

Arthur Kill Hillside Dev., LLC v JJR Realty, LLC

2011 NY Slip Op 30641(U)

March 15, 2011

Sup Ct, Richmond County

Docket Number: 100700/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

ARTHUR KILL HILLSIDE DEVELOPMENT, LLC,

Plaintiff,

-against-

**JJR REALTY, LLC, Its Successors and Assigns, and
REGIONAL ISLAND REALTY,**

Defendants.

Index No: 100700/09

**Calendar Nos: 3527-003
3861-004**

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

The following papers numbered 1 to 5 were submitted on these motions the 4th day of February, 2011:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant JJR Realty, LLC, with Affidavit, Exhibits and Memorandum of Law (dated October 22, 2010).....	1
Reply Affirmation by Defendant JJR Realty, LLC with Exhibits (dated October 22, 2010).....	2
Notice of Cross Motion for Summary Judgment by Plaintiff Arthur Kill Hillside Development, LLC, with Supporting Papers and Exhibits (dated November 22, 2010).....	3
Affidavit of Rocco J. DeFelippis, with Exhibits and Memorandum of Law (dated January 11, 2011).....	4
Reply Affirmation by Plaintiff Arthur Kill Hillside Development, LLC (dated February 2, 2010 [<i>sic</i>]).....	5

Upon the foregoing papers, the motion (Cal. No. 3527) of defendant JJR Realty, LLC (hereinafter defendant) for an order pursuant to CPLR 3212 dismissing the amended complaint in its entirety and permanently enjoining and restraining plaintiff Arthur Kill Hillside Development

Realty, LLC¹ (hereinafter “plaintiff”) from interfering with an easement that purportedly burdens plaintiff’s property in favor of defendant’s property, is denied. Plaintiff’s cross motion (Cal No. 3861) for summary judgment on its amended complaint is likewise denied.

Plaintiff and Defendant each own adjoining properties located in Richmond County. It appears that on December 15, 1977, an “Easement Agreement” was executed between their predecessors (*see* Affidavit in Support of the Motion Exhibit “2”) pursuant to which defendant was granted the express, perpetual right to drain water across the plaintiff’s estate into the Arthur Kill along a designated route. Apart from its metes and bounds description, the pertinent sections of the easement provide as follows:

2. The grantors herein hereby grant to the grantee, its successors and assigns a drainage easement and the right to lay pipes, conduits, connecting lines and fixtures generally utilized in the construction and maintenance of a storm sewer through [the] drainage easement above described for the purpose of the dispersal of water from the property of the grantee to the waters of the Arthur Kill at the westerly line of [the] grantor’s said land.

3. Said grant is perpetual in character and is deemed to cover all the rights and privileges incident and necessary to the enjoyment of said grant, including unlimited ingress and egress in and to the same for the purpose of the installation, maintenance, repair, extension and protection of said storm sewer.

5. Said grant is subject, however to the right of the grantors to the use of the surface area of said easement for the normal operation of their business, including ingress and egress to and from their burdened property, but such use shall be conducted in a manner so as not to damage said storm sewer system or unreasonably interfere with [the] grantee’s use of the same for drainage purposes.

10. The rule of strict construction does not apply to this grant. This grant shall be given a reasonable construction so that the intention of the parties to confer a commercially usable right of enjoyment on the grantee is carried out.

This easement was recorded in the office of the Richmond County Clerk on February 15, 1978.

¹Plaintiff subsequently filed an amended complaint substituting Richmond Mountainside Property, LLC for Arthur Kill Hillside Development Realty, LLC as plaintiff. However, the caption has not been changed on the motion papers.

Richard Ippolito, defendant's president, asserts that in September 2006, he was contacted by a representative of the plaintiff regarding an easement relocation plan pursuant to which defendant's drainage needs for the proposed development of its lot would be adequately protected. Defendant argues that no voluntary resolution was reached after numerous meetings between the parties because no viable development plan was submitted by plaintiff which would not adversely affect the drainage on defendant's property.

As is relevant, on January 11, 2010, plaintiffs served and filed an amended complaint seeking the entry of judgment (1) barring and foreclosing defendant from any right, title and interest in the recorded easement; (2) claiming the easement to be deemed abandoned or extinguished, or (3) in the alternative, that a declaratory judgment be issued granting plaintiff the unrestricted right to relocate the drainage easement as desired. In support of summary judgment, Leib Poretz, the managing member and plaintiff's principal, claims that since defendant has never actually laid "pipes, conduits, connecting lines and fixtures generally utilized in the construction and maintenance of a storm sewer...", both it and its predecessors have exhibited an intention to abandon the easement granted in 1977 (*see* Ippolito Affidavit Exhibit "2"). In opposition, defendant's president asserts that, since recorded, defendant and each of its predecessors has consistently exerted its rights pursuant to the letter and intent of the easement, and has never demonstrated any intention to abandon its rights thereunder. He further states that defendant has always protected the rights retained under the easement, and has repeatedly objected to any development of plaintiff's lot that might impair its rights.

