[* 1]

SHORT FORM ORDER

INDEX No. 12-22839

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 10-24-12 (#001)
MOTION DATE 11-20-12 (#002)
ADJ. DATE 12-20-12
Mot. Seq. # 001 - MotD
002 - MotD

---X

BARRY A. DINABURG, and SHARI B. DINABURG,

Plaintiffs,

- against -

LAURENCE DENIHAN, ANN DENIHAN, and DUNE ROAD HOLDINGS, INC.,

Defendants.

---X

HARRAS BLOOM & ARCHER, LLP
Attorney for Plaintiffs
445 Broad Hollow Road, Suite 127
Melville, New York 11747

LAMB & BARNOSKY, LLP
Attorney for Defendants
534 Broadhollow Road, P.O. Box 9034
Melville, New York 11747

Upon the following papers numbered 1 to 119 read on these motions for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23, 76 - 90; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 26 - 51, 91 - 119; Replying Affidavits and supporting papers 53 - 73; Other memoranda of law 24 - 25, 52, 74 - 75; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiffs for an order pursuant to CPLR 3212 granting them partial summary judgment on the first through fifth claims set forth in their complaint and partial summary judgment in their favor on the counterclaim set forth in the answer of the defendants Laurence Denihan and Ann Denihan is granted to the extent that the plaintiffs are entitled to a judgment declaring that they are the holders of a certain easement as alleged in their first claim, and to partial summary judgment regarding that portion of the aforesaid counterclaim which asserts the right to relocate the subject easement, and is otherwise denied; and it is further

ORDERED that the motion (incorrectly designated as a cross motion) by the defendant Dune Road Holdings, Inc. for an order pursuant to CPLR 3212 granting them partial summary judgment on the first through

TPR

fourth crossclaims against the defendants Laurence Denihan and Ann Denihan as set forth in their answer to the complaint is granted to the extent that the defendant Dune Road Holdings, Inc. is entitled to a judgment declaring that it is the holder of a certain easement as alleged in their first crossclaim, and that its codefendants may not unilaterally relocate said easement, and is otherwise denied; and it is further

ORDERED that upon a search of the record pursuant to CPLR 3212 (b), partial summary judgment is granted in favor of the defendants Laurence Denihan and Ann Denihan on that portion of their counterclaim and crossclaim which seeks a declaration that the plaintiffs and the defendant Dune Road Holdings, Inc. are not entitled to construct a walkway upon the subject easement unless required by law.

The plaintiffs commenced this action pursuant to Real Property Actions and Proceedings Law Article 15 seeking, among other things, a judgment declaring their rights with respect to a non-exclusive easement for pedestrian ingress and egress to Moriches Bay over property owned by the defendants Laurence Denihan and Ann Denihan (the defendants). The defendant Dune Road Holdings, Inc. (Holdings) owns property adjacent to that owned by the plaintiffs, which enjoys the same right of ingress and egress over the defendants' property. The plaintiffs' complaint consists of six separate claims against the defendants. The claims can be summarized as follows: the first claim seeks a judicial declaration that their property is benefitted by the subject easement; the second claim seeks a declaration that the plaintiffs may demarcate the boundaries of said easement; the third claim seeks a declaration that the plaintiffs may improve the easement and install a walkway thereon; the fourth claim seeks a permanent injunction enjoining the defendants from interfering with the plaintiffs' right of passage over the easement; the fifth claim seeks a mandatory injunction directing the defendants to remove certain obstructions allegedly lying within the boundaries of the easement; and the sixth claim seeks damages for the defendants' alleged interference with the plaintiffs' use of the easement in the summer of 2011 and the summer of 2012.

The plaintiffs are owners of a residential home located at 525 Dune Road, Westhampton Beach, New York (plaintiffs' property or 525 Dune) . Holdings is the owner of the house to the west of the plaintiffs' property, located at 527 Dune Road, Westhampton, New York. Both properties lie south of Dune Road, across from the property owned by the defendants located at 524 Dune Road, Westhampton Beach, New York (defendants' property or 524 Dune). The Atlantic Ocean abuts the southerly boundary of the plaintiff's property, and Moriches Bay abuts the northerly boundary of the defendants' property. It is undisputed that the three lots, along with a fourth lot located at 526 Dune Road, Westhampton Beach, New York, lie within chains of title from a common grantor. It is also undisputed that the plaintiffs' property is benefitted by a three-foot wide easement described as follows: "[A] non-exclusive easement for pedestrian ingress and egress only to Moriches Bay three feet in width along the westerly boundary of the premises at 524 Dune Road" (the easement).

The plaintiffs now move for summary judgment in their favor granting them the relief requested in their complaint. In support of the motion, the plaintiffs submit, among other things, their affidavits, copies of the pleadings, deeds, land surveys, and an expert affidavit by a licensed land surveyor. In his affidavit, the plaintiff Barry A. Dinaburg (Dinaburg) swears that he and his wife acquired 525 Dune by a certain deed dated May 11, 2011, duly recorded on May 24, 2011, which included the above-referenced easement. He states that the defendants acquired 524 Dune by a deed dated March 4, 2002, duly recorded on April 5, 2002, which states: "Subject to covenants, restrictions and conditions (if any) and easements (if any) of record affecting such premises. Subject also to any existing rights of way, or easements, to pass or repass over said premises or any

part thereof (whether or (*sic*) record or not of record) of any corporation, person or persons whomsoever." He states that the easement benefitting the plaintiffs' property as the dominant estate, and burdening the defendants' property as the servient estate, is contained in three deeds, all duly recorded, issued by the common grantor or his estate (Grantor), and that the location of the easement is defined, as demonstrated in the affidavit of his expert. He indicates that, at the time he and his wife purchased 525 Dune, the easement was clear all the way from Dune Road to the edge of Moriches Bay, "where there was just some natural brush," and that from May 11, 2011 to the first week in July 2011, he and his wife walked along the area of the easement. Dinaburg further swears that in or about the first week of July 2011, the defendants erected fences around the defendants' property and the adjacent parcel owned by them, located at 526 Dune Road, Westhampton Beach, New York (defendants' adjacent property) and west of 524 Dune, and otherwise obstructed the plaintiffs' use of the easement. He indicates that he spoke with the defendant Laurence Denihan (Denihan), who refused to install fence gates permitting the plaintiffs to use the easement. In August 2011, Denihan informed the plaintiffs that the defendants intended to unilaterally relocate the easement to the easterly boundary of the defendants' property. He states that, on July 12, 2012, he and his wife, as well as two members of a surveying crew, were informed by unidentified persons on the defendants' property that the easement had been relocated, and that they would not be permitted to use the easement. Dinaburg further swears that he and his wife did not agree, orally or in writing, to the relocation of the easement.[1]

In his affidavit, Floyd Carrington (Carrington) swears that he is a licensed land surveyor, and a principal in Raynor, Marcks & Carrington Surveying (RMCS). He states that he is familiar with the properties owned by the plaintiffs and the defendants, and that according to written and recorded deeds in the Office of the Clerk of Suffolk County, the defendants' property is burdened by a three-foot wide easement benefitting the plaintiffs' property. Specifically, he references three deeds which establish said easement. He indicates that, in or about April 2011, he went to Dune Road to observe the conditions on the defendants' property, including the general location of the easement. Carrington further swears that, on April 22, 2011, two employees of RMCS surveyed and staked the location of the easement, and that, on July 12, 2012, employees of RMCS re-set survey spikes at the corners of the easement, and located a wire fence and wood gate encroaching upon the easement. He attaches a copy of a survey to his affidavit, updated on July 12, 2012, which he avows shows the location of the easement.

A review of the deeds submitted in support of the plaintiffs' motion reveals that the four properties referenced herein were conveyed by the Grantor or his estate at one time or another.[2] In reviewing the three deeds specifically relied upon by the plaintiffs and their expert, the Court notes the following: in the first deed, dated August 21, 1973, recorded at Liber 7473, page 547, Grantor conveyed title to the property now owned by Holdings to a grantee:

> TOGETHER WITH a non-exclusive easement three feet in width along the westerly boundary of premises, now owned by the party of the first part ... for the right of ingress and egress only to Moriches Bay. The

---

[1] The affidavit of the plaintiff Shari B. Dinaburg contains the same factual allegations as those in Dinaburg's affidavit, which do not need to be repeated herein.

[2] That is, the plaintiffs' property, the Holdings property, the defendants' property, and the defendants' adjacent property.

> party of the second part is not granted the right to build an elevated boardwalk or walkway over the easement area unless same is required by law.

The second deed out of the Grantor's Estate, dated March 2, 1985, which lies within the defendants' chain of title for 524 Dune, includes the following provision:

> "SUBJECT TO a non-exclusive easement for pedestrian ingress and egress to Moriches Bay three feet in width along the westerly boundary of the premises ... as granted in a certain deed dated August 21, 1973, and recorded in the office of the Suffolk County Clerk in Liber 7473, pages 547 and 548, and for the benefit of the premises at 525 Dune Road to be granted in a deed from grantor conveying same at a later date."

The third deed out of the Grantor's Estate, dated July 31, 2005, which lies within the plaintiffs' chain of title for 525 Dune, includes the following provision:

> "TOGETHER WITH a non-exclusive easement for pedestrian ingress and egress only to Moriches Bay three feet in width along the westerly boundary of the premises at 524 Dune Road."

In opposition to the plaintiffs' motion, the defendants submit, among other things, Denihan's affidavit, copies of deeds, land surveys, and photographs of their property. In his affidavit, Denihan swears that the defendants' property is burdened by the easement which benefits the plaintiffs' property and the Holdings property, and that the easement appears in the deeds from the common grantor of all four lots involved in this action. He states that 524 Dune and the defendants' adjacent property were initially purchased by "a family company," that said company acquired title to 524 Dune by deed dated June 15, 1990, and that said company acquired title to the adjacent property by deed dated March 18, 1998. He declares that both properties were conveyed to him and his wife by deeds dated March 4, 2002, that both parcels have been used by his family as a single property since 1998, although they are separate tax lots, and that the easement runs through the middle of the "entire property." Denihan further swears that in approximately August 2010, construction of a new house on the adjacent property and renovation on the house located at 524 Dune commenced, and that said work continued through early July 2012. He states that the easement was not used prior to the subject construction, that it was populated with natural brush, and that the defendants have never planted anything in the area of the easement north of the gate in the wire fence installed by them. He declares that, prior to the plaintiffs' purchase of 525 Dune, he spoke with the plaintiffs and acknowledged that he was aware of the easement for pedestrian ingress and egress to Moriches Bay, that the plaintiffs indicated that they were uncomfortable using the easement running through the middle of the defendants' property, and that the plaintiffs suggested the relocation of the easement. He told the plaintiffs that he would consider moving the easement to the western boundary of the adjacent property, but that he would need the cooperation of Holdings. Denihan further swears that he offered the plaintiffs the use of an existing walkway on the adjacent property, that the plaintiffs accepted the offer, and that he observed them using said walkway on a number of occasions. He states that he decided that there was insufficient room to relocate the easement to the westerly boundary of the adjacent property, that he informed Dinaburg that he was making arrangements to relocate the easement to the easterly boundary of 524 Dune, and that Dinaburg "did not voice any objections," and appeared supportive

of the idea. Denihan declares that construction at the properties was coming to an end in early July 2011, and that fencing was installed "around the properties in order to comply with laws and regulations for properties with pools." He states that he told Dinaburg that he would "lead the process for relocation," that he contacted professionals to assist him in the relocation process, and that by January 2012, the relocated easement on the easterly boundary of 524 Dune had been cleared. Denihan denies the allegations that the plaintiffs' use of the easement was ever obstructed, and he states that the defendants were entitled to relocate the easement because it was not set forth by a metes and bounds description, and that the plaintiffs may not expand their rights in the easement by installation of a walkway.

It is well settled that express easements are defined by the intent or objective of the grantor (*see* ***Lewis v Young***, 92 NY2d 443, 682 NYS2d 657 [1998]; ***Estate Ct., LLC v Schnall***, 49 AD3d 1076, 856 NYS2d 251 [3d Dept 2008]). Where the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder (***Lewis v Young***, *supra*). Therefore, it has been held that a servient landowner may unilaterally relocate or alter an "undefined" right of way (*see* ***Lewis v Young***, *supra*; ***Estate Ct., LLC v Schnall***, *supra*), so long as the easement holder's right of passage is not substantially burdened or impaired (***Lewis v Young***, 92 NY2d at 449, 682 NYS2d at 660). However, where there is more than a mere general reference to a right of passage, such as where an easement is definitively located in the grantor's conveyance, unilateral relocation or alteration by the servient landowner is barred as a matter of law (*see* ***Marsh v Hogan***, 56 AD3d 1090, 867 NYS2d 786 [3d Dept 2008]; ***Clayton v Whitton***, 233 AD2d 828, 650 NYS2d 404 [3d Dept 1996]; ***Estate Ct., LLC v Schnall***, *supra*; *cf.* ***Lewis v Young***, *supra* (indefinite description of the right of way suggests that the parties intended to allow for relocation; right of passage over driveway, wherever located, in general directional sweep of the existing driveway held undefined); ***Chekijian v Mans***, 34 AD3d 1029, 825 NYS2d 281 [3d Dept 2006] (right of passage over general direction of driveway held undefined); ***Green v Blum***, 13 AD3d 1037, 786 NYS2d 839 [3d Dept 2004] (passage over existing roadway through a lot deemed undefined).

Here, the plaintiffs have established their entitlement to summary judgment regarding the first claim in their complaint and their right to a declaration that their property is benefitted by a non-exclusive easement for pedestrian ingress and egress only to Moriches Bay three feet in width along the westerly boundary of the premises at 524 Dune Road. A review of the relevant deeds, as well as the affidavit of the plaintiffs' expert, reveals that the Grantor intended to locate the easement to the westerly boundary of the servient parcel, that the easement is defined by the metes and bounds description defining the westerly boundary of said servient parcel, and that the easement is readily located by reference to said metes and bounds description. The defendants have failed to raise a material issue of fact regarding the Grantor's intent. In addition, they have not established that the location of the easement is undefined as a matter of law. The defendants' contention that the change in circumstances brought about by their purchase of the adjacent lot requires a different result is without merit. Accordingly, the plaintiffs motion for partial summary judgment on their first claim is granted.

The plaintiffs' second claim seeks a declaration that they are entitled to improve the easement by "demarcating" its boundaries. The plaintiffs' third claim seeks a declaration that they are entitled to improve the easement by constructing a walkway. As a rule, where an easement grants only a right of ingress and egress, it is a right of passage, and not any right in a physical passageway itself, that is granted to the easement holder (***Lewis v Young***, *supra*; ***Goldberg v Zoning Bd. of Appeals of City of Long Beach***, 79 AD3d 874, 912 NYS2d 668 [2d Dept 2010]). In the absence of an agreement to the contrary, the owner of the dominant estate is responsible for maintaining and repairing an easement (***Lopez v Adams***, 69 AD3d 1162, 895 NYS2d 532 [3d

Dept 2010]; ***Penn Hgts. Beach Club, Inc. v Myers***, 42 AD3d 602, 839 NYS2d 570 [3d Dept 2007]; ***Cypress Hills Cemetery v City of New York***, 35 AD3d 788, 826 NYS2d 736 [2d Dept 2006]). That is, the dominant estate has the right to maintain an easement in reasonable condition for its intended use (***Ickes v Buist***, 68 AD3d 823, 890 NYS2d 641 [2d Dept 2009]; ***Schoolman v Mannone***, 226 AD2d 521, 640 NYS2d 616 [2d Dept 1996]). However, the dominant estate may not inflict any unnecessary injury to the premises of the servient owner or materially increase the burden on the servient estate (***Gates v AT&T Corp.***, 100 AD3d 1216, 956 NYS2d 589 [3d Dept 2012]; ***Havel v Goldman***, 95 AD3d 1174, 945 NYS2d 332 [2d Dept 2012]; ***Lopez v Adams***, *supra*).

Here, the plaintiffs have failed to establish their entitlement to partial summary judgment on their second and third claims. The plaintiffs failed to submit any evidence in their moving papers as to the method or manner in which they intend to demarcate the boundaries of the easement, or the impact that the demarcation would have on the defendants' property. In their reply papers, the plaintiffs submit a second affidavit from Carrington indicating that they intend to install survey monuments at the corners of the easement and at points along the east and west boundaries of the easement. However, it is well settled that a movant may not remedy basic deficiencies in its prima facie showing of entitlement to summary judgment by submitting evidence in reply (***Barrera v MTA Long Island Bus***, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]; ***Rengifo v City of New York***, 7 AD3d 773, 776 NYS2d 865 [2d Dept 2004]). As such the Court cannot consider such evidence in determining the movant's entitlement to summary judgment (***Rengifo v City of New York***, *supra*; ***Constantine v Premier Cab Corp.***, 295 AD2d 303, 743 NYS2d 516 [2d Dept 2002]). In any event, the plaintiffs' reply papers do not establish that the installation of said monuments do not unnecessarily injure or increase the burden on the defendant's property.

Similarly, the plaintiffs failed to establish that the installation of a walkway is reasonably necessary to the intended use of the easement, and that said installation would not unnecessarily injure or increase the burden on the defendant's property. This is especially true where it is undisputed that the defendants use 524 Dune and the adjacent property as one "entire property." Accordingly, those branches of the plaintiffs' motion which seek partial summary judgment on their second and third claims are denied.

The plaintiffs' fourth claim seeks a permanent injunction enjoining the defendants from interfering with the plaintiffs' right of passage over the easement. A permanent injunction is an extraordinary remedy that will not be granted absent a clear showing by the party seeking such relief that irreparable injury is threatened and that no other adequate remedy at law exists (*see* ***Gaynor v Rockefeller***, 15 NY2d 120, 256 NYS2d 584 [1965]; ***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; ***McDermott v City of Albany***, 309 AD2d 1004, 765 NYS2d 903 [3d Dept 2003], *lv denied* 1 NY3d 509, 777 NYS2d 19 [2004]; ***Staver Co. v Skrobisch***, 144 AD2d 449, 533 NYS2d 967 [2d Dept 1988], *appeal dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]). Here, the conclusory statement in the plaintiffs' complaint that "Plaintiffs have no adequate remedy at law" is belied by the allegations and the demand for relief in the plaintiffs' sixth claim which seeks monetary damages for the defendants' alleged interference with the plaintiffs' right of passage over the easement in the summer of 2011 and the summer of 2012. In addition, a review of the record reveals that the plaintiffs have not submitted any evidence that they would be irreparably harmed once their right to passage over the easement has been established, and that the defendants, despite unsuccessfully asserting their right to relocate the easement, have expressly acknowledged the plaintiffs right of ingress and egress over their property.

"[A] permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (*see* ***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, 873 NYS2d 148 [2nd Dept 2009] *quoting* ***Icy Splash Food & Beverage, Inc. v Henckel***, 14 AD3d 595, 789 NYS2d 505 [2nd Dept 2005]; *see also* ***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; ***Forest Close Assn., Inc. v Richards***, 45 AD3d 527, 845 NYS2d 418 [2nd Dept 2007]). Injunctive relief is "to be invoked only to give protection for the future ... [t]o prevent repeated violations, threatened or probable, of the [plaintiffs'] property rights" (*see* ***Merkos L'nyonei Chinuch, Inc. v Sharf***, *supra*, quoting ***Exchange Bakery & Rest. v Rifkin***, 245 NY 260, 264-265 [1927]). A permanent injunction constitutes inappropriate and drastic relief under the current circumstances of this action. Accordingly, that branch of the plaintiffs' motion which seeks partial summary judgment on their fourth claim is denied.

The plaintiffs' fifth claim seeks a mandatory injunction directing the defendants to remove all obstructions allegedly lying within the boundaries of the easement including, but not limited to, trees and bushes planted by the defendants, fences, gates, poles, structures, fixtures, motor vehicles, and lacrosse nets. "A mandatory injunction is an extraordinary remedy to which a suitor has no absolute right but which may be granted or withheld by a court of equity in the exercise of its discretion. Even where the facts which would justify the grant of an extraordinary remedy are established, the court still must decide whether, in the exercise of sound discretion, it should grant the remedy, and if granted, the terms and conditions which should be annexed to it" (***Lexington & Fortieth Corp. v Callaghan***, 281 NY 526, 531 [1939]). A court determining an application for mandatory injunctive relief is required to consider both the benefit to the plaintiff and the harm to the defendant that would follow the granting of such remedy (*see* ***Nat Holding Corp. v Banks***, 22 AD3d 471, 802 NYS2d 214 [2d Dept 2005], *lv denied* 6 NY3d 715, 823 NYS2d 356 [2006]; ***Sunrise Plaza Assoc. v International Summit Equities Corp.***, 288 AD2d 300, 733 NYS2d 443 [2d Dept 2001], *lv denied* 97 NY2d 612, 742 NYS2d 604 [2002]; ***Medvin v Grauer***, 46 AD2d 912, 363 NYS2d 330 [2d Dept 1974]), as an injunction should not be granted if the injury to the plaintiff is not serious or substantial and the defendant would suffer "great inconvenience and loss" if the complained of acts were enjoined (*see* ***Forstmann v Joray Holding Co., Inc.***, 244 NY 22 [1926]; ***Sunrise Plaza Assoc. v International Summit Equities Corp.***, *supra*; ***Maspeth Branch Realty v Waldbaum, Inc.***, 20 AD2d 896, 249 NYS2d 32 [2d Dept 1964]).

A review of the record reveals that the plaintiffs have not submitted any evidence that the easement has been obstructed by the presence of poles, structures, fixtures, and lacrosse nets. There is evidence in the record that a motor vehicle was parked in a manner that obstructed the easement in whole or in part on one occasion, that a wire fence may have obstructed the easement for a period of time, and that there are two gates which lie across the path of the easement. Even if true, none of these obstructions warrant the issuance of a mandatory injunction herein. It is undisputed that the wire fence now has a gate which allows passage over the easement towards Moriches Bay. The second gate is a wooden gate which fronts onto Dune Road. The defendants contend, and the plaintiffs do not dispute, that the two gates are unlocked. It is well settled that a landowner burdened by an express easement of ingress and egress 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***, *supra*; ***Goldberg v Zoning Bd. of Appeals of City of Long Beach***, *supra*; ***J.C. Tarr, Q.P.R.T. v Delsener***, 70 AD3d 774, 895 NYS2d 168 [2d Dept 2010]; ***Guzzone v Brandariz***, 57 AD3d 481, 868 NYS2d 755 [2d Dept 2008]).

In addition, the plaintiffs have not submitted evidence sufficient to establish that the defendants planted any bushes or trees within the boundaries of the easement. Photographs submitted by the plaintiffs and the defendants are not conclusive. Moreover, Dinaburg admits that there is an area of "natural brush" along the

edge of Moriches Bay. Absent an agreement otherwise, a servient owner is under no obligation to construct means for the enjoyment of the easement or to perform the work of keeping the facility in a state of repair (***Tagle v Jakob***, 275 AD2d 573, 712 NYS2d 681 [3d Dept 2000]; ***Raksin v Crown-Kingston Realty Assoc.***, 254 AD2d 472, 680 NYS2d 265 [2d Dept 1998]; ***Allen v Greenberg***, 21 Misc2d 763, 195 NYS2d 287 [Sup Ct, Queens County 1959]). An easement for ingress and egress imposes no obligation on the servient owner other than the passive duty of submitting to the dominant owner's use (***Greenfarb v R. S. K. Realty Corp.***, 256 NY 130 [1931]; ***Muxworthy v Mendick***, 66 AD2d 1017, 411 NYS2d 737 [4th Dept 1978]; ***Janes v Politis***, 79 Misc 2d 941, 361 NYS2d 613 [Sup Ct, Rockland County 1974]). Accordingly, the plaintiffs' motion for partial summary judgment on its fifth claim is denied.

The Court now turns to that branch of the plaintiffs' motion which seeks an order granting partial summary judgment in their favor on the counterclaim set forth in the defendants' answer dated September 6, 2012. Said counterclaim[3] seeks a declaration that the easement be amended to provide for its relocation so that the plaintiffs and Holdings, as owners of the dominant estates, shall each have the same rights in an easement along the easterly boundary of 524 Dune, and that said owners are not granted the right to build an elevated boardwalk or walkway over the easement unless same is required by law. For the reasons set forth above, the plaintiffs are entitled to partial summary judgment, and a declaration that the defendants may not relocate the easement from the westerly boundary of 524 Dune to the easterly boundary of said premises.

However, the Court finds that its inquiry should not end there. A court may search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court (CPLR 3212 [b]; ***Dunham v Hilco Construction Co., Inc.***, 89 NY2d 425, 654 NYS2d 335 [1996]; ***1133 Taconic, LLC v Lartrym Serv., Inc.***, 85 AD3d 992, 925 NYS2d 840 [2d Dept 2011]; ***Shore Dev. Partners v Board of Assessors***, 82 AD3d 988, 918 NYS2d 566 [2d Dept 2011]; ***Masi v Kir Munsey Park 020 LLC***, 76 AD3d 514, 906 NYS2d 88 [2d Dept 2010]). Upon reviewing the entirety of the records submitted, the Court determines as a matter of law that the defendants are entitled to summary judgment dismissing the plaintiffs' third claim which seeks a declaration that the plaintiffs may improve the easement and install a walkway thereon.

As previously stated in its review of the deeds submitted in support of the plaintiffs' motion, the four properties involved in this action were conveyed by the Grantor. The easement was "originally" created in the deed dated August 21, 1973, recorded at Liber 7473, page 547, which expressly set forth that "The party of the second part is not granted the right to build an elevated boardwalk or walkway over the easement area unless same is required by law. Grantor's deed which lies within the defendants' chain of title includes a provision that the easement: " ... as granted in a certain deed dated August 21, 1973 ... and for the benefit of the premises at 525 Dune Road to be granted in a deed from grantor conveying same at a later date." It is well settled that express easements are defined by the intent of the parties (***Lewis v Young***, *supra*; ***Guzzone v Brandariz***, *supra*; ***Estate Court, LLC v Schnall***, *supra*; *see also* ***Meyer v Stout***, 79 AD3d 1666, 914 NYS2d 834 [4th Dept 2010]). The Court finds that the Grantor's intent was to prohibit the construction of a boardwalk or walkway by either of the dominant estates herein. To hold otherwise would lead to the absurd finding that the Grantor intended

---

[3] The defendants' answer includes allegations under the heading "Sixth Defense, Counterclaim and Cross-Claim" which set forth the relief sought. Despite the heading, the Court notes that the subject pleading is an omnibus claim which includes a sixth defense to the plaintiffs' claims, a single counterclaim against the plaintiffs, and a single crossclaim against Holdings, all in one series of combined allegations.

to prevent one dominant estate from improving the easement by construction of a walkway, while permitting the other, within the same defined location of the easement, to do so as of right. Accordingly, the Court grants the defendants partial summary judgment and a declaration that the plaintiffs are prohibited from building an elevated boardwalk or walkway over the easement area unless same is required by law.

Holdings now moves for summary judgment in its favor granting it the relief requested in the crossclaims against the defendants set forth in its verified answer dated September 6, 2012. In support of the motion, Holdings submits, among other things, the affidavit of one of its officers, copies of the pleadings, and deeds. In his affidavit, Renzo R. Mori (Mori) swears that he is an officer in Holdings, that a deed in the chain of title of Holdings' property contains the easement, and that Holdings and its guests have been unable to freely enjoy the benefits of the easement due to the defendants' interference. He states that Holdings is named as a defendant in the complaint as a means to determine the rights of the parties in the easement, and that he disagrees with the defendants' contention that the proposed relocated easement is a "suitable replacement for the current easement."

The Court finds that the first through fourth crossclaims in Holdings' answer are essentially identical to the first four claims in the complaint, and that Holdings has not submitted any evidence regarding its personal knowledge of the defendants' actions, alleged interference, or conversations regarding the easement. Thus, Holdings has failed to establish its entitlement to summary judgment on the second, third and fourth crossclaims against the defendants set forth in its answer. Nonetheless, based on Holdings submission, as well as a review of the entire record, the Court finds that Holdings has established its entitlement to partial summary judgment on its first crossclaim against the defendants. In opposition to Holdings' motion, the defendants set forth the same facts and arguments as proffered in its opposition to the plaintiffs' motion for partial summary judgment. For the reasons set forth hereinabove, the Court finds that the defendants have failed to raise an issue of fact regarding the defined location of the easement, Holdings' rights as owner of a dominant estate, or their right to relocate the easement. In addition, the Court notes that Holdings does not allege in its answer, nor does it contend within its motion, that it has the right, or seeks the right, to build a walkway upon the easement. However, the defendants have included Holdings in the "Sixth Defense, Counterclaim, and Cross Claim" set forth in their answer. In light of the circumstance, the Court finds it expedient to grant the defendants partial summary judgment that Holdings is prohibited from building an elevated boardwalk or walkway over the easement area unless same is required by law.

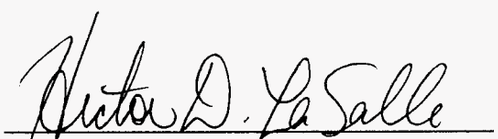
Accordingly, the Court finds that the plaintiffs are entitled to a declaration that they are the holders of a non-exclusive easement for pedestrian ingress and egress only to Moriches Bay three feet in width along the westerly boundary of the premises at 524 Dune Road, that the easement benefits the plaintiffs' property as the dominant estate and burdens the defendants' property as the servient estate, and that the defendants do not have the right to relocate said easement absent the consent of the plaintiffs and Holdings. In addition, the Court finds that Holdings is entitled to a declaration that it is the holder of a non-exclusive easement three feet in width along the westerly boundary of 524 Dune Road for the right of ingress and egress only to Moriches Bay, that the easement benefits Holdings' property as the dominant estate and burdens the defendants' property as the servient estate, and that the defendants do not have the right to relocate said easement absent the consent of Holdings and the plaintiffs. The Court further finds that the defendants are entitled to a declaration that the plaintiffs and Holdings do not have the right to build an elevated boardwalk or walkway over the easement area unless same is required by law.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Settle judgment.

The foregoing constitutes the Order of this Court.

Dated: April 1, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION