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SHORT FORM ORDER

INDEX NO. 3209/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

NORMA REYNOLDS REALTY, INC. d/b/a NORMA REYNOLDS SOTHEBY'S INTERNATIONAL REALTY,

Plaintiff,

-against-

CHRISTOPHER BARNES & KAREN BARNES,

Defendants.

- -

CHRISTOPHER BARNES & KAREN BARNES,

Third-Party Plaintiffs,

-against-

JOHN SCHMITT and TARA SCHMITT,

Third-Party Defendants.

ORIG. RETURN DATE: JUNE 10, 2010
FINAL SUBMISSION DATE: AUGUST 5, 2010
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: JUNE 10, 2010
FINAL SUBMISSION DATE: AUGUST 5, 2010
MTN. SEQ. #: 002
CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 8 read on this motion FOR PRELIMINARY INJUNCTION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT. Order to Show Cause and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Replying Affirmation and supporting papers 7, 8; it is,

ORDERED that this motion by third-party plaintiffs, CHRISTOPHER BARNES and KAREN BARNES ("Barnes plaintiffs"), for an Order directing third-party defendants, JOHN SCHMITT and TARA SCHMITT ("Schmitt defendants"),

to immediately remove the recently constructed fence which blocks passage over an easement to the bay located at 830B Dune Road, Westhampton Dunes, New York ("Premises"), owned by the Schmitt defendants, and that the Schmitt defendants cease and desist from interfering with the easement until further Order of this Court, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion by the Schmitt defendants for an Order: (1) granting partial summary judgment: (a) determining that the easement is a nullity, and (b) determining that the Schmitt defendants have no obligation to indemnify the Barnes plaintiffs for a real estate commission to plaintiff NORMA REYNOLDS REALTY, INC. d/b/a NORMA REYNOLDS SOTHEBY'S INTERNATIONAL REALTY ("Reynolds"); (2) altering the scheduling Order herein for discovery and granting leave to the Schmitt defendants to serve an amended pleading and supplemental summons adding John Barnes and Eileen Barnes ("senior Barnes") to the action; and (3) disqualifying Richard Bartel, Esq. as counsel for the Barnes plaintiffs and directing him to appear for a deposition, is hereby **GRANTED** solely to the extent set forth hereinafter.

By Order dated May 28, 2010, this Court granted the following temporary restraining Order, pending further Order of the Court:

> **ORDERED**, that the third-party defendants, John Schmitt and Tara Schmitt immediately remove the recently constructed fence which blocks passage over the easement to the bay at 830B Dune Road, Westhampton Dunes, New York and that the third-party defendants, John Schmitt and Tara Schmitt cease and desist from interfering with the easement.

Reynolds commenced the within action by the filing of a summons and verified complaint on or about January 27, 2009. Reynolds sought to recover a real estate broker's commission in the approximate amount of $98,000 in connection with the transfer of the Premises from the Barnes plaintiffs to the Schmitt defendants. A verified answer was served by the Barnes plaintiffs on February 10, 2009. On February 26, 2009, the Barnes plaintiffs commenced the instant third-party action, and served the third-party pleadings upon Reynolds on February 26, 2009 and upon the Schmitt defendants on March 19, 2009. On or

about April 7, 2009, the Schmitt defendants served a verified answer with counterclaims. On or about June 30, 2009, Reynolds served an Amended Complaint. On or about July 20, 2009, the Barnes plaintiffs served a verified answer to Reynolds' amended complaint, and a preliminary conference was conducted on even date.

The Barnes plaintiffs indicate that the first-party action has been settled and discontinued, and that only the third-party action remains. Indeed, by Stipulation of Discontinuance dated March 15, 2010, Reynolds discontinued all claims against the Barnes plaintiffs and the Schmitt defendants, with prejudice. The Barnes plaintiffs inform the Court that the first-party action was settled by Stipulation of Settlement dated March 15, 2010, which provided, among other things, that Reynolds was to receive the sum of $25,000 from the Barnes plaintiffs and the Schmitt defendants; however, apparently only the Barnes plaintiffs made the payment. As such, this third-party action continues, wherein the Barnes plaintiffs seek a judgment declaring that the Schmitt defendants are obligated to indemnify the Barnes plaintiffs with respect to the real estate commission paid to Reynolds, pursuant to the terms of the parties' contract of sale.

The Barnes plaintiffs were the former owners of the Premises, having acquired it in 1996. The Premises is located on a barrier beach between Moriches Bay to the north and the Atlantic Ocean to the south, and the Premises fronts the bay. Dune Road runs in an east-west direction along the center of the barrier beach. The Barnes plaintiffs additionally own real property located across the street from the Premises on the ocean side, commonly known as 847 Dune Road, having acquired this property in or about 1997. The senior Barnes, Christopher Barnes' parents, also own real property on the ocean side, which is commonly known as 845 Dune Road. The Barnes plaintiffs allege that their family has been regularly using the easement at the Premises to access Moriches Bay since the 1950's.

During the summer of 2008, the Schmitt defendants rented the Premises from the Barnes plaintiffs. Reynolds alleges in its complaint that on or about February 23, 2008, it procured a tenant for the Barnes plaintiffs, i.e. the Schmitt defendants, for the Premises. Reynolds alleges that the lease executed by the Barnes plaintiffs and the Schmitt defendants expressly acknowledged Reynolds as the broker for that transaction, and provided that if the Barnes plaintiffs sold the Premises to the Schmitt defendants, Reynolds would be

"entitled to the customary commission for the sale." Reynolds alleges that the customary commission is six (6%) percent of the sales price, which in this case equals $98,556.

During that summer, the Barnes plaintiffs desired to sell the Premises, and the Schmitt defendants agreed to purchase it. As such, the Barnes plaintiffs and the Schmitt defendants entered into a contract of sale for the Premises on or about September 2, 2008 ("Contract"). The Contract recites that both the Barnes plaintiffs and the Schmitt defendants had not dealt with any broker in connection with the sale (Contract, ¶ 27). However, the Contract also contains a clause wherein the Schmitt defendants agreed to indemnify the Barnes plaintiffs against any claims arising from any realtor or real estate agency for commissions on the sale of the Premises, with liability limited to $77,400 and shall survive closing (Rider to Contract, ¶ 40). The Barnes plaintiffs contend that the Schmitt defendants agreed to this clause in exchange for a reduction of the purchase price by the estimated commission amount, after negotiations fell through with a prior potential buyer who had a broker. The Barnes plaintiffs allegedly wanted such indemnification in the event of a "bogus action for commission" filed by the prior buyer's broker, as well as to protect them against a claim by Reynolds.

The parties' Contract did not contain any specific reference to an easement at the Premises, and the Barnes plaintiffs did not reserve an easement in the bargain and sale deed to the Schmitt defendants. However, by two separate indentures executed on October 17, 2008, the Barnes plaintiffs conveyed easements over the Premises, as follows: (1) from Christopher S. Barnes and Karen O. Barnes to Christopher Barnes and Karen Ossanna Barnes; and (2) from Christopher S. Barnes and Karen O. Barnes, to Eileen J Barnes and John E Barnes. Both easements appear to be in favor of two distinct properties located on Dune Road, presumably 845 Dune Road (senior Barnes) and 847 Dune Road (Barnes plaintiffs), although the street addresses are not contained in either indenture. On October 20, 2008, one day prior to closing, the Barnes plaintiffs caused these indentures to be simultaneously recorded with the Suffolk County Clerk.

The Barnes plaintiffs contend that the easements were always a condition discussed as part of the transfer of the Premises, and that the Schmitt defendants had notice of the easements prior to the transfer of title. The Schmitt defendants allege that they were unaware of the easements prior to closing;

however, the Barnes plaintiffs indicate that the Schmitt defendants were aware that their title company insured the title but specifically excepted the two easements from coverage. Furthermore, the Barnes plaintiffs claim that "each oceanfront house" along Dune Road has an easement to the bay, and the street is lined with easements on both sides. As such, the Barnes plaintiffs allege that the Schmitt defendants knew or should have known about the existence of the easements over the Premises. In addition, the Barnes plaintiffs point out that the Contract provides that the Premises were to be conveyed subject to rights of way and easements, among other things, contained in former deeds or other instruments of record, although the Schmitt defendants argue that such easements violated the Barnes plaintiffs' covenant in the deed not to encumber the Premises.

According to the Barnes plaintiffs, in or about the first week of May of 2010, the Schmitt defendants erected two fence sections and certain plantings, allegedly to bar all easement holders from use of the easement. The Schmitt defendants allege that the fence was erected almost a year earlier in July of 2009. As such, the Barnes plaintiffs filed the instant application for a preliminary injunction.

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (*see Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction pursuant to CPLR 6301, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (*see Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]).

The Court finds that an injunction is not warranted in the instant third-party action. CPLR 6301 specifies two circumstances in which preliminary

injunctive relief may be granted: (1) if the defendant threatens to harm plaintiff's rights in the subject of the action and such harm could render the judgment ineffectual; and (2) in an action in which the plaintiff seeks a judgment restraining the defendant from injurious conduct that would also injure the plaintiff if committed during the course of the action (*see* CPLR 6301; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C6301:1). The subject matter of the third-party action is the obligation to pay Reynolds' real estate broker's commission, and the Barnes plaintiffs seek a judgment declaring that the Schmitt defendants must indemnify the Barnes plaintiffs with respect thereto. There is no cause of action or prayer for relief concerning the disputed easement. As such, the Court finds that the Barnes plaintiffs' request for a preliminary injunction in this third-party action is misplaced.

In view of the foregoing, the Barnes plaintiffs' motion for injunctive relief with respect to the easements over the Premises is **DENIED**, and the temporary restraining Order heretofore granted on May 28, 2010 is hereby vacated. Further, the Court finds procedurally defective the additional relief requested by the Barnes' defendants in their counsel's affirmation, to wit: summary judgment dismissing the Schmitt defendants' counterclaims, declaratory judgment that the Barnes plaintiffs possess an easement across the Premises, declaratory judgment that the senior Barnes possess an easement across the Premises, money judgment against the Schmitt defendants in the amount of $25,000 representing the broker's commission paid, and sanctions in the amount of $20,000 pursuant to 22 NYCRR § 130-1.1. The Barnes plaintiffs failed to seek the aforementioned relief in their Order to Show Cause (*see* CPLR 2214) and improperly seek relief on behalf of non-parties, the senior Barnes, and the Schmitt defendants have objected on these procedural grounds. Therefore, the additional requests for relief are also **DENIED**.

By their cross-motion, the Schmitt defendants seek partial summary judgment determining that the Barnes plaintiffs' easement is a nullity, and that the Schmitt defendants have no obligation to indemnify the Barnes plaintiffs for the real estate commission paid to Reynolds. In addition, the Schmitt defendants seek to alter the scheduling Order herein for discovery and for leave to serve an amended pleading and supplemental summons to add the senior Barnes to the action. The Schmitt defendants additionally seek disqualification of Richard Bartel, Esq. as counsel for the Barnes plaintiffs and a direction that he appear for a deposition.

The Schmitt defendants allege that the Barnes plaintiffs attempted to give themselves an easement over their own property, which, pursuant to the merger doctrine, was void *ab initio* and of no legal effect. Therefore, the Schmitt defendants argue that any issues concerning notice of their easement are irrelevant. With respect to indemnification, the Schmitt defendants allege that the indemnification clause (Rider to Contract, ¶ 40), was inserted relative to a potential claim by real estate broker "Coldwell Banker Prestigious Properties" in the amount of $77,400, which would have been the amount of its commission. Hence, the Schmitt defendants' liability was limited to $77,400. The Schmitt defendants claim that the purchase price of the Premises was reduced by $77,400 to deal with Coldwell Banker's claim for commission, not Reynolds'. Thus, the Schmitt defendants argue that they are not obligated to indemnify the Barnes plaintiffs for commission paid to Reynolds. Based upon this alleged conflict with regard to the scope of the indemnification clause, the Schmitt defendants seek disqualification of Richard Bartel, Esq., the drafter of the clause, and a direction that he appear for a deposition.

Regarding those branches of the Schmitt defendants' cross-motion for partial summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In this cross-motion, the Court finds that the Schmitt defendants have made an initial *prima facie* showing of entitlement to judgment as a matter of law determining that the Barnes plaintiffs' easement recorded on October 20, 2008 is a nullity (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v*

Pomeroy, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). In opposition, the Barnes plaintiffs have failed to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action with respect to this easement *(Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). As discussed, on October 17, 2008, the Barnes plaintiffs conveyed an easement over the Premises to themselves while they were still titleholders, which was recorded one day prior to closing. Because all the uses of an easement are fully comprehended in the general right of ownership, a person cannot have an easement in his own land (*see Will v Gates*, 89 NY2d 778 [1997]; *Parsons v Johnson*, 68 NY 62 [1877]; *Town of Pound Ridge v Golenbock*, 264 AD2d 773 [1999]). Thus, the owner of a fee cannot create an easement in his or her own favor to exist during the time he is vested with the fee (*see Beekwill Realty Corp. v New York*, 254 NY 423 [1930]; *N.Y. City Council v City of New York*, 4 AD3d 85 [2004]; 5-40 Warren's Weed New York Real Property § 40.12).

Accordingly, that branch of the Schmitt defendants' cross-motion for partial summary judgment determining that the Barnes plaintiffs' easement recorded on October 20, 2008 is a nullity, is **GRANTED** (*see Beekwill Realty Corp. v New York*, 254 NY 423, *supra*).[1]

Next, with respect to that branch of the Schmitt defendants' cross-motion for partial summary judgment declaring that the Schmitt defendants have no obligation to indemnify the Barnes plaintiffs for the real estate commissions paid to Reynolds, the Court notes that the parties' Contract contained the following clause, in its entirety:

> The Purchaser agrees to indemnify and hold the Sellers harmless against *any claims* arising from *any realtor or real estate agency* for commissions on the sale of this property. This liability shall be limited to $77,400.00 and shall survive closing

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[1] The Court need not reach the issue of whether by recording the two easements on October 20, 2008, the Barnes plaintiffs violated the covenant in the deed that they had not done or suffered anything whereby the Premises were encumbered in any way. In addition, at this juncture the Court does not pass on the validity of the senior Barnes' easement over the Premises, which was purportedly obtained by way of prescription or express grant.