It is well established that absent clear and unequivocal facts demonstrating an intent to permanently relinquish the grant of right, the mere non-use of an express easement for a term of years is alone insufficient to establish an abandonment (*see* Wallkill Farms Homeowners Assn. v. Velazquez, 205 AD2d 681, 682; Route 22 Assoc. v. Cipes, 204 AD2d 705, 706). Rather, the grant of an easement "remains as inviolate as the fee favored by the grant" (Gerbig v. Zumpano, 7 NY2d 327, 330). Here, plaintiff has adduced no evidence establishing that the moving defendant ever expressly or by any overt act or omission demonstrated any intention to abandon the easement. Thus, plaintiff's claim that neither this defendant nor any of its predecessors has undertaken the construction of a drainage pipe in accordance with the language of the easement is legally insufficient to establish an abandonment as a matter of law (*see* Will v. Gates 254 AD2d 275; Janoff v. Disick 66 AD3d 963).

Given this Court's conclusion that plaintiff has not met its burden of establishing a *prima facie* case for abandonment of the easement, the sufficiency of the opposing papers need not be considered in order to deny plaintiff summary judgment (*see* Kjono v. Fenning 69 AD3d 581). In any event, the law is clear that "[o]nce an easement is definitively located, by grant or by use, its location cannot be changed by either party unilaterally" (*see* Affidavit of Richard Ippolito Exhibit "2" para. 1; Estate Ct., LLC v. Schnall, 49 AD3d 1076; Clayton v. Whitton, 233 AD2d 828, 829, 650). Moreover, paragraph 10 of the easement specifically provides that the intention of the parties is to create a commercially viable right of enjoyment for the "grantee", *i.e.*, defendant's predecessor in interest (*cf.* Marsh v. Hogan, 56 AD3d 1090, 1091-1092).

The parties' intent is also evident from so much of the subject easement as provides that the "...grant [to defendant's predecessor] is subject, however, to the right of the grantor [plaintiff's predecessor] to the use of the surface area of the easement for the normal operation of their [*sic*] business, including ingress and egress to and from the burdened property".

It is well settled that the extent of an easement is determined by the language of the grant and, where necessary, any circumstance that tends to demonstrate the parties' true intent (*see* Raven Indus., Inc. v. Irvine, 40 AD3d 1241, 1242). Thus, the rights of an easement holder are subject to the purpose and character of the easement, which "must be construed to include any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant" (*see*, Town of Elmira v. Huchinson, 53 AD3d 939, *quoting* Phillips v. Jacobsen, 117 AD2d 785). Accordingly, the holder of an easement cannot materially increase or impose new and additional burdens on the servient estate (*see*, 49 NY Jur, Easements § 114). In this case, it is clear from the language of the grant that the purpose of the easement was to allow for the orderly "dispersal of water from the property of the [defendant-]grantee to the waters of the Arthur Kill at the westerly line of [plaintiff-]grantor's land". Equally clear is the parties' intent that Arthur Kill remain available to the grantor "for the normal operation of its business" provided that such use does not "unreasonably interfere with [the grantee's] use of the same for drainage purposes" (*see* Affidavit of Richard Ippolito Exhibit "2" para 5).

With these principles in mind, plaintiff bases its claimed unilateral right to modify the existing easement for the purpose of developing its property upon the affidavit of Vito Fossella, a licensed engineer, which states that he is aware of the easement affecting both properties and their proposed development, but that it "is perfectly feasible to design and develop a storm water drainage system that would incorporate storm water disposal for defendant's property into the storm water disposal

system of plaintiff's property... in a commercially reasonable manner [that would] benefit both properties" (*see* Plaintiff's Exhibit "F"). However, defendant's president avers that when he submitted plaintiff's proposed easement relocation plan to an architect, Glen Cutrone, the latter responded in an authenticated letter (*see*, Defendant's Exhibit "5") that the "proposed easement relocation plan lacks sufficient detail and does not adequately accommodate defendant's drainage needs".

On these facts, the absence of any *prima facie* demonstration that defendant has abandoned its easement and the conflicting opinions of the respective experts are among the factors that preclude the summary disposition of the amended complaint (*see* Zuckerman v. City of New York 49 NY2d 557).

As a consequence, the parties' respective requests for sanctions must also be denied.

Accordingly it is hereby:

ORDERED, that the motion and cross motion are denied in their entirety.

All parties shall appear in **DCM Part 3 (located at 130 Stuyvesant Place, 3rd Floor)** for a pre-trial conference on **March 28, 2011**.

ENTER,

DATED: March 15, 2011

Joseph J. Maltese
Justice of the Supreme Court