Scasa v Trust
2019 NY Slip Op 33292(U)
October 30, 2019
Supreme Court, Suffolk County
Docket Number: 13-14535
Judge: Vincent J. Martorana

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 13-14535

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 12-6-18
ADJ. DATE 2-14-19
Mot. Seq. # 009 - MG

----------X

ORLANDO A. SACASA, JANE S. SACASA, EVAN SHEINBERG, ABIGAIL MCKENNA, JACK NUSBAUM, NORA ANN WALLACE, JEAN W. CLARKE, WINDMILL FAMILY LLC and WINDMILL GIFT, LLC,

Plaintiffs,

- against -

DAVID TRUST, Individually and as Trustee of the DAVID ANDREW TRUST REVOCABLE TRUST,

Defendant,

- and -

ALFRED J. SHUMAN, STEPHANIE J. SHUMAN, CALISTA WASHBURN, as Trustee of the CALISTA WASHBURN REVOCABLE TRUST DATED MAY 7, 2009 and as Trustee of the IRA H. WASHBURN, JR. REVOCABLE TRUST DATED MAY 7, 2009, IRA H. WASHBURN, as Trustee of the IRA H. WASHBURN, JR. REVOCABLE TRUST DATED MAY 7, 2009, LALITTE C. SMITH, Individually and as Trustee of the SMITH FAMILY QUALIFIED PERSONAL RESIDENCE TRUST #1 uad December 11, 2012, JOSEPH J. MAGLIOCCO, and ALLISON F. MAGLIOCCO,

Additional Defendants.

----------X

ESSEKS, HEFTER, ANGEL, DI TALIA & PASCA, LLP
Attorney for Plaintiffs Orlando Sacasa, Jane Sacasa, Evan Sheinberg, Abigail McKenna, Jack Nusbaum, Nora Ann Wallace & Jean Clarke
108 East Main Street
Riverhead, New York 11901

TARBET & LESTER
Attorney for Plaintiffs Windmill Family LLC & Windmill Gift LLC
132 North Main Street
East Hampton, NY 11937

LAW OFFICES OF MARK SHERMAN
Attorney for Plaintiffs Windmill Family LLC & Windmill Gift LLC
29 Fifth Street
Stamford, Connecticut 06905

TWOMEY, LATHAM, SHEA, KELLEY et al.
Attorney for Defendant/Third-Party Defendant David Trust
33 West Second Street
Riverhead, New York 11901

MCNULTY-SPEISS, P.C.
Attorney for Additional Defendants Alfred Shuman & Stephanie Shuman
214 Roanoke Avenue
Riverhead, New York 11901

----------X

DAVID TRUST, Individually and as Trustee of the DAVID ANDREW TRUST REVOCABLE TRUST,

Third-Party Plaintiff,

- against -

KATHLEEN N. ROSKELL as Trustee of the JAMES H. EVANS 2011 FAMILY TRUST, KATHLEEN N. ROSKELL and THOMAS C. JEPPERSON, as Trustees of the JAMES H. EVANS 2001 REVOCABLE TRUST, and EVANS INVESTMENT, LLC,

Third-Party Defendants.

----------X

MATTHEWS, KIRST & COOLEY, PLLC
Attorney for Additional Defendants Calista Washburn & Lalitte Smith
241 Pantigo Road
East Hampton, New York 11937

ROBERT KOUFFMAN & ASSOCIATES
Attorney for Additional Defendants Joseph Magliocco & Allison Magliocco
2411 Main Street, 2nd Floor
Bridgehampton, New York 11932

FOX ROTHSCHILD, LLP
Attorney for Third-Party Defendants
100 Park Avenue, 16th Floor
New York, New York 10017

Upon the following papers numbered 1 to 18 read on this motion for leave to reargue : Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 10 - 16; Replying Affidavits and supporting papers 17 - 18 ; Other __; it is,

ORDERED that the motion by third-party defendants for, inter alia, an order granting leave to reargue their prior motion for summary judgment, which was denied by order of this court dated September 18, 2018, is granted, and, upon reargument, granting summary judgment dismissing the third-party complaint and canceling the notices of pendency filed against the properties in the Village of East Hampton known as 26 Windmill Lane and 32 Windmill Lane, is granted; and it is

ORDERED that the notice of pendency against the property known as 26 Windmill Lane, East Hampton, New York, and the notice of pendency against the property known as 32 Windmill Lane, East Hampton, New York, both of which were filed with the Suffolk County Clerk on January 7, 2016, and extended by order of the court (Baisley, J.) dated April 5, 2019, hereby are canceled; and it is

ORDERED that third-party defendants shall serve a copy of this order, with notice of its entry, as well as the notice required under CPLR 8019 (c) to cancel the notices of pendency, upon the Suffolk County Clerk and upon all other parties within 20 days after its entry; and it is further

ORDERED that, upon service of a copy of this order with notice of entry and the notice required under CPLR 8019 (c), the Suffolk County Clerk shall cancel the notice of pendency filed by David Trust against the property known as 26 Windmill Lane, East Hampton, New York, designated on the Suffolk County Tax Map as District 0301, Section 010.00, Block 01.00, and Lot 008.000, and the notice of pendency filed by David Trust against the property known as 32 Windmill Lane, East Hampton, New York, designated on the Suffolk County Tax Map as District 0301, Section 010.00, Block 01.00, and Lot 010.000.

In 2013, plaintiffs, the owners of residential property abutting Windmill Lane, a private road in the Village of East Hampton, brought this action pursuant to article 15 of the Real Property Actions and Proceedings

Law for a judgment declaring that each of their properties is benefitted by a pedestrian right of way that begins at the southerly end of Windmill Lane and runs "across the westerly lines" of the properties known as 27 Windmill Lane and 33 Windmill Lane to the Atlantic Ocean beach. Plaintiffs allege, in part, that a deed issued by a common grantor created a 50-foot-wide easement (the Windmill Lane easement) for ingress and egress that runs south from Further Lane towards the Atlantic Ocean, terminating by the properties known as 27 Windmill Lane and 32 Windmill Lane; that each of the residential properties abutting the Windmill Lane easement is benefitted by such easement; and that each of plaintiffs' properties also is benefitted by an easement over a pedestrian pathway, measuring five feet wide, that begins at the southwestern corner of the property known as 27 Windmill Lane, crosses over the western border of the property known as 33 Windmill Lane, and leads down to the beach. It is noted that to create the Windmill Lane easement, each parcel of abutting land extends to the center line of the easement area, so that a 25-foot-wide strip of land running along the eastern or western boundary of each parcel, depending upon which side of the easement it is situated, is part of the easement area. Significantly, only a portion of the Windmill Lane easement is paved or covered with gravel, and nearly all of the paved or improved portion of the roadway at the southern end of the easement is within the property known as 27 Windmill Lane, located on the eastern side of the road.

Defendant David Trust (Trust) is the trustee of the David Andrew Trust Revocable Trust, which holds title to 27 Windmill Lane (the DAT Trust property. Additional defendants Alfred Shuman and Stephanie Shuman hold title to the property known as 33 Windmill Lane. Located just south of the terminus of the Windmill Lane easement, the Shuman property fronts the Atlantic Ocean and abuts the southern border of the DAT Trust property. In addition to seeking a determination as to their property rights, plaintiffs seek a permanent injunction prohibiting Trust from interfering with their use of Windmill Lane and directing the removal of certain obstructions he erected within the subject easements. The Shumans also brought a cross claim for a declaration that David Trust has no right to use the easement for pedestrian access to the Atlantic Ocean beach that crosses along the western boundary of their property. Additional details concerning the subject properties and easements, the events precipitating this action, and the allegations contained in the pleadings are set forth in orders issued by this court in December 2015, May 2017, September 2018 and August 2019, and will not be repeated herein, as the parties' familiarity with such orders is presumed.

Almost a year after this action was brought, Trust, individually and as trustee of the David Andrew Trust Revocable Trust, commenced a third-party action for declaratory and injunctive relief against the then-owners of the properties known as 26 Windmill Lane and 32 Windmill Lane, both of which are located across the street from the DAT Trust property. In January 2016, Trust served an amended third-party complaint naming Evans Investments, Kathleen Roskell, as trustee of the James H. Evans 2011 Family Trust and as co-trustee of the James H. Evans 2001 Revocable Trust, and Thomas Jepperson, co-trustee of the James H. Evans 2001 Revocable Trust, as third-party defendants. It is undisputed that 26 Windmill Lane, which is situated directly across the street from the DAT Trust property, presently is owned by Evans Investments, LLC, and that 32 Windmill Lane, abutting the southern border of 26 Windmill Lane, at the western terminus of the Windmill Lane easement, presently is owned by the James H. Evans 2011 Family Trust and the James H. Evans 2001 Revocable Trust. The amended third-party complaint alleges, in relevant part, that a strip of property measuring 25 feet wide and 154 feet long, which runs along the eastern boundary of the property known as 26 Windmill Lane, and a strip of property measuring 25 feet wide and 32.69 feet long, which runs along the eastern boundary of 32 Windmill Lane, are burdened by the Windmill Lane easement, and that third-party defendants have prevented the use of the Windmill Lane easement insofar as it crosses their properties by installing boulders, grass and other landscaping features, thereby imposing an undue burden on the DAT Trust property.

The first cause of action in the amended third-party complaint seeks a declaration that Trust and the David Andrew Trust Revocable Trust have rights "to and over the 25 feet of Windmill Lane for a length of 186.69 feet on the third-party defendants' properties and determining that Windmill Lane should burden not only third-party plaintiffs' property but the third-party defendants' properties equally and that they share in the burden of said roadway in accordance with the deeds in the respective chains of title." The second cause of action seeks a permanent injunction enjoining third-party defendants "from obstructing use and paving of the westerly 25 feet of Windmill Lane as it traverses their properties," and the third cause of action, which alleges only that third-party defendants are "necessary parties" to the underlying action, seeks "rights over and to third-party defendants' properties encompassed within Windmill Lane for access . . . to the beach access easement" for any plaintiff the court determines has rights in such easement. Third-party defendants' answer to the amended third-party complaint denies most of the allegations in the third-party complaint, asserts various affirmative defenses, and interposes a counterclaim under article 15 of the Real Property Actions and Proceedings Law for a judgment permanently enjoining Trust and the David Andrew Trust Revocable Trust from interfering with third-party Trust has obstructed the Windmill Lane easement by installing a gabion stone retaining wall, which runs 100 feet alongside the paved roadway, and a metal rail, which runs along the western edge of the paved roadway, in the easement area, and that the retaining wall and metal rail interfere with their use of the roadway. Notices of pendency filed by Trust against third-party defendants' properties on January 7, 2016 were extended by order issued by the court (Baisley, J.) on April 5, 2019.

Third-party defendants moved for summary judgment dismissing the amended third-party complaint and canceling the notices of pendency filed against the properties known as 26 Windmill Lane and 32 Windmill Lane. They argued, in part, that while Trust, in his capacity as trustee, has a right to use the Windmill Lane easement for passage, there is no legal basis for his contention that he is entitled to pave the unpaved portion of such easement so that the "burden" is equally shared by the properties on the east and west side of the easement area. They asserted that Trust, who purchased the DAT Trust property in 1999, has admitted the paved portion of the Windmill Lane easement is sufficient for ingress to and egress from the DAT Trust property; that he knew about the Windmill Lane easement two years before he purchased the property; and that he failed to raise any complaints about the Windmill Lane easement until after the commencement of this action. Moreover, third-party defendants asserted that the third-party action was not brought in good faith, but to gain leverage against plaintiffs, and that, as the pedestrian easement at issue in the underlying action is located on the eastern side of Windmill Lane, there is no basis for Trust's claim they are necessary parties to that action.

Trust opposed third-party defendants' motion, arguing that because the Windmill Lane easement is defined in the chain of title for 27 Windmill Lane as a 50-foot-wide "private road" or "common driveway" for the benefit of the owners of property located on the eastern and western side of the center line of such easement area, he is entitled to use the full width of such easement, including the area within the eastern boundaries of third-party defendants' properties. He further asserted that third-party defendants are necessary parties, because they use the Windmill Lane easement and claim that his actions have interfered with their use. According to Trust's attorney, "[i]t strains reason that the [third-party defendants'] properties would not be affected by a judgment that determines which of the parties in [the underlying action] has rights to travel down Windmill Lane beyond their property to access the beach."

By order dated September 18, 2018, the court denied third-party defendants' motion for summary judgment and cancellation of the notices of pendency, finding that it was untimely. Third-party defendants now move for leave to reargue their motion on the basis that the court had extended their time to cross-move for

summary judgment. Trust opposes the motion, arguing that third-party defendants' prior motion actually was not a cross motion and, therefore, was untimely.

Third-party defendants' motion for leave to reargue their prior motion for summary judgment is granted. A motion for leave to reargue must be based on "matters of fact or law allegedly overlooked or misapprehended by the court in determining a prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]; *see* ***Grimm v Bailey***, 105 AD3d 703, 963 NYS2d 277 [2d Dept 2013]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]). Reargument may be granted upon a showing that the court overlooked or misapprehended the facts or the law "or for some other reason mistakenly arrived at its earlier decision" (***Carrillo v PM Realty Group***, 16 AD3d 611, 611, 793 NYS2d 69, 70 [2d Dept 2005]; *see e.g.* ***Bueno v Allam***, 170 AD3d 939, 96 NYS3d 623 [2d Dept 2019]; ***Grimm v Bailey***, 105 AD3d 703, 963 NYS2d 277; ***E.W. Howell Co., Inc. v S.A.F. La Sala Corp.***, 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]). Here, the court overlooked the fact that the Honorable Arthur Pitts, to whom this action previously was assigned, had so-ordered a stipulation extending the statutory period for third-party defendants to make a cross motion for summary judgment.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d at 925, citing ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

Third-party defendants have established a prima facie case of entitlement to summary judgment dismissing the cause of action interposed by Trust under article 15 of the Real Property Actions and Proceeding Law to quiet title. In an action to quiet title brought under article 15, the plaintiff must establish by a preponderance of the evidence either that it has the claimed estate or interest in the subject property, or that the opposing party's claim to the subject property is without merit (*see* ***White Sands Motel Holding Corp. v Trustees of Freeholders & Commonalty of Town of E. Hampton***, 142 AD3d 1073, 37 AD3d 583 [2d Dept 2016]; ***State of New York v Moore***, 298 AD2d 814, 751 NYS2d 321 [3d Dept 2002]). As mentioned above, the first cause of action in the amended third-party complaint asserts the David Andrew Trust Revocable Trust's interest in the Windmill Lane easement is not an incorporeal right of way, but the right to "use the easement in its entirety, including the portion on the Evans' properties."

"An easement is not a personal right of a landowner but an appurtenance to the land benefitted by it (the dominant estate). It is inseparable from the land and a grant of the land carries with it the grant of the easement" (***Will v Gates***, 89 NY2d 778, 783, 658 NYS2d 900, 902 [1997]). An easement appurtenant occurs when the easement is conveyed in a writing, subscribed by the creator of the easement, which burdens the servient estate for the benefit of the dominant estate (***Djoganopoulos v Polkes***, 95 AD3d 933, 935, 944 NYS2d 217, 219 [2d Dept 2012]; ***Bogart v Roven***, 8 AD3d 600, 601, 780 NYS2d 355, 356 [2d Dept 2004]; ***Green v Mann***, 237 AD2d 566, 566-567, 655 NYS2d 627, 628 [2d Dept 1997]). When the dominant estate is transferred, the

easement passes to the subsequent owner through appurtenance clauses, even if there is no specific mention of it in the deed (*see* ***Djoganopoulos v Polkes***, 95 AD3d 933, 944 NYS2d 217; ***Green v Mann***, 237 AD2d 566, 655 NYS2d 627; ***Strnad v Brudnicki***, 200 AD2d 735, 606 NYS2d 915 [2d Dept 1994]). An easement appurtenant by grant passes with the dominant estate unless extinguished by abandonment, conveyance, condemnation or adverse possession (***Gerbig v Zumpano***, 7 NY2d 327, 330, 197 NYS2d 161, 163 [1960]; ***Corrarino v Byrnes***, 43 AD3d 421, 841 NYS2d 122, 125 [2d Dept 2007]; ***Spier v Horowitz***, 16 AD3d 400, 791 NYS2d 156, 158 [2d Dept 2005]; ***Green v Mann***, 237 AD2d 566, 567, 655 NYS2d 627, 628-629); the mere nonuse of an easement, even if for a substantial duration, will not establish a claim of abandonment (*see* ***Snell v Levitt***, 110 NY 595, 18 NE 370 [1888]; ***Gold v Di Cerbo***, 41 AD3d 1051, 837 NYS2d 887 [3d Dept], *lv denied* 9 NY3d 811, 846 NYS2d 601 [2007]; ***M. Parisi & Son Constr. Co., Inc. v Adipietro***, 21 AD3d 454, 800 NYS2d 723 [2d Dept 2005]).

Moreover, a grantee of land takes title subject to any duly recorded easements that were granted by his or her predecessors in title (*see* ***Corrarino v Byrnes***, 43 AD3d 421, 841 NYS2d 122; ***Pomygalski v Eagle Lake Farms, Inc.***, 192 AD2d 810, 596 NYS2d 535 [3d Dept], *lv denied* 82 NY2d 656, 602 NYS2d 805 [1993]), as well as to any unrecorded easements of which he or she has actual or constructive notice (***Stasack v Dooley***, 292 AD2d 698, 700, 739 NYS2d 478, 481 [3d Dept 2002]; ***Breakers Motel v Sunbeach Montauk Two***, 224 AD2d 473, 474, 638 NYS2d 135, 135 [2d Dept], *lv dismissed* 88 NY2d 1016, 649 NYS2d 382 [1996], *lv denied* 90 NY2d 810, 665 NYS2d 401 [1997]). A person who purchases a servient estate with actual or constructive notice of an easement is estopped from denying the existence of such easement (***Strnad v Brudnicki***, 200 AD2d 735, 737, 606 NYS2d 913, 915; *see* ***Zunno v Kiernan***, 170 AD2d 795, 565 NYS2d 900 [3d Dept 1991]), and may not unreasonably interfere with the rights of the owner of the dominant estate to use and enjoy the easement (***B.J. 96 Corp. v Mester***, 262 AD2d 732, 733, 692 NYS2d 185, 187 [3d Dept 1999]; ***Green v Mann***, 237 AD2d 566, 567-568, 655 NYS2d 627, 629; ***Wilson v Palmer***, 229 AD2d 647, 647, 644 NYS2d 872, 872 [3d Dept 1996]; *see* ***Herman v Roberts***, 119 NY 37, 23 NE 442 [1890]; ***Scappa v Herzig***, 92 AD3d 751, 938 NYS2d 346 [2d Dept 2012]; ***Rozek v Kuplins***, 266 AD2d 445, 698 NYS2d 866 [2d Dept 1999], *lv denied* 95 NY2d 754, 711 NYS2d 156 [2000]).

It is undisputed that Trust and third-party defendants are entitled to use the Windmill Lane easement to access their respective properties. The record shows that the parties' chains of title include an easement for ingress to and egress from their properties; that the paved or gravel roadway in question existed years, if not decades, before the David Andrew Trust Revocable Trust took title to 27 Windmill Lane; and that Trust made no claim prior to the filing of this action that the roadway as it exists is insufficient for accessing the DAT Trust property. Significantly, though language in the deed issued by the common grantor in 1949 refers to a "private roadway fifty (50) feet wide" and reservation of a right to use "light, water and telephone lines, cables, pipes and conduits now on the premises conveyed for the benefit of other premises" of the grantor, the evidence shows no private roadway measuring 50-feet wide and running the length of the Windmill Lane easement was ever constructed.

Trust's argument that the David Andrew Trust Revocable Trust is the dominant tenant over the western 25 feet of the Windmill Lane easement that runs across the eastern boundary of third-party defendants' properties, and that, as the trustee thereof, he has the right to pave the unpaved portion of such easement that crosses over third-party defendants' properties – not for purposes of securing ingress and egress to the DAT Trust property, but so the burden of such easement is shared equally by the property owners – is rejected. No deed or other documentary evidence has been submitted by David Trust showing entitlement to pass over a

defined 50-wide paved easement running from Further Lane to the southern end of the easement area, and there is no evidence, or even a claim, that third-party defendants' use of their properties impairs his right of way (*see* ***Mazzaferro v Association of Owners of Mill Neck Estates, Inc.***, 131 AD3d 949, 16 NYS3d 83 [2d Dept 2015]; ***J.C. Tarr, Q.P.R.T. v Delsener***, 19 AD3d 548, 800 NYS2d 177 [2d Dept 2005]). The court also rejects Trust's contention that, by virtue of language in the deed issued by the common grantor referring to a "private roadway fifty (50) feet wide" and reserving the right to use "light, water and telephone lines, cables, pipes and conduits now on the premises conveyed for the benefit of other premises" belonging to the grantor, as well as similar language contained in the deed given by his predecessor in title, he possesses more that a right of way over the Windmill Lane easement. "Once an easement is definitively located, by grant or by use, its location cannot be changed by either party unilaterally" (***Clayton v Whitton***, 233 AD2d 828, 829, 650 NYS2d 404, 405-406 [3d Dept 1996]; *see* ***Dowd v Ahr***, 78 NY2d 469, 577 NYS2d 198 [1991]; ***Evangelical Lutheran St. John's Orphan Home v Buffalo Hydraulic Assoc.***, 64 NY 561 [1876]).

As the evidence shows the David Andrew Trust Revocable Trust, like the owners of 26 Windmill Lane and 32 Windmill Lane, has a right of way, and as there is no claim the DAT Trust property is not accessible due to the width of the improved roadway (*cf.* ***Hoeffner v John F. Frank, Inc.***, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2003]; ***Noll v Weinman***, 253 AD2d 742, 677 NYS2d 590 [2d Dept 1998]), there is no legal basis for Trust's claim he is entitled to pave the unpaved portion of the Windmill Lane easement that crosses third-party defendants' properties. "As a rule, where the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder" (***Lewis v Young***, 92 NY2d 443, 449, 682 NYS2d 657 [1998]; *see* ***Mazzaferro v Association of Owners of Mill Neck Estates, Inc.***, 131 AD3d 949, 16 NYS3d 83; ***Guzzone v Brandariz***, 57 AD3d 481, 868 NYS2d 755 [2d Dept 2008]). Thus, Trust having failed to raise a triable issue of fact as to a right of the David Andrew Trust Revocable Trust "to use the [Windmill Lane] easement in its entirety" by having a 50-foot-wide roadway across from the DAT Trust property, summary judgment dismissing the first cause of action in the amended third-party complaint is granted.

Summary judgment dismissing the second cause of action against third-party defendants also is granted. A permanent injunction is an extraordinary remedy that will not be granted absent a clear showing by the party seeking such relief that irreparable injury is threatened and that no other adequate remedy at law exists (*see* ***Gaynor v Rockefeller***, 15 NY2d 120, 256 NYS2d 584 [1965]; ***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; ***McDermott v City of Albany***, 309 AD2d 1004, 765 NYS2d 903 [3d Dept 2003], *lv denied* 1 NY3d 509, 777 NYS2d 19 [2004]; ***Staver Co. v Skrobisch***, 144 AD2d 449, 533 NYS2d 967 [2d Dept 1988], *appeal dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]). Having established that Trust does not have the right to drive across or to pave the portion of the Windmill Lane easement that passes over the eastern side of 26 Windmill Lane and 32 Windmill Lane, third-party defendants also have demonstrated a prima facie case of no irreparable injury to the property interests of the David Andrew Trust Revocable Trust due to the particular uses of their land within such easement area (*see* ***Mazzaferro v Association of Owners of Mill Neck Estates, Inc.***, 131 AD3d 949, 16 NYS3d 83; ***518 E. 80th St. Co. v Smith***, 251 AD2d 215, 674 NYS2d 680 [1st Dept 1998]). In opposition, Trust failed to raise a triable issue of fact as to whether the David Andrew Trust Revocable Trust possesses a tangible property right in the roadway, rather than an incorporeal right of way in the Windmill Lane easement (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923).

Summary judgment dismissing the third cause of action also is granted. CPLR 1003 provides, in relevant part, that a court may add a party to an action on motion of any party. There is no cause of action for joinder of a party.

Finally, having granted the branches of third-party defendants' motion for summary judgment dismissing the causes of action asserted against them, the branch of their motion for an order cancelling the notices of pendency filed by Trust against their properties on Windmill Lane is granted.

Dated: Riverhead, New York
October 30, 2019

VINCENT J. MARTORANA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION