Garson v Tarmy
2016 NY Slip Op 32233(U)
November 2, 2016
Supreme Court, Suffolk County
Docket Number: 13-61322
Judge: Arthur G. Pitts

[* 1]

SHORT FORM ORDER

INDEX No. 13-61322

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 12/21/15 (#005)
MOTION DATE 2/25/16 (#006 & #007)
ADJ. DATE 2/25/16
Mot. Seq. #005 - MD
Mot. Seq. #006 - XMotD
Mot. Seq. #007 - MD

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JUDITH A. GARSON and STEVEN N. RAPPAPORT,

Plaintiffs,

- against -

BARBARA TARMY, GARY B. FRADIN, THE TROKEL QPRT NO. 1 and THE TROKEL QPRT NO. 2, ALEMARC, LLC, ALAN GOLUB, as Trustee of the Golub Family Bridgehampton Trust, STEPHEN GREENBERG and SANDRA GREENBERG,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Barbara Tarmy and Gary B. Fradin, dated November 17, 2015, and supporting papers; (2) Notice of Cross Motion by the plaintiffs, dated January 6, 2016, and supporting papers (including Memorandum of Law); (3) Affidavit in Support by the plaintiffs, dated December 9, 2015, and supporting papers; (4) Affidavit in Support by the plaintiffs, dated December 7, 2015, and supporting papers; (5) Supplemental Affirmation by the plaintiffs, dated January 5, 2016, and supporting papers; (6) Notice of Cross Motion by defendant Alemarc, LLC, dated January 7, 2016, and supporting papers; (7) Affirmation in Opposition by defendant Alemarc, LLC, undated; (8) Affidavit in Opposition by the plaintiffs, dated January 28, 2016, and supporting papers; (9) Affirmation in Opposition by the plaintiffs, dated January 13, 2016, and supporting papers; (10) Affirmation in Opposition by defendants Barbara Tarmy and Gary B. Fradin, dated January 28, 2016, and supporting papers; (11) Reply Affidavit by the plaintiffs, dated February 24, 2016, and supporting papers; (12) Supplemental Reply Affidavit by the plaintiffs, dated February 24, 2016; (13) Reply Affidavit by defendant Alemarc, LLC, dated February 24, 2016; (14) Supplemental Affidavit by defendants Barbara Tarmy and Gary B. Fradin, dated February 25, 2016, and supporting papers; and (15) Rebuttal Affidavit by the plaintiffs, dated February 26, 2016, and supporting papers; it is

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

ORDERED that the motion by defendants Barbara Tarmy and Gary B. Fradin for an order pursuant to CPLR

3212, granting summary judgment in their favor on their first counterclaim and dismissing the second amended complaint[1] against them, is denied; and it is further

ORDERED that the cross motion by the plaintiffs for an order pursuant to CPLR 3212, granting summary judgment dismissing the affirmative defenses and counterclaim asserted by defendants Barbara Tarmy, Gary B. Fradin, and Alemarc, LLC, and further granting summary judgment in their favor and against those defendants for the relief demanded in the second amended complaint, is granted to the extent indicated below, and is otherwise denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendant Alemarc, LLC for an order pursuant to CPLR 3212, granting summary judgment in its favor on its first counterclaim and dismissing the second amended complaint against it, is denied.

In this action, the plaintiffs seek, *inter alia*, a declaration of the parties' rights and obligations with respect to a "pedestrian walk way," located in a residential subdivision on Sam's Creek Road in Bridgehampton, New York and presumably intended to provide access to a body of water known as Sam's Creek.

The following statements of fact are undisputed. Sam's Creek Road is located proximate to Sam's Creek, an arm of Mecox Bay in Bridgehampton, New York. More than forty years ago, a local developer created a subdivision, consisting of eleven lots, around Sam's Creek Road. Seven of the lots were located directly on Sam's Creek; the other four lots were separated from Sam's Creek by Sam's Creek Road or around the bend along the road. At or sometime after the time the subdivision was developed, an easement was filed that purported to reserve a five-foot "pedestrian walk way" between two of the lots fronting on Sam's Creek (Lots 6 and 7) "reserved solely for the pedestrian use of owners of" the four outlying lots (Lots 1, 2, 3, and 4).

The plaintiffs and defendants The Trokel QPRT No. 1 and The Trokel QPRT No. 2 ("the Trokel Trusts") are the owners, respectively, of 39 Sam's Creek Road and 47 Sam's Creek Road, the two lots (Lots 6 and 7) on which the walkway is situated.[2] It appears that the width of the walkway on each of those lots is 2½ feet. The owners of the four lots in the subdivision that do not front on Sam's Creek (Lots 1, 2, 3, and 4)–and for whose benefit the walkway was presumably created–are defendants Barbara Tarmy and Gary B. Fradin (13 Sam's Creek Road), defendant Alemarc, LLC (80 Sam's Creek Road), defendant Alan Golub, as trustee of the Golub Family Bridgehampton Trust (91 Sam's Creek Road), and defendants Stephen Greenberg and Sandra Greenberg (18 Sam's Creek Road).[3]

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[1] By order dated May 12, 2015, the court denied prior motions for summary judgment without prejudice to renewal, finding the owners of certain nearby properties to be necessary parties and directing that the action should not proceed in their absence. The plaintiffs have since filed and served a supplemental summons and second amended complaint naming those owners–Alan Golub, as trustee of the Golub Family Bridgehampton Trust, Stephen Greenberg, and Sandra Greenberg–as additional party defendants.

[2] The Trokel Trusts have not answered or otherwise appeared in the action. By order dated May 5, 2014, the court granted the plaintiffs' motion for leave to enter a default judgment in their favor and against the Trokel Trusts.

[3] Alan Golub, as trustee of the Golub Family Bridgehampton Trust, Stephen Greenberg, and Sandra Greenberg have not answered or otherwise appeared in the action. By separate order of this date, the court

(continued...)

According to the plaintiffs, when they purchased their lot (Lot 6) in 1993, the walkway was an unused, barely-visible path that was protected by a 30-foot high canopy of mature, fully-grown trees. The plaintiffs claim that on or about May 7, 2013, agents of Barbara Tarmy and Gary B. Fradin entered upon and needlessly and recklessly cleared the walkway, removing trees both within and without its borders, destroying the tree canopy, and creating a condition significantly beyond that required to accommodate a pedestrian walkway.

Defendants Barbara Tarmy and Gary B. Fradin ("Tarmy/Fradin"), who purchased their lot (Lot 4) in 2002 and whose deed makes express reference to "the benefits of a pedestrian walkway as set forth in a deed * * * to Edrita Fried dated 11/13/72" (*see* n 4, *infra*), claim the right to clear the walkway to allow its unencumbered use and, further, that they performed no work which was not necessary to make the walkway usable. They also claim that prior to the "selective pruning and clearing of vegetation" which is the subject of the action, the walkway was densely vegetated and impassable on foot; apart from the vegetation, there was a fence constructed by the plaintiffs or their agents which obstructed use of the walkway.

Defendant Alemarc, LLC purchased its lot (Lot 2) in 2012 and claims, by virtue of its chain of title, to have the same right as the other outlying lot owners to use the full length and width of the walkway in perpetuity.

The plaintiffs allege five causes of action in their second amended complaint: the first and second against all the defendants, and the third through fifth against Tarmy/Fradin only. The first is for judgment declaring that the recorded documents purportedly creating the easement[4] were ineffective to create an easement for the benefit of Lots 1, 2, 3, and 4; the second is for judgment declaring that the defendants do not have the right to clear the walkway, to remove or destroy trees outside the walkway, or to remove the tree canopy; the third is for injunctive relief preventing Tarmy/Fradin from clearing the walkway, removing or destroying trees outside the walkway, or removing the tree canopy; the fourth is for damages based on trespass; and the fifth is to recover treble damages for removal or destruction of trees under RPAPL 861.

Tarmy/Fradin, in their answer, plead a single counterclaim for judgment declaring their right not only to

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[3](...continued)
granted the plaintiffs' motion for leave to enter a default judgment in their favor and against Alan Golub, as trustee of the Golub Family Bridgehampton Trust, Stephen Greenberg, and Sandra Greenberg to the extent of permitting the entry of judgment against those defendants at the time of or after the trial or other disposition of the action.

[4] Tarmy/Fradin's claim to an easement by grant or reservation derives from (i) a deed dated July 6, 1971 and recorded July 21, 1971 (Liber 6969, page 575), by which Ross O. Runnels, Jr. conveyed Lot 6 to Peconic Warehouse, Inc. but did not purport to grant a "pedestrian walk way" over any portion of Lot 6–a deed which, they claim, was subsequently corrected by deed dated April 14, 1972 and recorded April 18, 1972 (Liber 7142, page 245), purporting to convey Lot 6 to Peconic Warehouse, Inc., subject to an easement over the subject walkway "reserved solely for the pedestrian use of the owners of Lots 1, 2, 3, and 4"–and (ii) a deed dated November 13, 1972 and recorded December 1, 1972 (Liber 7294, page 168), by which Ross O. Runnels, Walter R. Neville, and Greer Marechal, Jr., Foundation conveyed Lot 4 to Edrita Fried, together with an easement over the subject walkway "reserved solely for the pedestrian use of the owners of Lots 1, 2, 3, and 4." Alemarc traces its alleged right to an easement from the aforementioned deed dated July 6, 1971, as "corrected" by the deed dated April 14, 1972, and from a deed dated November 18, 1976 and recorded November 30, 1976 (Liber 8149, page 305) by which Ross O. Runnels, Jr., Walter R. Neville, and the Greer Marechal, Jr. Foundation Inc. conveyed Lot 2 to Tanya Saunders, together with an easement over the subject walkway "reserved solely for the pedestrian use of the owners of Lots 1, 2, 3, and 4."

improve and clear the walkway and make it passable but also to construct a dock at the waterfront terminus of the walkway, subject to their obtaining appropriate permits. Tarmy/Fradin also allege, as an affirmative defense, the plaintiffs' failure to state a cause of action.

Alemarc similarly alleges in its answer a single counterclaim declaring that it is entitled to utilize the full length and width of the walkway in perpetuity and enjoining the plaintiffs and every person claiming under them from obstructing the walkway, as well as three affirmative defenses: the first, based on failure to state a cause of action, the second, that the plaintiffs' claims are barred by the doctrines of laches, waiver, and estoppel, and the third, that the plaintiffs' claims are barred by documentary evidence, including but not limited to the covenants and restrictions, the recorded instruments, and the subdivision map.

Each of the appearing parties now moves for summary judgment.

In support of their motion, Tarmy/Fradin rely, in part, on the affidavits of Barbara Tarmy, Stephen Ospitale, Martin Hand, and Frederico Azevedo. Based on those affidavits, it appears that in the spring of 2013, Tarmy/Fradin inquired of Ospitale, their caretaker, what would be involved in clearing the walkway. Ospitale obtained copies of the relevant deeds and contacted Hand, a surveyor, to stake out the area. After the area was staked, Ospitale met with Azevedo, their landscaper, and specifically asked him to be careful about clearing the walkway so as not to remove any vegetation outside its borders. He also contacted Southampton Town officials to confirm that there would be no violation of any relevant laws if the walkway were cleared. According to Ospitale, he met with Michael Chih from the Town's code enforcement office and Martin Shea from the Town's conservation and environment office, and was advised by them that no permits would be necessary as long as no stumps were removed. He was also told by Michael Chih that the Town would notify the adjoining property owners by letter advising that the clearing work would be done and that the existing fence would have to be moved; although he never saw such a letter, he believes it must have been sent because the fence was moved out of the walkway before the clearing work commenced. Ospitale claims that he supervised and inspected the work, which took place in a single day, and that no trees, brush or other vegetation was cleared outside of the staked area. He acknowledges, however, that the work was never completed because Michael Chih appeared in response to a complaint while the clearing was in progress, and directed that the work be stopped. Tarmy/Fradin further contend, to the extent that the plaintiffs' claims relate to the clearing of trees and vegetation on Lot 7, owned by the Trokel Trusts, that the plaintiffs lack standing to assert those claims.

The plaintiffs, in support of their cross motion, submit, *inter alia*, the affidavit of Lance R. Pomerantz, an attorney "actively engaged in the practice of land title examination since 1979." It is his opinion, based on his examination of the real property records in the Office of the Suffolk County Clerk, that no "pedestrian walk way" was ever legally created and that the defendants, therefore, have never benefitted from any easement over the plaintiffs' property. More specifically, he asserts

- that when the subdivision map was filed on July 17, 1970, Ross O. Runnels, Walter R. Neville, and the Greer Marechal Foundation ("Marechal") owned the property and each of the lots as tenants in common;

- that neither the map nor the abstract of title bore any indication at that time of the existence of a "pedestrian walk way" over Lot 6;

- that subsequent to the map filing and prior to the first conveyance of any of the individual lots, there was no instrument recorded whereby any portion of the property was burdened with a

"pedestrian walk way";

• that on December 7, 1970, the tenancy in common was terminated by the conveyance of the individual lots pursuant to three separate deeds;

• that by deed dated December 7, 1970 and recorded January 7, 1971 (Liber 6866, page 270), Runnels, Neville, and Marechal conveyed Lots 1, 8, 9, and 10 to Gemini Holding Corp., and that this deed did not purport to grant a "pedestrian walk way" over any portion of Lot 6;

• that by deed dated December 7, 1970 and recorded January 11, 1971 (Liber 6867, page 340), Runnels, Neville, and Marechal conveyed Lots 5, 6, and 7 to Runnels, individually, and that this deed did not purport to grant a "pedestrian walk way" over any portion of Lot 6;

• that by deed dated December 7, 1970 and recorded January 11, 1971 (Liber 6867, page 342), Runnels, Neville, and Marechal conveyed Lots 2, 3, and 4 to themselves as tenants in common, and that this deed did not purport to grant a "pedestrian walk way" over any portion of Lot 6;

• that as a result of and immediately following those three conveyances, only Runnels had the ability to impose a "pedestrian walk way" over Lot 6;

• that by deed dated July 6, 1971 and recorded July 21, 1971 (Liber 6969, page 575), Runnels conveyed Lot 6 to Peconic Warehouse, Inc., and that this deed did not purport to grant a "pedestrian walk way" over any portion of Lot 6;

• that as a result of and immediately following that conveyance, only Peconic Warehouse, Inc. had the ability to impose a "pedestrian walk way" over Lot 6; consequently

• that when Runnels, Neville, and Marechal conveyed Lot 4 to Edrita Fried by deed dated November 13, 1972 and recorded December 1, 1972 (Liber 7294, page 168), which purports to grant a "pedestrian walk way" over Lot 6 for the use of the owner of Lot 4, *et al.*, they had no ability to do so because they no longer had any interest in Lot 6; also

• that when Peconic Warehouse, Inc. conveyed Lot 6 to Runnels and Jean R. Moses by deed dated April 17, 1979 and recorded April 19, 1979 (Liber 8613, page 48), which purports to reserve a "pedestrian walk way" over Lot 6 for the use of the owner of Lot 4, *et al.*, it had no ability to do so because of the "stranger to the deed" rule, pursuant to which a deed with a reservation or exception by the grantor in favor of a third party does not create a valid interest in favor of that third party (***Matter of Estate of Thomson v Wade***, 69 NY2d 570, 516 NYS2d 614 [1987]); and

• that no subsequent owner in the chain of title for Lot 6 ever granted a "pedestrian walk way" over Lot 6 for the benefit of Lot 4.

The plaintiffs also submit the affidavit of Steven N. Rappaport, who states that although the plaintiffs were aware of the walkway when they bought their home, they never saw anyone use it from the time of purchase until May 2013; it was only after this action was commenced, moreover, that they discovered that the walkway was never properly recorded or created as an easement of record. As to the proposed dock, the plaintiffs submit the affidavit of Timothy S. McCulley, an attorney practicing "in real property with a concentration in land use issues," whose

opinion it is that Tarmy/Fradin have no right to construct a dock at the foot of the walkway and that they will not be granted the required approvals to do so. Finally, the plaintiffs contend that the Tarmy/Fradin motion should not be entertained before the plaintiffs are afforded an opportunity to depose Martin Hand, Steven Ospitale, Frederico Azevedo, and Martin Shea, all of whom have submitted affidavits in support of that motion.

Alemarc, in support of its motion, adopts and incorporates by reference the arguments made in the Tarmy/Fradin motion, claiming that it likewise has a "clear chain of title" with respect to the walkway and, in addition, that because the parties purchased with the knowledge and expectation of an easement, an easement by estoppel was created. Alemarc also contends that the plaintiffs lack standing to assert their claim that Alemarc is not permitted to use or clear the portion of the walkway situated on Lot 7, owned by the Trokel Trusts.

Preliminarily, and notwithstanding the breadth of relief requested by the plaintiffs in their notice of cross motion, the court notes that the plaintiffs have offered no argument in support of their request for summary judgment dismissing the affirmative defenses; rather, their submissions are addressed solely to the merits of their own causes of action and the counterclaims. In any event, as to the affirmative defenses based on failure to state a cause of action, it is clear that "no motion by the plaintiff lies under CPLR 3211 (b) to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" (***Butler v Catinella***, 58 AD3d 145, 150, 868 NYS2d 101, 105 [2008]).

Turning to the principal matter in dispute, the court finds as a matter of law that no valid easement exists over the subject 2½-foot-wide strip on the plaintiffs' property.[5] The plaintiffs established their prima facie entitlement to judgment as a matter of law by demonstrating that, at the time the easement was purportedly created, the owner of the servient lot (Lot 6) was Ross O. Runnels, Jr., and the owner of the dominant lots (Lots 2 and 4) was Ross O. Runnels, Jr., Walter R. Neville, and Greer Marechal Jr. Foundation, as tenants in common. "For an easement by grant to be effective, the dominant and servient properties must have a common grantor" (***Dichter v Devers***, 68 AD3d 805, 807, 891 NYS2d 426, 427 [2009]; *accord* ***Beachside Bungalow Preserv. Assn. of Far Rockaway v Oceanview Assoc.***, 301 AD2d 488, 753 NYS2d 133 [2003]). Even assuming, then, that the April 14, 1972 deed validly served to "correct" the July 6, 1971 deed, as the defendants claim (*but see* ***People v Tompkins-Kiel Marble Co.***, 269 NY 77 [1935]; ***Knapp v Hughes***, 25 AD3d 886, 808 NYS2d 791 [2006], *revd on other grounds* 19 NY3d 672, 957 NYS2d 640 [2012]), that deed would not create a valid interest in favor of the owners of Lots 2 and 4. In addition, "[t]he long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed', does not create a valid interest in favor of that third party" (***Matter of Estate of Thomson v Wade***, *supra* at 573-574, 516 NYS2d at 615); stated otherwise, a grantor may not reserve an easement other than for his or her benefit. Here, it is evident that Ross O. Runnels, Jr. did not purport to reserve an easement solely for his own benefit but rather for the benefit of all the co-tenant owners of Lots 2 and 4. Consequently, any easement reserved to the owners of Lots 2 and 4 in the plaintiffs' chain of title was ineffective to create an express easement in their favor. The defendants, in opposition, failed to raise a triable issue of fact. That the grantor may have intended to create such an easement, as they claim, is immaterial (*cf. id.*). Nor do any of the various estoppel theories advanced by the defendants avail them. "An easement by estoppel may arise if an owner of land, through specific representations, leads another to reasonably

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[5] Apart from what would appear to be a lack of standing on the part of the plaintiffs to contest whether a valid easement also exists over Lot 7, it is evident that the plaintiffs do not seek to pursue the issue; in a supporting affirmation, Lance R. Pomerantz acknowledges that his "engagement" on the plaintiffs' behalf was "limited to an analysis of claims to the Plaintiffs' parcel" and that he did "not reach a conclusion concerning the validity of the claimed easement over [Lot 7]."

believe a permanent, alienable interest in real property has been created, and if in reliance on such representations, the other makes permanent or valuable improvements on the land" (***Katz 737 Corp. v Shapiro***, 107 Misc 2d 127, 129, 433 NYS2d 543, 545 [1980]). Here, the record is devoid of proof of any prior representations by the plaintiffs as to an existing easement. The defendants cite only an excerpt from the deposition transcript of Steven Rappaport, who testified that when Tarmy/Fradin purchased Lot 4, they asked whether there was a walkway, and he responded that no one had ever used it. Even if Rappaport may be found to have expressed to Tarmy/Fradin his belief as to the existence of an easement, the defendants have not shown that they relied on any such statement to their detriment; to the contrary, it appears that Tarmy/Fradin relied primarily, if not exclusively, on their belief that a valid easement had been created, as well as statements by Town of Southampton officials indicating that the clearing of trees would not violate any local ordinances. As to the doctrine of judicial estoppel–which the defendants seek to invoke in order to prevent the plaintiffs, who initially pleaded the existence of an easement, from now denying its existence–the court finds it likewise inapplicable. "That doctrine applies when a party has assumed a certain position in a prior legal proceeding and secured a favorable judgment therein, which thereby precludes that party from assuming a contrary position in another action simply because its interests have changed" (***Rosario v Montalvo & Son Auto Repair Ctr.***, 76 AD3d 963, 964, 908 NYS2d 233, 234 [2010]). The doctrine does not apply here because the inconsistent positions have been asserted in the same action (*see* ***Olszewski v Park Terrace Gardens***, 18 AD3d 349, 798 NYS2d 1 [2005]).

Accordingly, the plaintiffs are entitled to the entry of judgment in their favor on their first, second, and third causes of action, and dismissing the defendants' counterclaims, to the extent of (i) declaring that the recorded documents purporting to create the "pedestrian walk way" over Lots 6 and 7 were ineffective to create an easement for the benefit of the owners of Lots 1, 2, 3, and 4, (ii) declaring that the defendants have no right to clear, remove or destroy trees from, or remove the tree canopy over that portion of the walkway situated on the plaintiffs' property, and (iii) enjoining Tarmy/Fradin from clearing, removing or destroying trees from, or removing the tree canopy over that portion of the walkway situated on the plaintiffs' property.[6]

The plaintiffs are also granted summary judgment on the issue of liability as to the their fourth and fifth causes of action, there being no dispute that Tarmy/Fradin or their agents entered upon the plaintiffs' property and removed and destroyed trees thereon, all without the plaintiffs' consent. "Entering upon the land of another without permission, even if innocently or by mistake, constitutes trespass" (***Curwin v Verizon Communications [LEC]***, 35 AD3d 645, 827 NYS2d 256, 257 [2006]). A defendant may be held for trespass even if it did not enter the plaintiff's land; it is sufficient that the defendant caused or directed another person to enter (***Spellburg v South Bay Realty***, 49 AD3d 1001, 854 NYS2d 563 [2008]). Under RPAPL 861, any person who engages in, or causes another to engage in, the cutting, removing, injuring or destroying of the trees of another without the owner's consent is liable for such conduct. Accordingly, the plaintiff is entitled to an assessment of the damages arising from both the trespass and the statutory violation.

The court directs that the plaintiffs' third cause of action be and hereby is severed and that entry of judgment on the remaining causes of action and counterclaims be held in abeyance pending the assessment of damages or other disposition of the action (*see* CPLR 3212 [e]).

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[6] As to the question of Tarmy/Fradin's right to construct a dock at the foot of the walkway–assuming that a valid easement may be found to exist over Lot 7–the court notes that it is does not present a judicial controversy ripe for determination, absent proof of any such construction or even of any efforts to secure the necessary permits.

The plaintiffs' cross motion is granted to the foregoing extent and the defendants' respective motions are correspondingly denied.

Dated: Riverhead, New York
November 2, 2016

ARTHUR G. PITTS, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**