

Boerum Johnson LLC v Marte
2020 NY Slip Op 33700(U)
October 29, 2020
Supreme Court, Kings County
Docket Number: 516295/19
Judge: Dawn M. Jimenez-Salta
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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 29th day of October, 2020.

P R E S E N T:

HON. DAWN M. JIMENEZ-SALTA,
Justice.

-----X
BOERUM JOHNSON LLC,

Plaintiff,

- against -

Index No. 516295/19

EMENEGILDA MARTE, GILBERT MARTE, JR.,
G&S AUTO REPAIR CORP.,

and "JOHN DOE NO 1" through "JOHN DOE NO 20", inclusive the last twenty names being fictitious and unknown to plaintiff, the person or parties intended being the tenants, occupants, persons, or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

87-105 119-130
120-130 132-133
134-136

Upon the foregoing papers in this quiet title action to extinguish an easement, plaintiff Boerum Johnson LLC (Boerum Johnson) moves (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and 3212, granting it

summary judgment on its complaint and dismissing defendants' answer and affirmative defenses.

Defendants Emenegilda Marte, Gilbert Marte, Jr. and G&S Auto Repair Corp. (G&S Auto) (collectively, the Marte Defendants) cross-move (in mot. seq. four) for an order: (1) granting them summary judgment dismissing the complaint, pursuant to CPLR 3212, and (2) granting defendant Emenegilda Marte a right of easement and usage of the neighboring property at Block 3073, Lot 14, as set forth in the March 17, 1949 easement agreement and included in the February 17, 1987 deed to defendant Emenegilda Marte recorded with the City Register on March 10, 1987, in Reel 1984, Page 622.

Background

The Property Dispute

The Marte Defendants claim to own the property at 215 Boerum Street in Brooklyn (Block 3073, Lot 16) (Marte Property). However, only defendant Emenegilda Marte has record ownership of the Marte Property by a February 17, 1987 deed recorded with the City Register on March 10, 1987, in Reel 1984, Page 622 (Marte Deed). Boerum Johnson has been the record owner of the neighboring, adjoining property at 217-219 Boerum Street in Brooklyn (Block 3073, Lot 14) (Boerum Johnson Property) since it obtained the Boerum Johnson Property pursuant to an October 30, 2018 deed.

The Marte Defendants claim to have rights to an easement for driveway purposes burdening the Boerum Johnson Property, pursuant to a March 18, 1949 grant and agreement between Hyman Mermelstein, Sholem Mermelstein, Mario Fortunato and

David V. Trevas recorded with the City Register on March 18, 1949 (1949 Driveway Easement).

The Instant Action

On July 24, 2019, Boerum Johnson commenced the instant action by filing a summons and a verified complaint asserting the following four causes of action: (1) a judgment declaring that the Marte Defendants have no right, title, claim, lien or interest in the Boerum Johnson Property, pursuant to RPAPL article 15; (2) adverse possession; (3) the 1949 Driveway Easement was extinguished by merger; and (4) the 1949 Driveway Easement was extinguished by abandonment. Boerum Johnson commenced this action against Emenegilda Marte, the record owner of the Marte Property, Gibert Marte, Jr., who claims an interest in the Marte Property, and G&S Auto, a tenant of the Marte Property.

The complaint alleges that “[d]efendants claim, or public records indicate that defendants may claim, to have an easement encumbering the [Boerum Johnson Property] . . .” (complaint at ¶ 14). The complaint further alleges that the 1949 Driveway Easement “is of no force and effect because, inter alia, it has been abandoned but improperly remains an encumbrance of record and improper claim against the [Boerum Johnson Property]” and “is unenforceable, inter alia, because its purpose – access from Bushwick Place to [the Marte Property] – is not capable of accomplishment” (*id.* at ¶¶ 15 and 16).

The complaint alleges that a recent survey of the Boerum Johnson Property “illustrates that the purported easement has been permanently blocked off by a metal fence on a 1.5 foot high, one foot wide concrete wall along Bushwick Place[,]” which was

“erected and maintained” by Boerum Johnson and its predecessor in title “[f]or a period of well over ten years prior to the commencement of this action . . .” (*id.* at ¶¶ 19 and 20).

The Boerum Johnson Property has allegedly “been enclosed by a fence erected by [Boerum Johnson’s] predecessor(s) in interest since at least the 1980’s” (*id.* at ¶ 21). In addition, the complaint alleges that the Marte Defendants “effectively abandoned” the 1949 Driveway Easement by:

“removing the ten-foot wide door that provided access over the purported easement area to the rear of its building . . . and bricked up the side of the building [and] adding a narrow door and roll gate to the building on Defendants’ Property which leaves no access or space for automobiles to enter. Defendants’ removal of the entrance to the purported easement by installing a brick wall made defendants’ use of the purported easement impossible, and evidenced defendants’ unequivocal and clear intention to abandon and relinquish all rights to the purported easement” (*id.* at ¶ 25).

On November 14, 2019, the Marte Defendants answered the complaint, denied the material allegations therein and asserted the following 13 affirmative defenses: (1) statute of limitations; (2) “[b]locking of an entrance or exit or door or window or fire exit is a basis or grounds for the creation or declaration of an easement by necessity or implication”; (3) Boerum Johnson’s use, possession and/or occupation of the 1949 Driveway Easement was not open; (4) the Marte Defendants’ use, possession and/or occupation of the 1949 Driveway Easement “is enforceable by way of accomplishment”; (5) failure to state a cause of action for adverse possession; (6) the 1949 Driveway Easement has not been terminated by merger; (7) the 1949 Driveway Easement has never been abandoned; (8) Boerum Johnson’s use, possession and/or occupation of the 1949 Driveway Easement was hostile

and adverse to the Marte Defendants' rights; (9) easement by prescription; (10) laches and estoppel; (11) unclean hands; (12) documentary evidence; and (13) lack of personal jurisdiction.

Boerum Johnson's Summary Judgment Motion

Boerum Johnson now seeks an order granting it summary judgment on its complaint and dismissing the Marte Defendants' answer and affirmative defenses.

As a preliminary matter, Boerum Johnson contends that defendants Gilbert Marte, Jr. and G&S Auto lack standing to prosecute any claims or defenses regarding the Marte Property or the 1949 Driveway Easement because "[o]nly the owner of the Marte Property could have standing to claim the benefit of any easement benefitting the Marte Property . . ." Boerum Johnson submits a copy of Emenegilda Marte's February 17, 1987 recorded deed to the Marte Property evidencing that she is the sole record owner of the Marte Property.

Boerum Johnson also contends that the 1949 Driveway Easement has been extinguished. Boerum Johnson submits an expert affidavit and report from Joseph Friedman, Esq. (Friedman), Executive Vice President and Chief Underwriting Counsel to Regal Title Agency. Friedman opines that the Boerum Johnson Property is not subject to the 1949 Driveway Easement because it has been extinguished by adverse possession, abandonment and merger.

Specifically, Friedman opines that the 1949 Driveway Easement was extinguished by adverse possession because:

“the owner of the servient estate erected a metal fence on a 1.5 foot high 1 foot wide concrete wall along Bushwick Place sometime prior to October 2007 . . . This fence and wall blocked the 15 foot 7 inch entrance to the right of way extending to the rear of the building owned by the dominant estate on Lot 16. The fence and wall presently exist in the same position as in Oct. 2007 as appears by Google Map Street View Nov, 2016 . . .”

Friedman also opines that “the owner of the dominant estate effectively abandoned the easement by removing the 10 foot wide door that provided access over the easement area to the rear of its building . . . and bricked up the side of the building.” Friedman notes that the owner of the Marte Property “recently added a narrow door and roll gate [with] no space for automobiles to enter . . . Access is only through the front of the building on Boerum Street . . .”

Friedman further opines that the 1949 Driveway Easement was terminated by merger, which “occurred when both the servient and dominant estates were in the same common owners, namely Helen S. Kaufman[,] 2017 Boerum Street Realty Corporation, and 126 Grattan Street, Inc., none of said deeds to them containing any reference to the easement.”

Boerum Johnson argues that the Marte Defendants’ claim of an easement by necessity in their answer based on a “fire exit” must also fail, as a matter of law, because “[i]t is uncontested that the Marte Property borders a public street and may be physically and legally accessed from that public street.” Boerum Johnson notes that “the alleged fire exit was only constructed after Boerum Johnson took title [i]n October 2018.”

Boerum Johnson submits an affidavit from Mordechai Schwimmer (Schwimmer), a member of Boerum Johnson, who attests that “[t]he alleged fire exit or fire door . . . was not installed until shortly after Boerum Johnson purchased the Boerum Johnson Property . . . on October 30, 2018.” Schwimmer further attests that:

“When Boerum Johnson purchased the Boerum Johnson Property, it had no reason to believe that the Boerum Johnson Property was encumbered by any kind of easement. The Martes’ purported easements did not show up in the survey or the title report that Boerum Johnson ordered for the purchase nor was any such easement disclosed by the seller. The Boerum Johnson Property was bounded by a fence and there was no indication that the Martes were making any use of the Boerum Johnson Property.”

Boerum Johnson also submits an affidavit from Zadok Zvi (Zvi), a manager of Kodez Realty LLC (Kodez), who attests that Kodez conveyed the Boerum Johnson Property to Boerum Johnson on October 30, 2018. Zvi attests that “I erected and maintained a fence completely enclosing the Premises from right after I purchased the Premises [in 1990] until the Premises was sold to Boerum Johnson . . .” Zvi further attests that “Gilbert Marte, Jr. began renting a portion of the Premises from me in connection [with] his auto repair shop until the time the Premises was sold to Boerum Johnson . . . and always acknowledged my superior ownership of the Premises.”

Boerum Johnson contends that the Marte Defendants’ claim of an easement by prescription must also fail because the factual and legal elements are not alleged. Boerum Johnson notes that the Marte Defendants admitted in their complaint filed in a related

action¹ that their use of the Boerum Johnson Property was permissive because Boerum Johnson and Kodez, its predecessor, had provided the Marte Defendants with a key to the Boerum Johnson Property since 1987, and the Martes Defendants had rented a portion of the Boerum Property from Kodez. Boerum Johnson argues that “[t]his is classic permissive use which destroys the requisite hostility element of a prescriptive easement.”

Boerum Johnson argues that the Marte Defendants’ claim of an easement by implication in their answer must also fail because “[t]he Martes have made no allegation and have offered no proof of any [of] the elements of an easement by implication.” Boerum Johnson also argues that the Marte Defendants’ remaining affirmative defenses should be dismissed because they lack merit.

***The Marte Defendants’ Opposition
and Summary Judgment Cross Motion***

The Marte Defendants, in opposition and in support of their summary judgment cross motion, submit an affidavit from defendant Gilbert Marte, Jr., who attests that he is the owner and operator of defendant G&S Auto and “the son of Defendant Emenegilda Marte, *the present owner of the property and easement . . .*” (emphasis added). Gilbert Marte, Jr. further attests that:

“The easement has been used since the property was bought in 1987. Initially, it was used as a parking lot to store cars. Eventually, the easement became a functional and important part of the autobody shop when it was opened in late 2000.”

¹ See *Marte v Boerum Johnson*, (Sup Ct, Kings County index No. 518962/19).

Gilbert Marte, Jr. asserts that “the emergency exit located in the rear of the auto body shop should not be removed or blocked” because it presents a fire and safety hazard. Gilbert Marte, Jr. attests that “[t]he exit door gives direct access to the easement and removal of said access erases the use of the emergency exit and the easement that has been part of the Martes property for over thirty years . . .”

Defense counsel affirms that “Boerum Johnson attempts to obtain illegal relief from this court in an effort to circumvent Federal and New York City law, relief which if awarded will put human life in danger, and render the defendants’ building a firetrap.” The Marte Defendants submit an expert affidavit from Vincent Florentino (Florentino), a Certified New York State Fire Inspector and a Fire and Line Safety consultant with NY Fire Consultants, to demonstrate “how loss of this easement would result in a substantial fire hazard and public safety concern.” Florentino attests that “NY Fire Consultants were hired to personally do an inspection of the secondary door at [the Marte Property] to determine whether this constitutes a fire safety exit.” Florentino attests that “[i]t is our conclusion that this exit door should not be eliminated as it would reduce the number of fire safe exiting options from a building.”

Finally, defense counsel generally contends that factual disputes “as to whether the easement has been used for the prescriptive period or whether it has been extinguished by non-use and adverse possession by plaintiff” preclude summary judgment. Notably, however, defense counsel admits that:

“[a]ll parties agree that at some point renovations were performed which changed some of the details of the prior

easement. Boerum Johnson LLC's predecessor erected a wall by the open side of the property and an enclosing fence. Cross-Movants were given a key to the gate to freely access the back of the property, albeit a mere few feet away from the spot of the original recorded driveway easement.

Boerum Johnson's Reply and Opposition to the Cross Motion

Boerum Johnson, in reply and in opposition to the cross motion, notes that the 1949 Driveway Easement allegedly created a driveway for the benefit of the Marte Property. Boerum Johnson reiterates that “[t]he use of the Boerum Property as a driveway by the Martes and their Predecessors in title has been rendered impossible for decades . . .” Boerum Johnson asserts that:

“[i]t is not disputed that the Boerum Property has been completely protected and enclosed by a fence since at least 1987 which excluded the Martes from the entire Boerum Property except to the extent that Boerum and the prior owners of the Boerum Property permitted access to the Martes.”

Boerum Johnson argues that the Marte Defendants' claim of an easement by necessity should be rejected, as a matter of law, because it is uncontested that the Marte Property borders a public street and can be “physically and legally accessed from that public street.” Boerum Johnson further argues that “[t]here is no authority for an easement of necessity based on a fire exit[,]” which was only constructed after Boerum Johnson took title to the Boerum Johnson Property in October 2018. Boerum Johnson asserts that “[t]he possible illegality or code violation of the Martes' building does not create an estate in real property.” Boerum Johnson notes that “[n]owhere in the affidavits from the Martes' purported experts is it explained how the need for a fire door or the need to comply with

any particular safety regulations would thereby create an estate in neighboring real property.”

Discussion

The Summary Judgment Motion and Cross Motion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010]).

Boerum Johnson is entitled to summary judgment because it has established that the 1949 Easement was extinguished by abandonment. “An easement, regardless of how created, may be extinguished by abandonment” (*DeDesare v Feldmeier*, 184 AD2d 220, 220 [1992]). “In order to prove abandonment it is necessary to establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement” (*Will v Gates*, 254 AD2d 275, 276 [1998]). Furthermore, “acts evincing an intention to abandon must be unequivocal” and “must clearly demonstrate the permanent relinquishment of all right to the easement” (*id.*).

Here, Emenegilda Marte, the owner of the Marte Property, abandoned the 1949 Driveway Easement by removing the ten-foot-wide door that provided driveway access over the easement area to the rear of the Marte Property and bricking up the side of the building at the Marte Property. The evidence reveals, and the Marte Defendants concede, that they recently added a narrow “fire door” and roll gate in place of the garage door, which leaves no access for automobiles to enter. Indeed, the Marte Defendants admit that “at some point renovations were performed which changed some of the details of the prior easement . . .” The removal of the entrance to the 1949 Driveway Easement by installing a brick wall and a narrow fire door made the use of the 1949 Driveway Easement physically impossible, and evidenced Emenegilda Marte’s unequivocal and clear intention to abandon and relinquish the 1949 Driveway Easement. The Marte Defendants have failed to raise an issue of fact to preclude summary judgment based on Emenegilda Marte’s abandonment of the 1949 Driveway Easement. Because the 1949 Driveway Easement has been abandoned, there is no need to address Boerum Johnson’s cause of action to extinguish the 1949 Driveway Easement based on adverse possession.

Emenegilda Marte is not entitled to an easement by necessity based on the “fire exit” that she recently installed in the rear of the Marte Property because the Property borders a public street and can be legally accessed from that public street (*GDG Realty LLC v 149 Glen Street Corp.*, 155 AD3d 833, 836 [2017] [rejecting claim for an easement by necessity because plaintiff “failed to allege that an easement over the adjoining property was absolutely necessary for access to the subject property, which fronts public street”]).

Contrary to the Marte Defendants' contention, the need for a fire door at the Marte Property does not create an estate in the neighboring property.

The court has considered the parties' remaining arguments and has determined that they lack merit. Accordingly, it is

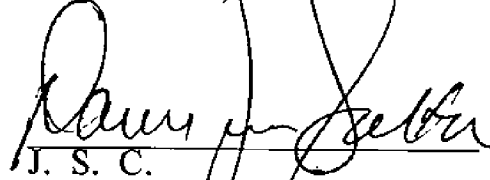
ORDERED that Boerum Johnson's summary judgment motion (in mot. seq. two) is granted regarding its first (quiet title) and fourth (abandonment) causes of action, and the motion is otherwise denied; and it is further

ORDERED, ADJUDGED AND DECLARED that Emenegilda Marte has no right, title, claim, lien or interest in the Boerum Johnson Property, and the 1949 Driveway Easement has been extinguished by abandonment; and it is further

ORDERED that defendants' summary judgment cross motion (in mot. seq. four) is denied in its entirety.

This constitutes the decision, order and judgment of the court.

ENTER,



J. S. C.
Hon. Dawn Jimenez-Salta
Justice of the Supreme Court