

Wheeler v Del Duca

2014 NY Slip Op 31603(U)

May 30, 2014

Supreme Court, Suffolk County

Docket Number: 12-00168

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

COPY

Mot. Seq. # 002 - MG; CASEDISP

-----X
SANDRA WHEELER f/k/a SANDRA PHILLIPS,

Plaintiff,

- against -

DONALD P. DEL DUCA and DONALD DEL
DUCA,

Defendants.
-----X

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Upon the following papers numbered 1 to 68 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 35; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 36 - 58; Replying Affidavits and supporting papers 59 - 68; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an order dismissing the complaint is granted.

This action was commenced in January 2012, at which time plaintiff Sandra Wheeler, f/k/a Sandra Phillips, was the owner of real property known as 17 Lawrence Lane, Bay Shore, New York (hereinafter referred to as the Lawrence Lane property). Located at the southeast corner of Lawrence Lane and Manatuck Lane, the Lawrence Lane property abuts a navigable waterway, known as the Manatuck River or Lawrence Creek, along its eastern boundary. Defendants Donald Del Duca and Donald P. Del Duca, who are father and son, are the owners of a small parcel of waterfront property on Manatuck Lane (hereinafter referred to as the Manatuck Lane property), which is improved with a bulkhead, dock, two finger piers, four boat berths, wooden pile moorings, parking spaces and a boat ramp. Situated south of the roadway and having no assigned street address, the Manatuck Lane property abuts a small section of the eastern boundary of the Lawrence Lane property and is identified on the Suffolk County Tax Map as district 0500, section 441.00, block 01.00 and lot 045.002. The property was transferred in 1984 by bargain and sale deed from Regina Schreiber to Rivindel Enterprises, Ltd., and then in 1985 by Rivindel Enterprises to Donald Del Duca. A deed creating a joint tenancy in the Manatuck Lane property between Donald Del Duca and Donald P. Del Duca was executed in 2004.

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The amended complaint asserts four causes of action. The first and second causes of action seek damages for private nuisance, alleging, in part, that defendants illegally use the Manatuck Lane property as a marina, renting out boat slips to third-parties, and that such use diminished the market value of the Lawrence Lane property and adversely affected plaintiff's use and enjoyment of such property. The third cause of action seeks damages and injunctive relief for the alleged violation of the Code of the Town of Islip and of a restrictive covenant contained in a 1985 agreement between Rivindel Enterprises and Ackerson Agency, Inc., as successor to the interest of C.L. Lawrance Corporation, which restricts the use of the Manatuck Lane property to the mooring of private pleasure boats owned by a resident of the Oconee (also known as O'Co-Nee) Estates area, within which the subject properties are located, or by Donald Del Duca, his spouse or his children. Lastly, the fourth cause of action alleges a boat docked at the Manatuck Lane property encroached upon the Lawrence Lane property, and that a wooden pole in the water installed by defendants encroached on adjoining property allegedly owned by the Oconee Association. It seeks damages for trespass and a judgment directing defendants to "cease operation of the unlawful private marina" and to remove the pole, known as a pile mooring, and the boat.

Defendants now move for an order dismissing the complaint based on documentary evidence, lack of standing, and failure to state a cause of action (*see* CPLR 3211 [a] [1], [3], [7]). Defendants argue, in part, that as plaintiff sold the Lawrence Lane property during the pendency of this action, she lacks the capacity to recover on her claims for private nuisance and trespass. They also argue plaintiff has no standing to sue for violation of any restrictive covenants or easements involving the Manatuck Lane property. Defendants further assert the allegations in the complaint that the presence of boats docked at the Manatuck Lane property "adversely affected" plaintiff's use and enjoyment of the Lawrence Lane property, and that defendants were in violation of certain Town of Islip ordinances and New York State Department of Environmental Conservation (DEC) regulations, are insufficient to state an actionable claim against them. Defendants argue documentary evidence establishes no pending Town Code violations, and that the DEC previously issued a permit to moor boats at the Manatuck Lane property. As to the fourth cause of action, defendants assert the complaint fails to set forth a cause of action for encroachment, as there is no allegation a boat or pile mooring encroached on the Lawrence Lane property. Defendants also state the mooring pole plaintiff alleges encroached upon her property was removed in 2013. Defendants' submissions in support of the motion include copies of the pleadings, various deeds for the Manatuck Lane property, including a deed executed in 1950, and an agreement between defendants and South Shore Estate Sales, Inc., a successor to the interests of C.L. Lawrance Corp., modifying two restrictions on the use of the Manatuck Lane property contained in the 1950 deed. Defendants also submit affidavits of Donald Del Duca and Frank Mina, who was the sole shareholder of Rivindel Enterprises, and an affidavit of John Maloney, the owner of the 50-foot boat allegedly docked at the Manatuck Lane property.

Plaintiff, who now resides at 19 Lawrence Lane, opposes the motion, arguing that, as a resident of the Oconee Estates neighborhood, she has standing to enforce restrictive covenants previously imposed on the Manatuck Lane property for the benefit of adjoining landowners. She argues that, as the owner of the Lawrence Lane property when the action was commenced, she had standing to sue for private nuisance and trespass. Plaintiff further argues, among other things, the allegations in her complaint that defendants installed piers and poles on the Manatuck Lane Property to accommodate 50-foot boats, that such structures and the boats docked there interfered with the use and enjoyment of her own backyard and encroached upon the Lawrence Lane property, and that she sustained money damages as a result, are sufficient to state a claim for nuisance. In addition, plaintiff argues issues of fact exist as to whether defendants' use of the

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Manatuck Lane property complies with the Islip Town Code and whether they have the required permits from the DEC.

Evidence submitted by plaintiff in opposition to the motion includes affidavits of plaintiff, of William Wheeler, who is plaintiff's husband, and of Henry Boudreau, a long-time resident of the Oconee Estates neighborhood, who lives at 28 West Lane, Bay Shore; various photographs of the Manatuck Lane property; and a copy of the bargain and sale deed transferring plaintiff's title to the Lawrence Lane property to Peter Glass and Laura Glass. In addition, plaintiff submitted copies of deeds, dated July 1962 and October 1962, transferring C.L. Lawrance's title to, inter alia, "any upland or land under water in or adjacent to Manatuck River between the shore lines and between Manatuck Lane and the Great South Bay," and to "any and all covenants and agreements . . . made by C.L. Lawrance Corp. or its predecessors in title in deeds of record with any of the grantees of parcels located in said premises commonly known as O'Co-Nee," and assigning the power to enforce such covenants and agreements and to sue for any breach thereof, to Ward Ackerson, and then to Ackerson Agency, Inc. Also included with the opposition papers is a deed, dated May 1986, transferring Ackerson's Agency's rights, subject to any easements or rights previously granted in deeds of record, to pass upon and approve "plans, designs and locations of buildings, the distribution of expenses of maintenance of lanes, canal and creek, the making of rules and regulations . . . consenting to fences . . . or signs in and to the premises commonly known as O'Co-Nee," and to "enforce, amend, confirm or otherwise affect all covenants, agreements, conveyances, transfers and other rights of the respective grantors in said deeds," to O-Co-Nee Association, Inc., with offices at 28 West Lane, Bay Shore. The Court notes that the sur-reply submitted by plaintiff without leave of court was not considered in the determination of this motion (see CPLR 2214; McMullin v Walker, 68 AD3d 943; Flores v Stankiewicz, 35 AD3d 804).

On a motion to dismiss, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (Simkin v Blank, 19 NY3d 46, 52; Leon v Martinez, 84 NY2d 83, 87-88; Thomas v Lasalle Bank N. A., 79 AD3d 1015, 1017). When a party moves under CPLR 3211 (a)(7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (Sokol v Leader, 74 AD3d 1180, 1180-1181). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (Leon v Martinez, 84 NY2d 83). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (Rovello v Orofino Realty Co., 40 NY2d 633, 635-636). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (Muka v Greene County, 101 AD2d 965, 965; see DiMauro v Metropolitan Suburban Bus Auth., 105 AD2d 236; Melito v Interboro-Mutual Indem. Ins. Co., 73 AD2d 819; Greschler v Greschler, 71 AD2d 322). Thus, bare legal conclusions and factual allegations "flatly contradicted by documentary evidence in the record are not presumed to be true, and '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action'" (Deutsche Bank Natl. Trust Co. v Sinclair, 68 AD3d 914, 915, quoting Peter F. Gaito Architecture, LLC v Simone Dev. Corp., 46 AD3d 530, 530; see Maas v Cornell Univ., 94 NY2d 87).

Furthermore, dismissal under CPLR 3211(a)(1) may be granted only if the documentary evidence “utterly refutes plaintiff’s factual allegations” and conclusively establishes a defense to the asserted claim as a matter of law (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326; see Leon v Martinez, 84 NY2d 83). As to defendants’ application under CPLR 3211 (a)(3), standing and capacity to sue are related, but distinguishable, legal doctrines concerning the authority to sue (see Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239, 242). A claim of lack of capacity to sue requires an inquiry into to the party’s status, namely, its power to appear and bring a grievance before the court (see Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148). A claim of lack of standing, however, requires an inquiry into whether the party seeking access to the courts to adjudicate the merits of a dispute has a sufficient stake in the outcome of the litigation (see Society of Plastics Indus. v County of Suffolk, 77 NY2d 761). To have standing, a plaintiff first must establish that he or she actually will be harmed by the challenged action, and that the injury is more than conjectural (Caprer v Nussbaum, 36 AD3d 176, 183). The plaintiff also must demonstrate that the alleged injury “falls within the zone of interests or concerns sought to be promoted by the statutory provision or recognized common-law relationship pursuant to which a defendant has acted” (Id.). Here, defendants are seeking dismissal of the complaint based on plaintiff’s alleged lack of standing.

Dismissal of the first and second causes of action is granted. A party may be liable for a private nuisance upon proof of an intentional and unreasonable invasion of the use and enjoyment of another’s land (see Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564; Broxmeyer v United Capital Corp., 79 AD3d 780). To establish a cause of action for a private nuisance, a plaintiff must show an interference that is (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with the plaintiff’s property right to use and enjoy the land, (5) caused by another’s conduct in acting or failing to act (see Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564; Gedney Commons Homeowners Assn., Inc. v Davis, 85 AD3d 854; Broxmeyer v United Capital Corp., 79 AD3d 780; Aristedes v Foster, 73 AD3d 1105). When seeking to recover for a private nuisance, a plaintiff also must show that he or she is entitled to monetary damages or injunctive relief. If the alleged injury to the plaintiff’s property is permanent, the measure of damages is the diminution in market value; if the alleged injury is temporary, the measure of damages is in the reduction in the rental or usable value of the property (see Guzzardi v Perry’s Boats, 92 AD2d 250).

The first cause of action alleges that plaintiff’s “use of her backyard and the privacy of same is adversely affected because of the proximity of defendants’ renters mooring boats in her backyard and defendants’ maintenance of a private marina,” and the second cause of action alleges “[d]efendants unlawful marina operation was and is an intentional, substantial and unreasonable interference with [p]laintiff’s use and enjoyment of her real property.” Absent from the complaint, however, are allegations setting forth how defendants’ use of the Manatuck Lane property to dock boats was unreasonable or how it substantially interfered with plaintiff’s rights as the owner of the Lawrence Lane property to use and enjoy such property (see Rodriguez-Nunci v Clinton Hous. & Dev. Co., 241 AD2d 339; Dugway, Ltd. v Fizzinoglia, 166 AD2d 836; see also Golub v Simon, 28 AD3d 359; Guzzardi v Perry’s Boats, 92 AD2d 250). Moreover, defendants’ undisputed evidence, including the affidavits of Donald Del Duca and John Maloney, shows the boats were docked on the Manatuck Lane property, part of which is submerged under water: that Maloney did not pay rent to Del Duca for the period of time his boat was docked at such property; and that other boats are docked at a marina, known as the Oconee Marina, located on the

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Manatuck River, directly across from the Lawrence Lane property.

Dismissal of the third cause of action also is granted. To maintain a private action to enjoin a zoning violation, a plaintiff must establish that he or she sustained special damages as a result of the defendant's activities (Zupa v Paradise Point Assn., Inc., 22 AD3d 843, 843; Futerfas v Shultis, 209 AD2d 761, 762; Santulli v Drybka, 196 AD2d 862, 863; Guzzardi v Perry's Boats, 92 AD2d 250, 253; see Society of Plastics Indus. v County of Suffolk, 77 NY2d 761; Little Joseph Realty v Town of Babylon, 41 NY2d 738). To establish special damages, a plaintiff must show a depreciation in the value of the real property "arising from the conduct of the [defendant's] forbidden use" (Cord Meyer Dev. Co. v Bell Bay Drugs, 20 NY2d 211, 218). However, a neighbor in close proximity to the property allegedly in violation of zoning laws is presumed to suffer an injury to the value of his or her property (see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406). Nevertheless, to have standing, a close neighbor must demonstrate that his or her interest is within the "zone of interest" protected by the zoning ordinance allegedly violated by the defendant (see Zupa v Paradise Point Assn., Inc., 22 AD3d 843).

Here, the complaint contains only a speculative, conclusory statement that the value of the Lawrence Lane property "has been adversely effected rendering it unsaleable at a reasonable price" due to the alleged violations of the Town Code. Moreover, while the Lawrence Lane property adjoins the Manatuck Lane property, so that a diminution of property value will be presumed, plaintiff's interests are not affected by the zoning provisions allegedly violated by the defendants (cf. East Hampton Indoor Tennis Club, LLC v Zoning Bd. of Appeals of Town of E. Hampton, 83 AD3d 935; Zupa v Paradise Point Assn., Inc., 22 AD3d 843). In addition, undisputed evidence shows that plaintiff sold the Lawrence Lane property in March 2013 for \$920,000, and that the defendants have not been cited by the Town or the DEC for any violations on the Manatuck Lane property. As to the request for injunctive relief based on the violation of the Town Code, the plaintiff does not controvert the defendants' proof that the wooden piling at issue was removed from the water, that John Maloney did not pay rent to dock his boat at the Manatuck Lane property, and that such boat is no longer at the property.

Further, as to the allegations in the third cause of action that the defendants are in violation of the restrictive covenant contained in the 1985 agreement between Rivindel Enterprises and Ackerson Agency, the law favors the free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them (Witter v Taggart, 78 NY2d 234, 237; Ford v Fink, 84 AD3d 725, 726). Restrictive covenants, therefore, will be enforced only where their existence and scope is established by clear and convincing evidence, with burden of proof resting on the party seeking their enforcement (see Greak Peak, Inc. v Grodner, 75 NY2d 981; Witter v Taggart, 78 NY2d 234; Huggins v Castle Estates, 36 NY2d 427; Butler v Mathisson, 114 AD3d 894). Restrictive covenants may be enforced by persons other than the grantor or the covenantee, and the owner of neighboring land for whose benefit a restrictive covenant is imposed by a grantor may enforce such covenant as a third-party beneficiary (Korn v Campbell, 192 NY 490, 495; Nature Conservancy v Congel, 253 AD2d 248). Also, a restrictive covenant imposed by a grantor as part of a general plan or scheme for the benefit of all grantees in a real estate subdivision or development may be enforced by any of the grantees in such subdivision or development (Chesebo v Moers, 233 NY 75, 80; Korn v Campbell, 192 NY 490, 495; Nature Conservancy v Congel, 253 AD2d 248, 251; Graham v Beermunder, 93 AD2d 254, 258).

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It is undisputed that plaintiff no longer owns the Lawrence Lane property, nor does she currently own any other property within the Oconee Estates neighborhood. Moreover, the evidence shows the restrictive covenant at issue was created not by the original grantor of the Oconee estates development, C.L. Lawrance Corp., but by a successor, Ackerson Agency, in the 1985 agreement with Rivindel Enterprises. Thus, defendants have shown plaintiff lacked standing at the inception of this lawsuit to sue for violation of the covenant restricting Del Duca's use of the Manatuck Lane property, since such covenant was not created as part of a common scheme or plan for the benefit of property owners within the Oconee Estates neighborhood (see Pagano v Kramer, 25 AD2d 887]; cf. Hidalgo v 4-38-68, Inc., 2104 NY Slip Op. 03491; Pantel v Iazzetti, 209 AD2d 493; Westmoreland Assn. v West Cutter Estates, 174 AD2d 144).

Finally, dismissal of the fourth cause of action is granted. "The essence of trespass is the invasion of a person's interest in the exclusive possession of land" (Zimmerman v Carmack, 292 AD2d 601, 602). An unlawful encroachment on another's real property is considered a continuous trespass and gives rise to successive causes of action (see 509 Sixth Ave. Corp. v New York City Tr. Auth., 15 NY2d 48; Wright v Sokoloff, 110 AD3d 989; CSC Acquisition-NY, Inc. v 404 County Rd. 39A, Inc., 96 AD3d 986). Defendants' submissions demonstrate that plaintiff lacks standing to maintain the fourth cause of action, as the 50-foot boat and the wooden pile mooring were located on the Manatuck River and did not encroach upon the Lawrence Lane property. While plaintiff's counsel asserts that the Lawrence Lane property includes land under the Manatuck River, plaintiff failed to submit a copy of her deed to such property or an expert affidavit attesting to her ownership of the land where the offending pole and boat allegedly were located. In fact, the 1962 deed transferring C.L. Lawrance's title to "any upland or land under water in or adjacent to Manatuck River between the shore lines and between Manatuck Lane and the Great South Bay" to Ward Ackerson, included with plaintiff's submissions in opposition to the motion, contradicts counsel's claim that the Lawrence Lane property includes land under the Manatuck River. Furthermore, the complaint does not allege that plaintiff owns the property where the pile mooring was located. Rather, it simply asserts "the eastern most mooring pole encroaches on O-Co-Nee property, the plaintiff herein being a member of the aforesaid organization."

Accordingly, defendants' motion for an order dismissing the complaint is granted.

Dated: May 30, 2014


 HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION