

JPM Columbia LLC v Wally Farms LLC

2021 NY Slip Op 33790(U)

April 6, 2021

Supreme Court, Columbia County

Docket Number: Index No. E012020016180

Judge: Richard M. Koweek

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

JPM COLUMBIA LLC and ARM COLUMBIA LLC,

Index No. E012020016180
RJI No.10-20-0365

Plaintiffs,

-against-

DECISION AND ORDER

WALLY FARMS LLC,

Defendant.

This is an application for a preliminary injunction by the plaintiffs (hereinafter plaintiffs) brought pursuant to CPLR 6313. It is opposed by the defendant. After receipt of opposition papers, plaintiffs moved for permission to serve a subpoena duces tecum upon the Town of Taghkanic. For the reasons that follow, the motion for a preliminary injunction is denied and the request for a subpoena duces tecum is granted.

BACKGROUND

Plaintiff filed a summons and complaint in October 2020 alleging that it was the owner of two adjacent parcels of real property located in the Town of Taghkanic, Columbia County, New York, identified only by way of two tax map parcels.¹ The complaint alleges that defendant entered onto plaintiffs' properties, installed permanent encroachments, including gates, chain-links and posts and

¹ Plaintiffs' complaint at paragraphs 17, 18 and 20.

otherwise disturbed and damaged plaintiffs' property without permission from either of the plaintiffs.² The complaint further alleges that the defendant does not have a right of way over plaintiffs' properties to allow access from its property to the town road known as Crow Hill Road, in the location where the access point was improved.³ In June 2019, plaintiffs allege they gave written notice to defendant that its behavior constituted trespassing, was being done without permission, and demand was made upon defendant to cease and desist its behavior.⁴ Plaintiffs further allege that defendant widened Crow Hill Road, and moved the centerline of the road west, effectively creating additional road frontage for the defendant, without permission of the plaintiff.⁵ They allege further that such behavior by the defendant has continued until July 2020, substantially interfering with plaintiffs' exclusive possession of their properties. In their first cause of action for trespass, they seek injunctive relief and damages, including both treble and punitive damages.⁶

Plaintiff's second cause of action sounds in nuisance and likewise seeks injunctive relief and damages. Plaintiffs' third cause of action is for a preliminary injunction, alleging defendant's trespass has been continuous for a period of at

² Paragraph 7.

³ Paragraph 29.

⁴ Paragraphs 36 through 39.

⁵ Paragraphs 43 through 46.

⁶ Paragraph 59.

least two years.⁷ It alleges the trespass and nuisance continues to the present, irreparably harming plaintiffs and that they lacked an adequate remedy at law.⁸ Plaintiffs also seek a cause of action pursuant to RPAPL §871 for removal of structures encroaching on plaintiffs' land and, ultimately, for a permanent injunction as a fifth cause of action.

Defendant interposes an answer denying most of the relevant allegations of the complaint other than admitting that it received notice in 2019 of a cease and desist letter but claims it was not applicable to it because the actions complained of were not performed by it, but rather by a third party, to wit: the Town of Hillsdale. It then raises ten separate affirmative defenses. Among them are that Crow Hill Road is a town road owned and/or maintained by the Town of Hillsdale and used by the public. Alleged activities by the defendant, including repairing/replacing an existing culvert were within areas of land constituting Crow Hill Road and/or within the town's right-of-way and were either done by the Town of Hillsdale or defendant with permission of the Town of Hillsdale.⁹ It also alleges that the Town of Hillsdale is a necessary party, that the actions complained of in the complaint were not performed by the defendant, and that the alleged actions at issue did not

⁷ Paragraph 77.

⁸ Paragraphs 72 through 83.

⁹ First affirmative defense.

cause any financial or other harm.¹⁰ Further, in the event the Court determines that access to the area in issue are not part of the town road, defendant asserts it has a prescriptive easement. The remaining affirmative defenses deny any ongoing actions by the plaintiffs to support a cause of action for nuisance or injunction and that there are no encroachments such as gates, chains and posts that were placed by the defendant to entitle plaintiffs to obtain relief pursuant to RPAPL §871.

In support of its application for a preliminary injunction, plaintiffs submit an affidavit of Benedict Morelli, a member of both of the plaintiffs' LLCs. He claims that defendant encroached upon property of plaintiff ARM Columbia LLC (hereinafter "ARM") to create an access point to defendant's own property without permission or authorization from either of the plaintiffs. He claims further that defendant performed significant tree removal, stump clearing and the renovation of the culvert, which, he asserts, was located on the property of ARM, not the town road. At no point does he assert that he personally observed any of the work being performed.

Plaintiffs also submit an affidavit from a realtor, Barbara Hermance, the owner of Land Source Real Estate. After describing what she believes to be the location of Crow Hill Road, she states that she witnessed significant encroachments to an area of ARM and JPM Columbia LLC (hereinafter "JPM")

¹⁰ Affirmative defenses "Two" through "Five".

property between the end of the town's right-of-way over Crow Hill Road and the Wally Farms property line. She does not state specifically how she comes to the belief that Wally Farms trespassed or removed stones, trees, and soil. Later in her affidavit¹¹, she claims she observed that "Wally Farms and or the Town of Taghkanic had again performed significant improvements to Crow Hill Road, irreparably damaging the ARM and JPM properties." Still further, in paragraph 33, she alleges that "Wally Farms and/or the Town of Taghkanic widened Crow Hill Road, moving the centerline of the road to the west, which attempted to create additional road frontage for the Wally Farms property and to improve its property value and development potential." She asserts that as a result of that work, plaintiffs' property values decreased.

Finally, plaintiffs submit a very brief affidavit of Daniel J. Russell, licensed land surveyor, purporting to show two minor subdivision survey maps of property located in the Town of Taghkanic. No further explanation regarding how these survey maps assist the plaintiffs, in its request for a preliminary injunction, are offered.

In opposition, defendant submits an affidavit from Walter Kiernan, a dairy farmer for his entire life, claiming to have personal knowledge of the Wally Farms property and its perimeter. He claims to have traveled Crow Hill Road on a

¹¹ Paragraph 31.

regular basis since the mid-1990s. He claims to have previously farmed a part of the land now included with the Wally Farm property and has a specific understanding of the access way from Crow Hill Road to the Wally Farm property. He further states that he did perform some work, before a June 2019 cease and desist letter, of replacing an old dilapidated culvert, but has performed no work since then. He claims to have personal knowledge of a prior history of using the access way from Crow Hill Road to Wally Farm property, while he leased the land since 2017.

Also submitted in opposition is an affidavit by Wesley Chase, licensed land surveyor who completed the perimeter survey of Wally Farms property, consisting of approximately 600 acres, in 2017. He returned to the property in 2019 after a cease and desist letter was received by the defendant and took a series of photographs. He also attaches a close-up copy of the Wally Farm survey showing the area in dispute.

Finally, attached is the affidavit of Albert Wenger, one of the two principals of the Wally Farms LLC. He confirms the accuracy of several photographs that are annexed and taken by the surveyor, showing the access way from Wally Farms property to Crow Hill Road. He further confirms that he instructed his tenant Walter Kiernan to replace an old culvert with a new culvert in 2018 and further that he authorized the replacement of an old chain with a new smaller chain and the

installation of a small cedar post for the holding of the new chain. Other than the culvert and chain replacement, he denies performing any other work or authorizing any work to be performed on his behalf. He contends that Crow Hill Road is a town road that allows the public to travel over it and that the accessway is part of the town road. Alternatively, if the accessway is not a town road, then he and his predecessors in interest have acquired a prescriptive easement. He denies removing part of the stonewall on plaintiffs' lands, widening Crow Hill Road and moving the centerline of the road, adding culverts to either side of Crow Hill Road and placing gravel on parts of Crow Hill Road. He further denies removing trees, soil, and vegetation from plaintiffs' properties.

After plaintiffs received the above described papers in opposition, they made a separate motion for permission to serve a subpoena duces tecum directed to the Town of Taghkanic to produce records relating to Crow Hill Road as they relate to the defendant and plaintiffs' properties. Defendant's counsel responded to this request by affirmation of Joseph Castiglione, Esq., which also sought to supplement the record previously submitted in opposition to the application for a preliminary injunction. Plaintiffs' counsel objected to this supplement as being the equivalent of a sur reply affirmation, not authorized by CPLR.

DISCUSSION

The plaintiffs showing on an application for a preliminary injunction must be convincing. Hui v. New Clients Inc., 126 A.D.3d 759 (2d Dept. 2015); Uniformed Firefighters Association v. City of New York, 79 N.Y.2d 236, 241 (1992).

Plaintiffs seeking an injunction must show, by clear and convincing evidence “(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor.” Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); Nobu Next Door LLC v. Fine Arts Hous. Inc., 4 N.Y.3d 839, 840 (2005). The decision to grant or deny such injunction rests in the sound discretion of the trial court. Sartwell v. Field, 68 N.Y. 341 (1877).

Here, plaintiffs make their application in October 2020 after actions alleged to have been performed by defendant have occurred in 2019 and 2020. They mistakenly identify the Town Road, Crow Hill Road, as belonging to the Town of Hillsdale in their pleadings but do not make the Town a defendant. After learning that the Town of Taghkanic may have performed some of the complained about actions resulting in claimed damage to their property, they sought permission to serve a subpoena duces tecum on the Town. No motion to amend the complaint to correctly identify the Town or add it as a named defendant, is before the Court.

Additionally, serious doubt has been raised, in the opposing papers, whether the claimed damage to plaintiffs' properties was performed by defendant and whether the complained about work actually occurred on plaintiffs' land.

In short, Plaintiffs have failed to show, by clear and convincing evidence, that defendant has installed any encroachments on Plaintiffs' properties in 2020 or that it is likely to do so in the future. The affidavit of Barbara Hermance did not specifically identify the persons who expanded the road and concedes it may have been the Town of Taghkanic who performed the work. Insufficient evidence is supplied to establish that the work did not take place within the Town right-of-way, or that the work caused damage to plaintiffs' properties. The request to supplement the record by way of a cross-motion is granted. The Court has considered the supplemental affidavits of Mr. Castiglione and Mr. Wenger. However, even if the Court had not considered those affirmations, submitted in response to the motion for a subpoena duces tecum, the results would have been the same.


The application for a preliminary injunction is denied.

The request to obtain a Court ordered subpoena duces tecum is granted and is executed simultaneously with this Decision and Order.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry and filing by the Columbia County Clerk.

Upon such entry, counsel for the plaintiffs shall promptly serve notice of entry on all other parties entitled to such notice and is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means.

DATED: April 6, 2021
Hudson, New York



RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Notice of Motion of Robert S. Rosborough IV, Esq., dated October 2, 2020 (NYSCEF Doc#2)
2. Affirmation of Robert S. Rosborough IV dated October 2, 2020 (NYSCEF Doc#3)
3. Affirmation of Benedict Morelli dated September 24, 2020 (NYSCEF Doc#4)
4. Affidavit of Barbara A. Hermance sworn to September 22, 2020, together with Exhibits A through D (NYSCEF Docs#5 through 9)
5. Affidavit of Daniel J. Russell PLS, sworn to September 23, 2020, together with Exhibits A through C (NYSCEF Docs#10 through 13)
6. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction of Robert S. Rosborough IV, Esq., dated October 2, 2020 (NYSCEF Doc# 14)
7. Defendant Wally Farms' Affidavit of Walter Kiernan in Opposition of Walter Kiernan sworn to November 24, 2020, together with Exhibits A through E (NYSCEF Docs#23 through 28)

8. Defendant Wally Farms' Affidavit of Wesley Chase in Opposition of Wesley Chase sworn to November 23, 2020, together with Exhibits A through C (NYSCEF Docs# 29 through 32)
9. Defendant Wally Farms' Affidavit of Albert Wenger in Opposition of Albert Wenger sworn to November 23, 2020, together with Exhibits A through H (NYSCEF Docs# 33 through 41)
10. Defendant Wally Farms' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction of Joseph F. Castiglione, Esq., dated November 25, 2020 (NYSCEF Doc#42)
11. Reply Affirmation of Robert S. Rosborough IV dated December 11, 2020 (NYSCEF Doc# 43)
12. Reply Memorandum of Law in Further Support of Plaintiffs' Motion for a Preliminary Injunction of Robert S. Rosborough IV, Esq., dated December 11, 2020 (NYSCEF Doc#44)
13. Notice of Motion of Robert S. Rosborough IV, Esq., dated December 18, 2020 (NYSCEF Doc# 45)
14. Affirmation of Robert S. Rosborough IV dated December 18, 2020, together with Exhibits (NYSCEF Docs#47 through 51)
15. Defendant Wally Farm's Notice of Cross-Motion to Supplement of Joseph F. Castiglione, Esq., dated December 22, 2020 (NYSCEF Doc# 52)
16. Defendant Wally Farms' Affirmation of Castiglione in Opposition/In Support of Cross-Motion to Supplement of Joseph F. Castiglione, Esq., dated December 24, 2020 (NYSCEF Doc#53)
17. Defendant Wally Farms' Affidavit of Albert Wenger in Support of Motion to Supplement of Albert Wenger sworn to December 22, 2020, together with Exhibits A and B (NYSCEF Docs# 54 through 56)
18. Affirmation of Robert S. Rosborough IV dated January 6, 2021 (NYSCEF Doc#60)