Villella v Logan
2022 NY Slip Op 30500(U)
February 22, 2022
Supreme Court, Putman County
Docket Number: Index No. 501477/2020
Judge: Thomas R. Davis
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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RICHARD O. VILLELLA, COURTNEY S. TARPLEY, JEFF ROSSI, MELISSA GILLMER, MICHAEL I. OLSHAKOSKI and ROSEMARIE OLSHAKOSKI,

Plaintiffs,

-against-

DOUGLAS W. LOGAN, HOMELAND TOWERS, LLC and NEW CINGULAR WIRELESS PCD LLC d/b/a AT&T, NEW YORK SMSA LIMITED PARTNERSHIP d/b/a VERIZON WIRELESS,

Defendants.

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DECISION and ORDER
(Mot. Seq. # 1)

Index No.: 501477/2020

Overview

Plaintiffs seek a preliminary injunction, enjoining the defendant, Homeland Towers, LLC ("Homeland"), from using a right-of-way over their land to construct the necessary access – both for underground conduit and cables and above-ground vehicle access – to a cell tower to be constructed on Homeland's adjoining, land-locked, vacant parcel. At issue is the meaning and scope of the right-of-way contained in Homeland's deed. Plaintiffs are the neighboring owners and residents of three properties abutting Homeland's property and contend the right-of-way allows solely for ingress and egress over their land. Homeland contends that the right-of-way may be used for any reasonable purpose, provided the use is lawful and is one contemplated by the grant – thus allowing the construction they propose. Homeland wishes to remove trees from the right-of-way, as well as widen it, resurface it and install underground conduit and cables within it. Plaintiffs sought and obtained a temporary restraining order to prevent Homeland's proposed construction pending determination of their motion for a preliminary injunction. For the reasons stated herein, the preliminary injunction will be granted.

The Papers Considered on this Motion

The following papers were read and considered in determining this motion:

Plaintiffs' (Richard O. Villella and Courtney S. Tarpley) motion papers identified as NYSCEF document numbers 14 through 25, and 30; and

So-Ordered Consolidation Stipulation identified as NYSCEF document number 33; and

Notice of Removal, identified as NYSCEF document numbers 35, 36; and

Signed order to show cause identified as NYSCEF document number 60; and

Plaintiffs' (Jeff Rossi and Melissa Gillmer) papers supporting the motion, identified as NYSCEF document numbers 70 through 74; and

Defendant's (Homeland Towers, LLC) papers in opposition to plaintiffs' motion identified as NYSCEF document numbers 75 through 112; and

Plaintiffs' (Richard O. Villella and Courtney S. Tarpley) reply papers identified as NYSCEF document numbers 113 through 115.

Relevant Factual and Procedural Background

This is a consolidated action for a declaratory judgment, permanent injunction, nuisance, trespass and fraud. A separate action, commenced by Jeff Rossi and Melissa Gillmer under Putnam County Supreme Court Index Number 501481/2020, was consolidated with the instant action on November 23, 2020, and the caption was ordered to be amended to read as reflected above. (So-Ordered Consolidation Stipulation, NYSCEF Doc. No. 33.)

The causes of action all pertain to the rights of the parties under certain rights-of-way over real property owned by plaintiffs, Richard O. Villella ("Villella") and Courtney S. Tarpley ("Tarpley"), and plaintiffs Michael I. Olshakoski and Rosemarie Olshakoski (the "Olshakoskis") in the Village of Nelsonville. Villella and Tarpley own a parcel located at 16 Rockledge Road. The Olshakoskis own a parcel located at 15 Moffat Road. Plaintiffs Jeff Rossi and Melissa Gillmer own a parcel located at 6 Rockledge Road.

As alleged by plaintiffs, Rockledge Road is a private road that is made up of two rights-of-way—one over the Villella/Tarpley parcel and one over the Olshakowski parcel—to reach the nearest public road, Moffat Road. (NYSCEF Doc. No. 73, ¶2; Doc. No. 15, ¶¶2, 3; Doc. No. 22, pgs. 1-2.)

Defendant Homeland is the owner of 15 Rockledge Road. Prior to Homeland acquiring 15 Rockledge Road in March 2020, it was owned by defendant Douglas W. Logan ("Logan"). The Homeland/Logan parcel is landlocked but is benefitted by the rights-of-way over the Villella/Tarpley parcel and Olshakoski parcel in order to reach Moffat Road. Rossi and

Gillmer's parcel is also benefitted by those rights-of-way. In Homeland's deed, the rights-of-way are described as one right-of-way with one metes and bounds description as follows:

> "TOGETHER WITH A RJGHT-OF-WAY IN COMMON WITH OTHERS OVER LANDS NOW OR FORMERLY OF O'NEIL (A PORTION OF WHICH ARE NOW OF MULVEHILL) DESCRIBED AS FOLLOWS
>
> BEGINNING AT THE POINT AND PLACE OF BEGINNING OF THE PARCEL HEREIN-ABOVE CONVEYED AND RUNNING THENCE ALONG LANDS OF CHAMPLIN SOUTH 71 ° 13 ' 41 " EAST 127.95 FEET TO A STAKE; THENCE ALONG THE BOUNDARY BETWEEN LANDS OF MULVEHILL AND CHAMPLIN SOUTH 21 ° 09' 40" WEST 25.22 FEET; THENCE LEAVING LANDS OF CHAMPLIN AND RUNNING THROUGH LANDS NOW OR FORMERLY OF MULVEHILL SOUTH 76° 26' 30" EAST 228.16 FEET TO THE CENTER LINE OF MOFFATT ROAD; THENCE ALONG THE CENTER LINE OF MOFFATT ROAD NORTH 23° 13' 10" EAST 25.35 FEET; THENCE LEAVING THE CENTER LINE OF MOFFATT ROAD NORTH 76° 26' 30" WEST 158.08 FEET; THENCE THROUGH LANDS OF O'NEIL NORTH 13° 33' 30" EAST 50.00 FEET; THENCE THROUGH LANDS OF O'NEIL NORTH 76° 26' 30" WEST 78.72 FEET; NORTH 71 ° 13' 41" WEST 129.90 FEET; NORTH 80° 54' 20" WEST 77.24 FEET AND SOUTH 9° 05 ' 40" WEST 50.00 FEET TO THE PREMISES HEREIN CONVEYED; THENCE SOUTH 80° 54' 20" EAST 77.24 FEET TO THE POINT OR PLACE OF BEGINNING." (NYSCEF Doc. No. 82.)

All of these parcels are located in a rural, residential area, described by Villella as the Mountain Residence District of the Hudson Highlands. (NYSCEF Doc. No. 22, pg. 3.) The parcels owned by plaintiffs Villella/Tarpley and Rossi/Gillmer are each improved with a home at which those plaintiffs reside. (NYSCEF Doc. Nos. 15, 73.) The Homeland/Logan parcel is a vacant lot.[1] (NYSCEF doc. No. 15, ¶¶ 3, 4.)

The circumstances giving rise to this action date back to 2016, during which time Homeland sought to acquire the vacant lot from Logan for the specific purpose of constructing a cellular tower thereon, and leasing space on the tower to various wireless providers, including Verizon Wireless and AT&T. (NYSCEF Doc. No. 75, pgs. 1-2.) In order to construct the cell tower, Homeland needed permits from the Village, which it sought beginning in 2016. Villella learned from review of Homeland's proposed site plan that as part of that plan, it intended to perform construction activity on Villella/Tarpley's property including, in sum and substance as alleged by Villella, the following: removal of at least five old-growth trees; widening the right-of-way; resurfacing the right-of-way; digging trenches hundreds of feet in length; and installing,

[1] The Olshakoskis never submitted papers in connection with the instant motion practice. It is presumed, at this juncture, that they reside at their property.

underground, hundreds of feet of conduit for the cables and/or wires necessary to service the cellular tower proposed to be constructed on the Homeland/Logan parcel. (NYSCEF Doc. No. 15.)

Villella alleges he repeatedly objected to the Village Boards considering the Homeland project, through appearances at meetings and through letters. He also allegedly objected to Logan, directly, in or around the spring of 2017. (NYSCEF Doc. No. 15.)

The Village denied the issuance of a Building Permit, which resulted in litigation brought in Federal District Court (Southern District of New York). Some of the neighbors to the Logan/Homeland parcel, including Villella and Tarpley, tried to intervene in the Federal action but were denied in that effort. That litigation spanned from 2018 through early 2020. (NYSCEF Doc. No. 75, pgs. 1-2.)

On January 29, 2020, Homeland (and Verizon Wireless, who was also a plaintiff in the Federal Action) entered into a Stipulation of Settlement and Consent Order with the Village in the Federal Action which provided, among other things, that the Village would issue the Building Permit for construction of the tower if Homeland purchased the parcel from Logan. (NYSCEF Doc. No. 77.) Homeland purchased the parcel on March 12, 2020. (NYSCEF Doc. No. 82.) A Building Permit for construction of the cell tower was issued on June 15, 2020. (NYSCEF Doc. No. 78.)

Villella and Tarpley and, separately, Rossi and Gillmer, commenced actions on October 27, 2020 by each filing a Summons and Complaint, seeking, in essence, to prevent the proposed work in the right-of-way. (Those actions were, as stated, consolidated into the instant one on November 23, 2020.)[2] Also on October 27, 2020, Villella and Tarpley filed a motion by order to show cause seeking a preliminary injunction as well as a temporary restraining order, seeking to prevent Homeland from undertaking any of the proposed construction activity in and along the right-of-way pending the outcome of the action. The order to show cause, with the TRO, was signed by the Court (J. Capone) on October 30, 2020. (NYSCEF Doc. No. 30.)

Rossi and Gillmer also sought, and obtained, in their action prior to its consolidation with the instant one, a TRO preventing any work by Homeland in the right-of-way pending the

[2] In both actions, the respective plaintiffs named each other, in addition to Homeland, Logan and the Olshakoskis, as defendants. When the actions were consolidated, the Olshakoskis were changed from defendants to plaintiffs. The Olshakoskis, though apparently aligned in interest with the other plaintiffs herein as neighboring property owners, have not, to-date, submitted any papers in connection with the motion practice.

outcome of the action. (NYSCEF Doc. No. 60.) They subsequently withdrew their motion, "without seeking to disturb the existing temporary restraining order" (NYSCEF Doc. No. 70, ¶3), and offered supporting papers for the Villella/Tarpley motion.

On November 24, 2020, one day after the So-Ordered Stipulation to consolidate the Villella/Tarpley action with the Rossi/Gillmer action was filed, Homeland filed a notice removing this action to Federal Court, alleging that the action involved questions of Federal Law. (NYSCEF Doc. Nos. 35, 36.) The action remained there until September 9, 2021, when the Federal Court granted the plaintiffs motion to remand this action back to State Court, finding that no questions of Federal Law were implicated. (NYSCEF Doc. No. 63.)

The TROs issued by this Court have remained in effect since October 30, 2020. The remaining, underlying motion in this consolidated action (motion sequence #1 herein) is now decided as follows:

Necessary Parties

As a threshold matter, Homeland asserts that a preliminary injunction may not be issued because plaintiffs have, "willfully neglected to join necessary parties." (Homeland's Memo of Law, pg. 4.) Homeland asserts that Verizon Wireless and AT&T are both necessary parties, by virtue of alleged lease agreements they each have for the proposed cell tower to be built on Homeland's, property. Homeland further asserts that plaintiffs are aware that Verizon Wireless and AT&T are necessary parties based on the So-Ordered Consolidated Stipulation (NYSCEF Doc. No. 33) which, among other things, Homeland alleges "specifically ordered that AT&T and Verizon Wireless be added to the caption as necessary parties and granted Plaintiffs leave to file and serve an amended complaint bringing [such parties] into the action."

Plaintiffs assert that only the fee owners to the relevant parcels of real property (in particular, Homeland, for the defendants) are necessary parties. They note that the day after the Consolidated Stipulation was entered, defendants removed this action to Federal Court with notice that, "this Court may 'proceed no further unless and until the case is remanded'." (Plaintiffs' Reply Memo of Law, pg. 6.) As a result, plaintiffs did not file and serve an Amended Complaint during the time the action was removed to Federal Court. Plaintiffs further assert that upon the action being remanded to this Court in September 2021, the only issue addressed in the

Court was briefing the instant motion, not filing amended pleadings. Plaintiffs assert that the additional parties will be served with the amended complaint.

Review of the Consolidated Stipulation reveals that while the plaintiffs did agree to consolidate two separate actions into the current caption, including to add Verizon Wireless and AT&T as defendants and to serve an amended complaint, there is no reference in the Consolidated Stipulation to Verizon Wireless and AT&T being "necessary parties". Therefore, there is no indication that the plaintiffs have "long been aware" that Verizon Wireless and AT&T are necessary parties to this action, as opposed to merely proper parties. (CPLR §1002.)

Moreover, the motion papers do not clearly establish that Verizon Wireless and AT&T are necessary parties to the action. The three cases cited by defendants recite the general rules with respect to necessary parties, but none involved disputes over real property rights where a lessee, as opposed to the fee owner, was deemed to be a necessary party. Notably, too, the defendants have not, to-date, sought any affirmative relief to dismiss the complaint on this ground. In any event, Verizon Wireless, through its Senior Manager of Real Estate and Emergency Services, has been heard on the instant motion as he submitted an Affidavit in Opposition to it. (NYSCEF Dos. No. 111.) There is no reason to believe that AT&T's position would be different than that of Verizon Wireless, given that its interest in leasing space on a proposed cell tower on Homeland's property is virtually identical to that of Verizon Wireless. As such, there is no concern that those two parties have not had the opportunity to be heard on the instant application.

Additionally, it is accurate that one day after the Consolidated Stipulation was filed, defendants removed this action to Federal Court, effectively staying the instant action. Therefore, plaintiffs' failure to file and serve an amended complaint does not amount to a "willful" failure to pursue that amended pleading. This is bolstered by the fact that the defendants have not, to-date, filed an answer to the complaint. It appears all parties treated the action as stayed during the period it was removed to Federal Court. Nonetheless, this case was remanded to State Court in September 2021. Plaintiffs must act expeditiously in filing and serving their amended complaint, as they previously agreed to do.

In light of the foregoing, a preliminary injunction in this action is not barred by the failure to name necessary parties.

Standard for Issuance of a Preliminary Injunction

"To obtain a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6312[c]; *Rowland v. Dushin,* 82 A.D.3d 738, 917 N.Y.S.2d 702; *S.J.J.K. Tennis, Inc. v. Confer Bethpage, LLC,* 81 A.D.3d 629, 916 N.Y.S.2d 789; *Volunteer Fire Assn. of Tappan, Inc. v. County of Rockland,* 60 A.D.3d 666, 667, 883 N.Y.S.2d 706). "The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits" (*Icy Splash Food & Beverage, Inc. v. Henckel,* 14 A.D.3d 595, 596, 789 N.Y.S.2d 505). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Trump on the Ocean, LLC v. Ash,* 81 A.D.3d 713, 916 N.Y.S.2d 177). The mere existence of an issue of fact will not itself be grounds for the denial of the motion (*see Stockley v. Gorelik,* 24 A.D.3d 535, 536, 808 N.Y.S.2d 282)." *Arcamone-Makinano v. Britton Property, Inc.*, 83 A.D.3d 623 [2d Dept 2011].

For the reasons that follow, this Court finds that the plaintiffs have met their burden and are entitled to a preliminary injunction.

Likelihood of Success on the Merits

The primary dispute over whether the plaintiffs are likely to succeed on the merits concerns the legal impact of the language used in the various parties' deeds, which, as stated above, is, "a right-of-way in common with others over lands now or formerly of…"

Plaintiffs contend that this language means, as a matter of law, that the right-of-way is only for ingress and egress over the surface of Rockledge Road. They further assert that the right of ingress and egress does not include the right of Homeland to undertake the work it intends to do. As stated, that work includes removing several large, old-growth trees from the right-of-way; widening the right-of-way; resurfacing the right-of-way; and digging trenches hundreds of feet in length to install, underground, hundreds of feet of conduit for the cables and/or wires necessary to service the cellular tower proposed to be constructed on the Homeland parcel.

Homeland contends that the language is, as a matter of law, broader than what the plaintiffs contend. It asserts that unless the language in the deeds establishing the right-of-way expressly limits the use of the right-of-way to purposes solely for ingress and egress, then the right-of-way may be used for any reasonable purpose, provided the use is lawful and is one contemplated by the grant. Homeland asserts that the reasonable use of the right-of-way here includes the aforesaid work it intends to undertake.

That this is, in fact, the central legal issue pertaining to the plaintiff's case is conceded by Homeland, who states, in its Memorandum of Law, that, "[t]he foundational element of Plaintiff's case [is that] the Easement may only be used for 'ingress and egress'". (Homeland Memo of Law, pg. 7.)

It is undisputed that the words "ingress and egress" do not appear on the parties' deeds. In support of their position that those words are implied by the phrase "right-of-way over the lands of", plaintiffs rely on New York Court of Appeals precedent in *Holden v. City of New York*, 7 N.Y.2d 840 [1959]. For their part, defendants rely on the absence of the words "ingress and egress" from the deed to support their argument, together with the Third Department case of *Phillips v. Iadarola*, 81 A.D.3d 1234 [3d Dept 2011].

Notably, Homeland ignores any discussion of *Holden, supra*, in their Memorandum of Law.

The decision by the Court of Appeals in *Holden*, while sparse, is on point to the central question identified above. The Court there held, "The reservation of a mere 'right-of-way' under the decisions included only the right of passage over the surface of the land." The underlying facts in *Holden* were that the defendant City's land (which it had acquired through condemnation) was subject to a "right-of-way" for the benefit of plaintiff's property. Plaintiff wanted to install a water pipe under the surface of the right-of-way, as well as cables containing electric and telephone wires. In affirming the Appellate Division, Second Department's reversal of the trial court's grant of the plaintiff's complaint after a non-jury trial, the Court of Appeals was direct and concise in its position. A "right-of-way", without more, is only the right to pass over the surface of the land. The plaintiff had no right to place the pipes and cables underneath its surface.

Seven years later, in *Heyert v. Orange & Rockland Utilities*, 17 N.Y.2d 352 [1966], the Court of Appeals again affirmed a decision of the Appellate Division, Second Department on different facts, but ultimately the same legal issue—the extent of an easement or right-of-way that does not have any particular language beyond that of just "easement" or "right-of-way". In *Heyert*, the plaintiff was the fee owner of land that extended into the middle of a roadway. The roadway was a road "by user", having become such by its use by the public for the requisite number of years. The Court recognized that roads "by user", "do not involve the conveyance of a fee but the transference of an easement to the public for the purpose of a highway." *Heyert* at

357. Therefore, the fee ownership of the road, to its middle point, belonged to the plaintiff. The easement for the benefit of the public was one by operation of law, and thus, had no particular language of whether it was only for passage over the surface, or something more.

The Town of Ramapo wanted to lay gas mains and pipes underneath the road and granted the right to do so to the defendant utility company. The defendant undertook that work. The plaintiff objected and sued to force the removal of the gas mains. The Court of Appeals, in affirming the Second Department's finding for the plaintiff, held:

> "As recently as 1959 we held in *Holden v. City of New York* (7 N Y 2d 840, 841) that 'The reservation of a mere 'right-of-way' under the decisions included only the right of passage over the surface of the land (*Thompson v. Orange & Rockland Elec. Co.*, 254 N. Y. 366; *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393; *Eels v. American Tel. & Tel. Co.*, 143 N. Y. 133; *Ferguson v. Producers Gas Co.*, 286 App. Div. 521; *Matter of Bensel*, 140 App. Div. 257).'" *Heyert* at 358.

The Court in *Heyert* went on to discuss the importance of adhering to these rules of law, especially since they implicated vital property rights of the fee owner. In one passage particularly applicable to this case, the Court stated:

> "As our court wrote in the *Bloomfield* case (62 N. Y., at pp. 389-390), 'The right contended for, is to dig in the soil, cut off drains, and disturb privileges, which had been exercised by the owner, for a long period of time. .....The right to the fee, to the fruits of the soil ... would be taken away, diverted and appropriated for the purposes of a corporation, without compensation and contrary to the clear and manifest original design contemplated by the laying out of the highway, and the intention of the owner of the fee, when he parted with his interest.'" *Heyert* at 365.

The Third Department cases on which Homeland relies for its proposition [that the language of the right-of-way here includes far more than simply passage over the surface of the land because it does not expressly limit its use for that purpose] are unavailing. First, the langue of the right-of-way here is not simply "right-of-way"; it is "right-of-way…*over lands now or formerly of*…" [Emphasis added.] This bolsters plaintiffs' position that the right-of-way is only for ingress and egress *over the land*, and renders the Third Department cases largely inapposite. Second, the Third Department cases appear to be in direct conflict with Court of Appeals precedent.

Based on *Holden* and *Heyert, supra.*, this Court finds that the plaintiffs are likely to succeed on the merits of the main legal issue presented in their Complaint—that the right-of-way benefitting the Homeland parcel is for ingress and egress only, to pass over the land.

This Court is mindful that this does not entirely end the analysis because the plaintiffs' Complaint and their instant motion seek to enjoin Homeland from undertaking *all* of the proposed work in the right-of-way. As discussed, that work includes widening and resurfacing the right-of-way, as well as digging trenches and installing hundreds of feet of length of underground conduit. Whether Homeland might be permitted to eventually undertake some efforts to widen the right-of-way in order to fully utilize it for access to its lot is still an open question. At this juncture, however, the Court does not need to determine that issue. It is clear from the totality of the motion papers that Homeland's desire to widen and resurface the right-of-way is incidental to its main goal of digging trenches and installing underground conduit and cables in the right-of-way to service the cell tower it proposes to build on its lot. To be sure, without the underground conduit and cabling, the cell tower will be inoperable, and constructing the cell tower was the very purpose for which Homeland purchased the property. Plaintiffs have demonstrated that they are likely to succeed on the merits that the trench-digging and installation of these materials is not permitted in the right-of-way.

Therefore, the Court is satisfied that this prong of the test for a preliminary injunction has been met.

Irreparable Injury

The plaintiffs assert that they will suffer irreparable injury if a preliminary injunction is not issued in that they will be stripped of their real property rights by Homeland's actions in removing several old-growth trees, installing additional roadway on the Villella/Tarpley property, creating substantial, additional surface disturbance, resurfacing the right-of-way and permanently installing underground conduit and cables over and under the Villella/Tarpley property. They assert that if the preliminary injunction is not issued, Homeland will perform all of this work while the action is pending, irreparably changing the right-of-way and the bucolic nature of the area rendering any potential, final judgment in their favor ineffectual.

Homeland asserts that the harm alleged by the plaintiffs is not irreparable for two main reasons: 1) the alleged harm can be compensated with money damages, in particular, the tree

removal (relying on RPAPL §861); and 2) a United States District Court Judge already ruled on a similar matter with respect to a different neighbor, and he denied the injunction.

Homeland's arguments are unavailing.

There is ample authority in the Second Department that the threatened removal of trees constitutes irreparable harm sufficient to warrant the issuance of a preliminary injunction. (See, *Sforza v. Nesconset Fire Dist.*, 184 A.D.2d 631 [2d Dep't 1992]; *McLaughlin v. Orange and Rockland Utilities, Inc.*, 87 A.D.2d 812 [2d Dep't 1982].) There is no dispute here that the defendants intend to remove several large, old-growth trees to prepare for the other work they intend to do. Further, the other work that defendants intend to do quite literally amounts to changing the landscape--widening the right-of-way, resurfacing the right-of-way—as well as digging trenches hundreds of feet in length and installing underground conduit and cables to service the proposed cell tower on defendants' property. Those changes, and the effect they have in stripping the plaintiffs of the ability to control what happens to the real property in which they have vested rights, and over which Homeland has a limited right to pass for ingress and egress, cannot be compensated with money damages. In this regard, and in general, the courts tend to treat threatened harm to, or loss of, real property as irreparable (see, e.g., *Randisi v. Mira Gardens, Inc.*, 272 A.D.2d 387 [2d Dep't 2000]; *Sforza, supra.*, *McLaughlin, supra.*, *Arcamone-Makinano, supra.*, *Deutsch v. Grunwald,* 165 A.D.3d 1035 [2d Dep't 2018]), and threatened harm to some purely economic interest as compensable by money damages (see, e.g., *Berman v. TRG Waterfront Lender*, 181 A.D.3d 783 [2d Dep't 2020]; *EdCia Corp. v. McCormack*, 44 A.D.3d 991 [2d Dep't 2007.)

The mere fact that RPAPL §861 provides an avenue of economic redress to one who wrongfully cuts trees on another's property does not render the threatened harm here reparable in the context of a preliminary injunction. RPAPL §861 exists to compensate those to whom damage has already been done. It is not a mechanism through which preventive measures can be taken. CPLR Article 63 is. Moreover, the fact that the statute provides for treble damages in appropriate circumstances is some acknowledgement that the loss suffered by the wrongful removal of trees is more than a simple reimbursement for an economic harm. Further, simply because a statute exists to try and provide some measure of damages for a loss does not mean the loss was, in the first place, reparable or purely economic. The existence of a wrongful death statute proves the point. (See EPTL §5-4.1.) Clearly, the latter concerns a far more severe and

consequential loss, but the reasoning is the same: The existence of a statute which provides a means to recoup damages for a loss does not render the loss reparable from the start.

With regard to the ruling by District Court Judge Briccetti in connection with the *Eisenbach* matter, that ruling is inapposite to the facts and legal issues presented here. As evident from the transcript of proceedings provided by Homeland (NYSCEF Doc. No. 98, pgs. 56-57), the plaintiffs in the *Eisenbach* matter sought a TRO to prevent Homeland from cutting trees that were all located *on its own property*—not along or within the right-of-way, as is the case here. In short, the tree-cutting in the *Eisenbach* matter did not implicate the property rights of the plaintiffs in that case, as it does the plaintiffs in this case.[3] Nor did the *Eisenbach* matter involve any work proposed to be done by Homeland in or to the right-of-way.

For all of these reasons, this Court finds that the plaintiffs have demonstrated that they will suffer "irreparable injury" if a preliminary injunction is not issued.

Balancing of the Equities

Plaintiffs argue that the equities are balanced in their favor because, inter alia, any alleged hardship to Homeland by the issuance of an injunction is self-created and is minor compared to the irreparable loss of property rights and destruction of property that the plaintiffs will suffer if the preliminary injunction is not issued. They assert that Homeland's hardship, if any, is self-created because Homeland knew from the very beginning (as far back as the public meetings during the approval process in 2016 and 2017) that plaintiffs took the position that the right-of-way was limited to ingress and egress and did not give Homeland the right to undertake the work it proposed to do within it, yet Homeland proceeded with its plans anyway.

In that regard, plaintiff, Richard Villella, attests that an attorney from the law offices representing Homeland called and spoke with him in 2017, to try and resolve the issues over the right-of-way access that had been discussed between Mr. Villella and Homeland's predecessor in title, Logan. That attorney had allegedly suggested that Mr. Villella and his wife sign a "guaranty deed with an easement, not a right-of-way", and that doing so would help his clients (defendants) with their application in front of the Village Boards. Mr. Villella allegedly "declined to sign such a document". (Villella Aff., ¶ 9.) It is notable that neither Homeland nor

[3] Incidentally, Judge Briccetti in *Eisenbach* acknowledged that, "almost by definition cutting a tree is irreparable." (Exhibit V, pg. 56.) He found that harm to be minor, however, based on the facts and legal issues presented in that case, which are decidedly different than the ones here.

its attorneys—the same firm representing it now—denied this allegation in the motion practice. Such conduct raises the specter that Homeland knew there was, at the least, a valid legal dispute over the scope of the right-of-way. Yet, it apparently proceeded as if it would ultimately prevail. As alleged in its opposition papers, it entered into leases with cell service providers and spent hundreds of thousands of dollars on materials and capital costs. It did not proceed with caution, such as by seeking a declaration from the courts as to the parties' rights and the scope and meaning of the language of the right-of-way.

Homeland argues that the equities are balanced in its favor for two reasons: First, because there are gaps in cell service in this geographical area which harms the public, including emergency personnel. Second, because it will suffer reputational damage if it does not build this cell tower and provide better cell service in this area. As to the former, Homeland does not offer any legal authority for the premise that alleged harm to the public can be used to demonstrate harm to it in the context of a preliminary injunction over the use of real property. Even if it could, this Court is not persuaded that the public's general desire for better cell phone coverage outweighs the real property rights of individuals. As to the latter, Homeland has not articulated the reputational harm that it will suffer in anything other than the most generalized terms. In this regard, Verizon Wireless's Senior Manager for Real Estate and Emergency Services, Robert Breyer, attests that, "Verizon Wireless's reputation has been harmed by the delay of construction of the Facility, and if there is any further delay…the general public and Verizon Wireless's customers will be irreparably harmed." (NYSCEF Doc. No. 111., ¶17.)

Labelling the litigation over property rights as a "delay" in construction presupposes that Homeland's right to undertake the work in the right-of-way exists in the first place. This perception lends credence to the plaintiffs' argument that Homeland's harm, if any, is self-created. It forged ahead presuming it would ultimately prevail rather than proceeding cautiously and, perhaps, seeking court intervention on the issue of the right-of-way *before* spending hundreds of thousands of dollars on capital expenses.

Based on the foregoing, it is this Court's determination that the equities are balanced in the plaintiffs' favor.

Undertaking

Pursuant to CPLR §6312(b), this Court is required to set an undertaking as a condition of the issuance of a preliminary injunction to the plaintiffs. Plaintiffs cite no authority for their

assertion that this Court has discretion to, "hold the matter of the security in abeyance or in the alternative, set only a diminimus amount." (Plaintiffs' Reply Memo of Law, pg. 10.)

The undertaking set by the Court must be rationally related to the damages that may be suffered by Homeland if it is finally determined that the plaintiffs were not entitled to an injunction. It cannot be based on speculation or conclusory assertions as to what potential damages a party may suffer. (See, *Lelekakis v. Kamamis*, 303 A.D.2d 380 [2d Dep't 2003]), *Ujueta v. Euro-Quest Corp.*, 29 A.D.3d 895 [2d Dep't 2006].)

Moreover, an undertaking cannot be excessive (see, *Lelekakis, supra.*), and should not be set in such an amount that it, "would result in a denial of the relief to which the plaintiffs show themselves to be entitled." *Peyton v. PWV Acquisition, LLC*, 35 Misc.3d 1207(A) (*citing, inter alia*, *Zonghetti v. Jeromack*, 150 A.D.2d 561 [2d Dep't 1989).

Homeland requests an undertaking in the amount of at least $500,000.00. In general support of that amount, Homeland identifies a host of costs and expenses totaling close to one-million dollars that it alleges it either has incurred, or will incur, in both purchasing the property "in reliance on the Consent Order," and by not being able to begin work in the right-of-way immediately. It also cites lost income it will incur as a result of leases that it has already entered into with Verizon and AT&T, and potential leases it might enter into with other providers, related to those companies' planned leases of space on the cell tower proposed to be constructed.

When each of the alleged items of damage is evaluated, it is not clear to the Court how Homeland arrived at a figure of $500,000.00. It appears that several of the alleged items of damage are not related to any conduct on the part of the plaintiffs in seeking an injunction (e.g., purchase cost of the property, capital expenditures), are speculative (loss of potential customers such as T-Mobile), or are simply not supported by the evidence adduced by Homeland it its opposition papers (e.g., no invoice/agreement for storage costs for materials; no documentary evidence or client affidavit to support allegation of loss of construction fee).

With respect to Homeland's loss of lease income as a result of the issuance of an injunction, the question is the amount of time for which the plaintiffs should bear responsibility for Homeland's potential losses. Homeland asserts that it should be at least two years, based on its experience with the average lifespan of a telecommunications lawsuit. (NYSCEF Doc. No. 112, ¶20.) The plaintiffs do not provide a suggested time. Unfortunately, based on the motion record as it presently exists, this Court is unable to determine what period of time would be

appropriate. Among other things, Homeland has failed to articulate when it would realistically expect lease payments from either lessee to begin if no preliminary injunction were to be issued. Without that information, the Court cannot reasonably determine how many months' worth of lease payments are to be lost by the issuance of an injunction. From the very few pages of each lease provided to this Court (NYSCEF Doc. Nos. 93, 94), the Court is left to speculate as to when such payments would actually begin if no injunction were issued, as the commencement of payments are tied into "substantial completion" dates, and other terms not fully set forth in the documents provided to the Court.

Further, and complicating matters, Homeland readily admits that there is a limited period of time each year during which it can begin the work in the right-of-way. Per Mr. Vicente's Affidavit, its first step before beginning any construction of their Facility (which construction appears, but is not certainly, a prerequisite to any lease payments to be made to it) is to remove several large trees from the right-of-way on Villella's property, and that can only be done between October 31st and March 31st in any given year due to Federally-protected species of bats which may use trees in this area as roosts during the remainder of the year. Therefore, no tree-cutting can occur between April 1st and October 30th. This circumstance is not of the plaintiffs' making, and this Court, at least at this juncture, is disinclined to ascribe that period of time to the plaintiffs as if it were, especially without knowing how much time would be needed by Homeland to undertake the tree-cutting, commence construction work and, at some point, enable lease payments to begin.[4]

As it currently stands, therefore, the Court does not have the information necessary to determine what an appropriate amount of time would be, on which to base expected lost lease payments to Homeland.

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[4] While the defendants assert that the plaintiffs commenced this action on October 27, 2020 specifically to create delay, knowing that the defendants could only perform tree-cutting from October 31st through March 31st, that allegation does not change the analysis. Regardless of when the plaintiffs started this action, the defendants would always be prevented from removing trees in the subject area for seven months out of the year. That is not delay caused by the plaintiffs nor the issuance of an injunction. Additionally, defendants caused their own delay in this action. Less than one month after plaintiffs commenced the instant action, the defendants removed it to Federal District Court on November 24, 2020. Plaintiffs made a motion to remand the case back to State Court (which was fully submitted in January 2021), and that motion was decided on September 9, 2021. That nearly ten-month period of delay cannot be attributed to the plaintiffs.

In light of the foregoing, the determination as to the amount of the undertaking to be set by this Court must be the subject of further submissions by Homeland, addressing the information discussed herein.

Therefore, upon the foregoing, it is hereby

ORDERED, that the plaintiffs' motion for a preliminary injunction is granted, and it is further

ORDERED, that defendant, Homeland Towers, LLC, and its agents, representatives and all persons acting on their behalf, are enjoined from developing and construction in the right-of-way on plaintiffs' properties which is the subject of this action (including removal of any trees), while this action is pending; and it is further

ORDERED, that the amount of the undertaking as a condition of the aforesaid preliminary injunction will be set by this Court upon further motion by defendant, Homeland, which motion shall conform with the following **briefing schedule**:

Homeland to file and serve its motion for the amount of the undertaking by no later than March 31, 2022;

Plaintiff(s) to file and serve their answering papers to the motion for an undertaking, if any, by no later than April 21, 2022;

Homeland to file and serve its reply on the motion, if any, by no later than May 5, 2022;

And it is further

ORDERED, that counsel for the parties, and any pro se parties, are directed to appear for an **in-person status conference on May 23, 2022, 9:30 a.m.** in this Part, at 44 Gleneida Avenue, Historic Courthouse, Carmel, NY 10512; and it is further

ORDERED, that all other relief requested but not granted herein is denied.

This constitutes the decision and order of this Court.

Dated: February 22, 2022
Carmel, NY

Enter:

Thomas R. Davis, J.S.C.

Pursuant to CPLR Section 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.