

DeMato v Mallin

2012 NY Slip Op 32293(U)

August 23, 2012

Supreme Court, Suffolk County

Docket Number: 20684/2001

Judge: William B. Rebolini

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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Daniel G. DeMato, Diane C. DeMato,
Charles Drake, Jr., Lisa Drake and Curt Koch,

Plaintiffs,

-against-

Barry Mallin, Gail Kriegel Mallin
and Town of Southold,

Defendants.

Motion Sequence No.: 008; MD
Motion Date: 6/20/12
Submitted: 8/1/12

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Upon the following papers numbered 1 to 65 read upon this application for summary judgment dismissing the amended complaint: Notice of Motion and supporting papers, 1 - 42; Answering Affidavits and supporting papers, 43 - 62; Replying Affidavits and supporting papers, 63 - 65, and upon the conference call with chambers held on August 15, 2012; it is

ORDERED that this motion by defendants Barry Mallin and Gail Kriegel Mallin for an order awarding summary judgment in their favor against plaintiffs is denied.

Plaintiffs Daniel G. DeMato, Diane C. DeMato, Charles Drake, Jr., Lisa Drake and Curt Koch commenced this action by the filing of a summons and complaint on August 31, 2001 for a declaratory judgment declaring that they are possessed of an easement over Bayberry Road,

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Cutchogue, New York, and for an order directing the removal by defendants of encroaching structures. Plaintiffs also seek recovery of monetary damages in trespass. It is alleged in the complaint that the parties are owners of real property located in a subdivision depicted on a subdivision map entitled "Amended Map A of Nassau Point, owned by Nassau Point Club Properties, Inc., situate in Town of Southold, Long Island, N.Y." (Map of Nassau Point) that was filed in the office of the Suffolk County Clerk on August 16, 1922. The plaintiffs' properties are shown on the subdivision map to abut Bayberry Road on its easterly side, so that Bayberry Road forms the western border of each of plaintiffs' properties. It is further alleged in the complaint that the deed to defendants' grantor Henrietta Silverman which was filed on November 13, 1989 conveyed property that included a portion of Bayberry Road, and that such conveyance was subject to the rights of others to pass and re-pass over Bayberry Road. It is plaintiffs' contention that defendants' title is burdened with an implied easement along Bayberry Road in their favor. It is also alleged that defendants installed concrete curbing, Belgian block, fencing and a gate along portions of Bayberry Road which have obstructed plaintiffs' access to Bayberry Road and which have interfered with their use thereof. Plaintiffs seek a judgment declaring that they are possessed of an easement over Bayberry Road and that defendants must remove the obstructions. Plaintiffs DeMato and Drake also seek recovery of damages for alleged trespass resulting from the erection of fencing by defendants on their properties.

By memorandum decision and order of the Court dated September 9, 2008 (Weber, J.), plaintiffs were granted leave to amend the complaint to join the Town of Southold. Additional causes of action were asserted in the amended complaint for recovery of damages by plaintiffs DeMato and Drake for defendants' alleged interference with their right to use Bayberry Road, which required plaintiffs to undergo additional expense to reconfigure building plans, for a judgment declaring invalid the certificate of abandonment relating to Bayberry Road, and for a judgment declaring invalid and unconstitutional Real Property Law § 335 (3). In their answer to the amended complaint defendants raised the defense of laches and asserted as an affirmative defense that Bayberry Road was abandoned in accordance with Real Property Law § 335 (3) by the filing of a certificate of abandonment in the office of the Suffolk County Clerk on September 26, 2000. Defendants also asserted a counterclaim for recovery of damages in defamation. Plaintiffs' reply to defendants' answer alleged as an affirmative defense that the statements made to secure the certificate of abandonment were false, that Bayberry Road was open and/or used by the public and not subject to abandonment, and that defendants acted with unclean hands and should be estopped from raising their affirmative defenses and counterclaims.

By memorandum decision of this Court dated April 2, 2012, the action was dismissed on motion of the Town of Southold as untimely under the four-month statute of limitations of CPLR 217 governing claims against a municipal body.

Defendants Mallin now move for an order awarding summary judgment in their favor dismissing the complaint against them. Plaintiffs have opposed the motion.

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept 1986]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*see Gilbert Frank Corp. v Federal Insurance Co.*, *supra*). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

In support of their motion, defendants assert that no express easement to Bayberry Road was granted to plaintiffs. Plaintiffs do not dispute such contention. The chain of title for that portion of defendants' property referred to as "Lot Number Two Hundred and Twenty-two, (222)" begins with a 1923 deed from Nassau Point Club Properties Inc. to Floyd S. Brown. Title to the portion of Bayberry Road bounded westerly and southerly by the easterly and northerly lines of lot 222 and by the curved line of Wunneweta Road on the west and south was conveyed by quitclaim deed from Nassau Point Club Properties to Abraham L. Garber and Albert Pollack by deed dated August 29, 1951. By deed dated August 2, 1971, title to lots 222 to 226, inclusive, and to a certain portion of Bayberry Road was conveyed to Edward N. Cartnick and Marie M. Cartnick, subject to the "[r]ights . . . any person may have in . . . Bayberry Road" without a specific description of those rights. In 1983, the Cartnicks conveyed a portion of the property, now known as lot 7.2, to Daniel Silverman and Henrietta Silverman and a portion of the property, now known as lot 7.1, to 158th Street Realty, Inc. The deed dated April 22, 1983 from the Cartnicks to 158th Street Realty, Inc., expressly states that the conveyance is subject to the "[r]ights any person may have in the aforesaid Bayberry Road, including the rights of others to pass and repass over Bayberry Road." In 1997, both lots 7.1 and 7.2 were conveyed to the defendants Mallin by deeds which do not expressly subject the conveyances to the rights of others in Bayberry Road.

The plaintiffs DeMato own lots 134 and 135 on the Map of Nassau Point, now known as lot 5.3 on the Suffolk County Tax Map of District 1000, Section 111.00, Block 12.00. Plaintiffs Drake own lots 132 and 133, now known as lot 5.2. Plaintiff Koch owns lots 138 and 139, now known as lot 5.5. The chain of title for all of the plaintiffs' lots begins with a deed conveyance in 1926 from Nassau Point Club Properties Inc. to J. Alonzo Hulse, and a deed conveyance the following day to John D. Howell. In 1947 the lots were transferred to Arthur H. Huene and Elsie B. Huene. Following Huene's death, a deed conveyance made in 1995 to Trustees of lots 132 and 133, as well

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as lots 136 and 137, noted that the property line ran “along the easterly side of Bayberry Road. . .” In 1997 the Trustees conveyed lots 136 and 137 to Koch by deed which states that the property line runs “along the easterly side of Bayberry Road.” In 1998 the Trustees conveyed lots 132 and 133 to Drake by deed that describes the lot as running “along the easterly side of Baybery [*sic*] Road.”

According to the affidavit of plaintiff Curt Koch as well as his deposition testimony, Koch used Bayberry Road in his vehicle “at least a dozen times” before purchasing the property in August 1997, and “at least another dozen times between August 1997 and the issuance of a building permit in July of 1998 and continuing thereafter.” In addition, Mr. Koch spoke with defendant Barry Mallin in July of 2000 because his post and rail fence along Bayberry Road was blocking Koch’s access to Bayberry Road. Since Mallin indicated that he wanted screening for privacy, on August 8, 2000 Koch sent Mallin a proposal for screening along Bayberry Road with access on to the adjacent properties. According to Koch, at one point Mallin suggested that Koch pay Mallin “to use Bayberry to offset some of his taxes.” On or about August 11, 2000 the defendants executed a certificate of abandonment in which they certified that Bayberry Road “is neither open, nor public highway, nor used by the public, nor necessary for the use of owners, occupants or any other persons having an interest in any part of the subdivision.” On September 14, 2000, the Town Assessor consented to and approved the defendants’ application and the certificate of abandonment was thereafter filed in the office of the Suffolk County Clerk. It is averred by Koch that the defendants never forwarded a copy of the certificate of abandonment to him and that Koch learned of it when the defendants’ answer was served in this action.

It is well-established that when property is described in a conveyance with reference to a subdivision map depicting proposed streets abutting the lot conveyed, easements in the private streets appurtenant to the lot pass to the grantee with the conveyance (*see Scaglione v Commonwealth Land Title Ins. Co.*, 303 AD2d 671, 757 NYS2d 84 [2d Dept 2003]; *see also DeRuscio v Jackson*, 164 AD2d 684, 565 NYS2d 593 [3d Dept 1991]). Moreover, the implied easement so conveyed is “as extensive and unrestricted as if they were public streets” (*Nassau Point Prop. Owners Assn. v Tirado*, 29 AD3d 754, 757, 815 NYS2d 674 [2d Dept 2006], quoting *Dalton v Levy*, 258 NY 161, 165, 179 NE 371 [1932]).

Although defendants acknowledge the general rule that would indicate that plaintiffs possess an implied easement over Bayberry Road, they argue that no implied easement exists because the 1951 conveyance of title to the road was without express reservation of any rights to the adjacent property owners. Assuming *arguendo* that an implied easement existed, however, the defendants also contend that the filing of the certificate of abandonment restored Bayberry Road to its status as property free of any encumbrance. In this regard, the defendants assert that because Bayberry Road was “properly abandoned” under Real Property Law § 335(3), it was restored to its status as described land. Defendants also argue that the dismissal of plaintiffs’ claims against the Town of Southold bars any challenge to the validity of the certificate of abandonment, although such dismissal was not on the merits and was made solely on the ground that the claims were time-barred under CPLR 217.

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It is the determination of this Court that triable issues of fact have been raised in the evidence before this Court. In view of the undisputed evidence that the plaintiffs' lots were conveyed with reference to a subdivision map depicting Bayberry Road as abutting the lots conveyed, defendants' property rights was subject to the rights of plaintiff landowners who own property to which the disputed street is appurtenant (*see Nassau Point Prop. Owners Assn. v Tirado, supra*, 29 AD3d 754, 757, 815 NYS2d 674 [2d Dept 2006]). There is evidence before this Court that suggests that Bayberry Road was not "properly abandoned" as a result of alleged misrepresentations made on the certificate of abandonment. Thus, plaintiffs have raised a triable issue of fact whether defendants should be estopped from asserting that their filing of a certificate of abandonment extinguished any rights that the plaintiffs had in Bayberry Road. The principle of estoppel "prohibits a person, upon principles of honesty and fair and open dealing, from asserting rights, the enforcement of which would, through his omissions or commissions, work fraud and injustice" (*White v LaDue & Fitch, Inc.*, 303 NY 122, 128, 100 NE2d 167 [1951], quoting *Rothschild v Title Guar. & Trust Co.*, 204 NY 458, 464). The record before this Court demonstrates that issues exist whether defendants' conduct is sufficiently culpable to justify enforcing equitable estoppel against them.

Dated:

August 23, 2012


 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION