

Harriton v Doft

2011 NY Slip Op 31749(U)

June 21, 2011

Sup Ct, Suffolk County

Docket Number: 10-20363

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 002 - MG
003 - XMD

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RICHARD HARRITON,	:	HARRAS BLOOM & ARCHER, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	445 Broad Hollow Road, Suite 127
	:	Melville, New York 11747
- against	:	
	:	MCNULTY-SPEISS, P.C.
SUZANNE DOFT,	:	Attorney for Defendant
	:	214 Roanoke Avenue, P.O. Box 757
Defendant.	:	Riverhead, New York 11901
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Upon the following papers numbered 1 to 53 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30 ; Notice of Cross Motion and supporting papers 31 - 40 ; Answering Affidavits and supporting papers 41 - 49 ; Replying Affidavits and supporting papers 50 - 51 ; Other (Plaintiff's Replying Memorandum) 52 - 53 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Richard Harriton for an order pursuant to CPLR §3212 granting summary judgment in his favor and against defendant Suzanne Doft on the causes of action alleged in his complaint and in the counterclaim alleged by defendant is granted; and, it is further

ORDERED that the cross motion by defendant Suzanne Doft for an order pursuant to CPLR§3212 awarding summary judgment in her favor and against plaintiff Richard Harriton is denied.

On August 29, 2003 plaintiff Richard Harriton entered into a written contract to sell the premises known as 128 Dune Road (property located on the canal side of Dune Road), Westhampton, New York to Harlen, LLC. The contract contained a provision that the deed to the property would contain a right of way, to run with the land, in favor of the seller, and any subsequent owner of the land on the ocean side of Dune Road (*i.e.* the other parcel located directly across the road from the property to be transferred pursuant to the contract and owned by plaintiff seller Richard Harriton). The contract contained a rider that granted the purchaser permission to construct a dock at its expense (for which the seller would obtain approvals from the New York State Department of Environmental Conservation, the Southampton Town Trustees and the US Army Corps of Engineers) which would not abut "the right-of-way to be established in favor of the ocean front property owned by the seller", provided that "the seller

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shall improve the right-of-way ... at the seller's own cost and expense and shall be entitled to add a walk from the right-of-way to the dock", and stated that "[t]he provisions of this paragraph shall survive the closing of title."

On November 10, 2003, the closing of the property took place, a deed was executed, and in compliance with the contract plaintiff, as grantee, entered into a written "Right of Way Agreement" with Harlen LLC, as grantor, which stated:

1. Grantor hereby grants Grantee an easement and right of way over that portion of the Premises leading from Dune Road to the Quantuck Canal as described on Schedule A attached to and made a part of this Agreement and as shown as a proposed 5' wide right of way on a survey made by Raynor & Marcks, which survey is dated October 18, 1990, re-dated July 16, 2001 and is entitled Map of Property of Richard Harriton.
2. Any and all construction on, or improvement of, the area of the right of way shall be at the sole cost and expense of the Grantee, shall be performed on weekdays between the hours of 8 AM and 6 PM, in a good and workmanlike manner and in accordance with any governmental rule and regulations which may apply.
3. The above-described right of way shall run with the land.
4. Grantee, at his sole cost and expense, shall be entitled to add and maintain a walk leading from the right of way to the dock now or hereafter on the Premises. Furthermore, Grantee shall be entitled to use the dock on the Premises at all times, for one boat not greater in length than 20 feet, and grantor shall keep adequate space available at the dock for Grantee for that purpose. Construction and maintenance of the dock shall be at the sole cost and expense of the Grantor. However, Grantee shall repair, at Grantee's expenses, any damage caused to the dock by the Grantee. The dock rights contained in this paragraph numbered "4" shall be limited in time so as to expire when Richard Harriton is no longer an owner of record of the land and building commonly known as and by the number 129 Dune Road, Westhampton, New York.
5. The terms 'Grantor' and 'Grantee', as used herein, shall include their heirs, successors and assigns."

On March 6, 2004, this Right of Way Agreement was recorded in the office of the Suffolk County Clerk at Liber D00012305 Page 623. A Modified and Extended Right of Way Agreement was executed on August 10, 2004 and recorded in the office of the Suffolk County Clerk on November 5,

2004 at Liber D00012353 Page 076. The addition made to the Agreement dated November 10, 2003 was that the language "Except with regard to the dock on Grantor's property, the construction of which shall be at the sole cost and expense of the Grantor," was added before the sentence contained in paragraph numbered "2". A modification to paragraph numbered "4" was made so that the last sentence regarding dock rights was deleted and the following sentence was substituted for it " The dock rights contained in this paragraph numbered "4" shall be perpetual, shall run with the land and are for the benefit of Richard Harriton, the owner of the land and building commonly known as and by the number 129 Dune Road, Westhampton Beach, New York, (the Grantee) his successors and assigns." (The Court notes that an identical legal description of the right of way was annexed to each of the Right of Way Agreements but that no survey was annexed to either one.)

Plaintiff Richard Harriton obtained a Trustees Permit from the Board of Trustees of the Freeholders & Commonalty of the Town of Southampton, New York on July 7, 2003 which permitted the construction of "a dock structure consisting of 3' x 5' stairs up to a 4' x 50' fixed elevated (3'6" above vegetated marsh) walkway supported by 6" x 6" poles, 3' x 16' hinged ramp and 6' x 20' floating dock secured by two (2) 6" diameter piles". With regard to certain special conditions, the permit refers to a portion of the structure as the "fixed dock" and another portion of the structure as the "floating dock". The Department of the Army, New York District, Corps of Engineers issued its authorization to plaintiff Richard Harriton on December 3, 2003, for the construction of "a pier assembly consisting of a 50-foot long by 4-foot wide fixed pier, a 16-foot long by 3-foot wide ramp, and a 20-foot long by 6-foot wide float in a 'T' configuration, secured by two (2) guide piles". At the northern portion of the property owned by defendant there exists a fifty foot non-disturbance, non-fertilization buffer (approximately ten feet south of the canal water line) upon which no structure may be built.

Harlen LLC conveyed the subject property acquired by deed from plaintiff (known as 128 Dune Road, Westhampton, New York) to 128 Dune, L.L.C. by deed dated January 25, 2006. Thereafter, 128 Dune, L.L.C. conveyed the subject property to defendant Suzanne Doft by deed on March 1, 2006. Harvey Goldsmith, a managing member of Harlen LLC and 128 Dune, L.L.C. averred, in an affidavit submitted in support of plaintiff's application, that the construction of the dock structure was completed prior to the time the property was sold to defendant Suzanne Doft and that plaintiff had used the stair and catwalk portions thereof. Plaintiff contends that he used the entire dock structure and was granted perpetual easement rights to travel over defendant's property and to use the catwalk and dock located thereon to access the waters of the Quantuck Canal and to moor a boat no longer than twenty feet (20'). He alleges that defendant violated his easement rights by removing access stairs to the elevated catwalk that lead to the dock and constructing a continuous railing along the catwalk/dock structure which prevents him from accessing the floating dock and mooring a boat.

As a result of these allegations plaintiff brought the instant action which seeks a judicial declaration that plaintiff has the right under an easement granted in his favor to add, maintain, and use a walk on defendant's premises to gain access to the dock which runs from the premises into the Quantuck Canal; a mandatory injunction requiring defendant to remove obstructions blocking plaintiff's access to the landward portion of the dock at a point south of the NYSDEC non-disturbance area and to restore plaintiff's access to the dock by replacing the stairs that defendant had removed; and, a permanent injunction restraining and enjoining defendant, her designees, heirs, successors and/or assigns from

obstructing and/or otherwise interfering with the rights of the plaintiff and his successors, assigns and invitees, under the easement. Defendant answered the complaint denying the allegations therein and setting forth a counterclaim seeking a judicial declaration that the easement or right-of-way is personal to plaintiff and does not extend to any other individuals or any particular parcel of property; that the dock rights which may exist do not afford the holder thereof any right to access and use any existing structure located on the subject premises other than the subject premises' dock in the Quantuck Canal; and that any right of the plaintiff or any other person to add and maintain a walk leading from the right-of-way over a portion of the subject premises to the subject premises' dock does not entitle the plaintiff or any other person to access and use any structures located on the subject premises other than the subject premises' dock located in the Quantuck Canal.

Plaintiff now moves for an order granting summary judgment in his favor and against defendant on the claims set forth and on the counterclaim asserted by defendant. In support of the motion he submits, *inter alia*, copies of the Right of Way Agreement, the Modified and Extended Right of Way Agreement, the pleadings, notice of pendency, deeds, permits, surveys and photographs of the walkway and railing as modified by defendant, right of way and catwalk and floating dock.

Defendant cross moves for an order awarding summary judgment to her upon the grounds that no triable issue of fact exists as to her entitlement to the relief she requests. In support of her motion, defendant submits, *inter alia*, copies of the pleadings, deed from 128 Dune, L.L.C. to her, Modified and Extended Right of Way Agreement, surveys dated 7/24/09 and 8/24/09, Right of Way Agreement, and photographs of the original dock structure.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see*, **Rotuba Extruders, Inc. v Ceppos**, 46 NY2d 223[1978]; **Andre v Pomeroy**, 35 NY2d 361 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324[1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853[1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (**S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.**, 34 NY2d 338 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (**Benincasa v Garrubbo**, 141 AD2d 636, 637 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Express easements are defined by the intent or object of the parties (**Lewis v Young**, 92 NY2d 443, 449 [1998]) and, "in the absence of a demonstrated intent to provide otherwise, a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired" (**Lewis v Young**, *supra* at 449). Generally, the extent of an easement is determined by the language of the grantor (*see Papasmiris v Katsos*, 262 AD2d 619 [2d Dept 1999]; **Ciano v Smolan**, 225 AD2d 727 [2d Dept 1996]).

Here, the plaintiff established his *prima facie* entitlement to judgment as a matter of law by proffering evidence that the language of the grantor, which is determinative on the issue of the extent of the easement (*see, Papasmiris v Katsos, supra; Ciano v Smolan, supra*), grants to plaintiff, his heirs, successors and assigns the right to use a five foot wide “walkway” which is located along the easterly side of defendant’s property leading from Dune Road to the Quantuck Canal and the use of a dock on the premises. It is clear that an easement was granted to plaintiff or his heirs, successors and assigns by defendant’s predecessor in ownership, by the November 10, 2003 agreement which indicated that the right or way shall run with the land, and that “the terms ‘grantor’ and ‘grantee’ ... shall include their heirs, successors and assigns”. This recorded agreement limited that portion of the easement which affected dock rights to the plaintiff and did not grant those rights to plaintiff’s heirs, successors or assigns. However, the recorded Modified and Extended Right of Way Agreement dated August 10, 2004 clearly and unambiguously stated that the dock rights shall be perpetual and run with the land and for the benefit of plaintiff, his successors and assigns. Consequently, when defendant purchased the premises in March 2006, she was obligated as a landowner, burdened by an express easement, to continue to permit plaintiff, his heirs, successors and assigns the right to use the right of way and dock. There is no question that the use of the dock was within the original grantor’s intent as it specifically states that in both of the recorded agreements. The agreements permitted plaintiff to add and maintain a “walk” leading from the right of way to the dock. Since the dock is located in what can best be described as the “center” of the north portion of the property, the only way to access it from the five foot wide right-of-way would be by means of a walk or path from one to the other. The permits issued by the town and the Army Corps of Engineers for the construction of the dock structure included distinct parts, *i.e.* the steps, the catwalk (over the protected wetlands), the ramp and the floating dock. When considering the purpose of the easement and right of way, it is clear that the intention was for the plaintiff, his heirs, successors and assigns, to have access through defendant’s property to the dock in the Quantuck Canal (for the mooring of a boat) from his property on the south side of Dune Road. Inasmuch as a walkway from the five foot wide legally described right-of-way to the dock was contemplated in the agreements, one can only conclude that the easement granted access to the entire dock structure and not simply the floating portion of the dock. It is clear that defendant had record notice of the easements upon her purchase of the property. The intent of the parties and the purpose of the easement must be construed from the entire instrument and from the surrounding circumstances and situation of the parties when the agreements were executed (*see Sassouni v Krim*, 68 AD3d 968 [2d Dept 2009]; *Hedberg v Brew*, 266 AD2d 432 [2d Dept 1999]).

Plaintiff has sufficiently pleaded a cause of action for a permanent injunction in that he will suffer an irreparable injury, has no adequate remedy at law and equity is balanced in his favor (*see Ickes v Buist*, 68 AD3d 823 [2d Dept 2009]; *Elow v Svenningsen*, 58 AD3d 674 [2d Dept 2009]; *Town of Liberty Volunteer Ambulance Corp.*, 30 AD3d 739 [2d Dept 2006]).

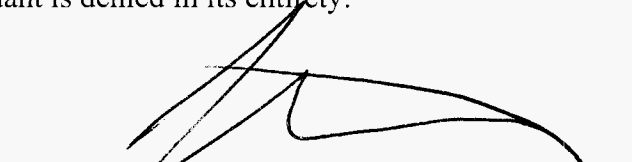
In opposition to plaintiff’s motion and in support of her own cross motion, defendant failed to raise a triable issue of fact and, thus, has failed to establish her entitlement to summary judgment in her favor.

Accordingly, the motion by plaintiff for summary judgment is granted and the Court declares that plaintiff has an easement permitting him, his heirs, successors and assigns to add, maintain, and use a

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walk from the five foot wide right of way to the dock structure at the point south of the NYSDEC non-disturbance area; plaintiff is granted an injunction requiring defendant to remove obstructions blocking plaintiff's access to the dock structure and to restore plaintiff's access to the dock structure by replacing stairs to same; and, plaintiff is granted a permanent injunction restraining and enjoining defendant, her heirs, successors and/or assigns from obstructing or otherwise interfering with the rights of plaintiff, his heirs, successors and assigns under the agreements to add, maintain and use a walk from the delineated five foot wide walkway to the dock structure at the point south of the NYSDEC non-disturbance area. The cross motion for summary judgment of the defendant is denied in its entirety.

Dated: June 21, 2011



HON. JOSEPH C. PASTORESSA

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