

<b>Matter of Ellis v Town of E. Hampton, N.Y.</b>
2017 NY Slip Op 31152(U)
May 30, 2017
Supreme Court, Suffolk County
Docket Number: 39825/2010
Judge: W. Gerard Asher
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**PUBLISH**

SHORT FORM ORDER

INDEX No. 39825-2010

SUPREME COURT - STATE OF NEW YORK  
IAS PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 09-12-12  
ADJ. DATE 05-23-17  
Mot. Seq. # 004, 005

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In the matter of the Application of	:	James S. Henry, Esq.
	:	Attorney for Plaintiff
Harry J. Ellis, in his capacity as Managing Partner	:	201 Offices at Water Street
on behalf of the Ellis Family Partnership,	:	P. O. Box 2668
	:	Sag Harbor, New York 11968
Plaintiff,	:	
	:	
For a judgment pursuant to Article 15 of the New	:	
York State Real Property and Proceedings Law	:	
and injunctive relief pursuant to New York Civil	:	
Practice Law and Rules §6301	:	
	:	
- against -	:	
	:	Susanne M. Roxbury, Esq.
Town of East Hampton, New York and William	:	Attorneys for Defendants
Wilkinson, in his official executive capacity as East	:	360 Montauk Highway
Hampton own Supervisor, Larry Penn, in his	:	P. O. Box 467
official capacity as Environmental Protection	:	Wainscott, New York 11975
Director of the East Hampton Natural Resources	:	
Department and East Hampton Natural Resources	:	
Department, as an interested party,	:	
	:	
Defendant.	:	

-----X

Upon the following papers numbered 1 to 40 read on this motion for summary judgment Notice of Motion/  
Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers 10-24  
; Answering Affidavits and supporting papers 25-29; Replying Affidavits and supporting papers 30-40; Other  
Summary Judgment exhibits A-F; Cross Motion exhibits A-E; Oral Argument transcript 1-67; and after hearing counsel  
in support and opposed to the motion, it is

**ORDERED** that plaintiff's motion for a partial summary judgment is denied, and, it is  
further

**ORDERED** that defendant's cross motion for sanctions against the plaintiff is denied.

Plaintiff Ellis Family Partnership (hereafter referred to as Ellis) commenced this action pursuant to Article 15 of the RPAPL by summons and complaint dated September 12, 2012 for a determination of the ownership of certain property in East Hampton. The allegations in the complaint were for a determination of property rights via adverse possession, easements, rights of way for property plaintiff disputes to be owned by East Hampton Town. A long history of deeds and use of the property by plaintiff and possible lack of use and care by East Hampton Town are all issues raised by Ellis in the complaint.

Issue was joined. Subsequently defendant East Hampton Town (hereafter referred to as EHT) brought a motion for summary judgment to dismiss the plaintiff's complaint. Issues with regard to access over the disputed property were resolved by stipulation pending the outcome of the lawsuit. The motion for summary judgment was vigorously opposed by Ellis and a decision denying summary judgment was issued June 28, 2011 (Asher, J.).

Now plaintiff Ellis moves for partial summary judgment regarding an alleged easement appurtenant, next to an alleged right of way on the northerly border of the Ellis property. Defendant East Hampton Town opposes the partial summary judgement and cross moves for sanctions against plaintiff for bringing the motion and delaying discovery. Oral arguments were heard by the Court on October 28, 2014

Plaintiff Ellis's request for a partial summary judgment centers around a 50 foot right of way to the north of the Ellis property which is used as part of a description in an April 30, 1930 deed from the Montauk Beach Development Corporation to Robert Bullock. A sketch (667) is attached to the moving papers and to the deed. Ellis claims that this 50 foot right of way is a 50 foot easement appurtenant. Defendant EHT argues that the claim for the appurtenant easement was not included in the papers for relief in the original summons and complaint with respect to the Article 15 proceeding and therefore the motion should be dismissed. However, the Court notes that in the original request for summary judgment by EHT, the opposition papers of plaintiff Ellis argues for an easement appurtenant in the lengthy opposition to defendant's original motion for summary judgment. A recitation of the subsequent deeds from Montauk Beach Development to Bullock and subsequent follows:

