DGT Millbrook Holdings, LLC v Nesle
2019 NY Slip Op 34127(U)
February 20, 2019
Supreme Court, Dutchess County
Docket Number: 53521/18
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

DGT MILLBROOK HOLDINGS, LLC,

Plaintiff,

-against-

NANCY HERRICK NESLE,

Defendant.

DECISION AND ORDER

Index No. 53521/18

The following papers were read on defendant's motion to dismiss:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
AFFIDAVIT IN SUPPORT
EXHIBITS A - E

MEMORANDUM OF LAW IN OPPOSITION
AFFIRMATION OF JODY CROSS
EXHIBITS A - C
AFFIDAVIT OF MATTHEW BLACKBURN

REPLY AFFIRMATION
EXHIBIT F

Plaintiff commenced this action seeking a declaratory judgment and injunctive relief. The claims arise out of a dispute between the parties pertaining to plaintiff's right to construct greenhouses and other structures on a 21.5 acre property in the Town of North East. In 1992 the owners of three contiguous parcels on the eastside of Route 83 in the Town of North East entered into an agreement and filed a restrictive covenant to limit development of the three parcels. Plaintiff DGT Millbrook Holdings, LLC ("DGT") subsequently acquired two of the parcels. In the winter of 2015-16 DGT constructed two greenhouses on the 21.5 acre parcel. In February 2018 DGT sought consent from defendant's designated agent to construct a third greenhouse and additional farming structures on the property. After a dispute arose about the proposed construction, plaintiff and defendant's designated agent entered into a forbearance agreement under which plaintiff agreed to halt all new construction and engage in negotiations over the scope and style of any development.

Plaintiff maintains that despite making reasonable construction proposals permitted under the 1992 restrictive covenants, defendant, through her agent, repeatedly and unreasonably failed to give consent. This action followed. Defendant moves to dismiss alleging the plaintiff has failed to name a necessary party and that the action is barred by documentary evidence.

On a motion to dismiss pursuant to CPLR 3211(a)(10) the court must first ascertain whether an individual is a necessary party. Under CPLR 1001(a), a necessary party is one whose nonjoinder will jeopardize the outcome of the action in either of two ways: (1) complete relief cannot be accorded the existing parties to the action; or (2) the absentee may be inequitably affected by the judgment. If a person's absence would lead to either of these situations, the person should be joined.

In November 2017 defendant designated a neighbor, Stephen Blauner, as her agent to make all decisions concerning her right to approve or disapprove plaintiff's development proposals. Defendant claims that Blauner is a necessary party and plaintiff's failure to name him as a defendant warrants dismissal of the action. The claim is based upon his status as defendant's agent and because he was a signatory to the April 2018 forbearance agreement.

Plaintiff is seeking a judgment declaring its right under the 1992 agreement to make certain improvements to its property. It further seeks a permanent injunction barring defendant from impeding or interfering with its lawful use and enjoyment of the property. This court can award such relief without Mr. Blauner being a named defendant. Nor has defendant submitted any evidence that Mr. Blauner would be inequitably affected by any such judgment. His status as a neighbor and agent of the defendant does not give him an equitable interest in issues pertaining to whether the plaintiff's proposed construction is permitted under the 1992 agreement. Accordingly, it is

ORDERED that defendant's motion to dismiss for failure to name a necessary party is denied.

This court may grant a motion to dismiss pursuant to CPLR 3211(a)(1) only if the documentary evidence submitted resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claims. Cives Corp v. George A. Fuller Co., 97 AD3d 713 (2nd Dept 2012). For evidence submitted in a CPLR 3211(a)(1) motion to qualify as "documentary evidence" it must be "unambiguous, authentic, and undeniable." Id. at 714. Neither affidavits, letters nor emails constitute documentary evidence under CPLR 3211(a)(1). Id. Defendant's motion to dismiss is based upon exhibits plaintiff annexed to its complaint, including a copy of the 1992 restrictive covenant agreement, email correspondence, a survey map, a letter from defense counsel, the agent designation and a copy of the forbearance agreement. Other than the restrictive covenant, the agent designation and the forbearance agreement, the documents do not constitute the type of documentary evidence sufficient to sustain a motion to dismiss under CPLR 3211(a)(1). The factual assertions in the letters and email correspondence are not of undisputed authenticity, and the restrictive covenant and forbearance agreement do not resolve the factual issues before the court as a matter of law. The relevant portion of the restrictive covenant requires the property to be used solely for residential, agricultural, forestry, recreational, horticultural, animal husbandry, equestrian and related

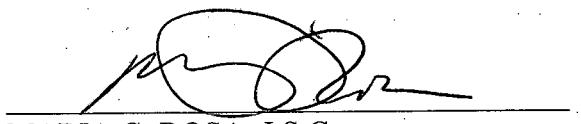
purposes. It further states that "[n]o building shall be erected on the premises except for one (1) single-family residence to be occupied by not more than one (1) family for residential purposes only, together with such accessory buildings as may be conventional for country purposes. The accessory buildings may include, without limitation, garages, machinery storage space, stables, pool hours, picnic shelters, barns and the like, provided such use shall not involve a commercial or industrial purpose, with the exception of agricultural, equestrian or animal husbandry." The documentary evidence submitted does not conclusively demonstrate that the plaintiff's greenhouses and future development plans are barred by this language. Accordingly, it is

ORDERED that defendant's motion to dismiss pursuant to CPLR §3211(a)(1) is denied.

The foregoing constitutes the decision and order of the Court. Defendant shall serve an answer within ten days of notice of entry of this decision and order. See CPLR 3211(f)

Dated: February 20, 2019
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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