

**Justy v Carlson**

2011 NY Slip Op 30474(U)

March 3, 2011

Supreme Court, Greene County

Docket Number: 10-1679

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT  
RICHARD V. JUSTY,

COUNTY OF GREENE

-against-  
Plaintiff,

**DECISION and ORDER**  
**INDEX NO. 10-1679**  
**RJI NO. 19-10-5464**

MIKE CARLSON &  
DONALD S. CARLSON,

Defendants.

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Supreme Court Greene County All Purpose Term, January 25, 2011  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Stiefel & Winans  
John W. Winans, Esq.  
*Attorney for Plaintiff*  
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Catskill, New York 12414

Beth Konken, Esq.  
*Attorney for Defendants*  
2891 Route 22  
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**TERESI, J.:**

Plaintiff commenced this RPAPL Article 15 action, seeking an easement to his real property over Defendants' adjacent real property. His first cause of action seeks the declaration of an express easement, while his second cause of action seeks an easement by prescription. Defendants joined issue, and discovery is ongoing.

Defendants now move to dismiss Plaintiff's complaint, pursuant to CPLR §§ 3211(a)(1) and (7), to cancel Plaintiff's Lis Pendens (CPLR § 6514), and for attorney's fees. Plaintiff opposes the motion, and cross moves to re-plead in the event that his complaint is dismissed.

Because Defendants failed to establish their entitlement to dismissal of Plaintiff's complaint, their motion is denied in its entirety; as is Plaintiff's motion to re-plead.

### **Defendants' CPLR § 3211(a)(1) Motion**

Considering first Defendants' CPLR §3211(a)(1) motion, "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Erie Ins. Group v. National Grange Mut. Ins. Co., 63 AD3d 1412, 1413 [3d Dept. 2009]; Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]). The documentary evidence must resolve "all factual issues as a matter of law and definitively dispose... of the plaintiff's claim." (Wallach v. Hinckley, 12 AD3d 893, 894 [3d Dept. 2004]). Moreover, unless the documentary evidence is "admissible... [it] cannot serve as documentary evidence which conclusively establishes a defense." (Advanced Global Technology, LLC v. Sirius Satellite Radio, Inc., 44 AD3d 317, 318 [1st Dept. 2007]).

### **Plaintiff's Express Easement Claim**

Here, the documentary evidence Defendants submitted failed to definitively dispose of Plaintiff's express easement claim.

"The existence of an express easement depends upon the language of the instrument itself." (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821, 823 [3d Dept. 2010] quoting Wechsler v. New York State Dept. of Env'tl. Conservation, 193 AD2d 856, 858 [3d Dept. 1993]). "The extent and nature of an easement must be determined by the language contained in the grant, aided where necessary by any circumstances tending to manifest the intent of the parties. "

(Sambrook v. Sierocki, 53 AD3d 817, 818 [3d Dept. 2008], quoting Raven Indus. v. Irvine, 40 AD3d 1241, 1242 [3d Dept. 2007] [internal quotation marks omitted]).

In support of their motion, Defendants submit their deed and Plaintiff's deed. Both deeds constitute CPLR § 3211(a)(1) "documentary evidence." (Crepin v. Forgarty, 59 AD3d 837, 838-39 [3d Dept. 2009]).

Considering first Defendants' deed, it does not grant Plaintiff an express easement. Defendants' deed provides that: "[e]xcepting and reserving to the public the use of the roads and rights of way as contained within the above described premises, for highway purposes only; and the owner of the above lands is to be held harmless for any accident occurring on said roads." This grant, to an unnamed third party, provides Plaintiff with no valid interest.

"[A] deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed,' does not create a valid interest in favor of that third party." (Bauer v. County of Tompkins, 57 AD3d 1151, 1152 [3d Dept. 2008], quoting Matter of Estate of Thompson v. Wade, 69 NY2d 570, 573-74 [1987]). Because Plaintiff is a "stranger to the [Defendants'] deed," he cannot rely upon it to support his first cause of action.

Plaintiff's deed, however, does not conclusively establish a defense to Plaintiff's express easement claim. Plaintiff's deed provides that:

[t]he grantor herein conveys any and all easements, licenses, and rights-of-way it now has or may hereafter acquire for access between the aforescribed parcel and Bogart Road, however, the grantor makes no representation that it now has or will hereafter acquire any such easement, license or right-of-way.

Because of such language's inherent ambiguity, it does not "definitively dispose... of the plaintiff's [express easement] claim." Rather, the language may reasonably be read, in

conjunction with the circumstances surrounding the grant, as providing Plaintiff with an express easement. The language itself fails to conclusively foreclose Plaintiff's express easement claim.

Accordingly, Defendants' CPLR §3211(a)(1) motion to dismiss Plaintiff's express easement claim is denied.

### **Plaintiff's Prescriptive Easement Claim**

Here too, Defendants failed to submit sufficient "documentary evidence" to definitively dispose of Plaintiff's prescriptive easement claim.

"To succeed on a prescriptive easement claim a plaintiff must show that the use of the servient property was open, notorious, continuous and hostile for the prescriptive period; once the other elements of the claim are established, hostility is generally presumed." (Barra v. Norfolk Southern Ry. Co., *supra* at 823-824).

To support this portion of their CPLR § 3211(a)(1) motion, Defendants rely on a copy of the Town of Catskill Planning Board's March 11, 2008 meeting minutes. Such copy is neither certified nor sworn to, and as such has not been properly authenticated. "Authentication is as necessary for a document used upon a motion as for one offered as evidence upon a trial." (Martens v. Martens, 284 NY 363 [1940]). Because the meeting minutes are not authenticated they are not admissible and do not constitute CPLR § 3211(a)(1) documentary evidence. (Advanced Global Technology, LLC v. Sirius Satellite Radio, Inc., *supra*). Similarly unavailing is Defendants' reliance upon Plaintiff's attorney's settlement letter, which is "inadmissible as proof of... invalidity of the claim." (CPLR §4547).

Accordingly, Defendants' CPLR § 3211(a)(1) motion to dismiss Plaintiff's prescriptive easement cause of action, is denied.

### **Defendants' CPLR § 3211(a)(7) Motion**

Considering next Defendants' CPLR §3211(a)(7) motion, “[Plaintiff’s] complaint is afforded a liberal construction and the benefit of every favorable inference, the facts alleged in the complaint and in any submissions in opposition are accepted as true, and the court determines whether the facts alleged fit within any cognizable theory.” (Sawyer v. Prusky, 71 AD3d 1325, 1325-1326 [3d Dept. 2010], quoting Leon v. Martinez, 84 NY2d 83, 87-88 [1994]).

### **Plaintiff's Express Easement Claim**

Defendants' failed to demonstrate that Plaintiff's express easement claim fits within no legally cognizable theory.

As set forth above, “[t]he existence of an express easement depends upon the language of the instrument itself.” (Barra v. Norfolk Southern Ry. Co., supra 823). Here, Plaintiff's complaint attaches his deed and alleges that the deed's language furnishes him with an express easement over Defendants' property. Affording Plaintiff's allegations and deed language “a liberal construction and the benefit of every favorable inference,” Plaintiff sufficiently set forth a claim which fits within a legally cognizable, express easement, theory. (Sawyer v. Prusky, supra at 1325).

Accordingly, Defendants failed to demonstrate their CPLR § 3211(a)(7) entitlement to dismissal of Plaintiff's express easement claim.

### **Plaintiff's Prescriptive Easement Claim**

Defendants also failed to demonstrate that Plaintiff's complaint did not state a prescriptive easement cause of action.

Again, to establish a prescriptive easement claim Plaintiff must “show that the use of the

servient property was open, notorious, continuous and hostile for the prescriptive period; once the other elements of the claim are established, hostility is generally presumed.” (Barra v. Norfolk Southern Ry. Co., supra at 823-824). On this record, Plaintiff alleged that he has continuously used the disputed easement, on virtually a daily basis, since 1983. He further alleged that he has maintained, repaired and improved the easement. This open, notorious, and continuous use gives rise to the presumption of hostility, and sufficiently sets forth a prescriptive easement claim.

Accordingly, Defendants’ CPLR § 3211(a)(7) motion to dismiss is denied because Plaintiff alleged facts which fit within a prescriptive easement theory.

#### **Defendants’ Motion to Cancel Plaintiff’s Lis Pendens**

Due to the foregoing, Defendants’ motion to cancel the Plaintiff’s Lis Pendens is denied. This action is not “settled, discontinued or abated” (CPLR § 6514[a]), and a factual dispute exists regarding Plaintiff’s claimed easement over Defendants’ real property. (Shapiro v. Ungar, 46 AD3d1069, 1071 [3d Dept. 2007], Bonded Concrete, Inc. v. Johnson, 280 AD2d 758 [3d Dept. 2001]). As such, Defendants failed to demonstrate their entitlement to cancellation of the Lis Pendens herein.

#### **Defendants’ Motion for Sanctions**

Defendants’ motion for sanctions is similarly denied. This court may issue financial sanctions against a party engaged in “frivolous” conduct, defined as “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal

of existing law.” (22 NYCRR §130-1.1[c][1]). Here, as Plaintiff has prevailed on this motion, his conduct is not “without merit in law.” As such, Defendants’ motion for sanctions is denied.

**Plaintiff’s Motion to Re-Plead**

Lastly, because Plaintiff sought to re-plead his complaint only in the event it was dismissed - and his complaint has not been dismissed herein, this motion is moot and Plaintiff’s motion for leave to re-plead the complaint is denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. 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: March 3, 2011  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**Papers Considered:**

1. Notice of Motion, dated December 22, 2010; Affidavit of Beth Konken, dated December 22, 2010, with attached Exhibits “A” - “F”.
2. Notice of Cross Motion, undated; Affidavit of John W. Winans, dated January 18, 2011, with attached Exhibits “A” - “B”; Affidavit of Richard V. Justy, dated January 18<sup>th</sup>, 2011, with attached Exhibits “A” - “E.”