

Herskowitz v A.V.R. Dev., LLC
2024 NY Slip Op 35050(U)
March 27, 2024
Supreme Court, Rockland County
Docket Number: Index No. 031905/2023
Judge: David Fried
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To commence the statutory time period for appeals as of right (CPLR §5513 [a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
YOSEF HERSKOWITZ,

Plaintiff,

-against-

A.V.R. DEVELOPMENT, LLC,

Defendant.

-----X
HON. DAVID FRIED, A.J.S.C.

DECISION & ORDER

Index No. 031905/2023
Motion Sequence Nos. 1 & 2

The papers filed electronically via NYSCEF numbered 5-23, 60, 62, 64, 66, and 69-70 (“Motion Seq. No. 1”); and 24-59, 61, 63, 65, 67, and 71-73 (“Cross-Motion Seq. No. 2”) were read and considered herein. Upon such reading and consideration, the Motion and Cross-Motion are disposed as follows:

BACKGROUND

This action was commenced with the filing of a Summons and Complaint by Plaintiff Yosef Herskowitz (“Plaintiff”), via NYSCEF, on April 28, 2023. Plaintiff seeks a declaratory judgment recognizing a continuing easement, or easement by necessity, for ingress and egress over a certain portion of real property owned by Defendant A.V.R. Development, LLC (“Defendant”). Plaintiff posits that said purported easement is his only access to his land-locked parcel of real property. On June 24, 2023, Defendant filed an Answer with affirmative defenses, via NYSCEF.

Plaintiff alleges that he is the owner of a parcel of land located at 327 South Mountain Road, New City, New York, with a tax designation of 26.18-1-3 (“Plaintiff’s Parcel”) and Defendant is the owner of an adjacent parcel of land located at 317 South Mountain Road, New City, New York, with a tax designation of 26.18-1-2 (“Defendant’s Parcel”). It is further alleged that both parcels are set back from South Mountain Road, but that Defendant’s Parcel contains a ten-foot-wide path connecting both the main part of Defendant’s Parcel and Plaintiff’s Parcel to South Mountain Road.

Pre-Note of Issue, Plaintiff has brought Motion Seq. No. 1, in which he seeks an Order granting

summary judgment against Defendant. Defendant opposes Plaintiff's Motion and cross-moves for summary judgment (Cross-Motion Seq. No. 2) against Plaintiff. Plaintiff opposes said Cross-Motion.

PARTIES' CONTENTIONS

Plaintiff contends that the history of the parcels at issue reveals that ingress and egress to Plaintiff's Parcel has always been through the ten-foot-wide path, as follows: Plaintiff's Parcel is located behind the real property currently owned by Gosman, which property has frontage on South Mountain Road; that in 1955, said frontage property was owned by Waitzman; that the 1955 recorded deed conveyed said frontage property to Waitzman, containing the ten-foot-wide path; that the ten-foot-wide path referenced in the 1955 deed is the historical "Mountain Road," which road provided ingress and egress to Plaintiff's Parcel, which historically provided a by-pass from South Mountain Road to Route 202 in Haverstraw; that the "footprint" of said Mountain Road remains at the "property;" that on June 24, 1963, Bamberger, the former owner of Defendant's Parcel and Waitzman executed an agreement which further established Mountain Road as an easement in favor of Plaintiff; that no new public road was ever built and dedicated; that in 1964, William and Anna Metz acquired Defendant's Parcel from Bamberger; that in 1969, William Metz, alone, acquired Plaintiff's Parcel from the Estate of Brinkman; that in 1992, the Defendant's Parcel changed ownership, and in 1980, the Plaintiff's Parcel changed ownership; and that the ten-foot-wide path which includes Mountain Road, is the only access to Plaintiff's Parcel.

Based on the aforementioned history, Plaintiff argues that the 1955 Waitzman deed conveyed an expressed easement over the ten-foot-wide path which corresponds with the historical Mountain Road. As such, Plaintiff avers that he has met his burden to demonstrate the long-term historic use and the intent of the grantor of the easement. Plaintiff also argues that same was not an easement or right of way by prescription or by necessity; rather, he contends, it was an easement and right of way by grant, based on the following: that the easement contained in the 1955 Waitzman deed states that the grantor intended that "adjoining owners" continue to have access to the Mountain Road; that the existence of the easement was further ratified in the Mountain Road easement which provided for a land swap between Bamberger and Waitzman; that the agreement acknowledged that an easement for ingress and egress existed which traversed the lands of Bamberger and Waitzman, and it was known as the Mountain Road; that the agreement provided for the termination of the easement upon a condition subsequent – dedication of a new public road – but that said condition subsequent never occurred; and that the condition subsequent was required to insure that the northwest area of lands of Waitzman, which is now Plaintiff's Parcel, were not landlocked.

