

Daniello v Wagner
2021 NY Slip Op 34323(U)
July 13, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 605339/2020
Judge: Martha L. Luft
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Short Form Order

Index No. 605339/2020

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

x
JOSEPH DANIELLO, PATRICIA
DANIELLO, DARREN PERSON and
JAIMIE PERSON,

Plaintiffs,

-against-

RONALD WAGNER,

Defendant.

xMot. Seq. No.: 001 - MD
Orig. Return Date: 02/16/2021
Mot. Submit Date: 02/16/2021Mot. Seq. No.: 002 - Mot.D
Orig. Return Date: 02/16/2021
Mot. Submit Date: 02/16/2021**PLAINTIFFS' ATTORNEY**Anthony C. Pasca, Esq.
Esseks, Hefter, Angel, DiTalia & Pasca LLP
108 East Main Street
P.O. Box 279
Riverhead, NY 11901**DEFENDANT'S ATTORNEY**John Huber, Esq.
Dayton, Voorhees & Balsam, LLP
231 Pantigo Road, Suite 1
East Hampton, NY 11937

Upon the e-filed documents numbered 14 through 59, it is

ORDERED that the motion by the defendant Ronald Wagner for, *inter alia*, an order granting summary judgment dismissing the complaint and in his favor on the counterclaims is granted to the extent described herein, but is otherwise denied; it is further

ORDERED that the portions of the defendant's motion seeking summary judgment in his favor and dismissing the plaintiffs' second cause of action for declaratory judgment adjudging that they are entitled to an easement by prescription over certain property, and in his favor on his first counterclaim declaring the plaintiffs' easement invalid is denied; it is further

ORDERED that the remaining portion of the defendant's motion seeking summary judgment in his favor on the remaining counterclaims for ejectment, permanent injunctive relief, trespass, and removal of encroachments is denied; it is further

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ORDERED that the cross motion by the plaintiffs Joseph Daniello, Patricia Daniello, Darren Person, and Jaimie Person for, *inter alia*, an order granting summary judgment in their favor, dismissing the counterclaims, and granting certain declaratory relief is granted to the extent described herein, but is otherwise denied; it is further

ORDERED that the portion of the plaintiffs' cross motion seeking summary judgment and declaratory relief on their first cause of action adjudging that they possess a deeded easement over the disputed property and that the defendant's adverse claim to this area is invalid is granted; it is further

ORDERED that the portion of the plaintiffs' cross motion seeking summary judgment and declaratory relief on their second cause of action adjudging that they are entitled to an easement by prescription over certain property is denied; it is further

ORDERED that the portion of the plaintiffs' cross motion seeking summary judgment on their third cause of action for permanent injunctive relief is denied; it is further

ORDERED that the portion of the plaintiffs' cross motion seeking summary judgment dismissing the defendant's counterclaims is granted to the extent that the defendant's first counterclaim seeking declaratory relief adjudging the plaintiffs' easement to be invalid is dismissed, but is otherwise denied as to the remaining counterclaims; and it is further

ORDERED that the plaintiff's counsel shall contact all parties to arrange for a preliminary conference on a date prior to **August 10, 2021**, to be conducted by telephone or other meeting platform, at which the parties shall confer and complete a proposed preliminary conference order, which must be uploaded to the New York State Courts Electronic Filing system (NYSCEF) no less than one business day prior to the conference date. Please note that **no in-person or virtual appearance before the Court is required on the preliminary conference date**.

This is an action to determine the rights as between the plaintiffs and the defendant as to a certain portion of real property located in Suffolk County, New York, pursuant to Article 15 of the Real Property Actions and Proceedings Law ("RPAPL"). By their verified complaint, the plaintiffs allege the following facts and circumstances. The parties own adjacent lots of improved real property in Montauk, located at 15 Grant Drive and 21 Grant Drive, respectively. The area in dispute is about 247 square feet between the two properties that has been used as a driveway, and in close proximity to the disputed area, on the defendant's property, there is a retaining wall and separate driveway present. The plaintiffs acquired title to 15 Grant Drive in May 2018, and the defendant acquired title to 21 Grant Drive in October 2005. Nonparty George Paley previously owned both parcels, conveying 15 Grant Drive to nonparty Orest Neimanis on July 2, 1974, and then the plaintiffs acquired title in May 2018 from Mr. Neimanis's estate. On January 30, 1987, Mr. Paley conveyed 21 Grant Drive to himself and his wife, nonparty Eileen

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Paley, then, on May 24, 1989, the Paleys conveyed this property to nonparties William S. Brancaccio and Judith H. Boland. In October 2005, the defendant acquired title to 21 Grant Drive from Mr. Brancaccio and Ms. Boland.

On May 19, 1989, Mr. Neimanis executed a “declaration of easement” as to the disputed driveway area, which was recorded with the Suffolk County Clerk on June 13, 1989. This document describes the “burdened property” as 21 Grant Drive, the “benefitted property” as 15 Grant Drive, along with metes and bounds descriptions. It purports to create covenants that run with the land, and it is described by the plaintiffs as a “reciprocal easement.” The document, provides, in pertinent part, “[t]hat neither the party of the second part, nor his distributees, heirs or grantees shall build or cause to be built or erected any structure whatsoever upon the above described premises without the permission of the plans to, and approval by, the party of the first part, his distributees, heirs or grantees, such approval to be based solely on the specific restrictions contained herein.”

The May 24, 1989 deed from the Paleys to Mr. Brancaccio and Ms. Boland states the following:

“SUBJECT TO an easement and right to use and maintain as part of a driveway and for no other purpose the existing driveway over the premises conveyed herein in favor of Mr. Orest Neimanis, the current owner of the existing premises immediately adjoining on the South, his heirs, successors, assigns and other successors in interest.”

The October 2005 deed from Mr. Brancaccio and Ms. Boland to the defendant contains the same paragraph as to the easement, and both contain metes and bound descriptions for it. In 2019, the plaintiffs replaced an existing wooden retaining wall in the disputed area with a stone wall and replaced the oil and stone driveway with crushed stone. The plaintiffs brought the instant action after disputes arose with the defendant as to this new construction, as well as vehicles being parked in the disputed area.

The defendant now moves for summary judgment dismissing the complaint, in his favor on the counterclaims, and for declaratory relief, arguing, *inter alia*, that the May 19, 1989 “declaration of easement” is not valid, that the plaintiffs fail to establish an easement by prescription, and that the 2019 construction in the disputed area encroaches onto his property. In support, the defendant submits, among other things, copies of deeds to the subject properties from 1974 to the present; a copy of a survey of the plaintiffs’ property, dated May 1, 2018; his own affidavit; and an affidavit of David Austin Weaver, L.L.S., a licensed land surveyor and President of George Walbridge Surveyors, P.C.

The plaintiffs oppose the motion, and they cross-move for summary judgment on the complaint, dismissal of the counterclaims, and for declaratory relief, arguing, among other things, that the 1989 and 2005 deeds to the defendant’s property expressly reserve an easement in

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favor of their property. In the alternative, the plaintiffs argue that they have established an easement by prescription over the disputed area, as the parties' predecessors-in-interest used the disputed area in a similar fashion for over forty years. In support, the plaintiffs submit several documents, including a copy of the May 19, 1989 "declaration of easement;" affidavits of Mr. Person and various nonparties, including the plaintiffs' predecessor-in-interest and several neighbors; an affidavit of nonparty David Saskas, a licensed land surveyor; and a survey of the plaintiffs' property, dated July 21, 2020. In reply to the motion, the defendant submits, among other things, a memorandum of law, and his own affidavit, along with several exhibits. In reply to the cross motion, the plaintiffs submit a memorandum of law.

The principal requisite of an easement is that it be imposed upon corporeal real property, for the benefit of corporeal real property, and that there be two distinct estates: the dominant and the servient (*see Metcalf v Crystal Brook Park Ass'n*, 63 AD 445, 446, 71 NYS 537 [2d Dept 1901]). In addition, an easement appurtenant occurs when the easement is created in writing, subscribed by the creator, and burdens the servient estate for the benefit of the dominant estate, and once created, it can be extinguished only by abandonment, conveyance, condemnation, or adverse possession (*see Will v Gates*, 89 NY2d 778, 658 NYS2d 900 [1997]; *114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 760, 114 NYS3d 100 [2d Dept 2019]). However, a grantor cannot create an easement benefitting land not owned by the grantor at the time of the purported conveyance (*see Matter of Estate of Thomson v Wade*, 69 NY2d 570, 573, 516 NYS2d 614 [1987]; *Tuscarora Club of Millbrook, N.Y. v Brown*, 215 NY 543, 109 NE 597 [1915]; *Sachar v East 53 Realty, LLC*, 63 AD3d 715, 880 NYS2d 331 [2d Dept 2009]).

Here, the defendant's submissions establish that the May 19, 1989 "declaration of easement" did not create a valid easement, as the plaintiffs' predecessor-in-interest owned the land which was to benefit from the easement, but not the one to be burdened by it at that time (*see Matter of Estate of Thomson v Wade, supra; Tuscarora Club of Millbrook, N.Y. v Brown, supra; Sachar v East 53 Realty, LLC, supra*). However, these submissions also demonstrate that the May 24, 1989 deed to the defendant's predecessor-in-interest created an easement appurtenant burdening the defendant's property and benefitting the plaintiffs' property, which has not been extinguished (*see Will v Gates, supra; Realty, LLC v 10 Bethpage Rd., LLC, supra; Metcalf v Crystal Brook Park Ass'n, supra*). As such, the portion of the plaintiff's cross motion for summary judgment on their first cause of action for declaratory relief adjudging that they have an easement over the 247 square foot area is granted, and the portion of the defendant's motion for summary judgment dismissing the complaint is denied.

As the plaintiffs have an express easement appurtenant over the defendant's property, the portion of the defendant's motion seeking summary judgment on his first counterclaim for declaratory relief adjudging such easement to be invalid is denied, and the portion of the plaintiffs' cross motion seeking summary judgment dismissing this counterclaim is granted.

As to the portion of the motion seeking summary judgment on the remaining

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counterclaims, by his affidavit, the defendant avers that the plaintiffs' use of the easement, namely the replacement of the stone retaining wall and driveway, and parking vehicles in the area are in violation thereof, as this type of use encroaches onto his property and is prohibited by the language of the easement. However, the Court notes that all of the parties' submissions indicate that the retaining wall and driveway are not within the 247 square feet delineated by the easement, and the parties' surveys submitted in support of their motions confirm that. As such, the remaining issues before the Court are whether the plaintiffs' use of the easement area violates the terms set forth in the May 1989 and October 2005 deeds to the defendant's property, and whether the plaintiffs have acquired a prescriptive easement over the areas where they replaced the retaining wall and driveway.

By his affidavit, the defendant avers that there has been a set of steps leading from his property to the driveway easement area, that he would use these steps to gain access to this area, as well as the plaintiffs' property, as he and Ms. Neimanis, one of the former owners of the plaintiffs' property, were personal acquaintances. Further, the defendant states that the previous owners of both properties had been friends for years, that the easement area was only used as a "turnaround" area, not for parking vehicles during that time, and that from 2005 to 2018, he and Ms. Neimanis only used this area for such purpose. As to the plaintiffs' construction, the defendant avers that, although Ms. Neimanis replaced the wooden retaining wall in 2016, she only did so after seeking his permission and this work was done in the same exact location as the previous wall. The defendant states that the plaintiffs' replacement of the retaining wall and driveway extends well beyond where the former structures existed previously, and that these new structures have fully blocked the steps he and his predecessors-in-interest have used to access the easement area and the plaintiffs' property.

The defendant also submits an affidavit of surveyor Mr. Weaver, who avers that he prepared the May 2020 survey for the defendant, and that he reviewed the deeds to both properties, as well as a May 1989 survey he prepared for Mr. Paley, in making his determination. In addition, Mr. Weaver opines, among other things, that substantial portions of the stone retaining wall and driveway installed by the plaintiffs lie well outside the metes and bounds of the 247 square foot area specified in the May 1989 and October 2005 deeds to the defendant's property. Specifically, Mr. Weaver opines that these structures extend beyond the metes and bounds of the disputed area to the east and the west, completely blocking the steps used by the defendant to access the area. However, the Court notes that Mr. Weaver fails to address that a retaining wall present on the May 1989 survey was also well outside the easement area, and that the May 2020 survey reflects that the new stone retaining wall built by the plaintiffs is in an area nearly identical to the prior structure.

In opposition, and in support of the cross motion, by his affidavit, Mr. Person avers that, before the plaintiffs purchased the property, he witnessed vehicles parked in the disputed area often, as he lived on the same street for several years prior to this purchase. By her affidavit, Helen Stephanie Neimanis, executor of Mr. Neimanis's estate and the party who conveyed 15

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Grant Drive to the plaintiffs, avers that she replaced the same retaining wall and driveway four years prior to the plaintiffs' purchase, and that Mr. Neimanis constructed the original oil and stone driveway in the 1970s. By their affidavits, nonparties John Morris and Alice Morris aver, among other things, that they have lived across the street from 15 Grant Drive for over forty years, that they often saw vehicles parked in the disputed area, and the Neimanises allowed them to use this area for guests to park their vehicles, as well. In addition, by his affidavit, Mr. Saskas avers that he prepared the July 2020 survey for the plaintiffs, and that he reviewed the deeds to both properties, as well as a May 2018 survey, in making his determination. Mr. Saskas provides a "layered" survey taking into account the retaining wall, driveway, and easement area as they existed in May 2018 and May 2020, by which the Court notes that, although the retaining wall and driveway are well outside the easement area, the plaintiffs' new construction utilizes nearly the same footprint as the prior structures.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

To acquire an easement by prescription, it must be shown that the use was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of ten years, and each of these elements must be proven by clear and convincing evidence (*see Panday v Allen*, 187 AD3d 775, 777-778, 133 NYS3d 303 [2d Dept 2020]; *Ciringione v Ryan*, 162 AD3d 634, 78 NYS.d 421 [2d Dept 2018]). Generally, where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive (*see Aboulissan v Kingsland 79, LLC*, 179 AD3d 878, 114 NYS3d 663 [2d Dept 2020]; *Colin Realty Co., LLC v Manhasset Pizza, LLC*, 137 AD3d 838, 840, 26 NYS3d 606 [2d Dept 2016]). However, this presumption does not arise when the parties' relationship was one of neighborly cooperation or accommodation (*see Estate of Becker v Murtagh*, 19 NY3d 75, 82, 945 NYS2d 196 [2012]; *Ward v Murariu Bros., Inc.*, 100 AD3d 1084, 1085, 952 NYS2d 850 [2d Dept 2012]).

The record before the Court is insufficient to determine whether the plaintiffs' use of the easement, namely parking vehicles thereon, violates the terms of the easement. As express easements are governed by the intent of the parties (*see Lewis v Young*, 92 NY2d 443, 449, 682 NYS2d 657 [1998]), the Court must look to the language used in the 1989 and 2005 deeds to the defendant's property. The language creating the easement does not specify whether vehicles may be parked thereon, and the parties clearly have differing views as to how a "driveway" may be used. As such, the portions of the motions seeking relief as to this use of the easement area are denied.

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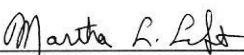
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Further, the plaintiffs' submissions fail to establish, by clear and convincing evidence, that the use of the retaining wall and driveway areas by their predecessors-in-interest was hostile, and thus, they fail to demonstrate that they are entitled to an easement by prescription over these areas (*see Aboulissan v Kingsland 79, LLC, supra; Colin Realty Co., LLC v Manhasset Pizza, LLC, supra*). The parties' conflicting accounts as to how the existing structures came to be built and repaired, and the history of the relationships of the parties' predecessors-in-interest, create a triable issue of fact as to whether such use was hostile or the result of neighborly cooperation or accommodation (*see Alvarez v Prospect Hosp., supra; see also Estate of Becker v Murtagh, supra; Ward v Murariu Bros., Inc., supra*).

Accordingly, the defendant's motion is denied, and the plaintiffs' cross motion is granted in part, and denied in part.

E N T E R

Date: July 13, 2021
Riverhead, New York


HON. MARTHA L. LUFT, A.J.S.C.

____ Final Disposition

 X Non-Final Disposition