

Venables v Rovegno
2017 NY Slip Op 31655(U)
July 25, 2017
Supreme Court, Suffolk County
Docket Number: 24178/14
Judge: Paul J. Baisley, Jr.
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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DEIRDRE S. VENABLES, MARIANNE M.
FARRELL, A. EDWARD PATMOS III, EDITH
GREENLAW, DAVID MAMBRINO, TARA
HAKIMI MAMBRINO, GREGG LUBONTY and
JOHN G. HIMMER,

Plaintiffs,

-against-

MARIA E. ROVEGNO,

Defendant.

INDEX NO.: 24178/14
MOTION DATE: 2/2/17
MOTION NO.: 001 MG; 002MD;
003 MOT D; 004 MD

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 80 read on this motion for preliminary injunction, cross-motions for summary judgment, motion for protective order: Notice of Motion/ Order to Show Cause and supporting papers 1-15; 61-66; Notice of Cross Motion and supporting papers 28-34; 51-60; Answering Affidavits and supporting papers 16-27; 35-38; 39-50; Replying Affidavits and supporting papers 67-71; 72-80¹; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the order of this court (GAZZILLO, J.) dated December 16, 2015 granting plaintiff's motion for a preliminary injunction (motion sequence no. 001) as "unopposed" is hereby recalled and vacated, and the motion is hereby restored to the calendar as of February 2, 2017; and it is further

ORDERED that the said motion (motion sequence no. 001) of plaintiffs Deirdre S. Venables, Marianne M. Farrell, A. Edward Patmos III, Edith Greenlaw, David Mambrino, Tara Hakimi Mambrino, Gregg Lubonty and John G. Himmer, brought on by order to show cause (MARTIN, J.) dated August 4, 2015, for a preliminary injunction enjoining defendant Maria E. Rovegno, her agents, servants, employees and others acting in concert with them, from continuing to obstruct the right of way of which defendant's property is burdened and by which plaintiffs benefit; and immediately cease and desist, and be enjoined from, installing any plantings within the right of way or cutting any vegetation along plaintiffs' side of the right of way without further court order, is granted; and it is further

ORDERED that the cross-motion (motion sequence no. 002) of defendant for an order granting defendant summary judgment on the counterclaims contained in defendant's answer to plaintiffs' complaint is denied; and it is further

¹ The court notes that it is constrained to disregard the purported reply affirmation of plaintiff Deirdre S. Venables submitted in further support of plaintiffs' order to show cause and in opposition to defendant's motion for a protective order (#004). Although plaintiff is a licensed attorney, an attorney who is a party to an action may not affirm (CPLR R. 2106(a)).

ORDERED that the cross-motion (motion sequence no. 003) of plaintiffs for an order: pursuant to CPLR R. 3212, granting summary judgment in favor of plaintiffs against defendants on their first cause of action; pursuant to CPLR R. 3212, dismissing defendant's fourth affirmative defense and fourth and fifth counterclaims; pursuant to CPLR §3025(b), permitting plaintiffs to amend their complaint; pursuant to CPLR R. 3124, compelling defendant to respond to plaintiffs' discovery demand; pursuant to CPLR §3126, for the imposition of sanctions against defendant; and for such other and further relief as to the court may seem proper, is granted to the extent that plaintiffs' motion for summary judgment on their first cause of action is granted, and, on searching the record, defendant is granted summary judgment dismissing plaintiffs' second cause of action; plaintiffs are granted summary judgment dismissing defendant's fourth affirmative defense and defendant's fourth and fifth counterclaims; and plaintiffs are granted leave to amend their complaint pursuant to CPLR §3025(b) to add a cause of action on behalf of plaintiffs Deirdre S. Venables and Marianne M. Farrell, A. Edward Patmos III, and Edith Greenlaw for adverse possession with respect to various encroachments on the easement; and, pursuant to CPLR R. 3124, defendant is directed to provide full, complete and substantive responses to plaintiff's outstanding discovery demand within 30 days of the date of service of notice of entry of this order; and the motion is otherwise denied; and it is further

ORDERED that the motion (motion sequence no. 004) of defendant for a protective order pursuant to CPLR §3103 with respect to the requirement of defendant to respond to plaintiffs' demand for discovery dated August 3, 2015 is denied.

This action asserting claims and counterclaims arising out of an easement burdening defendant's property was previously assigned to the Hon. Ralph T. Gazzillo, and was reassigned to the undersigned justice upon the retirement of the former. The record reflects that on December 16, 2015, Judge Gazzillo issued an order granting plaintiff's motion for a preliminary injunction as "unopposed." In fact, the parties' request to adjourn the motion on consent to January 14, 2016 had been granted by the court, but it appears that the court's records were never updated to reflect the adjournment. The parties thereafter stipulated to vacate the order granting the motion, but it does not appear that any action was taken by the court with regard to the stipulation. Accordingly, as a preliminary matter, the court is constrained to vacate the December 16, 2015 order of the court and deem plaintiff's order to show cause submitted as of February 2, 2017, together with defendant's submissions in opposition and the further cross-motions and motions originally contemplated by the parties to be considered and determined by the court simultaneously.

As to the merits of the motions and cross-motions, the court makes the following findings and determinations.

Defendant Maria E. Rovegno is the owner of a flag-lot property located at 60 Middle Pond Road in Southampton, New York, which has frontage on Middle Pond, a navigable waterway that provides access to Shinnecock Bay and from there to the Atlantic Ocean. Defendants' property is burdened of record by a 20-foot ingress and egress easement that provides the only access to Middle Pond Road for the properties owned by plaintiffs Deirdre S. Venables and Marianne M. Farrell at 62 Middle Pond Road, A. Edward Patmos III at 66 Middle Pond Road, and Edith Greenlaw at 64 Middle Pond Road. The easement, which is expressly granted in those plaintiffs'

deeds, also provides plaintiffs Venables/Farrell and Greenlaw with access to Middle Pond and to the beach area below the easement “for beach and bathing purposes.”

Plaintiffs David Mambrino and Tara Hakimi Mambrino own property located at 58 Middle Pond Road, plaintiff Gregg Lubonty owns property located at 61 Middle Pond Road, and plaintiff John G. Himmer owns property located at 63 Middle Pond Road (the latter two both located across the road from defendant’s flagpole property on the north side of Middle Pond Road). All of the deeds in to their predecessors in interest granted a 20-foot right of way, “in common with others,” over defendants’ property to Middle Pond. The deeds in to these plaintiffs did not include the express grant but granted them “all right, title and interest, if any, of the party of the first part in any to any streets and roads abutting the...premises to the center lines thereof; TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises.”

Plaintiffs’ amended complaint herein alleges that in recent years, defendant has obstructed plaintiffs’ access to the easement by planting various shrubs, trees, and privet hedges and installing cobblestone in concrete and a fence and gate within the easement, thereby narrowing the right of way. Plaintiffs’ first cause of action demands that defendant remove the obstructions and restore the right of way to its former condition. Plaintiffs’ second cause of action seeks a determination by the court that the installation by plaintiffs of a dock at the end of the easement is a permissible use of the easement.

In her verified answer, defendant denies the essential allegations of plaintiffs’ complaint, and alleges that a bamboo stand on plaintiffs Venables/Farrell’s property, hedges on plaintiff Patmos’ property, and part of the house on plaintiff Greenlaw’s property are encroaching on her property. Defendant has interposed five counterclaims seeking removal of the encroachments (first counterclaim), damages for trespass (second counterclaim), ejectment (third counterclaim), costs and attorney’s fees (fourth counterclaim), and “such other relief as the court may deem just, proper and equitable under the circumstances” (fifth counterclaim).

After issue was joined, plaintiffs moved by order to show cause (#001) for a preliminary injunction enjoining defendant from continuing to obstruct plaintiffs’ right of way. Defendant opposed plaintiff’s order to show cause for a preliminary injunction, and interposed a cross-motion (#002) for summary judgment on defendant’s counterclaims. Simultaneously, defendant moved (#004) for a protective order with respect to plaintiff’s outstanding discovery demands.

In response to defendant’s cross-motion for summary judgment, plaintiffs cross-moved (#003) for an order granting plaintiffs summary judgment on their first cause of action and dismissing defendant’s fourth affirmative defense and fourth and fifth counterclaims. Among other items of relief, plaintiffs also seek leave to amend their complaint to add a third cause of action for adverse possession, alleging that the encroachments of plaintiffs Venables/Farrell, Patmos, and Greenlaw complained of by defendant have ripened to title.

The proponent of a motion for a preliminary injunction is required to demonstrate a likelihood of ultimate success on the merits; irreparable injury if the injunction is not granted; and that the balance of the equities is in favor of the movant (*Doe v Axelrod*, 73 NY2d 748 [1988]). Here, plaintiffs’ deeds and surveys establish the 20-foot-wide easement by express grant in a fixed

location over a portion of defendant's property, set forth in metes and bounds, for access to their properties and Middle Pond "for beach and bathing purposes."² Defendant concedes the existence of an ingress and egress easement burdening her property in favor of plaintiffs. She alleges, however, that the purpose of the easement is to allow plaintiffs access to their properties and pedestrian access only over the burdened property to Middle Pond. She contends that she need only maintain a minimum 14-foot-wide driveway as required by the Southampton Town Code for the portion of the easement that provides access to the three properties adjoining the flag lot (those belonging to Venable/Farrell, Patmos, and Greenlaw), and alleges that she has done that (by removing some of the encroaching bamboo and hedges on Venable/Farrell's and Patmos' side of the easement). She further states that her intention to provide a four-foot-wide path is sufficient to provide plaintiffs with "full access" to Middle Pond.

The law is clear, however, that "easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant...[T]he language of the easement is controlling, and if a grant is specific in its terms, it is decisive of the limits of the easement" (*Gilliland v Acquafredda Enterprises, LLC*, 92 AD3d 19 [1st Dept 2011]). Where, as here, the easement over the defendant's property is defined by metes and bounds, the defendants do not have the right to unilaterally restrict, relocate or alter the easement (*Marsh v Hogan*, 56 AD3d 1090 [3d Dept 2008]). Thus, the submissions are sufficient to establish plaintiffs' *prima facie* entitlement not only to a preliminary injunction but also to summary judgment as a matter of law on their first cause of action (*Wernicki v Knipper*, 119 AD3d 775 [2d Dept 2014]; *Gilliland v Acquafredda Enterprises, LLC*, 92 AD3d 19 [1st Dept 2011]). Defendant's submissions in opposition to the branch of plaintiff's motion for summary judgment (#003) fail to raise a question of fact. Accordingly, plaintiffs are granted summary judgment with respect to their first cause of action. Plaintiffs are also granted summary judgment dismissing plaintiff's fourth affirmative defense and fourth and fifth counterclaims, which fail to state a cause of action.

In determining a motion for summary judgment, a court may search the record and award summary judgment to a nonmoving party (*Homeland Insurance Co. of New York v National Grange Mutual Insurance Co.*, 84 AD3d 737 [2011]). Here, the court is constrained to conclude that plaintiffs' second cause of action fails to state a cause of action. Plaintiffs have cited no authority for their contention that their deeded grant of an easement to Middle Pond "for beach and bathing purposes" entitles them to build a dock on defendants' property. Accordingly, upon searching the record, the court grants defendant summary judgment dismissing plaintiffs' second cause of action.

Defendant's motion for summary judgment on her cross-claims against plaintiffs Venables/Farrell and Patmos and Greenlaw (#002) is denied. Although the affidavit of defendant's surveyor and the survey he prepared for her reflect, *prima facie*, that certain plantings and a portion of a structure encroach on defendant's property, plaintiffs' submissions in opposition raise questions of fact regarding whether the plaintiffs may have obtained title to the area of the encroachment via adverse possession.

² The court notes that the easement language varies slightly from deed to deed, and that not all of the deeds in to the plaintiffs contain the express easement language.

Plaintiffs seek leave to amend the complaint to interpose their adverse possession claims. It is well established that leave to amend is freely granted, provided the proposed amendment is not palpably insufficient or patently without merit, and in the absence of prejudice or surprise to defendant (*Maya's Black Cr., LLC v Angelo Balbo Realty Corp.*, 82 AD3d 1175 [2d Dept 2011]). The court does not find the proposed additional cause of action to be palpably insufficient or patently without merit. Accordingly, so much of plaintiff's cross-motion as seeks leave to amend the complaint is granted.

With regard to the discovery issues raised by plaintiffs' cross-motion (#003) and defendant's motion (#004), the court finds that the surveys, title reports, deeds and photographs of the area demanded by plaintiffs are material, necessary and relevant to the prosecution of plaintiffs' claims herein and the defense of defendant's counterclaims. Accordingly, so much of plaintiff's motion as seeks an order compelling defendant to respond to their outstanding discovery demands is granted, and defendant is directed to provide full, complete and substantive responses to plaintiff's outstanding discovery demand within 30 days of the date of service of notice of entry of this order. Defendant's motion for a protective order is denied.

The court does not agree with plaintiffs that discovery sanctions pursuant to CPLR §3126 are warranted at this juncture and that branch of plaintiffs' cross-motion is denied.

The parties are reminded that this matter is scheduled for a compliance conference before the undersigned on August 3, 2017 at 9:30 a.m.

Dated: July 25, 2017

HON. PAUL J. BAISLEY, JR.

J.S.C.