(Rider to Contract, ¶ 40) (emphasis supplied). The Court finds that according to its plain language, this indemnification clause applies to *any* claim from *any* real estate broker for commissions in connection with the sale of the Premises. This clause does not reference a specific broker, and therefore, contrary to the Schmitt defendants' argument, is not limited to a claim by Coldwell Banker. The Court notes that this is the last paragraph of the Rider, directly preceding the parties' signatures.

In view of the foregoing, that branch of the Schmitt defendants' cross-motion for partial summary judgment declaring that the Schmitt defendants have no obligation to indemnify the Barnes plaintiffs for the real estate commission paid to Reynolds, is **DENIED**.

The Schmitt defendants also seek leave to serve a fourth-party summons and amended third-party verified answer and counterclaims and fourth-party complaint to assert claims for unjust enrichment and to quiet title against the senior Barnes.

CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (CPLR 3025 [b]). Leave to amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

As discussed, the Barnes plaintiffs granted an express easement over the Premises to the senior Barnes on October 17, 2008 and, the senior Barnes claim to have acquired the easement by prescription based upon continuous seasonal use dating back to the 1950's. The owner of an easement is a necessary party to a quiet title proceeding (*see Schaffer v Landolfo*, 27 AD3d 812 [2006]; *Hitchcock v Boyack*, 256 AD2d 842 [1998]; *Woodstone Lakes Development, LLC v Iroquois Hunting and Fishing Club, Inc.*, 2009 NY Slip Op 51509[U] [Sup Ct, Sullivan County]). Hence, the senior Barnes are parties with an interest which "might be inequitably affected by a judgment in [this] action" (CPLR 1001 [a]) and are entitled to protect their interest in the real property at issue (*see Hitchcock v Boyack*, 256 AD2d 842, *supra*).

In view of the foregoing, that branch of the cross-motion by the Schmitt defendants for leave to amend is **GRANTED** to the extent that the Schmitt defendants are granted leave to serve the proposed fourth-party summons and amended third-party verified answer and counterclaims and fourth-party complaint, annexed to the Schmitt defendants' moving papers as Exhibit "C," upon the senior Barnes. The senior Barnes shall then serve responsive pleadings in accordance with CPLR 3025 (d). Regarding the Schmitt defendants' request for a modified discovery schedule, the Court holds that a preliminary conference may be conducted in the newly constituted action after issue is joined in the fourth-party action and upon the request of any party.

Finally, the Schmitt defendants seek an Order disqualifying Richard Bartel, Esq., the drafter of the indemnification clause in the Rider to the Contract, as attorney for the Barnes plaintiffs herein and a direction that he appear for a deposition. In determining whether a party's lawyer, at its adversary's instance, should be disqualified during litigation, a court must also consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437 [1987]).

Further, disqualification of counsel may be required only when it is likely that the testimony to be given by the witness is necessary, and that such testimony is or may be prejudicial to the client (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Goldberger v Eisner*, 21 AD3d 401 [2005]; *Daniel Gale Assoc. v George*, 8 AD3d 608 [2004]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Matter of Porter*, 35 AD3d 477 [2006]).

After balancing the aforementioned factors, and given the Court's ruling herein, the Court finds that disqualification of Mr. Bartel is not warranted. Although the Schmitt defendants argue that "Bartel feels compelled to state his own reasons for his drafting paragraph 40 of the rider relating to indemnification against claims by Reynolds," the Court has found, based upon the clear, express language of the indemnification clause, that it applies to any claim from any real estate broker for commissions in connection with the sale of the Premises. Extrinsic and parol evidence may not be considered unless the document itself is

ambiguous, and may not be used to create an ambiguity in a written agreement which is clear and unambiguous on its face (*see Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59 [2006]; *South Rd. Assocs., LLC v IBM*, 4 NY3d 272 [2005]; *R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29 [2002]). As the Court has now interpreted the clause based upon its unambiguous terms, Mr. Bartel's testimony is not necessary or admissible, and may not be considered to alter or vary its terms (*see Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, *supra*; *Alvarez v Amicucci*, 2011 NY Slip Op 1606 [2d Dept]).

Accordingly, that branch of the Schmitt defendants' cross-motion to disqualify Mr. Bartel from representing the Barnes plaintiffs in this action is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: March 22, 2011

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**