

Naghavi v Giglio

2013 NY Slip Op 30732(U)

April 4, 2013

Supreme Court, Suffolk County

Docket Number: 26836/2008

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

INDEX NO.: 26836/2008
SUBMIT DATE: 12-19-2012
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 5/26/2010
MOTION NO.: MOT D

-----X
REZA NAGHAVI a/k/a RAY S. NAGHAVI
and SITARA KHAN,

Plaintiffs,

-against-

DAMON GIGLIO,

Defendant.
-----X

**TWOMEY, LATHAM, SHEA, KELLEY,
DUBIN & QUARTARARO, LLP**
Attorneys for Plaintiffs
33 West Second Street, P.O. Box 9398
Riverhead, NY 11901-9398

STANLEY S. ZINNER, PC
Attorneys for Defendant
58 South Service Rd, Suite 410, Melville, NY 11747

DAVID J. GILMARTIN, Intervenor
320 Hampton Road, P.O. Drawer 5071
Southampton, NY 11968-5071

RONALD E. DePETRIS, Intervenor
240 Madison Avenue, New York, NY 10016

Upon the following papers numbered 1 to 110 read on this application for an order holding the defendant in civil contempt; Notice of Motion/Order to Show Cause and supporting papers 1-26; 49-50; 69-78 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 27-48; 60-64; 79-98 ; Replying Affidavits and supporting papers 51-59; 65-68; 99-100 ; Other ___; it is

ORDERED that so much of the application by the Intervenors, David J. Gilmartin and Ronald E. DePetris, ["the Intervenors"], for an order adjudging the defendant, Damon Giglio, ["the defendant" or "Giglio"], in civil contempt for willfully violating this Court's Order dated December 2, 2008, and punishing the defendant by further Order pursuant to Judiciary Law § 753, including the imposition of fines to compensate the aggrieved parties for the injuries to their property rights caused by defendant's contempt, and for attorneys' fees incurred in connection with the contempt proceedings, as well as coercive fines to ensure the defendant's compliance with the Preliminary Injunction and Orders of this Court is granted in part and denied in part.

The plaintiffs originally moved for the above-described relief by notice of motion dated April 26, 2010. Part of the motion has remained open for further proceedings and pending the parties' attempts to resolve their differences without court intervention. The parties' familiarity with the facts underlying the relief sought is assumed and will be restated here only to inform the instant decision. The original plaintiffs, Reza Naghavi a/k/a Ray S. Naghavi and Sitara Khan, commenced the action alleging that they [were] the owners of real property located at 14 Sandringham Lane in Southampton, New York. The defendant is the owner of the property located at 12 Sandringham Lane. The lots are located on the Sandringham Beach subdivision map ["the map"].

The action involves an easement running over a portion of Lot No. 2 on the map owned by defendant Giglio. Giglio's is a "flagpole lot" with the easement running along the entire twenty foot (20') wide "flagpole" portion of the property as well as the easterly twenty feet (20') of the "flag" portion of the lot. The grant of the easement to each lot owner giving access to Shinnecock Bay was memorialized in a Declaration dated September 1, 1977, and recorded in the Suffolk County Clerk's Office on September 21, 1977. When Giglio purchased the property at 12 Sandringham in 2006, he was unaware that a 20' x 645' pedestrian right-of-way or easement encumbered the property.

The easement provides access to and from Sandringham Lane, a public street, and Shinnecock Bay for nineteen (19) owners of lots on the map of Sandringham Beach including the Intervenor, David J. Gilmartin and Ronald E. DePetris, who own property at 37 Kenwood Road, and 27 Kenwood Road, Southampton, respectively. The easement is the only "on-site" access to the beach and bay by the other nineteen lot owners. The 645 linear foot easement runs along the easterly side of Giglio's property and also serves as his driveway. Both Messrs. Gilmartin and DePetris are practicing attorneys who represent themselves in this action.¹

The action was commenced in July of 2008 to enjoin any interference with and/or obstruction of the easement. The complaint alleged that Giglio repeatedly blocked and obstructed the easement. Shortly after purchasing his home, Giglio embarked on an extensive renovation of the premises which included revisions to the bay water-frontage property including the easement.

A temporary restraining order was first issued on July 17, 2008, as modified by stipulation dated August 13, 2008, enjoining and restraining Giglio, and anyone acting on his behalf, from obstructing and interfering with the easement pending a decision on the motion, brought on by Order to Show Cause, for a preliminary injunction. The temporary restraining order was modified by a stipulation of the parties dated August 13, 2008, which provided, inter alia, that "the defendant, his agents, servants and employees [could] temporarily park or cause to be temporarily parked construction vehicles or equipment in the passageway created by the easement provided the same [did] not preclude, prevent, or unreasonably obstruct access to or from Shinnecock Bay."

¹ The application by Ronald E. DePetris and David J. Gilmartin for leave to intervene as plaintiffs pursuant to CPLR 1012 [a] [3] was granted by separate Order dated August 6, 2010.

By order dated December 2, 2008, the Court granted a preliminary injunction and ordered that Giglio and his agents were “enjoined from obstructing, interfering with, blocking, leaving construction debris, sand or dirt piles upon, and/or taking any other action that unreasonably obstructs or prevents access to the pedestrian easement and right-of-way, provided however, that motor vehicles may be temporarily parked along the driveway located within the easement as long as they don’t obstruct access to or from the beachfront via the right-of-way.”

The instant motion was brought on by Order to Show Cause seeking dual relief: leave for Messrs. Gilmartin and DePetris to intervene, and for civil contempt. Although the original plaintiffs Naghavi and Khan joined in the motion, they submitted no separate papers on the application. The Intervenor argued that Giglio and/or his agents continuously and blatantly violated the preliminary injunction by blocking the easement with debris, sand and dirt piles, construction vehicles, a dumpster, and a six foot high privet hedge and wire fence erected approximately four to five feet from the easternmost border of the easement after the issuance of the preliminary injunction. The configuration created a four foot wide grassy walkway of sorts running the length of the easement from the public street and approximately 400 feet south. What remained of the easement was a fifteen feet wide driveway, rather than a twenty foot wide right-of-way for the first 400 feet of the easement. The Intervenor also argued that Giglio removed the natural vegetation on the westernmost edge of the easement and replaced it with a thick hedge planted in an elevated berm further narrowing the easement.

An affidavit provided by Giglio’s architect in opposition contended that Giglio constructed the grassy walkway separating Giglio’s driveway within the easement to protect Giglio’s neighbors from cars and construction and delivery vehicles entering the driveway and to provide a more esthetically pleasing walkway rather than the original overgrown gravel driveway, at considerable expense to Giglio. Giglio allegedly created the grassy walkway with input from Ted Hepp, then President of the Sandringham Beach Homeowners Association.

According to the architect’s affidavit, the wire fence that was erected adjacent to the four foot walkway was intended to prevent the privet hedges from expanding into the grassy walkway. Giglio’s affidavit contended that he constructed the grassy walkway only after meeting with the President and Board members of the homeowners association in June of 2009 who were uniformly in favor of Giglio’s proposals. Giglio attested that when he purchased the home in 2006, the right-of-way was only eleven feet wide due to overgrown natural vegetation and Giglio widened it to twenty feet. Giglio denied creating the walkway in order to narrow the existing easement from twenty feet to four feet. Giglio asserted that on May 14, 2010, while the instant motion was pending, he spoke with then Homeowners Association President Hepp who confirmed that the homeowners were satisfied with what Giglio had done in the right-of-way.

The Intervenor, Gilmartin and DePetris, dispute that the homeowners approved of the measures that Giglio had taken in the easement. In any event, the Intervenor urge that the easement was created for the benefit of the lot owners, as distinguished from the homeowners association. If Giglio wished to alter the easement by the construction of a walkway or otherwise, it was incumbent upon him under the terms of the preliminary injunction to seek a further court order.

On August 11, 2010 the court heard oral argument on the motion and reviewed numerous photographs including ones provided by Giglio's attorney that were purportedly taken the day before the oral argument. The court specifically stated that Giglio was entitled to install fencing so long as that fencing did not impair the right of passage of the benefitted property, in this case, no less than a width of twenty feet representing the width of the easement. However, the court found that the erection of the fence and privet hedge located four feet from the eastern most boundary of the property line within the easement was in contempt of the Court's prior order granting the preliminary injunction and specifically instructed Giglio to "[t]ake the hedge and the fence out".

The court gave Giglio until September 22, 2010 as a period of time to cure. If the fence and hedge were removed or, if the parties reached some other agreement before that date, the parties were not required to appear on the adjourned date. Giglio removed the fence and privet hedge prior to the adjourned date. The court's finding at the oral argument that Giglio was in contempt of the December 2, 2008 order was limited to the issue of the fence and privet hedge obstructing the easement, not the remaining allegations of dumpsters, vehicles, debris, etc. alleged to have obstructed the easement between December 2, 2008, and the Fall of 2009.

"To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with contempt willfully violated a clear and unequivocal mandate of a court's order, with knowledge of that order's terms, thereby prejudicing the movant's rights" (*Rubin v. Rubin*, 78 A.D.3d 812, 813, 911 N.Y.S.2d 384; see *Judiciary Law* § 753[A][3]; *McCain v. Dinkins*, 84 N.Y.2d 216, 225–226, 616 N.Y.S.2d 335, 639 N.E.2d 1132; *McGrath v. McGrath*, 85 A.D.3d 742, 742, 924 N.Y.S.2d 805; *Matter of Philie v. Singer*, 79 A.D.3d 1041, 1042, 913 N.Y.S.2d 745). Additionally, the movant has the burden of proving contempt by clear and convincing evidence (see *Matter of Philie v. Singer*, 79 A.D.3d at 1042, 913 N.Y.S.2d 745; *Vujovic v. Vujovic*, 16 A.D.3d 490, 491, 791 N.Y.S.2d 648).

Regarding the erection of the fence and privet hedge, at the oral argument conducted in August of 2010, the court found that Giglio was in contempt of the Court's 2008 order. Giglio took advantage of the period of time to cure and removed the fence and hedge restoring the twenty foot wide easement, thereby purging himself of the contempt (see *Yang v. Luo*, 103 A.D.3d 661, 960 N.Y.S.2d 129 [2d Dept. 2013]).

Nevertheless, the fact remains that the Intervenors incurred significant time away from their own livelihoods in applying to the court for leave to intervene and to enforce the terms of the preliminary injunction, ultimately leading to the restoration of the easement shortly after the oral argument in August of 2010. Mr. Gilmartin attests that he expended approximately sixty-six hours in legal work including the preparation of the motion leading up to the oral argument; Mr. DePetris attests that he likewise spent an additional fifty-six (56) hours from October 8, 2009 until and including August 11, 2010.

At an hourly rate of \$250, which this court finds to be the customary rate for similar services by lawyers in the community with like experience and comparable reputations to the Intervenors, (see

generally *Long Island Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.*, 865 F.Supp.2d 284 [E.D.N.Y. 2012] [collecting cases]), the defendant is assessed a fine of \$30,500, to be made payable to David J. Gilmartin and Ronald E. DePetris, plaintiffs. In addition, the defendant is also required to pay an additional \$338.89 as reimbursement for costs advanced by David J. Gilmartin, and a \$250 statutory fine in connection with the erection/installation of the fence and privet hedge.

In addition to the above, the court finds by clear and convincing evidence that the between June 8, 2009, and September 19, 2009, Giglio defied the court's 2008 order by obstructing the easement as evidenced by photographs annexed to the moving papers and described as follows: Exhibit G-4 taken June 8, 2009, depicting dumpster located in easement area; Exhibit H taken June 14, 2009, depicting sand pile, dumpster, debris and trash barrel within 20 foot wide right-of-way; Exhibit I-3 taken June 19, 2009 depicting unoccupied bulldozer parked in the middle of the easement; Exhibit N-1 taken September 2, 2009 depicting vehicles and equipment parked in the easement area, blocking easement; Exhibit O-1 taken September 10, 2009 depicting a truck and car blocking use of the easement; Exhibit P-2 taken September 19, 2009 depicting trucks and cars parked in the easement area; Exhibit Q-4 taken October 4, 2009 depicting irrigation head spraying within the pedestrian area; Exhibit R-1 taken December 6, 2009 depicting vehicles and debris parked and lying in the easement; Exhibit B-2 to Reply- taken June 8, 2009 showing a sandpile, landscape lumber and dumpster in the easement blocking the access by the driveway; Exhibit B-3 taken June 14, 2009 same sand pile, dumpster, landscape lumber and blocked access with garbage pail; Exhibit B-5 taken September 19, 2009 depicting three trucks parked in and blocking the easement.

A statutory fine in the amount of \$250 is assessed for the above enumerated violations of the court's order for a total additional amount of 2,750.00 (*see Judiciary Law* § 753).

The court granted the parties leave to supplement their original moving and opposition papers when, despite the court's encouragement, it became apparent that the parties were unable to resolve their remaining differences without court intervention. In fact, the Intervenor's have indicated their belief that Giglio has listed his premises for sale with several local realtors. Recent photographs of Giglio's premises including the easement reveal a finished, esthetically pleasing and well maintained premises that includes the easement.

In addition to the original moving and opposition and reply papers filed between April 26, 2010, and May 24, 2010, the court has also considered the defendant's Supplemental Affirmation dated August 14, 2012, the Intervenor's Affirmation in Reply to Supplemental Affirmation dated August 27, 2012, the Supplemental Affidavit of Messrs. DePetris and Gilmartin dated November 25, 2012 with exhibits, the defendant's Opposition Affirmation dated December 7, 2012, with exhibits, and the Intervenor's Affidavit in Reply To Opposition Affirmation and Affidavits dated December 17, 2012.

The additional submissions demonstrate that for the two-and-a-half years since the oral argument, Giglio was required to obtain various government permits and perform additional work on the property, albeit some of the work required as a result of Giglio's removal of natural vegetation and

disturbance of the sensitive wetlands located on his property. Giglio submitted a recent email received from former Homeowners Association President Ted Nepp dated November 9, 2012, substantiating Giglio's claim that "for a few years now" Nepp and other community members, exclusive of the Intervenor, felt that Giglio had fully complied with the Association's requests concerning the easement.

While the Intervenor is correct that the Homeowners Association does not speak for the lot owners who enjoy the easement, the fact that former President Nepp corroborates Giglio's claim that the neighboring community was and is satisfied with Giglio's efforts undercuts the Intervenor's claims that Giglio's continuing violations of the Order meet the clear and convincing burden necessary to establish any further findings of contempt (*see Matter of Philie v. Singer*, 79 A.D.3d at 1042, 913 N.Y.S.2d 745; *Vujovic v. Vujovic*, 16 A.D.3d 490, 491, 791 N.Y.S.2d 648).

The "Wherefore" clause of the Intervenor's final affidavit dated December 17, 2012, requests that the court grant a judgment declaring that the easement is and shall remain in full force and effect for its full twenty feet in width from Sandringham Lane to Shinnecock Bay, and the preliminary injunction be made permanent. Neither of these requests was included in the original Notice of Motion. Nevertheless, the court declines to make such a declaration since Giglio has never disputed that the easement is and remains in full force and effect for its full twenty feet in width from Sandringham Lane to Shinnecock Bay; thus, there is no controversy warranting such a declaration (*see American Ins. Assn. v. Chu*, 64 N.Y.2d 379, 383, 487 N.Y.S.2d 311, 476 N.E.2d 637, *cert. denied* 474 U.S. 803, 106 S.Ct. 36, 88 L.Ed.2d 29).

With respect to so much of the additional request for relief in the December 17, 2012 "Wherefore" clause- that the preliminary injunction be made permanent, that relief was not requested in the original notice of motion and is denied. The most recent photographs of the easement depict a manicured, well maintained twenty foot wide easement in stark contrast to the overgrown eleven foot wide gravel path that predated Giglio's ownership. The Intervenor, the plaintiffs, and the nonparty easement owners are beneficiaries of the greatly improved easement. In the exercise of the court's discretion, any further penalties or fines imposed upon Giglio would amount to a windfall in favor of the Intervenor, the plaintiffs, and the nonparty easement owners.

Submit Judgment on notice in favor of the plaintiffs and the Plaintiff Intervenor.

DATED: 4 April 2013


HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION