

Freed v Best

2015 NY Slip Op 30254(U)

February 18, 2015

Supreme Court, Suffolk County

Docket Number: 14-01247

Judge: Jr., Andrew G. Tarantino

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Todd E. Freed and Edith Webster-Freed [collectively "Freed"], from performing any construction or demolition work on premises designated as 12400 New Suffolk Avenue, Cutchogue, New York, referred to as "the subject premises", by the defendant Zarko Svatovic ["Svatovic"], the supporting affidavit dated October 31, 2014, and supporting exhibits (sequence 008), the affidavit in opposition on behalf of Freed and exhibits A through F, and the "Affidavit in Opposition to Reply Affidavit" by Svatovic dated December 9, 2014, and the additional two Affidavits of Svatovic, both dated November 25, 2014, and attached exhibits A through C, and exhibit A, respectively, and

having considered Svatovic's Order to Show Cause seeking an Order directing Freed to join as defendants all necessary parties to the action, namely, all deed-holders to a certain contested right-of-way, and restraining Freed from taking any further action in this lawsuit until the proposed necessary parties have been joined (sequence 009), Svatovic's affidavit in support dated December 19, 2014, and exhibits A through M, and oral argument on the motion having been heard on January 15, 2015, it is now

ORDERED that motion sequences 007 and 008 are considered together for purposes of this determination; and it is further

ORDERED that the Order to Show Cause to quash a subpoena and for a protective order (007) is denied; and it is further

ORDERED that the Order to Show Cause by Svatovic seeking to enjoin the construction and demolition work undertaken by Freed pursuant to a building permit issued by the Town of Southold (008), is denied; and it is further

ORDERED that the Order to Show Cause by Svatovic seeking an order directing Freed to join as parties defendant all deed-holders to the right of way and for a stay of further proceedings pending the joinder is denied, without prejudice to a subsequent application by Best in accordance herewith; and it is further

ORDERED that after review of the submissions by the attorneys for Freed and Best regarding the appropriate amount of an undertaking while there is a temporary restraining order in effect as to the contested right of way, the Court determines that a nominal undertaking of \$100.00 to be posted by the plaintiffs will be required at this time.

The parties' familiarity with the underlying facts is assumed and has already been set forth at some length in the prior order of the Court dated November 25, 2014. Nevertheless, the Court adds the following additional facts to inform the instant decision.

The case essentially involves two title issues. The first issue is whether the defendants have a right-of-way over a thirty-three foot wide path on the eastern most boundary line of the Freed property extending from New Suffolk Avenue to Great Peconic Bay [“the contested right-of-way” or “the right-of-way”]. The second issue, raised by Best’s counterclaim, is whether Freed owns the property over which the right-of-way runs. Best and Svatovic contend first, that they as co-owners of 12355 New Suffolk Avenue, Cutchogue, New York, have a deeded right-of-way over the subject 33 foot wide path to the Bay, and second, that Freed’s property does not include the right-of-way.

Regrettably, since the issuance of an order on June 5, 2014, intended and referred to as a “peace-keeping Order”, the dispute over the right-of-way appears to have intensified. Mr. Svatovic, who is self-represented, has presented at least two additional Orders to Show Cause in this action (sequences 008 and 009 herein), and two additional motions described as Motions “to Renew Reargue” (sequences 010 and 011), the latter two motions not yet having been fully submitted.

Since the November 2014 extension of the peace-keeping Order, the Court conferenced the matter in open court, on-the-record, on January 15, 2015, and heard argument on Svatovic’s pending Orders to Show Cause. At that time it was discussed that Svatovic commenced a special proceeding entitled *Zarko Svatovic v Town of Southold*, Index No. 2014-22339, seeking to revoke a building permit issued to Freed by the Town of Southold [“the Town”], for demolition and construction of a new single family dwelling with attached two car garage, covered front entry and terraces at the subject property. The special proceeding was originally assigned to the Hon. Jerry Garguilo but was subsequently transferred to this Court as a related case by order dated December 3, 2014. Svatovic’s motion to renew and reargue the order of transfer was denied by Judge Garguilo in an order dated February 6, 2015. Thus, both the Freed action and Svatovic’s special proceeding against the Town are now before this Court.

Notably, at the hearing on January 15, 2015, the Court ordered Svatovic to cease and desist from making any further applications for relief to the Court in this action without leave of Court. The Order was effective immediately. It is unclear as to whether Svatovic filed the last two “Motions to Renew Reargue” (sequences 010 and 011 herein), after the January 15th bench order, notwithstanding the Court’s directive to Svatovic to seek prior leave of court before filing any more papers. In any event, giving Mr. Svatovic the benefit of the doubt, the Court will assume that the motions were filed before the January 15th order and will hold the two “renew/reargue motions” in abeyance, *sine die*, pending completion of discovery to enable the parties to resolve the ultimate issue- the ownership of the approximately 33 feet wide strip of land that runs along the eastern boundary of the Freed property and leads from New Suffolk Avenue to Peconic Bay. Anecdotally, the Court has set the date of February 23, 2015, for the parties to appear and report on the progress of discovery.

Svatovic's Order to Show Cause seeking an Order directing Freed to join as defendants all deed-holders to the contested right-of-way, and restraining Freed from taking any further action in this lawsuit until the proposed necessary parties have been joined (sequence 009) was denied from the bench on January 15, 2015. Remaining are two motions (007 and 008), and the matter of the appropriate amount of an undertaking, if any, as a result of the temporary restraining order imposed on the parties on June 5, 2014, and extended by the November 25, 2014 Order. The issues will be addressed *seriatim*.

Regarding the appropriate amount of an undertaking, after considering the submissions by the attorneys for Freed and Best the Court determines that a nominal undertaking in the amount of \$100.00 to be imposed upon the plaintiff is appropriate under the circumstances. The injunctive relief that was fashioned by the Court at the June 5th hearing and continued by the November 2014 Order, sought to accommodate all parties, not just Freed, pending the ultimate resolution of the dispute. As a consequence, even though Freed contested the claim of Svatovic and Best to traverse the contested 33 foot path, the defendants were permitted to gain access to the beach and the bay using the eastern-most, ten foot wide strip of the contested right-of-way for the duration of the injunction. All parties, not just the defendants, were prohibited from otherwise entering on to the other's property. All parties were prohibited from leaving any unattended items including chairs, kayaks, etc., on the contested right-of-way. Admittedly, the defendants' use of the beach was limited, by restricting use of the beach to the east of the path, a measure that sought to address reciprocal accusations that the parties were harassing and provoking one another. Although the injunction prohibited the defendants from altering the contested path, it is questionable whether they have the right to do so even if they are correct that they have a deeded right-of-way.

Best argues that a \$400,000.00 undertaking is warranted as a result of the devaluation of her property as a result of the temporary injunction. If Best and/or Svatovic intend to convey their interest in their property before the resolution of this action, the Court will allow the defendants to renew the application for the posting of an undertaking. Hopefully, such a renewal will not be necessary assuming the parties move expeditiously through discovery and to a hearing on the ultimate issue of the ownership rights of the contested right-of-way. Best's allegation that a higher undertaking is required since Freed's attorneys have been uncooperative during discovery is unrelated to the amount of any undertaking. Any failure on the part of Freed's attorneys to engage in discovery in good faith will be addressed at the conference scheduled for February 23, 2015.

Regarding motion sequence 007, the motion to quash Best's subpoena and for a protective order is denied. The proposed deponent, Ileen Truglia, is a real estate agent who purportedly represented the seller in regards to the sale of the premises at 12400 New Suffolk Avenue to Freed. The subject subpoena seeks the deposition of Truglia and "[a]ll documents including correspondence and e-mails concerning Todd E. Freed and Edith Webster-Freed's

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purchase of property located at 12400 New Suffolk Avenue, Cutchogue, New York, concerning any claims as to the ownership of that property including but not limited to correspondence with the seller's attorney or any title agency or title insurance company, and any non-disclosure agreements related to the purchase."

With respect to disclosure sought from a non-party, the Second and Third Departments, while acknowledging that the "special circumstances" requirement no longer applies, nonetheless required the party seeking discovery to meet the "material and necessary" standard and more. Specifically, in the Second Department, a motion to quash a subpoena would be granted if "the party issuing the subpoena [] failed to show that the disclosure sought [could] not be obtained from sources other than the nonparty, and properly denied when the party show[ed] that the evidence [could] not be obtained from other sources" (*Kooper v. Kooper*, 74 A.D.3d 6, 16–17, 901 N.Y.S.2d 312 [2d Dept. 2010] [citations omitted]; see also *American Heritage Realty LLC v. Strathmore Ins. Co.*, 101 A.D.3d 1522, 1524 [3d Dept. 2012]; *Cotton v. Cotton*, 91 A.D.3d 697, 699, 938 N.Y.S.2d 92 [2d Dept. 2012]).

The Court of Appeals has now abrogated the added requirements imposed by the Second Department's holding in *Kooper v Kooper*, *supra*, holding that the "material and necessary" standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this state's policy of liberal discovery (*Kapon v Koch*, 23 N.Y.3d 32, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014]).

The words "material and necessary" as used in section 3101 must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Id.* at 38, citing *Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968]). Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty (*Id.*).

The contested subpoena demands all documents concerning any claims as to the ownership of the property purchased by Freed including but not limited to correspondence with the seller's attorney or any title agency or title insurance company, and any non-disclosure agreements related to the purchase. On its face, documents concerning claims of ownership of the contested right-of-way go to the very heart of the dispute here. The argument that Truglia enjoys a privilege of confidentiality with her clients is without merit as there is no authority to support the notion that there is a common law or statutory privilege, as distinguished from a fiduciary duty, between a real estate broker and that broker's client(s). To the extent that Truglia or her attorney believe that certain questions may force Truglia to incriminate herself, those questions shall be marked for a ruling at the deposition and the Court will determine whether that particular

question threatens to violate Truglia's Fifth Amendment right against self-incrimination. However, the argument that any and all testimony by Truglia regarding the purchase and sale of the subject premises will violate her Fifth Amendment rights is without merit and Truglia's motion to quash the subpoena and for a protective order is denied.

Svatovic seeks an order prohibiting plaintiffs or anyone acting on their behalf from performing any construction or demolition work on the "lot/area/parcel defined by the building permit survey, the survey based on which the #39201 permit was issued [by the Town of Southold] on September 22, 2014, until the Court rules on whether or not Plaintiffs own the property for which the permit was issued for". The survey submitted with the building permit application, rightly or wrongly, depicts two separate tax map numbers for the parcel at issue. Lot 12.1 is where three then existing structures were located which Freed expressed the intention to demolish, to be replaced by a house with an attached garage. Lot 12.2 contains the 33 foot pathway from New Suffolk Avenue to Peconic Bay which Svatovic claims is owned by someone(s) other than Freed or the defendants. The entirety of the construction for which approval was sought and received, is to take place on that portion of the survey identified as Lot 12.1, no part of which impedes on the area of the survey depicted as Lot 12.2 containing the purported right of way. Counsel for Freed represents, and there has been no evidence to the contrary, that in applying for the permit, all setbacks were calculated as though Lot 12.1 were the boundary line, notwithstanding that Freed asserts that 1) they own the entire parcel depicted on the survey as Lots 12.1 and 12.2, respectively, and 2) there is no right-of-way.¹

In essence, Svatovic's application here challenges construction on a portion of the property indisputably owned by Freed, and approved by the Town. Any argument that the Town improperly issued the building permit will presumably be addressed in the related Article 78 proceeding entitled *Zarko Svatovic v Town of Southold*, Index No. 2014-22339, and is not properly before this Court in this action. The Court denies Svatovic's request to stay construction and demolition approved by the Town on that portion of the property indisputably owned by Freed (*see Edwards v. Incorporated Village of Hempstead*, 122 A.D.3d 627, 996 N.Y.S.2d 100 [2d Dept. 2014] [Supreme Court providently exercised its discretion in denying petitioners' motion for preliminary injunctive relief, since they failed to establish likelihood of success on the merits, and their claim of irreparable injury was merely speculative]).

In sum, the Court has ordered the following. Plaintiff is to post an undertaking in the amount of \$100.00 during the pendency of the temporary injunction. Truglia's motion to quash

¹ At the on-the-record conference on January 15, 2015, Freed's attorney confirmed the Court's understanding that the intent of Freed's lawsuit was not to terminate the claimed easement as to 22 other deedholders, nor could Freed do so without joining them in the action. The action was limited to declaring the rights of the parties to the action, Freed, Best and Svatovic.

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Best's subpoena and for a protective order is denied. Svatovic's motion for a stay of any demolition or construction work under Southold Town Building permit #39201 is denied. Svatovic's motion for an order directing Freed to join as parties defendant all deed-holders to the right of way and for a stay of further proceedings pending the joinder is denied, without prejudice to a subsequent application by Best. Svatovic's two "renew/reargue motions", (sequences 010 and 011), are held in abeyance, *sine die*, pending completion of discovery. Lastly, Svatovic is enjoined from filing any further applications or from seeking any relief in either this action or in *Zarko Svatovic v Town of Southold*, Index No. 2014-22339, without the Court's express permission.

The parties or their attorneys are directed to appear for a compliance conference on February 23, 2015.

This constitutes the Order of the Court.

Dated: Riverhead, New York
February 18, 2015



ANDREW G. TARANTINO, Jr., A.J.S.C.

 FINAL DISPOSITION

XX NON-FINAL DISPOSITION