Deed from Montauk Beach Development Corporation to Robert Bullock dated April 30, 1930; deed from Robert Bullock to Sentinel Holding, Inc., dated October 17, 1949; deed from Sentinel Holding, Inc. to Charles V. Crookall and Ann-Marie Crookall dated August 24, 1951; deed from Ann-Marie Crookall to Harry T. Ellis and Barbara J. Ellis dated October 21, 1974; deed from Harry T. Ellis and Barbara J. Ellis to Ellis Family Partnership dated December 21, 1999; deed from Harry T. Ellis and Barbara J. Ellis to Ellis Family Partnership dated November 30, 2010.

Copies of these deeds are attached to the movant's papers as exhibits. The deed to Ellis in 1974 description does not contain the northerly boundary reference to the right of way of the Ellis property. No easement is mentioned.

Plaintiff Ellis in oral argument and in their moving papers relies *Parsons v Johnson* 68 NY 62, an 1877 New York Court of Appeals case discussing the requirements to determine easement appurtenant. That case involved the construction of a wall. The issues were complicated by a mortgage foreclosure. Appurtenances were discussed in regard to the conveyance of stores and mills. Intent of the parties was also discussed by the court. Ellis's reliance on *Parsons* is not persuasive in any way and this Court finds the analysis unavailing.

Plaintiff's reliance on *Glennon v Mayo* 221 AD2d 504 a 1995 case decided in the Appellate Division 2<sup>nd</sup> Department is also not helpful to plaintiff. The *Glennon* case had nothing to do with an "appurtenant" argument, but instead involved an implied easement for access to a public road, but more to the point, the *Glennon* court found an express grant by Clark to Glennon. If anything, the case is more on point for defendant EHT's argument that Ellis's request for summary judgment should be denied.

Defendant EHT relies on *Tarolli v Westvale Genesee*, 6 NY2d 32, a 1959 Court of Appeals' case. The facts of the *Tarolli* case are set forth in 6 AD 48. A critical passage from the Court of Appeals follows:

"A summary of the proof in this case is to be found in the dissenting opinion at the Appellate Division 6AD 2d 848 and need not be repeated here. There was strong evidentiary support for the affirmed finding of fact that the parties in the 1954 transaction did not intend that the vendees should acquire thereby a right of way easement as to the private road or lane in dispute. We, therefore, deal with the assertion of those vendees that as matter of law such an easement was implied. The principal reliance of appellants is on the description of the westerly boundary as running "along the east boundary" of the private road. There was, however, no mention of an easement. We hold that this language of description did not require the implication of such an easement.

One who claims an implied easement has the burden of establishing all the fact necessary to support it (Real Property Law §251; *Zeiger v Interborough R.T. Co.*, 254 App. Div 908, affd. 280 NY 516; *Root v Conkling*, 199 App. Div. 90, 93). We do not have here the situation of a grantor subdividing his property and sellinglots bounding on a street shown on his subdivision map (*Wiggins v McCleary*, 49 NY 3446; *Matter of Opening of Eleventh Ave.*, 81 NY 436; *Matter of Opening of St. Nicholas Terrace*, 143 NY 621). Nor is this a case where a private right of way has been in use for many years and the surrounding circumstances show that is must have been the intent of the parties to give the grantee continued use of the passageway (*Ranscht v. Wright*, 9 Aoo, Div. 108, affd. 162 NY 632). Merely bounding premises by a road (for purposes of description like using any other mark or

monument) “is very different from selling by reference to a map or plat on which the grantor has laid out streets” (*King v Mayor of City of New York*, 102 NY 171, 175). The controlling intent to be determined in the light of all the circumstances, and that running a boundary along a road is one such circumstance only (*Matter of City of New York [Northern Blvd.]* 285 NY 136, 147, 148, 149; *Erit v. Sea Gate Assn.*, 259 NY 466, 470; *Matter of City of New York [Harrison Ave.]*, 267 NY 64, 78).

We affirm on the ground that the judgment below is soundly based on the finding of fact that there was in this instance no intent to grant an easement.”

This Court finds that the *Tarolli* case along with *Glennon v Mayo supra; Brennan v Salkow* 101 AD3d 781 are dispositive of the partial summary judgment request by Ellis. The *Brennan* case follows *Glennon* and critical language of the Brennan court is:

“Here, contrary to the plaintiffs’ contention, the mere descriptive reference to a “right-of-way” in a 1966 deed to the plaintiffs’ predecessor did not give rise to an easement by implied grant benefitting the plaintiffs’ property (see *Palma v Mastroianni*, 276, AD2d 894, 894-895, 714 NYS2d 537 [2000]; *Michalski v Decker*, 16 AD3d 469, 792 NYS2d 103 [2005]). The plaintiffs’ argument regarding an easement implied from a 1920 grant of part of their property is without merit.”

The use of a description of the right of way in the original Bullock deed and subsequent deeds was only used as a description of the property line, not to grant an easement to Bullock. Nowhere was there any indication that the right of way was a necessity in order for Bullock to access his property. The Bullock/Ellis property had access to a highway.

The defendant’s argument that the partial summary judgment motion should be denied by reason of the fact that a full copy of all the pleadings of the underlying action were not included in the moving papers has merit, but since the papers are available to the Court and the pleadings were included in defendant’s opposition papers the Court chooses to overlook that procedural requirement. In addition, defendant EHT alleges in their papers that the arguments of plaintiff Ellis are inconsistent with the arguments set forth in their vigorous opposition to the original motion for summary judgment by defendant EHT. That argument also is unavailing in as much as the allegation of an easement appurtenant was contained in the opposition to the original motion by EHT. Therefore, those two arguments are not considered by the Court.

However, easements appurtenant have to do with a filed map or a specific subdivision. It is evident a filed map and subdivision did not exist 1930 so an easement appurtenant certainly could not be afforded on that basis. Plaintiff argues it can be gleaned from the documentary evidence and the “intent” of the parties. This Court disagrees.

There is insufficient evidence presented by plaintiff Ellis that the easement appurtenant applies to this particular case. On the other hand, there is much evidence favoring the defendant EHT’s position that there is no “intent” to create an easement.

Defendant EHT has not requested that this Court make a determination that, in point of fact, there is no easement appurtenant. Nevertheless, based on the paperwork presented by both sides the argument on October 28, 2014, the Court opines that the 50 foot easement right of way noted on the sketch (667) dated April 30, 1930 is subject to proof as to whom the easement benefits, if anyone.

Therefore, the request for partial summary judgment on behalf of the plaintiff Ellis must be denied. Discovery with respect to all the property rights of the two parties making claim to the property north of the Ellis property line is yet to be completed.

With respect to the request for sanctions argued on behalf of defendant EHT the attorneys at oral argument relied on the paperwork submitted to the Court. This Court determines that the plaintiff had adequate reason to request the partial summary judgment in an effort to narrow some of the issues with regard to possible negotiations between the parties to resolve their differences on the underlying actions and/or establish an easement to give access to the property from the northerly side of plaintiff's property. All these issues need more fact discovery.

The request for partial summary judgment on behalf of plaintiff Ellis is denied. The request for sanctions on behalf of defendant EHT is also denied.

The parties are directed to appear for a compliance conference for a discovery schedule on July 13, 2017.

Dated: May 30, 2017

W. Gerard Asher

J.S.C.

**HON. W. GERARD ASHER**

FINAL DISPOSITION  NON-FINAL DISPOSITION