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SHORT FORM ORDER

INDEX No. 09-15715

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 - MotD

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WILD OAKS, LLC,

Plaintiff,

- against -

JOSEPH A. BEEHAN, JR. GENERAL CONTRACTING, INC. and JOSEPH A. BEEHAN, JR.,

Defendants.

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Upon the following papers numbered 1 to 35 read on this motion to dismiss the defendants' affirmative defenses ; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 26 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 27-33 ; Replying Affidavits and supporting papers 34-35 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the plaintiff, Wild Oaks, LLC, for an order pursuant to CPLR 3211 (b) dismissing the defendants' first, second, third and fourth affirmative defenses interposed in their answer is granted to the limited extent that the fourth affirmative defense, that the plaintiff has unclean hands, is dismissed, and the motion is otherwise denied.

In 2009, Wild Oaks, LLC (Wild Oaks) commenced this action to permanently enjoin the defendants Joseph A. Beehan, Jr. General Contracting, Inc. and Joseph A. Beehan from utilizing a portion of a common driveway that traverses the plaintiff's property and alleging that they trespassed on its property and were in violation of restrictions contained in a 1983 declaration recorded with the Suffolk County Clerk. Thereafter, by order dated August 21, 2009, the defendants' cross-motion for dismissal of the complaint and to cancel the lis pendens was granted. By decision and order dated, dated October 28, 2010, the Appellate Division, Second Judicial Department found that the evidentiary proof submitted by the defendants did not refute the plaintiff's allegations. Accordingly, it modified the August 21, 2009 order by deleting the provisions which granted those branches of the defendants' cross motion which sought dismissal of the complaint and cancellation of the notice of pendency. The complaint was restored and the matter was remanded to Supreme Court.

The Appellate Division set forth the circumstances from which this action arose. In 1981, the defendant, Joseph A. Beehan, Jr., subdivided certain real property he owned in Southampton, and in 1982, he sold one lot (hereinafter Lot 2) to Nathan Howard. In their contract of sale, Beehan reserved a right to re-acquire a 25 foot strip of land on Lot 2, represented by a shaded area on the subdivision map (hereinafter the shaded area), in the event that he acquired a landlocked parcel to the east of Lot 2 which became known as Lot 3. The contract provided that, in such event, Howard, and any subsequent owner of Lot 2, would retain an easement over the

shaded area, and Beehan and any subsequent owner of Lot 3 would have an easement over a 25-foot strip of land on Lot 2 which lay immediately south of the shaded area. The purpose of the reciprocal easements was for the owners of Lots 2 and 3 to share a common driveway to their respective residences.

On February 24, 1983, Howard and Beehan recorded with the Suffolk County Clerk an executed Declaration which, provided, inter alia, that the shaded area and the contiguous 25-foot strip "shall not be made available or be used as a right-of-way for access to any Lot, plot, piece or parcel of land other than parcels 2 and 3, unless such right-of-way is approved by the Planning Board of the Town of Southampton, or its successors." Beehan acquired Lot 3, Howard reconveyed the shaded area to Beehan, and the shaded area was merged with Lot 3 to form a flagpole lot. Thereafter, Lots 2 and 3 used the common driveway comprised of the shaded area and the contiguous 25-foot strip for street access.

On July 30, 1997, the defendant Joseph A. Beehan, Jr. General Contracting, Inc. (hereinafter Beehan Contracting), purchased Lot 4, a landlocked parcel to the east of Lot 3. In 1998, Beehan Contracting applied to the Planning Board for, inter alia, permission to use the common driveway of Lots 2 and 3 for the purpose of obtaining access to Lot 4. The Planning Board conditioned approval of the application upon "submission of a common driveway easement in a form acceptable to the Town Attorney," and the applicant's satisfactory completion of improvements to the driveway recommended by the Director of Engineering. Thereafter, Beehan and Beehan Contracting entered into an easement agreement permitting Lot 4 to use the shaded area and other areas on Lot 3. The defendants did not obtain consent for an easement from the owner of Lot 2 permitting them to use the 25-foot strip on Lot 2. The Director of Engineering subsequently conducted an inspection, and on April 28, 2003, wrote to the Planning Board, recommending engineering approval of the common driveway plan for the benefit of Lot 4.

In 2006, the plaintiff, Wild Oaks, LLC, purchased Lot 2 from its former owner, Nathan Howard.

In 2009, Wild Oaks commenced this action to permanently enjoin the defendants from utilizing the portion of the common driveway on Lot 2, alleging that the defendants were in violation of the restrictions in the 1983 Declaration and were trespassing on its property. The complaint alleges that the plaintiff had not given Beehan Contracting permission to use the driveway or the portion of the driveway that crosses over into Lot 2 property, and that it is not within the easement area for access to and egress from the Lot 4 property. The plaintiff alleges that Beehan Contracting is trespassing over the Lot 2 property and seeks to enjoin the defendant from using both the easement area and the portion of the driveway that traverses over the Lot 2 property to gain access to Lot 4. The relief the plaintiff seeks, by way of a preliminary and permanent injunction, is equitable in nature, as the plaintiff seeks no monetary damages (Sohayegh and Bravo Management, LLC v. Sohayegh, 2008 NY Slip Op 30307U [Sup Ct, Nassau County]).

By way of their answer, the defendants assert a first affirmative defense that they have a prescriptive easement over the flag-strip portion of Lot 2 property; a second affirmative defense that the plaintiff's claims are barred by the doctrine of laches; a third affirmative defense that the plaintiff and the plaintiff's predecessors in interest have consented to the location of the driveway (as defined in the complaint) as presently configured, that the defendants have relied thereon to their detriment, and the plaintiff's claims herein concerning the location of the driveway are barred by the doctrines of waiver and estoppel; and a fourth affirmative defense that the plaintiffs come to this court with unclean hands and are not entitled to the equitable relief they seek.

The plaintiff Wild Oaks now seeks an order dismissing the defendants' first, second, third and fourth affirmative defenses pursuant to CPLR 3211 (b).

Pursuant to CPLR 3211 (b), a plaintiff may move, at any time, to dismiss a defendant's affirmative defense on the ground that it "has no merit." When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law. In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see* Fried v Tucker, 27 Misc3d 871 [Sup Ct, Kings County 2010]). Pursuant to CPLR 3013, statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

This court is mindful of CPLR 3013 and 3018 (b). As set forth in First Data Merchant Services Corporation v Olympia York Builders and Developers, Inc., 14 Misc3d 1228A [Sup Ct, Kings County 2007], "CPLR 3013 states with respect to pleadings that "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences of series of transactions or occurrences intended to be proved and the material elements of each cause or action or defense. CPLR 3018 (b) states, with respect to affirmative defenses, that a "a party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or raise issue of facts not appearing on the face of a prior pleading." While the days of courts strictly construing pleadings ended with the CPLR's liberalization of pleading requirements, there are still the above cited minimum requirements, so that parties and courts will have notice of each defense. In Foley v D'Agostino, 21 AD2d 60 [1st Dept 1964], the Court analyzed the then new CPLR liberalized pleading standards and requirements, holding that "it is clear that under CPLR, the statements in pleadings are still required to be factual, that is, the essential facts required to give notice' must be stated,' and 'a party may supplement or round out his pleading by conclusory allegations... if the facts upon which the pleader relies are also stated.'"

FIRST AFFIRMATIVE DEFENSE-PRESCRIPTIVE EASEMENT

The defendant asserts a first affirmative defense that it has a prescriptive easement on the disputed property.

"Easements may be created by grant, reservation, prescription, estoppel, necessity or implication. The 'servient' estate is that burdened by the easement; the 'dominant' estate is that benefitted by the easement. As against the holder of the dominant estate, a purchaser will be charged with constructive notice of the easement that is open, notorious, and clearly visible.... To create an easement by express grant there must be an unequivocal writing evincing the grantor's intent to create a permanent right of use.... A prescriptive easement may be acquired over land held to be acquired through open, notorious, uninterrupted, and undisputed use for the prescriptive period (ten years) (*see* 12B-34 Purchase and Sale of Real Property §34.04 [2] Easements). To acquire a prescriptive easement, the plaintiff is required to demonstrate by clear and convincing evidence adverse, open and notorious, and continued and uninterrupted, use of property for the prescriptive period, which is ten years. Once these elements are established, the burden shifts to defendants to show the use was permissive, since the presumption arises that the use was hostile" (Long Island Beach Buggy Association, Inc. et al v Town of Islip et al, 58 Misc2d 295 [Sup Ct Suffolk County 1968]; Gorman et al v Hess et al, supra; Lew Beach Company v Carlson, 57 AD3d 1153 [3d Dept 2008]; J.C. Tarr, QPRT v Delsener et al, 19 AD3d 548 [2d Dept 2005]). It is noted, however, in a claim of easement by prescription, seeking permission for use from the record owner negates hostility and absent a clear, unequivocal, open repudiation of permission, the user is not

transformed into a hostile one (City of Tonawanda v Ellicott Creek Homeowners Association, Inc., 58 NY2d 824 [1983]).

In the instant action, it is determined that the plaintiff has not established entitlement to dismissal of the defendant's affirmative defense that there is an easement by prescription over the disputed property. The plaintiff argues that permission was never given by the owner of Lot 2 to the defendants to utilize the easement and driveway, and more particularly, a circular turn-around on her property. Thus, the plaintiff is claiming that the use of the land has been hostile. However, it is noted that at paragraph 27 of the complaint, the plaintiff alleges that the Planning Board of the Town of Southampton required Beehan Contracting to obtain a common driveway easement agreed to by the owners of Lot 2, Lot 3, and Lot 4 properties because the prior Declaration recorded in 1983 specifically stated that the driveway: "Shall not be made available or be used as a right-of-way for access to any Lot, plot piece or parcel of land other than parcels 2 and 3.... (*Emphasis added.*)" This, however, is quoted only partially correctly by the plaintiff, and the allegation will be addressed accordingly.

On June 1, 1999, the Town of Southampton issued a building permit to Joseph Beehan, Jr. for construction of a one family dwelling on Lot 4, along with a garage, swimming pool and porch. A site plan for a common driveway was found to be satisfactory by the Director of Engineering of the Town of Southampton on April 28, 2003. On November 13, 2008, a certificate of compliance was issued for the completed buildings on Lot 4. In 2006, Wild Oaks, whose principal is Linda Hansen, purchased Lot 2 from Howard. The instant action was commenced by filing the summons and complaint on April 27, 2009. By way of the affidavit of Linda Hansen, she avers that she did not know at the time that she purchased Lot 2 that Beehan had constructed a house on Lot 4. She was aware, however, of the contract between Beehan and Howard for the sale of Lot 2 to Howard which provided for reconveyance of a 25 foot strip of land to Beehan if he purchased Lot 3. Beehan did purchase Lot 3 and that 25 foot strip on Lot 2 was reconveyed to Beehan. However, the plaintiff avers that the contract between Beehan and Howard contained restrictions which specifically limited the use of the right of way over the reconveyed strip wherein its use for ingress and egress were to be limited to the occupants of a single one-family dwelling to be built on Lot 3. The plaintiff continues that Beehan and Howard filed with the office of the Clerk of Suffolk County, a Declaration dated February 24, 1983 evincing their agreement and intent.

The Declaration of February 24, 1983 provides, inter alia, "[T]hat on parcels 2 and 3, as herein described in Schedule "B", the 20 (sic) foot wide flagstrips, which provided access to said Lots from Brick Kiln Road, shall not be made available or used as a right-of-way for access to any Lot, plot piece or parcel of land other than parcels 2 and 3, unless such right-of-way is approved by the Planning Board of the Town of Southampton or its successors." The Declaration further provides "[T]hat parcels 2 and 3, as herein described in Schedule "B", shall have a singular, common access point to and from Brick Kiln Road, and vehicular access shall be so limited to only one point."

Pursuant to the Declaration, the flagstrips which provide access to said lots 2 and 3 from Brick Kiln Road were not to be made available or be used as a right-of-way for access to any Lot, plot, piece of parcel of land other than parcels 2 and 3, unless such right-of-way is approved by the Planning Board of the Town of Southampton or its successors, and the parcels shall have a singular common access point to and from Brick Kiln Road. Therefore, it is determined that the Declaration did not require consent from Nathan Howard or a subsequent owner of Lot 2, for the right-of-way to access any other lot, including Lot 4. The Declaration entered into by Howard and Beehan provided that in order to make the right-of-way available for lots other than 2 and 3, approval by the Planning Board of the Town of Southampton was all that was required. The site plan for a common driveway was found to be satisfactory by the Director of Engineering of the Town of

Southampton on April 28, 2003. On July 30, 1998, The Town of Southampton, by Resolution, stated the following, "[T]he Planning Board reviewed the above referenced referral at its July 30, 1998 Planning Board meeting. The Board has no objection to the issuance of the lot frontage variance and is amenable to the common driveway extension subject to the granting of said variance and submission of a common driveway easement in a form acceptable to the Town Attorney. Final approval of the proposed common driveway extension will be conditioned upon satisfactory completion of the improvements outlined in the Director of Engineering July 28, 1998 memorandum." On November 13, 2008, a certificate of compliance was issued for the completed buildings on Lot 4. Thus, the condition that the Planning Board approve of the common driveway to make the right-of-way available for lots other than 2 and 3 was met.

Although not set forth in the complaint, the plaintiff avers in her affidavit that she has a circular turn around that many truck drivers and visitors use which is not within the easement area for access to and egress from the Lot 4 property. However, the plaintiff does not indicate where on Lot 2 this circular turn around is located. Michael Brusseau, the Principal Planner for the Planning Board of the Town of Southampton, by memorandum dated July 28, 1998, made several recommendations, including "a turn around area for emergency vehicles where the topography flattens out. Currently, it is very difficult to turn large trucks and cars around when the existing parking spaces are occupied."

Beehan Contracting purchased the landlocked Lot 4 on July 30, 1997. Thus Beehan had access to Lot 4 for a period of approximately twelve years by crossing over the easement area on Lot 2. The plaintiff has not set forth the period of time the defendant has been using the circular turn around. No surveys or other evidentiary proof has been submitted in support of this claim. This twelve year period exceeds the time necessary to establish a prescriptive easement. While there may be factual issues to be determined concerning whether or not the defendant has a prescriptive easement over the area the plaintiff alleges is not within the easement area for access to and egress from Lot 4, the plaintiff has not demonstrated a basis for dismissal of the affirmative defense of prescriptive easement as a matter of law. Accordingly, that portion of motion (003) which seeks an order dismissing the first affirmative defense is denied.

SECOND AFFIRMATIVE DEFENSE-LACHES

The defendants assert as a second affirmative defense that the plaintiff's claims are barred by the doctrine of laches. Wild Oaks has pleaded that the defendants are trespassing on its property, that it has no remedy at law, and seeks an injunction. The essence of trespass is the invasion of a person's interest in the exclusive possession of land, and a person who enters upon the land of another without permission, whether innocently or by mistake, is a trespasser (Fells v Schneider, 2009 Slip Op 33130U [Sup Ct, Nassau County]). Alleged acts of continuing trespass give rise to successive causes of action under the continuous wrong doctrine (Lucchesi v Perfetto, 72 AD3d 909 [2d Dept 2010]; Hale v Burns et al, 101 AD2d 101[2nd Dept 1905]).

"Under the laches doctrine, equitable relief is barred where a party unreasonably or inexcusably delays in under-taking to enforce rights, with resulting prejudice to the opposing party. While the two essential elements of laches are unexplained delay and prejudice, these elements have been more specifically articulated as follows: (1) conduct on the part of the defendant, or one under whom he claims, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event that relief is accorded to the complainant or that the suit is not barred" (Marriott v Shaw, 151 Misc3d 938 [Civ Ct,

Kings County 1991]; *see also,* Airco Alloys Division, Airco Inc v Buffalo Color Corporation, 76 AD2d 68 [4th Dept 1980]).

In the instant action, the plaintiff alleges that the defendants are traversing on property that is not encompassed by any agreement or declaration, and is doing so without its consent. The easement agreement dated September 18, 1998, was entered into between Joseph A. Beehan Jr. and Joseph A. Beehan, Jr. General Contracting. On June 1, 1999, the Town of Southampton issued a building permit to Joseph Beehan, Jr. for construction of a one family dwelling on Lot 4, along with a garage, swimming pool and porch. A site plan for a common driveway was found to be satisfactory by the Director of Engineering of the Town of Southampton on April 28, 2003. On November 13, 2008, a certificate of compliance was issued for the completed buildings on Lot 4.

In 2006, Wild Oaks, LLC, purchased Lot 2 from Howard, and commenced the instant action by filing the summons and complaint on April 27, 2009. Counsel for the defendants has set forth that the plaintiff's whole basis for the injunction is that her driveway is being used as a turn around. It is noted that the plaintiff was issued a permit dated April 21, 2008, for construction of a two story garage, accessory building renovation, swimming pool and spa, and front entry gate and piers. A second permit was issued December 17, 2009 for construction of a two-story attached garage, covered porch, roofed decks, covered roofed porch, and first and second floor addition to the single family residence. Counsel asserts that the construction of the front entry gate and piers should resolve the issue of the driveway being used as a turn around.

Here, the plaintiff demonstrated that it purchased the subject property in 2006 and was aware of the recorded Declaration dated February 24, 1983. However, Hansen, the principal of Wild Oaks, further contends that she was not aware of the house on Lot 4 at the time she purchased Lot 2. The plaintiff additionally contends that there were documents on public record that limited the use of the common driveway to Lot 2 and Lot 3, but the plaintiff does not indicate that any investigation was done to ascertain whether or not the Town had given approval for the proposed common driveway extension. The defendant made substantial improvements to Lot 4, premised in part upon reliance on the Declaration and the easement agreement required by the Town of Southampton. The plaintiff delayed commencement of this action for three years after purchasing the property, despite the ongoing construction on Lot 4. The plaintiff offers no excuse for the delay in commencing the action and does not address the issue of prejudice to the defendants. Hansen, on behalf of Wild Oaks, avers that consent was needed from the prior owner of Lot 2, Nathan Howard, for Beehan to utilize the easement to the benefit of Lot 4, and that no such consent was obtained. Because consent was not obtained from Howard, the plaintiff contends that Beehan does not have the right to utilize the easement for Lot 4. Hansen has not demonstrated that the Declaration provided a requirement that consent be obtained from the owner of Lot 2 before the easement could be utilized for any lot other than Lot 2 or 3. Nor has Hansen demonstrated that the prior owner, Nathan Howard, ever denied or consented to the common driveway use being extended to accommodate Lot 4. Based upon the Declaration, approval by the Planning Board of the Town of Southampton was all that was required. Based upon the foregoing, a basis for the affirmative defense of Laches has been demonstrated. Accordingly, the application for dismissal of the affirmative defense of laches is denied.

THIRD AFFIRMATIVE DEFENSES-WAIVER AND ESTOPPEL

The defendants assert as a third affirmative defense that the plaintiff and the plaintiff's predecessors in interest have consented to the location of the driveway (as defined in the complaint) as presently configured,

that the defendants have relied thereon to their detriment, and that the plaintiff's claims herein concerning the location of the driveway are barred by the doctrines of waiver and estoppel.

To establish waiver, it is necessary to show that there has been an intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it (*see* Airco Alloys Division, Airco Inc v Buffalo Color Corporation, supra).

"Equitable estoppel prevents one from denying his own expressed or implied admission which has in good faith been accepted and acted upon by another. The elements of estoppel are, with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position"
(Airco Alloys Division, Airco Inc. v Buffalo Color Corporation, supra).

Based upon the findings of the Appellate Division, it has already been established that in 1981, the defendant, Joseph A. Beehan, Jr., subdivided certain real property he owned in Southampton, and in 1982, he sold one lot (hereinafter Lot 2) to Nathan Howard. In their contract of sale, Beehan reserved a right to re-acquire a 25 foot strip of land on Lot 2, represented by a shaded area on the subdivision map (hereinafter the shaded area), in the event that he acquired a landlocked parcel to the east of Lot 2 which became known as Lot 3. The contract provided that, in such event, Howard and any subsequent owner of Lot 2 would retain an easement over the shaded area, and Beehan and any subsequent owner of Lot 3 would have an easement over a 25-foot strip of land on Lot 2 which lay immediately south of the shaded area. The purpose of the reciprocal easements was for the owners of Lots 2 and 3 to share a common driveway to their respective residences.

On February 24, 1983, Howard and Beehan executed the Declaration which was recorded with the Suffolk County Clerk, providing, inter alia, that the shaded area and the contiguous 25-foot strip "shall not be made available or be used as a right-of-way for access to any Lot, plot, piece or parcel of land other than parcels 2 and 3, unless such right-of-way is approved by the Planning Board of the Town of Southampton, or its successors." Beehan acquired Lot 3, Howard reconveyed the shaded area to Beehan, and the shaded area was merged with Lot 3 to form a flagpole lot. Thereafter, Lots 2 and 3 used the common driveway comprised of the shaded area and the contiguous 25-foot strip for street access.

On July 30, 1997, the defendant Joseph A. Beehan, Jr. General Contracting, Inc. (Beehan Contracting), purchased Lot 4, a landlocked parcel to the east of Lot 3. In 1998, Beehan Contracting applied to the Planning Board for, inter alia, permission to use the common driveway of Lots 2 and 3 for the purpose of obtaining access to Lot 4. The Planning Board conditioned approval of the application upon "submission of a common driveway easement in a form acceptable to the Town Attorney," and the applicant's satisfactory completion of improvements to the driveway recommended by the Director of Engineering. Thereafter, Beehan and Beehan Contracting entered into an easement agreement permitting Lot 4 to use the shaded area and other areas on Lot 3. The defendants did not obtain consent for an easement from the owner of Lot 2 permitting them to use the 25-foot strip on Lot 2. The Director of Engineering subsequently conducted an inspection, and on April 28, 2003, wrote to the Planning Board, recommending engineering approval of the common driveway plan for the benefit of Lot 4.

It is determined that the evidentiary submissions consisting of contracts, the agreement between Howard and Beehan, the Declaration, and the decision by the Planning Board establish a basis for the defendants to

assert the defenses of waiver and estoppel. Accordingly, that part of the plaintiff's application which seeks an order dismissing the third affirmative defense of waiver and estoppel is denied.

FOURTH AFFIRMATIVE DEFENSE-UNCLEAN HANDS

In the fourth affirmative defense, the defendants allege that the plaintiff has come to this Court with unclean hands and is not entitled to the equitable relief it seeks.

The Court of Appeals in National Distillers & Chemical Corp. v Seyopp Corp., 17 NY2d 12 [1966], instructed that: "[t]he equitable rule or maxim that he who comes into equity must come with clean hands... is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by their conduct" (*see also,* Columbo v Columbo, Jr., 50 AD3d 617 [2d Dept 2008]). "The unclean hands doctrine rests on the premise than one cannot prevail in an action to enforce an agreement where the basis of the action is 'immoral and one to which equity will not lend its aid'" (Muscarella v Muscarella, 93 AD2d 993 [4th Dept 1983]). Thus, one who has executed an agreement to perpetrate a fraud has 'forfeited his right, in law or equity, to protection or recourse in a dispute involving his accomplices in that very scheme'" (Ta Chun Wan v Chun Wong, citation omitted)" (Dillon et al v Dean., 158 AD2d 57 [2d Dept 1990]).

In her affidavit dated April 23, 2009, submitted in support of the instant application, Linda Hansen avers that the Beehan defendants did not have permission from the Town of Southampton to rent the house on Lot 3 or the house on Lot 4, and that the accessory building is being used illegally for residential purposes. As previously set forth by this court in its order dated August 21, 2009 (Pastoressa J.), the defendants submitted copies of the Builder's Permit No. R1090037 which provides for a two- year rental ending June 29, 2011 for the house on Lot 4, and Permit No. PO62385 for construction of the two story, attached garage, covered porch, roofed decks, covered porch and the first and second floor addition to the single family residence, and that the plaintiff's claims are without basis. The court continued that "a field report from Public Safety for the Town of Southampton indicates that on March 30, 2009, after a complaint was made by an unknown female, the officer inspected the "cottage " and found there were no bedrooms or sleeping facilities, and no cooking facilities on the premises." Again the plaintiff is asserting the same claims in her supporting affidavit. The plaintiff's claim that it is the defendants who have unclean hands is not dispositive. However, the defendants have not pleaded any specific conduct on the part of the plaintiff which is immoral or unconscionable, and the prior findings of the Appellate Division, and the findings of this Court, do not establish such conduct. Accordingly based upon the foregoing, the plaintiff has established its entitlement to dismissal of the fourth affirmative defense.

Dated: February 27, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION