaintiffs' express easement construction claim, its existence and construction "depends upon the language of the instrument itself" (Barra v. Norfolk Southern Ry. Co. supra at 823, quoting Wechsler v. New York State Dept. of Envtl. Conservation, 193 AD2d 856 [3d Dept. 1993], lv. denied 82 NY2d 656 [1993]) and "limited to those actions necessary to effectuate the express purpose of its easement." (Lopez v. Adams, 69 AD3d 1162 [3d Dept.

2010], quoting Albrechta v. Broome County Indus. Dev. Agency, 274 AD2d 651 [3d Dept. 2000][internal quotation marks omitted]). However, "[a]bsent express language to the contrary... [t]he grant of a mere right-of-way for ingress and egress does not... include the right to install underground pipes or utility lines." (Spiak v. Zeglen, 255 AD2d 754 [3d Dept. 1998], quoting U.S. Cablevision Corp. v. Theodoreu, 192 AD2d 835 [3d Dept. 1993][internal quotation marks omitted]).

On this record, Plaintiffs failed to demonstrate their entitlement to judgment on their express easement construction claim.

It is uncontested that the parties to this action own four contiguous parcels of property located in the Town of Hunter, New York. Starting in the East, Plaintiffs own a 17.9[1] acre parcel of property (hereinafter "parcel A"). Immediately West, Defendant owns a 56.9 acre parcel of property (hereinafter "parcel B"). Then, immediately West of Defendant's parcel B, Plaintiffs own two combined parcels of property consisting of 30 total acres (hereinafter "parcel C").

According to Plaintiffs, there is no public access to Plaintiffs' parcel C. Rather, Plaintiffs allege, a right of way bounds their parcel A on the North, runs into and crosses Defendant's parcel B, and continues onto Plaintiffs' parcel C. Plaintiffs claim that such right of way was granted to them in their deed to the combined parcel C. The Deed's language states:

> Together with a right of way for travel by pedestrians, teams and vehicles and any and all other means of travel along an existing old roadway from the Easterly bounds of the twenty acre tract of land now owned by one George Martin and extending Easterly over other lands of the parties of the first part herein and crossing the said lands of the parties of the first part herein and connecting with a road in sunset park near the property now owned by one, Percy B. Bromfield. The parties of the second part, their heirs and assigns shall not only have the privilege of using this as a right of way for travel as hereinbefore

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[1] All acreage set forth herein is approximate.

> expressed but shall have the right and privilege of improving the old roadway in such manner as the parties of the second part may elect or choose to make it more suitable and practical for use in going to and from the premises first above described.
> ALSO: A right of way for travel by pedestrians, teams and vehicles and any and all other means of travel along an existing old roadway from the Easterly bounds of a ten acre tract of land this day conveyed by the heirs of Samuel E. Rusk to Henry J. Myers and Lucy Myers and extending Easterly across a twenty acre tract of land owned by the parties of the first part herin and over an old roadway to the easterly bounds of the lands of the said parties of the first part which are the westerly bounds of other lands of the heirs of Samuel E. Rusk, now deceased.

As is readily apparent from Plaintiffs' right-of-way, it does not expressly "include the right to install underground pipes or utility lines." (Spiak v. Zeglen, supra). As such, Plaintiffs failed to demonstrate their entitlement to judgment as a matter of law. Instead, such plain language demonstrates Defendant's entitlement to judgment dismissing Plaintiffs' first cause of action.

Turning next to Plaintiffs' second cause of action, "[a]n implied easement will arise upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate." (Mobile Motivations, Inc. v. Lenches, 26 AD3d 568, 570 [3d Dept. 2006], quoting Minogue v. Monette, 158 AD2d 843 [3d Dept. 1990]; see also U.S. Cablevision Corp. v. Theodoreu, supra).

Here, Plaintiffs failed to demonstrate their entitlement to judgment on their implied easement by necessity claim.

While Plaintiffs demonstrated a unity and subsequent separation of title they failed to sufficiently demonstrate that at the time of severance their proposed easement was "in use and... reasonably necessary for the fair enjoyment of the other part of the estate." (Id.) Plaintiffs

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attorney submits his review of the chain of title for parcels A, B and C. He alleges separation of title occurred by Deed dated August 31, 1847. He sets forth no proof, however, establishing that Plaintiffs' proposed easement was "in use and... reasonably necessary" at such time. Nor does Plaintiff Vincent Saladino's affidavit demonstrate the requisite use or necessity at the time of severance. As such, Plaintiffs failed to demonstrate their entitlement to judgment as a matter of law on their implied easement by necessity cause of action. (see U.S. Cablevision Corp. v. Theodoreu, supra).

Nor, on this record, did Defendant affirmatively prove, as a matter of law, non-use or non-necessity of Plaintiffs' claimed easement at the time of severance. In support of her motion, Defendant submits only her attorney's affirmation, with attachments. This affirmation, because it is not based upon personal knowledge, "lack[s] any evidentiary value." (Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010] citing Ahlers v. Wildermuth, 70 AD3d 1154 [2010]). Moreover, Defendant's attorney's mere "pointing to gaps in [the Plaintiffs'] proof" fails to establish Defendant's affirmative burden. (DiBartolomeo v. St. Peter's Hosp. of City of Albany, supra).

Accordingly, Plaintiffs' motion for summary judgment is denied in its entirety, Defendant's motion for summary judgment dismissing Plaintiffs' express easement construction cause of action is granted and Defendant's motion for summary judgment dismissing Plaintiffs' easement by necessity cause of action is denied.

This Decision and Order is being returned to the attorneys for the Defendant. 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: January 6, 2011
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, undated, Affidavit of Vincent Saladino, dated November 12, 2010, Affirmation of Ralph Lewis, dated November 15, 2010, with attached Exhibits A-H.
2. Notice of Cross Motion, dated November 29, 2010, Affirmation of Michael Goldsmith, dated November 29, 2010, with attached Exhibits A-D.
3. Affirmation of Ralph Lewis, dated December 13, 2010.