Freed v Best
2018 NY Slip Op 32603(U)
September 28, 2018
Supreme Court, Suffolk County
Docket Number: 01247/2014
Judge: Martha L. Luft

[* 1]

Short Form Order

Index No. 01247/2014

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

PRESENT:
Hon. Martha L. Luft
Acting Justice Supreme Court

POST TRIAL DECISION AND ORDER

_____X
TODD FREED and EDITH FREED,

Plaintiffs,

-against-

BARBARA BEST and ZARKO SVATOVIC,

Defendants.
_____x

Mot. Seq. No.:	029 - MD
Orig. Return Date:	08/09/2018
Mot. Submit Date:	08/28/2018
Mot. Seq. No.:	030 - MD
Orig. Return Date:	08/14/2018
Mot. Submit Date:	08/28/2018
Mot. Seq. No.:	031 - Mot-D
Orig. Return Date:	08/09/2018
Mot. Submit Date:	08/28/2018

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DEFENDANTS PRO SE
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Barbara Best
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Upon the notice of motion dated July 23, 2018 of defendant Svatovic with supporting papers, the notice of motion dated July 2, 2018 of defendant Best with supporting papers, the affidavit in opposition to both of the aforesaid, sworn to August 8, 2018 by Stephen R. Angel with supporting exhibits, the affidavit in reply of defendant Svatovic dated August 7, 2018,the notice of motion dated July 26, 2018 of plaintiffs with supporting papers and

memorandum of law, the affidavit in reply to motion of defendant Svatovic dated August 3, 2018 with supporting papers, the affidavit in reply of defendant Best dated August 3, 2018, and the reply affidavit in further support of the plaintiffs' motion of Anthony C. Pasca, sworn to August 13, 2018,it is hereby

ORDERED that the motion (seq. 029) by Zarko Svatovic, defendant *pro se* to vacate the jury verdict rendered in this matter on July 12, 2018 is denied; and it is further

ORDERED that the motion (seq. 031) by Barbara Best, defendant *pro se*, to vacate the jury verdict rendered in this matter on July 12, 2018 is denied; and it is further

ORDERED that the motion (seq. 030) by plaintiffs is granted to the extent that such portion of the jury verdict rendered on July 12, 2018 as answered the third question on the Special Verdict Sheet [specifically: Is the ten-foot-wide area at the easterly boundary of the 33-foot strip of property sufficient to provide the defendants with reasonable and convenient pedestrian access to the Peconic Bay?] in the negative is hereby set aside and shall be replaced with an answer in the affirmative; and it is further

ORDERED that plaintiffs, owners of property, located at 12400 New Suffolk Avenue, Cutchogue, New York, and designated on the Suffolk County Tax Map as Nos. 1000-116.00-06.00-012.1 and 1000-116.00-06.00-012.2 ("Lot 12.2"), are entitled to a permanent injunction restricting any pedestrian access rights defendants may have to the Peconic Bay over plaintiff's property, to a ten-foot wide area along the eastern boundary of Lot 12.2 and further enjoining defendants from utilizing Lot 12.2 for any purpose other than pedestrian ingress and egress, from storing, placing or leaving personal property or belongings on plaintiffs' property, from maintaining any structures or encroachments on the plaintiffs' property, and from interfering with plaintiffs' use of Lot 12.2; and it is further

ORDERED that plaintiffs' request for a declaratory judgment from the court is denied as unwarranted; and it is further

ORDERED that plaintiffs are entitled to costs and disbursements of this action, as well as the additional allowances pursuant to CPLR §8302 (b) (1) - (4) and CPLR §8303 (a) (2), to be taxed by the clerk.

Following a lengthy jury trial, a verdict was rendered in this matter on July 12, 2018 which held for the plaintiffs in establishing their ownership of a 33-foot wide strip of property, referred to above as Lot 12.2, but also found that the ten-foot wide area at the easterly boundary thereof was not sufficient to provide defendants with reasonable and convenient pedestrian access to Peconic Bay. Thereafter, the three motions before the court were filed. Defendants *pro se*, Zarko Svatovic and Barbara Best filed identical motions to set aside the verdict. Ms. Best merely adopted the motion made by Mr. Svatovic as her own. Plaintiffs also filed a motion requesting that the portion of the verdict regarding whether the ten-foot wide area was reasonable and convenient for pedestrian access to the bay be set aside, and for a ruling by the court on their request for equitable relief.

BACKGROUND

A brief recitation of the long history of this matter is appropriate to place the applications before the court in context. A temporary restraining order was issued in this matter, after hearing, on June 5, 2014, *inter alia*, limiting defendants to use of a ten-foot wide path on the easterly edge of Lot 12.2 for pedestrian access to Peconic Bay. By order dated November 25, 2014 (Tarantino, J.), a preliminary injunction was granted continuing the terms of the temporary restraining order pending determination of this action.

Subsequently, plaintiffs moved and defendants cross-moved for summary judgment. By decision dated March 6, 2017, summary judgment was denied to all parties. That decision did reflect certain changes in position taken by the plaintiffs and by defendant Best during the pendency of the motions. Specifically, the plaintiffs stated their willingness to withdraw their request for a declaratory judgment holding that defendants have no interest or rights of any kind in Lot 12.2, and to recognize defendants' entitlement to a pedestrian right of way over the ten-foot path at the easterly edge of the lot. Based upon the submissions made by Ms. Best's attorney, the court noted that 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." (March 6, 2017 decision at p. 4). The court also noted that the purported right-of-way was obviously "undefined." (*Id.* at p. 8).

This issue could not be finally determined because the court found that questions of fact existed as to plaintiffs' ownership of Lot 12.2, and declined to decide the case in a piecemeal fashion. Moreover, prior to the return date, Ms. Best discharged her attorney and decided to represent herself, notifying the court that she withdrew both her defenses and her counterclaims. Because Mr. Svatovic had raised no defenses nor asserted any counterclaims, all that remained to be determined in this matter were the plaintiffs' claims. One of the plaintiffs' claims, that alleging trespass, was marked withdrawn by order of this court dated October 11, 2017 (Baisley, J.).

The plaintiffs' case is a mixture of claims at law and at equity. Thus, the issues of fact to be determined regarding their ownership of Lot 12.2 were questions for the jury, while their request for a permanent injunction was to be determined by the court. Following the verdict, the court deferred its decision on the permanent injunction, pending a determination of the current motions.

THE STANDARDS FOR SETTING ASIDE A JURY VERDICT

CPLR 4404 (a) addresses motions following a jury trial, and provides, in pertinent part, that the court "may set aside a verdict . . . and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . ." Just two years ago, the Court of Appeals reiterated the two standards of review of jury verdicts pursuant to this statute in ***Killon v Parrotta***, 28 NY3d 101, 42 NYS3d 70 (2016). A court cannot rule that a verdict is against the weight of the evidence unless "the evidence so

preponderate[d] in favor of the [moving paty] that [it] could not have been reached on any fair interpretation of the evidence" (*citation omitted*). *Id.* at 108, 42 NYS3d at 74.

In order to direct that judgment be entered as a matter of law, the court must "first determine that the verdict is 'utterly irrational' (*citation omitted*)." *Id.* To make such a determination, the court must find "that 'there is simply no valid line of reasoning and permissible inferences which could possibly lead [a] rational [person] to the conclusion reached by the jury on the basis of the evidence presented at trial' (*citation omitted*)." *Id.*

DEFENDANTS' MOTIONS

The defendants' motions, which, as noted above, are identical, fail to make any kind of pertinent showing for relief pursuant to CPLR 4404, and must be denied in their entirety. The submissions are nothing more than a series of conclusory statements regarding issues that were long-since ruled upon. The improprieties of the papers are numerous and will not be listed individually. Suffice it to say that they rely heavily on matters and documents outside the record in this matter, primarily items that have been ruled upon as inadmissible, without any showing that such rulings were improper. Many of the arguments raised rest upon the defendants' misapprehension of the import of a denial of summary judgment, *viz.* that it is not a determination on the merits, but merely a determination that there are issues of fact to be determined by the jury. Others are a blatant misrepresentation of the record in this matter and raise objections that were undoubtedly waived, such as, by way of example, the contents of the Special Verdict Sheet.

Their request that the court issue a declaratory judgment is additionally improper because they have no counterclaims for relief of any sort. Defendants repeat their assertion, made at trial, that they do not claim ownership or any rights, adverse to plaintiffs. The latter statement is plainly contrary to their prosecution of the defense in this matter, in the course of which they have made abundantly clear that they believe they have a right to use Lot 12.2, as well as to their actions during the course of the four years of this litigation.

PLAINTIFFS' MOTION

With regard to plaintiffs' motion, they have clearly demonstrated that the jury's negative answer to question 3 on the Special Verdict Sheet lacked any rational basis in the record. A ten-foot wide path is wider than any path that had been used by anyone testifying at trial, including witnesses on both plaintiffs' case and defendants' case. In addition, the testimony of plaintiffs' land surveyor expert supported an affirmative answer to question 3. There simply is no evidence in the record of this case upon which one could base a decision that a ten-foot wide path leading directly to the beach does not provide "reasonable and convenient pedestrian access to Peconic Bay."

Plaintiffs devote much space to the argument that this issue was rendered academic by the defendants' statement that they make no claim of ownership or of any rights adverse to the plaintiffs. While it is undeniable that they have made that statement repeatedly, the court declines

to give it credence on its face. As noted above, their arguments, legal posture, and their actions throughout the pendency of this matter bespoke the very opposite. The court can only presume that the defendants *pro se* made these statements in what they thought would be a clever legal maneuver to demonstrate how completely they reject the plaintiffs' ownership of Lot 12.2, such that they do not even need to assert rights as against the plaintiffs.[1] No matter their motivation, the court is not crediting the statement at face value, and will not rely on it in reaching a determination of the plaintiffs' motion. To do otherwise would be to undermine the long-held policy of allowing legal matters to be determined on the merits. *See, e.g.,* ***Rubin v Pan American World Airways, Inc.,*** 128 AD2d 765, 513 NYS2d 248 (2d Dept. 1987). After all of the years of litigation in this case, it is proper that the legal issues raised therein be settled to the extent possible.

PERMANENT INJUNCTION DETERMINATION

With the establishment of the plaintiffs' ownership of Lot 12.2 by record title, coupled with the court's ruling that the ten-foot wide path provides reasonable and convenient pedestrian access to the Peconic Bay, the court can determine the plaintiffs' cause of action for a permanent injunction, an equitable remedy which is exclusively within the court's purview, rather than that of the jury. CPLR 4211; ***Mercantile & General Reinsurance Co., PLC v Colonial Assur. Co.,*** 82 NY2d 248, 251, 604 NYS2d 492, 493 (1993).

Plaintiffs have shown that they are entitled to a permanent injunction. The credible evidence presented at trial shows that the defendants repeatedly acted in violation of and interference with plaintiffs' rights as owners of Lot 12.2. Indeed, the defendants do not even dispute most of the violative actions, such as wandering outside of the path designated by the plaintiffs for ingress to and egress from Peconic Bay, repeatedly leaving objects such as broken beach chairs, some of which were purposefully coated with molasses or motor oil to make removal difficult and unpleasant, on plaintiffs' property, by inserting wooden stakes attached by string on plaintiffs' property to identify a larger area over which defendants claimed the right to pass, and by defendant Svatovic yelling obscenities in front of plaintiffs' children.

Moreover, the original temporary restraining order itself was not sufficient to control defendants' behavior. Each was held in contempt of court for violating it and fined therefor, with additional sanctions being required to induce compliance by defendant Svatovic in the form of a thirty-day jail sentence, held in suspense so long as he complied. Defendant Svatovic's inclination to disregard court orders was further evidenced by his flouting of the January 15, 2015 order (Tarantino, J.) that required Mr. Svatovic to obtain court permission prior to filing any additional motions, due to his "inundating this case with paper and exhausting the Court's patience." This occurred when he made a motion to the Calendar Control Part Justice (Baisley,

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[1]For example, in his affidavit in support of his own post-trial motion (Mot. Seq. 029), at paragraph 15, Mr. Svatovic avers: "Defendants do not recognize Plaintiffs' interest of any kind whatsoever in the ROW property [Lot 12.2] and therefore claim rights to nothing in this lawsuit." Whether defendants recognize the plaintiffs' interest in the property or not has no bearing on the resolution of this matter. The jury has determined that plaintiffs do own Lot 12.2 by record title.

J.) without requesting permission and without informing such Justice of the restriction that had been placed upon him.

Such a history of contumacious behavior during the pendency of this litigation, coupled with the defendants' behavior in violation of the plaintiffs' rights as owners of Lot 12.2 weigh heavily in favor of the equitable relief requested by plaintiffs. A permanent injunction, as set forth in the decretal paragraph above, shall issue.

PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF

Plaintiffs also request a declaratory judgment stating that they have established their title to Lot 12.2 and that defendants possess only a pedestrian right of passage over that lot. However, these are the very issues that were to be addressed by the jury, and were so addressed in the form of the questions posed on the Special Verdict Sheet. There is no doubt that declaratory relief is the appropriate vehicle for resolving real property claims of the sort involved herein. ***Chanos v MADAC, LLC***, 74 AD3d 1007, 1008, 903 NYS2d 506, 508 (2d Dept. 2010). It is also beyond dispute that a declaratory judgment can be either legal or equitable in nature. ***First National Stores, Inc. v Yellowstone Shopping Center, Inc.***, 21 NY2d 630, 637, 290 NYS2d 721, 725 (1968). One must examine the specific nature of the action itself to identify into which category it falls. ***State Farm Mut. Auto. Ins. Co. v Sparacio***,25 AD3d 777, 778-779, 809 NYS2d 151, 153 (2d Dept. 2006).

In the present matter, the court has previously analyzed this issue upon plaintiffs' motion (mot. seq. 025) requesting that defendants' jury demand be stricken. In denying the request, by order dated October 11, 2017, this court (Baisley, J.), held that plaintiffs' cause of action for a declaratory judgment fell within the "umbrella of CPLR §4101 claims triable as of right by a jury." The fact that the complaint had not specifically referred to article 15 of the Real Property Actions and Proceedings Law was not controlling of the applicability of CPLR §4101(2), but rather, the court looked at the nature of the factual issues involved, which plainly involved the "determination of a claim to real property." CPLR §4101 (2); ***Paciello v Graffeo***, 8 AD3d 543, 779 NYS2d 526, 527 (2d Dept. 2004); ***Lillianfeld v Lichtenstein***, 181 Misc.2d 571, 572, 694 NYS2d 600, 602 (Sup. Ct. Kings Co. 1999).

Thus, the declaratory relief was to be determined by the jury, which, in fact, they did, by way of their answers to the questions on the Special Verdict Sheet. There is no basis to ask for a declaratory judgment from the court.

COSTS, DISBURSEMENTS AND ALLOWANCES

Having prevailed in this matter, plaintiffs are entitled to statutory costs and disbursements in this matter. CPLR §§8101, 8301. In their post-trial motion, they have requested additional allowances pursuant to CPLR §§8302 (a) and 8303 (a) (2). The former accords entitlement to an additional allowance in, *inter alia*, "an action: . . . (3) to compel the determination of a claim to real property", into which category the present matter falls. Because the allowance calculation is based upon the value of the property, plaintiffs are entitled to the maximum award as set forth in

CPLR §8302 (b) (1) - (4). In addition, the history of this litigation undoubtedly shows that it falls within the category of a "difficult or extraordinary case," and thus, plaintiffs are entitled to the additional allowance of $300.00 provided for in CPLR §8303 (a) (2).

REQUEST FOR SANCTIONS AND OBJECTIONS TO DEFENDANTS' REPLY

In the Reply Affidavit submitted in further support of plaintiffs' motion, a request that the court set this matter down for a hearing or such other proceedings as are appropriate to determine whether sanctions should be imposed upon defendants pursuant to 22 NYCRR §130-1.1 was made. Subsection (d) of that rule provides for the imposition of sanctions "either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard." The plaintiffs have made their request in their reply papers, rather than upon motion as required by the rule. Plaintiffs are free to pursue this remedy, by making a motion on notice.

Finally, the court will address the objections raised by plaintiffs' counsel in correspondence dated September 10, 2018 to Mr. Svatovic's reply affidavit served in further support of the defendants' post-trial motion. The objections pertain to its timeliness, to the fact it was mailed from Poland and to the deficiencies in the notarization thereof. The most serious objection pertains to the deficient notarization, with an incomplete jurat and the date crossed out twice on the papers filed with the court (which differs from the copy accompanying the September 10, 2018 letter where it is only crossed out once). While the objections have merit, and the defects in the notarization may be sanctionable under some other analysis, the court will exercise its discretion to disregard these defects pursuant to CPLR §2001 and will consider defendants' reply because a substantial right of the plaintiffs will not be prejudiced thereby. There is no right to respond to a reply affidavit. More importantly, the contents of the affidavit lacked any credence whatsoever, as did the defendants' moving papers and their motions have been denied.

Submit Judgment.

ENTER

Date: September 28, 2018
Riverhead, New York

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

___FINAL DISPOSITION **___NON-FINAL DISPOSITION**