

**Bluffs at Baiting Hollow Homewoners Assn., Inc. v
Fox Hill Acquisitions, LLC**

2015 NY Slip Op 30907(U)

May 19, 2015

Supreme Court, Suffolk County

Docket Number: 15656/2012

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 15656/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 THE BLUFFS AT BAITING HOLLOW
 HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

-against-

FOX HILL ACQUISITIONS, LLC and
 SOUNDVIEW ASSOCIATES, LLC,

Defendants.

ORIG. RETURN DATE: AUGUST 24, 2012
 FINAL SUBMISSION DATE: MAY 8, 2014
 MTN. SEQ. #: 002(001)
 MOTION: MOT D

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Upon the following papers numbered 1 to 7 read on this motion _____
FOR PRELIMINARY INJUNCTION

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation and supporting papers 6, 7; it is,

ORDERED that this motion by plaintiff, THE BLUFFS AT BAITING HOLLOW HOMEOWNERS ASSOCIATION, INC. ("plaintiff" or "Bluffs Homeowners Association"), for an Order:

(1) pursuant to RPAPL Article 15, determining that defendant FOX HILL ACQUISITIONS, LLC is the title owner of the subject property known as the Baiting Hollow Club pursuant to an October 2011 deed executed by Rugby Recreational Group, LLC;

(2) pursuant to RPAPL 1521, mandating that defendant FOX HILL ACQUISITIONS, LLC record the October 2011 deed;

(3) pursuant to RPAPL 1521, mandating defendant FOX HILL ACQUISITIONS, LLC to re-execute an amended easement, as grantors, and further execute and record all documents required for the recording of the amended easement; and

(4) granting a preliminary injunction, pursuant to Article 63 of the CPLR, enjoining defendants and all persons and entities acting in concert with them, pending the hearing and determination of this motion, from transferring in any manner the subject property known as the Baiting Hollow Club,

is hereby **GRANTED** solely to the extent provided hereinafter. The Court has received opposition hereto from defendants FOX HILL ACQUISITIONS, LLC and SOUNDVIEW ASSOCIATES, LLC ("Soundview").

By Order dated August 10, 2012, the Court (Baisley, J.) issued the following temporary restraining Order:

ORDERED, that pending the return date of Plaintiff's application for a preliminary injunction, Defendants be, and they hereby are, **TEMPORARILY RESTRAINED** from making any transfer of the Property known as the Baiting Hollow Club.

By Order dated September 10, 2012, this Court extended and continued the temporary restraining Order until the ultimate determination of plaintiff's instant motion for a preliminary injunction and other relief.

BACKGROUND

Pursuant to an Easement and Right of Way Agreement dated November 19, 1996 (the "1996 Easement") and recorded with the Suffolk County Clerk on May 2, 1997, the Bluffs Homeowners Association became a beneficiary and was granted a permanent and perpetual non-exclusive easement and right-of-way to utilize a certain roadway named Fox Hill Drive from the adjacent burdened Baiting Hollow Golf Club property. The 1996 Easement was executed to protect the Bluffs, as Fox Hill Drive is the sole and exclusive access road to the Bluffs Homeowners Association condominiums for all of its residents.

Inclusive in the 1996 Easement was the covenant that Soundview, the Knolls of Fox Hills, Inc., the previous owner of the Baiting Hollow Golf Club property, and the Bluffs Homeowners Association would all equally share in any expense necessary to maintain Fox Hill Drive. Plaintiff alleges, upon information and belief, that prior to 2005 Soundview became the sole owner of the Baiting Hollow Golf Club property and subsequently sold its interest to Rugby Recreational Group, LLC ("Rugby").

THE 2005 RUGBY LITIGATION

As a result of Rugby and Soundview allegedly failing to pay their respective share of the maintenance expenses of Fox Hill Drive over the course of approximately ten (10) years, the Bluffs Homeowners Association commenced an action in Supreme Court, Suffolk County in 2005 under Index No. 18091/2005 (the "Rugby Litigation") to collect all monies owed by Rugby and Soundview to the Bluffs Homeowners Association for the maintenance of Fox Hill Drive.

Plaintiff informs the Court that in settlement of the Rugby Litigation, Rugby paid the Bluffs Homeowners Association a total of \$75,000.00. Of this amount, \$50,000.00 represented the settlement amount for all existing arrears, and \$25,000.00 represented the first of an agreed-upon continual, annual payment to the Bluffs Homeowners Association.

The settlement of the Rugby Litigation resulted in the execution of: (1) a Stipulation of Settlement entered into on or about September 2011 (the "Stipulation"); and (2) an Amendment to Easement and Right-of-Way Agreement (the "Amended Easement") duly executed on or about April 2011 between Rugby, Soundview and Bluffs Homeowners Association.

The Stipulation was executed on behalf of Soundview by its principal, Rego, and on behalf of Rugby by its principal, Barry Biel. The Amended Easement was executed by Marie E. Pryor on behalf of the Bluffs Homeowners Association, and by Barry J. Beil on behalf of Rugby.

Plaintiff alleges that the Stipulation altered the obligations under the 1996 Easement from "sharing in the expenses," to requiring Rugby to make an

annual payment of \$25,000.00 to the Bluffs Homeowners Association for the maintenance and upkeep of Fox Hill Drive.

DEFENDANTS' LEGAL ARGUMENT

Defendants contend that plaintiff's original action for money damages for the nonpayment of the agreed upon annual easement fee is an action at law for money damages, and therefore this motion is an improper context for the temporary and injunctive relief applied for by plaintiff. Defendants further contend that a plenary action is now required wherein all affected parties are to be summoned before the court.

While certainly the better practice would have been the commencement of the RPAPL Article 15 proceeding contemporaneously with the within action for money damages, the Court knows of no prohibition against the amendment of the existing matter and the addition of other parties as necessary should any existing party be so inclined.

CPLR 1001 (a) provides that necessary parties include those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." As to the latter requirement, "[t]he possibility that a judgment rendered without [the omitted party] could have an adverse practical effect [on that party] is enough to indicate joinder" (Siegel, NY Prac § 132 at 199 [2d ed]). "A principal reason for compulsory joinder of parties is 'to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter' " (*Matter of Llana v Town of Pittstown*, 234 AD2d 881, 883-884, quoting *Joanne S. v Carey*, 115 AD2d 4, 7 [1986]; see *Hitchcock v Boyack*, 256 AD2d 842 [3d Dept 1998]).

Defendants further contend that the Amended Easement need not be recorded due to the existence of the original Easement as recorded. While an interesting observation, the contemporaneously executed Stipulation contains the express provision that it be recorded. The Stipulation at paragraph 4 is quite straightforward and provides:

4. The Amendment to the Easement and Right of Way Agreement dated November 19, 1996, shall be recorded with the Suffolk County Clerk's Office.

There is no denial of the existence of the Amended Easement, and there is no denial of the content, including paragraph 11 of the Amended Easement, which recites as follows:

11. The rights granted and obligations imposed hereby shall run with the land and shall be binding upon and inure to the benefit of Rugby and the Homeowners Association, and their representatives, successors and assigns. A sale, lease or other transfer by any of the parties hereto of its interest in the related premises shall relieve the transferor of its obligations hereunder and the transferee shall be deemed, without the need for any further agreement, to have assumed and agreed to carry out and comply with all of the terms of the EASEMENT AND RIGHT OF WAY AGREEMENT dated November 19, 1996, as amended by this document that were and are to be carried out and complied with by the transferor.

Given the foregoing language and the binding nature of the writings upon the parties, plaintiff has satisfied its burden with respect to qualification for a preliminary injunction within the context of the amended complaint.

AMENDED COMPLAINT

Plaintiff has served and filed an Amended Verified Complaint wherein a Second Cause of Action pursuant to RPAPL Article 15 has been pleaded, and in response to which defendants have interposed their Verified Answer to Amended Complaint. Plaintiff has now properly brought the equitable proceeding before the Court. The writings speak for themselves. The preliminary relief that plaintiff is requesting concerns only the transfer of the property and would preserve the status quo. Defendants argue that any prospective purchaser or transferee would be on "inquiry notice" concerning the existence of the

Amended Easement. The parties to the Stipulation and Amended Easement agreed to its recording, and there is a significant qualitative difference between “actual” notice and “inquiry” notice under the circumstances here present.

Any transfer of the property prior to the recording of the Amended Easement would produce injury to plaintiff, in that any transferee would be potentially unaware of the additional provisions of the Amended Easement, specifically the \$25,000.00 annual fee in accordance with its terms. The signatories to the Stipulation and Amended Easement bound their successors for the requirement of the recording and, as such, the likelihood of success on the merits weighs in plaintiff’s favor. It is the recording that is the crux of the matter. The potential for injury in the event of a transfer is real and extends beyond the value of the annual fee. Defendants seek to make the original easement and the amendment severable and the latter inferior as to its efficacy while claiming they are the same. Unless and until the amendment is recorded, it would appear at this juncture that the recorded easement would certainly be more effective than the unrecorded amendment regardless of any assertion of an inquiry obligation.

There are a significant number of cases wherein “actual” versus “inquiry” versus “constructive” notice of an easement are before the courts. The Stipulation and Amended Easement herein contain provisions requiring recording such that this Amended Easement would avoid becoming the subject of controversy as it concerns any future transferee of the premises.

The Second Department has spoken to the issue in *Schulz v Dattero*, 104 AD3d 831 (2d Dept 2013):

With respect to their amended counterclaim for a judgment declaring that they are entitled to the easement rights set forth in the Agreement, the Datteros contended that the plaintiffs were on inquiry notice as to the existence of the Agreement. “[A]n unrecorded conveyance of an interest in real property is deemed void as against a subsequent good faith purchaser for value who acquires his interest without actual or constructive notice of the prior conveyance” (*Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13, 16-17, 399 NE2d 1160, 424 NYS2d 139 [1979]; see Real Property

Law § 291). However, “ [w]here a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser’ ” (*Maiorano v Garson*, 65 AD3d 1300, 1303, 886 NYS2d 190 [2009], quoting *Williamson v Brown*, 15 NY 354, 362 [1857]; see *Congregation Beth Medrosh of Monsey, Inc. v Rolling Acres Chestnut Ridge, LLC*, 101 AD3d 797, 956 NYS2d 95 [2012]). “This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part” (*Williamson v Brown*, 15 NY at 362).

There is certainly a qualitative difference between a recorded easement and an unrecorded amended easement.

With respect to the elements of a preliminary injunction, in order to obtain a preliminary injunction a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]). Furthermore, the purpose of a preliminary injunction is to maintain the status quo pending the determination of the action (see *Town of Carmel v Melchner*, 105 AD3d 82 [2013]; *Ruiz v Meloney*, 26 AD3d 485 [2006]; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642 [2006]). “The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2011]).

The Court has weighed the elements necessary for the granting of a preliminary injunction to maintain the status quo herein, and given paragraph 4 of the Stipulation and paragraph of 11 of the Amended Easement, the Court finds that plaintiff has clearly sustained its burden.

WHEREFORE, it is

ORDERED, that plaintiff's request for a preliminary injunction enjoining defendants and all persons and entities acting in concert with them from transferring in any manner the subject property known as the Baiting Hollow Club is hereby **GRANTED**.

All other relief requested herein is referred to the trial of this action.

The foregoing constitutes the decision and Order of the Court.

Dated: May 19, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION