

**Adams v Schneider**

2012 NY Slip Op 30629(U)

March 15, 2012

Sup Ct, Greene County

Docket Number: 11-988

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

RAYMOND E. ADAMS and MARK R. ADAMS

Plaintiffs,

-against-

**DECISION and ORDER**  
**INDEX NO. 11-988**  
**RJI NO. 19-12-6122**

SARAH SCHNEIDER

Defendant.

SARAH SCHNEIDER

Third Party Plaintiff,

-against-

SANTO ASSOCIATES LAND SURVEYING AND  
ENGINEERING, P.C. and ALTON P. MACDONALD, JR.

Third Party Defendants.

Supreme Court Greene County All Purpose Term, March 1, 2012  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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and Engineering, PC and Alton P. MacDonald, Jr.*  
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**TERESI, J.:**

Plaintiffs commenced this action claiming, under a number of legal theories, their ownership of an easement for crossing Sarah Schneider's (hereinafter "Schneider") adjacent property (hereinafter "the servient estate"). Issue was joined by Schneider. She then commenced a third party breach of contract action against the surveyors who drafted a survey for her, without depicting the alleged easement. While it is unclear whether the Third Party Defendants (hereinafter "Santo Defendants") joined issue, discovery is ongoing.

Plaintiffs now move for summary judgment pursuant CPLR §3212, and the Santo Defendants move to dismiss the third party complaint as time barred pursuant to CPLR §3211(a)(5). Schneider opposes both motions. Because the Plaintiffs' summary judgment motion is procedurally defective it is denied. The Santo Defendants, however, demonstrated their entitlement to dismissal of the third party complaint.

Considering Plaintiffs' summary judgment motion first, CPLR §3212(b) states that all "motion[s] for summary judgment shall be supported... by a copy of the pleadings." A movant's "failure to provide a copy of all of the pleadings with their summary judgment motion require[s] summary denial of the motion." (Welton v Drobnicki, 298 AD2d 757 [3d Dept 2002], Bonded Concrete, Inc. v Town of Saugerties, 3 AD3d 729 [3d Dept 2004], Fishkin v Feinstein, 67 AD3d 961 [2d Dept 2009], Senor v State, 23 AD3d 851 [3d Dept 2005]).

Here, Plaintiffs motion is denied because they failed to submit all of the pleadings. Plaintiffs failed to submit any of the third party action's pleadings. The Santo Defendants' motion did not corrected such defect, and make the record "sufficiently complete" (Greene v Wood, 6 AD3d 976 [3d Dept 2004], quoting General Motors Acceptance Corp. v Albany Water Bd., 187 AD2d 894 [3d Dept 1992]), because they did not attach a copy of the third party answer. Thus, Plaintiffs' summary judgment motion must be denied.

Moreover, even if the merits of Plaintiffs' motion were considered, it would still be denied because issues of fact remain. On this record, both Plaintiffs and Schneider submit expert testimony concerning the alleged easement. While the experts agree on the chain of title for the relevant properties, the experts' proffer contradictory analyses of the deed Plaintiffs' allege created their easement. Because this instrument is "susceptible of more than one interpretation... the easement is not clear and unambiguous on its face [and] triable issue[s] of fact" remain. (Jordan v Vogel, 59 AD3d 919, 920-21 [3d Dept 2009]).

Turning next to the Santo Defendants' motion, they demonstrated their entitlement to dismissal of the complaint pursuant to CPLR §3211(a)(5).

"To dismiss a cause of action pursuant to CPLR 3211(a)(5), on the ground that it is barred by the Statute of Limitations, a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired." (Morris v Gianelli, 71 AD3d 965, 967 [2d Dept. 2010] quoting Savarese v Shatz, 273 AD2d 219 [2d Dept 2000]; see also Siegel v Wank, 183 AD2d 158 [3d Dept 1992]; Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc., 168 AD2d 822 [3d Dept. 1990]). Once the defendant has met this threshold requirement, "the burden shifts to the [plaintiff] to aver evidentiary facts establishing that the case at hand falls within [an

exception to the statutory period.]” (Hoosac Val. Farmers Exch. v. AG Assets, supra at 823).

On this record, the Santo Defendants met their prima facie burden. Schneider’s third party complaint alleges that she entered into a contract with the Santo Defendants for a survey of the servient estate on March 8, 2005. The Santo Defendants’ allege, with Mr. MacDonald’s affidavit, that the survey was completed on March 27, 2005. He further established that Schneider used such survey to obtain final subdivision approval on September 7, 2005. As such, Schneider’s cause of action accrued, at the very latest, on September 7, 2005. Because this action was not commenced until August 25, 2011, the Santo Defendants established that CPLR §214(6)’s three year statute of limitations expired prior to commencement.

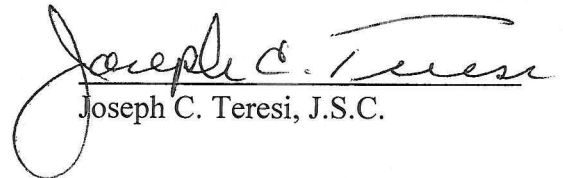
With the burden shifted, Schneider failed to proffer sufficient evidentiary facts to establish an exception to the statute. While Schneider’s affidavit alleges that the Santo Defendants’ work was not complete until August 30, 2007, accepting such allegation as true her cause of action still accrued more than three years prior to her commencement of this action. Her complaint’s allegation that work occurred in 2008, even when liberally construed, is similarly unavailing because it is wholly conclusory and provides no evidentiary facts. Additionally, Schneider’s attorney is incorrect that this motion is premature (CPLR §3211[e]), nor did the opposition papers specify “facts essential to justify opposition [that] may exist but cannot then be stated.” (CPLR §3211[d]; Beesmer v Besicorp Dev., Inc., 72 AD3d 1460 [3d Dept 2010]). Moreover, contrary to Schneider’s attorney’s assertions, the third party complaint does not detail a cause of action for fraud (CPLR §3016[b]) nor has she proffered evidentiary facts to establish that a fraud cause of action was timely commenced.

Accordingly, the Santo Defendants' motion to dismiss is granted.

This Decision and Order is being returned to the attorneys for the Santo Defendants. 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: Albany, New York  
March 15, 2012

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, undated, Affirmation of Ralph Lewis, dated February 8, 2012, with attached Exhibits A-C; Affidavit of Charles Foote, dated January 31, 2012, with attached Exhibits A-D; Affidavit of Gary Harvey, dated January 26, 2012, with attached Exhibits A-B; Affidavit of Alton MacDonald, dated January 31, 2012, with attached Exhibits A-B.
2. Affirmation of Sarah Schneider, dated February 15, 2012, Affidavit of Kenneth Schwartz, dated February 8, 2012 with attached Exhibits A-L.
3. Notice of Motion, dated January 18, 2012, Affidavit of Alton MacDonald, dated January 31, 2012, with attached Exhibits A-D.
4. Affirmation of Sarah Schneider, dated February 19, 2012, Affidavit of Sarah "Sally" Schneider, dated February 13, 2012 with attached Exhibits A-L.
5. Affirmation of Robert Deily, dated March 1, 2012.