SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

SHUTTLE CONTRACTING CORP.,

Plaintiff(s),

-against-

MOTION #001
INDEX #4399/11
MOTION DATE:
June 10, 2011

BEHZAD PEIKARIAN and FABIAN PEIKARIAN,

Defendant(s).

The following papers read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....1
Reply Affirmation.....1

Upon the foregoing papers, it is ordered that the motion by defendants, Behzad Peikarian and Fabian Peikarian ("Peikarians") seeking an Order of this Court pursuant to CPLR §3211 (a)(1) and (7), dismissing plaintiff's, Shuttle Contracting Corp.'s ("Shuttle") complaint and/or alternatively treating the instant motion as a Summary Judgment motion pursuant to CPLR §3211(c), is determined as hereinafter set forth.

This zoning and/or real property action arises from an underlying cause of action where Shuttle alleges that the Peikarians improperly expanded the scope of an access easement, owned by Shuttle for the Peikarians' benefit, when they obtained approvals to subdivide their real property which included a plan to construct a driveway across a part of the easement. Shuttle is seeking a declaratory judgment determining that the defendants are not permitted to construct a driveway on a certain part of the easement and for a permanent injunction enjoining the defendants from constructing the driveway. Shuttle also seeks damages of no less than $250,000 in the event that the driveway is constructed on the easement.

FACTS

The basic facts are not in dispute. The Peikarians are owners of real property, located at

199 Dwight Lane in Village of Great Neck ("Village"), County of Nassau, specifically described as Section 1, Block 201, Lot 47, 48, and 49. Shuttle owns a parcel of property, a private road, known as Dwight Lane in Great Neck, County of Nassau and specifically described as Section 1, Block 201, Lot 57. Shuttle acquired the real property subject to an easement granting an unlimited right of way to "others". The deed conveying such easement in 1950, provides in relevant part:

> "...WHEREAS, the Second Party desires to acquire from the First Party, and the First Party is willing to grant to the Second Party, a right of way over the said private lane, known as Dwight Lane, all as hereinafter more particularly provided:...
> That said....First Party, hereby gives and grants to...the Second Party, her heirs and assigns,...an unlimited right of way, in common with others, over said premises known as Dwight Lane, as herein above more particularly described, in either direction;
> Together with the right to use in common with others, the gas mains, water main, sewerage mains, electric light lines and telephone lines heretofore constructed or which may hereafter be constructed on or under Dwight Lane;
> Subject, however, to any outstanding and subsisting covenants, agreements, easements or restrictions affecting the use of said premises, contained or referred to in prior deeds or instruments of record."

The Peikarians sought to divide one lot into three building lots. In February 2006, they applied to the Village Zoning Board of Appeals for a variance as the subdivision plans caused the proposed buildings to be non complaint with the frontages as set forth in the Village Code. The Zoning Board approved their application.

The building proposed for Lot 47 included a construction of a driveway which crossed over a portion of an easement owned by Shuttle and for the benefit of the Peikarians, specifically a grassy area referred to as "the bulge". In 2007, the Peikarians applied to the Village Planning Board for approval of the proposed subdivision. In June 2007, the Planning Board conducted a preliminary hearing where Shuttle objected to the plans, complaining that the Peikarians had no right to construct a driveway crossing over its property. The proposed subdivision, however, was approved by that Board.

In June 2007, Shuttle commenced an Article 78 proceeding in this Court to annul the Planning Board's decision to approve the Peikarians's subdivision, alleging that the Peikarians had no right to expand the easement, and such easement was limited to a width of 30 feet, clearly excluding the bulge area. The Court upheld the Board's termination, holding that the Board had broad discretion and that its decision, supported by substantial evidence, was not arbitrary or capricious. The Court also noted that Shuttle failed to challenge the decision of the Zoning Board of Appeals. Shuttle appealed the Court's Order to the Appellate Division, Second Department, where it was affirmed; however, the court held that Shuttle was not precluded from commencing a private enforcement action against the Peikarians.

In March, 2011, Shuttle filed a summons and complaint in this Court seeking: a declaratory judgment determining that the Peikarians are not permitted to construct a driveway

on the subject easement; a permanent injunction enjoining the Peikarians from construction the driveway; and damages for unauthorized use of the subject easement.

Shuttle contends that the 1950 deed referencing the subject real property sets forth the metes and bounds of the easement and the 1917 deed which conveyed the right of way, indicated that the width of the easement is 30 feet. As the bulge is outside of the metes and bounds, it is not included in the right of way. Further, Peikarians' June 12, 2006 letter to Shuttle requesting to purchase the "bulge", supports a concession that they cannot cross and/or use the bulge without Shuttle's consent. Additionally, the bulge has never been used as a right of way and resultantly, trees have grown in the area. Shuttle argues that Peikarians' proposed construction is destructive as it will require the removal of those trees. In addition to its references to exhibits already submitted by the Peikarians, Shuttle attaches a radius map of the real property, a copy of the 1917 deed, and Peikarians' June, 2006 letter as evidence.

The Peikarians argue that the terms of the easement provide that the parties have an unlimited right of way and the 30 feet measurement set forth in the 1950 deed, is for descriptive purposes. Therefore, the deed describes the easement as "Dwight Lane" which includes the bulge. Further, Shuttle is not a servient estate as the subject easement is not actually attached to any real property it owns. Therefore, its rights are not impacted by the proposed driveway construction. The Peikarians submit the following as evidence: copies of the pleadings; the survey of the subject real property; a copy of the 1950 deed; a map of the proposed subdivision; the October 4, 2006 Resolution of the Village Zoning Board of Appeals; the title report of the subject real property; a copy of the June 30, 2008 Order of the Nassau County Supreme Court by the Hon. F. Dana Winslow; a copy of the decision from the Appellate Division, Second Department; a copy of the 1917 deed; and the minutes of the July 19, 2007 Village Planning Board.

Generally, a motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Fontanetta v. Doe,* 73 A.D.3d [2nd Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10 at 22). In sum, the analysis is two-pronged; the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

For evidence to considered as documentary, it must be unambiguous, authentic, and undeniable. The term "documentary evidence" as referred to in CPLR 3211(a)(1) typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes "[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20, *Teitler v. Max J. Pollack & Sons,* 288 AD2d 302 [2nd Dept 2001]).

On such a motion, if the documentary evidence submitted by the defendant refutes the plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a

matter of law, the motion may be granted (see *Logatto v. City of New York*, 51 AD3d 984 [2 Dept 2008]). Here, the evidence submitted by the Peikarians is documentary and not only does it support their arguments, it clearly refutes Shuttle's claims.

However, on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must determine whether, accepting the facts alleged in the complaint as true and according the plaintiff the benefit of every possible inference, the facts as alleged fit within any cognizable legal theory (see *Sarva v. Self Help Community Services, Inc.*, 73 AD3d 1155 [2nd Dept 2010]). Shuttle has set forth a cognizable cause of action in its complaint and this branch of Peikarians' motion cannot be granted.

It is well settled that where the language of the grant contains no restrictions or qualifications and the purpose of the easement is to provide ingress and egress, any reasonable lawful use within the contemplation of the grant is permissible (see *J.C. Tarr, Q.P.R.T. v. Delsener*, 19 AD3d 548 [2nd Dept 2005]). Said another way, the rule of construction is that the reservation refers to such right of way as is necessary and convenient for the purpose for which it was created and includes any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant (see *Mandia v. King Lumber and Plywood Co., Inc.* 179 AD2d 150 [2nd Dept 1992], *Albright v. Davey*, 68 AD3d 1490 [3rd Dept 2009]).

The extent of an easement is limited by the language of the grant, and its terms are to be construed **most strongly against the grantor in ascertaining the extent of the easement** (emphasis added). Where, as here, an easement is granted in general and broad terms, the rule of construction is to construe the extent of its use as is necessary and convenient for the purpose for which the easement was created (see *Somers v. Shatz*, 22 AD3d 565 [2nd Dept 2005]).

As to prevailing issues of the underlying cause of action of whether the construction of a driveway across the easement is a permissible use and whether the bulge is included in the easement, this Court determined as follows:

> "...the Peikarians' proposed use is within the scope of the grant. In this respect, Mr. Leiberman of Shuttle, a sophisticated businessman, should have contemplated that the easement would be used for ingress and egress to the property owned by the Peikarians...
>
> ...
>
> [Shuttle's] assertion that this constitutes a *de facto* taking is also rejected by this court. A *de facto* taking requires a physical entry by the condemner, a physical ouster of the owner, a legal interference with the owner's power of disposition of the property [citations omitted]. No such action has taken place here." (see Notice of Motion, Exhibit J).

In addition, the survey incorporating the 1950 deed, clearly indicates that Dwight Avenue includes the "bulge", and the deed provides for ingress and egress across Dwight Avenue. A careful review of the 1917 deed notes that it sets forth the width of the easement at "about 30 feet", which indicates that the measurements of the easement are not recorded in

absolute figures. As such, the documentary evidence indicates that the "bulge" is part of Dwight Avenue. Further, the language in the easement at bar, provides for foreseeable development and the construction of the driveway is an anticipated use of the easement.

In sum, to succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim (see *New York Community Bank v. Snug Harbor Square Venture,* 299 AD2d 329 [2nd Dept 2002]). As the Peikarians proffered documentary evidence which sufficiently contradicted the allegations in the complaint, there is no need to convert the instant motion to that of Summary Judgment. Further, before this Court can covert this motion to a Summary Judgment motion, adequate notice must be given to both parties (*see Farrell v. Kiernan*, 213 AD2d 373 [2nd Dept 1995]).

Regarding that branch of the Peikarians' motion, pursuant to CPLR 3211(a)(7), this branch of the instant motion is rendered moot as the complaint is dismissed pursuant to CPLR§3211(a)(1)..

Accordingly, the defendants' motion, pursuant to CPLR §3211(a)(1), is granted and the complaint of plaintiff is dismissed.

Dated: AUG 15 2011

J.S.C.

ENTERED
AUG 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE