| **Sacasa v Trust** |
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| 2017 NY Slip Op 31056(U) |
| May 16, 2017 |
| Supreme Court, Suffolk County |
| Docket Number: 13-14535 |
| Judge: Arthur G. Pitts |
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SHORT FORM ORDER

INDEX No. 13-14535

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY



***PRESENT:***

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-18-16
ADJ. DATE 11-10-16
Mot. Seq. # 005 - MD

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ORLANDO A. SACASA, JANE S. SACASA, EVAN SHEINBERG, ABIGAIL MCKENNA, JACK NUSBAUM, NORA ANN WALLACE, JEAN W. CLARKE, DAVID STEMERMAN, Individually and as Trustee of the JOLINE STEMERMAN 2012 GIFT TRUST, and JOLINE STEMERMAN, Individually, and as Trustee of the DAVID STEMERMAN 2012 FAMILY TRUST,

Plaintiffs,

- against -

DAVID TRUST, Individually and as Trustee of the DAVID ANDREW TRUST REVOCABLE TRUST,

Defendant,

- and -

ALFRED J. SHUMAN, STEPHANIE J. SHUMAN, CALISTA WASHBURN, as Trustee of the CALISTA WASHBURN REVOCABLE TRUST DATED MAY 7, 2009 and as Trustee of the IRA H. WASHBURN, JR. REVOCABLE TRUST dated May 7, 2009, LALITTE C. SMITH, Individually and as Trustee of the SMITH FAMILY QUALIFIED PERSONAL RESIDENCE TRUST #1 uad December 11, 2012, JOSEPH J. MAGLIOCCO and ALLISON F. MAGLIOCCA,

Additional Defendants.

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DAVID TRUST, Individually and as Trustee of the DAVID ANDREW TRUST REVOCABLE TRUST,

Third-Party Plaintiff,

- against -

KATHLEEN N. ROSKELL as Trustee of the JAMES H. EVANS 2011 FAMILY TRUST, KATHLEEN N. ROSKELL AND THOMAS C. JEPPERSON, as Trustees of the JAMES H. EVANS 2001 REVOCABLE TRUST, and EVANS INVESTMENT, LLC,

Third-Party Defendants.

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Upon the following papers numbered 1 to 103 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 52 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 53 - 97 ; Replying Affidavits and supporting papers 99 - 103 ; Other Memorandum of Law 98 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the renewed motion by defendant/third-party plaintiff David Trust for, inter alia, an order granting summary judgment in his favor on the first cause of action in the third-party complaint is denied.

Plaintiffs, owners of parcels of residential property fronting a private road known as Windmill Lane, brought this action for a judgment declaring they have an easement, by deed or prescription, over a five-foot-wide pedestrian right of way providing access to the Atlantic Ocean that runs across residential properties known as 27 Windmill Lane and 33 Windmill Lane. Title to the property known as 27 Windmill Lane is held by the David Andrew Trust Revocable Trust, and title to the property known as 33 Windmill Lane is held by defendants Alfred Shuman and Stephanie Shuman. Plaintiffs further seek an injunction prohibiting defendant/third-party plaintiff David Trust from interfering with plaintiffs' use of the easement and directing the removal of obstructions he allegedly erected within the easement.

Thereafter, David Trust, trustee of the David Andrew Trust Revocable Trust, commenced a third-party action for declaratory and injunctive relief against MJE Cottage, LLC, and the James H. Evans 2011 Family Trust, which held ownership interests in the real properties 26 Windmill Lane and 32 Windmill Lane. Both the 26 Windmill Lane property and 32 Windmill Lane property are situated across the street from the 27 Windmill Lane property, title to which was transferred to the David Andrew Trust Revocable Trust in 1999. Briefly stated, relying upon a 50-foot-wide easement established by the common grantor, Russell Hopkinson, to provide ingress and egress to the owners of parcels of residential property situated between Further Lane and the Atlantic Ocean, David Trust asserts he is entitled to use the 25-foot strip of land that runs across the eastern boundary of the 26 Windmill Lane and 32 Windmill Lane properties to access the property held by the David Andrew Trust Revocable Trust (hereinafter the DAT property). It is noted that to create the 50-foot-wide easement (also referred to as the Windmill Lane easement), each parcel of abutting land extends to the center line of the easement area, so that a 25-foot-wide strip on land running along the eastern or western boundary of each parcel, depending upon which side of the easement it is situated, is part of the easement area. Significantly, only a portion of the Windmill Lane easement is paved or

