Martin v Robins
2016 NY Slip Op 31879(U)
August 9, 2016
Supreme Court, Suffolk County
Docket Number: 22818/2004
Judge: Ralph T. Gazzillo
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Index No: 22818/2004

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

POST-TRIAL ORDER

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

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Michael Martin and James P. Sheehan,

Plaintiff(s),

- against -

Samuel Davis Robins,

Defendant(s).

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The non-jury trial of this matter was conducted before the undersigned on May 2nd and 3rd, 2016. Prior to the testimony, a number of items were pre-marked as either exhibits or directly admitted into evidence. In addition to those items, the parties relied upon the testimony of seven (7) witnesses. The plaintiff, Michael Martin, called himself, Edward Dilport and Amelia Mac Donald; the defendant, Samuel Robins, called himself, David Saskas, Howard Young, and Peggy Hammond. Additionally, the defendant's counsel read excepts from the deposition of a non-party witness, Suzanne Bennett; other portions of her deposition as well as a prior order of this court[1] were offered as rebuttal by the plaintiff.

At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments, requests for findings of fact pursuant to CPLR §4213, as well as any responses and replies by July 5th, 2016. Those memoranda having finally been received and since reviewed, the Court's decision is as follows:

The analysis begins with the plaintiff's complaint which set forth six causes of action: 1) a demand for declaratory and injunctive relief regarding the validity and extent of an easement; 2) *prima facie* tort - specifically, the failure to abide by a court order; 3) and 4) two claims of nuisance (the second of the two or "Fourth" cause of action, has since been withdrawn); 5) damages; 6) punitive damages.

At the beginning of the trial, there were a number of stipulations, *viz.*

1) By easement dated February 13, 1969, defendant's predecessor in his chain of title granted plaintiff's predecessor

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[1] Tanenbaum, J.S.C.

in title an easement for ingress and egress over the defendant's driveway. That easement provides:

> "That the party of the first part . . . does hereby remise, release and forever quitclaim unto the party of the second part, her heirs and assigns, a right to use a driveway jointly with the party of the first part, his heirs and assigns, for all ordinary purposes of ingress and egress, over the same, leading from Cedar Street on the northeasterly side of premises of the party of the second part situate in the Town of East Hampton, Suffolk County, New York and running southwesterly therefrom along the southeasterly side of the premises of the party of the first part adjoining said premises of the party of the second part, and over an existing driveway, said easement being limited to a width of 15 feet."

2) Both properties are contiguous.

3) Previously, it had been stipulated that there was no need to call a representative for purposes of authenticating aerial maps from Geo-Maps as long as the maps are accompanied by proper Affidavit of Authenticity from Geo-Maps or Aerial Image Resources.

4) Previously, it had also been stipulated that neither plaintiff nor the defendant, their agents, representatives or counsel will designate, call or otherwise use David L. Saskas, LS, as an expert witness in this trial. Neither party, however, was precluded from calling Saskas as a fact witness in the trial. (There was, however, an on-going controversy which accompanied this stipulation: the question of whether his testimonial evidence would be classified as that of a"fact" or an "expert" witness and thereby precluded by the stipulation. After arguments by both sides, the determination of the issue was reserved.)

TESTIMONY

What immediately follows is an uncritiqued and condensed version of the testimony of the various witnesses regarding the relevant and germane facts of this matter as was portrayed,

purported and alleged by each.

Martin, the plaintiff, testified that he resides at the subject location, 129 Cedar Street. In August of 2003, he purchased it with Jim Sheehan. In 2005, he bought out Sheehan and is now the sole owner. He has three pre-teen daughters who reside with him, and he has been married for three years. He also has a home in Montclair, New Jersey where the children attend school. Last year he spent weekends, Christmas, and the summer at his Cedar Street home. From 2006 to 2008, it was his primary residence.

When he purchased the property he was aware of the easement. It was his understanding that it provided him access to his house for entire length of his property from Cedar Street to the rear property line or border it shared with Cedar Lawn Cemetery. Its width is 15 feet along the property line with his neighbor, the defendant Robins, and its pathway is located on Robins' property. Both parties' properties have the same rear boundary - again, the cemetery.

After the purchase in 2003, Martin would drive the length of driveway/property line (hereinafter, "the driveway") and park at the rear. He did this every time he was there for the first year and a half - which was mainly on the weekends. Parking at the rear required him to drive to the end of the driveway and then turn left onto the rear of his property. This ended one day when Robins blocked his path midway with vehicles, a fence post, and building materials; Robins had started to install a fence post halfway up the driveway. He asked Robins to please not do that, adding that he would take legal action if it was continued. Robins replied that Martin had no right to use the entire driveway.

He had first met Robins on August 14, 2003, the day of the closing. Robins said, "You stole my house," and that the previous owner had promised she would sell it to him. Robins indicated he had given the prior owner a contract. Robins and Martin next spoke a few weeks later. Robins said he was a contractor and had plans for a wall across the front of the property to abate street noise; Martin opted against it at that time. Shortly thereafter Robins came over with a bottle of wine and four pasta bowls. Martin said he would not accept the bowls if they were part of an attempt to purchase the easement; Martin accepted them when Robins denied that had been his purpose.

He stated that Robins has three access points to his property, one in the front of the house, one in the middle of his property and a third at the barn/garage at the rear. They are somewhat equidistant from each other and across from his three access points. In 2004, Robins would park a car in the middle of the driveway just behind the Robins pool cabana and leave. As a result, Martin was only able to access the middle driving area but not beyond. Robins also blocked further access with vehicles, containers, construction materials. Martin added that he was unable to access the back area since this court's September 22, 2004 temporary restraining order and its resulting order of May 12, 2005.[2] In essence and pending the further order of the court, those

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[2] Tanenbaum, J.S.C.

orders found that Robins was interfering with Martin's access to his property from the entire length of the driveway and ordered Robins to remove any obstacles. Martin indicated that "to this day" Robins hadn't removed the obstacles and there was a "blockade" of steel pipes and beams. Martin identified photographs depicting those and other obstructions he claims "completely block [his] access to [his] property." He reviewed other photographs which depicted fenceposts as well as the rear of Robins' property and the vehicles, materials, and gateposts stored there. Martin claimed this made it impossible to enter his property at its rear or back end. He also indicated that Robins had stored construction material against his property line to annoy him. From October of 2004 until the present, Martin has had no access rear of property via the driveway. The materials were not there when he moved in, they were placed there after the temporary restraining order. Since that time those obstacles have limited the number of cars he could have on his property and obstructed the passage of construction vehicles and machinery for the installation of a cesspool and pool house.

On cross-examination, he indicated that the trucks and construction materials which are displayed in photographs as stored at the rear of Robins' property were on a surface improved with pavers, but he stated they are "within the 15 feet of the easement." He identified a fence at the rear of Robins property and indicated the fence which separates their properties and the cemetery; he also has a fence for the pool area.

Returning to the discussion of the pavers, he stated they were there when he purchased the property; he also described the location of the pavers, and that they are close "if not touch" his property. The storage in this area began in 2004 and was limited to the area with the pavers. It is his position that he has the right to access where the construction material is, as well as any point along the boundary between the parties' two properties. He indicated there were three access points. The first access point is in front of house. Crushed gravel and Belgian block have been placed there but doesn't believe its size has been expanded. He usually parks two cars there; he has six. There is no claim that Robins has obstructed the first access point.

Although Martin had driven past it for several years prior to the purchase, the first time he was on the property was in early April or May 2003. At that time it was owned by Suzanne Bennett and that first access point was in existence. The second access point is behind house; it has a parking area 25 feet deep and is wide enough to tightly fit three cars. He has reduced that area with plantings.

His entire plot is approximately 120 to 125 feet wide; it is rectangular. The parties stipulated that the "street side" width of the property is 100.00 feet while the rear or cemetery side is 100.08 feet. The property line between the parties' properties runs 358.69 feet; the other side is 354.62 feet. The property is level.

He added that he wanted to bring in trucks to install and service a septic system and build a pool house and pool. The contractors did so by access through the "middle" access point and they could not have accessed pool area from other access areas without damage to the property.

He didn't have a survey completed when first purchased property and the first survey was ordered when selecting a location for the pool.

Between his house and the street there is a water runoff system or cistern which takes up about 12 feet and runs from the corner of his property and Robins'. There is a historically-protected tree at the other corner. The existing front parking area does not fill the entire front yard and has room for expansion. There is a lawn behind the house. The pool fence extends to this second parking area. He doesn't know if "legally" there is room for more parking on his land. There is a fence about two-thirds down the property line from the cemetery and perpendicular to the property line; it was there when he purchased the property. When he moved in, the rear of property was an overgrown unimproved area; he didn't recall if there was a path to the house. As to the gate posts he had described on his direct testimony, there is no gate, just posts.

On his re-direct examination he stated he had seen a gate; when the defendant was installing the gate posts, he had it laid out on the lawn. As to his first parking access point (in the front of his house), it is the same size and location as Robins'. As to the second, Robins' is slightly smaller while Robins's third is significantly larger. If the obstructions on the driveway were removed he could turn into his back parking area without moving the pool fence.

On re-cross-examination he stated that when he purchased the home there had been a parking area on the back of his property near where the pavers are. There is a cutout area near pavers; there is a fence there which may have been installed on the property line.

Finally, on re-direct, he stated that the pool fence is properly placed where he intended it to be.

Dilport testified as an expert, specifically as a photogrammetrist. He has been in this field for 31 years and initially received his training and experience while serving four years with the United States Air Force. He attended an Armed Forces intelligence course and was trained for a year in aerial photo interpretation and related chores including using photographs to produce maps and graphics. His title or MOS was as a target intelligence specialist. In 1988 he entered into his civilian career, beginning with Golden Aerial Services. That firm interprets aerial photographs and converts them into maps and graphics and produces "orthophotos" or photographic maps. This process essentially "flattens the subject" and thereby assists in ascertaining more precise measurements of distances.

Focusing on the matter at bar, he indicated that he had reviewed a number of photographs of the subject properties which were in evidence, beginning with the earliest, one dated April 1, 1969. He indicated that it was a "poor scan" and very grainy; it was also during "leaf-on conditions," or shadowy due to a "canopy" or leaves still on the trees. Focusing on the back end of the properties, he noted that the east side of the driveway was obscured and it did not show where the end of the driveway was. Another 1969 photo was "leaf-off" and clearly portrayed the

driveway, including an area obscured in the previous photo. The "leaf-on" photo did not reveal an auto on the plaintiff's property but the other showed one which "in whole or in part" was. He indicated that he was "100 percent confident" that it was an automobile. Furthermore, he projected that to get to that location the car had to travel down the driveway. A 1976 "leaf-off" photo but at a different scale showed the driveway. He stated that there was a boat on Robins' property and an auto in the same location as the prior vehicles - again in whole or in part on Martin's property. He stated this was definitely a parking area (there was a tone change in the surrounding area) and he reiterated his opinion that method for the vehicle to arrive at that location was to travel down the driveway. Another "leaf off" photo, this from 1978, showed a car in the same parking space and another on the defendant's property. Once again he opined that the both autos had to "traverse down the driveway." After viewing a 1984 "leaf-off" photo he also concluded that the parking area's contrasting color *vis-a-vis* the surrounding area was caused by repeated traffic. After his review of all of the photos - those from 1969, '76, '78 and '84 - he opined that the use of the driveway was consistent through those years.

On cross-examination, he indicated the photos are - other than when they were taken - of the same area. He stated that he could not indicate the boundary between the two properties. He identified what might have been a single car. He added that there is no way to determine who parked cars on the properties. He also opined that the area in front of Martin's house was used as a parking area in the 1976 photo; this did not appear in the 1969 photo but the one behind the house did. A structure at the rear of the Robins' property had a boat nearby. He stated that the car in the parking area was "roughly" fifty feet from the structure and it was two hundred feet from the car to Martin's house; other than the driveway, there was no visible pathway between the two. As to any auto in the photo, there was no way to determine if it was usable or junk. Using the scale on a 1978 photo, he estimated the distance from the edge of a car in the parking area to the structure at the rear of the Robins' property to be "thirty-five, forty feet," and "180 feet, roughly" to the Martin house with no path visible other than the driveway. Lastly, a 1984 photo indicated a fence might have been added since 1978 and that the driveway appeared to veer "ever so slightly" away from the Martin property.

During his re-direct examination he indicated that while there were no pathways visible in the photos there may or may not have been a path. Using an inlayed surveyed/photo of the properties, he indicated that the car appeared to be substantially outside of Robins' property.

Mac Donald testified that she has been a land surveyor for 20 years, licensed and registered in New York, Connecticut, and North Carolina. She was schooled and apprenticed in her profession, having attended SUNY Buffalo and Suffolk County Community College. For purposes of the trial she was deemed an expert in land surveying.

Prior to the trial she had reviewed the properties' chains of title, the subject easement, its right to use the driveway. She stated in particular that the easement is not a driveway but the right to access. She also stated that the easement ran over an existing driveway but did not limit specific points of ingress and egress. She opined that it "was written as general in nature in

providing access from the street to the property." The only written restriction it contained was its width: fifteen feet and for "ordinary" use. A review of prior surveys, the chains of title, and aerial photographs indicated to her that the driveway is in substantially same location.

During her cross-examination she stated that the easement's words for "for all ordinary purposes" of ingress and egress are restrictive. She personally visited the property and saw a masonry driveway but was unable identify any such driveway on the photographic evidence nor testify as to when or for what purpose it might have been installed. Lastly, she confirmed that Suzanne Bennett owned the property from May 8, 1970 to August 13, 2003. Thereafter, she also confirmed that she was unable to identify pavers at rear of driveway. The plaintiff rested upon completion of her testimony.

The defendant's case began with Robins. He identified the July 11, 1988, deed to his property and the Certificate of Occupancy. He described the property's condition when he had purchased it and that there was a dirt and gravel driveway, and halfway or so down it there was a turnoff. The driveway veered towards the barn at the rear with a small clearing for parking. Besides the midway turnoff there was one in front of the house (now Martin's house); both turnoffs led to the now-Martin property. At the time of the purchase, there was a "drive or whatever" that veered toward the barn with a seashell-covered parking area. After he occupied the dwelling he made alterations. He cleaned up the barn and made structural improvements including siding. In 1988 or 1989, he installed pavers. At that time up to the present he has used the property for his "construction/contracting/cabinet/carpentry business" purposes. In 1994 or 1995 he stored materials such as lumber and other items on the now-Martin then-Bennett property. Bennett was still the owner and she permitted it, but in 2003 when she was selling the property she asked him to remove the material and he did. When Martin purchased the his property, it been essentially unchanged: a row a shrubs had been added and the wooded area and the rear was more overgrown while the fence at rear along property line was still there. In 2003 there were two locations to drive onto defendant's property, one in front of the house, one to the house's rear. When he installed the pavers it did not change the driveway or its location and since then he has occasionally filled-in potholes and did some grading. As to his house, he began to expand it and built the pool house, pool and garage. He never altered the access points on Martin's property but Martin did, widening both the front and middle points. There had never been a rear access point beyond the midway opening in all the time he was there. He also reviewed somewhat recent photos of the driveway and his pool and pool house. He indicated that he had stored framing lumber, PVC pipe and masonry on Bennet's property and then moved it onto the paved area of his property.

On cross-examination he reiterated that in 2003 he had moved and removed construction material on his area but what presently remains there is not entirely the same items as some is old and some has been added. In 2006 the barn existed but it was a storage space and not a work area. He also has storage bins on his property. He identified a photo which shows his truck parked at the end of the driveway - the same place as a white van and a blue truck shown in a 2008 photo. He also identified recent photos of a pile of metal pipe and copper which were

awaiting recycling as well as pallets, metal pipes, garbage, wood, framing lumber, plywood and CCA lumber - all on his property. If the area were clear of material he could park ten to twelve vehicles there; he presently he parks two business vehicles there. He detailed how Martin's use of the entire driveway would impact on his use of his property, specifically how turning his vehicles would be difficult, but it would not impact on his use of the pool. He indicated that he stores construction vehicles, materials, bins and a dumpster on his property and runs his business there. He concluded by stating that he lives in Amagansett, not at the location.

On re-direct examination he stated that he has a building permit for the house.

Saskas testified that he is a land surveyor and since 1992 has had his own business. He prepared a survey for Martin and his former co-owner, Sheehan. His office is his office is on opposite side of street from the property and some six or seven hundred feet diagonally south of it. He is somewhat familiar with property shown on survey and has walked down the driveway and observed two vehicular access point but had no recollection of a paved surface. He has never seen a vehicular access point in the now-brick or rear surfaced area.

On cross-examination, and after viewing some of the aerial photographs, he acknowledged that the rear area appeared to be a parking area.[3]

Next, Bennett's deposition was read into the record. She had lived more often than not at 129 Cedar Street. Between 1970 and sometime in the early 1980's she was only there on weekends. Behind the house there had been a free-standing garage which fit one vehicle; it faced the driveway. She would drive onto driveway to get into the garage. She knew of the easement and that when Wilbur Hamilton lived in 131 Cedar Street he had used the barn as part of his plumbing business. The backyard had grass, a fence and behind which was "just left wild." The fence was wooden, had vertical slats and there as more property beyond it up to the cemetery. The fence was perpendicular to the property line and more or less the width of her property. After Robins moved in, he put in a pool and a pool house. He stored some material on his property and some at the rear of her property. She had never discussed the easement with anybody. Robins may have paved driveway back by the barn. The first access point in front of her house was not there when she purchased it; she constructed it. She had reduced the size of the parking area at the second access point. During the entire 33 years she owned the property there were never any other access points to her property other than the two in front of and to the immediate rear of the house. She may have driven to rear of property; it was not something she made a habit of. She also knew Hamilton had "stuff" in the barn and had trucks there.

Young testified as an expert in land surveying. He prepared a survey of the Robins' property and overlaid it over certain aerial phonographs. His surveys are prepared using aerial, satellite controlled photographs or "survey grade GPS." The end result or product is

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[3] In view of the limited scope of his testimony, he would be deemed a "fact" not an "expert" witness, and therefore not a violation of the parties' pre-trial stipulation.

topographical or surface earth features on the ground which are "as accurate as you can see with the eye" or as portrayed within the survey. Employing this method, the exact location of the property lines are revealed but no vehicle was shown in the parking area in the 1969 or 1976 photographs. The exhibits, however, do depict a driveway that was similar over time and never changed in its location. The driveway does not totally parallel the property: at the rear it veers inward toward the rear storage area or barn. The "parking area" appears to be within the Robins property.

During his cross examination it was indicated that the earlier 1969 photo was "leaf-on" while another was "leaf-off." He disputed whether the path after the brick area could be called a "driveway." When shown other photographs he indicated he saw what "looks like a car" but it could be other things. When questioned by the court, he stated that the object had "a very small portion . . . right on the property line" and the majority of it was on the Martin property.

The last *viva-voce* witness, Hammond, indicated that she knows Robins ever since he moved to 139 Cedar Street. He lives across the street from her and Martin is a "little to the left." She first met him "in the hallway" before she testified. She had lived in her house since 1968. Her home was built in 1910; it's a large, three-story shingled farmhouse. She has walked on both parties' properties since her children were young. From the from second and third floors of her house she has been able to see all of the properties all the way back to the cemetery. On Robins' property there had been an ugly brick commercial plumbing building with a half-circle driveway to its front. Behind the building were brambles which overtook the entire rear portion the property. Martin's property had a ranch house. In 1968, a dirt driveway branched into the half-circled driveway in front of the plumbing store and then went to the back of the "Martin" house. From Cedar Street it went behind the house where there were two parking spots. There were no other access points on the "Martin" side. There was a field beyond that second access point. After the prior property owners divorced, they split the property in two. After that time, there was still only one parking area behind the house on Martin's side. The property to the rear of that house became progressively more overgrown and it became hard to see the cemetery. During the 1970's there was a shed on the "Martin" property behind the house and between the shed and cemetery there were brambles and trees. Nothing changed when Suzanne Bennett owned property other than perhaps putting up a fence.

During cross-examination she indicated that prior to the divorce, the two properties were one and the owners of the properties had a house on one side and a business on the other. She did not identify a driveway when shown a photograph.

Following the close of the defendant's case, the plaintiff's offered portions of the Bennett deposition as rebuttal. As noted therein, when she purchased her property she understood she had an easement to use driveway. She had seen a legal document to that effect and she never relinquished her right to utilize her right to use the driveway. When she purchased the property the driveway went the length of the property to the cemetery. No one ever prevented her from using any part of the driveway. The driveway was already in existence when she purchased the

property and its configuration never changed.

Lastly, the March 31, 2005 order of this court[4] which granted the plaintiff interim injunctive relief regarding the his access to the easement was read into the record.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondarily, it should go without saying that in evaluating any witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence,* 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, a witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record. The fact-finder, of course, enjoys a unique perspective for all of this as well as the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v Town of Bedford,* 60 NY2d 492 (1983); *Latora v Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc. v Parr Gen. Contr. Co., Inc.,* 102 AD3d 770 (2d Dept 2013); *Hom v Hom,* 101 AD3d 816 (2d Dept 2012); *Marinoff v Natty Realty Corp.,* 34 AD3d 765 (2d Dept 2006). Lastly, common sense, experiences, expectations as well as logic are, of course, part of the process; as Hemingway observed, "The truth has a certain ring to it."

Also worthy of examination is any witness' interest in the litigation. *See e.g.,* 1 NY PJI3d, vol.1A, §1.22, p. 186. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact; under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus,* the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *Id.* §1.22, p.46.

Additionally, it should be underscored and acknowledged that during the course of gauging any witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See e.g., People v Bass,* 110 AD3d 1356 (4th Dept 2014); *Matter of Onuoha v Onuoha*, 28 AD3d 563 (2d Dept 2006); *People v Brown*, 24 NY2d 168 (1969).

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[4] Tanenbaum, J.

Those tasks and duties aside, there is also the purpose and goal of the proceeding, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it. If the evidence does not so satisfy the fact-finder, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d, vol.1A , §1:23. Parenthetically, the same standards and rules apply, obviously, to a defendant *vis-a-vis* any counter-claims. *Pagnotta v Diamond*, 51 AD3d 1099 (3d Dept 2008); 1 NY PJI3d, vol.1A , §1:23; *see also,* pgs. 71-72.

As to those issues and law which are more particular to the matter at bar, the legal analysis begins with noting that there is no argument that an easement exists and it existed when the plaintiff took the property. *Cf., Witter v Taggart*, 78 NY2d 234 (1991). The focus of the dispute, however, is the interpretation of that grant. The plaintiff's argument, is, in essence, that for various reasons he is entitled to the full use of the so-called "driveway." The defendant claims it is less generous and the use restricted. The easement's literal language, however, is not sufficiently specific to off-handedly dismiss either points of view, and thus the litigation.

While they have their disagreements, there can also be no argument that a "covenant is ambiguous when it is capable of more than one interpretation or, in other words, when it does not unequivocally prohibit a use." However, it was long ago underscored that "it is a well established rule that a vested right in real property should never be allowed to rest on inference or speculation." *Dime Sav. Bank of Bklyn v Berri,* 176 Misc. 334 at 337 (Sup Ct Kings County 1941). Even older is the is the law's paramount concern and the key to the resolution of such issues, *viz*, the intent of the parties. *Bliss v Greeley*, 6 Hand 671 (NY Ct. of Appeals, 1871). When there is a questionable construction the resolution of that issue may be had after reviewing the circumstances surrounding the original grant and thereby determine the original parties' intentions and motivations. *Phillips v Jacobsen*, 117 AD2d 785 (2d Dept 1986). This "look-back" procedure is by no means novel. Indeed, over a century and a half ago it was noted that the approach to "regulation" of such controversies is guided by "the nature of the case and the circumstances of the time and place" and even at that time the practice was already well-settled. *Bakeman v Talbot*, 4 Tiffany 366 at 370 (N.Y.Ct. of Appeals, 1865). Not withstanding its age, that approach has continued to be the rule and over the years repeatedly applied by the trial courts. *See, e.g., Anthony v Bardeshewski*, 49 Misc2d 1030 (Sup Ct. Oswego Cty 1966). As a result of this established practice hornbook law has evolved: any such covenants should be interpreted so as to give effect to the parties' intention as may be ascertained from the document's language or the surrounding circumstances so as to carry out the purpose for which it was created. 1 Restatement 3d of Property, Servitudes, 1.1.

It was equally well-settled long ago that once a court determines the purpose for which the parties created the covenant it is its responsibility to fashion an order "such as is reasonably necessary and convenient for" that purpose. *Grafton v Moir*, 85 Sickels 465, 130 NY 465, (NY Ct of Appeals, 2d Division 1892)(a case cited by the defense). Despite its age, that rule also has been followed again and again. *See, e.g., Dalton v Levy*, 258 NY 161 (1932); *Minogue v Kaufman,* 124 AD2d 791 (2d Dept 1986). This approach has been utilized when determining "a right of 'egress and ingress' over" a lot. *Dalton v. Levy, supra,* at 166. The resulting grant, of course, may not be as generous as the beneficiary of the easement might claim necessary or desire, but may be limited (*Minogue v Kaufman, supra*) as the law "bounds it by the line of reasonable enjoyment." *Grafton v Moir, supra*, at 471. A result may be one where the court denies the beneficiary the unrestricted full use of the grantor's property. *Dalton v Moir, supra.* Quite obviously, of course, this is not the case when the length has been satisfactorily specified within the grant. *See, e.g., Capersino v Gordon*, 35 Misc2d 1222(A), (Sup. Ct. Suffolk 2012).

Lastly, there is another consideration which may be relevant to determining the extent or limit of the grant, and one which focuses on what may have preceded or even followed the grant. That theory recognizes that a "neighborly relationship between the" parties and their "predecessors in title" may create "an implication that the use of [a] disputed driveway" which arose "from a cordial and cooperative relationship" may support a finding that the use was "permissive." *See, e.g., Hassinger v Kline*, 91 AD2d 988 at 989 (2d Dept 1983).

The plaintiff's second cause of action alleges *prima facie* tort. The basic *rule vis-a-vis* such an action is simply stated: "the key to *prima facie* tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful." *ATI v Rudder & Finn,* 42 NY2d 454 at 458 (1977)(quoting *Ruza v. Ruza,* 286 AD 797 at 769 (1st Dept 1955); *see also, Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585 (1st Dept 1982).

The third cause of action is stated as "NUISANCE FOR INTERFERENCE WITH EASEMENT." A so-called "private" nuisance occurs when one invades the interest in the use and private enjoyment of land and the invasion is unreasonable and intentional, or negligent or reckless. *See, generally, Spano v. Perini Corp* 25 NY2d 11 (1987). An important caveat to that cause of action is that the interference must be substantial. *Copart Indus. v Consol. Edison Co. of N.Y.*, 41 NY2d 564 (1977).

As the fourth cause of action having been withdrawn, the next or fifth cause of action seeks damages, purportedly for the costs incurred by the plaintiff to access the property and to enforce the court's orders. Where an award of money damages is sought in a civil action, one of the basic premises in gauging the viability of such an action is the maxim of *damnum sine injuria est injuria sine damnum:* liability without damages is the same as damages without liability. In the absence of proof of both liability by the defendant as well as damages by the plaintiff, the plaintiff will typically not receive any compensation. Also, and assuming the issues of liability and damage are found in the plaintiff's favor, there is a further caveat, *viz*, the proof must contain

evidence to support a valid calculation of any monetary award for the damages. Stated otherwise, an award of money damages should not be measured or determined by a whim or caprice; there must be a rational, well-established basis for any such award. Obviously, this rule is not only logical and just, it also reflects the established and historic admonition to avoid awarding damages on whim and/or naked speculation as opposed to some proven, satisfactory method which has some acceptable measure of precision. *See e.g. Goldberg v. Besdine*, 76 AD 451 (2d Dept 1902); *see also Kenford Co. v. County of Erie*, 67 NY2d 257 (1986); *R. B. v. M.S.*, ___ Misc. 3d ___, 303455/10, NYLJ 1202642854926 (Sup NY 2014). Indeed, in addressing the issue of a claim for damaged personal property the unanimous *Goldberg v. Besdine* panel wrote,

> "There is proof as to the first cost of the articles which the plaintiff claims were injured or destroyed, but they were all in use, and had been in use for some time, and no proof was made of their condition or value at the time of the fire. Under these circumstances, the estimate of the value made by the court was necessarily conjectural, and is not based upon that reasonably precise proof which it was within the power of the plaintiff to furnish and which the law requires."

Goldberg v. Besdine, supra at 452-53.

Although the rule that requires "that damages be reasonably certain, [it] does not require absolute certainty." *Ashland Mgt. v. Janien*, 82 NY2d 395 at 404 (1993) (as long as based upon reliable factors but without any undue speculation, damages from loss of future profits are often an approximation). *Cf. Vasquez v. Gesher Realty Corp. & B & B Mgt.*, 43 Misc 3d 53 (App Term 1st Dept 2014) (in the absence of articulated basis for estimated lost profits, claimed amount for damages indicated as "more or less" insufficient). Under appropriate circumstances where the proof does not provide a sufficient degree of preciseness but there is some support in the record and it is not legally erroneous, the fact-finder may rely upon "reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgement and common sense in arriving at [an] amount." *Matter of Rothko*, 43 NY2d 305 at 323 (1977). "The rule of certainty as applied to the recovery of damages does not require absolute certainty or exactness, but only that the loss or damage be capable of ascertainment with reasonable certainty." 36 NY Jur Damages, § 15. Recognition of that logic and the rule which flows from it is long and well established. *See, e.g., Gombert v. New York Cent. & Hudson Riv. R.R. Co.*, 195 NY 273 (1909).

The sixth and last cause of action demands punitive damages for the defendant's alleged interference with the plaintiff's property rights, the encroachments, and violation of the court's orders. Albeit in a libel case, *Toomey v Farley*, 2 NY2d 71 (1956), the law and/or rule of punitive damages that was therein set forth is equally applicable to the case at bar:

> "Punitive or exemplary damages are intended to act as a deterrent upon the libelor so he will not repeat the offense, and to serve as a warning to others. They are intended as a punishment for gross misbehavior for the good of the public and have been referred to as 'a sort of hybrid between a display of esthetical indignation and the imposition of a criminal fine.' Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit. The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another."

2 NY2d at 83 (citation omitted).

Stated otherwise, a demand for punitive damages may be granted in those cases where the "wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as other who might otherwise be so prompted, from indulging in similar conduct in the future." *Walker v. Sheldon*, 10 NY2d 401 at 404 (1961)(citations omitted). They are not, however, subject to unbridled discretion and must be aimed toward fulfilling their purpose: *not* to remedy private wrongs but to vindicate the rights of the public. *Rocanova v. Equitable Life Assur. Soc. of the U.S.*, 83 NY2d 603 (1994). They are recoverable if the conduct was "'aimed at the public generally.'" *Id.* at 613 (citing *Walker v. Sheldon, supra*, at 404-05).

As regards the question of contempt, there are two types contained within the Judiciary Law: 1) the so-called "criminal" (§ 750) and 2) "civil" (§ 755). There are a number of distinctions between the two but the key difference is the degree of wilfulness - criminal contempt occurs when an order is violated with a higher degree of wilfulness than that required of civil. *Dept. of Envtl. Protection of NYC v Dept of Envtl. Conservation of NYS*, 70 NY2d 233 (1987). Additionally, no matter the type, an action for contempt has a number of unique demands and procedural niceties. Those requirements are not only essential, they are absolutely indispensable and the rules requiring their satisfaction are applied remorselessly. *See, e.g.*, Brunetti, *The Judiciary Law's Criminal Contempt Statute: Ripe for Reform*, 69 DEC. N.Y.S. B. J. 47, (1997).

Bootstrapped to the contempt aspect of this proceeding is the issue of the preliminary injunction. As is commonly known among practitioners, a preliminary injunction may be granted after the movant has, by clear and convincing evidence, established 1) a likelihood of success on the merits; 2) irreparable harm absent injunctive relief; 3) a balancing of the equities in the movant's favor. *Bd. of Managers of the Britton Condo. v C.H.P.Y. Realty*, 101 AD3d 917 (2d Dept 2012). It is by definition a preliminary proceeding, one which merely grants some interim

relief pending a more robust presentation and a final determination.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Initially, and as to the witnesses' credibility, after scrutinizing each of the participant's performance, comparing their accounts to logic, common sense and experience, juxtaposing each to the others and the other evidence, analyzing each for internal consistencies, there is nothing which compels a finding that any were incredible and their testimony completely discarded. In all candor, however, and as is noted in the defendant's post trial memoranda (pps. 15-16), Martin's testimony was not total unblemished. All in all, however, all of the testimony and evidence supplies a suitable portrait of the relevant facts.

Upon that basis, and after reviewing both sides presentations of the evidence and their arguments, it should be further noted that both attorneys have provided impressive demonstrations. Indeed, clearly there is evidence, testimonial and otherwise, which provides some support for both positions. As noted above, of course, some support is not sufficient for the plaintiff to prevail. Indeed, taken as a whole, the facts and the applicable law seem to be more persuasively supportive of the defendant's position.

For example, the plaintiff maintains that the April 1, 1969 photograph displays a vehicle he claims was parked on his property. That evidence, he contends, demonstrates the prior use of that location as an access point to his property, i.e., a parking spot. While that evidence and argument have appeal, they are not conclusive. First and foremost, that photograph is *after* the February 13, 1969 date of the easement. As such, any "prior use" argument is therefore not totally sacrosanct nor completely beyond any dispute. Secondarily, Dilport - the expert - could not determine whether the vehicle parked was operable or "junk" stored there. Moreover, Young's testimony suggests that the location may not have been on what is now Martin's property. Perhaps also neutralizing the weight of that photo - or any photo - is the fact that the ownership of any such vehicle has not been established. It is therefore as equally likely that any vehicle parked there was owned by Robins or his grantor (or anyone else). Additionally, the vehicle is at the rear-most portion of the property, well beyond the middle parking area, and furthest from the now-Martin house. Why someone would park so far away from that house when the middle access parking was closer and more reasonable is contrary to one's expectations. On the other hand, a more logical explanation can be obtained by coupling that vehicle's proximity to the defendant's rear barn or shop: the nexus between the two is more obvious, more compatible, and more logical. As such, the photos supply a conclusion which readily but equally supports the defendant's contentions. Further supportive of a determination that the questioned car/parking area is for the benefit of the defendant's property is the manner in which (as testified by Dilport, Young, and Robins) that the driveway veered towards the barn, i.e., inward to Robins' property.

Next, perhaps the pivotal issue of fact and law is somewhat close to what is contained within the plaintiff's post-trial memorandum (p. 14): "the only question that remains is what was the location and use of the Driveway (sic) as it existed at the time of the grant." First of all, and

as indicated above, the use of the driveway at the time of the grant was, quite clearly, access to the barn at the rear of Robins' property. Among other indications of that is the manner in which it veers towards the barn.

Next, and as the relevant law dictates, the circumstances existing at the time of the grant can supply the intent of the grantor and grantee. Apart from the direction of the driveway to the barn, it is also clear from multiple witnesses (i.e., Hammond, Bennet, and Robins) that there was never a rear access point, and only one "parking area" behind the now-Martin house. It is also evident that when the Hamiltons divorced and split the property, that was the only parking area on the wife's (now Martin's) side and - without use of a portion of the driveway - it was inaccessible by a vehicle. Prudence would, therefore, require her to obtain access to her parking area - the logical solution being an easement granting her access to the area behind her home. It is also clear from the uncontraverted testimony of various witnesses that at the time of the grant and for sometime thereafter, the area between that middle point and the cemetery was "wild" and "overgrown." Such conditions do not readily indicate that the motives of the parties would include concern for access to this unimproved and unattended (if not abandoned) area. To the contrary, vehicular access to that area would seem beyond their contemplation nor the wife's need.[5] Indeed, the subsequent owner, Bennett, did little to change the rear area, and while she indicated she may have driven the length of the driveway (although it was not her habit), there is no indication that she used it as a parking area. Moreover, even if, *arguendo*, she did so on an occasion or occasions, this would be consistent with neighborly relationship she shared with Robins as portrayed by the fact that she permitted him to store materials on her property (which he removed upon her request when she was marketing her property). Lastly, granting access to the middle parking spot - a parking area which unquestionably existed at that time - would be consistent with the purpose of the easement as indicated by the surveyor Mac Donald, *viz.* "for all ordinary purposes." Ingress and egress to an existing but otherwise "landlocked" parking area would seem "ordinary" while such access to a virtually ignored area would not.

In sum, therefore, the plaintiff hasn't persuasively, much less sufficiently demonstrated that the easement should be extended beyond access to the middle parking area. Indeed, in the competition between the contentions of the plaintiff versus those of the defense, the plaintiff's appears to be significantly less than likely in both fact and law.

The limits of the easement having been thus established, the remainder of the plaintiff's causes of action must also be rejected as they pivot on the legitimacy of that claim. The *prima facie* tort action is predicated by his failure to abide by the court's order. First of all, that order was an interim order. Much like a *pendante lite* award, its finality awaited a trial. It would appear, however, that he was justified in his belief that unrestricted access was beyond the easement's grant. The nuisance claim similarly fails; his "invasion" of the land was not

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[5]Parenthetically, under those circumstances, a demand that the husband's property to be burdened by such an unlimited access would not have been dictated by the parties' apparent history of essentially abandoning the area.

unreasonable or unlawful. As to the damages, the liability needed to trigger damages is missing. Also, evidentiary proof of any loss absent. Indeed, there are no bills, expert testimony, merely Martin's estimate. That alone is insufficient even for a small claims action. *See, e.g.*, UJCA § 1804, UDCA § 1804. Finally, the punitive damages claim must also fall. Besides falling outside the conditions singularly required for such an award, Robins was preserving and protecting his lawful rights; under the circumstances of this case, that should not be punished.

Having failed by a preponderance of the evidence to demonstrate the merits of his complaint and any of its causes of action, the plaintiff's complaint is dismissed in its entirety and the Court finds for the defendant.

Submit judgment on notice.

Dated: 8/9/16

Hon. Ralph T. Gazzillo
A.J.S.C.

Final Disposition

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