

JMMJ Dev., LLC v Town of Greenport
2022 NY Slip Op 35212(U)
May 3, 2022
Supreme Court, Columbia County
Docket Number: Index No. E012019015220
Judge: Henry F. Zwack
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF COLUMBIA

JMMJ DEVELOPMENT, LLC,

Plaintiff,

-against-

TOWN OF GREENPORT,

Defendant.

, All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
Index No. E012019015220

Appearances: O'Connell & Aronowitz, PC
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DECISION/ORDER

Zwack, J:

In this real property action, the defendant Town of Greenport ("Town") moves pursuant to CPLR 3211 for summary judgment, an order dismissing the Amended Verified Complaint of the plaintiff JMMJ Development, LLC ("JMMJ"), and an order adjudging and declaring that the Town has a 20 foot easement over the property of JMMJ — as depicted in the August 3, 2017 "Survey of Property of Alva A. Stalker to be Conveyed to JMMJ Development, LLC," by Daniel Russell of Crawford & Associates Engineering & Land Surveying ("Russell Survey") — for the continued use, operation and maintenance of sewer and water lines that were constructed as part of the Town's former Sewer District No. 2, since consolidated with Sewer District 1. JMMJ opposes and has cross moved for summary judgment for the relief sought in its Amended Complaint.

According to the Amended Complaint, JMMJ took title to the subject property, which was encumbered by an unrecorded sewer and water easement. Alleging nuisance, trespass, and the unrecorded easement, JMMJ has sued the Town for its interference with JMMJ's property rights

and its plan of development. The Amended Complaint seeks the removal of the encroachments and damages. The Town answered, denying JMMJ's allegations, and also asserted a cross-claim under RPAPL Article 15 that it has a prescriptive easement over the subject property for the use of the Town's water and sewer lines, and is entitled to a judgment declaring the same. In its answer, the Town also asserted that the Amended Complaint fails to state a cause of action, is barred by the statute of limitations, is barred by documentary evidence, that JMMJ failed to comply with a condition precedent to suit (General Municipal Law), and that JMMJ is barred from bringing suit by the Real Property Law provisions relating to the recording of instruments affecting property. Further, the Town asserts that JMMJ took title to the property with actual and or constructive notice of the Town's water and sewer lines, and that the Town's use of the property was open and notorious, open and hostile, and continuous for a period of more than ten years — thereby creating a prescriptive easement of the subject property in the favor of the Town.

For the reasons that follow the Court grants the Town's motion for summary judgment and denies JMMJ's cross motion for summary judgment.

A proponent of a summary judgment motion has the burden of establishing prima facie entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material facts which would necessitate a trial (*Winegard v New York University Medical center*, 64 NY2d 851,853 [1985]). Further, the evidence must be viewed in the light most favorable to the non-moving party (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once the prima facie showing of entitlement to judgment has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form, sufficient to establish the existence of material facts which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, the Court is mindful that “a grantee of land takes subject to duly recorded easements that have been granted by his or her predecessors-in-title, as well as to unrecorded easements of which he or she has actual or constructive notice” (*Stasack v Dooley*, 292 AD2d 698 [3d Dept 2002]).

To establish a prescriptive easement, the Town was required to “show, by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years...(and where) continuity and open and notorious use have been proven, hostility is

generally presumed, thus shifting the burden to (JMMJ) to demonstrate that the use was permissive” (*Rensselaer Polytechnic Inst. v Schubert*, 170 AD3d 1307, 1310 [3d Dept 2019], quotations and citations omitted).

In support of its application, the Town has produced evidence in documentary form that the 20 foot easement on the property in question was purchased by the Town for the express purpose of establishing a second sewer district, including affirmations by Sharon Zempo and John Mokszycki that a Town resolution was passed authorizing the creation and construction of Sewer District 2 in 1971. Construction drawings, completed in 1976, depict the sewer and water lines crossing property owned by the Stalkers (a JMMJ predecessor in title), together with the proposed easement (Drawings F-37-231 and F-37-232). On February 7, 1979, the Town adopted a resolution to pay \$13,800 to the Stalkers to acquire property and easement rights “for the construction of a pump station, force main and sewer interceptors in connection with the current project now underway for improvements in Sewer District 2” (Zempo Affidavit; see also, Town’s Resolution Number 8-1979). The Town has produced a check register which includes an entry for a check in the amount of \$13,800 to the Stalkers for “Property 7 Easement Rights Per Board Resolution 8-1979.”

The record also includes a letter to the Stalkers stating that the easement and pump station parcel had been acquired by eminent domain, offering the \$13,800 highest appraisal for the property, and enclosing a metes and bounds description of the same.

As stated in the Town's Statement of Facts (and supported by affidavits), a survey of the Stalker property was prepared by the firm of Plass, Rockefeller & Nucci, LLC., for Alva Stalker ("Plass Survey"), and it included the description of the easement crossing her property and the Pump Station Parcel associated with Sewer District 2, and Stalker provided the surveyor with a copy of the letter from the Town offering her the \$13,800 for the property. The 2013 Plass survey depicts a 20 foot wide "Town of Greenport Sewer Easement" crossing the subject property.

The record establishes that JMMJ — beginning with the proposed 2017 contract to purchase, both the Plass Survey and Russell Survey, and Melino's title insurance policy — was on notice of the water and sewer easement when it took title to the property. Simply stated, albeit the Town's easement was not recorded, given JMMJ's actual and constructive notice of the easement — and certainly charged with facts "sufficient to put (it) on inquiry as to the existence of some right or title in conflict with that (it) is

about to purchase..."*Schultz v Dattero*, 104 AD3d 831, 834[2d Dept 2013], citations and quotations omitted) — JMMJ took title subject to the Town's 20 foot easement.

On this record, the Town has also demonstrated that its use of the property was open and notorious for over 30 years, including: the public record of Town's Resolution which established the Town of Greenport Sewer and Water District 2; the Town's Resolution authorizing remuneration to the Stalkers for their land which became the easement; the actual construction of the water and sewer lines; and the visible manhole covers and the Pump Station. The payment to the Stalkers for the easement, as set forth in the Town's Resolution, removes any question that the use by the Town was permissive, so as to rebut the presumption of hostility (*Hulett v Korb*, 192 AD3d 1424 [3d Dept 2021]).¹

All said, the Town has met its burden of establishing, prima facie, entitlement to judgement as a matter of law, thereby shifting to JMMJ the burden to establish the existence of material issues requiring a trial (*Alvarez*, 68 NY2d at 324).

¹While the Town may not have a copy of the cancelled check, they have the check register reflecting the payment, and plaintiff's argument that this may be fraudulent is made without any foundation in fact or law.

In opposition, JMMJ has simply failed to offer proof in evidentiary form which disputes the Town's factual showings establishing the subject 20 foot easement — instead arguing that, because the easement was not recorded, it is not bound by it. However viewed, the argument is neither persuasive or supported by the record.

In response to the Town's discovery demands, JMMJ provided an unsigned contract dated June 28, 2017 for its purchase of the subject property — which describes the property as appearing on the Plass Survey (which depicts the Town's 20 foot easement) and also provides that JMMJ is purchasing the property "subject to the conditions, easements and rights of way as depicted on said survey map". The record also establishes that Melino had his own survey prepared prior to closing title (the Russell Survey) which depicts a 20 foot wide "Town of Greenport Sewer Easement" crossing the subject property, and the pump station on property identified as "Lands of the Town of Greenport." A subsequent title insurance policy was issued for Melino, which references the property pursuant to the Russell Survey and specifically exempted from coverage the rights of the Town in the 20 foot wide Town of Greenport Sewer Easement.

Turning to JMMJ's argument that its surveyor, Mr. Russell, was wrong

in his deed description and incorrect in noting the easement, beyond that bald and self serving claim, it failed to provide an affidavit from its expert, Mr. Holtz, in support. Further, JMMJ's reliance on a hearsay letter is insufficient to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 597-598). The Court also notes that JMMJ failed to attach the Holtz deposition transcript in its entirety.

Again, faced with the Town's overwhelming documentary showing, in evidentiary form, it was incumbent upon JMMJ to submit its defense in evidentiary form as well. JMMJ has submitted the affidavit of its principal, Joseph Melino, and the Court has considered his argument that his surveyor, Mr. Russell, was wrong in his deed description and incorrect in noting the easement. As explained in deposition testimony, Surveyor Russell was obligated to set out the easement, as he did, because there was evidence of the sewer easement and pump station due to the visible observation of his field crew, and because he was in possession of maps of the sewer district prepared by Plass, Rockefeller & Nucci, LLC's field (being the successor to that firm) as well as the letter from the Town to Alva Stalker referencing an eminent domain proceeding with deed and easement descriptions.

What is remarkable, despite being provided with survey maps depicting the subject easement is that JMMJ (represented by counsel) made no efforts to dispute the Town's easement until *after* it closed title — although it had every resource able to do diligence prior to closing. All said, when JMMJ took title to the subject property it had actual notice of the Town's 20 foot easement, as depicted in both the Plass and Russell surveys, and which the Town has continually used for more than 10 years in the operation and maintenance of the Town's sewer district.

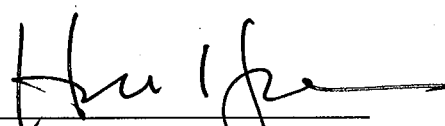
Accordingly, it is

ORDERED, that the defendant Town of Greenport's motion for summary judgment is granted, and plaintiff JMMJ Development, LLC's Amended Complaint, and cross-claim, is dismissed in its entirety; and it is further

ORDERED and DETERMINED, that the defendant Town of Greenport has a 20 foot wide Sewer Easement with sewer manholes and "other appurtenances" as depicted on the updated 2017 survey of Daniel Russell of Crawford & Associates, P.C. and the 2013 survey of Jeffrey Plass of Rockefeller & Nucci, LLC.

This constitutes the Decision and Order of the Court. This original Decision and Order is filed by the Court in NYSCEF, which does not constitute filing and entry under CPLR 2220. Counsel for the defendant is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: May 3, 2022
Troy, New York


Henry F. Zwack
Acting Supreme Court Justice

Papers Considered, as filed with NYSCEF:

1. Documents #30 through #70;
2. Documents #73 through #91.