

229 Quimby Lane, LLC v Siegel
2013 NY Slip Op 33320(U)
December 12, 2013
Sup Ct, Suffolk County
Docket Number: 13-4393
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-22-13 (#001)
MOTION DATE 5-16-13 (#002 & #003)
MOTION DATE 8-15-13 (#004)
ADJ. DATE 9-19-13
Mot. Seq. # 001 - MotD
 # 002 - MotD
 # 003 - XMD
 # 004 - MD

-----X	
229 QUIMBY LANE, LLC,	:
	:
Plaintiff,	:
	:
- against -	:
	:
ALAN M. SIEGEL, Individually and as Trustee of	:
the ALAN M. SIEGEL QUALIFIED PERSONAL	:
RESIDENCE TRUST DATED AS OF OCTOBER	:
1, 2012 and GLORIA F. SIEGEL, Individually and	:
as Trustee of the GLORIA F. SIEGEL QUALIFIED	:
PERSONAL RESIDENCE TRUST DATED AS	:
OF OCTOBER 1, 2012,	:
	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 148 read on these motions for a preliminary injunction, to punish for contempt, and for summary judgment ; Notice of Motion/ Order to Show Cause (001) and supporting papers 1 - 8 ; Notice of Motion/ Order to Show Cause (002) and supporting papers 9 - 26 ; Notice of Cross Motion (003) and supporting papers 27 - 80 ; Notice of Motion/ Order to Show Cause (004) and supporting papers 81 - 110 ; Answering Affidavits and supporting papers 111 - 131 ; Replying Affidavits and supporting papers 132 - 148 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (001) by defendants for an order pursuant to CPLR 6301, 6311, and 6314, the motion (002) by defendants for an order adjudicating plaintiff in contempt of court, and the motion (004) by defendants for an order pursuant to CPLR 3212 granting summary judgment, are consolidated for the purposes of this determination and are decided together with the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment and a declaratory judgment pursuant to RPAPL Article 15; and, it is further

ORDERED that the portion of the motion by defendants for an order pursuant to CPLR 6301, 6311, and 6313 preliminarily enjoining plaintiff from traversing the disputed concourse access for vehicular and construction ingress and egress to and from plaintiff's property and from constructing upon, clearing, grading, paving, and permitting construction related activity upon the disputed concourse access is granted only to the extent that the April 5, 2013 order of the Hon. Thomas Whelan, J.S.C. shall remain in full force and effect until further order of this court, and the remaining portion of the motion which seeks an order directing plaintiff to restore the disputed concourse access to its former condition is denied at this time; and, it is further

ORDERED that the motion by defendants for an order adjudging plaintiff and its member, George Roger Waters, in contempt for wilfully violating an order of this court dated April 5, 2013 pursuant to Judiciary Law §§ 751 and 753 is referred to the trial court for determination; and, it is further

ORDERED that the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment; pursuant to RPAPL Article 15 declaring that plaintiff is the owner of an easement and holds the right to free and unobstructed access over and across a certain private road known as Quimby Lane and that plaintiff has the right to open, improve, and use said private road for purposes of egress and ingress by foot and automobile, and for all other reasonable purposes incidental to the private road; enjoining defendants from obstructing plaintiff's use of the said private road; and, denying plaintiff's motion for injunctive relief is denied; and, it is further

ORDERED that the motion by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and granting judgment on defendants' counterclaims declaring that plaintiff does not have an easement or, alternatively, to the extent plaintiff has an easement over the concourse access, declaring that same is only for pedestrian access from the terminus of Quimby Lane to and from the bathing concourse and permanently enjoining plaintiff from interfering with, paving, cultivating, improving, obstructing, or traveling the concourse for any use other than pedestrian traverse, and ordering plaintiff to restore the concourse access to its previous condition is denied.

The within motions arise from a declaratory judgment action commenced and counterclaims asserted in connection with an easement or right of way over and about a "concourse access" leading from a private roadway (Quimby Lane) to waterfront property at Sag Pond in Bridgehampton, New York. Essentially, plaintiff, which purchased a parcel known as 229 Quimby Lane on October 2, 2010, alleges that the disputed area is an extension of Quimby Lane, a private road, to which plaintiff has access rights by way of an easement, and that as a result thereof plaintiff may use it for vehicular access, ingress and egress, including the incidental right to improve the road area by constructing a road bed and to keep it in good repair. Defendants dispute plaintiff's claims and seek a declaration that the right of way is limited to pedestrian ingress and egress, may not be used as and for a second private service entrance into and from plaintiff's waterfront parcel, and may not be graded, excavated, paved, or otherwise improved.

Plaintiff commenced this action to determine its rights in connection with the easement and served its complaint on March 27, 2013. Defendants allege that nine days later, on April 5, 2013, plaintiff began excavating/digging on the parcel in dispute, despite the pendency of the lawsuit. Later that day, defendants

moved for a preliminary injunction pursuant to CPLR 6301, 6311, and 6313 enjoining and restraining plaintiff and its members, assigns, etc. from traversing the disputed concourse access for vehicular and/or construction ingress and egress to and from plaintiff's property; prohibiting the construction upon, clearing, grading, paving and all other construction related activity upon the disputed concourse area; and, directing plaintiff to restore the disputed concourse access to its "formerly undisturbed condition at plaintiff's sole cost and expense."

On April 5, 2013, defendants obtained a temporary restraining order from the Hon. Thomas Whelan, J.S.C. which stated that "pending the determination of this motion, (1) Plaintiff, its members, successors, assigns, attorneys, employees, contractors, agents and all others purporting to act on the Plaintiff's behalf are hereby restrained and enjoined from traversing the disputed concourse right of way by vehicular means for any construction related activity or purpose related to plaintiff's parcel, and (2) Plaintiff, its members, successors, assigns, attorneys, employees, contractors, agents and all others purporting to act on the Plaintiff's behalf are hereby restrained and enjoined from permitting or suffering the construction upon, clearing, grading, paving and all other construction related activity upon the concourse right of way or vehicular access into plaintiff's parcel." Defendants claim that the order was served upon plaintiff on April 8, 2013. Defendants allege that despite the said restraining order, plaintiff or its agent were "excavating the disputed right of way and surrounding area and installing electrical wire, cable, fiber-optic cable and/or plumbing installations on, under and through the disputed right of way" on April 29, 2013.

Defendants seek an order punishing plaintiff for its contempt in violating Justice Whelan's April 5, 2013 order. Plaintiff does not dispute, that "a sub-subcontractor performed work at the site ... [which] was incidental to the installation of underground electrical service wires", but claims that it was due to a "miscommunication among the tradesmen involved in the construction of Plaintiff's residence" and that the work was done in the "grassy area adjoining the gravel driveway ... and the driveway was not traversed by any vehicles at any time to access the 229 Quimby lot." As such, plaintiff claims that the work done was without the knowledge of plaintiff's individual member or its property manager, and that it was not intentional, deliberate, or willful. Counsel for plaintiff also maintains that the work done did not involve a violation of an "unequivocal mandate" inasmuch as the work done on April 29th did not involve driving over and across the driveway into and out of plaintiff's parcel or construction on the driveway. He claims that the underground electrical installation "in no way involved construction upon the driveway or traversing the driveway to access Plaintiff's adjoining residential lot."

Following the defendants' motions for an injunction and to punish for contempt, plaintiff cross-moved for summary judgment seeking a declaration that plaintiff is the owner of an easement and holds the right to free and unobstructed access over and across a certain private road known as Quimby Lane and that plaintiff has the right to open, improve, and use said private road for purposes of egress and ingress by foot and automobile, and for all other reasonable purposes incidental to the private road; and for an order enjoining defendants from obstructing plaintiff's use of the said private road and, denying plaintiff's motion for injunctive relief. In support of its motion, plaintiff submits, *inter alia*, an affidavit of an attorney, Lance R. Pomerantz, who is alleged to be "a recognized expert in matters of real estate titles and deed abstract analysis."

Defendants also move for summary judgment, seeking an order dismissing plaintiff's complaint and granting judgment on defendants' counterclaims, declaring that plaintiff does not have an easement or, alternatively, to the extent plaintiff has an easement over the concourse access, declaring that same is only for pedestrian access from the terminus of Quimby Lane to and from the bathing concourse and permanently enjoining plaintiff from interfering with, paving, cultivating, improving, obstructing, or traveling the concourse for any use other than pedestrian traverse, and ordering plaintiff to restore the concourse access to its previous condition. In support of their motion, defendants submit, *inter alia*, an affidavit of William A. Colavito, an attorney at law, purported to be an expert in real property and title insurance issues.

Lance R. Pomerantz, Esq., the plaintiff's expert concludes that "plaintiff can show an unbroken chain of title for its parcel extending back more than 100 years" which explicitly refers to the existence of the disputed area as a "private road" during that time period, that "long-settled rules of construction confer an unfettered easement appurtenant on the Plaintiff's parcel to use the Disputed Area as a road and [that] Plaintiff's improvements to the Disputed Area are legally recognized, permissible incidents of enjoyment of the aforesaid easement." Mr. Pomerantz opines that it is "black-letter law in New York State that the conveyance of a right of way unquestionably gives the grantee not only a right to unobstructed passage but also all such rights as are incident or necessary to the enjoyment of such right of passage. Perforce, the grantee acquires the rights to construct such a roadbed as he desires and to keep the same in repair. ... Plaintiff's improvement of the Disputed Area portion of Quimby Lane over which it held an easement for all lawful purposes is clearly one of the incidents of enjoyment of the easement." Conversely, William A. Colavito, Esq., the defendants' expert avers that "[a]n easement appurtenant or an easement by implication has not arisen granting to Plaintiff an easement over the Concourse Access because, principally, Plaintiff's use of the Concourse Access is not a necessary adjunct to the proper use and enjoyment of Plaintiff's parcel. Plaintiff has an existing easement, nearby, granting to Plaintiff vehicular access to its parcel and access for the installation of utilities." He concludes that "[e]ven were the Court to find that Plaintiff does possess an easement over the Concourse Access, Plaintiff's desired use overburdens the Concourse Access."

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Here, given that each side has come forth with expert opinions regarding the chains of title and existence of an easement, the Court cannot make a determination as to the credibility of either one (*S.J.*

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Capelin Assocs., Inc. v Globe Mfg. Corp., *supra*). Inasmuch as each expert comes to an opposite conclusion as to the existence of an easement based upon their interpretations of the factual history or chain of title regarding the property, questions of fact exist which preclude the granting of summary judgment for either party. Thus, the summary judgment motions of plaintiff and defendants are denied.

Pursuant to Judiciary Law §750, this court has the power to punish for a criminal contempt where there has been a wilful disobedience to a lawful mandate of the court. Additionally, personal service upon the person or entity to be punished is indispensable (*Pitt v Davison*, 37 NY 235 [1867]; *Caiola v Allcity Ins. Co.*, 305 AD2d 350, 758 NYS2d 683 [2d Dept 2003]). The court must make a determination as to the degree of wilfulness and contumaciousness before plaintiff could be held in criminal contempt (*see In re Murray*, 98 AD2d 93, 469 NYS2d 747 [1st Dept 1983]), and that the contempt is established by clear and convincing evidence (*Massimi v Massimi*, 56 AD3d 624, 869 NYS2d 558 [2d Dept 2008]). Since plaintiff has indicated that there were “miscommunications” and that it was not “aware” of the work done on the right of way after the issuance of Justice Whelan’s restraining order, a finding of contempt cannot be made upon the papers submitted. Rather, a hearing is necessary to determine the degree of wilfulness or contumaciousness, if any, thus the motion to punish plaintiff for contempt is referred to the trial court for a determination on the relevant issues.

Finally, given the fact that defendants have shown that irreparable injury will occur absent an injunction pending the outcome of the lawsuit, and that they have submitted evidence, including the expert’s affidavit, that there is some likelihood of success on the merits, the order of the Hon. Thomas Whelan granting a restraining order dated April 5, 2013 shall remain in full force and effect until further order of this Court. All other relief requested is denied at this time.

Dated: December 12, 2013



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION