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SHORT FORM ORDER INDEX NO. 11149/2011

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

STEVE JOHNSON,

Plaintiff,

-against-

PAUL G. BRODER and ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendants.

ORIG. RETURN DATE: DECEMBER 22, 2011
FINAL SUBMISSION DATE: JANUARY 26, 2012
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: JANUARY 12, 2012
FINAL SUBMISSION DATE: JANUARY 26, 2012
MTN. SEQ. #: 002
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 13 read on this motion TO AMEND PLEADINGS AND FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-motion and supporting papers 5-7; Memorandum of Law 8; Reply Affidavit and supporting papers 9, 10; Reply Memorandum of Law 11; Reply Affidavit 12; Reply Memorandum of Law 13; it is,

ORDERED that this motion by defendant, PAUL G. BRODER ("defendant"), for an Order, pursuant to CPLR 3025 (b), granting defendant leave to amend/correct his answer; and, upon such leave, pursuant to CPLR 3212, granting partial summary judgment to defendant on the ground that the statute of limitations is a complete defense to plaintiff's claim of mutual mistake, is hereby **GRANTED** as set forth hereinafter; and it is further

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ORDERED that this cross-motion by plaintiff, STEVE JOHNSON, for an Order, pursuant to CPLR 3212, granting summary judgment to plaintiff declaring that defendant has no interest in the land described as Pole Drive and that his easement for ingress and egress is over the existing gravel driveway, on the grounds that: (1) it was the intent of the parties that the grant to defendant and his predecessors-in-title be over the existing gravel driveway; (2) defendant and his predecessors-in-title have abandoned any interest of ingress and egress over a paper street known as Pole Drive; (3) that plaintiff has possessed the land and appurtenances within the paper street known as Pole Drive for a period in excess of ten years, openly, notoriously and adverse to defendant and his predecessors-in-title; and (4) that by the conduct of both parties, and their predecessors-in-title under the doctrine of practical location, they have fixed the location of the easement of ingress and egress by their thirty-two (32) years of use of the gravel driveway for access to their property, is hereby **DENIED** for the reasons set forth hereinafter.

Plaintiff commenced this action on April 4, 2011, by the filing and subsequent service of a summons and verified complaint seeking a judgment reforming a deed dated, August 31, 1998, granting the property commonly known as 80 Mount Grey Road, Setauket (Village of Old Field), New York to defendant: (1) omitting therefrom the metes and bounds description of a paper street known as "Pole Drive" and substituting therefor an easement for a right-of-way over the gravel driveway actually used and maintained by the parties subject to relocation by the Village of Old Field upon a subdivision approval; (2) declaring that defendant has no interest in nor right in the property described as Pole Drive; and (3) declaring that plaintiff is the owner of the real property encompassed within the description of Pole Drive in fee simple without restriction or encumbrance. Plaintiff bases his request for declaratory relief upon the assertion that there was a mutual mistake of fact by plaintiff's and defendant's predecessors-in-title as to the location of the gravel driveway, as a result thereof, a mis-description of the right-of-way in defendant's deed and in the deeds of defendant's predecessors-in-title. Plaintiff claims that it was the intention of the previous property owners that defendant and his predecessors-in-title have an easement of ingress and egress solely over the existing gravel driveway. In addition, plaintiff argues that he has acquired Pole Drive by adverse possession as he and his predecessors-in-title have, since 1951, used and occupied the area encompassed within the easement described as Pole Drive openly hostile and adverse to any persons entering on the premises. Issue was joined in this action on or about June 6, 2011, by the service of defendant's verified answer to the complaint by defendant's former counsel.

Plaintiff is the owner of the property commonly known as 76 Mount Grey Road, Setauket (Village of Old Field), New York, as of 1986. Defendant's property is contiguous to plaintiff's property. Incorporated into the deed of defendant and his predecessor-in-title from 1979 is a right-of-way easement for ingress and egress in favor of defendant over plaintiff's property and is expressly described in defendant's deed by metes and bounds.

Defendant has filed the instant motion, and plaintiff has filed the instant cross-motion, seeking the relief described hereinabove. Initially, defendant seeks leave to amend/correct his answer to separately number his affirmative defense of statute of limitations. Plaintiff does not oppose this branch of defendant's motion. Accordingly, that branch of defendant's motion seeking to amend/correct his answer is **GRANTED**. The proposed amended verified answer, annexed to defendant's moving papers as Exhibit "D," shall be deemed served upon plaintiff as of the date of service of the instant Order upon plaintiff with notice of entry.

Upon the amendment of his answer, defendant seeks partial summary judgment on the ground that the statute of limitations is a complete defense to plaintiff's claim of mutual mistake. Initially, defendant argues that as plaintiff and defendant were not parties to the original agreement concerning the recorded easement, plaintiff lacks standing to assert a claim for mutual mistake. Notwithstanding the foregoing, defendant alleges that the six-year statute of limitations is a defense to a claim of mutual mistake, pursuant to CPLR 213 (6). Defendant argues that the statute of limitations begins to run when the mistake is made, not when it is discovered.

A cause of action seeking reformation of an instrument on the ground of mistake is governed by the six-year statute of limitations pursuant to CPLR 213 (6), which begins to run on the date the mistake was made (*see Taintor v Taintor*, 50 AD3d 887 [2008]; *Amalgamated Dwellings v Hillman Housing Corp.*, 299 AD2d 199 [2002]; *Ta Chun Wang v Chun Wong*, 163 AD2d 300 [1990], *appeal denied* 77 NY2d 804 [1991], *cert denied* 501 US 1252 [1991]). On a motion to dismiss a claim on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see e.g. Baptiste v Harding-Marin*, 88 AD3d 752 [2011]; *Rakusin v Miano*, 84 AD3d 1051 [2011]).

Here, the Court finds that defendant has demonstrated that plaintiff's claim of mutual mistake was not timely commenced within six years after the alleged mistake was made in the deed dated August 31, 1998 (*see* CPLR 213 [6]; *Morris v Gianelli*, 71 AD3d 965 [2010]; *Zane v Minion*, 63 AD3d 1151 [2009]). Indeed, the Court notes that plaintiff himself has represented to the Court that the mistake was originally made in the deed dated August 27, 1979, which had transferred the property from plaintiff's father, William Johnson, to Shokrollah Fakheri and Monireh Fakheri. Accordingly, that branch of defendant's motion seeking partial summary judgment in favor of defendant on the ground that the statute of limitations is a complete defense to plaintiff's claim of mutual mistake, is **GRANTED**.

With respect to plaintiff's cross-motion for summary judgment, on a motion for 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]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). 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 sufficient evidence 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 the instant matter, plaintiff seeks to have this Court summarily hold that defendant has no interest in Pole Drive based upon: (1) defendant's alleged non-use of Pole Drive; (2) plaintiff's adverse possession of Pole Drive; and (3) that the doctrine of "practical location" should govern the location of the easement, despite the fact that it is an express easement in favor of defendant's property specifically recited in at least four deeds. In opposition to this motion,

defendant avers that he has asserted his rights to the easement in writings to plaintiff in 2000 and 2001. Further, the Court finds that there exist questions of fact as to defendant's use, or non-use, of the right-of-way easement, which preclude summary judgment on that ground. Plaintiff claims that he exclusively utilizes and maintains the easement land, while defendant contends that he constantly uses the westernmost portion of the easement land because the gravel driveway does not extend to defendant's property line. Moreover, the correspondence of plaintiff and defendant raise questions of fact as to whether plaintiff ever claimed to own Pole Drive free of the rights of defendant therein, thereby precluding a claim of adverse possession of the easement at this juncture. Finally, the doctrine of "practical location" does not apply to a particularly described easement, such as in the case at bar (*cf. Lewis v Young*, 92 NY2d 443 [1998]; *see MacKinnon v Croyle*, 72 AD3d 1356 [2010]). In any event, due to the parties' conflicting versions of the facts and circumstances surrounding the easement, as well as the express description of the easement in at least four separate deeds, the Court is unable to declare on this record that the gravel driveway constitutes the right-of-way easement for access to defendant's property.

Accordingly, for the foregoing reasons, this cross-motion by plaintiff for summary judgment is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: July 12, 2012

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**