City of Mechanicville (Edna Ave.)
2016 NY Slip Op 32703(U)
July 6, 2016
Supreme Court, Saratoga County
Docket Number: 2009-1878
Judge: Richard E. Sise
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

PRESENT: HON. RICHARD E. SISE
Acting Justice
STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

CITY OF MECHANICVILLE,

DECISION AND ORDER
Index No.: 2009-1878
RJI No.:45-1-2009-0716

Plaintiff,

-against-

FOR A DECLARATORY JUDGMENT QUIETING TITLE AGAINST ANY AND ALL PERSONS CLAIMING AN INTEREST IN AND TO PARCELS OF REAL PROPERTY LOCATED AT EDNA AVENUE AND LARKSPUR AVENUE, IN THE CITY OF MECHANICVILLE, COUNTY OF SARATOGA AND STATE OF NEW YORK, BEARING SBL#s 268-45-1-6; 268.45-1-7; 268.37-1-40; 268-37.37-1-41; and 268-37-1-42 & 43,

Defendants.

(Supreme Court, Saratoga County, Motion Term)

FILED
2016 JUL 12 PM 2:19
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

APPEARANCES: Bond, Schoeneck & King, PLLC
(By: Gregory J. McDonald, Esq.)
Attorneys for New York State Electric & Gas Corporation
350 Linden Oaks, Suite 310
Rochester, New York 14625

Tabner, Ryan and Keniry, LLP
(By: Brian M. Quinn, Esq.)
Attorneys for Brian Rohloff
18 Corporate Woods Boulevard, Suite 8
Albany, New York 12211

Sise, J.

This declaratory judgment action was brought in 2009 to quiet title to six parcels of real property the City of Mechanicville (City) claimed to own along Edna Avenue and Larkspur Avenue. As alleged in the petition, the action was brought because, following a duly noticed tax sale in February 2009, a search of the records in the Saratoga County Clerk's office failed to reveal that the City, or any other person, held title to the parcels. Though the action was brought in the name of the City, in an affidavit submitted in support of a motion pursuant to CPLR 316, for leave to serve by alternate means, Kevin J. Tollison, an attorney, asserted that he actually represented Brian Rohloff, the successful bidder for the parcels at the February 2009 tax sale, but had been authorized by the City to bring the quiet title action at no cost to the City. Based on the allegations in the verified complaint, the affidavit by Tollison and an affidavit by Penny A. Carlton, the individual who conducted the title search, the court concluded that the defendants in the action could not be ascertained with any degree of certainty and authorized service of the Summons with Notice by publication. After service was completed, the court, in August 2009, issued a judgment[1] barring any claim or interest, including any easement, in the six parcels, by any person and declaring that the City was the fee owner of the properties.

New York State Electric & Gas Corporation (NYSEG) has moved for an order vacating, as to them, the judgment issued by the court. According to NYSEG, the City granted it a permanent easement in 1997 across certain of the parcels involved in this action. NYSEG recorded the easement in December 1997 and has constructed and maintained utility poles and lines within the boundaries of the easement. The motion to vacate the judgment is made pursuant

[1]Though labeled "Order" the August 20, 2009 determination is properly a Judgment.

to CPLR 5015 (a) (3) and (4) and based on claims that in seeking alternate means of service the state of the title was misrepresented to the court, the court lacked jurisdiction to render the judgment as against NYSEG and excusable default.

In instances where a person claims an estate or interest in real property, RPAPL § 1501 authorizes an action against any person, known or unknown, to compel a determination of any claim adverse to the plaintiff which the defendant makes, or which, appears from the public records, the defendant might make. In the affidavits by Tollison and Carlson, submitted in support of the application for alternate service, all discussion of the search of the County Clerk's records is limited to title and ownership and no representation is made with respect to whether the search revealed any easement of record. However, in the complaint, the City sought not only a determination that it held title to the property but also to bar any claim in the nature of an easement. The determination by the court essentially mimics the prayer for relief in the complaint including barring any claim to an easement. Thus, while there was no patent misrepresentation with respect to the results of the title search, the submissions failed to advise the court as to whether an easement of record was found. Moreover, NYSEG had erected utility poles and lines along the easement which were visually apparent. Given the presence of the filed easement in the County Clerk's records and the presence of the poles and lines, the implication, on the application for alternate service, that no possible defendant could be known or ascertained, misrepresented the facts. That misrepresentation resulted in service upon NYSEG by publication. Such service, however, may only be authorized where service by another prescribed method is impracticable (CPLR 316) and service on NYSEG by other means was readily available (see

CPLR 311). Moreover, as service by publication failed to provide actual notice to NYSEG[2], the misrepresentation was prejudicial to NYSEG and requires that the August 2009 judgment be vacated with respect to that party.

Though not a party to this action, Rohloff has cross-moved to consolidate this action with the encroachment action brought by NYSEG. Under CPLR 602 (a) the court may order the consolidation of actions involving common questions of law and fact. Rohloff contends that both actions involve questions of whether the easement is properly described in the document NYSEG received from the City in 1997 and whether the document was properly recorded. In addition, Rohloff has asserted two counterclaims in the encroachment action seeking a judgment declaring the easement as invalid on those bases. Though both issues could be litigated in this action, the City may choose to allow the earlier determination to stand with the exception that it is ineffective with respect to the easement claimed by NYSEG.[3] Those issues could then be resolved in the encroachment action. Moreover, even if it is necessary to resolve those issues in the context of the City's declaratory judgment action, consolidation of the actions would unnecessarily involve the City in litigating issues in which it has no interest. Accordingly, the

---

[2]NYSEG only learned of this action in May 2015 through document disclosure provided by Rohloff in an action brought by NYSEG for various causes of action based on the alleged encroachment. This, despite the fact that NYSEG had complained of the encroachment in a November 2009 letter to the City and Tollison, as Rohloff's attorney. The letter was sent at a time when Rohloff was just beginning construction of the four houses he built on the property and before title was transferred from the City to Rohloff in April 2010.

[3]The City has submitted an affidavit by C. Mark Seber, its Commissioner of Accounts/City Clerk, in which he asserts that it was not the intent of the City to extinguish the 1997 easement to NYSEG. In addition, Seber notes that the City has no objection to the application by NYSEG to vacate the August 2009 judgment to the extent it extinguishes the easement.

cross-motion should be denied.

Accordingly, it is

ORDERED, that the judgment issued August 20, 2009 resolving the issues in this action is vacated insofar as it affects the rights of New York State Electric & Gas Corporation with respect to the real property at issue in this action and it is further

ORDERED, that the cross-motion to consolidate this action with New York State Electric & Gas Corporation v. Rohloff, Supreme Court, Saratoga County, Index No 20133839 is denied.

This constitutes the decision and order of the Court. The original decision and order is returned to the attorney for New York State Electric & Gas. A copy of the decision and order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Albany, New York
July 6, 2016

ENTERED
Craig A. Hayner

Saratoga County Clerk

Richard E. Sise
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated August 24, 2015;
2. Affidavit of Debra A. Drake dated August 19, 2015 with Exhibits A-H annexed;
3. Affirmation of Gregory J. McDonald dated August 24, 2015 with Exhibits A-D

SARATOGA COUNTY CLERK'S OFFICE BALLSTON SPA, NY
2016 JUL 12 PM 2:19

ENTERED

annexed;
4. Memorandum of Law dated August 24, 2015;
5. Affidavit of C. Mark Seber dated October 5, 2015;
6. Notice of Cross-Motion dated October 13, 2015;
7. Affidavit of Brian Rohloff dated October 9, 2015 with Exhibits A-B annexed;
8. Affirmation of Brian M. Quinn dated October 13, 2015 with Exhibits 1-2 annexed;
9. Memorandum of Law dated October 13, 2015;
10. Affidavit of Debra A. Drake dated October 27, 2015 with Exhibits A-D annexed;
11. Affirmation of Gregory J. McDonald dated October 27, 2015 with Exhibits A-F annexed;
12. Memorandum of Law dated October 27, 2015.