Bonnemazou v Levine
2017 NY Slip Op 32800(U)
December 6, 2017
Supreme Court, Suffolk County
Docket Number: 14-16404
Judge: Sanford Neil Berland
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SHORT FORM ORDER

COPY

INDEX NO.: 14-16404

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

FLORENT BONNEMAZOU,

Plaintiff,

-against-

ALAN H. LEVINE and RENAY WEISBERG, as Trustees of THE FRANCES W. LEVINE FAMILY TRUST,

Defendants.

ORIG. RETURN DATE: February 14, 2017
FINAL RETURN DATE: September 19, 2017
MOT. SEQ. #: 003 **MD**

ORIG. RETURN DATE: August 29, 2017
FINAL RETURN DATE: September 19, 2017
MOT. SEQ. #: 004 **MG**

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion for Summary Judgment, made by plaintiff, dated January 4, 2017; (2) Affirmation in Support of Motion for Summary Judgement, made by plaintiff, dated January 3, 2017, and supporting papers; (3) Affidavit of Florent Bonnemazou in Support of Motion for Summary Judgement, made by plaintiff, dated January 2, 2017, and supporting papers; (4) Memorandum of Law, made by plaintiff, dated January 4, 2017; (5) Affirmation in Opposition, made by defendants, dated February 1, 2017, and supporting papers; (6)Affidavit of Alan H. Levine in Opposition, made by defendants, dated January 30, 2017, and supporting papers; (7) Affidavit of Frances W. Levine in Opposition, made by defendants, dated February 2, 2017; (8) Supplemental Affidavit of Alan H. Levine, made by defendants, dated March 2, 2017, and supporting papers; (9) Supplemental Affidavit of Frances W. Levine, made by defendants, dated March 2, 2017; (10) Corrected Memorandum of Law in Opposition, made by defendants, dated April 4, 2017, and supporting papers; (11) Reply Memorandum of Law, made by plaintiff, dated April 4, 2017; (12) Order to Show Cause, made by plaintiff, dated August 11, 2017, and supporting papers; it is,

ORDERED that these motions (#003 and #004) are hereby consolidated for purposes of this determination; and it is further

ORDERED that motion sequence 003 by plaintiff Florent Bonnemazou made pursuant to CPLR 3212 seeking partial summary judgement is denied; and it is further

ORDERED that motion sequence 004 by way of order to show cause by plaintiff Florent Bonnemazou made pursuant to CPLR 6513 seeking to extend the notice of pendency from August 21, 2017, through and including August 21, 2020 is granted; and it is further

ORDERED that the parties are directed to appear for a previously scheduled compliance conference on **Wednesday, December 6, 2017 at 9:30 A.M.** in Part 6 located at the Cromarty Court Complex, 210 Center Drive South in Riverhead.

This is an action to compel the determination of a claim to real property under Article 15 of the Real Property Actions and Proceedings Law ("RPAPL"). Plaintiff Florent Bonnemazou and defendants Alan Levine and Renay Weisberg, Trustees of the Frances W. Levine Family Trust, are the owners of adjoining parcels of real property located on Rose Hill Road in Water Mill, New York. Plaintiff claims that his parcel ("the Bonnemazou Parcel"), which he purchased in April 2012, is benefitted by a five-foot wide pedestrian easement (the "pedestrian easement") over defendants' parcel ("the Levine Parcel") for access to Hayground Bay. The pedestrian easement is not separately recorded, but plaintiff claims its existence is documented in a contract for the sale of the Levine Parcel, dated May 21, 1985, a survey of the Levine Parcel, dated June 13, 1974, and in the Bonnemazou Parcel chain of title. Plaintiff further claims that in September 2013, defendants installed a wire mesh fence that prevented access to the pedestrian easement and interfered with his easement rights. The defendants deny the existence and validity of the claimed pedestrian easement across their parcel and assert a counterclaim for the alleged interference by the plaintiff with a portion of a separate driveway easement benefitting their property ("driveway easement"), which is now purportedly blocked by gas utilities. The driveway easement benefitting the Levine Parcel is not in dispute and is recorded in both the Levine Parcel's and Bonnemazou Parcel's chains of titles.

Plaintiff now moves for partial summary judgment (a) declaring that he has a right to use the five-foot strip to walk over the property owned by defendants to Hayground Bay, and (b) permanently enjoining the defendants from interfering with his use of the strip for that purpose. In support of his motion, plaintiff offers the chain of title to his parcel, the Bonnemazou Parcel, which recites the claimed easement; photographs purporting to show a pedestrian pathway across the claimed easement; and an uncertified copy of a 1974 survey of the Levine Parcel that shows a "5' EASEMENT" along the northern border of the Levine Parcel, running from the north eastern corner of the Chorlton (now Bonnemazou) Parcel to Hay Ground Bay.

Defendants oppose the motion, arguing that plaintiff has not demonstrated an entitlement to relief or, in any event, has not eliminated all triable issues of material fact. In support of their position, defendants offer the deed to the Levine Parcel, dated September 30, 1985, as well as the Title Insurance Report for the Levine Parcel, also dated September 30, 1985, neither of which explicitly mention the alleged pedestrian easement, as evidence that they had no notice of the pedestrian easement.

On a motion for summary judgment, the movant bears the initial burden and must tender

evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, plaintiff has made a prima facie showing of his entitlement to summary judgement. Plaintiff alleges that defendants had actual notice of the claimed easement or, in the alternative, constructive or inquiry notice of its existence. In response, however, defendants have demonstrated triable issues of fact. Accordingly, plaintiff's motion for summary judgment must be denied.

Actual Notice

"[A]n unrecorded conveyance is deemed void against a subsequent good faith purchaser for value who acquires his interest without actual or constructive notice of the prior conveyance" (***Schulz v Dattero***, 104 AD3d 831, 961 NYS2d 308 [2nd Dept 2013]). Actual notice sufficient to grant an order for summary judgment has been found, for example, when the moving party showed that, prior to the acquisition of the servient parcel, defendant's title insurance excepted the easement from the policy (***Baiting Hollow Props., LLC v Knolls of Baiting Hollow, LLC***, 89 AD3d 776, 932 NYS2d 160 [2nd Dept 2011]); and also when the moving party showed that the contract of sale signed by the defendants expressly stated that the premises were sold subject to an easement (***Snyder v Voris, Martini & Moore***, *LLC*, 52 AD3d 811, 860 NYS2d 622 [2nd Dept 2008]).

The basis for plaintiff's contention that defendants had actual notice of the pedestrian easement lies in the contract of sale dated May 21, 1985 between Frances W. Levine and the then owners of the Levine Parcel, which recites, among other things, that "[t]he premises are to be transferred subject to: . . . d. Any state of facts as shown on a survey by Squires & Holden last dated June 13, 1974." As noted above, the copy of the survey provided by plaintiff, and which evidently was produced in discovery by the defendants, shows a "5' easement" providing access from the Bonnemazou Parcel to Hayground Bay. In opposition to the plaintiff's allegation, the defendants submitted affidavits by Alan and Frances Levine swearing that they had no recollection of seeing or possessing the survey until after the commencement of the instant action.[1] In contrast to the showings in ***Snyder*** (*supra*) and in ***Baiting Hollow*** (*supra*), the

[1] Initially, defendant Alan H. Levine averred that the copy of the survey had been provided to him in correspondence by plaintiff's attorney shortly before the current action was commenced. In a subsequent Supplemental Affidavit,

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documents the defendants admit having in their records, including the deed to the Levine Parcel and the title insurance report, make no direct reference to the alleged pedestrian easement. Here, the defendants raised triable issues of fact with respect to whether they had actual notice of the pedestrian easement. Thus, plaintiff's motion for partial summary judgment cannot be sustained on an "actual notice" theory.

Constructive Notice

Constructive notice can be proven "in the absence of actual notice before or at the time of... purchase... if [restrictions] appear in some deed of record in the conveyance to [that owner] or [that owner's] direct predecessors in title" (***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010], *quoting* ***Witter v Taggard***, 78 NY2d 234, 573 NYS2d 146 [1991] (internal quotations omitted)). "The recording statutes in a grantor-grantee indexing system charge a purchaser with notice of matters only in the record of the purchased land's chain of title back to the original grantor... [A purchaser] is not chargeable with constructive notice of conveyances recorded outside of the purchaser's direct chain of title where, as in Suffolk County, the grantor-grantee system of indexing is used" (***Witter v Taggard***, *supra*; ***Ioannou v Southold Town Planning Bd.***, 304 AD2d 578, 758 NYS2d 358 [2d Dept 2003]). "[A] deed conveyed by a common grantor to a dominant landowner does not form part of the chain of title to the servient land retained by the common grantor" (***Witter v Taggard***, *supra*; ***Ioannou v Southold Town Planning Bd.***, *supra*; ***Farrell v Sitaras***, 22 AD3d 518, 803 NYS2d 659 [2d Dept 2005]).

Plaintiff offers two bases to support his allegation that the defendants had constructive notice of the claimed pedestrian easement. First, through his expert, he contends that because the driveway easement recited in the Chorlton Deed for the benefit of the Levine Parcel is "an estate in land appurtenant to the Levine Parcel," the Chorlton Deed - which also recites the 5' pedestrian easement - is in the chain of title for the Levine Parcel. No legal authority, however, is cited by plaintiff or his expert, an attorney, for this proposition. Second, plaintiff argues that by expressly invoking, as the predicate for their counterclaim, the driveway easement as it is recorded in the Bonnemazou chain of title, defendants should be deemed to have made a "judicial admission" of the enforceability of all of the provisions of the Chorlton Deed, including the pedestrian easement claimed by plaintiff, are not free to pick and choose which of the allegedly "reciprocal" easements is cognizable and which is not, and, in any event, have conceded notice of the pedestrian easement across their parcel as recited in the Chorlton deed.

Although there is some degree of disingenuousness in the defendants' counterargument - that, notwithstanding the express allegations of their counterclaim, the "evidence" of the driveway easement in their favor can be found in their own deed and, therefore, it was unnecessary for them to "resort to the Chorlton Deed to find their easement . . . ." – they are right that knowledge of the contents of that deed at the time they propounded their counterclaim does

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Mr. Levine stated that he had been incorrect and that the survey had been obtained by his own lawyer in 2014 after his title insurer informed Mr. Levine that it had been unable to obtain a copy of the survey from Squires & Holden.

not, in and of itself, prove knowledge at the time their property was acquired. In any event, the Court of appeals has held that a purchaser of land "is not chargeable with constructive notice of conveyances recorded outside of the purchaser's direct chain of title where, as in Suffolk County, the grantor-grantee system of indexing is used" (***Witter v Taggard***, *supra* (emphasis supplied)). Thus, on the current state of the record, there are triable issues of fact with respect to whether the defendants can be charged with constructive notice of the pedestrian easement recited in the Bonnemazou parcel chain of title.

Inquiry Notice

"'Where 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… (***Schultz v Dattero***, *supra*, *quoting* ***Maiorano v. Garson***, 65 AD3d 1300, 886 NYS2d 190 [2d Dept 2009]). "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'" (***Schultz v Dattero***, *supra*, *quoting* ***Williamson v Brown***, 15 NY 354 [1857]). In this context, some courts have found that the purchase of title insurance constitutes a reasonably diligent inquiry, sufficient to defeat a presumption of inquiry or constructive notice (*see e.g.*, ***Capital Stack Fund, LLC v Badio***, 36 Misc 3d 1226[A], 1226A, 2012 NY Slip Op 51481[U] [Sup Ct, Rockland County 2012]).

The basis for plaintiff's allegation that defendants had inquiry notice of the claimed pedestrian easement returns, again, to the May 21, 1985 contract for sale of the Levine Parcel. Plaintiff contends that the exception in the contract of sale for "[a]ny state of facts as shown on" the 1974 survey created a duty to make inquiry into the existence of adverse claims or interests in the property or suffer the consequences of failing to do so. Plaintiff alleges that had defendants exercised proper diligence and reviewed or otherwise made inquiry into the survey, they would have learned of the existence of the pedestrian easement. In response, defendants argue that any duty on their part was satisfied by their purchase of title insurance and their reliance on the Title Insurance Report, which made no mention of the pedestrian easement benefitting the Bonnemazou parcel. Pending further development of the facts, whether such reliance in the face of the express exception in the contract of sale constituted proper diligence or, conversely, defendants should be deemed to have had inquiry notice of the existence of the pedestrian easement shown on the 1974 survey and recited in the Chorlton Deed, involves issues of fact that cannot be resolved on the current record. Accordingly, summary judgment on the basis of inquiry notice must be denied at this time.

The Court has also taken notice of the parties' respective discussions of the theories of abandonment and adverse possession with respect to the easement rights claimed by plaintiff. The parties' competing contentions on these contradictory assertions only serve further to demonstrate that triable issues of fact preclude summary judgment. Accordingly, plaintiff's motion pursuant to CPLR 3212 seeking partial summary judgment is denied in its entirety.

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Notice of Pendency

Finally, plaintiff moves, by order to show cause, to extend the Notice of Pendency in this matter, which was set to expire on August 21, 2017. The order signed by Justice Quinlan was served on defendants on August 11, 2017, has not been opposed by defendants, and temporarily extended the Notice of Pendency pending a determination by this court. "A notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods upon a showing of good cause" (***Petervary v Bubnis***, 30 AD3d 498, 819 NYS2d 267 [2d Dept 2006]; *see* CPLR § 6513). "The extension ... must be requested prior to the expiration of the prior notice," and "[a] lapsed notice of pendency may not be revived"(***Thompson Bros. Pile Corp. v Rosenblum***, 134 AD3d 1020, 21 NYS3d 709 [2d Dept 2015]) Courts have found good cause shown in a variety of circumstances. (*See, e.g.*, ***Aames Funding corp v Houston***, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008] (finding "good cause" where foreclosure action was stayed due to a party filing bankruptcy); ***L & L Painting Co., Inc. v Columbia Sussex Corp.***, 225 AD2d 670, 639 NYS2d 491 [2d Dept 1996] (finding "good cause" where trial court delayed trial for eleven months); ***Knopf v Sanford***, 110 AD3d 502, 972 NYS2d 893 [1stDept 2013] (finding "good cause" where discovery and motion practice significantly delayed the final adjudication of the action)).

Here, plaintiff established good cause sufficient for an extension of the Notice of Pendency. Among other things, plaintiff urges that motion practice has been ongoing over a period of months and that the case was transferred from the inventory of the Honorable Peter H. Mayer to this Court, causing some delay in the adjudication of the action. Therefore, the motion to extend the Notice of Pendency is granted.

Dated: 12/6/2017
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**