Freed v Best
2017 NY Slip Op 30848(U)
March 6, 2017
Supreme Court, Suffolk County
Docket Number: 14-01247
Judge: Martha L. Luft

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 14-01247
CAL. No. 16-00483EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 8-9-16 (016)
MOTION DATE 9-13-16 (017) (018)
ADJ. DATE 9-23-16
Mot. Seq. # 016 - MD
017 - XMD
018 - XMD

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TODD E. FREED and EDITH WEBSTER-FREED,

Plaintiffs,

- against -

BARBARA BEST and ZARKO SVATOVIC,

Defendants.

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Barbara Best, Self-Represented
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Upon the following papers numbered 1 to 91 read on this motion and these cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 43 ; Notice of Cross Motion and supporting papers 46 - 50, 51 - 73 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 74 - 79, 80 - 85, 86 - 91 ; Other memorandum of law 44 - 45 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiffs for, among other things, an order pursuant to CPLR 3212 granting them summary judgment for certain relief based on the causes of action set forth in their complaint is denied; and it is further

ORDERED that the cross motion by defendant Barbara Best for an order pursuant to CPLR 3212 granting her summary judgment is denied; and it is further

ORDERED that the cross motion by defendant Zarko Svatovic for an order pursuant to CPLR 3212 granting him summary judgment is denied; and it is further

ORDERED that the preliminary injunction set forth in the order of the Court dated November 15, 2014 (Tarantino, J.) shall be continued pending the determination of this action.

The plaintiffs are the owners of real property located at 12400 New Suffolk Avenue in Cutchogue, New York, which is bounded on the north by said roadway and on the south by Peconic Bay. The property allegedly consists of two parcels designated on the Suffolk County Tax Map as Nos. 1000-116.00-06.00-012.1 (Lot 12.1) and 1000-116.00-06.00-012.2 (Lot 12.2). Lot 12.1 is approximately 115 feet wide at its northerly and southerly boundary lines and approximately 300 feet deep at its easterly and westerly boundary lines. Lot 12.2 is located east of Lot 12.1 and is approximately 33 feet wide at its northerly and southerly boundary lines and approximately 300 feet deep at its easterly and westerly boundary lines. It is undisputed the plaintiffs are owners in fee of Lot 12.1 (the Freed property); it is unclear whether the plaintiffs own Lot 12.2 (the disputed area).

The defendants are the owners as tenants in common of real property located at 12355 New Suffolk Avenue in Cutchogue, New York, which is across the street from and north of the Freed property. The defendants claim that they have a deeded right of way over the entire width of the disputed area in order to access Peconic Bay, as well as for the storage of personal items such as beach chairs and boats. It is undisputed that the relationship between the parties has been contentious due to their competing claims of rights, or the limitation of any rights, over the disputed area and mutual allegations of harassment.

The plaintiffs commenced this action by the filing of a summons and complaint on January 17, 2014. The complaint sets forth three cause of action against the defendants. The first cause of action seeks a permanent injunction prohibiting the defendants from interfering with the plaintiffs' rights in the disputed area and their use and possession of the Freed property. The second cause of action seeks a declaratory judgment that the defendants have no interest or rights in the disputed area, which is owned free and clear of any rights claimed by the defendants. The third cause of action seeks damages for the defendants' alleged trespass onto the disputed area.

By an answer dated July 9, 2014, the defendant Zarko Svatovic (Svatovic), acting in a self-represented capacity, joined issue herein. Said answer did not include any affirmative defenses or counterclaims, but alleged that the plaintiffs lack ownership of Lot 12.2. By her answer dated July 15, 2014, the defendant Barbara Best (Best), through her attorney, filed her verified answer to the complaint, which included a number of defenses and counterclaims. On August 25, 2016, prior to the return date of this motion, Best filed a consent to change attorney with the Clerk of the Court indicating that she would be proceeding as a self- represented party in this action.

The plaintiffs now move for summary judgment in their favor granting them certain relief regarding the right-of-way and the use of the disputed area. In support of the motion, the plaintiffs submit, among other things, the affidavit of the plaintiff Edith Webster-Freed, the pleadings, excerpts of the transcripts of the depositions of the defendants, land surveys, and numerous deeds in the chains of title for the Freed property, allegedly including the disputed area, and that of the parcel abutting the disputed area to the east. At the outset, it is noted that the signature pages and certification pages are not included with the excerpts of the defendants' depositions, and that the plaintiffs have failed to submit proof that the transcripts were forwarded to the defendants for their review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of the defendants is not in admissible form (*see* ***Kahan v Spira***, 88 AD3d 964, 932 NYS2d 76 [2d Dept 2011]; ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In her affidavit, the plaintiff Edith Webster-Freed (Webster-Freed) swears to the facts and circumstances supporting the plaintiffs' claims of harassment by the defendants, and she indicates that she and her husband are "willing to recognize Defendants' deeded pedestrian right-of-way and to withdraw our trespass claim for the purposes of this motion, provided that Defendants' usage is 'limited' to no more than a 10-foot wide pedestrian path and 33-foot wide beach area, both running along the easterly portion of Lot 12.2." She states that, based on the reasons in her affidavit and the affirmation of the plaintiffs' counsel, and based on the memorandum of law submitted in support of the plaintiffs' motion, the Court should grant the application for a permanent injunction, and the other relief requested in their complaint.

In his affirmation, counsel for the plaintiffs asserts that the plaintiffs' ownership of the Freed property and the disputed area is "based upon a January 7, 2013 deed, recorded in the Office of the Suffolk County Clerk on January 22, 2013 at Liber 12718 page 264, which conveyed the Subject Property (Lots 12.1 and 12.2) to the Freeds," and he attaches a copy of said deed as an exhibit to his affirmation. Said deed indicates that the conveyance to the plaintiffs is intended to be "the same premises which was conveyed to Donald Case, Donald G. Case, Deborah Ann Kaminsky and David R. Case, as tenants in common by Deed dated December 1, 2000, recorded March 7, 2001, in Liber 12106, Cp. 108" (the Sellers Deed) The plaintiffs do not submit a copy of the deed dated December 1, 2000 in their initial submission.

However, in their reply papers the plaintiffs submit the affirmation of their expert witness, who includes a copy of the deed dated December 1, 2000, as well as deeds in the chains of title to both the plaintiffs' parcel and the parcel abutting the disputed area to the east. A review of the deed dated December 1, 2000, reveals that the immediate predecessor in title to the plaintiffs seller conveyed "[a] parcel of land 115 feet wide by 300 feet deep more or less, bounded on the North by New Suffolk Avenue, east now or formerly by Carruthers, south by the Great Peconic Bay, and west now or formerly by Plimpton. BEING AND INTENDED to be the same premises conveyed ... by deed dated July 11, 1979 ... under liber 8662 ... at page 269." A review of the deed dated July 11, 1979, indicates a conveyance of an undivided one-fifth interest in said 115 foot wide parcel. That is, it appears that the plaintiffs' immediate predecessors clearly conveyed title to the plaintiffs' as to Lot 12.1. However, as discussed below, it is unclear whether the plaintiffs obtained title to Lot 12.2 based upon the plaintiffs' submission and the adduced evidence herein.

In his affirmation, counsel for the plaintiffs further asserts that the defendants' deed to their property located at 12355 New Suffolk Avenue makes no reference to any easement rights over the disputed area, and that Best's former counsel asserted that the defendants are entitled to a written easement granted in deeds recorded in the Suffolk County Clerk's Office in Liber 1682 at page 177, Liber 3363 at page 282, Liber 3363 at page 285, Liber 3363 at page 289 and Liber 3427 at page 360, and that said easement ran with the land to the defendants' benefit. In contesting said assertion, counsel for the plaintiff submits the subject deeds which purport to convey certain property:

> Together with a free and unobstructed use in common with other owners of a right-of-way for passage on foot over a certain Private Road two (2) rods in width running from New Suffolk Avenue in a southerly direction to Peconic Bay.[1]

A review of the enumerated deeds submitted by counsel for the plaintiff, upon which former counsel for Best relied for his assertion that the defendants enjoy easement rights over the disputed area, reveals that the defendants' entire argument rests upon the alleged creation of the subject right-of-way in the deed dated October 2, 1932, recorded in Liber 1682 at page 177. Said deed by the grantors, Olivia Case, Ruth B. Case and Clifford Case, conveys a certain parcel of land north of New Suffolk Avenue together with an easement or right -of-way for foot and vehicles over a "private road" two rods wide "bounded on the north by New Suffolk Avenue; on the East by land of Beverly King; on the South by Peconic Bay; and on the West by land of the Estate of George H. Case." However, by the afore-mentioned deed dated August 1952, recorded in Liber 3427 at page 360, the owners of the properties containing the right-of-way for access to Peconic Bay by vehicles and foot mutually agreed to modify the right-of-way to delete the words "and with vehicles." Thus, the only rights that the defendants could potentially have in the right-of-way is access to Peconic Bay by virtue of a pedestrian easement and ingress and egress by foot.

A review of all of the deeds submitted herein reveals that there are questions of fact whether the plaintiffs are owners in fee of Lot 12.2, and whether the defendants are the holders of an easement or

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[1] A rod is a unit of length equal to 16.5 feet, and two rods is approximately 33 feet in length.

right-of-way over the disputed area, Lot 12.2. By deed dated February 2, 1868, recorded on May 12, 1869 in Liber 159 at page 193, Nancy F. Case obtained title to 150 acres which include the parcels of land involved in this action. Upon her death, Nancy F. Case bequeathed an undivided interest in said land to her sons, Wickham Case and George H. Case. In an exchange of quitclaim deeds dated January 1, 1897, the brothers divided the 150 acres with general references to the land easterly or westerly of the other. The lack of specificity and the conflicting descriptions in the conveyances over the decades, has resulted in an open question as to who has title to the disputed area.

There are four parcels of land involved in this long-standing and bitter dispute over the parties' rights in Lot 12.2. That is, the Freed property (Lot 12.1), the disputed area (Lot 12.2), the defendants' property north of New Suffolk Avenue, and the property abutting the easterly boundary of the disputed area, designated on the Suffolk County Tax Map as No. 1000-116.00-06.00-013, now or formerly owned by Leonard P. Wessell, III and Amy P. Wessell (the Wessell property). A review of the chains of title for the Freed property and the Wessell property indicate that the plaintiffs own fee title in Lot 12.1, the Freed property, derived from the successors of George H. Case, and that title to the Wessell property is derived from the successors of Wickham Case. In addition, the plaintiffs and the defendants have not established from which of the two relevant chains of title the defendants and the grantors of any alleged right-of-way derive their rights, title, or interests.

The plaintiffs have not submitted any evidence to establish prior title to the disputed area in either George H. Case or Wickham Case, or any of their successors. The plaintiffs' expert indicates that "[d]ue to the lack of additional monumentation, the precise location of the boundary between the George H. Case parcel and the Wickham Case parcel cannot be established solely from the descriptions in [the respective] deeds." Nonetheless, the plaintiffs' expert opines that "the practical boundary between the George H. Case parcel and the Wickham Case parcel places the disputed area on the "George H. Case side" of the boundary. It appears that a significant factor in the expert's opinion depends upon the interpretation of a deed from Wickham Case to Julia S. King, dated April 20, 1920, recorded on April 21, 1920 at Liber 999, cp 26, conveying the parcel now owned by the Wessells, with the following description:

> ALL that tract or parcel of land situate on Cutchogue Neck, near the Village of Cutchogue in the Town of Southold, County of Suffolk and State of New York, bounded Northerly by Suffolk Avenue Seven rods; easterly by land of Julia S. King; Southerly by Peconic Bay; and Westerly of the said party-of the first part; the Easterly and Westerly sides are parallel and seven rods apart and the said Westerly line is parallel to and two-rods distant from the easterly line of land of George H. Case ...

The plaintiffs' expert notes that Julia S. King bequeathed the subject parcel of land to her son without a precise description, and that a "third-party appraiser" of her estate filed an affidavit which indicated that her property was bounded on the west by lands of George H. Case. He alleges that said appraiser "was obviously aware ... of off-record information concerning ownership of [the disputed area]." That is, that said appraiser placed fee title to the disputed area in George H. Case. The plaintiffs' expert does not set forth the legal basis for the appraiser's statement, or why the subject deed indicates

that the easterly property line of the property owned by George H. Case is 33 feet from the westerly property line of the King property.

However, a review of the chain of title from George H. Case to the plaintiffs reveals that there is an issue of fact whether the plaintiffs have title to the disputed area. George H. Case bequeathed the parcel now owned by the plaintiffs to his five grandsons in a will dated September 6, 1928, admitted to probate on July 8, 1932 in Suffolk County Surrogate's Court file #297 P 1932. The will describes the subject parcel as "bounded on the east by King," an ambiguous statement in light of the issues herein. Nonetheless, the three subsequent conveyances of said property each contain a precise description of the parcel as "115 feet wide by 300 feet deep." That is, the same dimensions as those of Lot 12.1 without the disputed area. It is not until 2012 that the issue of the disputed area is addressed in the chain of title to the plaintiffs. By quitclaim deed dated October 15, 2012, recorded at Liber 12718 p 262, the Grantor conveyed any interest in the subject property to Donald Case, Donald G. Case, Deborah Ann Kaminsky and David R. Case (the plaintiffs' sellers), described as "[b]eing the same premises which was conveyed to [the plaintiffs' sellers] ... by deed dated December 1, 2000, ... under Liber 12106 Cp. 108." Despite the reference to the Sellers Deed, which only conveyed a parcel 115 feet wide by 300 in depth, this deed now includes a metes and bounds description of Lot 12.1 and the disputed area, Lot 12.2.

It is determined that there is a question of fact whether George H. Case or Wickham Case owned the disputed area. Thus, there are issues of fact requiring a trial of this action as to whether the plaintiffs own the disputed area, whether the grantors of the right-of-way were the successors to George H. Case or Wickham Case, and whether the grantors of the right-of-way had the capacity to grant said easement to those in the defendants' chain of title.

The plaintiffs' first cause of action seeks, among other things, a permanent injunction prohibiting the defendants from interfering with the plaintiffs' rights in the disputed area. "[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]). As noted above, the plaintiffs have failed to establish their property rights in the disputed area as a matter of law.

Counsel for the plaintiffs contends that the defendants do not have standing to challenge whether the plaintiffs have title to the disputed area based upon a previous order of the Court. By order dated January 15, 2016, the Court (Tarantino, J.) granted the plaintiffs' cross motion to dismiss Best's counterclaim challenging whether the plaintiffs hold title to the disputed area on the ground that Best does not have standing to bring said claim. However, where a party claims title to land, the burden rests upon said party to establish such claim other than by relying on defects in the title of another (*see* ***O'Brien v Town of Huntington***, 66 AD3d 160, 884 NYS2d 446 [2d Dept 2009]; ***LaSala v Terstiege***,

276 AD2d 529, 713 NYS2d 76 [2d Dept 2000]). In addition, the standard of review on a motion for summary judgment requires the movant to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). The plaintiffs have failed to do so herein regardless of whether or not the defendants have standing to challenge their title to the disputed area. Accordingly, that branch of the plaintiffs' motion which seeks summary judgment on their first cause of action is denied.

The plaintiffs' second cause of action seeks, among other things, a declaratory judgment that they own the disputed area "free and clear of any rights claimed by the defendants." Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (*see* CPLR 3001; ***Rockland Light & Power Co. v City of New York***, 289 NY 45, 43 NE2d 803 [1942]; ***Thome v Alexander & Louisa Calder Found.***, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 906 NYS2d 817 [2010]). For the reason stated above, the plaintiffs have failed to establish their prima facie entitlement to summary judgment seeking a declaratory judgment as to their rights, title, and interest in the disputed area. Accordingly, that branch of the plaintiffs' motion which seeks summary judgment on their second cause of action is denied.

The plaintiffs' third cause of action seeks damages for the defendants' alleged trespass onto the disputed area. Trespass is an intentional entry onto the land of another without justification or permission (***Carlson v Zimmerman***, 63 AD3d 772, 882 NYS2d 139 [2d Dept 2009]; ***Woodhull v Town of Riverhead***. 46 AD3d 802, 849 NYS2d 79 [2d Dept 2007]). To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]). Here, the plaintiffs have failed to establish their title to the disputed area as a matter of law. Accordingly, that branch of the plaintiffs' motion which seeks summary judgment on their third cause of action is denied.

The Court now turns to the remaining requests for relief contained in the plaintiffs' motion. Perhaps in an effort to avoid the issues of fact regarding their claim to title to the disputed area, the plaintiffs seek, among other things, a judgment declaring that the defendants have only a right of passage on foot over a 10-foot wide path along the eastern boundary of the disputed area and use of the 33-foot wide beach area of Lot 12.2, and a permanent injunction prohibiting the defendants from storing, placing or leaving personal property or belongings on Lot 12.1 or Lot 12.2. The plaintiffs also seek an order dismissing all of the defendants' remaining counterclaims and defenses; and striking the defendants' jury demand.

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 state that they are willing to accept the validity of the defendants right-of-way if they accept a ten-foot wide easement[2] located on the eastern boundary of the disputed area, along with other conditions. However, said concession and the plaintiffs' request for a declaration to that effect are dependent upon the plaintiffs establishing their ownership of the servient estate (the disputed area), and their right to unilaterally relocate or alter the obviously "undefined" right of way herein. While the plaintiffs correctly point out that a right of passage does not permit a party any other rights beyond ingress and egress to a specified location, the Court declines to determine the remaining issues between the parties in a "piecemeal" fashion.

In addition, the undersigned notes that Svatovic has not asserted any affirmative defenses or counterclaims against the plaintiffs, and that Best has withdrawn her defenses and counterclaims in her affidavit in support of her cross motion and in opposition to the plaintiffs motion for summary judgment. Accordingly, that branch of the plaintiffs' motion which seeks to dismiss those claims is denied as academic. Finally, the plaintiffs seek to strike the defendants' jury demand on the grounds that, except for their cause of action for trespass, their claims are equitable in nature. The plaintiffs state that they are "willing to withdraw [their claim for trespass] for the purposes of this motion." Regardless of whether the Court should accept such an equivocal statement, the plaintiffs have failed to establish that their remaining claims are solely equitable in nature as discussed herein (CPLR 4101). Thus, that branch of the plaintiffs, motion which seeks to strike the defendants' jury demands is denied without prejudice to renewal before the Justice presiding at trial. Accordingly, the plaintiffs' motion is denied in its entirety.

The defendants each cross-move for summary judgment granting them certain relief. In an affidavit in support of her cross motion, Best swears that her motion rests entirely on the papers submitted by Svatovic, and that the "exhibits, arguments, evidence and demands stated in ... Mr. Svatovic's affidavit and his Cross-Motion are to be considered my own exhibits, arguments, evidence and demands." Thus, the Court will address both motions as if they were one, referring to Svatovic's cross motion as if made by both defendants.

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[2] It should be understood by all parties that the terms right-of-way and easement are interchangeable and are used in this order without implying any difference in the legal rights conveyed.

In reviewing the defendants' requests for relief, it is determined that several such requests are duplicative and can be addressed together. In essence, the defendants seek summary judgment declaring that the plaintiffs do not own the disputed area, Lot 12.2, that the plaintiffs committed fraud in filing the deeds establishing their title to Lot 12.2, granting them a permanent injunction regarding the right-of-way as "owners in common," and granting their request for a jury trial and damages allegedly caused by the plaintiffs.

As set forth above, the issues of fact as to whether the plaintiffs have title to the disputed area and whether the successors to Wickham Case had the right to grant the original right-of-way for foot and vehicular passage, requires the denial of the defendants' application for summary judgment on their requests for declaratory judgment and permanent injunction. In addition, it is evident that the self-represented defendants mistakenly assume that the term "owners in common" of the purported right-of-way gives them ownership rights in the disputed area enabling them to do more than traverse the area to reach the Peconic Bay.

Moreover, it is noted that the defendants do not have any affirmative defenses or counterclaims against the plaintiffs at this time, and that, even before Best withdrew all such claims, her answer did not include any claim of fraud against the plaintiffs. Generally, a defendant's motion for summary judgment must be denied where it is predicated on a ground not pleaded as a defense in the answer (***Contelmo's Sand & Gravel v J & J Milano***, 96 AD2d 1090, 467 NYS2d 55 [2d Dept 1983]; ***Cohn v Adler***, 128 AD2d 749, 513 NYS2d 460 [2d Dept 1987]). However, "a court may grant summary judgment based upon an unpleaded defense where reliance upon that defense neither surprises nor prejudices the plaintiff" (***Millbrook Hunt v Smith***, 249 AD2d 283, 670 NYS2d 905 [2d Dept 1998], quoting ***Olean Urban Renewal Agency v Herman***, 101 AD2d 712, 475 NYS2d 955 [4th Dept 1984]; *see also* ***Cohn v Adler***, *supra*). Here, not only does the late assertion of fraud as a defense surprise and prejudice the plaintiffs, the submission by the defendants and the record before the Court indicates that said claim is without merit. Finally, the defendants request for an order setting this matter down for a jury trial is deemed academic. The defendants have filed their demands for a jury trial which have not been stricken or otherwise deemed improper. Should the plaintiffs choose to renew their motion to strike the defendants jury demands, the defendants can oppose said motion. The issue of the defendants' alleged damages must await a determination whether they have any rights relative to the disputed area that have been abrogated by the plaintiffs. Accordingly, the defendants' cross motions are denied in their entirety.

Pursuant to the order of the Court dated November 15, 2014 (Tarantino, J.), the preliminary injunction extending the June 5, 2014 temporary restraining order and all of its numerous prohibitions regarding the defendants access to the Peconic Bay shall be continued pending the determination of this action.

Dated: March 6, 2017

Martha L. Luft
HON. MARTHA L. LUFT A.J.S.C.

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