Umlas v Britton
2021 NY Slip Op 34298(U)
September 21, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 610385/2018
Judge: Vincent J. Martorana
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INDEX NO: 610385/2018

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

ANDREA UMLAS,

Plaintiff,

- against-

CHRISTOPHER BRITTON and PATRICIA BRITTON,

Defendants.

ORIG. RETURN DATE: 12/12/19
ADJOURNED DATE: 08/26/21
MOTION SEQ. NO.: 001 - MD

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Upon the following papers read on the e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants, filed November 6, 2019; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers by plaintiff, filed January 9, 2020; Replying Affidavits and supporting papers by defendants, filed May 4, 2020; Other ____; it is

ORDERED that the motion of defendants, Christopher Britton and Patricia Britton, for summary judgment dismissing the complaint and severing defendants' counterclaims is denied.

Plaintiff Andrea Umlas commenced this action on June 1, 2018 seeking an injunction directing defendants to remove certain cable/wires from her property located at 28 S. Eldert Street, Montauk, New York. Plaintiff alleges that defendants, Christopher Britton and Patricia Britton, owners of the adjoining property at 21 S. Emden Road, Montauk, New York, laid underground cable/wires on her property without her consent. By her complaint plaintiff seeks an injunction, as well as monetary damages. Issue was joined by filing of defendants' answer on June 27, 2018.

Defendants now move for an order granting summary judgment pursuant to CPLR 3212(b) dismissing the complaint and severing defendants' counterclaims. In support, defendants submit the affidavit of defendant Christopher Britton with exhibits, including the pleadings, surveys of the properties, a deed to defendants' property, a 1951 easement executed by Montauk Beach Company, Inc. and Long Island Lighting Company. Defendants argue the underground utility wires are a *de minimis* encroachment, and non-compensable, that the underground wires have had no effect on the condition of plaintiff's yard, and that plaintiff failed to name necessary parties. By his affidavit Mr. Britton states that prior to 2016 the three utility wires for his electric, cable television, and telephone service (hereinafter "utility wires") extended above ground from the roof of defendants' home to the

top of a utility pole located on plaintiff's property, which pole was placed on plaintiff's property pursuant to an easement granted November 21, 1951. Then, in Spring, 2016 defendants hired a contractor, V. Allegretta Electrical Corp, to obtain the necessary approvals for moving the utility wires underground from defendants' home to the bottom of the pole on plaintiff's property, and to perform all work necessary to place the utility wires underground.

In opposition plaintiff submits her affidavit in which she details a number of occasions where defendants or their invitees were accessing plaintiff's property without her permission. Plaintiff states she first planted shrubs on her property line to deter access to her property, then in August of 2015 she had a deer fence installed to close off access from defendants' property, which she replaced with a wooden stockade fence since neither shrubs, nor the deer fence, deterred defendants from entering her property. Plaintiff further states that in May 2016 she was walking her property when she realized that the utility wires that had previously run from defendants' home to the top of the pole on plaintiff's property now appeared to be running from defendant's home underground, to the base of the pole on plaintiff's property. Plaintiff states defendants entered her property without permission to install the underground utility wires, defendants damaged her property, and while defendants are attempting to minimize the value of her claim, they cannot quantify how important it is to plaintiff. Further, since defendants undertook the relocation of the wires on their own, neither LIPA nor PSEG have anything to do with the matter, and all necessary parties have been named in the action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment, failure to make such a showing requires 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]). If the moving party produces the requisite evidence, the burden then shifts to the opponent to proffer evidence in admissible form sufficient to establish a material issue of fact requiring a trial of action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Pursuant to RPAPL 871(1):

> "an action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify."

Defendants argue that plaintiff is not entitled to injunctive relief. To make this showing, defendants must demonstrate that the encroachment is *de minimis* and that the harm to defendant from granting the relief would outweigh the benefit to be gained by the plaintiff in compelling its removal (*see* ***Town of Fishkill v Turner***, 60 AD3d 932, 933, 876 NYS2d 92 [2d Dept 2009]; ***Matter of Angiolillo v Town of Greenburgh***, 21 AD3d 1101, 1104, 801 NYS2d 629 [2d Dept 2005]; ***Marsh v Hogan***, 81 AD3d 1241, 919 NYS2d 536 [3d Dept 2011]).

Based on a review of the admissible evidence this Court finds that defendants have failed to support the heavy burden of proof required for an award of summary judgment. Here defendants concede that utility wires extended above ground from the roof of their home to the top of a utility pole located on plaintiff's property, and that in 2016 they hired a contractor to move those utility wires underground, which required burial of the utility wires on plaintiff's property. While defendants submit a diagram to show the purported path of the underground wires drawn by Mr. Britton, who purports to be a licensed architect, no proof of his qualifications are provided. Though defendants argue the utility wires are only buried two and a half feet below the surface of plaintiff's property, the only proof submitted of the alleged depth are photographs taken by Mr. Britton of that part of the trench located on *defendants' property*, there are no photographs showing the actual depth of the utility wires on plaintiff's property. Additionally though defendants state that they had permission to conduct the utility work and relocate the wires, notably missing from the submissions are approvals from any of the utility companies.

Defendants have failed to establish that the placement of their utility wires, on plaintiff's property without her consent, which wires are purportedly two and a half feet beneath the surface, extending for a distance of two feet from the property line onto plaintiff's property, is *de minimis* (***Town of Fishkill v Turner***, 60 AD3d at 933). Nor have defendants established that any harm to them from granting the relief would outweigh the benefit to plaintiff in compelling removal of the offending wires.

Additionally defendants' argument in reply that there was no trespass because of the existence of the 1951 utility easement, is without merit. While an action for trespass may not be maintained where the purported trespasser has acquired an easement over the land in question (***Havel v Goldman***, 95 AD3d 1174, 1175, 945 NYS2d 332, 333 [2d Dept 2012]; *see* ***Kaplan v Incorporated Vil. of Lynbrook***, 12 AD3d 410, 412, 784 NYS2d 586 [2d Dept 2004]), in the present case the easement at issue was granted to the Long Island Lighting Company, and presumably its successors, while the purported trespassers on plaintiff's property are defendants, not LIPA or PSEG.

That part of defendants' motion to dismiss the action for failure to join necessary parties is also denied. Pursuant to RPAPL 1511(2) "[w]here it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgment, the court, upon application ... of any party to the action, or on its own motion, may direct that such person be made a party." Necessary parties are persons "who might be inequitably affected by a judgment in the action" and must be made plaintiffs or defendants (CPLR 1001[a]; *see* ***Censi v Cove Landings, Inc.***, 65 AD3d 1066, 885 NYS2d 839 [2d Dept 2009]). In the present case defendants have failed to establish that LIPA or PSEG are necessary parties to the action. Insofar as defendants have conceded that they hired a contractor to bury their utility wires underground, and there is no proof that any of the work was conducted, or approved, by the utility companies,

defendants have not established how either LIPA or PSEG might be inequitably affected by a judgment in this action.

Dated: September 21, 2021
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION