Duffy v Cornwell
2016 NY Slip Op 30795(U)
April 12, 2016
Supreme Court, Suffolk County
Docket Number: 8405/2013
Judge: James Hudson
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Short Form Order

Supreme Court of the County of Suffolk PUBLISH
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x---x
JAMES R. DUFFY and MARY ELLEN DUFFY,

Plaintiffs,

-against-

THOMAS CORNWELL, ROBERT LEHNERT (a/k/a "ROBERT LEHNERT, Jr."), NASSAU POINT PROPERTY OWNERS ASSOCIATION, INC., and NASSAU POINT PROPERTY OWNERS ASSOCIATION, INC., as successor-in-interest to NASSAU POINT CAUSEWAY ASSOCIATION, INC.,

Defendants.
x---x

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SEQ. NOS.:001-MD
002-MOT D

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Upon the following papers numbered 1 to 40 read on this Motion/Order to Show Cause for Summary Judgment and Cross Motion to Compel; Notice of Motion/ Order to Show Cause and supporting papers 1-9 (001) Supplemental Memorandum of Law 10-11 ; Notice of Cross Motion and supporting papers 12-34; Answering Affidavits and supporting papers 0; Replying Affidavits and supporting papers 35-40; ~~Other 0; (and after hearing counsel in support and opposed to the motion)~~, it is

ORDERED, that Defendants' motion for summary judgment is denied under the circumstances presented here (CPLR Rule 3212); and it is further

ORDERED, that Plaintiffs' cross-motion to compel disclosure is granted to the extent that Defendants shall provide any written documents which are not subject to a privilege which reference the Duffy property and/or the piece of land in question; and it is further

ORDERED, that Defendants shall provide a transcript of the minutes of any meetings held in which the subject property was discussed; and it is further

ORDERED, that Defendants shall further make these specific disclosures within sixty (60) days of the date upon which they have been served this Order with notice of entry.

Defendants move for summary judgment (CPLR Rule 3212) in this action seeking a declaratory judgment and damages for trespass to land, defamation and conspiracy. The action arises out of Plaintiffs' ownership of real property on a peninsula of land known as Nassau Point in the Hamlet of Cutchogue, situated within the Town of Southold, Suffolk County, New York. Plaintiffs contend that a portion of their land traversed by a paper road known as "Carpenter Road" and existing on a map filed by the owner of the property in question in 1922, is being utilized illegally by neighbors and passers-by pursuant to a perceived easement. Plaintiffs further contend that said trespassers have conspired to seize the easement by continuous use and by defaming Plaintiff James R. Duffy, Esq., an attorney, by filing an anonymous grievance against him with the Grievance Committee for the Tenth Judicial District.

Plaintiffs oppose the motion for summary judgment and cross-move for an order compelling Defendants to provide discovery (CPLR Rule 3124) or in the alternative, striking Defendants' answer (CPLR § 3126).

According to the complaint, on or about December 18, 1980 Mr. James R. Duffy and Mrs. Mary Ellen Duffy purchased a 4.5 acre lot known as "Camp Wawokiye" located on Wunneweta Road, in Cutchogue, New York. The Duffy's, Plaintiffs in this case, concede that a portion of the lot known as "Carpenter Road," is designated as a "paper road," meaning that it only appears on the original subdivision map filed in this case in 1922. Plaintiffs aver that at some point after taking title to the land, the name of "Carpenter Road" was changed to "Carrington Road." The change took place without notice to the Duffy's, nor were the Duffy's made aware of any reason for the name change, however, it appears that the name change was undertaken subsequent to the Duffy's acquiring title to the property. Plaintiffs further aver that since their ownership, they have undertaken various and numerous steps designed to protect their interest in the property and to prevent others from using it. This assertion pertains particularly to Carpenter/Carrington Road being traversed by neighbors and other unknown persons.

Defendants in this case present a scenario which differs from Plaintiffs' in that they aver that they and the homeowners association, Nassau Point Property Owners Association, Inc., have continuously maintained an easement over the Duffy's property running along the Carpenter/Carrington Road. Asserting that this fact is not in dispute, or more accurately, cannot be disputed, Defendants move for summary judgment.

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636 [2d Dept 1988]). The function of the Court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295 [1st Dept 1986]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see* ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966 [1988], citing ***Zuckerman v City of New York,*** 49 NY2d 557 [1980]; ***Friends of Animals v. Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*see* ***Gilbert Frank Corp. v Federal Insurance Co.,*** *supra*). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital,*** 98 AD2d 976 [4th Dept 1983]).

In the instant case, the parties have each submitted separate affirmations by experts on the question of the existence of the easement. Defendants submit the affirmation of Lance R. Pomerantz, Esq., an attorney with an impressive history of experience and knowledge on the subject of land use and chain of title. Mr. Pomerantz concludes that "all owners of lots on the Filed Map [sic] have an unrestricted right of way over the Road [sic] that cannot be prevented by the Plaintiffs." In addition to his direct referral to the chain of title, Mr. Pomerantz also relies upon the decision in the case of ***Nassau Point Property Owners Association, Inc. v Tirado, et al,*** 29 AD3d 754 (2nd Dept 2006). In that case, the Court held that properties appurtenant to the road in question had an easement of access over the property in question. Defendants and their expert point to the decision in ***Tirado,*** *supra.* as it involved the same question regarding easements over a paper road on Nassau Point properties.

Plaintiffs submit the affirmation of William A. Colavito, Esq., an attorney with an equally impressive history of experience and knowledge on the subject of land use and chain of title. Mr. Colavito concludes that "no one other than the Plaintiffs have a right to use 'Carpenter Road' and the Defendants do not have an easement over 'Carpenter Road'." In arriving at his conclusion, Mr. Colavito distinguishes ***Tirado,*** *supra.*, and relies upon the same Court's decision in ***H.S. Farrell, Inc. V Formica Constr. Co., Inc.***, 41 Ad3d 652 (2nd Dept 2007). Mr. Colavito concludes that the question of whether an easement exists in the instant case, when taken in the light of the decision in ***H.S. Farrell v Formica,*** *supra.*, is a fact driven inquiry based upon the original grantor's intent to create an easement. The

question is further compounded when, as Mr. Colavito does, the determiner of fact perceives a gap in the chain of title as to the easement. That very inquiry of fact is what distinguishes the two decisions and creates a question of fact in this case.

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra,* citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616 [2d Dept 1985], *affd,* 66 NY2d 701). Here, the Court finds the issues of fact to be genuine and for that reason the motion for summary judgment is denied.

Plaintiffs cross-move to compel discovery pursuant to CPLR Rule 3124. Plaintiffs aver that their combined demands for discovery have in large part been objected to by Defendants. Plaintiffs have set forth in their papers a painstaking account of the efforts put forth by their counsel to obtain disclosure. Defendants assert that they have complied with discovery, that most of the documents that they are relying on are public documents and that Plaintiffs demands amount to a "fishing expedition."

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material . . . in the prosecution or defense'" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403,407, 288 NYS2d 449, *quoting* ***Matter of Comstock***, 21 AD2d 843, 844, 250 NYS2d 753 [4th Dept 1964]). Nonetheless, litigants do not have *carte blanche* to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Breytman v Olinville Realty, LLC***, 99 AD3d 651, 952 NYS2d 205 [2d Dept 2012]; ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998, 922 NYS2d 470 [2d Dept 2011]; ***Foster v Herbert Slepoy Corp.,*** 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]), and a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see* ***Ural v Encompass Ins. Co. of Am.***, 97 AD3d 562, 948 NYS2d 621

[2d Dept 2012]; ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; ***Gonzalez v International Bus. Machs. Corp.***, 236 AD2d 363, 654 NYS2d 327 [2d Dept 1997]; ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420 [2d Dept 1989]).

To the extent that the Court will compel disclosure, Defendants shall provide any written documents which are not subject to a privilege and to the extent to which they exist which reference the Duffy property and/or the piece of land in question, as these bear complete relevance to the action in question. Furthermore, Defendants shall provide a transcript of the minutes of any meetings held in which the subject property was discussed, again to the extent that they exist, as these too bear relevance to the action. Defendants shall further make these specific disclosures within sixty (60) days of the date upon which they have been served this Order with notice of entry.

The foregoing constitutes the decision and Order of the Court.

DATED: APRIL 12, 2016
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.