Small v Wheaton
2014 NY Slip Op 33074(U)
June 30, 2014
Supreme Court, Putnam County
Docket Number: 612/09
Judge: Lewis J. Lubell

SC 8/25/14 @ 9:30 AM

To commence the 30 day statutory time period 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 PUTNAM

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DAVID SMALL AND AMY SMALL,

Plaintiffs,

-against -

MARYANN WHEATON,

Defendant.

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DECISION & ORDER

Index No. 612/09

Sequence No. 4-7

LUBELL, J.

The following papers were considered in connection with **Motion Sequence #4** by defendant for an Order granting summary judgment pursuant to CPLR Section 3212; **Motion Sequence #5** by plaintiffs for an Order pursuant to CPLR 3212 granting summary judgment for the relief demanded in the complaint on the grounds that defendant has interfered with an easement and user rights of the plaintiffs and for a money judgment pursuant to RPAPL 861; awarding attorney's fees, costs and disbursements in this proceeding; **Motion Sequence #6** by defendant for an Order (1) granting a preliminary injunction pursuant to CPLR 6301 enjoining plaintiffs from (a) interfering with plaintiff's driveway in any manner during the pendency of this lawsuit including, but not limited to, by placing or causing to be placed onto defendant's driveway large rocks, physical barriers, ropes, trees, debris, or any other objects; and/or (b) preventing any person from lawfully accessing the driveway including, but not limited to, defendant, her son, friends, family, and/or anyone performing work on defendant's behalf, such as JNC Construction, including by harassment, intimidation, or otherwise threatening conduct or communications; (2) granting defendant an award of costs in the amount of $1,025.00 representing the incidental damages that she incurred due to plaintiffs' frivolous conduct, pursuant to 22 NYCRR 130-1.1; (3) imposing sanctions upon plaintiffs pursuant to 22 NYCRR 130-1.1 for their frivolous conduct undertaken primarily to harass and maliciously injure defendant; **Motion Sequence #7** by plaintiffs for an Order pursuant to CPLR 3211 dismissing defendant's order to show cause and granting plaintiffs an order

requiring defendant to remove the encroachment on their property; awarding plaintiffs' attorney's fees, costs and disbursements in this proceeding:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-L	1 A&B
MEMORANDUM OF LAW	2
NOTICE OF CROSS MOTION/AFFIRMATION/AFFIDAVIT/ EXHIBITS A-D	3
LEGAL MEMORANDUM	4
ORDER TO SHOW CAUSE/AFFIRMATION/EXHIBITS A-C	5
202.7 AFFIRMATION/EXHIBIT A	6
AFFIDAVIT OF WHEATON/EXHIBIT A	7
MEMORANDUM OF LAW	8
NOTICE OF CROSS MOTION/AFFIRMATION/AFFIDAVIT/ EXHIBITS A-C	9
AFFIRMATION OF JONATHAN B. NELSON	10
MEMORANDUM OF LAW	11
AFFIRMATION IN SUPPORT AND OPPOSITION/EXHIBIT A	12
MEMORANDUM OF LAW	13
MEMORANDUM OF LAW	14
REPLY AFFIRMATION IN SUPPORT OF CROSS MOTION	15
AFFIRMATION IN FURTHER SUPPORT/EXHIBIT A	16
MEMORANDUM OF LAW	17

Plaintiffs, David Small and Amy Small, and defendant, Maryann Wheaton, own adjoining parcels of property situated in the Town of Philipstown, County of Putnam. The parcels derive from a common grantor, Diane Cummings Beattie ("Beattie").

By way of their first and second causes of action, plaintiffs seek judgment declaring that they have the right to use a certain right of way, known as the Wood Road Right of Way (the "Right of Way"), for unlimited ingress and egress to their property along the entire distance that the Right of Way abuts their property and, correspondingly, for an order prohibiting the defendant from interfering, obstructing or limiting the use of the Right of Way.

More particularly, plaintiffs assert that they enjoy an appurtenant easement right to a 20' wide length of defendant's land at its boundary with plaintiffs', through plaintiffs' chain of title, originating in Hershel Harris and Francis O. Harris through to Richard Pickens and Ann Pickens. Plaintiffs also claim a prescriptive right on a portion of the easement area arising from the continual use of a portion of the easement for access to a rear landlocked parcel and barn.

Through their third cause of action, plaintiffs seek treble

damages pursuant to RPAPL §861 for the value of their trees allegedly taken down by defendant.

Appurtenant Easement

The Court finds that defendant has come forward in the first instance with sufficient evidence in admissible form establishing entitlement to judgment in her favor on plaintiffs' claim seeking the enforcement of the terms of the appurtenant easement contained in plaintiffs' chain of title.

> A grantor may effectively extinguish or terminate a covenant . . . [by] convey[ing] retained servient land to a bona fide purchaser who takes title without actual or constructive notice of the covenant because the grantor and dominant owner failed to record the covenant in the servient land's chain of title (see, 3 Powell, Real Property ¶¶421, 424, at 34-269--34-270; Buffalo Academy of Sacred Heart v. Boehm Bros., 267 NY 242, supra; Goldstein v. Hunter, 257 NY 401; Tufts v Byrne, 278 App Div 783; see also, Real Property Law §291).

(Witter v. Taggart, 78 NY2d 234, 239 [1991]).

Defendant has established (1) that the chain of title from the common grantor, Beattie, to her estate, the servient estate, failed to record the subject right of way contained in plaintiffs' dominant estate, (2) that no subsequent grantor in defendant's chain included a grant of the right of way in any of their deeds out and (3) that a dominant landowner or grantor in plaintiffs' chain of title recorded in the servient chain (defendant's chain) "the conveyance creating the covenant rights so as to impose notice on subsequent purchasers of the servient land" (Witter v. Taggart, supra, at 239-40).

In response, however, plaintiffs have raised a triable issue of fact as to whether defendant should be estopped from raising any related defense.

> As [was] explained in Strnad v. Brudnicki, 200 A.D.2d 735, 737, 606 N.Y.S.2d 913 "[e]ven if we assume that [an] easement is not appurtenant and did not pass automatically to the subsequent owners, a person who purchases the servient estate with actual or constructive notice of the easement is estopped from denying the existence of the easement."

(Air Stream Corp. v. 3300 Lawson Corp., 99 AD3d 822, 828 [2d Dept 2012] lv to appeal denied, 21 NY3d 852, 988 NE2d 528 [2013]). In this regard, there are material questions of fact as to whether a purchaser or purchasers of the servient estate (Wheaton's chain of title) were on notice of the easement notwithstanding the absence of same in the servient chain of title.

Prescriptive Easement

"In order to establish a prescriptive easement, a plaintiff must prove, by clear and convincing evidence, that the use of the servient property was open, notorious, continuous, hostile and under a claim of right for the requisite 10-year period" (Allen v. Mastrianni, 2 AD3d 1023, 1024 [3d Dept 2003], citing Beretz v. Diehl, 302 A.D.2d 808, 809 [2003]; Aubuchon Realty Co. v. Cohen, 294 A.D.2d 738, 739 [2002]; Gordon v. Thomas, 177 A.D.2d 909, 909 [1991]; RPAPL 311). Generally, such proof gives rise to the presumption of hostility and claim of right; thus, shifting the burden of proof from the dominant estate to the servient estate to establish that the use was permissive (Allen v Mastrianni, supra, citing Wechsler v. New York State Dept. of Envtl. Conservation, 193 A.D.2d 856, 859 [1993], lv. denied 82 N.Y.2d 656 [1993]; Bova v. Vinciguerra, 184 A.D.2d 934, 934 [1992]). Permission may be inferred where the relationship between the parties can be described as "one of neighborly cooperation and accommodation", in which case the presumption of hostility does not arise (Allen v. Mastrianni, supra id. citing McNeill v. Shutts, 258 A.D.2d 695, 696 [1999]; Van Deusen v. McManus, 202 A.D.2d 731, 733 [1994]).

Whether or not and to what extent plaintiffs or their predecessors in title may have openly, notoriously, and continuously used the disputed area during the asserted prescriptive period, defendant has not come forward with sufficient proof in admissible form establishing or inferring "neighborly cooperation and accommodation" such as would defeat plaintiffs' claim. Nor has defendant established that plaintiffs' use of the disputed area was with the permission of defendant or any of her predecessors-in-interest.

The Court does not interpret plaintiffs' deposition testimony, as cited by defendant, as conclusive on the issue of express permission, be it alleged permission from Mr. Matuszak, Mr. Quigley or anyone else in the servient (defendant's) chain of title. One's acquiescence to a speaker's pronouncement of his or her legal rights does not, as a matter of law, constitute an express grant of permission as is necessary to defeat a claimed right to a prescriptive easement (see Fink v. Friedman, 78 Misc 2d 429, 433 [Sup Ct 1974]["Acquiescence borne out of mutual mistake does not create an easement"]). Accordingly, the motion by defendant is denied.

RPAPL §861

Defendant's motion for summary judgment on plaintiffs' section 861 claim is denied.

> [A] defendant seeking summary judgment "must affirmatively establish the merits of its ... defense and does not meet its burden by noting gaps in its opponent's proof" (Orcutt v. American Linen Supply Co., 212 A.D.2d 979, 980; see New York Mun. Ins. Reciprocal v. Casella Constr., Inc., 105 AD3d 1440, 1441) . . .

(Claypoole v. Twin City Ambulance Corp., _____ AD3d ____ [4th Dept 2014], 2014 NY Slip Op 04635 [4th Dept June 20, 2014]), such as is the case here.

Plaintiffs' cross-motion:

The Court denies plaintiffs' motion for summary judgment on plaintiffs' behalf, including, their claim for RPAPL §861 damages. Among other things, there are extant questions of fact as to whether defendant may be estopped from denying the existence of the appurtenant easement (see "Appurtenant Easement", supra) and plaintiffs have failed to come forward with an adequate showing of entitlement to judgment in their favor as a matter of law on the prescriptive easement issue, including its precise dimensions, among other things.

With those ruling in place, the Court denies all remaining aspects of the above referenced motions except that all previously issued injunctions and admonishments by the Court shall remain in place, pending final judgment.

Counsel and their parties are directed to appear before the Court at 9:30 AM on August 25, 2014, for a Final Settlement Conference, pending trial.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
June 30, 2014

S/ _____
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