Aboulissan v Kingsland 79 LLC
2017 NY Slip Op 33076(U)
April 20, 2017
Supreme Court, Kings County
Docket Number: 510852/16
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of April, 2017.

PRESENT:

HON. DAWN JIMENEZ-SALTA,
Justice.

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MOHAMMED ABOULISSAN,

Plaintiff,

DECISION/ORDER

- against -

Index No. 510852/16

KINGSLAND 79 LLC and ALI RASHID,[1]

Mot. Seq. No. 3-4

Defendants.

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Recitation, as required by *CPLR 2219 (a)*, of the papers considered in the review of:

1) Plaintiff Mohammed Aboulissan's ("Plaintiff") Motion, Dated December 12, 2016, for an Order:
   a) Granting him Summary Judgment on the Cause of Action for a Declaratory Judgment for Easement by Prescription;
   b) Dismissing the Affirmative Defenses and the Counterclaim of Defendant Kingsland 79 LLC ("Defendant"); and
   c) Granting Plaintiff Costs and Disbursements of this Action.

2) Defendant's Affirmation in Opposition to Plaintiff's Motion for Summary Judgment, Dated December 23, 2016 (the "Defendant's Opposition").

3) Defendant's Cross Motion for Summary Judgment, Dated December 23, 2016, for an Order, Pursuant to CPLR 3212, Dismissing Plaintiff's Complaint and Granting Defendant Summary Judgment on its Counterclaim.

4) Plaintiff's Affirmation in Further Support and Opposition to Defendant's Summary Judgment, Dated January 8, 2017 (the "Plaintiff's Opposition").

5) Defendant's Reply Affirmation in Support of Cross Motion, Dated January 23, 2017.

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[1] By stipulation, dated October 5, 2016, this action was discontinued with prejudice against codefendant Ali Rashid.

Papers	NYSCEF No.
Notice of Motion, Affidavits/Affirmations, and Exhibits Annexed	Plaintiff 58-80
Affirmation in Opposition	Defendant 81-102
Notice of Cross Motion, Affidavits/Affirmations, and Exhibits Annexed	Defendant 104-125
Affirmation in Further Support and Opposition	Plaintiff 128
Reply Affirmation in Support of Cross Motion and Exhibits Annexed	Defendant 152-155

Background

This is a dispute between two Brooklyn neighbors as to whether Plaintiff may continue to use a portion of Defendant's property as his driveway. Plaintiff and Defendant own real properties adjoining each other. Plaintiff's property is a one-family house which he purchased in 1986. Defendant's property originally had been improved by a one-family house which fell in disrepair after its prior owner, Frank Landy ("Landy"), abandoned it in 1987 and moved elsewhere. In 2012, the house on Landy's property was demolished by the City of New York. Defendant acquired the vacant lot from Landy in 2016, and the property is currently under construction.

In 1991, which was approximately four years after Landy abandoned his property, Plaintiff hired a contractor to repave the driveway that was situated between his property and that of Landy (the "driveway"). Between 1991 and until 2016, Plaintiff allegedly used the driveway as his own. After Defendant acquired Landy's property in 2016, it put up a construction fence in the driveway, precluding Plaintiff from his further use.

Plaintiff brought this action, pursuant to RPAPL article 15, for a judgment declaring that the driveway at issue is subject to an easement in his favor. Plaintiff asserts four causes of action: 1) easement by express consent, 2) easement by prescription, 3) injunctive relief, and 4) prima facie tort. Defendant interposed an answer, asserting various affirmative defenses, as well as a single counterclaim, pursuant to RPAPL article 15, to quiet title to the driveway free and clear of Plaintiff's claims. Plaintiff replied to the counterclaim. Pre-Note of Issue, both parties have moved or cross-moved, as the case may be, for summary judgment.

Plaintiff's Claims for Easement by Prescription and for Injunctive Relief (the Second and Third Causes of Action, Respectively)

Plaintiff moves for summary judgment on his second cause of action which is for a declaration that he has an easement by prescription over the driveway. On the same basis,

Plaintiff concurrently seeks dismissal of Defendant's affirmative defenses and counterclaim, together with an award of costs and disbursements in this action. Defendant, in opposition, cross-moves for, inter alia, summary judgment on Plaintiff's claims for easement by prescription and for injunctive relief, as well as for a declaration that it owns the driveway free and clear of Plaintiff's claims.

Generally, an easement by prescription is demonstrated by proof of "the use [that is] adverse, open and notorious, continuous and uninterrupted for the prescriptive period" (*Di Leo v Pecksto Holding Corp.*, 304 NY 505, 512 [1952]). Where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive (*see Hryckowian v Pulaski*, 249 AD2d 511, 512 [2d Dept 1998]).

This presumption, however, does not arise when the parties' relationship was one of neighborly cooperation or accommodation (*see Colin Realty Co., LLC v Manhasset Pizza, LLC*, 137 AD3d 838, 840 [2d Dept 2016], *lv denied* 27 NY3d 908 [2016]). Likewise, "[w]here permission can be implied from the beginning, no adverse use may arise until the owner of the servient tenement is made aware of the assertion of a hostile right" (*Susquehanna Realty Corp. v Barth,* 108 AD2d 909, 910 [2d Dept 1985]).

The record here reveals triable issues regarding whether Plaintiff has acquired an easement by prescription over the driveway (*see Barlow v Spaziani*, 63 AD3d 1225, 1227 [3d Dept 2009]). It cannot be established as a matter of law at this point that Plaintiff's use of the driveway was without the permission of Defendant's predecessor in title (Landy), as opposed to the natural byproduct of a "neighborly accommodation," if any, between Landy and Plaintiff (*see Mee Wah Chan v Y & Dev. Corp.*, 82 AD3d 942, 944 [2d Dept 2011] [quoting *Duckworth v Ning Fun Chiu*, 33 AD3d 583, 584 [2d Dept 2006]). Therefore, Plaintiff's motion for summary judgment is denied in its entirety. Likewise, the branches of Defendant's motion for 1) a declaration that Plaintiff lacks an easement by prescription over the driveway, 2) summary judgment dismissing Plaintiff's claim for injunctive relief, and 3) summary judgment on Defendant's counterclaim to quiet title to the driveway, are all denied (*see Barra v Norfolk Southern Ry. Co.*, 75 AD3d 821, 824 [3d Dept 2010]). Said denials are without prejudice to renew after discovery is completed.

Two principal points raised by counsel need to be addressed so as to avoid their repetition in any future motion practice. First, even accepting as true Plaintiff's allegation that he repaired the driveway in 1991, such repair is irrelevant to the issue of whether he acquired an easement by prescription over the driveway. Repair or improvement of the property in dispute is an element of the claim of *adverse possession*, but has no relevance to the claim of *prescriptive easement*. Whereas adverse possession is proved by, inter alia, repair or improvement of the property in dispute, prescriptive easement is proved by, inter alia, the "making use of" the property in dispute (*see Di Leo v Pecksto Holding Corp.*,

304 NY 505, 511 [1952] ["As the enjoyment of easements lies in use rather than in possession, the only physical conduct necessary for their acquisition by prescription is making use of a portion of another's land, and one claiming a right of way by prescription is not required to prove that the way was enclosed, cultivated or improved."] [internal quotation marks omitted]).

Second, it is well-established that "[c]auses of action . . . may be stated alternatively or hypothetically" (CPLR 3014; *West Park Assoc., Inc. v Cohen*, 43 AD3d 818, 819 [2d Dept 2007]). Thus, Plaintiff was within his rights to plead in his complaint the theory of prescriptive easement in addition to his alternative theory of easement by express consent. Although Plaintiff initially advanced the alternative theory of easement by express consent on his prior motion for a temporary restraining order and offered an affidavit in that regard, his failure to prevail on that theory does not judicially estop him now from proceeding on the theory of prescriptive easement. "Under the doctrine of judicial estoppel, a party who assumes a certain position in a prior legal proceeding and *secures a favorable judgment* therein is precluded from assuming a contrary position in another action simply because his or her interests have changed" (*Paese v Paese*, 144 AD3d 770, 771-772 [2d Dept 2016] [internal quotation marks omitted; emphasis added]). Here, however, Plaintiff has failed to prevail on his theory of easement by express consent and, as part of the instant motion, has abandoned it. Plaintiff, therefore, is not judicially estopped from proceeding on his alternative theory of easement by prescription (*see Marcum, LLP v Silva*, 117 AD3d 919, 920 [2d Dept 2014]).

Plaintiff's Claims for Easement by Express Consent and for Prima Facie Tort (the First and Fourth Causes of Action, Respectively)

Plaintiff has conceded that he does not have a claim for easement by express consent (*see* Plaintiff's Opposition, ¶ 10 ["While Plaintiff claimed there was an express easement granted(,) (he) has failed to produce said document. . . ."]). Thus, the branch of Defendant's motion for summary judgment dismissing Plaintiff's first cause of action which is for easement by express consent is granted and such claim is dismissed (*see Willow Tex v Dimacopoulos*, 68 NY2d 963, 965 [1986], *rearg denied* 69 NY2d 742 [1987]).

Plaintiff's remaining cause of action is for prima facie tort. "Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs" (*Lancaster v Town of East Hampton*, 54 AD3d 906, 908 [2d Dept 2008] [internal quotation marks omitted]). The requisite elements of a cause of action for prima facie tort are 1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts which would otherwise be lawful (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). "A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages" (*id.* at 143). "Special damages contemplate the loss of something having economic or pecuniary value" (*Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992] [internal quotation marks omitted]).

The allegations in Plaintiff's complaint, which generally amount to a claim of emotional distress, are insufficient to allege special damages (*see Berland v Chi*, 142 AD3d 1121, 1123 [2d Dept 2016]). Moreover, Plaintiff has failed to oppose the branch of Defendant's motion which is for summary judgment dismissing the cause of action which is for prima facie tort (*see Bank of New York Mellon v Vytalingam*, 144 AD3d 1070, 1071 [2d Dept 2016]). Accordingly, the dismissal of the fourth cause of action which alleges prima facie tort is appropriate.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied in its entirety without prejudice to renew after discovery is completed; and it is further

ORDERED that Defendant's cross motion for summary judgment is granted to the extent that Plaintiff's first cause of action which alleges easement by express consent and his fourth cause of action which alleges prima facie tort are dismissed with prejudice, and the remainder of its cross motion is denied, without prejudice to renew after discovery is completed; and it is further

ORDERED that in light of the prior stipulated dismissal of Ali Rashid as codefendant, the caption is amended in its entirety to read as follows:

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MOHAMMED ABOULISSAN,

Plaintiff,

- against - Index No. 510852/16

KINGSLAND 79 LLC,

Defendant.

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This constitutes the Decision/Order of the Court.

Dated: April 20, 2017
Brooklyn, NY

Aboulissan v Kingsland 79 LLC
Index No. 510852/16

FILED
KINGS COUNTY CLERK
2017 JUN 12 AM 8:52

E N T E R,

Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta