EPG Assoc., LP v Cascadilla Sch.

2018 NY Slip Op 30464(U)

March 21, 2018

Supreme Court, Tompkins County

Docket Number: EF2017-0225

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 1st day of December, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

EPG ASSOCIATES, LP &
ENP ASSOCIATES, LP,

Plaintiffs,

-vs-

CASCADILLA SCHOOL, BARBARA CHEUNG
AND CHI-KAY CHEUNG, 232 DRYDEN ROAD, LLC
and THE CITY OF ITHACA

Defendants.

DECISION AND ORDER

Index No. EF2017-0225
RJI No.: 2017-0450-M

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to address: 1) an Order to Show Cause filed by Plaintiffs[1] and signed by this Court on October 6, 2017; 2) a Motion to Dismiss Plaintiffs' complaint, filed by Defendant City of Ithaca; 3) a Cross-Motion to Dismiss the complaint, filed by 232 Dryden Road, LLC; 4) a Cross-Motion by Plaintiffs to disqualify counsel for 232 Dryden Road, LLC due to a conflict of interest. Subsequent to Plaintiffs' Cross-Motion to disqualify, 232 Dryden Road, LLC obtained new counsel, and therefore, the Cross-Motion to disqualify is moot.

BACKGROUND FACTS

Summit Avenue is a street located in the City of Ithaca, and all parties to this action, except for the City of Ithaca, own property that abuts Summit Avenue. The parties dispute whether Summit Avenue is a privately owned street, or a public street. Plaintiffs contend it is a public street, while all the Defendants argue that it is a private right of way.

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[1]EPG Associates, LP was formerly known as ENP, Associates, LP, so there is only one Plaintiff entity, which has gone by two different names. However, since the pleadings and other submissions have utilized the name of two Plaintiffs, the Court will refer to them in the plural, as "Plaintiffs".

Plaintiffs filed this action seeking a declaratory judgment defining the rights of the parties to Summit Avenue, as well as a preliminary injunction and eventually a permanent injunction, preventing defendants from obstructing access to Summit Avenue, and money damages. Plaintiffs made an application via an Order to Show Cause for a preliminary injunction, and this Court granted a preliminary injunction[2] pending a return date on the Order to Show Cause. After hearing arguments on the preliminary injunction, the parties agreed that the temporary restraining order would be vacated, but that the parties would comply with certain other conditions relative to maintaining Summit Avenue open for ingress and egress, pending resolution of this action.

Plaintiffs' complaint asserts four causes of action. The first cause of action is a claim under Article 15 of the Real Property Actions and Proceedings Law, seeking a declaratory judgment that all of Summit Avenue is a public street. The second and third causes of action seek declaratory judgments to establish a right of way over Summit Avenue and removal of any encroaching structures, respectively. The fourth cause of action seeks monetary damages against 232 Dryden Road, LLC and the Cheungs.

Summit Avenue runs north-south between Oak Avenue on the north and Dryden Road to the south. It is a 50 foot corridor, and was laid out prior to the City of Ithaca being incorporated. There are six parcels that front or abut Summit Avenue. Cascadilla School owns two of those parcels, 232 Dryden Road, LLC owns two parcels (including an apartment building), and Defendants Cheung and Plaintiffs' own one parcel each. Plaintiffs' parcel is located at the southeasterly part of Summit Avenue, closest to Dryden Road. Defendant 232 Dryden Road, LLC owns property on the western side of Summit Avenue, and has plans to develop two four-story apartment buildings containing 62 units and 205 bedrooms. Plaintiffs' property is essentially located across Summit Avenue from the development.

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[2]The Order directed defendants to remove any obstructions of encroachments located in any portion of Summit Avene and to refrain from obstructing access to or otherwise exclusively occupying any part of Summit Avenue.

In the middle of 2017, the City's Planning and Development Board approved a site plan submitted by 232 Dryden Road, LLC involving improvements to Summit Avenue for parking and sidewalks. 232 Dryden Road, LLC took title to its two parcels on September 1, 2017 from James R. Rider, in furtherance of its development project.

Shortly after 232 Dryden Road, LLC took title to its property, it began construction. In the latter part of September, 2017, fencing was installed at the site for security and a staging area for construction vehicles. The first part of the project involved the demolition of the existing buildings and asbestos abatement, and therefore the fencing was deemed necessary to protect vehicles and pedestrians using Summit Avenue. Plaintiffs filed this action claiming that the fence and project constituted an interference with Summit Avenue, and Plaintiffs sought a preliminary injunction, as noted above. Plaintiffs point to several factors in support of a conclusion that this is a public street including the fact that: maps from the time of the City's incorporation show Summit Avenue as a street; there is a water main installed on Summit Avenue which serves the properties and connects with City lines; the municipality collects garbage on Summit Avenue; the City maintains a stop sign at the end of Summit Avenue; and mail is delivered by the United States Postal Service to Summit Avenue addresses. The City of Ithaca filed a Motion to Dismiss Plaintiff's Complaint, followed by 232 Dryden Road LLC's Motion to Dismiss. The Cheungs filed papers objecting to any preliminary injunction and requested that the temporary restraining order be lifted. Cascadilla School filed an Answer to the complaint.

1. City of Ithaca's Motion to Dismiss

The City of Ithaca filed a pre-Answer Motion to Dismiss Plaintiffs' Complaint raising three different arguments. First, the City argues that Plaintiffs' first cause of action to declare Summit Avenue a public street is barred on the basis of *res judicata* and collateral estoppel. In support of the *res judicata* argument, the City references a prior action, Kaplan v. Rider (Tompkins County Index No.: 2006-0468). The Plaintiff in the action was Philip L. Kaplan,

Plaintiffs' predecessor in interest in the Summit Avenue property. Kaplan had filed an action against Rider, who owned the property now owned by 232 Dryden Road LLC's. Kaplan alleged, among other things, that Summit Avenue had become a public roadway. While the action was pending, Kaplan conveyed his parcel to ENP Associates. The earlier action was ultimately discontinued on the merits and with prejudice.[3] The City contends that the issues are the same in both actions, and that Plaintiffs are seeking the same relief- a finding that Summit Avenue is a public street. Since Plaintiffs discontinued the EPG 1 action, they should be precluded from maintaining the current action.

Secondly, the City argues that Plaintiffs' Complaint fails to state a cause of action for dedication and acceptance. The City contends that there are no allegations or evidence of a formal act by the City to accept any purported dedication of Summit Avenue as a public street, or that the City maintained Summit Avenue.

Thirdly, the City claims there is no justiciable controversy between Plaintiffs and the City with respect to the second and third causes of action (declaratory judgment that Summit Avenue is subject to Plaintiffs' right of way and declaratory judgment against defendants to remove encroaching structures, respectively).[4] The City claims that it does not own the neighboring properties or any of the structures that Plaintiffs' claim encroach their right of way, so there is nothing to be decided between the City and Plaintiffs on those issues.

2. Defendant 232 Dryden Road, LLC's Motion to Dismiss

232 Dryden Road, LLC also filed a pre-Answer Motion to Dismiss pursuant to CPLR

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[3]The earlier action was re-captioned ENP Associates LP, as Successor in Interest to Philip L. Kaplan v. James R. Rider and Lois E. Rider. At some time after the case was re-captioned, ENP Associates must have been changed to EPG Associates, since the stipulation of discontinuance listed Plaintiff as EPG Associates. That action will be referred to herein as "EPG 1".

[4]The fourth cause of action is only against 232 Dryden Road, LLC and the Cheungs.

§§3211(a)(1), (2), (5) and (7) on the grounds that Plaintiffs' claims are barred by *res judicata*, documentary evidence, or otherwise fail to state a cause of action. 232 Dryden Road, LLC also opposes Plaintiffs' request for preliminary injunction.

Similar to the arguments made by the City, 232 Dryden Road, LLC argues that Plaintiffs' claims are an attempt to litigate the same issues as in EPG 1, and that Plaintiffs' first and second causes of action are barred by *res judicata*. 232 Dryden Road, LLC also argues for dismissal of the first and second causes of action based on documentary evidence and failure to state a cause of action claiming that Plaintiffs' have failed to allege that there was a formal dedication of Summit Avenue, and that Plaintiffs have only a right of way over the northern portion of Summit Avenue, but not the entirety of Summit Avenue. 232 Dryden Road, LLC also argues that even with the construction fence Plaintiffs still have over 30 feet to access their property, and therefore, Plaintiffs' right of way has not been impaired.[5]

3. Defendants Barbara Cheung and Chi-Kay Cheung

The Cheungs submitted a Memorandum of Law in opposition to Plaintiffs' Motion for a Preliminary Injunction and a Supplemental Memorandum of Law in further opposition. The Cheungs argue that there is insufficient evidence to show any offer in the remote past to dedicate Summit Avenue as a public street, and there is no offer of proof that the municipality maintained the road as a public thoroughfare. Instead, the evidence supports the fact that the neighbors on the street have maintained the street. Therefore, they argue that Plaintiffs' cannot prevail on their claim.

[5]It appears that since the commencement of the action, the construction project has continued, and that the construction fence has actually been re-located, affording access to the whole of Summit Avenue.

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4. Cascadilla School

The remaining defendant, Cascadilla School, who owns two properties abutting Summit Avenue, did not file a motion or reply to any of the above motions. Instead, Cascadilla School has served an Answer which raises defenses of *res judicata* and failure to state a cause of action.

LEGAL ANALYSIS AND DISCUSSION

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference ... Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005) [internal citation omitted]; *see Maki v. Bassett Healthcare*, 141 AD3d 979, 980 (3rd Dept. 2016), *appeal dismissed and lv denied* 28 NY3d 1130, (2017), *reconsideration denied* (2018).

RES JUDICATA ARGUMENT

The Court will first address the *res judicata* argument. "The doctrine of res judicata bars a party from litigating a claim where a final [disposition] on the merits has been rendered on the same subject matter, between the same parties." *Bernstein v. State of New York*, 129 AD3d 1358, 1359 (3rd Dept. 2015), *citing Matter of Hunter*, 4 NY3d 260, 269 (2005) and *Tovar v. Tesoros Prop. Mgt., LLC*, 119 AD3d 1127 (3rd Dept. 2014); *see Maki v. Bassett*, 141 AD3d at 980, *supra*. In New York, the Courts have "adopted the transactional analysis approach in deciding *res judicata* issues ... [and] once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. Syracuse*, 54 NY2d 353, 357 (1981) (citation omitted); *Matter of Bemis v. Town of Crown Point*, 121 AD3d 1448, 1450-1451

(3rd Dept. 2014).

Both 232 Dryden Road, LLC and the City of Ithaca argue that Plaintiffs' claims in the current case are the same as in EPG 1- that Summit Avenue should be declared a public street and that Plaintiffs have established a right of way by adverse possession over a portion of Summit Avenue. In EPG 1, Plaintiffs eventually discontinued that case on the merits, with prejudice. The defendants argue that Plaintiffs are precluded from maintaining the instant action because it is the same claim and seeks the same relief as EPG 1.

In a situation where settlement "discontinues the action or proceeding with prejudice, as it did here, it may have a preclusive effect in future litigation." *Matter of Bemis*, 121 AD3d at 1451. Where the claims arise out of the same facts or transactions, and the current claims should have, or could have, been resolved in the prior action, *res judicata* can apply. *Braunstein v. Braunstein*, 114 AD2d 46 (2nd Dept. 1985). "[H]owever, a future action or proceeding will not be subject to res judicata if the identity of the parties engaging in the litigation is not identical." *Matter of Bemis*, 121 AD3d at 1451, *citing City of New York v. Welsbach Elec. Corp.*, 9 NY3d 124, 127 (2007) and *Matter of LaRocco v. Goord*, 43 AD3d 500, 500 (3rd Dept. 2007). The related concept "of collateral estoppel or 'issue preclusion' is invoked when the cause of action in the second matter is different from that in the first and applies only to a prior determination of an issue which was actually and necessarily decided in the earlier matter and not to those which could have been litigated." *Koether v. Generalow*, 213 AD2d 379, 380 (2nd Dept. 1995) (citations omitted). "[F]urther, there must have been a full and fair opportunity to contest the decision now said to be controlling." *McWain v. Pronto*, 30 AD3d 675, 676 (3rd Dept. 2006), *citing Schwartz v. Public Adm'r of County of Bronx*, 24 NY2d 65, 71 (1969). "[T]he burden of showing that the issue was identical and necessarily decided rests upon the moving party." *Schwartz*, 24 NY2d at 73.

There are several significant differences between EPG 1 and the current action. First, the parties are not the same. In EPG 1, there were only two parties- Kaplan (and later EPG

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Associates) and Rider (232 Dryden Road's predecessor in interest). Second, although the complaint in EPG 1 did assert that Summit Avenue was a public street, that issue was not necessarily decided, nor could it have been without additional parties. EPG 1 could not have resulted in any determination on whether Summit Avenue was a public street, because the other landowners on the street and the City of Ithaca were not parties to the action. *See e.g. City of New York v. Welsbach Elec. Corp.*, 9 NY3d 124 (2007). Accordingly, EPG 1 did not, and could not, finally resolve the issues of the status of the road. *See e.g. Matter of Bemis*, 121 AD3d 1448, *supra*. The main issue in EPG 1 was between the two neighbors and grounded on adverse possession. The area of Summit Avenue in dispute was limited. The current action involves all the owners of land abutting Summit Avenue, the City of Ithaca, and deals with all of Summit Avenue, by contending it is a public street.

Even though 232 Dryden Road, LLC was not a party to the earlier action, it does at least have the extra argument that its predecessor in interest, Rider, was a party to the earlier action. Even with that fact and connection, however, the Court concludes that *res judicata* and collateral estoppel do not bar the present action, because the earlier action was limited in scope, and also because of the details of the settlement of EPG 1. The EPG 1 case was resolved by a settlement agreement, and a discontinuance with prejudcie. Although *res judicata* can apply to a stipulation of discontinuance (*Biggs v. O'Neill*, 41 AD3d 1067 [3rd Dept. 2007]), the Court has to give consideration to the terms of the earlier discontinuance. "[T]he language 'with prejudice' is narrowly interpreted when the interests of justice, or the particular equities involved, warrant such an approach." *Van Hof v. Town of Warwick*, 249 AD2d 382, 382 (2nd Dept. 1998) (citations omitted). The Settlement Agreement between Rider and ENP Associates resolved issues between those two parties for an apportionment of their respective shares of road maintenance, to the extent that the City of Ithaca did not pay for it. If Summit Avenue was deemed a public road, then the City would be paying for all the maintenance, and the Agreement would not be necessary. However, by entering into the Agreement, the parties recognized, and specifically left open, the question of whether Summit Avenue was a public street. The quit claim deed that was conveyed as part of the resolution of EPG 1 was also drafted to acknowledge and reserve the

rights of all other owners of property on Summit Avenue. Based upon the language surrounding the settlement of EPG 1, and the parties involved, the Court concludes that the current action is not barred by the doctrines of *res judicata* and/or collateral estoppel.

FAILURE TO STATE A CAUSE OF ACTION AND DOCUMENTARY EVIDENCE

Both the City and 232 Dryden Road, LLC have moved for dismissal of the first cause of action on the grounds of failure to state a cause of action that Summit Avenue is a public street by dedication and acceptance. 232 Dryden Road, LLC also argues that the first and second causes of action should be dismissed under CPLR 3211 (a)(1) based on documentary evidence.

"On a CPLR 3211 (a) (7) motion, a court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether the defendant has a defense." *Unadilla Silo Co. v. Ernst & Young*, 234 AD2d 754, 754 (3rd Dept. 1996) *citing Leon v. Martinez*, 84 NY2d 83, 87-88 (1994) and *Beltrone v. General Schuyler & Co.*, 223 AD2d 938, 939 (3rd Dept. 1996). "To succeed on a motion under CPLR 3211 (a) (1), a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Unadilla Silo*, 234 AD2d at 755.

In appropriate circumstances, title to real property can be obtained by a municipality through dedication and acceptance.

> "Dedication of a street . . . is essentially of the nature of a gift' by a private owner to the public and it becomes effective when the gift is accepted by the public" (*Matter of City of New York [Sealand Dock & Term. Corp.]*, 29 NY2d 97, 101, 272 NE2d 518, 324 NYS2d 1 [1971], *quoting Scarborough Props. Corp. v Village of Briarcliff Manor*, 278 NY at 377; *see Zebrowski v Trustees of Town of Brookhaven*, 128 AD2d 704, 705, 513 NYS2d 200 [1987]).

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" 'The test of the validity of a dedication, like the test of the validity of other gift or transfer, is, primarily, whether there has been complete relinquishment on the one side and acceptance on the other' " (*Zebrowski v Trustees of Town of Brookhaven*, 128 AD2d at 705, *quoting Scarborough Props. Corp. v Village of Briarcliff Manor*, 278 NY at 377; *see Perlmutter v Four Star Dev. Assoc.*, 38 AD3d at 1140; *Matter of Angiolillo v Town of Greenburgh*, 290 AD2d 1, 10, 735 NYS2d 66 [2001]; *Winston v Village of Scarsdale*, 170 AD2d 672, 673, 567 NYS2d 269 [1991]). Further, in addition to an offer and acceptance, there must be "some formal act on the part of the relevant public authorities adopting the highway" (*Perlmutter v Four Star Dev. Assoc.*, 38 AD3d at 1140; *see People v Brooklyn & Queens Tr. Corp.*, 273 NY 394, 401, 7 NE2d 833 [1937]; *Niagara Falls Suspension Bridge Co. v Bachman*, 66 NY 261 [1876]). "[T]he burden of proof lies on the party asserting that the land has been dedicated" (*Winston v Village of Scarsdale*, 170 AD2d at 673).

Romanoff v. Village of Scarsdale, 50 AD3d 763, 764 (2nd Dept. 2008); *see also Matter of Jasinski v. Hudson Pointe Homeowners Ass'n, Inc.*, 124 AD3d 978 (3rd Dept. 2015).

In the present case, Plaintiffs allege that the mapping and offering of lots prior to the incorporation of the City of Ithaca constitutes an offer of dedication to the City. (Plaintiffs' complaint at ¶40). The City contends that there is no allegation that there has been a complete relinquishment of rights and title to Summit Avenue by the abutting landowners, and that the Plaintiffs do not allege a formal act by the City accepting any dedication, or that the City maintained Summit Avenue for any period of time. 232 Dryden Road, LLC shares the City's argument that Plaintiffs have not alleged any facts to support a finding of dedication and acceptance and also highlights that title documents extending back eighty plus years show that Summit Avenue is privately owned, and subject to rights of way for the adjacent property owners. 232 Dryden Road, LLC further argues that Plaintiffs' first cause of action is flatly contradicted by the documentary evidence. (CPLR 3211(a)(1)). The Cheungs point out that Plaintiffs have not offered any information concerning the purported map(s) providing such "dedication", and that the City's acts in providing some public uses along Summit Avenue do not constitute acceptance.

Whether a dedication has occurred "'must be determined from the acts and declarations of the parties and all the attending circumstances.'" *Pyramid Centres & Co. v. Sarwill Assoc.*, 186 AD2d 968, 969 (1992) *quoting Zebrowski v. Trustees of Town of Brookhaven*, 128 AD2d

704, 705, *supra*. In the present case, the Court concludes that Plaintiffs' claim that Summit Avenue is a public street by dedication and acceptance is not "flatly contradicted" by all the evidence. The Plaintiffs point to various pieces of evidence including maps depicting Summit Avenue prior to the City of Ithaca being incorporated in 1888, as well as maps subsequent to its incorporation and the inclusion of Summit Avenue in map legends of street, roads and avenues. Plaintiffs also point to several deeds from the 1880s up to 1914 containing language that reserve a strip of land for Summit Avenue. At this juncture, the Court cannot determine if those are official maps supporting the claim of dedication. The Court need only consider if facts are alleged that could support such a claim, or if the allegations are utterly refuted by the documentary evidence. The Court finds that Plaintiffs have presented enough evidence to go forward with a claim that a dedication has occurred. No discovery has been obtained yet, and there may be additional information that could shed light on the issue.

Similarly, the parties dispute whether the City has taken any actions that would indicate acceptance of any purported dedication. Plaintiffs highlight several facts to support their position including the City's construction of a water main and sewer line, the placement of a stop sign on Summit Avenue, a garbage pick up location, and Plaintiffs also submitted an affidavit from Jay Franklin, the Director of Assessment in Tompkins County. Franklin notes that assessments of Summit Avenue have changed several times throughout the last 20 years, and that it has been on the City roles at various times as a City street. This is a pre-answer motion to dismiss and the Court finds that Plaintiffs' evidence and allegations as to acceptance are sufficient to defeat a motion to dismiss a claim based on dedication and acceptance.

Plaintiffs' second cause of action is for declaratory judgment that Summit Avenue is subject to a right of way. 232 Dryden Road, LLC argues that documentary evidence shows that the chains of title gave Plaintiffs a right of way over only the northern portion of Summit Avenue and no rights to the southerly portion of Summit Avenue.[6] In support, 232 Dryden Road, LLC

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[6]The northern portion of the road is identified as the area "running northerly in Summit Street from a line 10 feet south of the northern line of [Plaintiffs' lots]". In the area to the north,

has submitted several deeds, maps and surveys, which it claims show that Plaintiffs do not have a right of way in the southern portion of Summit Avenue.

In particular, 232 Dryden Road, LLC details the chains of title following a foreclosure action in 1933 by Ithaca Trust Company (the "Trust Company"). As a result of that foreclosure action, the Referee conveyed 8 lots. Three parcels were to the east of Summit Avenue and five parcels were to the west. The Trust Company received deeds to 7 of the 8 parcels. With regard to the southern parcels (on either side of Summit Avenue), the Trust Company deeds contained rights to both the eastern and western half of Summit Road. Subsequently, the Trust Company conveyed the lots on the southeastern side of Summit Avenue to Frank E. Bailey and Olive H. Bailey ("Baileys") in 1939. That deed specifically conveyed a right of way in common with other property owners, to the northern part of Summit Avenue. However, it also provided "that no right, title or interest whatsoever in and to the southerly end of Summit [Avenue] is included in this conveyance. The Trust Company reserved those rights. The subsequent conveyances in Plaintiffs' chain of title contained the same language that no rights in the southern part of Summit Avenue were being conveyed; up to the deed into EPG Associates, L.P. which recited the right of way to the northern part of Summit Avenue, but made no mention about the southern portion.

On the other hand, the deeds in 232 Dryden Road, LLC's chain of title have contained language that the southern portion of Summit Avenue were conveyed with those lots. A deed in 1946 specifically identified that southern area as an extension of Summit Avenue, and that it had not been opened as a street. In that context, it makes more sense that area was conveyed with the appropriate lots, because it was not viewed as a street. In this case, the transfers happened to be with the lots on the west side, and the lots owned by 232 Dryden Road, LLC.

Based on the documentary evidence regarding the conveyances and chains of title herein, the Court concludes that Plaintiffs' do not have a right of way, or any other interest, in the

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all the property owners on the street have a right of way.

southern portion of Summit Avenue.

Plaintiffs additionally argue that the historic deeds to the properties on Summit Avenue show that the parties owning property on the street, and the public in general, had a common right of use. Plaintiffs argue that this right still continues.

However, the deeds establish that Trust Company owned the property to the west side of Summit Avenue, the property to the east side, and the rights in between (Summit Avenue itself). As such, it owned all the property at issue, and any interests would have merged because no easement would be necessary. *Will v. Gates*, 89 NY2d 778 (1997). Accordingly, Plaintiffs' argument that a right of way exists in the southern portion of Summit Avenue fails to overcome the documentary proof.

Therefore, the Court concludes that Plaintiffs' second cause of action alleging a right of way to the entirety of Summit Avenue is contradicted by the documentary proof. Plaintiffs have no rights to the southern part of Summit Avenue.

232 Dryden Road, LLC has also submitted evidence with respect to the northern portion, but the other property owners have not made motions, and the Court is not making a ruling with respect to northern portion of Summit Avenue, or with respect to any rights of way the other landowners may have in the southern part of Summit Avenue. However, as the motion pertains to 232 Dryden Road, LLC and Plaintiffs' rights to the southern portion of Summit Avenue, the Court can make a ruling as to the rights of those parties. Based upon the documentary evidence. 232 Dryden Road LLC's motion with respect to dismissing Plaintiffs' claim to a right of way to the southern portion of Summit Avenue is GRANTED.

The City of Ithaca has also moved to dismiss the second cause of action against it. Although the Court has concluded that the Plaintiffs have at least pled a cause of action that Summit Avenue is a public street, and that is still to be resolved, the second cause of action

based upon a right of way does not implicate the City of Ithaca. The City would not be a proper party to a determination of the rights of abutting landowners and any right of way between the parties. Accordingly, the City of Ithaca is also entitled to dismissal of the second cause of action against it, and therefore, that motion is GRANTED.

232 Dryden Road, LLC also seeks dismissal of Plaintiffs' third cause of action. The third cause of action is for declaratory judgment and removal of any encroaching structures. Specifically, Plaintiffs allege that the construction fence "effectively restricts the right-of-way for access and egress to and from the premises." Based upon the preceding discussion, the Plaintiffs' have no right of way in the southern portion of Summit Avenue. The only issue, then, is whether the fence restricts Plaintiffs' right of way running the north. Although the issue may be moot with the re-location of the fence and access to all of Summit Avenue, the Court will nevertheless address the issue.

To the extent that Plaintiffs have a right of way in the northern portion of Summit Avenue, that does not mean that 232 Dryden Road, LLC cannot utilize its own property or has to keep the southern portion open for Plaintiffs' benefit. *See e.g. Boice v. Hirschbihl*, 128 AD3d 1215 (3rd Dept. 2015). 232 Dryden Road, LLC, however, cannot cut off access to the right of way, so Plaintiffs' herein must be afforded a right of ingress and egress from their property to the right of way to the northern part of Summit Avenue. *See e.g. Rosen v. Mosby*, 148 AD3d 1228 (3rd Dept. 2017); *Sambrook v. Sierocki*, 53 AD3d 817 (3rd Dept. 2008). However, in this case, the documents and pictures show that Plaintiffs' access to their property has not been impaired. 232 Dryden Road, LLC has provided evidence that Plaintiffs have over 30 feet on Summit Avenue to access the entrance to their property. Parking spaces previously existing on the western side of Summit Avenue had limited access to 19 feet, so the 30 feet is even more than what had been available before. Base upon the documentary evidence, the Court concludes that Plaintiffs' access has not been impaired. Therefore, 232 Dryden Road, LLC's motion to dismiss the third cause of action against it is GRANTED.

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The City of Ithaca has also moved to dismiss the third cause of action against it. The City does not own any of the abutting properties, nor has it taken any steps or installed any structures or materials that could possibly be interfering with Plaintiffs' ability to access their property. There is no justiciable controversy presented to the Court with respect to the City and Plaintiffs' claim of encroachment. Therefore, the City of Ithaca's motion to dismiss the third cause of action against it is GRANTED.

With respect to 232 Dryden Road, LLC's motion to dismiss Plaintiffs' fourth cause of action for damages, the Court has determined that 232 Dryden Road, LLC has not encroached on any claimed right of way, and that Plaintiffs do not have any rights in the southern portion of Summit Avenue. Accordingly, there can be no damages awarded. Therefore, 232 Dryden Road, LLC's motion to dismiss the fourth cause of action against it is GRANTED.

CONCLUSION

Plaintiffs' first cause of action, alleging that Summit Avenue is a public street is not barred by *res judicata*; nor is it subject to dismissal based upon documentary evidence or failure to state a cause of action. Therefore, the City's motion to dismiss the first cause of action is DENIED. 232 Dryden Road, LLC's motion to dismiss the first cause of action is also DENIED.

Plaintiffs' second cause of action claiming a right of way over the entirety of Summit Avenue is contradicted by the documentary evidence. Therefore, the motion of 232 Dryden Road, LLC to dismiss the second cause of action is GRANTED. The City of Ithaca has no interest in the right of way and therefore the City's motion to dismiss the second cause of action is also GRANTED.

Plaintiffs' third cause of action seeking declaratory judgment on the question of impairment of its right of way and/or access to its property is belied by the facts and cannot

stand. Plaintiffs' have no rights in the southern part of Summit Avenue, and their access to the right of was to the northern part of Summit Avenue has not been impaired Accordingly, the motion of 232 Dryden Road, LLC to dismiss the third cause of action is GRANTED. Likewise, the claim against the City is not supported and the City's motion to dismiss the third cause of action is GRANTED.

Plaintiffs' fourth cause of action is a claim for money damages. Based upon the Court's conclusion that Plaintiffs' have no rights in the southern portion of Summit Avenue, and that 232 Dryden Road, LLC has not encroached or restricted Plaintiffs' access to their own property, there can be no claim for damages from 232 Dryden Road, LLC. Accordingly, the motion of 232 Dryden Road, LLC to dismiss the fourth cause of action against it is GRANTED.

IT IS SO ORDERED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: March 21, 2018
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice