

March v Town of North Castle
2014 NY Slip Op 32904(U)
September 10, 2014
Supreme Court, Westchester County
Docket Number: 56062/2011
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LAURIE MARCH and ROBIN C. MUELLER,

Plaintiffs,

-against-

THE TOWN OF NORTH CASTLE, ROCCO RUSSO,
and ANNA RUSSO,

Defendants.
-----X

DECISION and ORDER
Sequence No. 4
Index No. 56062/2011

CONNOLLY, J.

The following documents were read in connection with the plaintiffs' motion for leave to renew and reargue:

Notice of motion, affirmation, exhibits	1-30
North Castle's opposition affirmation	31
Plaintiffs' reply affirmation to North Castle's opposition	32
Russos' opposition affidavit, exhibits	33-37
Plaintiffs' reply affirmation to the Russos' opposition	38

The plaintiffs commenced this action against their next-door neighbors, the defendants Rocco and Anna Russo (hereinafter the Russos), and the defendant Town of North Castle (hereinafter the Town), to recover damages for the alleged diversion of water onto their property located at 9 Sniffen Road, Armonk, New York 10504.

In prior motion practice, the Russos moved for partial summary judgment, the Town separately cross-moved for summary judgment, and the plaintiffs cross-moved for partial summary judgment and issuance of a permanent injunction.

In an order dated March 18, 2014, those three motions were resolved by this Court as follows: (1) the branch of the Russos' motion which was for summary judgment dismissing the plaintiffs' claims for damages sustained prior to September 26, 2008 was granted, and motion was otherwise denied; (2) the Town's cross motion for summary judgment dismissing the complaint insofar as asserted against it was granted; and (3) the plaintiffs' motion for summary judgment and a permanent injunction was denied.

The plaintiffs now move for leave to renew and reargue her opposition to the Town's motion for summary judgment dismissing the complaint and her cross motion for summary judgment in her favor. With respect to the issue of whether the Town had obtained a prescriptive easement for its water discharges, the plaintiffs argue that the Court misapplied the facts and law in finding that Anna Russo's recollection that the plaintiffs' predecessors in interest, the Tavolaccis, gave the Town permission to extend the Town-owned stormwater pipe was insufficient to raise a triable issue of fact. In analyzing the hearsay nature of the Tavolaccis' purported consent to the installation of the pipe, the plaintiffs contend that the Court misapplied and misinterpreted the case of *Cloverdale v Zucker* (261 AD2d 429 [2d Dept 1991]), arguing "*Cloverdale* is not applicable to motions for summary judgment since the testimony referred to in that case was trial testimony" (Affirmation in support ¶ 20). The plaintiffs also contend that the Court erred in finding that the Town-owned pipe was open and notorious, claiming that the proof established that the pipe was buried and not discovered for years. Finally, the plaintiffs contend that the Town is not entitled to a prescriptive easement since it took the position that water was not flowing from its pipe, and inconsistently took the position that it had a prescriptive easement for the discharges. Accordingly, the plaintiffs argue that, upon renewal and reargument, the Court should deny the Town's motion for summary judgment and grant the plaintiffs' motion for summary judgment and grant a permanent injunction.

In opposition, the Town argues that the record clearly establishes that the discharges from the Town's pipe have been adverse, open and notorious, and continual since 1980. Further, the Town contends that the plaintiffs failed to raise an issue of fact as to whether the use was permissive, as Anna Russo's testimony that the Tavolaccis consented to moving the pipe over 35 years ago constitutes inadmissible hearsay. The Russos submit opposition papers arguing that the Court correctly determined that the Town obtain a prescriptive easement for the discharges.

In reply, the plaintiffs argue that there are questions of fact as to whether the Town acquired a prescriptive easement. The plaintiffs argue that, even if Anna Russo's recollection that the Tavolaccis gave consent constitutes hearsay, other evidence in the record—such as the fact that the Town initially obtained an easement from the Russos (before the pipe was relocated to its present location)—supports a finding of permissive use.

DISCUSSION/ANALYSIS

Leave to renew is denied

As an initial matter, leave to renew is denied, as the plaintiffs have not identified any "new facts not offered on the prior motion" (*see* CPLR 2221 [e] [2]).

Leave to reargue is denied

Further, leave to reargue is denied. As noted in the prior order, "an easement for drainage of surface water may be acquired by prescription" (*Torre v Meade*, 226 AD2d 447, 447 [2d Dept 1996]; *see Zutt v State of New York*, 50 AD3d 1133 [2d Dept 2008]; *Vinciguerra v State*, 262 AD2d 743,

745 [3d Dept 1999]). “A party claiming entitlement to an easement by prescription must demonstrate the adverse, open and notorious, and continuous use of the subject property for the prescriptive period” (see *Old Town Tree Farm, Inc. v Long Is. Power Auth.*, 101 AD3d 692, 692 [2d Dept 2012]). Based upon the proof in the record, the Court found that the Town established, by clear and convincing evidence, that the discharges from the pipe have been adverse, open and notorious, and continual since 1980. The plaintiffs contend, on the instant motion, that the Court overlooked the fact that the Town-owned pipe was buried, arguing that the pipe was not open or notorious. However, while the majority of the pipe is in fact buried, there is no proof in the record that the outfall (i.e., the “point source”) was ever buried. Indeed, although the plaintiff Laurie March testified at her deposition that she first noticed the Town-owned pipe sometime in 2001, the record establishes that the pipe has been in the same location and condition since approximately 1980. Accordingly, the plaintiffs have failed to establish that the Court overlooked or misapprehended the facts as to the open and notorious nature of the pipe and its discharges.

Once the Town established that the use of the property was open, notorious, continuous and undisputed, a presumption of hostility arose, shifting the burden of proof to the plaintiffs to show that the use was permissive (see *Allen v Matrianni*, 2 AD3d 1023, 1024 [2d Dept 2003]). The only evidence in the record on the issue of permissive use is the testimony of Anna Russo that the Tavolaccis, the plaintiffs’ predecessors in interest, agreed to the relocation of the pipe to the rear of the Russos’ property. Specifically, the plaintiffs contend that the Court erred in relying on *Coverdale v Zucker* (261 AD2d 429 [2d Dept 1991]), arguing that *Coverdale*, an appeal after a trial, is not applicable to a motion for summary judgment. However, it is the plaintiffs who have misread *Coverdale*. In that case, the defendant sought to establish the existence of a prescriptive easement over a shared driveway. The Supreme Court denied the defendant’s motion for summary judgment and the case proceeded to trial resulting in a judgment in favor of the plaintiff. The defendant sought appellate review of *both* the order denying her motion for summary judgment and the judgment after trial.¹ The Appellate Division held that the defendant established, *prima facie*, the elements of a prescriptive easement, thereby shifting the burden to the plaintiff to establish that the defendant’s use of the alleged easement area was permissive. As relevant to the case at bar, the Appellate Division found that the plaintiff’s “*hearsay statement* that her husband gave Zucker and her former husband permission to use the driveway, was insufficient to overcome the presumption of a prescriptive easement as to the use of the subject property” (*id.* at 431 [emphasis added]). Notably, however, a careful examination of the Appellate Division’s decision and order reveals that, in reversing the judgment, the court granted the plaintiff’s motion for summary judgment which was brought up for review by the appeal from the final judgment. The decretal paragraph in *Coverdale* states: “Ordered that the judgment is reversed, on the law, *the appellant’s motion for summary judgment on her counterclaim declaring that she has a prescriptive easement over the subject property is granted*, the order is modified accordingly, and the matter is remitted to the Supreme

¹ “An appeal from a final judgment brings up for review . . . *any non-final judgment or order which necessarily affects the final judgment*, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken” (CPLR 5501 [a] [1]).

Court, Nassau County, for entry of an appropriate amended judgment” (*id.* at 430 [emphasis added]). Accordingly, the principals of law espoused in *Coverdale* are directly applicable to motions for summary judgment.

In any event, even recognizing that hearsay statements may be used to oppose a summary judgment motion, such evidence is insufficient to raise a triable issue of fact where it is the only evidence offered (*see Feinberg v Sanz*, 115 AD3d 705, 707 [2d Dept 2014] [“Although hearsay evidence may be considered in opposition to a motion for summary judgment, such evidence alone is not sufficient to defeat the motion”]). Here, there was no other admissible evidence offered to establish that the Town’s discharges were permissive.

Accordingly, since the plaintiffs have failed to establish that the Court overlooked or misapprehended any law or fact in deciding the prior motion (*see CPLR 2220 [d]*), leave to reargue is denied.

Based upon the foregoing, it is hereby

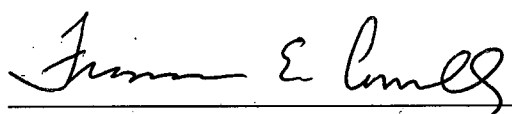
ORDERED that leave to renew is denied; and it is further

ORDERED that leave to reargue is denied; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 10, 2014


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