

Green Hills (USA), LLC v Marjam of Rewe Street, Inc.
2019 NY Slip Op 30108(U)
January 9, 2019
Supreme Court, Kings County
Docket Number: 505620/2015
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 9th day of January, 2019.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

GREEN HILLS (USA),LLC,

Plaintiff,

- against -

Index No.: 505620/2015

Motion Seq. #5,6 & 7

MARJAM OF REWE STREET, INC., MARJAM SUPPLY OF REWE STREET LLC, and MARJAM SUPPLY CO., INC., 1 REWE STREET REALTY, LLC, 6 REWE STREET REALTY, LLC, WEST TERMINAL, LLC, 8 REWE STREET, LLC, 12 REWE REALTY,LLC, 15 REWE STREET, LLC, 16 REWE STREET, LLC, A&I REALTY CORP., RECKSON ASSOCIATES, a New York Co-Partnership, REWE PARK, LLC, REWE ROAD,LLC, and JOHN DOES 1-20,
Defendants.

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
15 Rewe Street's Notice of Motion,	1
Affidavits, Affirmation, & Exhibits	2
& Memorandum of Law	3
Marjam/Reckson's' Affirmation in Opposition & Exhibits	4
Marjam/Reckson's Notice of Motion	5
Affidavits, Affirmation & Exhibits	6
Memorandum of Law	7
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Upon the foregoing papers Defendant, 15 Rewe Street("15 Rewe"), moves this Court for an Order pursuant to CPLR § 3212 granting partial summary judgment in its favor. Defendants,

Marjam of Rewe Street Inc., Marjam Supply of Rewe Street LLC and Marjam Supply Co., Inc., Reckson Associates ("Reckson") and Rewe Road LLC, 8 Rewe Street LLC, 12 Rewe Street, LLC, 16 Rewe Street LLC, A & I Realty Corp. and Rewe Park, LLC (collectively "Marjam/Reckson") move separately for an Order pursuant to CPLR § 3212 granting summary judgment in their favor. The Marjam Defendants and Rewe Park also seek an Order granting a default judgment against Co-Defendant ("West"). Plaintiff, Green Hills (USA), LLC ("Green Hills") also moves separately for an Order pursuant to CPLR § 3212 granting summary judgment in its favor.

BACKGROUND

Newtown Industrial Center owned the subject property known as Block #2927 in Brooklyn, New York and intended to sell parcels contained therein as an industrial park. In 1957, Newtown Industrial Center created an easement within Block # 2927 that established "...a perpetual and unobstructed right of way as a driveway and passageway for vehicles and pedestrians for ingress and egress...." to be known as Rewe Street..¹ The easement was created to benefit the appurtenant parcels that were being sold to various businesses as part of the industrial park.

The original easement was amended on or about September 12, 1957 in relevant part as follows:

"Whereas, the undersigned desires to amend said easement by increasing its width along Vandervoort Avenue from thirty (30) feet to fifty (50) feet and by granting other rights and privileges concerning sewer and water pipe an other utility service.."

¹ All references to the easements are to Exhibit "A" through "H", annexed to the Affirmation in Support & Opposition by Edgar Roggenkamp IV, Esq.

The easement was amended again on or about January 20, 1958 to include "...a perpetual benefit by increasing its width along Vandervoort Avenue from fifty (50) feet to sixty (60) feet.

On or about August 28, 1958 the easement was amended again, as follows:

"Whereas, the undersigned desires to further extend said easement by extending it in a southerly direction at its southerly corner as a further continuation of the right of way known as "Rewe Street".

The 1958 amendment also set forth that the Grantor shall be responsible for maintaining the right of way, lighting, sewer and water pipelines for the benefit of the appurtenant property owners and that the costs will be assessed against them on a pro rata basis. Further, the Grantor expressed his intent that the easement would not remain a private street but rather a public roadway by stating that responsibility for maintenance will expire when the road upon which the easement is granted becomes a public highway or street.

Newtown Industrial Center transferred all the parcels contained in Block 2927, including Rewe Street, to Newtown Industrial Associates on or about May 17, 1967. On or about October 1, 1974, Newtown Industrial Associates transferred those same lots as well as Rewe Street to William Rechler. The next day, on October 2, 1974, Mr. Rechler transferred those properties including Rewe Street to Reckson. Thereafter, Reckson sold off the parcels appurtenant to Rewe Street. The deed reflecting the transfer of Rewe Street from Newtown Industrial Center to Newtown Industrial Associates stated the increased size of the easement. The transfer of that property from Newtown Industrial Associates to William Rechler and then to Reckson did as well. Additionally, each recorded deed made it clear that the easement included in the transfer was, "Said premises being known as Rewe Street...".

Ownership of Rewe Street

Marjam/Reckson submits two quitclaim deeds in support of its motion seeking a declaration that Rewe Park is the rightful owner of Rewe Street. The first quitclaim deed signed by Donald Rechler, the last surviving partner of Reckson, allegedly reflects a transfer of Rewe Street to Rewe Road, a Reckson affiliate, on or about March 18, 2016. The second quitclaim deed signed by Donald Rechler on behalf of Bulldog Equity Corp. reflects that Rewe Road allegedly transferred Rewe Street to Rewe Park, a Marjam affiliate, on or about September 23, 2016. Schedule "A", containing the "meets and bounds" description, attached to both quitclaim deeds, does not match the description of Rewe Street contained in all previously recorded deeds.

In support of its assertion that Rewe Park is the rightful owner of Rewe Street, Marjam/Reckson submits the deposition testimony of Donald Rechler taken on June 20, 2017 in conjunction with a prior action between the same parties that was discontinued on July 20, 2017². Mr. Rechler testified that Reckson has not been an active company since 1989 and is merely an entity used for bookkeeping or accounting purposes. While, Mr. Rechler stated it was his signature on the deed allegedly transferring Rewe Street to Rewe Road, he further testified that he had no knowledge that Reckson still actually owned the property known as Rewe Street, nor did he know that Rewe Road was a Reckson affiliate.³

Upon a motion for summary judgment the movant must establish the cause of action or

² Green Hills v Marjam, et.al, Index # 504774/2014.

³ Exhibit "I" annexed to Affirmation in Support by Edgar Roggenkamp IV, Esq.

defense “sufficiently to warrant the court as a matter of law in directing judgment” in his/her favor by the tender of evidentiary proof in admissible form. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). On such a motion, the evidence will be construed in the light most favorable to the party against whom summary judgment is sought. *Spinelli v Procassini*, 258 AD2d 577 (2d Dept 1999); *Tassone v Johannemann*, 232 AD2d 627, 628 (2d Dept 1996). If the party moving for summary judgment has established a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opposing party, who must “show facts sufficient to require a trial.” *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067–68 (1979), citing CPLR § 3212 (b); *Zuckerman v City of New York*, *supra*, at 562.

A quitclaim deed passes only such right, title, and interest as the grantor has at the time of making the deed. 43 A N.Y. Jur. 2d Deeds § 242. Here, the property descriptions in the two quitclaim deeds are inconsistent with those previously recorded for the property known as Rewe Street. Moreover, Mr. Rechler, the transferor, was not sure that his company even owned Rewe Street nor did he know that it was being transferred to another Reckson affiliate. Additionally, it is unclear why the deed from Rewe Road to Rewe Park was signed by Mr. Rechler on behalf of Bulldog Equity Corp. These issues create unresolved factual questions precluding a declaration that Rewe Park is the rightful owner of Rewe Street. Marjam/Reckson has failed to eliminate all questions of fact regarding the ownership of Rewe Street and is therefore not entitled to a declaration that Rewe Park is the rightful owner of Rewe Street. *Weeks v Weeks*, 265 AD 942 (2d

Dept 1942). Under these circumstances the Court need not consider the sufficiency of the opposing papers on the issue of ownership. ***Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 (1985).***

Use of Rewe Street

Marjam/Reckson also asserts that pursuant to an agreement with Rewe Park, Marjam will have the right to store materials on Rewe Street in furtherance of their business.⁴ In exchange for that right, Marjam agrees to provide accounting, bookkeeping, property management and “inside legal counsel” to Rewe Park. The law is clearly established that the fee owner of property encumbered by a right of way easement may not interfere with the use of the easement and may be held liable in damages for obstructing or interfering with its use. ***Julia Property v Levy, 137 AD3d 1224, 1226 (2d Dept 2016).*** Courts have also held that a fee owner who unreasonably interferes with the use of the easement may be compelled to remove obstructions and be liable in damages. ***Id. at 1226; Scappa v Herzig, 92 AD3d 751, 752 (2d Dept 2012); 49 N.Y. Jur. 2d Easements § 132.***

The extent of an easement claimed under a grant is generally limited by the language of the grant, as a grantor may create an extensive or a limited easement. ***DiDonato v Dyckman, 166 AD3d 942 (2d Dept 2018).*** In order to determine the exact nature of the easement, the court must look to the language contained in the grant, aided where necessary by any circumstances tending to manifest the intent of the parties. ***Gates v AT&T Corp., 100 AD3d 1216, 1218 (3d Dept 2012).*** The use of the easement by the grantees includes any reasonable use necessary and

⁴ “Services Agreement”, Exhibit “K” annexed to Affirmation in Support by Brian E. Maas, Esq.

convenient for the purpose for which it is created. *Hoffmann v. Delbeau*, 139 A.D.3d 803, 804 (2d Dept 2016); *Mitkowski v Marceda*, 133 AD3d 574, 575 (2d Dept, 2015), quoting *Dowd v Ahr*, 78 NY2d 469, 473 (1991). Once an express easement is created, it will pass with the land and can be extinguished only by abandonment, conveyance, condemnation, or adverse possession. It remains "as inviolate as the fee." *Spier v Horowitz*, 16 AD3d 400, 401 (2d Dept 2005), citing *Gerbig v Zumpano*, 7 NY2d 327, 330 (1960). A right of way easement for appurtenant parcels cannot be separated from the land and will be conveyed with the appurtenant land even if not expressly set forth in the deed. *Reilly v Achitoff*, 135 AD3d 926, 927 (2d Dept, 2016); *M. Parisi & Son Construction Co. v Adipietro*, 21 AD3d 454, 456 (2d Dept, 2005). The parcels appurtenant to Rewe Street were only given the right of passageway for all ordinary purposes over the described property. The grantor specifically stated that no other rights were given to the parcel owners with regard to the use of Rewe Street. *Solow v Liebman*, 175 AD2d 120, 121 (2d Dept 1991); *Ernst v Keniry*, 19 AD2d 938, 939 (3d Dept 1963), *affd*, 14 NY2d 668 (1964), citing *Andrews v. Cohen*, 221 N.Y. 148, 155(1917). Accordingly, the subject easement provides for only unobstructed ingress and egress and no other use of Rewe Street is permissible by the parcel owners according to the specific intent of the grant.

Rights and Obligations of the Rewe Street Easement Owners

An easement owned in common with others entitles each owner to full and complete use of the whole easement and one owner cannot make such use of the easement as will unduly interfere with the enjoyment of the easement by other owners. 49 N.Y. Jur. 2d Easements § 112 The Grantor in this case specified that the holders of the easement would have a perpetual and

unobstructed right to ingress and egress upon the property known as Rewe Street.

The original grant of the easement contained language indicating that the fee owner's intention, in addition to creating a perpetual unobstructed right of way, was that Rewe Street should not remain a private roadway, but rather should become a public highway or street. ***Mackie v Martucci, 39 AD3d 820 (2d Dept 2007)***. Therefore, it is clear that the Grantor in the instant action intended that Rewe Street remain open as a perpetual, unobstructed right of way for the parcels appurtenant to the easement. ***Ranscht v Wright, 9 AD 108, 112 (2d Dept 1896)***.

Green Hills and 15 Rewe Street seek a declaration that Marjam has violated the terms of the easement by placing storage units on Rewe Street. The subject easement was specifically created only for ingress and egress thereby making any other use of Rewe Street a clear violation of the terms of the grant. Marjam's placing storage units on Rewe Street is a right to which they have no claim under the easement. Moreover, as set forth above, even if Rewe Park was declared the owner of Rewe Street, it would not be entitled to place storage units on Rewe Street in any way that obstructed the other parcel owners rights of egress and ingress. ***Ledly v DJ & NA Mangement, 71 AD3d 1096 (2d Dept 2013); Solow v Liebman, 175 AD2d 120 (2d Dept 1991)***.

Conclusion

15 Rewe Street and Green Hills seek a declaration that Marjam's operations violate the terms of the easement. As set forth above, the easement in dispute granted the appurtenant parcel owners' only a right of way for travel on Rewe Street. Clearly, placing storage containers is a right not granted and is in violation of the easement. However, whether or not Marjam

and/or its affiliated businesses' operation itself is in violation of the easement is a question of fact and no declaration can be made at this time. *Hoffmann v. Delbeau, supra at 804*. 15 Rewe Street and Green Hills also seek a declaration that Reckson is in violation of the easement for its failure to maintain and repair Rewe Street from January 1, 1957 to the present. However, the Statute of Limitations for this claim is three years and any declaration that Reckson has violated the terms of the easement would be so limited. *Fucile v L.C.R. Dev., Ltd., 102 AD3d 915, 917 (2d Dept 2013); CPLR 214 (4)*. Moreover, since actual ownership of Rewe Street is unresolved any judgment against Reckson for damages incurred for its violation of the easement would also be limited to the date of any valid transfer of ownership. The terms of the easement also provided that the costs of maintenance would ultimately be borne by the parcel owners on a pro rata basis. This Court finds that Reckson is in violation of the easement. Damages, if any, will be assessed at the time of trial.

Marjam and Rewe Park seek reimbursement on a pro rata basis from the other parcel owners for monies allegedly spent on repair and maintenance of Rewe Street undertaken pursuant to the "Services Agreement". However, the original invoices for the work, estimates and bids received, proof in admissible form of the actual work performed and that Marjam paid its pro rata share has not been submitted. Accordingly, questions of fact exist regarding the reimbursement sought by Marjam and Rewe Park. Additionally, a question of fact exists as to whether or not Reckson's failure to maintain Rewe Street caused any additional damage to the easement and what its proportionate share should be. Accordingly, since Rewe Park's ownership of Rewe Street has not been established the "Services Agreement" shall be held in abeyance. The

Accordingly, it is

ORDERED that 15 Rewe Street's motion is granted in part and denied in part as set forth in the within decision, and it is

ORDERED that Marjam/Reckson's motion is denied in its entirety, and it is

ORDERED that Green Hills' motion is granted in part and denied in part as set forth in the within decision.

DECLARED that Reckson is in violation of the easement and as the property owner of record is responsible for the repair and maintenance of Rewe Street, and it is

DECLARED that all of the appurtenant parcel owners to Rewe Street shall have full and complete use of the whole easement and one owner cannot make such use of the easement as will interfere with the enjoyment of the easement by other owners and each owner is responsible for the payment of costs incurred for maintenance and repairs of Rewe street, on a pro rata basis, upon the presentation of an invoice for same, and it is

DECLARED that Marjam and/or its affiliates are in violation of the easement and must remove any and all storage containers from Rewe Street within thirty (30) days of service of the within Order with Notice of Entry.

ENTER

LOREN BAILY-SCHIFFMAN
JSC

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KINGS COUNTY CLERK
FILED