

Ontario TK Owner, LLC v Fedyk Bldrs., Inc.
2023 NY Slip Op 30149(U)
January 17, 2023
Supreme Court, Wayne County
Docket Number: Index No. 85231
Judge: Daniel G. Barrett
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At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 13th day of September, 2022.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

ONTARIO TK OWNER, LLC,

Plaintiff

-vs-

FEDYK BUILDERS, INC.,

Defendant

DECISION
Index No. 85231

The Plaintiff, Ontario TK Owner, LLC, commenced this action seeking a declaratory judgment regarding an easement recorded in 1979 in the Wayne County Clerk's Office. At the present time, Plaintiff owns property at 6272 Furnace Road and Defendant owns property at 2112 Community Lane which is adjacent to and south of Plaintiff's property. Plaintiff took title to 6272 Furnace Road on December 2, 2014. Defendant took title to Community Lane on May 8, 1996.

The Plaintiff commenced this action pleading three causes of action.

CAUSE OF ACTION #1

The Plaintiff requested a declaration that the easement recorded in 1979 is currently valid and the construction of the retention pond in the easement area by the Defendant constitutes a permanent obstruction.

CAUSE OF ACTION #2

The Plaintiff requested an Order obligating the Defendant to remove the retention pond from within the boundary of the easement. Alternatively, the Plaintiff requested money damages in the amount to be determined at trial.

CAUSE OF ACTION #3- INJUNCTIVE RELIEF

The Plaintiff requested an injunction prohibiting the Defendant from interfering with the Plaintiff's use of the easement.

The Defendant served a Verified Answer which essentially denied all the allegation with respect to the validity of the easement except the language contained in the recorded easement.

The Defendant pleaded five affirmative defenses:

1. Verified Complaint fails to the state a cause of action upon which relief can be granted;
2. The Plaintiff's causes of action are barred by the applicable statute of limitations;
3. The Plaintiff's causes of action are barred by the doctrine of laches;
4. The Plaintiff is guilty of unclean hands;
5. The Plaintiff and its predecessor-in-interest abandoned the easement and therefore it is void.

As a preliminary matter this Court is dismissing all of the affirmative defense except for the abandonment of the easement.

In his opening statement, counsel for Plaintiff, pared down the request for relief. Counsel stated that the form of relief requested was a declaratory judgment recognizing the validity of the easement and finding that the Defendant encroached upon it. During the course of testimony counsel for Defendant moved to dismiss the claims for money damages and injunctive relief and counsel for Plaintiff agreed to these applications. Thus, these two claims are dismissed.

RECORDED EASEMENT

Robert N. Waterman, Sr. and Rose Mary M. Waterman owned 2112 Community Lane in Ontario immediately prior to the Defendant. Patsy Catalano and Rose Mary Catalano owned property adjacent to and north of the Watermans' property. The Watermans' granted to the Catalanos' a nonexclusive easement to pass and repass on foot and with vehicles from property owned the Catalanos' to Community Lane. A description of the easement using compass directions was utilized. The easement was rectangular in shape, 60 feet by 150 feet. The recorded easement also provided that the easement would be dedicated to the Town of Ontario for public highway purposes. It is noted that at no time since the creation of the easement did the described easement connect to Community Lane.

Sometime in 1996 Plaintiff's predecessor-in-interest applied to the Town of Ontario Planning Board for subdivision and site approval of the construction of a shopping plaza at 6272 Furnace Road to be anchored by Tops Market. The application provided for means of ingress and egress onto Route 104 and Furnace Road but it did not seek a means of ingress or egress over the area covered by the easement, nor did it seek to extend Community Lane to the easement.

In 2005, Plaintiff's predecessor-in-interest submitted another application for site plan approval for the development of a commercial building in the northwest corner of 6272 Furnace Road. The application and site plan made no reference to the easement.

The southern boundary of the Plaintiff's property that abuts the northern boundary of the easement has been overgrown with vegetation for many years. John August, the managing member of the Plaintiff, indicated he was responsible for maintaining the property but does not recall having hired anyone to maintain the access point to the easement. He also testified that there was a fence constructed across the easement by the Plaintiff's predecessor-in-interest and there was no gate in the easement to access the easement area. This fence is located on a map dated 10/06/17 prepared by Thomas Rodak. The fence is described as a stockade fence.

The northern boundary of the easement opens onto the rear of a commercial building on Plaintiff's property where loading docks and utility meters are located.

In the easement area near the north boundary of the easement there is a utility pole supported by a guy wire on which are mounted three transformers. The pole is located about 10 feet west of the eastern most point of the easement as a result, even if the retention pond were removed, it would be impossible to construct a roadway on the eastern third of the easement.

In 2017, Defendant applied for site plan and subdivision approval for phase 1 of Community Ridge, a planned unit development on the property located at 2112 Community Lane. The site plan provided for the construction of a drainage retention pond that encroached on the eastern portion of the easement. The site plan also provided for the extension and relocation of Community Lane. As a result of the proposed change in location of the extension of Community Lane, the northern boundary of Community Lane no longer abuts with the southern boundary of the easement such that the easement does not extend to Community Lane.

The Town Planning Board conditioned its approval on the Defendant obtaining the Plaintiff's permission to release the easement or to allow the retention pond within the easement area. This was required to be accomplished within two years. The parties negotiated but failed to reach an agreement on the easement. In a letter dated January 24, 2018, to the town attorney and the Defendant, Plaintiff's counsel informed them that the Plaintiff was not granting a release of the easement. In letter dated August 6, 2018, to the same recipients, Plaintiff's counsel informed them that the construction of the retention pond had begun in violation of a refusal to grant a release of the easement. The letter indicated the easement is valid and a request was made to stop construction of the retention pond.

Without the consent of the Plaintiff, Defendant completed construction of the retention pond which extended into the easement area by about 18 feet.

ANALYSIS

This Court finds that at its inception, the absence of the signature of the Catalanos' is not a bar to the effectiveness of the easement. The easement contained three essential elements:

1. It was conveyed in writing;
2. It was subscribed by the person creating the easement (the Watermans');
3. It burdened the servient estate, (Watermans' property) for the benefit of the dominant estate (Catalanos' property). (see 114 Woodbury Realty, LLC, et al, v 10 Bethpage Rd., LLC, 178 A.D. 3d 757 [2nd Dep't 2019]),

An easement can come into existence between adjoining property owners without the necessity of a common grantor for both the dominant and servient estates. (See Sassouni v Krim, 68 A.D. 3d 968 [2nd Dep't 2009]).

The actions or inactions of the predecessor-in-interest have a direct bearing on whether the easement has been abandoned. (See Chapman v Vondorpp, 256 A.D. 2d 297 2nd Dep't 1998]; Arthur J. Ouesnel Family Trust v Harstedt, 285 A.D. 2d 704 [3rd Dep't 2001]).

The language of the easement provides that the Watermans' and the Catalanos' agreed to dedicate the easement to the Town of Ontario for public highway purposes. There is no proof that anyone has dedicated the easement to the Town of Ontario for highway purposes.

Standing on northern boundary of the easement and facing north one observes the rear of a commercial building and utility meters.

The use of an alternate route of access while permitting the unimpeded growth of trees to obstruct the right-of-way for several decades may be indicative of an intention to abandon the easement. Chapman v Vondorpp, *supra*, p. 298.

Over growth of an easement may constitute evidence of abandonment. Sam Dev., LLC v Dean, 292 A.D. 2d 585, 585 (2nd Dep't 2002).

A fact issue is presented when abandonment is based on "use of alternate access, lengthy nonuser, large trees and a fence encroaching on the easement for decades." Arthur J. Quesnel Family Trust v Harstedt, *supra*, p. 706.

No maintenance was performed on the easement area while the Defendant owned the property since 1996. It is well settled, absent an agreement to the contrary, the owner has the duty for maintaining and repairing the easement (see Tagle v Jakab, 275 A.D. 2d 573, 574 [3rd Dep't 2000]).

This easement has not been used as a means of access to the Plaintiff's property since the Defendant acquired the Community Lane property in 1996. Parenthetically, the easement created in 1979 was not necessary for the Catalanos' to access their property. They had access to their property from Furnace Road.

The testimony and photographic evidence established that the vegetation had been growing in the easement area for quite some time resulting in the blockage of the easement in the area where it abuts the Plaintiff's property.

A stockade fence was constructed by the Plaintiff's predecessor-in-interest on the Plaintiff's property blocking the entrance to the easement. The stockade fence had no opening in it. The evidence establishes that this was constructed after the Defendant acquired Community Lane but before the Plaintiff acquired their property in 2014.

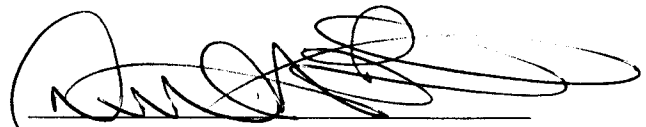
This Court has evaluated five factors and concludes that the easement was abandoned before the Plaintiff took possession to Furnace Road. The factors are:

1. No one took any steps to dedicate the easement area to the town of Ontario for public highway purposes since it was created in 1979;
2. No one maintained the easement area since 1996;
3. A stockade fence was constructed blocking entrance to the easement by Plaintiff's predecessor-in-interest;
4. Overgrowth of trees and bushes for an extended period of time;
5. No necessity for the easement to gain access to the Plaintiff's property.

Since this Court finds that the easement was abandoned prior to the Plaintiff taking title to Furnace Road in 2014, counsel's letters dated January 24, 2018, and August 6, 2018, are not effective in reviving the easement. (see Puchalski v Wedemeyer, 185 A.D. 2d 563, [3rd Dep't 1992]; Stilbell Realty Corp. v Cullen, 43 A.D. 2d 966 [2nd Dep't 1974]).

It is the Decision of this Court that the easement created in 1979 is declared void and unenforceable due to its abandonment by the predecessor-in-interest.

Dated: January 17, 2023
Lyons, New York

A handwritten signature in black ink, appearing to read 'Daniel G. Barrett', written over a horizontal line.

Daniel G. Barrett
Acting Supreme Court Justice