Matter of Marchand v New York State Dept. of Envt.l Conservation
2009 NY Slip Op 33292(U)
September 17, 2009
Sup Ct, Nassau County
Docket Number: 13478/06
Judge: William R. LaMarca

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

PRESENT: HON. WILLIAM R. LaMARCA
Justice

In the Matter of the Application of RONALD MARCHAND, JR. and MARGARET MARCHAND,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78 of the CPLR and a Declaratory Judgment Pursuant to Article 15 of the Real Property Actions and Proceedings Law

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and INCORPORATED VILLAGE OF BAYVILLE,

Respondents-Defendants.

Motion Sequence #5, #6
Submitted July 13, 2009

INDEX NO: 13478/06

The following papers were read on these motions:

MARCHAND Notice of Motion.....1
Petitioners' Memorandum of Law.....2
BAYVILLE's Notice of Cross-Motion.....3
BAYVILLE's Memorandum of Law.....4
Reply Affirmation and in Opposition to Cross-Motion.....5
Petitioners' Reply Memorandum of Law.....6
Reply Affirmation on Cross-Motion.....7
Reply Memorandum of Law.....8

Petitioners-plaintiffs, RONALD MARCHAND, JR. and MARGARET MARCHAND (hereinafter referred to as "petitioners"), move for summary judgment in this hybrid

declaratory judgment/Article 78 proceeding to quiet title pursuant to Real Property Actions and Proceedings Law § 1501. Respondent-defendants, INCORPORATED VILLAGE OF BAYVILLE (hereinafter referred to as the "VILLAGE"), opposes the motion and cross-moves for summary judgment declaring that the "Traveled Way" is a VILLAGE street by prescription. The motion and cross-motion are determined as follows:

Petitioners, RONALD and MARGARET MARCHAND, are the owners of a parcel of real property known as 100 Washington Avenue in Bayville.[1] The property abuts Mill Neck Creek and is improved with a one-family dwelling. Petitioners acquired title to the property on March 24, 1998. The property is served by an easement, or right of way, which leads from Wilson Avenue, the nearest public street to the north, to petitioners' property.[2] The easement runs over a dirt path known as Washington Avenue, or Shore Road, or by its more quaint name, the "Traveled Way."

On April 8, 2004, the VILLAGE submitted an application to the respondent, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (hereinafter referred to as the "DEC"), for a tidal wetlands permit to improve drainage and treat stormwater runoff in the vicinity of petitioners' property. The proposed improvements included the installation of new drainage piping, leaching basins, and stormceptor units. The improvements were to be placed beneath a section of the Traveled Way, where it continues along the southerly portion of petitioners' property. Petitioners filed an objection

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[1]The property is designated as Section 29, Block 9, Lots 362 and 1012 on the land and tax map of Nassau County.

[2]The property is burdened by easements in favor of the two abutting properties to the south to enter petitioners' property in connection with their septic systems.

with the DEC on the ground that the VILLAGE had failed to obtain a utilities easement.[3] In response, the VILLAGE asserted that Traveled Way had become a VILLAGE street by prescription.

On July 24, 2006, the DEC granted the VILLAGE's application and issued the tidal wetlands permit. The permit provided that it "does not convey to the permittee any right to trespass upon the lands or interfere with the riparian rights of others in order to perform the permitted work nor does it authorize the impairment of any rights, title, or interest in real or personal property held or vested in a person not a party to the permit."[4]

On August 21, 2006, petitioners' commenced this proceeding which seeks to review the DEC's determination granting a permit, and to establish petitioners' title to the affected property. Petitioners also request an injunction prohibiting the VILLAGE from installing any drainage improvements on their property. By order, dated July 26, 2007, the Court denied the VILLAGE's motion to dismiss the complaint on the grounds of failure to join the abutting property owners and failure to state a cause of action.[5] In the same order, the Court granted the DEC's motion to dismiss the Article 78 proceeding after finding that its decision to issue the permit was not arbitrary.

Petitioners now move for summary judgment declaring that they are the owners of the portion of the Traveled Way running across their property and that the Traveled Way

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[3]Petitioners' ex. "M".

[4]The DEC also awarded the VILLAGE a $900,000 grant to fund the drainage improvement, but the grant was to expire if the project was not completed in a timely fashion.

[5]The Court's order was affirmed by the Appellate Division, Second Department, *Marchand v DEC*, 51 AD3d 795 (2d Dept 2008).

is not a public street by prescription. Petitioners further request injunctive relief prohibiting the VILLAGE from installing the drainage improvements beneath their portion of the Traveled Way or entering their property for the purpose of installing the improvements. Petitioners assert that the Traveled Way is used for egress only by petitioners, the owners of abutting properties which are also served by the easement, and their guests and invitees. Petitioners assert that they "chase away sightseers and joy riders" and deny that the Traveled Way is used by the general public as a street. While petitioners' acknowledge that the VILLAGE provides municipal services, they deny that the VILLAGE maintains the Traveled Way or has taken control over it. Petitioners stress that they and the other property owners regrade the Traveled Way at least once a year, repair potholes in the road, and clear it of debris.

The VILLAGE cross-moves for summary judgment declaring that the Traveled Way is a VILLAGE street by prescription. The VILLAGE submits affidavits from long-term residents, stating that the Traveled Way was open to the public for many years before petitioners took title to their property in 1998. The VILLAGE stresses that it provides municipal services to the owners of the properties along the Traveled Way, including garbage disposal, water, snow plowing, sanding, and fire protection.

Although the VILLAGE claims that the Traveled Way is a VILLAGE street by prescription, it does not challenge plaintiffs' title to the portion of the Traveled Way which crosses petitioners' property. "In the absence of a statute expressly providing for the acquisition of the fee, or of a deed from the owner expressly conveying the fee, when a highway is established by dedication or prescription, or by direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in

the landowner" (*Bashaw v Clark*, 267 AD2d 681, 699 NYS2d 533 [3d Dept 1999]). "[T]he absence of a provision for compensation in legislation creating a public highway is itself evidence that only an easement was acquired" (Id).

Village Law § 6-626 provides that "[a]ll lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such." The statute makes no provision for compensation of the owner when the village asserts that particular property has become a village street by prescription. Moreover, pursuant to the analogous provision of the Highway Law, lands which have been used by the public as a highway for ten years or more become a highway "with the same force and effect as if it had been duly laid out and recorded as a highway" (Highway Law § 189). This provision creates only a public easement and leaves title to the lands unaffected (*Ashland Oil & Refining Co. v New York*, 26 NY2d 390, 310 NYS2d 500, 258 NE2d 915 [C.A.1970]).

Since Village Law § 6-626 similarly does not provide for acquisition of the fee, the VILLAGE did not acquire the fee to the Traveled Way, regardless of whether it is a VILLAGE street by prescription. Accordingly, petitioners' motion for summary judgment is granted to the extent of declaring that petitioners hold title to the portion of the Traveled Way which runs across their property. The Court will next proceed to consider whether the Traveled Way is a VILLAGE street by prescription.

While naked use by the public is not sufficient for a private road to become a street, prescription will arise where the village has assumed control of the thoroughfare, as by repairing and maintaining it or performing other services (*Impastato v Catskill*, 55 AD2d

714, 389 NYS2d 152 [3rd Dept 1976]). The burden of establishing both public use and the village's assumption of control is upon the party claiming that the road has become a public street by prescription (Id).

Based upon the affidavits of residents and VILLAGE officials, the Court concludes that through public use and the VILLAGE's assumption of control, the Traveled Way became a VILLAGE street many years before petitioners took title to their property. However, Highway Law § 205 provides that "every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right-of-way." The statute establishes a "six-year limitation on the life of an unused public easement" and, provided the village has not acquired the fee to the land in question, applies to village streets (*Romanoff v Scarsdale*, 50 AD3d 763, 856 NYS2d 168 [2d Dept 2008]).

Once a road has become a village street by prescription, there is a presumption in favor of continuance (*Smigel v Rensselaerville*, 283 AD2d 863, 725 NYS2d 138 [3d Dept 2001]). The burden of proving abandonment by nonuse is upon the party who asserts that the road is no longer a village street (Id). The municipality's intention regarding the road is irrelevant (*Daetsch v Taber*, 149 AD2d 864, 540 NYS2d 554 [3d Dept 1989]). Occasional, limited use will not defeat a finding of abandonment (*Abess v Rowland*, 13 AD3d 790, 787 NYS2d 143 [3d Dept 2004]). The question of whether a street has been abandoned by nonuse is ordinarily a factual question (*Smigel v Rensselaerville*, *supra*).

According to the affidavit of Victoria Siegel, the Mayor of BAYVILLE, petitioners erected a barricade of earth-filled planters across the Traveled Way in September 1998. While the VILLAGE succeeded in restoring access to the Traveled Way for emergency vehicles, the general public appears to have used the road only on an occasional basis since that date. Petitioners also assert that at high tide the Traveled Way is "covered by water and impassable." The Court concludes that petitioners have established *prima facie* that the public's right of way has been abandoned by nonuse for over six (6) years. Thus, the burden shifts to the VILLAGE to establish an issue of fact as to whether the Traveled Way continues to be a public street (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]).

In opposition, the VILLAGE submits the affidavit of Deborah Valentine who has lived on Bayview Avenue, a continuation of the Traveled Way south of plaintiffs' residence, since 1963. Ms. Valentine states that the Traveled Way "is a well-traveled road open to the public for pedestrians and motor vehicles, and I have observed many of the residents from Bayview Avenue use [the Traveled Way] as it crosses [petitioners' residence] on a frequent basis as a main thoroughfare to get to the center of the Village...from 1963 on a continuous basis to the present."

The VILLAGE also submits the affidavit of Gerome Enea, petitioners' predecessor in title. Mr. Enea asserts that use was "continuous and open" since the 1950's but does not address the public's access after 1998. Finally, the VILLAGE submits the affidavit of Edith Whitehead, who has lived in BAYVILLE since 1917. Ms. Whitehead states that the Traveled Way was a "well-traveled public road used by all of the residents of the Village" from the time she was a young child. Ms. Whitehead states that she used the Traveled

Way "on a continuous basis for almost fifty years," and that it has been a well-traveled road open to the members of the public as a main thoroughfare.

The Court concludes that the VILLAGE has carried its burden of showing a triable issue as to whether the Traveled Way continues to be a public street or whether that status has been abandoned. Therefore, petitioners' motion for summary judgment is denied to the extent of declaring that the Traveled Way is no longer a public street by prescription. The VILLAGE's motion for summary judgment declaring that the Traveled Way is a VILLAGE street by prescription is denied as well. "It is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]).

Contrary to the VILLAGE's argument, petitioners request for an injunction prohibiting the VILLAGE from installing the drainage improvements on their property or entering their property for the purpose of installing the improvements is not moot. The VILLAGE notes that, on August 24, 2006, counsel stipulated before Justice Brennan that the VILLAGE would not "commence any work pursuant to [the] DEC permit" without obtaining petitioners' permission. However, since the stipulation was in settlement of petitioners' application for a preliminary injunction, the Court construes the stipulation as restraining the VILLAGE from commencing the drainage improvement work only until final judgment in the present action.

"The essence of trespass to real property is injury to the right of possession, and such trespass may occur under the surface of the ground" (*Bloomingdale's, Inc. v Transit Authority*, 2009 N.Y. LEXIS 1846 [C.A.2009]). Equitable relief can be a proper remedy to prevent repeated or continuing trespasses, even where damages are slight and nominal (*Warm v New York*, 308 AD2d 534, 764 NYS2d 483 [2d Dept 2003]). However, equitable relief may be withheld as a matter of discretion, and must be denied where petitioner has an adequate remedy at law (Id).

It appears that the VILLAGE is redesigning its drainage and improvement project and does not intend to trespass upon petitioners' premises. Nevertheless, if the VILLAGE decides to install the improvements under petitioners' portion of the Traveled Way, it must make every reasonable effort to justly compensate petitioners by negotiation and agreement (Eminent Domain Procedure Law § 301). Absent an agreement with the VILLAGE, petitioners may bring a proceeding for determining just compensation (Eminent Domain Procedure Law § 501 et seq.).[6] While the VILLAGE's voluntary decision to relocate the project is not grounds for denying equitable relief, petitioners have an adequate remedy in Eminent Domain, if the VILLAGE trespasses upon their property. Accordingly, petitioners' motion for an injunction prohibiting the VILLAGE from installing drainage improvements beneath their portion of the Traveled Way or entering their property for the purpose of installing the improvements is denied.

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[6] The court notes that even if the Traveled Way is determined to still be a public street, the VILLAGE would be required to obtain petitioners' permission to use the public easement for another purpose, such as the installation of drainage improvements (See *Ashland Oil & Refining Co. v New York, supra,*).

All further requested relief not specifically granted is denied.

This constitutes the decision and judgment of the Court.

Dated: September 17, 2009

WILLIAM R. LaMARCA, J.S.C.

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