Plaintiff also contends that there are no facts which would support the notion that the easement was ever extinguished or otherwise unequivocally demonstrate that any owner of what is now Plaintiff's Parcel, intended to permanently relinquish all rights to the easement.

As to Defendant's affirmative defense – that the easement was terminated by merger – Plaintiff argues

that while William Metz, at one point in time, had an interest in both Defendant's Parcel and Plaintiff's Parcel, merger is not effective, and an easement is not extinguished as a result of the merger, if the person owning both the dominant and servient estates only holds title to the servient tenement as tenant in common with another; that said person must own the entire title to both lots in fee if the easement is to terminate by merger. Plaintiff further argues that ownership in the two lots was never identical because William Metz and Anna Metz owned Defendant's Parcel from 1964-1992; yet, William Metz, alone, owned Plaintiff's Parcel from 1969-1980. Plaintiff contends that the interest of Anna Metz in Defendant's Parcel defeats any termination of the easement by merger because the ownership of the two lots was not identical.

In the alternative, Plaintiff avers that the conditions for an easement of necessity were met as of the time Plaintiff's Parcel was conveyed out, because there was unity of ownership of the "mother" parcel under the Metz's, the "mother" parcel was separated into two parcels, and a "daughter" parcel (Plaintiff's Parcel) became landlocked. Plaintiff further avers that an easement by necessity was created when William Metz sold Plaintiff's Parcel in 1980.

In opposition to Plaintiff's Motion, and in support of its Cross-Motion, Defendant contends that a complete unity of title existed in William Metz, which extinguished any easement benefiting Plaintiff because, between 1969-1980, the Plaintiff's Parcel and the Defendant's Parcel were both owned by William Metz ("Metz") (Metz having acquired the Defendant's parcel in 1964 from Bamberger and the Plaintiff's Parcel in 1969 from the Estate of Brinckmann). Defendant further contends that these two deeds establish Metz's concurrent ownership of Defendant's Parcel and Plaintiff's Parcel sufficient to invoke the doctrine of merger to extinguish any easement or right of way in the old Mountain Road.

Defendant argues that in 1969, when Metz individually acquired title to Plaintiff's Parcel, all estates in Plaintiff's Parcel merged in Metz and any easement or right of way was extinguished. Defendant argues further that Metz had no need to use the easement to gain ingress or egress from the northwest area of the lands of Waitzman, which was his property in fee simple. Defendant avers that the easement was extinguished as a matter of law because all estates were held by William Metz, the beneficiary of the grant who no longer had the need to use it any differently than his fee.

In reply, as to the issue of merger, Plaintiff notes that Defendant all but ignores Anna M. Metz's ownership interest in the Defendant's Parcel, thereby enabling Defendant to maintain its position that William Metz was the owner of both parcels, thus creating the merger. On the other hand, Plaintiff maintains his position that where ownership of two lots are never identical, merger cannot occur, and thus, there was no termination of the easement.

As to the issue of easement by necessity, Defendant contends that Plaintiff's lot is surrounded by some vacant and undeveloped properties. Defendant also contends that there are lands to the south and the north that are vacant and not developed and could provide Plaintiff access to nearby public

roads. Defendant avers that there is no showing of what, if any, efforts were made to obtain access from the adjacent vacant and undeveloped properties and that, therefore, the Court cannot conclude that it is “absolutely necessary” to obtain access to Plaintiff’s Parcel over Defendant’s land. Defendant further avers that public record shows that everyone other than Plaintiff has negotiated with their adjacent neighbors to obtain access to the public road. Defendant argues that Plaintiff has not disclosed whether he had actual or constructive knowledge of the conditions of the area before acquiring his parcel given that his father is in the chain of title.

Further in reply, Plaintiff avers that the aforementioned agreements amongst neighbors relate to a nearby subdivision (Mountainview Estates Subdivision), that Plaintiff’s Parcel is not part of said subdivision, and that there would have been no reason for the owners of property in that subdivision to include Plaintiff’s Parcel, or how or why the owners within the Mountainview Estates Subdivision would include the Plaintiff’s Parcel in their homeowners’ association.

DISCUSSION

The remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent “must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez, supra*.

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dept. 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dept. 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even “arguable,” the motion must be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre, supra*.

At bar, both parties move for summary judgment. Neither party is contesting the location of and or dimensions of the ten-foot-wide path at issue. It is also uncontested that in 1964, William and Anna Metz acquired Defendant’s Parcel from Bamberger; and that in 1969, William Metz, **alone**, acquired Plaintiff’s Parcel from the Estate of Brinkman. What is contested is the application of the merger doctrine. Plaintiff contends that ownership of the two lots at issue were never identical, and that as aforesaid, only prior owner William Metz, alone, owned both parcels at one time; hence, merger cannot occur, and thus, there was no termination of the easement. Notably, in its moving papers, Defendant stays completely silent to Anna Metz’s ownership of only one parcel while making the

argument that William Metz's ownership of both parcels invokes the merger doctrine to extinguish the easement.

“The merger doctrine proceeds from a recognition that a person cannot have an easement in his or her own land because all the uses of an easement are fully comprehended in the general right of ownership (*Beekwill Realty Corp. v. City of New York*, 254 NY 423, 426; 2 Warren's Weed, New York Real Property, Easements, §3.03 [4th ed]). Consequently, when the dominant and servient estates become vested in one person, the easement terminates. At that point, the easement no longer serves a purpose and the owner may freely use the servient estate as its owner (*see*, Restatement of Property §497).

Where, however, only a portion of the dominant or servient estate is acquired, there is no complete unity of title and there remain other dominant owners whose rights are inviolate. The easement rights of these owners cannot be extinguished by a conveyance to which they are not a party. An easement ceases to exist by virtue of a merger only when there is a unity of title of all the dominant and servient estates (*see*, 28A CJS, Easements, §123[b], at 307 [an easement is “not extinguished under the doctrine of merger by the acquisition by the owner of the dominant or servient estate to title to only a fractional part of the other estate”]; Restatement of Property §497, comment c.)” *Will v. Gates*, 89 N.Y.2d 778, 680 N.E.2d 1197, 658 N.Y.S.2d 900 (1997).

“It is fundamental that where the title in fee to both the dominant and servient tenements become vested in one person, an easement is extinguished [by merger]” (*Castle Assoc. v. Schwartz*, 63 A.D.2d 481, 486, 407 N.Y.S.2d 717; *see also*, *Riccio v. De Marco*, 188 A.D.2d 847, 591 N.Y.S.2d 569).” *See*, *Seebaugh v. Borruso*, 220 A.D.2d 573, 632 N.Y.S.2d 800 (2nd Dept 1995).

Here, Plaintiff argues that the ownership of the two lots are not identical since Anna Metz was an owner of Defendant's Parcel, while William Metz alone owned both parcels at one time. Notably, Defendant initially left Anna Metz's ownership of just one parcel out of its analysis. Notwithstanding that neither the CPLR nor this Court's Part Rules permit a Reply on a Cross-Motion, this Court will consider that portion of Defendant's Reply, wherein, Defendant subsequently added Anna Metz to the analysis. As such, based on the aforementioned holdings of the Court of Appeals and Appellate Division, Second Department, it cannot be said that *Cowan v. Carnevale*, 300 A.D.2d 893 [3d Dept. 2002] stands for the proposition that because Anna Metz is the wife of William Metz, her easement rights were extinguished by a conveyance to which she was not a party.

The dominant and servient estates were not vested in one person, therefore merger did not occur and the easement was not extinguished under the merger doctrine. Upon this holding, the remaining contentions are academic.

In light of the foregoing, it is hereby

ORDERED, Plaintiff's Motion (Motion Seq. No. 1) for Summary Judgment, as against Defendant, is GRANTED and, as such, this Court declares the continued easement for ingress and egress over the Defendant's Parcel, in favor of the Plaintiff's Parcel. Plaintiff shall submit Judgment on notice within forty-five (45) days of the date of this Decision & Order; and it is further

ORDERED, Defendant's Cross-Motion (Motion Seq. No. 2), for Summary Judgment as against Plaintiff, is DENIED in its entirety.

The foregoing constitutes the Decision & Order of this Court.

Dated: New City, New York
March 27, 2024

ENTER:



HON. DAVID FRIED, A.J.S.C.
STATE OF NEW YORK
COUNTY OF ROCKLAND