

Dilorenzo v Juan Ortoo Holdings, Ltd.

2014 NY Slip Op 33975(U)

June 4, 2014

Supreme Court, Otsego County

Docket Number: 2014-0277

Judge: Brian D. Burns

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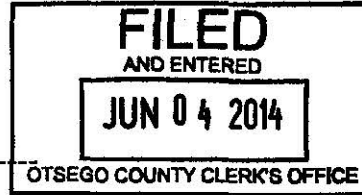
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At a term of the Supreme Court of the State of New York held in and for the County of Otsego at the Village of Cooperstown, New York on the 23rd day of May, 2014.

PRESENT: HON. BRIAN D. BURNS
Acting Justice of the Supreme Court

STATE OF NEW YORK
COUNTY COURT: COUNTY OF OTSEGO



2014 JUN 4 PM 1 40
OTSEGO COUNTY
CLERK'S OFFICE

FRED DILORENZO and JAN M. DILORENZO,

Plaintiffs,

DECISION AND ORDER

-against-

Ind. No. 2014-0277
RJI No. 2014-0120

JUAN ORTOO HOLDINGS, LTD., STEVEN
STEGMAN, MICHAEL SWATLING d/b/a SWATLING
LOGGING, ROBERT SCHALLERT and JOAN M.
SCHALLERT,

Defendants.

Plaintiffs have moved this court for an order granting a preliminary injunction by filing an Order to Show Cause. The Order to Show Cause was signed on April 4, 2014, and made returnable for May 2, 2014. The Order to Show Cause temporarily enjoined the defendants from removing timber from certain property pending determination of the motion (see, CPLR § 6301). At the request of counsel for the defendants, Juan Ortoo Holdings and Steven Stegman, the court adjourned the matter to May 23, 2014.

The court has considered the papers submitted in support of, and in opposition to the motion. The court has also considered the arguments made on the return date. Finally, the

court has reviewed applicable law and now finds the following.

Procedural Background

Plaintiffs filed a Verified Complaint together with the motion papers seeking a preliminary injunction. The Complaint sets forth nine causes of action. Briefly, the Complaint alleges that plaintiffs own certain real property consisting of approximately 112.05 acres, located in the Town of Hartwick, Otsego County, which was acquired by deed made by defendants Robert and Joan Schallert on May 5, 2003, and recorded the same day in the Office of the Otsego County Clerk in Liber 1003, Page 258.

The Complaint further alleges Juan Ortoo Holdings owns real property, consisting of approximately 112.22 acres, that abuts a portion of the northwest boundary of plaintiffs' property. Plaintiffs allege that in July 2013, Mr. DiLorenzo discovered that timber had been harvested from an area bordering the Juan Ortoo Property in an area, consisting of approximately 34 acres, which is referred to as the "Todd Lands". It is also alleged that Mr. Stegman hired Mr. Swatling to remove timber from the Juan Ortoo property, who admitted that removal from the Todd Lands was in error and offered to reimburse plaintiffs, which is alleged to not have occurred.

On April 1, 2014, the Complaint alleges, Mr. DiLorenzo again discovered representatives from Swatling Logging removing timber from the Todd Lands. A representative from Swatling

Logging stated that they possessed a survey which showed that Mr. Stegman or Juan Ortoo Holdings is the owner of the real property upon which they were logging.

Conclusions of Law

A "preliminary injunction is a provisional remedy, interlocutory in nature, designed to maintain the status quo until adjudication on the merits (Moore v. Ruback's Grove Campers' Assn., Inc., 85 A.D.3d 1220, 1221, 924 N.Y.S.2d 197 [3rd Dept. 2011])." The grounds for granting a preliminary injunction are set forth in CPLR § 6301 which provides that one may be issued "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

Against this statutory standard, courts have established a three-pronged test which requires that the moving party "establish a likelihood of success on the merits, irreparable harm in the absence of an injunction and a balancing of the equities in his favor (Moore, id.)."

Addressing the first prong, plaintiffs have proffered a

deed, which has been recorded in the Otsego County Clerk's Office, which conveys property, including the Todd Lands, to them. They have also provided a tax map which shows they are owners of the same property. Finally, they have averred that they have held continuous, open and notorious possession of, and paid real property taxes on, the same property. In opposition, the defendants have offered a land survey completed in February 2014 by Michael D. Austin, and filed on March 6, 2014 in the Otsego County Clerk's Office, which shows that the Todd Lands are not part of the DiLorenzo parcel.

The conflict between the evidence submitted by both sides cannot be resolved at this preliminary stage, and without further proceedings, there is no method to fully assess the qualitative measure of the evidence submitted. However, from an objective standpoint, the court concludes that plaintiffs have demonstrated a likelihood of success on the merits.

Addressing the issue of irreparable harm, defendants have imposed upon plaintiffs a requirement that they provide an estimate of the number of trees cut, the species of trees cut, and estimated value to demonstrate that there has been irreparable harm. Whereas, even the threat of removal of large trees, alone, has constituted irreparable harm (Green Harbour Homeowners' Assn., Inc., v. Ermiger, 67 A.D.3d 1116, 1117, 889 N.Y.S.2d 687 [3rd Dept. 2009]), the court concludes that plaintiffs' allegations - that actual removal of trees has

occurred and there exists the threat of continued removal - demonstrate a danger of irreparable harm. Furthermore, it can't be reasonably argued that if trees were taken from the property illegally, that the character of the land, now stripped of trees, has not changed materially and, in all likelihood, irreparably.

Finally, in considering the balance of equities, the court again considers that if a preliminary injunction is not issued, and trees are removed by defendants, and the removal is later determined to be unlawful, there is no practical way to return plaintiffs nor their land to the status quo. While plaintiffs may be compensated ultimately, replacing or replanting trees and restoring the land to its previous condition would likely take decades, if ever.

By comparison, if defendants are not permitted to harvest timber from the land, while the action is pending, and it is later determined that they should have been permitted to do so, they necessarily suffer financially by the delay. However, the trees, and potential money to be realized from the harvest, still remain to be taken. Further, in that the loss is pecuniary, the loss is compensable.

In sum, the balance of equities weigh in favor of plaintiffs.

NOW, THEREFORE, it is hereby

ORDERED AND ADJUDGED that the motion for a preliminary

injunction is granted; and it is hereby

ORDERED AND ADJUDGED that defendants are enjoined and restrained from trespassing upon, or cutting and/or removing timber from, the property that is the subject matter of this litigation, located in the Town of Hartwick, Otsego County, Tax Map I.D. No.: 162.00-1-22.01 until such time as all causes of action asserted by the plaintiffs have been determined by this court.

Dated: June 4, 2014
at Cooperstown, New York

ENTER



Hon. Brian D. Burns
Acting Supreme Court Justice

To: Clerk of the Court
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