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PUBLISH

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 11465-09

PRESENT:
HON. DANIEL MARTIN

Motion Date: 2/9/11
Submitted: 4/5/11
Motion Sequence No.: 04 -MD

OLD TOWN TREE FARM, INC.,

Plaintiff,

-against-

LONG ISLAND POWER AUTHORITY and LONG ISLAND LIGHTING COMPANY, d/b/a LIPA,

Defendants.

PLAINTIFF'S ATTY:
William R. Garbarino, Esq.
40 Main Street, P.O. Box 717
Sayville, NY 11782

DEFENDANTS' ATTY:
Cullen & Dykman, LLP
100 Quentin Roosevelt Boulevard
Garden City, NY 11530

The following named papers have been read on this motion:	
Order to Show Cause/Notice of Motion	**X**
Answering Affidavits	**X**
Replying Affidavits	**X**

ORDERED that the motion by defendants for summary judgment in their favor is denied.

Plaintiff Old Town Tree Farm, Inc. and defendants Long Island Power Authority (LIPA) and Long Island Lighting Company d/b/a LIPA (LILCO) are owners of adjoining parcels of real property located in East Setauket, New York. Pursuant to Real Property Actions and Proceedings Law Article 15, plaintiff seeks a determination that it has a right to ingress and egress across the premises owned by defendants. The complaint alleges that the deeds of plaintiff's predecessors in interest contain a right of way through defendants' property, that as plaintiff's land is landlocked it is entitled to a right of way by necessity, and that plaintiff has a prescriptive easement over defendants' property. Defendants' answer interposes a counterclaim against plaintiff for trespass.

In 1947, Britannia Realty Company, an owner of a large parcel of property located in the Town of Brookhaven, transferred certain properties to LILCO, including a parcel of land to the south of the Long Island Rail Road (LIRR), identified as Parcel H in the survey dated November 10, 1947 prepared by Wells & Blydenburgh, as well as a triangular shaped property south of Parcel H, which

abuts Old Town Road where plaintiff alleges it has a right of ingress and egress. Britannia retained ownership to a parcel of land to the west of the LILCO properties (western parcel). In 1948, LILCO acquired from James O'Connor a parcel of land located south of Parcel H, which connects Parcel H to the triangular parcel leading into Old Town Road. In 1949, Britannia transferred the western parcel, which is bisected to the north by the LIRR, to Harry Hocker. In 1951, Hocker transferred the portion of the western parcel to the north of the LIRR to John Augustitus, and in 1961 transferred the remaining portion (plaintiff's parcel) to North Shore Industrial Corporation. After multiple transfers in ownership of the subject parcel during the period from 1961 to 2007 plaintiff obtained title to the property in 2007. Plaintiff's parcel is landlocked, bounded on the south and the west by properties owned by parties not involved in this action, on the north by the LIRR, and on the east by property owned by LILCO. The complaint alleges that plaintiff has an easement for ingress and egress from its property over LILCO's properties to Old Town Road.

Defendants now move for an order granting summary judgment dismissing the complaint, arguing that there was no grant by defendants or any of its predecessors in interest of an easement over their property. Defendants also argue that plaintiff cannot satisfy its burden of establishing the elements of its claims of easement by prescription and easement by necessity. In support of their motion, defendants submit, among other things, copies of the pleadings, various deeds and surveys of the subject property, a copy of the title insurance policy for plaintiff's property, transcripts of the deposition testimony of Lori Colletti, Richard Edgar, and J. Timothy Shea, Jr., and an affidavit of Laurence Schreiber. In opposition, plaintiff argues that triable issues of fact exist and submits, among other things, copies of various deeds and surveys.

Mr. Schreiber's affidavit states that he is familiar with plaintiff's parcel, as he owned the property in both his individual name and under the names of corporations which he controlled. It states that during his ownership of the property from 1961 until 1990, he gained access to and from his property by traversing LILCO's property to other lots that he owned. It states that his trucks regularly traversed LILCO's property without interruption or interference. It further states that his use was continuous and observable by LILCO and the public, and that he never received permission from LILCO to traverse its property. It also states that in 1965, Schreiber, as president of North Shore Industrial Corporation, deeded the subject property to Lauron Ltd. It states that the deed included language stating "[t]ogether with a right of way to cross and re-cross premises now or formerly of the Long Island Lighting Company lying between Parcels I and II above described so long as the same does not interfere with the construction, operation and maintenance of electric transmission lines, poles, towers, wires and appurtenant facilities."

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To establish an easement by prescription, plaintiff is required to show by clear and convincing evidence that it enjoyed uninterrupted use of the road for the statutory 10-year period, and that its use for that entire period was adverse, open and notorious (*see* ***Manoselis v Woodworth Realty, LLC***, 83 AD3d 801, 920 NYS2d 683 [2d Dept 2011]; ***Mee Wah Chan v Y & Dev. Corp.***, 82 Ad3d 942, 919 NYS2d 74 [2d Dept 2011]). Generally, where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive (*see* ***Eskenazi v Sloat***, 40 AD3d 577, 834 NYS2d 330 [2d Dept 2007]; ***Duckworth v Ning Fun Chiu***, 33 AD3d 583, 822 NYS2d 147 [2d Dept 2006]; ***J.C. Tarr, Q.P.R.T. v Delsener***, 19 AD3d 548, 800 NYS2d 177 [2d Dept 2005]).

Defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law by conclusively negating any one of the elements of an easement by prescription which, if proven by plaintiff at trial, would warrant the recognition of such an easement (*see* ***Lew Beach Co. v Carlson,*** 57 AD3d 1153, 869 NYS2d 278 [3d Dept 2008]). Significantly, the affidavit of Schreiber states that he traversed a road through LILCO's property from 1961 until 1990 without interruption, and that his use was open and notorious for that period of time. Defendants contend that plaintiff's use was not continuous as there is no evidence of adverse use from 1990 to 2007. However, while the use must be continuous for the statutory period, plaintiff's prescriptive right to the easement would already have matured prior to 1990 if plaintiff is able to establish that a prescriptive easement was created during Schreiber's use of the dirt road over LILCO's property (*see generally* ***Kusmierz v Herman***, 172 AD2d 1056, 569 NYS2d 312 [4th Dept 1991]; ***Fila v Angiolillo***, 88 AD2d 693, 451 NYS2d 316 [3d Dept 1982]; ***Knapp v New York***, 140 AD 289, 125 NYS 201 [1st Dept 1910]). Defendants also argue that plaintiff cannot claim a prescriptive easement, because the land held by LIPA is used for a public purpose. However, as defendants state that LIPA did not own the subject land until 1998, the prescriptive easement would have already matured prior to LIPA taking ownership of the land. In addition, defendants failed to submit any evidence that LIPA is in fact the owner of the subject property. The Court notes that the copy of the Agreement and Plan of Merger and the affidavit submitted for the first time with the reply cannot be considered (*see* ***GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc.***, 35 AD3d 535, 828 NYS2d 409 [2d Dept 2006]; ***Rengifo v City of New York***, 7 AD3d 773, 776 NYS2d 865 [2d Dept 2004]; ***Jackson-Cutler v Long***, 2 AD3d 590, 768 NYS2d 360 [2003]).

As to defendants' assertion that plaintiff cannot have a prescriptive easement over their property because there was no intent by plaintiff's predecessors to pass the easement to it, a matured easement appurtenant passes with the transfer of the dominant estate so long as there is privity of estate and undoubted intent to convey the easement (*see* ***Fila v Angiolillo***, *supra*). Here, the deeds from Schreiber to Gary Taylor, from Taylor to Northville Industries Corp., and from Northville to plaintiff do not expressly mention an easement over the property of LILCO. However, the conveyances state "[t]ogether with the appurtenances and all the estate and rights of the party of the first part in and to said premises." An appurtenance is a right of way that is necessary to give usable enjoyment to the conveyed premises (*see* ***Fischer v Anger***, 283 AD2d 865, 725 NYS2d 437 [3d Dept 2001]). Moreover, when title is conveyed subject to appurtenances, an easement appurtenant is conveyed to the grantee, even in the absence of express language regarding such easement (*see* ***Will v Gates***, 89 NY2d 778, 658 NYS2d 900 [1997]; ***Corrarino v Byrnes***, 43 AD3d 421, 841 NYS2d 122 [2d Dept 2007]). Thus, the easement rights could have been passed to plaintiff through

the appurtenance clause in the above deeds.

In addition, the surveys and deeds submitted by defendants are in the technical language of a surveyor and no affidavit by a surveyor or other expert interpreting the documents was included with the moving papers (*cf.*, ***Kahil v Townsend***, 5 AD2d 940, 171 NYS2d 971 [3d Dept 1958]). Without such an expert, the Court is unable to determine, among other things, where the easement is located relative to the survey dated 1947 and to which parcels of land the deeds refer. While defendants submit an affidavit of Edward Dull, the affidavit fails to establish his qualifications as an expert in interpreting surveys and deeds (*see* ***Pellechia v Partner Aviation Enters., Inc.***, 80 AD3d 740, 916 NYS2d 130 [2d Dept 2011]; ***Hofmann v Toys R Us, NY Ltd. Partnership***, 272 AD2d 296, 707 NYS2d 641 [2d Dept 2000]), and only explains the location of the alleged easement. As defendants failed to meet their burden on the motion, it is unnecessary to consider whether the papers in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

Accordingly, defendants' motion for summary judgment in their favor is denied.

So Ordered.

Dated: July 25, 2011
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.