

Shelmerdine v Myers
2013 NY Slip Op 34116(U)
November 25, 2013
Supreme Court, Saratoga County
Docket Number: 20132478
Judge: Thomas D. Nolan
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STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

ROBERT SHELMERDINE and SALLY SHELMERDINE,

Plaintiffs,

-against-

DECISION AND ORDER

RJI No. 45-1-2013-1178

Index No. 20132478

NANCY MYERS,

Defendant.

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: MICHAEL W. SMRTIC
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SARATOGA COUNTY
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FILED

On the instant motion, plaintiffs seek a preliminary injunction requiring defendant to remove from her property a recently erected earthen berm and rock wall which allegedly impair plaintiffs' right of passage over defendant's property to plaintiffs' backyard and storage shed.¹

In opposition, defendant contends that the installation of the berm and rock wall was a necessary part of the construction of her replacement residence and that plaintiffs' access, although modified, has not been impaired. Defendant seeks an order vacating the temporary

¹In an undated memorandum of law received by the court on September 5, 2013, plaintiffs request a permanent injunction. Such relief is premature since the action has not been tried, and no motion for summary judgment has been made.

restraining order that presently prevents her from constructing a replacement septic system.

First, the background. The parties' adjoining properties are located in the Town of Edinburg, Saratoga County near Great Sacandaga Lake. In 1993, plaintiffs purchased their lot from defendant's parents, J. Rupert Hoffman and Virginia G. Hoffman, and in 1996, the Hoffmans and the plaintiffs entered into an agreement, never recorded, wherein the parties "mutually agreed to allow each other tax lots #13 [the Hoffmans] and #17 [the Shelmerdines] his heirs and assigns for a period of 99 years, starting immediately the right to ingress and egress their properties and tool sheds...". According to plaintiffs, they stored boats, lawnmowers, and other equipment in their backyard sheds and crossed defendant's property to access their backyard and to remove and return their equipment. In 2012, defendant purchased lot #13 from her mother, the surviving owner, and then had constructed a new residence on the same footprint as the former structure's footprint. In the construction project, defendant's contractor installed the berm and rock wall reputedly to properly backfill the new foundation. According to the town's code enforcement officer, when the new foundation was excavated, "the soil was too wet to dig the required four foot depth as originally planned and in order to meet the four foot frost requirement, the lot was built up and leveled off...dirt was placed on the exterior of the foundation and a retaining wall was built to support the soil". According to defendant, who concedes the existence of plaintiffs' right-of-way, plaintiffs' access was not eliminated but once again simply modified. On the other hand, plaintiffs contend that the utility of the right-of-way has been significantly compromised in that they no longer can move their boats and other equipment from their backyard either through the now narrowed opening between the new wall and exterior stairway to their house or up and over the raised berm. Plaintiffs also contend that

water now is being directed from defendant's property onto their property and that defendant plans to install a new septic system within the right-of-way. In reply, defendant submits engineering drawings showing the septic system will be installed in front of her house, exactly where the original system was located, and not in the right-of-way.

To obtain a preliminary injunction, plaintiffs "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in [their] favor". Nobu Next Door LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 (2005). In establishing these elements, plaintiffs must show a "clear right" based upon affidavits and other proof which "factually and convincingly" show that the court should exercise its discretion in their favor. Matter of Gault v United States Bobsled and Skeleton Federation, 179 AD2d 881 (3rd Dept 1992); Armbruster v Gipp, 103 AD2d 1014 (4th Dept 1984). The likelihood of success element need not be proved to a certainty, Cooperstown Capital LLC v Patton, 60 AD3d 1251 (3rd Dept 2009), and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction". Emerald Green Props. Owners Assn. v Jada Developers LLC, 63 AD3d 1396, 1397 (3rd Dept 2009), quoting Egan v New York Care Plus Ins Co., 266 AD2d 600, 601 (3rd Dept 1999).

It is long settled that "a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right-of-way passage is not impaired". Lewis v Young, 92 NY3d 443, 449 (1998).

Photographs showing the newly installed berm and rock wall establish that the physical characteristics of the right-of-way have been significantly modified and that plaintiffs cannot use the now narrowed strip of land closest to their residence to move their boat and other equipment


from their backyard. Now, there appears to be just enough space at grade for only one person to pass between the new rock wall and the plaintiff's existing stairway. And, the only feasible way to retrieve a boat and equipment is to lift such items over the wall to reach the top of the raised berm and to climb over the wall to get to the raised berm. Clearly the installation of the berm and rock wall unduly restricts the previously enjoyed access. Marek v Woodcock, 277 AD2d 864 (3rd Dept 2000). Plaintiffs satisfy the three elements necessary to the issuance of a preliminary injunction.

Plaintiffs' motion is granted to the extent within 45 days of service of a copy of this order with notice of entry, defendant is ordered to regrade the rear section of the berm near plaintiffs' backyard and to regrade the front section of the berm that borders or is near defendant's driveway so that plaintiffs will have unimpeded access to and from their backyard by usual and customary means of travel over the berm. Plaintiffs shall post an undertaking of \$500.00 (CPLR 6514) within twenty (20) days hereof.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for plaintiffs. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiffs is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: November 25, 2013
Saratoga Springs, New York


HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

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Peter R. Martin

Saratoga County Clerk