

Phillips v Iadarola

2007 NY Slip Op 34592(U)

December 7, 2007

Supreme Court, Ulster County

Docket Number: 07-2187

Judge: Gerald William Connolly

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

ARLENE PHILLIPS and ALLEN G. PHILLIPS, JR.,

Plaintiffs,

-against-

CARMINE IADAROLA a/k/a CARMINE IADAROLA,
JR., a/k/a CARMINE R. IADAROLA, JR. and LORRIE
PLACE,

Defendants.

(Supreme Court, Ulster County, All Purpose Term)

APPEARANCES:

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DECISION AND ORDER

Index No. 07-2187 ✓
RJI No. 55-07-00869

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Connolly, J.:

Defendants have moved for an order (i) dismissing all causes of action concerning defendants' installation of utility service lines in the right-of-way, (ii) vacating the preliminary injunction, and (iii) prohibiting plaintiffs and those claiming through them from placing obstacles and other items in the right-of-way or otherwise disturbing defendants' rights of ingress and egress.

Plaintiffs oppose the instant motion and contend that: (a) defendants' motion to dismiss pursuant to CPLR 3211(a)(7) should be denied as: (1) at least one of plaintiffs' claims is legally sufficient and (2) as all of plaintiffs' claims are legally sufficient; (b) defendants' motion to dismiss pursuant to CPLR 3211(a)(1) should be denied as the documentary evidence submitted by defendants fail to conclusively establish a defense to the asserted claims; (c) defendants' request to vacate the preliminary injunction be denied; and (d) defendants' request for an order prohibiting plaintiffs from interfering with defendants' alleged "right-of-way" is based on unsubstantiated conclusory allegations and should be denied.

Plaintiffs own two parcels of land in the Town of Lloyd, Ulster County, New York. Defendant, Lorrie Place, is an owner of a land-locked parcel that lies to the southeast of plaintiffs' property.¹ Defendant Lorrie Place's deed grants her a right-of-way over plaintiffs' land. Defendants have been constructing a home on the land-locked parcel. Plaintiffs moved for a preliminary injunction by Order to Show Cause dated May 30, 2007, enjoining defendants from altering or developing the lands of plaintiff or the purported "right of way" to gain access to or develop lands of defendants and from connecting or installing power or utility wires, pipes, lines, or any other installation within or outside of a purported "right-of-way" located on plaintiffs' property for the duration of the action. The Court granted, in part, plaintiffs' request for a preliminary injunction.

Plaintiffs allege that the defendants have used the "right-of-way" unlawfully and have expanded the "right-of-way" beyond 20 feet, encroaching on the plaintiffs' property and destroying vegetation. Plaintiffs also allege that defendants' "right-of-way" provides only ingress and egress

¹ According to plaintiffs, Defendant Lorrie Place and Defendant Carmine Iadarola once owned the land-locked parcel as tenants in common and plaintiff alleges that Defendant Carmine Iadarola, individually, and as Defendant Lorri Place's agent has caused plaintiffs' damage.

and does not include a right to install or erect utility lines above or below the ground within the “right-of-way”. Plaintiffs’ complaint seeks a permanent injunction restraining defendants from connecting, installing or running cables or utility lines in or adjacent to the “right-of-way” to benefit defendant’s property and compelling the removal of such lines, and a declaratory judgment limiting the scope of the 20 foot right of way to ingress and egress, as well as alleging causes of action in trespass, nuisance and tortuous interference with a contract.

In a motion pursuant to CPLR 3211, the pleadings shall be liberally construed, the facts alleged accepted as true, and every possible favorable inference given to the plaintiff (*see Leon v. Martinez*, 84 NY2d 83 [1994]; *Manupella v. Troy City Zoning Bd. Of Appeals*, 272 AD2d 761 [3rd Dept., 2000]). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action (*see Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In examining the sufficiency of the pleading, the court must accept the facts alleged as true and interpret them in the light most favorable to the plaintiff (*see Matter of Bd. of Education v. State Education Dept.*, 116 AD2d 939 [3rd Dept., 1986]). On such a motion, the court’s sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see Leon v. Martinez, supra* at 87-88; *see also Pietrosanto v. NYNEX Corp.*, 195 AD2d 843 [3rd Dept., 1993]).

Initially, the Court notes that defendants failed to include a copy of the summons or complaint in their submission to the Court. The plaintiffs, however, included a copy with their affirmation in opposition.

Defendants argue that all portions of the plaintiffs’ causes of action concerning defendants’ installation of utility service lines in the right-of-way must be dismissed as plaintiffs

have failed to state a cause of action as a matter of law (CPLR 3211(a)(7)) and based upon documentary evidence (CPLR 3211(a)(1)). Defendants argue that, the language of the grant, as stated in the deed, provides a right of way that is not specifically limited to ingress and egress, or, in fact, limited in any manner whatsoever. Defendants further argue that they possess an easement by necessity to install the utilities in the right-of-way.

The Court denies defendants' motion to dismiss. Defendants have failed to establish that as a matter of law, the language of the grant, or the documentary evidence provided, permit defendants a right to install utilities in the right-of-way. The language of the deed alone is ambiguous as to the extent of the grant. Specifically, the language of the grant provides a "20 foot right-of-way over Eusebi lot to and continuing over Eusebi and their right of way to Blue Point Road over Eusebi, Gendus and Grandeppieno" over plaintiffs' land. Where the extent of a grant is not evident from the language of the grant, the parties "should be permitted to offer extrinsic evidence to establish the grantor's intent and the purpose of the right-of-way" (Hudson Valley Cablevision Corporation v. 202 Developers, Inc., 185 AD2d 917, 920 [2nd Dept., 1992]). Defendants are currently requesting that the Court review not only the documentary evidence provided, but also review submitted affidavits in order to determine the extent of the grant and that the Court make a determination based on such submissions as to the extent of such grant. It is premature at this stage, in the context of a motion to dismiss, for the Court to examine such extrinsic evidence in order to determine the extent of such grant (*see Guggenheimer, supra* at 268). Defendants' also argue that they possess an easement by necessity to install utilities in the right-of-way. Again, however, the documentary evidence alone, including *inter alia*, the deed and survey presented, do not conclusively establish such easement and it is premature at this

stage for the court to review defendants' affidavits or any other evidence in order to make such a determination. As stated above, on a motion to dismiss, the court is limited to examining the pleading of the plaintiff to determine whether it states a cause of action (*see Guggenheimer, supra* at 268).

Accordingly, defendants' motion to dismiss is denied and the Court need not discuss plaintiffs' contentions.

Defendants also request the Court to vacate the existing preliminary injunction or clarify that such injunction solely prohibits the defendants from altering or developing plaintiff's property outside of the right-of-way, but does not prohibit the defendants from taking such action within the bounds of the right-of-way. Plaintiffs oppose any vacation or modification of the preliminary injunction.

The decision of the Court granting the preliminary injunction prohibits the defendants from altering or developing plaintiffs' property to gain access to or improve Defendant Lorri Place's property, which includes altering or developing the right-of-way running through plaintiffs' property. While defendants may ordinarily have the right to improve the area within the right-of-way, the decision of the Court granting the preliminary injunction limited such right. As it is within the Court's discretion to modify such injunction and as defendants allege that they are seeking modification to repair a portion of their driveway as a portion is washing out due to heavy rains, the Court will reserve such issue for determination and hereby schedules a conference for **Monday, January 28, 2008 at 10:30 a.m.** at the Ulster County Courthouse, 285 Wall Street, Kingston, New York.

Finally, Defendants request that the Court issue an order prohibiting the plaintiffs from placing obstacles or any other items in the right-of-way or otherwise impeding or disturbing

defendants' right-of-way rights. Defendants are seeking injunctive relief.

In order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. Based upon the record before the Court, the defendants have made such demonstration. The defendants have a likelihood of success on the merits as the preliminary injunction issued by the Court clearly did not enjoin the defendants ability to access Defendant Lorri Place's via such right-of-way, defendants will suffer irreparable injury if they are not permitted access and a balancing of the equities require relief in defendants' favor. Accordingly, Defendants' request is hereby granted as set forth below. Additionally, defendants are hereby required to post an undertaking in the amount set forth below.

The parties remaining contentions have been considered and found to be without merit.

Accordingly, it is

ORDERED, that Defendants' motion to dismiss is hereby denied in its entirety;

ORDERED, that Defendants' request vacating or modifying the preliminary injunction is hereby reserved;

ORDERED, that Plaintiffs and those claiming through them, are enjoined from placing obstacles and other items in the right-of-way or otherwise disturbing defendants' rights of ingress and egress over such right-of-way; and

ORDERED, that Defendants submit an undertaking, as required by CPLR § 6312(b), with an appropriate surety in the aggregate amount of \$500.00 and that evidence of such undertaking

be provided to the Court within seven (7) days of the signing of this order.

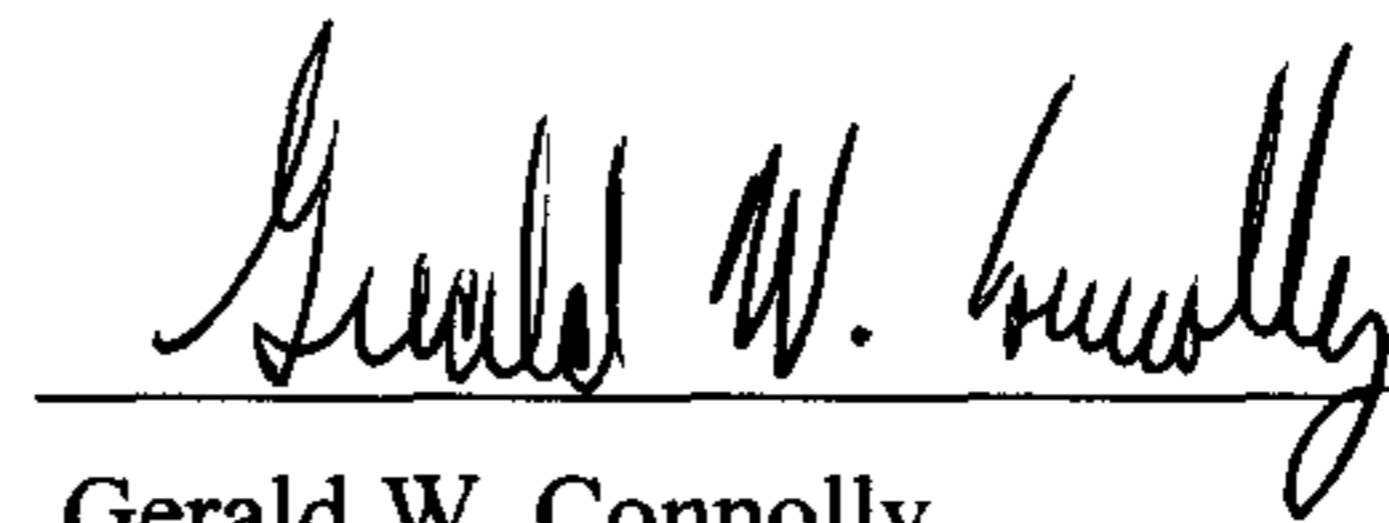
This shall constitute both the decision and order of the Court. All papers, including this decision and order, are being returned to Defendants' counsel. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: December 7, 2007

Kingston, New York



Gerald W. Connolly
Acting Supreme Court Justice

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Papers Considered:

1. Notice of Motion dated July 25, 2007; Supporting Affirmation of J. Benjamin Gailey dated July 15, 2007; Supporting Affidavit of Carmine Iadarola dated July 25, 2007; Supporting Affidavit of Anna Iadarola dated July 25, 2007; Supporting Affidavit of Lorrie Place dated July 25, 2007 and accompanying exhibits.
2. Affirmation in Opposition to Motion to Dismiss dated August 20, 2007; Affidavit of Arlene Phillips dated August 20, 2007 and accompanying exhibits.
3. Reply Affirmation Supporting Defendants' Motion to Dismiss dated August 30, 2007; Reply Affidavit of Carmine Iadarola dated August 30, 2007.
4. Supplemental Affirmation in Opposition to Defendants' Motion to Dismiss dated October 11, 2007 with accompanying exhibit.