Findlay Teller Hous. Dev. Fund Corp. v Daughter of Jacob Geriatric Ctr.
2011 NY Slip Op 33983(U)
April 8, 2011
Supreme Court Bronx County
Docket Number: 308454-10
Judge: Howard H. Sherman
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[* 1]

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NEW YORK SUPREME COURT - COUNTY OF BRONX

APR 12 2011

PART 04

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
---X

FINDLAY TELLER HOUSING

Index №. **0308454/2010**

-against-

Hon. **HOWARD H. SHERMAN**, Justice.

DAUGHTERS OF JACOB
---X

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **November 22 2010** and duly submitted as No. ____ on the Motion Calendar of ______________

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
______________________ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: ______
Dated: ______

MOTION IS DECIDED IN ACCORDANCE WITH

THE ATTACHED MEMORANDUM DECISION

Dated: APR 5 /2011

Hon.

HOWARD H. SHERMAN, J.S.C.

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NEW YORK STATE SUPREME COURT-COUNTY OF BRONX
PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

FINDLAY TELLER HOUSING
DEVELOPMENT FUND CORPORATION
AND FINLAY TELLER, L.P.

Index No. 308454-10

Decision/Order

Plaintiffs,

-against-

Present:

Hon.Howard H. Sherman
J.S.C.

DAUGHTERS OF JACOB GERIATRIC
CENTER f/k/a HOME AND HOSPITAL
OF THE DAUGHTERS OF JACOB a/k/a
THE HOME OF THE DAUGHTERS OF
JACOB et al.,

Defendants

HON. HOWARD H. SHERMAN:

This matter concerns the moving defendants' application to cancel certain lis pendens filed by plaintiffs against numerous properties located in the vicinity of the Daughters of Jacob Geriatric Center, and the defendants' additional application to dismiss certain causes of action in the plaintiffs' complaint, and a subsequent motion by defendants to dismiss certain portions of the amended complaint filed by the plaintiffs.

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The initial motion brought by defendants DOJ Support Organization s/h/a Daughters of Jacob Geriatric Center ("DOJ Support"), Daughters of Jacob Nursing Home Co. Inc. ("DOJ Nursing"), Findlay House Inc. ("Findlay House") and Findlay Plaza Housing Development Fund Corporation ("Findlay Plaza") seeks cancellation of various notices of pendency filed against certain properties of these defendants, and dismissal of various causes of action in the plaintiffs' complaint. The second motion seeks dismissal pursuant to CPLR Section 3211 (a)(1) and (7), in whole or in part, of the first, second, third, fourth, sixth, seventh and eighth causes of action in the amended complaint.

The plaintiffs Findlay Teller Housing Development Fund Corporation and Findlay Teller L.P. (collectively "plaintiffs") are the record and beneficial owners of property located at 1201 Findlay Avenue (hereinafter "1201 Findlay") in the Bronx, which they acquired pursuant to a non-judicial foreclosure conducted by the United State Department of Housing and Urban Development. The plaintiffs have filed lis pendens against the following parcels: 1) property owned by DOJ Support at 315 East 167th Street [hereinafter "315 Residence"], with a tax map designation of Block 2435 Lot 35; 2) property owned by Findlay House ["Findlay House"] at 1175 Findlay Avenue, with tax map designation of Block 2435 Lot 25;

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3) property owned by DOJ Nursing at 1160 Teller Avenue ["Nursing Home Property"] with a tax map designation of Block 2435, Lot 45; 4) property owned by DOJ Support at 1174 Teller Avenue ["Garage Property"] with a tax map designation of Block 2430, Lot 17; and 5) property owned by DOJ Support at 321 East 167th Street ["Park Property"] with a tax map designation of Block 2435, Lot 44.

The parties have annexed a survey map of the various parcels, depicting the plaintiffs' parcel 1201 Findlay at the center, surrounded by the other parcels. 1201 Findlay, which borders on its southerly side on the Park Property owned by Defendant DOJ Support, contains 163 residences for the elderly within various buildings. There is a Main Building and various Annex Buildings, which are connected via corridors. Each of the Annex Buildings has one elevator, none of which stop at street level. The elevators stop at the first floor level of the Main Building, and there is no direct access to the street from the Annex Buildings.

The Main Building contains three elevators, two of which are at the large main entrance, which fronts on the boundary between 1201 Findlay and the Park Property. The main entrance, significantly within the contexts of these motions, fronts on a driveway that is located on the Park Property. This main entrance has no access to the street except through the Park Property.

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The plaintiffs contends that the third elevator is smaller and poorly-suited to moving furniture or other large items. It descends to street level on the Findlay Avenue side of the Main building. There is also a small side entrance on Findlay Avenue with access to that street, but it is too small to be of use in moving large items, and too easily congested to accommodate the residents.

The north side of the plaintiff's parcel is bound by a stone wall, on the other side of which is a Public School, and the east and west sides are bordered by Teller and Findlay Avenues, respectively. However, due to the elevations of the property, there are stone retaining walls up to 7 feet in height along both streets.

The main entrance leads to the driveway that traverses the Park Property, and there is an iron gate flanked by stone piers across the entrance of this driveway. Although the defendants had formerly provided the key to this gate to the plaintiffs, the key was withdrawn by defendants prior to this litigation, and the driveway remains locked.

For a period of over 40 years, from February 26, 1969 until October 4, 2009, all six properties involved in this litigation were under common ownership by defendants DOJ Support and its affiliates and predecessors. The plaintiffs also contend that for thirty years, from the 1970's until late November 2009, almost two months after the plaintiffs acquired 1201

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Findlay Avenue, use was made of the Park Property and Driveway by the plaintiffs, their staff, guests and licensees on a daily basis. The Park Property was also used as an area for passive recreational activities, as well as for its access to the front entrance to 1201 Findlay. Employees of 1201 Findlay Avenue purportedly parked their vehicles on the driveway for many years.

The motion brought by the defendants seeks cancellation of the lis pendens filed with respect to the 315 Residence Property, the Findlay House Property and the Nursing Home Property on the grounds that the plaintiffs do not seek relief that would in any way affect the title to, or possession, use or enjoyment of these particular properties.

In their opposition papers, the plaintiffs seek leave to voluntarily withdraw the lis pendens as against the 315 Residence property, and for leave to file separate amended lis pendens against four other parcels, not including the 315 Residence property.

The complaint states that the Nursing Home parcel is connected to the 1201 Findlay Avenue parcel via a causeway/ pedestrian bridge known as the Teller Bridge, while the Findlay House property is connected to the 1201 Findlay Avenue parcel via a second causeway/ pedestrian bridge known as the Findlay Bridge. The complaint seeks an order pursuant to RPAPL Section 871 directing the defendants to remove these alleged encroaching pedestrian bridges.

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The initial question concerns the validity of the lis pendens, or notices of pendency, filed by plaintiffs against these properties. Although the original complaint has now been superseded, the Court must evaluate this original pleading to determine whether a cause of action falls within the scope of CPLR Section 6501.

Pursuant to CPLR Section 6501 a notice of pendency may be filed in any action in which the Judgment demanded would effect the title to, or the possession, use or enjoyment of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrance against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. Since the statutory scheme permits a party to inhibit the alienability of real property without any prior judicial review, the Courts have required strict compliance with the statutory procedural requirements. 5303 Realty Corp v. O & Y Equity Corp, 64 N.Y. 2d 313 (1984).

Although the plaintiffs have now filed an amended complaint, it is the the original complaint which was filed with the notices of pendency which must be adequate to support the filing of the notices; the subsequent amended complaint cannot be used to justify the earlier notices of pendency. 5303 Realty Corp v. O & Y Equity Corp., *supra.* The Court of Appeals in *5303*

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Realty Corp. also held that in determining whether the action is one affecting the title to, or the possession, use or enjoyment of real property, the Court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of the statute, but that the Court's analysis is to be limited to the pleading's face. 5303 Realty Corp v. O & Y Equity Corp., 64 NY 2d 313 at 321.

The rule applied in New York with respect to such notices is called the "Doctrine of No Second Chance" in that a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property has been cancelled, or vacated, or had expired, or become ineffective. CPLR Section 6516 [c]; De Silva v. Musso, 76 NY 2d 436.

Notably, the filing of an amended complaint, in itself, does not vitiate an existing lis pendens that was validly filed pursuant to the terms of the original complaint. To the extent that the defendants assert, in their reply memorandum of law, that "by amending their complaint, the plaintiffs have lost their notice of pendency and cannot obtain another one," the Court rejects this assertion that by merely amending the complaint, without more, the plaintiffs have vitiated previously-filed notices of pendency which are otherwise valid. Indeed, 5303 Realty Corp v. O & Y Equity Corp, *supra*, can be cited as authority refuting this false implication by the defendants.

However, the filing of an amended complaint cannot be the basis for

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saving a notice of pendency if it was invalidly filed in the first instance . Sealy v. Clifton, 68 A.D. 3d 846 (2nd Dept 2009).

The Court further finds, based on a review of the initial complaint, which on its face demands the removal of two encroaching pedestrian bridges from two of the defendants' parcels, the Nursing Home and Findlay House parcels, such a cause of action is sufficient to support the filing of a lis pendens. Thus the filing of the lis pendens as against these two parcels is sufficient, and the motion to strike the lis pendens as to these two particular parcels is denied. Lafayette Forwarding Co v. Rothbart Garage Operators, 205 App. Div. 247 (1st Dept, 1923); Moeller v. Wolkenberg, 67 App Div. 487 (1st Dept. 1902)

The motion is granted to the extent of striking the lis pendens filed against the 315 Residence property, as the complaint does not seek relief that would in any way affect the title to, or possession, use or enjoyment of the said property. If the plaintiffs' papers are also read as an application -- improperly incorporated within their opposition papers -- seeking leave to re-file amended notices of pendency as against the other properties, such application is denied, as there is no authority cited which would support it. As previously stated, a notice of pendency cannot be filed in any action in which a previously filed notice of pendency had been cancelled or vacated, expired or became ineffective. CPLR Section 6516 [c].

That portion of the defendants' motion seeking to dismiss the initial complaint, which has now been superseded, is denied as moot.

Aside from the examination of the validity of the filing of the lis pendens, the case will proceed as if the original complaint had never been filed . See Halmar Distributors Inc. v. Approved Mfg. Corp., 49 A.D.2d 841 [1st Dept, 1975].

Easements on the Park Property

Turning to the defendants' motion to dismiss portions of the amended complaint, the defendants contend that documentary evidence bars the plaintiffs first, second, third and fourth causes of action to impose an easement on the Park Property. The plaintiffs contend that they are entitled to an easement on four grounds, namely, by express grant to their predecessor in title Findley Plaza, as well as by prior use, by necessity, and by estoppel.

In this context that Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff with the benefit of every possible inference. EBC I Inc. V. Goldman Sachs & Co., 5 NY 3d 11 (2005). When a motion to dismiss is premised on documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations,

conclusively establishing a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of NY 98 NY 2d 314. (2002). Evidentiary material may be submitted on a motion to dismiss pursuant to CPLR Section 3211 (a), and factual affidavits may be considered to remedy defects in the complaint.

In asserting that an easement was created by express grant, the plaintiffs allege that the defendants, including plaintiffs' predecessor in title, made an application to the New York City Planning Commission for a special permit for the Findley Plaza Property [the 1201 Findlay Avenue parcel] to develop and convert the property from its use as a nursing home to low income housing for the elderly. The DOJ Defendants applied to the City of New York for various concessions, including special permits, zoning variances and tax abatements. They sought designation of these six parcels as a "Large Scale Community Facility Development." These designations permitted buildings to be constructed or remodeled in a manner that would not be permitted pursuant to conventional zoning regulations. A project plan summary submitted by the defendant DOJ Support to the Planning Commission alluded to an easement in the Park Property in favor of Findlay Plaza.

While seeking approval of the development of the 1201 Findlay Property as the "Findlay Plaza Project" the DOJ Defendants requested that the Park Property be removed from the Findlay Plaza project site.

Purportedly, the granting of this request was expressly contingent upon the granting by DOJ Support of easement rights through the driveway on the park property.

The plaintiffs have furnished a letter in their opposition papers from the counsel to the DOJ Defendants dated July 19, 1974 representing to the City of NY that " [i]t is the intention of the sponsors, upon transfer of the project property to Findlay Plaza, to grant Findlay Plaza an easement of access across the park area and through the driveway and walkways traversing same." The Project Plan summary submitted to the City Planning Commission in connection with an application for a zoning variance to permit a change of use of the 1201 Findlay Property from community facility use to residential use specifically provided for an easement of use for the Findlay Plaza residents of a park siting area fronting on and contiguous to the project.

When the application of DOJ Support was granted by the City Planning commission and thereafter by the Board of Estimate the resolutions issued incorporated the prior approvals granted and plans filed and stated that "the premises shall be developed in size and arrangement substantially as proposed and as indicated on the plan filed with the application."

However, defendants point out that the final approval of this project by the City Planning Commission and the Board of Estimate made no specific

mention of an easement,

Moreover, defendants also note that the final approval of the project provided that the Daughters of Jacob Geriatric Center, now DOJ Support, would not develop the Park Property for non-recreational purposes during the term of a loan to be provided to Findlay Plaza. This loan, from New York State, was not provided, and the funding which was provided emanated from the Department of Housing and Urban Development instead. When a new application based on this new funding was made to the Board of Estimate, the plan was approved but eliminated the Park Property from the Findlay Plaza Development site. DOJ Support contends that the mere fact that its right to develop the Park Property was allegedly limited only by the pendency of a loan which never came into being establishes that there was never an easement in the Park Property, but only a license terminable by DOJ Support at such time as the HUD Mortgage was removed from the property.

To establish an easement by express grant, the plaintiffs must establish the existence of a writing that unequivocally conveys the easement: "The writing must establish unequivocally the grantor's intent to give for all time to come a use of the servient estate to the dominant estate. The policy of the law favoring unrestricted use of reality requires that where there is any ambiguity as to the permanence of the restriction to be imposed on the servient estate, the right of use should be deemed a license, recoverable at

will by the grantor, rather than an easement. Willow Tex Inc., v. Dimacopoulos, 68 N.Y. 2d 963, 965 (1986). However, this holding was issued following a full trial of the relevant issues; it was not a holding granting a motion to dismiss based on documentary evidence.

The Court is in agreement that the retention by the defendants of a right to develop the Park Property does not conclusively negate the existence of an easement over that parcel, and this aspect of the defendants' argument does not meet its very weighty burden on this motion. There are numerous filings with the relevant municipal authorities already in the record where usage is made of the word 'easement ' - although occasionally references to a 'license' are substituted – which suffice for the plaintiffs' purposes on this motion. The extent of an easement under a grant is determined by the language of the grant. The terms of the easement are to be construed most strongly against the grantor in determining the extent of the easement. Stevens v. Grody, 297 A.D. 2d 372 (2nd Dept, 2002). The Court concludes that the defendants have not refuted the cause of action asserting an easement over the park property by express grant by documentary evidence.

The defendants further claim that the plaintiffs are not entitled to an easement under theories of prior use, necessity or estoppel because public documents expressly put them on notice that only a license was in existence with respect to the use of the park property. However, the mere fact that the

easement was not part of or created by the Findlay Plaza Project is not a positive refutation of the easement for the purposes of this motion, as the overall record of filings presents a vastly more mixed picture, including alleged representations by the defendants to preserve the easement as a condition of obtaining approvals of the project. Morever, even if there had been no showing of the existence of an express easement, this in and of itself does not refute the existence of such an easement under other theories. For example, even under those circumstances where a plaintiff's case for an express easement is refuted by documentary evidence, the plaintiff may nonetheless be entitled to an implied easement. Gherardi v. Burke, 144 A.D. 2d 339 (2nd Dept. 1988). Although no rights by implication can arise where instruments on file clearly negative an intention on the part of the grantor to create an easement [Fieder v. Terstiege, 56 N.Y.S. 2d 837 [Sup Ct, Suffolk County, 1945] , there are no instruments of this conclusive effect on file in this matter.

An easement may be implied from pre-existing use upon severance of title when three elements are shown: 1. Unity and subsequent separation of title; 2. The claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and 3. The use must be necessary to the beneficial enjoyment of the land retained. Abbott v. Herring, 97 A.D. 2d 870, aff'd 62 NY 2d 1028.

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To establish the element of necessity the proponent need only establish "reasonable" necessity, not absolute necessity. Monte v. DeMarco, 192 A.D.2d 1111.

With respect to the cause of action for an easement based on prior use of the Park Property, the plaintiff's demonstration that the owner of 1201 Findlay made lengthy, continuous and obvious use of the Park Property for the requisite period is unrefuted.

With respect to the cause of action for an easement based on estoppel, the plaintiffs assert that the defendants repeatedly represented that this easement existed in various applications with the City Planning Commission, and that plaintiffs' reliance on these representations was reasonable. Although this use of the term "easement" was inconsistent, with the word "license" being substituted at times, for the purposes of this motion the Defendants have failed to meet their burden of proof.

The defendants make no other attempted refutations of the causes of action seeking an easement by necessity, by estoppel or through prior use.

As there has been no showing by defendants that the amended complaint has failed to substantiate the elements of an easement by grant, by necessity, by estoppel or prior use, or that these elements are refuted by documentary evidence, that portion of the motion seeking dismissal of the first, second, third and fourth causes of action is denied.

Specific Performance of the Use Agreement

The defendants seek dismissal of the sixth cause of action seeking specific enforcement of a Use Agreement dated November 1969 between Daughters of Jacob Geriatric Center and Findlay House Inc. In this agreement the parties covenanted and agreed that the land – i.e. all of the parcels, namely the 1201 Findlay Property, the Park Property, the Findlay House Property, the 315 Residence Property, the Nursing Home Property, and the Garage Property - would be developed as a unit consistent with the provisions of the City Planning Commission dated October 20, 1965 CP-19080, Cal. No. 24, and that "this restriction on the use of land shall be binding upon and shall encumber the said land and inure to the benefit of successors in interest and/or assigns of the parties to this agreement. " On or about January 14, 1971 an Amendment was entered into which excepted the Nursing Home property from the Use Agreement. Beyond this, the plaintiffs assert that the overall plans submitted required that all properties aside from the Nursing Home property be developed together without regard for zoning lot lines so that each property could benefit from the others' development rights, without which these properties could not have been legally developed

in their present form.

Although defendants assert that this Use Agreement is without relevance because it was entered into in connection with the construction of Findlay House, and before the Findlay Plaza project was completed, this interpretation fails to account for the scope of the covenant entered into with respect to all of the parcels, excepting only the Nursing Home, or the fact that the Agreement expressly provided that the covenants would run with all of these parcels in perpetuity. There was also nothing in this Agreement which provided that approval of the Findlay Plaza project by the municipal authorities would vitiate any of the covenants contains therein. No documentary proof has been provided that this Use Agreement, except for the omission of the Nursing Home property noted above, has been vacated or amended in any manner significant to this cause of action, and as such, this portion of the motion is denied.

Cause of Action for Damages

As the defendants have not met their burden of demonstrating that the plaintiffs' four causes of actions seeking an easement, or any of them, should be dismissed, it follows that this portion of the motion seeking dismissal of the cause of action seeking money damages for interference with the easement must also be denied.

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The Findlay and Teller Bridges

Finally, the defendants move to dismiss the eighth cause of action as against defendant DOJ Support for removal of the Findlay Bridge and the Teller Bridge upon the grounds that the defendant Findlay Plaza was responsible for these bridges, not DOJ Support. It is further asserted that under the terms of the deed transferring title to plaintiffs after the HUD foreclosure the plaintiffs also received title to fixtures and improvements on the land, which would include the two pedestrian bridges.

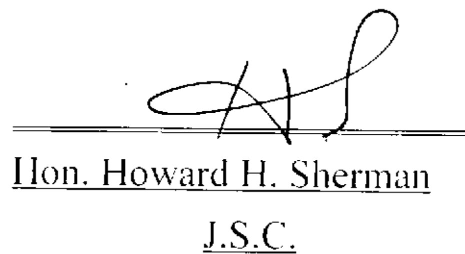
The Court finds neither of these arguments persuasive, as no documentary proof conclusively demonstrating DOJ Support's lack of involvement in this matter has been proffered, particularly where a significant portion of the defendants' motion is contested by plaintiffs' claim that DOJ Support, then known as Daughters of Jacob Geriatric Center, actually built the Teller Bridge. The consent agreements between the City of New York and the Findlay Plaza Agreement, wherein the latter agreed to be solely responsible for removal of these pedestrian bridges, is also not conclusive proof of lack of responsibility vis a vis the other corporate defendants. Moreover, whether these bridges are to be considered fixtures or improvements, as contended by defendants, or encroachments as contended

by plaintiffs, is a question of fact which is not resolved on these papers. Summary dismissal is not warranted on this record. This portion of the motion is denied.

Beyond this, all motions are denied.

This will constitute the decision and order of this Court.

Dated: April 8 2011
Bronx, New York



Hon. Howard H. Sherman
J.S.C.