covered with gravel, and nearly all of the improved portion of the roadway at the southern end of the easement is within the DAT property, which is located on the eastern side of the roadway.

By order dated December 22, 2015, the Court denied, without prejudice, a motion by David Trust for summary judgment in his favor on the cause of action asserted in the third-party complaint for a declaration that he has "rights to and over the 25 feet of Windmill Lane for a length of 186.69 feet on the third-party defendants' properties and determining that Windmill Lane should burden . . . the third-party defendants' equally and that they share in the burden of said roadway." The undersigned determined that James Evans, the trustee of the James H. Evans 2011 Family Trust, was a necessary party to the third-party action, and directed that David Trust serve and file a supplemental summons and amended third-party complaint naming Evans as a third-party defendant. A motion by MJE Cottage and the James H. Evans 2011 Family Trust for judgment in their favor on certain affirmative defenses and on their counterclaim against David Trust also was denied. The relevant facts regarding the properties at issue, the allegations contained in the pleadings, and the bases for the Court's determination of the motions are set forth in an order issued by the undersigned on December 22, 2015, and will not be repeated herein, as the parties' familiarity with such order is assumed.

Subsequently, Mr. Evans passed away in 2015. In January 2016, an amended third-party summons and complaint naming MJE Cottage, the James H. Evans 2011 Family Trust, the James H. Evans 2001 Revocable Trust, Kathleen N. Roskell, as co-trustee of the James H. Evans 2011 Family Trust and trustee of the James H. Evans 2001 Revocable Trust, and Thomas C. Jepperson, as co-trustee of the James H. Evans 2001 Revocable Trust, as third-party defendants was served. The amended third-party complaint asserts three causes of action. The first cause of action seeks a judgment pursuant to article 15 of the Real Property Actions and Proceedings Law declaring that David Trust, as trustee of the DAT property, has easement rights "to and over the 25 feet of Windmill Lane for a length of 186.69 feet on the third-party defendants' properties and determining that Windmill Lane should burden not only the third-party plaintiff's property but the third-party defendants' property equally and that they share in the burden of said roadway in accordance with the deeds in their respective chains of title." The second cause of action seeks an injunction enjoining third-party defendants "from obstructing the westerly 25 feet of Windmill Lane as it traverses their properties and enjoining them from obstructing third-party plaintiff[] in an attempt to pave or improve Windmill Lane as it traverses their properties," and the third cause of action seeks a judgment declaring that third-party defendants are necessary parties to the underlying action brought by plaintiffs. Both the James H. Evans 2011 Family Trust and the James H. Evans 2011 Revocable Trust hold ownership interests in the property known as 32 Windmill Lane.

After service of the amended third-party complaint, the property known as 26 Windmill Lane was sold by MJE Cottage to Evans Investment, LLC. A stipulation dismissing the claims against MJE Cottage and amending the caption to substitute Evans Investment as a third-party defendant in its place was so-ordered by the undersigned on March 23, 2016. Meanwhile, third-party defendants Kathleen Roskell, as trustee of the James H. Evans 2011 Family Trust and co-trustee of the James H. Evans 2001 Revocable Trust, Thomas Jepperson, as co-trustee of the James H. Evans 2001 Revocable Trust, and Evans Investment served an answer to the amended third-party complaint in March 2016.

David Trust now moves for summary judgment in his favor on the first cause of action in the amended third-party complaint, arguing that documentary evidence, namely the deeds issued for the subject properties abutting the Windmill Lane easement, establishes that the DAT property has "rights over the easterly 25 feet of the third-party defendants' properties encompassing the westerly 25 feet" of the Windmill Lane easement. He also seeks a

determination by this Court "that would permit [him] to extend the existing paved portion of the roadway so that the centerline of the pavement corresponds to the boundary line between the Trust and Evans properties." Trust's submissions in support of the motion include copies of the summons and complaint, the amended third-party complaint, third-party defendants' answer to the amended complaint and counterclaim, various deeds, a 1999 survey map of the DAT property, updated in 2007 in connection with an application to construct a swimming pool and patio, and a 2014 survey map of Windmill Lane. Trust also submits his own affidavit and a copy of correspondence from his counsel to counsel for MJE Cottage and the James H. Evans 2011 Family Trust dated December 18, 2013. Third-party defendants oppose the motion, arguing there is no legal basis for David Trust's claim that, as trustee of the DAT property, he is entitled to fully access and pave the 25-foot-wide portion of the Windmill Lane easement that runs across their properties. Third-party defendants further contend that the right of the DAT property owner to pass over the portion of the Windmill Lane easement located on their properties was extinguished by adverse possession or, alternatively, by abandonment. In opposition, third-party defendants submit, inter alia, deeds in the chains of title for the properties known as 26 Windmill Lane, 27 Windmill Lane and 32 Windmill Lane; an affidavit of Thomas Jepperson; and photographs of the Windmill Lane easement area in front of the properties at issue in the third-party action. The Court notes the sur-reply and the sur-sur-reply, submitted without leave of court, were not considered in the determination of this motion (*see* CPLR 2214).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

An easement, which can be created only by one who has title to or an estate in the servient estate (***Simone v Heidelberg***, 9 NY3d 177, 181-182, 847 NYS2d 511 [2007]), is a permanent right, conferred by grant or prescription, "authorizing one landowner to do or maintain something on the adjoining land of another which, although a benefit to the land of the former and a burden to the land of the latter, is not inconsistent with general ownership" (***Trustees of Town of Southampton v Jessup***, 162 NY 122, 126, 56 NE 538 [1900]). It is not a personal right of a landowner but an appurtenance to the land benefitted by it, i.e., the dominant estate (***Will v Gates***, 89 NY2d 778, 783, 658 NYS2d 900 [1997]). As relevant to the instant action, an easement appurtenant is created when the easement is conveyed in a writing, subscribed by the creator of such easement, which burdens the servient estate for the benefit of the dominant estate (***Djoganopoulos v Polkes***, 95 AD3d 933, 935, 944 NYS2d 217 [2d Dept 2012]; ***Bogart v Roven***, 8 AD3d 600, 601, 780 NYS2d 355 [2d Dept 2004]; ***Green v Mann***, 237 AD2d 566, 566-567, 655 NYS2d 627 [2d Dept 1997]). Once created, an easement appurtenant passes with the dominant estate unless extinguished by abandonment, conveyance, condemnation or adverse possession (***Gerbig v Zumpano***, 7 NY2d 327, 330, 197 NYS2d 161 [1960]; *see* ***Corrarino v Byrnes***, 43 AD3d 421, 841 NYS2d 122 [2d Dept 2007]; ***Spier v Horowitz***, 16 AD3d 400, 791 NYS2d 156 [2d Dept 2005]).

Significantly, the landowner of the dominant estate "does not . . . possess or occupy an easement or any other incorporeal right. An easement derives from use, and its owner gains merely a limited use or enjoyment of the

servient estate" (***Di Leo v Pecksto Holding Corp.***, 304 NY 505, 511, 109 NE2d 600 [1952] [internal quotation marks omitted]; *see* ***Paradise Point Assn., Inc. v Zupa***, 22 AD3d 818, 803 NYS2d 190 [2d Dept 2005]). Hence, the owner of property that is subject to an easement generally may use his or her land in any lawful way, provided that he or she does not interfere with the rights of the owner of the easement (*see* ***Grafton v Muir***, 130 NY 465, 29 NE 974 [1892]; ***Hurd v Lis***, 92 AD2d 653, 460 NYS2d 173 [2d Dept 1983]).

Moreover, when an easement is created only for the purpose of affording a right of ingress and egress, the easement holder is granted the right of passage, not any right in a physical passageway (***Lewis v Young***, 92 NY2d 443, 449, 682 NYS2d 657 [1998]; *see* ***Mazzaferro v Association of Owners of Mill Neck Estates, Inc.***, 131 AD3d 949, 16 NYS3d 83 [2d Dept 2015]; ***Guzzone v Brandariz***, 57 AD3d 481, 868 NYS2d 755 [2d Dept 2008]). The owner of land burdened by an easement for ingress and egress, therefore, "may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired" (***Lewis v Young***, 92 NY2d 443, 449, 682 NYS2d 657). As explained by the Court of Appeals, "affording the landowner this unilateral, but limited, authority to alter a right of way strikes a balance between the landowner's right to use and enjoy the property and the easement holder's right of ingress and egress" (***Lewis v Young***, 92 NY2d 443, 450, 682 NYS2d 657).

Trust's motion for summary judgment in his favor on the first cause of action in the third-party complaint is denied. The extent and nature of an easement by grant generally is determined by the language used in the grant (***Starcic v Hardy***, 31 AD3d 630, 818 NYS2d 602 [2d Dept 2006]; ***Perillo v Credendino***, 264 AD2d 473, 694 NYS2d 698 [2d Dept 1999]). Express easements are construed to give effect to the parties' intent as manifested by the language used in the grant (***Mitkowsi v Marceda***, 133 AD3d 574, 19 NYS3d 313 [2d Dept 2015]; *see* ***Somers v Shatz***, 22 AD3d 565, 802 NYS2d 245 [2d Dept 2005]; *see generally* ***Mandia v King Lumber & Plywood Co.***, 179 AD2d 150, 583 NYS2d 5 [2d Dept 1992]). Where the extent of a right of way is not specified, it will be construed to be that which is necessary and convenient for the use for which it was created (*see* ***Dalton v Levy***, 258 NY 161, 179 NE 371 [1932]; ***Grafton v Muir***, 130 NY 465, 29 NE 974; ***Hoffman v Delbeau***, 139 AD3d 803, 33 NYS3d 289 [2d Dept 2015]; ***Minogue v Kaufman***, 124 AD2d 791, 508 NYS2d 511 [2d Dept 1986]).

Trust's submissions are insufficient to establish a prima facie case of entitlement to judgment in his favor on the first cause of action. Here, the documentary evidence submitted on the motion shows that by deed issued in 1949, the common grantor, Russell Hopkinson, identified as party of the first part, transferred to the R.E. Dowling Realty Corporation his ownership of the tract of land lying south of Further Lane to the Atlantic Ocean, situated on the eastern side of the private roadway known as Windmill Lane, "together with a perpetual right-of-way" over the westerly 25 feet of the 50-foot private road for ingress and egress to Further Lane, reserving for himself "a permanent right-of-way over the easterly 25 feet of said fifty (50) foot private road for ingress to and egress from the other premises" he owned west of such road. In apparent contemplation of further subdivision of the land, the deed further states "[t]he said private road fifty (50) feet wide shall be and remain a common driveway for the benefit of the owner or owners of the premises herein conveyed or any part thereof, and the owner or owners of the other premises of the party of the first part on the west, or any part thereof," with the center line of such road described by reference to certain concrete monuments. The 1957 deed conveying Russell Hopkinson's interest to the property known as 26 Windmill Lane states that the transfer includes "a perpetual right-of-way over Windmill Lane, the private road 50 feet wide above mentioned, for ingress to and egress from said premises from and to Further Lane," and reserves for Hopkinson "a permanent right-of-way over the easterly 25 feet of the premises above described, being the westerly 25 feet of Windmill Lane, the private road above mentioned, for ingress to and egress from other premises of the party of the first part on the south, from and two Further Lane." It also states that the transfer is subject to all right-of-way easements previously granted by Hopkinson over the easterly 25 feet of such

private road, "being the westerly 25 foot of Windmill Lane, the private road above mentioned." Finally, it appears from the documentary evidence that Russell Hopkinson, who passed away in March 1979, retained possession of the parcel known as 32 Windmill Lane, which fronts the Atlantic Ocean. A 1980 deed transferring ownership of the property executed by his wife, Mary Lewis Hopkinson, as executrix of his estate, to his wife and Peter Hopkinson, as trustees, does not refer to an easement.

In support of his motion, Trust does not present any evidence – or even allege – that he is unable to access the DAT property using the paved portion of the Windmill Lane easement. Rather, he asserts in his affidavit that third-party defendants have "refused to permit any common use of Windmill Lane as it crosses their properties and insist that the full burden of Windmill Lane along its southern 186 [feet] be pushed onto my property," and that "I do not have the advantage of using a large portion of the road bed of Windmill Lane as my lawn" as do the third-party defendants. Trust further states that "[u]pon information and belief," the easement area running across third-party defendants' properties "has always been primarily lawn," and a 1999 survey map of the DAT property included with the moving papers depicts the paved portion of the easement as located almost entirely within the DAT property.

Contrary to the assertions by Trust, the deeds submitted with the moving papers, particularly the 1949 deed transferring ownership of the tract of land to R.E. Dowling Realty, show Hopkinson created an easement for ingress and egress, not a property right to access or occupy the 25-foot-wide portion of the Windmill Lane easement running along the eastern boundary of the parcels of land situated on the western side of the private roadway (*see* ***Lewis v Young***, 92 NY2d 443, 682 NYS2d 657; ***Mazzaferro v Association of Owners of Mill Neck Estates, Inc.***, 131 AD3d 949, 16 NYS3d 83 [2d Dept 2015]; ***Guzzone v Brandariz***, 57 AD3d 481, 868 NYS2d 755). The evidence further shows that the paved portion existed in its present location when title to 27 Windmill Lane was transferred to the David Andrew Trust Revocable Trust in 1999, and that the request by Trust to use the 25-foot-wide grassy portion of the easement area running across third-party defendants' properties was not prompted by difficulty entering or exiting the DAT property, but by commencement of the underlying action for a declaration that plaintiffs have a five-foot-wide pedestrian right of way to the Atlantic Ocean across the DAT property (*see* ***Getz v Harvey***, 289 AD2d 526, 736 NYS2d 65 [2d Dept 2001]; ***Minogue v Kaufman***, 124 AD2d 791, 508 NYS2d 511). It is noted the "wherefore" clause of the third-party complaint includes a demand for a judgment "[g]ranting rights over and to the third-party defendants' properties encompassed within Windmill Lane for access by plaintiffs to the beach easement referenced above." Moreover, assertions by Trust that it is "unfair" that the burden of the easement is borne primarily by the DAT property at the southern end of Windmill Lane, and that he is entitled to use a portion of the Windmill Lane easement as a lawn, are insufficient to establish he is entitled to use the entire 50-foot width of the easement (*see* ***Sambrook v Sierocki***, 53 AD3d 817, 861 NYS2d 482 [3d Dept 2008]; ***Serbalik v Gray***, 268 AD2d 926, 702 NYS2d 686 [3d Dept 2000]). Once the character of an easement for passage is fixed by use, the holder of such an easement may not unilaterally alter the burden on the servient estate, for example, by changing the location or width of a right of way (*see* ***Minogue v Kaufman***, 124 AD2d 791, 508 NYS2d 511; *see also* ***Lewis v Young***, 92 NY2d 443, 451, 682 NYS2d 657; ***Grafton v Muir***, 130 NY 465, 29 NE 974; *cf.* ***Dowd v Ahr***, 78 NY2d 469, 577 NYS2d 198 [1992]; ***Onthank v Lake Shore & Michigan S.R.R. Co.***, 71 NY 194 [1877]).

**Dated: Riverhead, New York**
**May 16, 2017**

**ARTHUR G. PITTS, J.S.C.**

**___ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**