

Ira & Larry Weinstein, LLC v Mill Ave. Dev. LLC

2023 NY Slip Op 32336(U)

July 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 516272/2018

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of July 2023

HONORABLE FRANCOIS A. RIVERA
-----X
IRA AND LARRY WEINSTEIN, LLC and
IRA WEINSTEIN and LARRY WEINSTEIN,

DECISION & ORDER
Index No.: 516272/2018

Plaintiffs

- against -

MILL AVENUE DEVELOPMENT LLC AND
HEBREW LANGUAGE ACADEMY
CHARTER SCHOOL,

Defendants.

-----X
Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion, filed on April 7, 2022, under motion sequence number three, by plaintiff Ira And Larry Weinstein, LLC (hereinafter the Weinstein LLC or plaintiff movant) for an order: (1) pursuant to, inter alia, CPLR §§ 3212 and 5012 granting summary judgment in favor of the Weinstein LLC and as against defendants Mill Avenue Development, LLC (hereinafter MAD) and the Hebrew Language Academy Charter School (hereinafter the HLA) on the first cause of action set forth in the verified complaint; (2) entering an order and judgment that the parcel of real property owned by the Weinstein LLC, Block/Lot No. 8470/1090 known as 2184 Mill Avenue/6103 Strickland Avenue, Kings County, New York (the hereinafter the Dominant Parcel) is benefitted by an Easement for light and air and ingress and egress over Block/Lot No. 8470/1091 known as 2186 Mill Avenue, Kings County, New York (hereinafter the Servient Parcel), more particularly described in the metes and bounds description contained in Exhibit B to the verified complaint; and (3) severing the first cause of action set forth in the verified complaint from the remaining causes of action set forth in the verified complaint; and (4) granting such other and further relief in the Weinstein LLC’s favor as the Court deems just, proper, and equitable under the circumstances including, without limitation, attorneys’ fees, costs, and disbursements.

- ◆ Notice of Motion
- ◆ Statement of Material Facts
- ◆ Affidavit in Support by Ira N. Weinstein
- ◆ Affidavit of Steven Lax
 - Exhibits A-Q
- ◆ Affirmation of Gregory M. Dexter, Esq.
 - Exhibits 1-16
- ◆ Memorandum of Law in Support
- ◆ Memorandum of Law in Reply¹

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross motion, filed on November 1, 2022, under motion sequence number four, by defendants MAD and HLA (hereinafter the cross movants) for an order pursuant to CPLR 3212 granting summary judgment in favor of the cross movants and dismissing the first cause of action in the plaintiffs' complaint.

- ◆ Notice of Cross Motion
- ◆ Affirmation in Support
 - Exhibits A-G
- ◆ Affidavit of Paul Grossman
- ◆ Affidavit of Christopher Merone
- ◆ Memorandum of Law in Opposition to the Motion and in Support of the Cross Motion
- ◆ Response to Movants Statement of Material Facts
- ◆ Cross Movants' Statement of Material Facts
- ◆ Response to Cross Movants' Statement of Material Facts
- ◆ Memorandum of Law in Reply

BACKGROUND

On August 9, 2018, plaintiffs Ira and Larry Weinstein, LLC, Ira Weinstein, and Larry Weinstein (collectively hereinafter as the plaintiffs) commenced the instant action for, inter alia, declaratory, and injunctive relief by filing a summons and verified complaint with the Kings County Clerk's office. The verified complaint alleges fifty-two

¹ The cross movants' papers also serve as opposition to the plaintiff movant's motion papers.

allegations of fact in support of six causes of action. The first cause of action seeks a judicial declaration that the Weinstein LLC Property is benefitted by an easement. The second seeks a judicial declaration that the Weinstein LLC Property is benefitted by a prescriptive easement. The fourth seeks a mandatory injunction requiring MAD, HLA, and their tenants, agents, guests, invitees, and employees to remove all obstructions located within the boundaries of the easement. The fifth seeks a permanent injunction requiring MAD, HLA, and their tenants, agents, guests, invitees, and employees to remove all obstructions located within the boundaries of the easement. The sixth seeks a permanent injunction enjoining MAD, HLA, and their tenants, agents, guests, invitees, and employees and from entering on the Weinstein LLC Property and/or parking vehicles on the Weinstein LLC Property, from using the Weinstein LLC Property for the purpose of ingress to and egress from the Mill Ave. Property.

On 15, 2018, MAD interposed and filed an answer to the verified complaint. On July 20, 2021, HLA interposed and filed an amended answer to the verified complaint.

The following facts are undisputed as set forth in the parties' respective statements of material facts submitted in accordance with 22 NYCRR 202.8-g.

Chain of Title to the 2184 Mill Avenue Property

By deed, dated December 22, 1954, Lena and Simon Wolf conveyed 2184 Mill Ave. to Dick Sales Corp.

On or around March 8, 1955, Dick Sales Corp. changed its name to PLEG Realty Co., Inc.

On or around September 4, 1963, Lena Wolf conveyed a correction deed to PLEG Realty Co., Inc.

By deed, dated March 10, 1975, PLEG Realty conveyed 2184 Mill Ave. to Phillip and Lillian Lubin.

By deed, dated September 17, 1975, Phillip and Lillian Lubin conveyed 2184 Mill Ave. to Ira Norman Weinstein.

By deed, dated September 19, 1975, Ira Norman Weinstein conveyed 2184 Mill Ave. to Ira Norman Weinstein and Larry P. Weinstein, as tenants-in-common.

By deed, dated August 5, 2002, September 19, 1975, Ira Norman Weinstein, and Larry P. Weinstein conveyed 2184 Mill Ave. to plaintiff the Weinstein LLC.

The Weinstein LLC is the current fee owner of the property known as and located at 2184 Mill Avenue Brooklyn, New York also known as 6103 Strickland Avenue, Kings County, New York, Block/Lot No. 8470/1090.

Chain of Title to 2186 Mill Avenue Property

By deed, dated June 9, 1955, Simon and Lena Wolf conveyed 2186 Mill Ave. to Tama Realty Corporation.

By deed, dated January 2, 1971, Tama Realty Corporation conveyed 2186 Mill Ave. to Tama Realty Co.

By deed, dated June 4, 1990, Tama Realty Co. conveyed 2186 Mill Ave. to Polymer Research Corp. of America.

By deed, dated December 12, 2008, Alan Nisselson, as Trustee etc., conveyed 2186 Mill Ave. to 2186 Mill Ave Holdings LLC.

By deed, dated May 5, 2011, Mill Avenue Holdings LLC conveyed 2186 Mill Ave. to Paul Grosman.

By deed, dated December 28, 2011, Paul Grosman conveyed 2186 Mill Ave. to defendant MAD.

MAD is the current fee owner of the property known as and located at 2186 Mill Avenue Brooklyn, New York, Block/Lot 8470/1091.

In or around 2016, defendant HLA began operating a school at 2186 Mill Ave. and leased the same from MAD.

LAW AND APPLICATION

The plaintiff movant seeks, inter alia, an order pursuant to CPLR §§ 3212 and 5012 granting summary judgment in their favor as against defendants MAD and HLA on the first cause of action set forth in the verified complaint. The first cause of action seeks a judicial declaration that the Weinstein LLC Property is benefitted by an easement over the 2184 Mill Avenue parcel.

The cross movants seek an order pursuant to CPLR 3212 granting summary judgment in their favor declaring that the 2184 Mill Parcel is not burdened by an easement benefiting the 2186 Mill Ave parcel and dismissing the first cause of action as asserted against them.

CPLR 5012 provides in pertinent part that a Court may render judgment upon a cause of action in a complaint and order a severance of the remainder.

CPLR 3001 provides that the supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether further relief is or could be claimed (*see Peters v Smolian*, 154 AD3d 980, 983 [2d Dept 2017], citing CPLR 3001). To constitute a justiciable controversy, there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect (*see Cong. Machon Chana v Machon Chana Women's Inst., Inc.*, 162 AD3d 635 [2d Dept 2018], quoting *Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]).

It is well established that summary judgment may only be granted when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no

merit (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

Until December 22, 1954, Lena and Simon Wolf (hereinafter the Wolfs) owned both parcel 2184 and 2186 Mill Avenue. When the Wolfs conveyed (hereinafter the December 1954 conveyance) the 2184 Mill Ave. parcel to Dick Sales Corp. by deed dated December 22, 1954, they granted Dick Sales Corp, an express easement for light and air and for ingress and egress over the 2816 Mill Ave. parcel which the Wolfs continued in fee at the time.

The language contained in the deed, subscribed by the Wolfs, manifested an intent to grant an express easement to Dick Sales Corp. over the 2186 Mill Ave. parcel. Several months later, the Wolfs conveyed the 2186 Mill Ave parcel to MAD's predecessor in interest, Tama Realty Corp., by a deed, dated June 9, 1955 (hereinafter the June 1955 conveyance).

The deed of the June 1955 conveyance contained the following language (hereinafter the excepting language):

“EXCEPTING so much thereof as was conveyed to Dick Sales Corp. by deed dated December 22, 1954, and recorded December 24, 1954 in Liber 8301 Cp 2224, bounded and described as follows:
All that certain interior lot, plot or parcel of land, situate, lying and being in Block 8470 of the Tax Map of the Borough of Brooklyn, County of Kings, City and State of New York, being more particularly bounded and described as follows:

BEGINNING at a point distant 141.05 feet westerly from the westerly side of Strickland Avenue measured along a line drawn right angles thereto through a point thereon distant 709.15 feet southerly from the corner formed by the intersection of the said westerly side of Strickland Avenue with the southerly side of Mill Avenue running thence southwesterly along a line deflecting to the left at an angle 46 degrees 18 minutes 22 seconds with the above described line drawn at right angles to Strickland Avenue 227.89 feet; thence deflecting to the right angle of 45 degrees 16.97 feet thence deflecting against to the right at an angle of 45 degrees to a distance of 73.74 feet; thence following courses and distances all of which are at right angles to the immediately preceding course; northeasterly 12.00 feet; northwesterly 12.00 feet; northeasterly 128.69 feet; northwesterly 4.41 feet; northeasterly 16.33 feet; northwesterly 31.55 feet; northeasterly 39.13 feet; northwesterly 25.40 feet; northeasterly and part of the distance through a party wall 78.74 feet; southeasterly 124.10 feet; thence deflecting to the right at an angle of 45 degrees, 49.50 feet to the point or place of beginning.”

It is this excepting language contained in the June 1955 deed conveying the 2186 Mill Ave parcel from the Wolfs to MAD’s predecessor in interest, Tama Realty Corp., (hereinafter the June 1955 conveyance), in which the Weinstein LLC and the cross movants respective positions differ.

The plaintiff movant contend that an express easement was created by the language in the December 1954 conveyance of the 2184 Mill Ave property from the Wolfs to Dick Sales Corp. They further contend that by that conveyance the 2184 Mill Ave parcel became the dominant parcel, and 2186 Mill Ave parcel which the Wolfs kept at that time became the servient parcel.

The plaintiff movant also contends that the excepting language contained in the June 1955 deed conveying the 2186 Mill Ave. parcel by the Wolfs to Tama Realty Corp., continued the express easement in favor of Tama Realty Corp. over the Wolfs’ property

with the 2184 Mill Ave parcel remaining the dominant parcel and 2186 Mill Ave parcel remaining the servient parcel.

The cross movants contentions are to the contrary. First, they contend that an express easement may only be created when the easement language is recorded in both the servient and dominant parcels' chain of title, which, undisputedly, is not the case at bar. Thus, an express easement was never created. Further, they contend that the excepting language contained in the June 9, 1955, deed in which the Wolfs conveyed the 2186 Mill Ave. parcel to Tama Realty Corporation also failed to create or continue an express easement in favor of the 2186 parcel.

It is undisputed that the easement language, referenced for the Weinstein LLC Property, is not expressly included within the title chain for the Mill Ave Property. Instead, the plaintiff's claim is that this excepting language, which references another deed, is sufficient to put the easement within Mill Ave's chain of title, thereby creating an enforceable easement. There is no dispute, however, that the Wolfs did not have a joint ownership interest in the 2184 and the 2186 Mill Ave parcels on June 9, 1955, the date of the deed with the excepting language.

An easement appurtenant is created through a written conveyance, subscribed by the grantors, that burdens the servient estate for the benefit of the dominant estate (*Dornan v Fort Ann Cent. Sch. Dist.*, 201 AD3d 1229, 1230 [3rd Dept. 2022]). To create an easement by express grant there must be a writing containing plain and direct language

evinced the grantor's intent to create a right in the nature of an easement rather than a revocable license (*Willow Tex, Inc. v Dimacopoulos*, 68 NY2d 963, 965 [1986]).

The plaintiff movant contends that the excepting language contained in the deed contained in the June 1955 deed conveying the 2186 Mill Ave. parcel by the Wolfs to Tama Realty Corp., created or reinforced an express easement in favor of Tama Realty Corp. over the Wolfs' property with the 2184 Mill Ave parcel remaining the dominant parcel and 2186 Mill Ave parcel remaining the servient parcel. At the time that the June 1955 conveyance occurred, however, the Wolfs had already conveyed that the 2184 parcel to Dick Sales Corp. by deed, dated December 22, 1954.

The cross movants have correctly cited the Appellate Division Second Department holding in the matter of *Lechtenstein v P.E.F. Enterprises, Ltd.* (189 AD2d 858, 859 [2d Dept 1993]) which states that an easement by grant to be effective, the dominant and servient properties must have a common grantor. A deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed', does not create a valid interest in favor of that third party (*Beachside Bungalow Preserv. Ass'n of Far Rockaway, Inc. v Oceanview Assoc., LLC*, 301 AD2d 488, 489 [2d Dept 2003], quoting *Estate of Thomson*, 69 NY2d 570; *Dichter v Devers*, 68 AD3d 805 [2d Dept 2009]). The Court of Appeals and the Appellate Division Second Department have held that a grantor cannot create an express easement across adjoining parcel, where, at time easement was purportedly created, grantor owned servient property, but not dominant property (*see id.*). Applying these holdings, the exception language in the deed dated June 9, 1955, did not

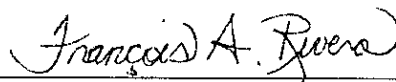
create a valid and binding express easement benefitting the 2184 Mill Ave parcel or burdening the 2186 Mill Ave parcel (*see id.*). Accordingly, the plaintiff movant did not make a prima facie showing of entitlement to a declaratory judgment in their favor declaring the Weinstein LLC Property is benefitted by an express easement over the 2184 Mill Avenue parcel. Furthermore, the defendant cross movants did make a prima facie showing of entitlement to a declaratory judgment declaring that the 2184 Mill Ave parcel is not burdened by an express easement benefitting the 2186 Mill Ave parcel.

CONCLUSION

The motion the plaintiff Ira and Larry Weinstein, LLC for an order pursuant to CPLR §§ 3212 and 5012 granting summary judgment in their favor as against defendants Mill Avenue Development, LLC, and the Hebrew Language Academy Charter School on the first cause of action set forth in the verified complaint is denied.

The cross motion by defendants Mill Avenue Development, LLC, and the Hebrew Language Academy Charter School for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing the first cause of action in the plaintiff Ira and Larry Weinstein, LLC's complaint is granted.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.