

Levin v Turner

2013 NY Slip Op 32868(U)

October 29, 2013

Sup Ct, Suffolk County

Docket Number: 34647/2012

Judge: Joseph Farneti

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

COPY

MELVIN LEVIN and JOY R. LEVIN,
Individually, and, as Trustees of the MELVIN
IRA LEVIN REVOCABLE TRUST and the
JOY R. LEVIN REVOCABLE TRUST,

Petitioners,

-against-

MICHAEL TURNER and KRISTIN NELSON
a/k/a KRISTIN TURNER and SUSAN
JAMISEN,

Respondents.

ORIG. RETURN DATE: DECEMBER 4, 2012
FINAL SUBMISSION DATE: FEBRUARY 14, 2013
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: JANUARY 10, 2013
FINAL SUBMISSION DATE: FEBRUARY 14, 2013
MTN. SEQ. #: 002
CROSS-MOTION: XMG

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Upon the following papers numbered 1 to 14 read on this motion _____
AND CROSS-MOTION FOR A PRELIMINARY INJUNCTION _____.
Order to Show Cause and supporting papers 1-3; Verified Petition and supporting papers 4,
5; Affirmation in Opposition and supporting papers 6, 7; Reply Affirmation and supporting
papers 8, 9; Notice of Cross-motion and supporting papers 10-12; Affirmation in
Opposition to Cross-motion 13; Reply Affirmation 14; it is,

ORDERED that this motion (seq. #001) by petitioners, MELVIN LEVIN and JOY R. LEVIN, Individually, and, as Trustees of MELVIN IRA LEVIN REVOCABLE TRUST and the JOY R. LEVIN REVOCABLE TRUST (collectively "petitioners"), for an Order, pursuant to CPLR 6301, enjoining the respondents, their agents, servants and employees, and all persons acting on their behalf from blocking the roadway across respondents' premises and denying petitioners access to their property, is hereby **GRANTED** as set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #002) by respondent, SUSAN JAMISEN ("Jamisen"), for an Order, pursuant to CPLR 6301, granting Jamisen a preliminary injunction enjoining and restraining respondents MICHAEL TURNER and KRISTIN NELSON a/k/a KRISTIN TURNER ("Turners") from denying Jamisen the use and enjoyment of a certain easement over the Turners' property known by street address 8 Bevin Road, Asharoken, New York, is hereby **GRANTED** as set forth hereinafter.

The Court has received opposition to both applications at bar from the Turners.

Petitioners inform the Court that they reside in the Village of Asharoken, in the County of Suffolk, at the end of Bevin Road East. Bevin Road East is a private road that leads to another private road, to wit: Bevin Road, which leads to a public portion of Bevin Road. Petitioners reside at 12 Bevin Road East; the Turners reside at 8 Bevin Road East; and Jamisen resides at 10 Bevin Road East. The parties' lots are adjacent to each other in a north-south configuration. Petitioners' lot is the most southerly, Jamisen's lot is directly to the north of petitioners', and the Turners' lot is directly to the north of Jamisen's lot with access to Bevin Road East. There exists a private gravel roadway on petitioners' property that runs north onto Jamisen's property, and then continues onto the Turners' property, for the benefit of petitioners' and Jamisen's properties for the purpose of ingress and egress to and from Bevin Road East ("Easement").

Petitioners indicate that they have enjoyed the benefits of the Easement for as long as petitioner, MELVIN LEVIN, has lived there, which is since 1964. Furthermore, petitioners allege that access to Bevin Road East and Bevin Road from petitioners' property has been across the Easement for more than 100 years. Moreover, petitioners allege that their property is landlocked, and that their only access to Bevin Road East is via the Easement across the Jamisen and Turner properties.

Petitioners allege that the Turners have owned their property and have resided thereat for approximately ten years. Petitioners contend that the Turners have interfered with petitioners' ingress and egress to their property by installing a lock and chain across the Easement, and have posted "no trespassing" signs where the Easement crosses Jamisen's property to the Turners' property. The Turners have also allegedly prohibited garbage pick-up and mail delivery to petitioners' premises, and have expressed a desire to install a fence across the Easement.

Petitioners commenced this special proceeding by Order to Show Cause and Verified Petition, seeking, among other things, a judgment directing respondents not to interfere with petitioners' access for ingress and egress of their premises, and directing respondents not to interfere with petitioners' use of the Easement across respondents' premises. In their Second cause of action, petitioners seek a judgment declaring that petitioners have a prescriptive easement over respondents' premises, and in their Third cause of action, a judgment declaring that petitioners have an easement by necessity over respondents' premises. On November 15, 2012, the Court (Mayer, J.) issued the following temporary restraining Order:

ORDERED, that pending the hearing and determination of the Petition and further Order of this Court, the Respondents herein be and hereby are enjoined and restrained from blocking Petitioners access to their property by way of the existing roadway across Respondents' premises, except for usual and customary residential use and maintenance.

Petitioners argue that they have a valid recorded easement across the Jamisen and Turner properties. Specifically, petitioners allege that the Easement was expressly granted and described in prior deeds to all three lots from the original grantors, Sidney W. Davidson and United States Trust Company of New York, as executors of and/or trustees under the Last Will and Testament of Sydney Bevin. The relevant language in petitioners' deed is as follows:

Together with an easement in common with others of ingress and egress from Asharoken Avenue to and from said parcel over the private road which runs in a northerly and westerly direction from said parcel to another private road known as Bevin Road running in a general northerly direction to Asharoken Avenue, and

then over said second mentioned private road in a general northerly direction to Asharoken Avenue.

As noted, Jamisen has cross-moved for similar injunctive relief against the Turners, alleging that the Easement has been in existence “for decades,” and has been enjoyed by Jamisen and petitioners as well as their predecessors-in-title.

The Turners have filed opposition to both motions. The Turners argue that the descriptions of the Easement in the various deeds submitted only create an easement over the Jamisen property, and not their property. Further, the Turners claim that a recent title report shows that there are no recorded easements at all crossing their property. The Turners allege that if it is determined that an easement exists over their property, then they would seek to relocate its position. In addition, the Turners contend that although they did erect wooden posts and a chain “to restrict the volume of traffic, including commercial traffic going to and from [petitioners’] property,” they gave petitioners a key for the lock on the chain for their personal use. Furthermore, the Turners argue that contrary to petitioners’ contention, petitioners are not landlocked as they have access to Bevin Road East across a “dog leg” on the Jamisen property, along a “southern” route used after Superstorm Sandy, and via the navigable waterway known as Duck Island Harbor.

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N. Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]). Furthermore, the purpose of a preliminary injunction is to maintain the status quo pending the determination of the action or proceeding (see *Town of Carmel v Melchner*, 105 AD3d 82 [2013]; *Ruiz v Meloney*, 26 AD3d 485 [2006]; *Coinmach*

Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2006]). “The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2011]).

The Court has weighed the elements necessary for the granting of a preliminary injunction to maintain the status quo, and finds that petitioners and Jamisen have sustained their burden. Although the parties’ submissions demonstrate that there may be a factual dispute as to the description of the Easement and the precise placement thereof, it appears that each parcel of the Bevins Estate was granted an easement across the parcel to the north of it. Indeed, according to petitioner MICHAEL LEVIN, he has personally used and/or witnessed such use of the Easement for nearly 50 years.

In view of the foregoing, this motion and cross-motion are both **GRANTED** to the extent that the Court issues the following preliminary injunction, pending the hearing and determination of the underlying petition or further Order of the Court, so as to maintain the status quo of the parties:

Respondents are hereby enjoined and restrained from blocking Petitioners’ access to their property by way of the existing roadway across Respondents’ premises, except for usual and customary residential use and maintenance, including but not limited to, mail delivery, municipal garbage service, fuel oil deliveries, and landscaping services.

The foregoing constitutes the decision and Order of the Court.

Dated: October 29, 2013



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION