Garuc v Henderson

Supreme Court of New York, Greene County

December 17, 2015, Decided

15-0865

Reporter
2015 N.Y. Misc. LEXIS 5005 *; 2015 NY Slip Op 52002(U) **; 52 Misc. 3d 1220(A); 43 N.Y.S.3d 767

[1]** Jasmin Garuc, Plaintiff, against George Henderson, Emil L. Shultis and Joe/Jane Doe, Defendants.

Notice: PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

easement, driveway, gravel, guests, right of way, tenants, fence, roadway, correspondence, restraining, permission, real property, tax deed, cul-de-sac

Headnotes/Syllabus

Headnotes

Injunctions—Preliminary Injunction—Property Line Dispute over Gravel Driveway—Injury to Plaintiff. Easements—Right-of-way.

Counsel: [*1] For Plaintiff, movant: Carlo A. C. de Oliveira, Esq., Cooper Erving & Savage LLP, Albany, New York.

For George Henderson, Defendant: Roger H. Mallery, Esq., Cobleskill, New York.

Judges: HON. LISA M. FISHER, SUPREME COURT JUSTICE.

Opinion by: LISA M. FISHER

Opinion

Lisa M. Fisher, J.

This matter involves a property line dispute over a gravel driveway which culminated in $2,900.00 of property destruction. Plaintiff purchased his property on or about October 16, 2013 at a tax foreclosure sale. The property is located at a cul-de-sac at the end of Pinewoods Road in the Town of Durham, Greene County. When Plaintiff first took possession, the neighbors to the west abutting property were Mr. Robert and Mrs. Gail Young.

Initially, the Youngs informed Plaintiff that he was improperly using the driveway which was on their property. While this is hearsay, it has no bearings on the merits. Plaintiff claims this was the impetus for the land survey he ordered and was conducted on November 11, 2014 by Santo Associates Land Surveying and Engineering, P.C. This survey revealed that the gravel driveway starting at the beginning of the cul-de-sac was on Plaintiff's property, as was the vast majority of it with an exception for the very **[*2]** end.

On February 11, 2015, Plaintiff's former counsel sent correspondence advising the **[**2]** Youngs of the survey findings and advised there were no right of way or easements on the premises in the their favor. The correspondence also stated that Plaintiff was not conferring any permission to use the gravel driveway and requested all use immediately stop. The Youngs were in the process of selling their home. Allegedly, albeit more hearsay, the Youngs asked Plaintiff if they could continue to use the gravel driveway until they sold their property. Plaintiff granted such request.

The Youngs sold their property to Defendant George Henderson (hereinafter "Henderson"). Defendant Henderson rented his property to Defendant Emil L. Shultis (hereinafter "Shultis") and his daughter. Plaintiff learned on or about May 2015 that Defendant Henderson and/or his guests or tenants were using a portion of Plaintiff's property to drive and park their vehicles.

Plaintiff avers he asked Defendant Shultis to stop entering the property without Plaintiff's permission. Plaintiff claims he advised Defendant Shultis that he was erecting a fence to separate the property. Plaintiff alleges that Defendant Shultis told **[*3]** Plaintiff to delay for a couple of weeks, which Plaintiff did.

On or about June 7, 2015, Plaintiff installed a 255 foot fence

between his property and the property owned by Defendant Henderson and occupied by Defendant Shultis. On June 9, 2015, Defendants removed a portion of Plaintiff's fence without Plaintiff's permission; New York State Police were called and an incident report was filed. Plaintiff (by and through himself, not by counsel), sent Defendant Henderson correspondence urging him and his guests and/or tenants to cease using the gravel driveway and entering Plaintiff's property pursuant to the survey completed in November 2014. Plaintiff again advised that Defendants did not have a right of way or easement on Plaintiff's property, nor did Defendants have permission to use the property and must immediately stop such use.

On July 1, 2015, Defendants removed a larger portion of Plaintiff's fence without Plaintiff's permission. Other vehicles belonging to Defendants and/or their guests or tenants was parked on Plaintiff's property without Plaintiff's permission. The New York State Police were again called and filed an incident report reflecting Plaintiff's claims.

On or about **[*4]** July 16, 2015, Defendant Henderson's attorney sent Plaintiff correspondence claiming that "[t]he right of way over 20 years still remains, despite the fact [Plaintiff] purchased the property from the county." Defendant Henderson's counsel stated that he is "not to block the right of way."

On or about August 17, 2015, Plaintiff's attorney sent correspondence to Defendant Henderson's attorney demanding that Defendant Henderson and his guests and/or tenants immediately stop trespassing onto the property. Plaintiff's attorney also sought payment of $2,900.00 to repair the damage caused to Plaintiff's fence.

The instant application was brought on by Order to Show cause dated September 25, 2015 and signed by this Court on October 2, 2015. Plaintiff seeks a preliminary injunction and temporary restraining order preventing Defendants and their guests or agents from 1) entering upon Plaintiff's real property located at 53 Pinewoods Road, Town of Durham, and 2) destroying, removing or otherwise interfering with any portion of the fence or other improvements erected on Plaintiff's real property located at 53 Pinewoods Road, Town of Durham. Plaintiff's application was supported with an affidavit of Plaintiff, **[*5]** Jasmin (Jay) Garuc.

Defendant Henderson opposes such application, arguing that Plaintiff "admits that all properties located at the end of the cul-de-sac have access to Pinewood Road, which is **[**3]** maintained by the Town of Durham." Defendant Henderson also claims that the subject property was part of a larger real estate development which was split up into several lots at or near the cul-de-sac of Pinewood Road. Defendant Henderson contends that his property borders the gravel driveway/road which Plaintiff "knew the private road was constructed by the developer as the only way for ingress and egress to and from" Defendant Henderson's property. Defendant Henderson points to the tax deed which claims that it excluded and was subject to "any existing right of way and easements, and any and all existing restrictions, conditions and covenants of record."

Based on these contentions, Defendant Henderson refers to various legal theories in support of his claim. First, he argues that was an implied easement or grant of right of way by implication because Plaintiff had knowledge (actual or constructive notice) of an easement at the time of acquiring his property. Defendant Henderson than claims that **[*6]** he and the prior owners, the Youngs, had acquired an easement/right-of-way over the private road by adverse possession since they had used the road adversely for more than 10 years. Defendant Henderson also argues that the gravel driveway/roadway is an easement by necessity to the town road. Continuing, he claims that "[t]here was and is still no other reasonable way to [Defendants' property] from the town highway." Further, Defendant Henderson claims that "[i]t would be unreasonable to try to put a driveway over the gulley."

Defendant Henderson's opposition contained an attorney affirmation from his counsel, with two exhibits. One being the tax deed and the other being a copy of Plaintiff's November 2014 survey. No other evidence was submitted. Defendant Henderson did not cite to a single statute or case, only to a secondary source treatise which as not force of law.

Plaintiff submits a reply, including from a licensed professional engineer whom avers that Defendant Henderson's property is not landlocked as Defendant Henderson claims it is. Plaintiff also raises several substantive and procedural issues with Defendant Henderson's opposition. The Court held an Order to Show conference on October **[*7]** 7, 2015 wherein the parties' contentions where heard and discussed with the Court.

Grounds for preliminary injunction and temporary restraining orders are governed by *CPLR § 6301*, which provides that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or *is doing . . . an act in violation of the plaintiff's rights respecting the subject of the action* . . . or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, *would produce injury to the plaintiff*." (emphasis added.) *Section 6301* further provides that "[a] temporary restraining order may be granted pending

a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss of damage will result unless the defendant is restrained before the hearing can be had." (*See also* CPLR § 6313.)

Here, Plaintiff has established through the land survey—which was also affixed to Defendant Henderson's opposition—that the gravel driveway/roadway is on Plaintiff's property except for the very end of the driveway. It **[*8]** is clear that Plaintiff has demonstrated that Defendant Henderson and his guests and/or tenants has continued to use the gravel driveway/roadway on Plaintiff's property and has threatened to continue use such property by and through the correspondence dated July 16, 2015 from Defendant Henderson's counsel. The gravel driveway/roadway is the subject of this action and Plaintiff has demonstrated that his private use **[**4]** and enjoyment of the property would be vitiated by Defendant Henderson and his guests and/or tenants' continued us.

In opposition, Defendant Henderson failed to proffer any competent evidence in opposition to Plaintiff's application. In fact, the Court does not need to delve deeply into the law as Defendant Henderson has utterly failed to produce any competent evidence for the Court to *apply* to the law. Each of the scattered claims in Defendant Henderson's opposition is quickly debunked on the pure facts as they patently lie before the Court.

First, Defendant Henderson's opposition is from his attorney whom has no personal knowledge and is otherwise incompetent to testify as to the facts. (*See Gillis v Herzog Supply Co., Inc., 121 AD3d 1334, 1336, 995 N.Y.S.2d 314 [3d Dept 2014]* [holding attorney affirmation had no probative value as to the facts and circumstances **[*9]** of the subject accident]; *accord Interboro Mut. Indem. Ins. Co. v Gatterdum, 163 AD2d 788, 789, 558 N.Y.S.2d 749 [3d Dept 1990]* ["The affidavit of counsel, who lacked personal knowledge of the facts, was patently insufficient."]; *see also Christostomides v Fidelity Detective Bur., 148 AD2d 348, 348, 538 N.Y.S.2d 559 [1st Dept 1989]* ["statements of counsel without knowledge of the facts are not sufficient to overcome a proper motion for summary judgment."]; *1375 Equities Corp. v Buildgreen Solutions, 120 AD3d 783, 992 N.Y.S.2d 288 [2d Dept 2014]*; *Brown v Smith, 85 AD3d 1648, 924 N.Y.S.2d 867 [4th Dept 2011]*; *Conti v City of Niagara Falls Water Bd., 82 AD3d 1633, 919 N.Y.S.2d 639 [4th Dept 2011]*.) Therefore, the factual contents of Defendant Henderson's opposition carry no probative value and are ignored.

Second, Defendant Henderson's reliance on the tax deed for the statement that it is subject to existing right of way or easements is misplaced. Such statement is present on nearly every tax deed and does not automatically mean there is a right or way or easement. In fact, the tax deed requires same to be "of record." Defendant Henderson does not point to any recorded right or way or easement. The survey completed in November 2014 also did not reveal any right of way or easements. Plaintiff's counsel searched and affirmed under penalties of perjury that no right of way or easements were found. Defendant Henderson's counsel did not aver whether he did such a search, and did not point to any such right of way or easement.

Third, Defendant Henderson's claim that he has an easement by necessity is without **[*10]** merit. Plaintiff provided the affidavit of licensed professional land surveyor Alton P. MacDonald, Jr., whom averred Defendant Henderson's property is not landlocked and has 87.28 feet of frontage to the town road on the cul-de-sac. While Defendant Henderson's attorney claims that it would not be "reasonable" to connect Defendant Henderson's property to the town highway and that it would "be unreasonable to try to put a driveway over a gulley[,]" Defendant Henderson's attorney has not identified himself as a licensed professional engineer or land surveyor. Thus, Defendant Henderson's attorney is incompetent to testify to such claims. Thus, Defendant Henderson's claim as an easement by necessity is defeated.

Fourth, Defendant Henderson's claim that he has an easement by implication also does not compute given his own definition. To establish proof of entitlement to an implied easement, which is "not favored by law[,]" Defendants carry the burden by clear and convincing evidence. (*See Hedden v Bohling, 112 AD2d 23, 24, 490 N.Y.S.2d 391 [3d Dept 1985]*.) Specifically here, Defendant Henderson claims that Plaintiff had knowledge of the easement when he took the property. However, as aforementioned, Defendant Henderson's attorney does not have personal **[*11]** knowledge to claim that Plaintiff has such knowledge. Defendant Henderson has still not pointed to any easement which Plaintiff—if the Court gives the benefit of every favorable inference to Defendants—could have possibly known about; no easements or right of ways have been **[**5]** identified. Moreover, the fact that Plaintiff organized and had a land survey conducted which revealed no easements further defeats Defendant Henderson's argument that Plaintiff knew about an easement or right of way.

Fifth, Defendant Henderson claims that the gravel driveway/roadway was acquired as an easement/right-of-way by adverse possession as Defendant Henderson and the prior owners have held it for more than 10 years. This must be proven by clear and convincing evidence. (*Walling v Przybylo, 7 NY3d 228, 232, 851 N.E.2d 1167, 818 N.Y.S.2d*

816 [2006].) While the Court understands that Defendants are not yet required to prove such standard yet, Defendant Henderson has not provided *any* evidence. Again, Defendant Henderson's attorney cannot state—without any competent evidence—that this is true as he does not have personal knowledge of the facts and circumstances. Even assuming *arguendo* that he did, Defendant Henderson has utterly failed to provide competent evidence establishing that **[*12]** the 10 years of continuous and adverse possession was exercised. Said differently, Defendant Henderson has provided absolutely no evidence to establish a chain of 10 continuous years of open and hostile use of the gravel driveway/roadway, or any of the five elements. (*See* Walling, 7 NY3d at 232 ["To establish a claim for adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period."] [citations omitted].)

Notwithstanding, as Plaintiff aptly points out, there are several legal issues with Defendant Henderson's claims. For instance, the Court of Appeals has stated that "[t]he purchaser of property at a tax sale . . . acquires a new and complete title to the land under an independent grant from the sovereign, a title free of any prior claims to the property or interests in it." (*Melahn v Hearn, 60 NY2d 944, 946, 459 N.E.2d 156, 471 N.Y.S.2d 47 [1983]*.) Moreover, "it has been determined that an adverse possessor does not acquire rights superior to those obtaining title as the result of tax foreclosure proceedings held in accordance with the mandates of *RPTL article 10*." (*Borisenok v Hug, 212 AD2d 282, 284, 630 N.Y.S.2d 122 [3d Dept 1995]*.)

To the extent not specifically addressed above, the parties' remaining contentions **[*13]** have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Plaintiff's motion is **GRANTED**, and therefore it is

ORDERED that Defendants and their guests, agents, tenants, occupants, visitors, or any other individuals or entities relating to or having business with Defendants shall be preliminarily adjoined and restrained from entering upon Plaintiff's real property located at 53 Pinewoods Road, Town of Durham; and it is further

ORDERED that Defendants and their guests, agents, tenants, occupants, visitors, or any other individuals or entities relating to or having business with Defendants shall be prohibited from destroying, removing, or otherwise interfering with any portion of the fence or other improvements erected on Plaintiff's real property or to be erected on Plaintiff's real property, including but not limited to a fence along or near the subject gravel driveway/roadway, located at 53 Pinewoods Road, Town of Durham; and it is further

ORDERED that such enjoinment and restraint shall commence at the time of service of notice of entry of this Decision and Order on Defendants, and shall continue until otherwise expressly terminated by **[*14]** this Court's directive or operation of law.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the **[**6]** County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with *CPLR R. 2220*. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: December 17, 2015

Catskill, New York

HON. LISA M. FISHER

SUPREME COURT JUSTICE