

Unique Design Home Builders, Inc. v Town of Islip

2010 NY Slip Op 31608(U)

June 23, 2010

Supreme Court, Suffolk County

Docket Number: 06-3308

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY



PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-4-09 (#002)
MOTION DATE 1-28-10 (#003)
ADJ. DATE 2-18-10
Mot. Seq. # 002 - MD
003 - XMotD

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UNIQUE DESIGN HOME BUILDERS, INC., :
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 Plaintiff, :
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 - against - :
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 TOWN OF ISLIP, COMMISSIONER OF PUBLIC :
 WORKS OF THE TOWN OF ISLIP, JACK :
 INGOLD, JERRILYN INGOLD, STEVEN :
 ZAMICHOW, ELLEN ZAMICHOW, EDWARD :
 BEERS, DOLORES BEERS, ROBERT RUCKEY, :
 JANICE RUCKEY, DOUGLAS MEYER, MARY :
 MEYER, RONALD YOUNG, ELIZABETH :
 YOUNG, CARL SAITTA, CHRIS SAITTA, :
 NICHOLAS DIBENEDITTO and JOHN :
 GERATTO, :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 101 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; and affirmation in support of defendants' motion 15 - 16; "error correction affirmation - 17"; Notice of Cross Motion and supporting papers 18 - 61; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 62 - 87; Other Reply Affidavit in further support of cross motion 88 - 101; it is,

ORDERED that the motion by defendants John Ingold, Jerilyn Ingold, Steven Zamichow, Ellen Zamichow, Robert Rucky, Janice Rucky, Doug Meyer, Mary Meyer, Ronald Young, Elizabeth Young, Carl Saitta, Chris Saitta, and Nicholas Dibeneditto is denied; and it is further

ORDERED that the cross motion by plaintiff Unique Design Home Builders, Inc. is granted to the extent that it is declared that Huntting Lane is a public highway pursuant to New York Highway Law § 189, and equitable relief permanently enjoining defendants from obstructing or otherwise interfering with plaintiff's and the public's use of Huntting Lane is awarded, but is denied as to the claim under New York Real Property Actions and Proceedings Law Article 15.

Defendants Jack Ingold, Jerilyn Ingold, Steven Zamichow, Ellen Zamichow, Robert Rucky, Janice Rucky, Doug Meyer, Mary Meyer, Ronald Young, Elizabeth Young, Carl Saitta, Chris Saitta and Nicholas Debeneditto ("defendants" or the "homeowners") move for an order dismissing the complaint by plaintiff Unique Home Builders, Inc. ("plaintiff" or "Unique") and provide an affidavit by counsel, copies of the pleadings, material denominated "Documents placing Huntting Lane on official map," correspondence and affidavits by Vita Seidita and Winifred G. Bubla. Defendant Town of Islip ("Town") has submitted an affirmation in support of the homeowners' motion. Counsel for the homeowners has also submitted an "Error Correction Affirmation" and a memorandum of law. Plaintiff has cross-moved for an order granting it summary judgment declaring that Huntting Lane is a public highway pursuant to New York Highway Law § 189, and awarding it equitable relief permanently enjoining the homeowners from obstructing or otherwise interfering with the public's use, including plaintiff's use, of Huntting Lane and determining all claims adverse to that of plaintiff pursuant to New York Real Property Actions and Proceedings Law Article 15. In support, plaintiff provides copies of the pleadings, various court orders, various deeds, photographs, an affidavit by Louis Raciti, former Town Highway General Supervisor in the Department of Public Works, Highway Division ("Raciti"), lists of Town maintained roads, list of dedicated streets, various deposition testimony, a Town Maintenance filing system card, a Town snow map, an affidavit by Michael Tollin ("Tollin"), correspondence, a paving report, a Town permit issued for excavation, a contract between the Town and the Suffolk County Water Authority, a work order for the installation of a stop sign, an affidavit by Liz Gilmartin ("Gilmartin"), and a title report for the Ingolds' property. The homeowners have submitted a reply and affirmation in opposition to plaintiff's cross motion, and plaintiff has submitted a reply affirmation in further support of its cross motion.

By its amended complaint plaintiff seeks, by its first cause of action, a judgment declaring Huntting Lane a public highway pursuant to Highway Law § 189; by its second cause of action, a permanent injunction permitting it to use Huntting Lane as a public highway free and clear of any interference by homeowners; and, by its third cause of action, a determination of all claims adverse to plaintiff pursuant to New York Real Property Actions and Proceedings Law Article 15 and an injunction barring homeowners from obstructing or otherwise interfering with the public's use of Huntting Lane.

A recitation of the lengthy history of this matter is useful in placing the instant motions in context. Defendants are homeowners living on Huntting Lane, in East Islip, New York. Huntting Lane ends in a cul de sac and plaintiff purchased property facing a private road known as Blackmore's Lane and wishes to develop the property by building four houses with access through Huntting Lane. After a public hearing, the Town approved plaintiff's proposed subdivision plan to build four homes on one acre plots and use of the right of way easement based, in part, on its representation that its property has an appurtenant easement for access over Huntting Lane. Defendants then commenced an action pursuant to Real Property Actions and Proceedings Law Article 15 seeking a determination that plaintiff never acquired a right of way easement over Huntting Lane, because no such easement had been granted to its predecessor in title. Upon a reversal of the court's dismissal of the homeowners' complaint and finding that all parties had a right of way interest over Huntting Lane (Werner, J.), the Appellate Division, by order dated November 8, 2004, held that plaintiff's parcels were not granted an easement over Huntting Lane and that Huntting Lane was not even in existence

when the common grantor conveyed plaintiff's parcels. Thereafter the homeowners moved for summary judgment as to the remaining claims.

By their motion, defendants contend that Highway Law § 189 is to be strictly construed and that the evidence proffered must be clear and convincing. They contend that it must be shown that the public, not just the homeowners and their invitees, have used the road as a public street for the requisite statutory period and that the Town has "unequivocally adopted" Huntting Lane by maintaining it "with the same intensity" that it maintains other Town roads. The homeowners note that Huntting Lane is a cul de sac, and that it has no curbs, sidewalks or drainage structures. They claim that the Town has never paved Huntting Lane. The homeowners also point to "periodic" closings of Huntting Lane for block parties. As indicia of their position that Huntting Lane is a private road, the homeowners point to several documents, including correspondence dated June 21, 1967 from the then Town Director of the Department of Building and Housing to "Ronald and Eliz. Young" in response to their application for a building permit. Accompanying the approval of the permit, a handwritten entry on a document titled "Board of Review Inspection Report" included a notation that "applicant acknowledges the fact that Huntting Lane is a private road & will have Huntting Lane placed on an official map before C.O. is issued." The homeowners also submit a report by the Engineering Department of the Town dated January 15, 1968, which identified Huntting Lane as a private right of way. In addition, the homeowners provide a copy of an "Easement and Settlement Agreement" dated November 12, 1980 granting the Southwest Sewer District an "exclusive easement and right-of-way for the purpose of installing, constructing, maintaining, repairing, operating, and removing sanitary sewer pipes and/or similar installations for the collection and disposal of sewage . . ." The easement also permitted "[t]he placement of resurfacing materials" over the roadway. The homeowners also rely on the correspondence from Donald F. Caputo ("Caputo"), then Deputy Commissioner of the Town Department of Public Works, dated March 31, 1997, denying Ingold's request for street lighting on the ground that Huntting Lane "is a private roadway." They contend that the Town has never placed Huntting Lane on its list of official public roads as required by Highway Law § 140. The homeowners also point to a document titled "Town of Islip Panning Board Subdivision and Land Development Regulations - Final Resolution" dated November 20, 2002, which included a directive to the applicant for the subdivision plat to file a "Declaration of Covenants" stating, among other things, that "Huntting Lane shall remain a private right-of-way, and shall never be offered for dedication to the Town of Islip." Counsel also submits documents denominated as "affidavits" from two former homeowners. The statements, each addressed "To Whom It May Concern" bear notary stamps, however, the statements contain no language attesting to the truth of the documents.

Counsel for the homeowners elected not to "burden" the court with the deposition testimony of the various witnesses on whom he relies and depends upon plaintiff's attorney to "correct me if I misstate something." In addition, counsel notes that "the homeowners concede that during the last twenty years there may have been isolated instances where the Town did more than pick up garbage. Private snow plow contractors hired by the Town may have either inadvertently or on purpose plowed Huntting Lane on isolated occasions." Counsel goes on to opine: "all of the parties to this action will be happy if this action gets dismissed. The homeowners will be happy to retain their cherished privacy, the Town will be happy to be relieved from future maintenance and the expense of this litigation, the builder will be happy because his title company will finally have to pay him. The only unhappy entity will be the incompetent title company that has been financing this senseless litigation."

By its cross motion, Unique notes, as a threshold matter, that it is a defendant in a related action by the homeowners for summary judgment. Unique contends that the Town, after completing the appropriate reviews and conducting a public hearing, approved its proposed subdivision in 2002. It then began clearing

its property in preparation for the construction of four homes and laying an infrastructure and pavement for a road accessing Huntting Lane. Unique notes that its property is contiguous to Huntting Lane and that it comprises tax lots 21 and 50. That portion of the property which is part of tax lot 50, according to Unique, “traces back to a deed dated January 29, 1946 from [John B.] Dawson to [William] Prescott.” That deed conveyed “a 3.49-acre parcel that is described as running by a ‘fifty foot Right of Way’, which is what is now known as Huntting Lane. Huntting Lane is consistently identified as 50-feet wide.” A copy of a deed which plaintiff alleges reflects the property ultimately conveyed to it references a transfer from John B. Dawson to William F. Prescott and Elizabeth Coe Prospect on June 28, 1945 of a 3.13-acre plot that is described as “running by ‘Brushwood Court’ as well as ‘Blackmore Lane.’” The significance of the street names, according to Unique, is that “there is evidence that Huntting Lane was previously known as Brushwood Court.” It points to tax maps prepared during the 1970's which depict Brushwood Court as situated where Huntting Lane now lies. Unique acknowledges that Huntting Lane has never been dedicated to the Town, and that it was chained off from the public during the 1950's and did not receive municipal services during that time. Relying on various exhibits, however, Unique contends that the nature of Huntting Lane has been altered dramatically during the ensuing years. Based upon those changes, it asserts the former private road has become a public roadway pursuant to Highway Law §189.

According to an affidavit by Raciti, the former Town Highway General Supervisor, the Town has maintained Huntting Lane for a more than 20 years. Based upon his personal knowledge gleaned from Town employment dating back to 1964, Raciti stated that during the period from 1979 to 2003, while he served as Highway General Supervisor, it was his understanding that the Town maintained Huntting Lane. “In fact, I know and have personally observed that Huntting Lane has received maintenance services, such as street sweeping and snow plowing . . . It has also always been my understanding that Huntting Lane was used by, and open to, the public. I have never understood Huntting Lane to be a private road and it was never treated like a private road by the Town [] during my employment with the Town.” As to the allegation that Huntting Lane is not a dedicated road, Raciti noted that “in my experience, undedicated roads in the Town [] were, and are, frequently treated like dedicated roads and receive many, if not all, of the services that a dedicated road receives. Thus, the fact that a road is dedicated or undedicated is usually a mere formality.” Further, Raciti affirmed that “[d]uring my many years of employment with the Town, Huntting Lane did not have any of the common indicators to signify that it was a private road, such as a sign that reads, ‘Private - Keep out’, an unpaved road or a barrier or gate to keep individuals from using the road. To my knowledge, the homeowners along Huntting Lane did not build, install or maintain the road. In fact, Suffolk County’s Southwest Sewer District paved the road, using Suffolk County’s Taxpayer’s money, when it installed sewers on Huntting Lane.” Upon receiving an admonition not to provide further maintenance services on Huntting Lane after the homeowners voiced concern about possible development in 2000, Raciti advised Ron Delisi (“Delisi”), then Area Foreman for the area including Huntting Lane, not to perform maintenance services on the road. Raciti also noted that “snow books” compiled by the Town included Huntting Lane and that the roads included in the snow books received snow removal services provided by the Town.

Unique also relies upon road lists compiled by Town personnel which include Huntting Lane as a roadway maintained by the Town. It also relies upon the deposition testimony of Dina Langen (“Langen”), an employee with the Town’s Central Services Unit, who testified based upon the information provided by the town road lists she believed that Town services were provided to Huntting Lane. Virginia Sikinger, the principal clerk/supervisor of the Central Services Unit corroborated Langen’s testimony during her own deposition. Thomas Pfaffe, the Town Executive Assistant in the Department of Public Works also testified that the Town provided snow removal services on Huntting Lane and that, in fact, it received “priority” in

determining which roads would be plowed. He also indicated that the Town has responded to complaints from homeowners regarding problems with the road.

Unique also relies upon an affidavit by Tollin, a resident of Blackmore Lane, who stated that he has resided at his present address since 1980 and, during that time, has “used Huntting Lane for ingress and egress to my property. It has always been my impression and understanding that Huntting Lane was used by, and open to, the public.” Tollin also indicated that the signage used to identify Huntting Lane has been of the same type used by the Town to identify public roads. Tollin further stated that, over the years, the Town swept and plowed Huntting Lane and installed water lines under Huntting Lane and that the residents were not charged for the work done. As to a “Private Road” sign at the entrance of Huntting Lane, Tollin affirmed that it was “recently placed” without the approval of the Town. In addition, Unique relies on documentation generated in connection with the installation of a sewer line beneath Huntting Lane in 1987. The work, according to those submissions, was completed by the Suffolk County, which also installed fire hydrants and paved the road. Unique notes that the “original contract between the Town and the Suffolk County Water Authority indicates that the Town paid more than \$2 million for the installation of the infrastructure and other work.” Unique also points to the installation of a stop sign at the corner of Huntting Lane in 1974 bearing the words “Town of Islip,” as well as a “Dead End” sign of the same type used by the Town to regulate traffic on its public roads. It notes that the Town lists Huntting Lane as a public street on its official website and that the residents of the street receive a variety of municipal services including garbage pickup. Unique also points to an alleged failure on the part of the homeowners to treat Huntting Lane as a private road and notes that it has never been barricaded and the public has used it without restriction since 1974. It also points to an affidavit by Winifred Bubla (“Bubla”), who lived on Huntting Lane from 1957 to 1979, to support its contention that the nature of Huntting Lane changed over the years from a private to a public roadway. Bubla stated “from its inception, in the early 1950's, Huntting Lane was established as a private lane. It was chained off, so that only landowners and residents had access. In the beginning, (I don't remember for how many years) we did not have mail delivery, garbage collection, snow plowing, street lights, city water or road maintenance.”

Finally, Unique point to the Ingolds' title report which advised “that the street fronting the within-described premises is maintained by the Town of Islip.” It notes that the Ingolds' parcel does not contain a deeded easement over Huntting Lane, but that they nonetheless built their home fronting the street and have used it continuously for over 30 years. Unique also contend that any claim by the homeowners that the Ingolds have an easement by virtue of the fact that their home fronts Huntting Lane, should apply to it as well. Unique claims that “[a]t minimum, the Ingolds and the other Homeowners are equitably estopped from denying Unique an equitable easement over Huntting Lane.”

By their reply and opposing affirmation, the homeowners counter that the Central Services Unit lists do not establish that maintenance was actually performed on Huntting Lane; that the Central Services employees do not have actual knowledge as to whether maintenance work was performed on Huntting Lane; that “[m]arking Huntting Lane as a ‘priority road’ on snow removal maps is a joke. Someone's felt tipped pen must have slipped”; that Racini's statements were “surmises”; that the stop sign on Huntting Lane was for the benefit of the public traveling on Dock Road; that the Town's website is not determinative; that there is “undisputed evidence” that Huntting Lane was occasionally barricaded; that the homeowners have never claimed that Huntting Lane could not be used to service their homes; and that the paving work done by the Suffolk County Water Authority was performed upon an easement granted to it by the homeowners. Counsel also claims that the Ingolds' property abuts Huntting Lane while Unique's does not.

The Town, by its counsel, has submitted an affirmation in support of defendants' motion for summary judgment and "is in complete accord with [the homeowners'] affirmation." Counsel, however, does "take exception" to an exhibit submitted by Unique which indicates that the Town website identifies Hunting Lane as a public roadway. Counsel asserts that "a cursory look at this map" reveals "several roads which I personally know to be private undedicated roads."

It has oft been held that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case" (*Gilbert v Frank Corp. V Federal Ins. Co.*, 70 NY2d 966 [1988]). Such evidence must be in admissible form (*see Friends of Animals, Inc. v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1068 [1979]). If this burden is not met, the motion must be denied regardless of the sufficiency of the opposing papers (*Wingrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In short, movants must demonstrate the merit of their claims (*Alvarez v Twentieth Century Renovations Ltd.*, 66 Ad3d 524, 525 [2009]).

The homeowners, in essence, ask that plaintiff's underlying complaint alleging that Hunting Lane is a public highway, be dismissed. Highway Law § 189 provides:

All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway and the town superintendent shall open all such highways to the width of at least three rods.

Here, counsel for the homeowners, by his affidavit, "claim[s] no personal knowledge beyond what can be seen and learned by examining the admissible evidence" and thus fails to satisfy the requisite showing of "having knowledge of the facts." (CPLR 3212 [b]). Nor do the statements by the former residents constitute affidavits. Further, the remainder of the documentation submitted is either irrelevant or beyond the statutorily articulated time frame. The motion for summary judgment by defendants, therefore, is denied.

Unique, by its cross motion, has demonstrated that Hunting Lane has become a public highway pursuant to Highway Law § 189. The affidavit by Raciti, former Highway General Supervisor, has demonstrated that Hunting Lane has been maintained by the Town for a period in excess of ten years including regular street sweeping and plowing and that it has been used by, and open to, the public. According to Raciti, Hunting Lane has never been treated as a private road by the Town and has been "continuous[ly]" maintained by the Town. In addition, traffic control devices have been installed by the Town on Hunting Lane and the various lists of Town maintained roads includes Hunting Lane including maps used to coordinate snow removal. Although discounted by counsel for the homeowners, Tollin's affidavit included his observations of snow removal and street sweeping on Hunting Lane from the 1980's to present. Evidence has also been submitted showing that the County paved Hunting Lane and installed fire hydrants subject to inspection by the Town. Finally, Unique has shown that Hunting Lane has been open to the public for the requisite time frame.

In opposition, the homeowners counter that the various lists do not establish that maintenance was performed on Hunting Lane, that the notation on the snow removal map was a "joke," that Raciti's affidavit was stated in "generalities," that the Town installed stop sign did not evince maintenance, that Tollin's affidavit was "permeated with hearsay," that there is "undisputed evidence" that Hunting Lane has been "occasionally barricaded and closed to the public." The last apparently refers to occasional block parties. The

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Town's opposition appears to rely on counsel's personal knowledge of roads which are not the subject of this motion and an affidavit by Dave Genaway, the Deputy Commissioner of the Town of Islip Department of Planning and Development, who avers that one of the maps submitted by Unique "was never intend[ed] to be a true and accurate source of information regarding the legal or ownership status of any particular road shown on the map as a dedicated public road or highway." Such conclusory statements fail to raise a triable issue of fact nor has an excuse been provided for the failure to make the requisite proffer of an acceptable excuse for not offering evidence in admissible form (*see e.g. Grasso v Angerami*, 79 NY2d 813, 814 [1991]).

The evidence is sufficient to demonstrate that Huntting Lane has become a public highway through use and maintenance (*see LaSalle Co. v Town of Hillsdale*, 199 AD2d 685 [1993]). In opposition, the homeowners have failed to rebut the evidence of public use established by Unique (*see Stuart v Town of Wells*, 161 AD2d 1073 [1990]). However, Unique has failed to demonstrate entitlement in its favor as to its claim under RPAPL 1501 articulated by its third cause of action for a determination that any property interests the homeowners may have had in Huntting Lane have been extinguished inasmuch as there has been no showing it possesses a property interest in the road (*see Lennard v Chinkpoo Realty Holding Corp* 72 AD3d 747 [2010]).

The cross motion by Unique, therefore, is granted as to its first and second causes of action, but denied as to its third cause of action under RPAPL Article 15. Having established its entitlement to summary judgment in its favor on the first and second causes of action, Unique is entitled to a judgment declaring that Huntting Lane is a public highway pursuant to New York Highway Law § 189 and awarding it equitable relief permanently enjoining defendants from obstructing or otherwise interfering with the public's use, including plaintiff's use, of Huntting Lane.

Decided also this date are motions in a companion action entitled *Ingold v Unique Design Home Builders, Inc. and John Geratto*, under index number 15624/2003.

Dated: 4/23/2010


 Hon. Joseph Farneti
 Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION