

At a Submitted Motion Term of The Supreme Court of the State of New York held in and for the Sixth Judicial District, at the Hazlett Building, in the County of Chemung, Elmira, New York, heard on the 2nd day of February 2018.

RECEIVED
MAR 14 2018
SCHUYLER COUNTY
ATTORNEY

PRESENT: HON. JUDITH F. O'SHEA
SUPREME COURT JUSTICE

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CHEMUNG

County of Schuyler and
County of Chemung

Plaintiffs,

vs.

William Hetrick

Defendant.

DECISION AND ORDER

INDEX #2014-2093
RJI # 2014-0641-M

JUDITH F. O'SHEA, JSC

FINDINGS OF FACT

This matter was previously before the Court on plaintiffs' order to show cause dated October 1, 2014, seeking a temporary restraining order to enjoin defendant, William Hetrick, from blocking access to plaintiff County of Schuyler's easement across his property located at 781 Beardsley Hollow Road, Alpine, New York. It was before the Court again in August, 2016, when plaintiffs moved for summary judgment on their declaratory judgment actions and defendant moved to vacate the Note of Issue and Certificate of Readiness. The Court granted defendant's motion and denied plaintiffs' motion for summary judgment. Discovery is now complete and a new Note of Issue was filed on June 8, 2017. Plaintiffs County of Schuyler and County of Chemung now move for Summary Judgment and an Order dismissing defendant's affirmative defenses and counterclaims. Defendant cross-moves for summary judgment and an Order awarding relief pled in defendant's counterclaims.

By way of background, Schuyler County acquired approximately one-acre of land from Miller Farms by deed dated July 19, 1966. The property is landlocked by property currently owned by defendant. The 1966 deed placed the following restrictions on the property:

1. The premises hereinbefore conveyed shall be used for the purpose of erecting towers and radios for voice communication, for the County of Schuyler, it's (sic) governmental departments and agencies and other political subdivisions now cooperating in and using it's (sic) various radio systems, only, and the right of way is for the construction, operation, maintenance, repair and/or removal of subject tower and attendant equipment therefore.
2. No residential dwellings or garages or other buildings shall be erected on said premises other than that necessary for the operation of said radio tower and attendant equipment.

At the time of the transfer, Schuyler County was already leasing the parcel from Miller Farms as the site of a communications tower. The 1966 deed also provided for an easement across Miller Farm's (now defendant Hetrick) property "for the purpose of ingress and egress from the Beardsley Hollow Road along the existing farm lane . . ."

Sometime in 2012, Schuyler County and Chemung County collaborated to apply for grants from New York State Department of Homeland Security to upgrade their communication systems. Both counties were awarded grants and each then entered into contracts with Motorola Solutions, Inc. to purchase communications equipment and to install a new tower on the existing tower site. The counties submitted affidavits from a Motorola employee and their expert witness stating that the new tower and equipment work in substantially the same manner as the old, just with newer technology. The affidavits further state that the tower is used for radio transmission and voice communication, as such terms are commonly used. The new tower is substantially taller than the one it replaced.

Defendant objected to the proposal to replace the existing tower, claiming that Schuyler County was violating the deed restrictions because (1) the new tower was capable of transmitting more than voice communications, (2) the tower was restricted to use by Schuyler County and that Chemung County, not being an agency of Schuyler County, could not use the tower. Defendant submits the affidavit of Richard Miller, the individual who originally conveyed the property to Schuyler County, in which Mr. Miller states that "the [deed] restriction did not include use of the tower by Chemung County or any other political entity outside Schuyler County."

When construction of the new tower was started, defendant installed a locked gate across the easement, thereby blocking the defendants' access to the tower. By order dated October 7, 2014, this Court ordered defendant to remove the lock from the gate to allow plaintiffs to access the tower site. Defendant removed the lock but claims that plaintiffs committed additional trespasses by improperly reinstalling the gate, and violating the restrictive covenants by using the easement beyond its prescribed width.

CONCLUSIONS OF LAW

It is well settled that “the proponent of a motion for summary judgment is required to tender sufficient, competent, admissible evidence establishing a prima facie entitlement to judgment as a matter of law so as to demonstrate the absence of any material issue of fact.” Holly v. Morgan, 2 A.D.3d 1170 (3rd Dept. 2003), citing Guiffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). “Only when this burden is met is the opponent required to produce competent admissible evidence establishing the existence of a material issue of fact which would preclude a grant of summary judgment.” Id. at 1171, citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

As explained by the Court in Davidowitz v. Cazes, 157 A.D.2d 1014, 1016 (3rd Dept. 1990),

“Summary judgment is a drastic remedy, the procedural equivalent of a trial. Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974). Where there is doubt as to the existence of a triable issue or where the issue is arguable, summary judgment should not be granted (Stillman v. Twentieth Century Fox Corp., 3 N.Y.2d 395, 404 (1957)). Issue-finding rather than issue-determination is the key to the procedure.”

Likewise, “when considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every favorable inference from the record proof, without making any credibility determinations.” Black v. Kohl’s Dept. Stores, Inc., 80 A.D.3d 958 (3rd Dept. 2011), citing Gadani v. Dormitory Auth. of State of N.Y., 43 A.D.3d 1218, 1219 (3rd Dept. 2007); Tenkate v. Tops Mkts., LLC, 38 A.D.3d 987, 989 (3rd Dept. 2007).

In the case at bar, the Court must determine whether a triable issue of fact exists as to two primary issues; (1) are the plaintiffs in violation of the deed restrictions by using the tower site for purposes other than voice or radio communications and because of Chemung County’s purported use of the tower, and (2) did the plaintiffs commit a trespass when installing the tower by incorrectly reinstalling the gate, failing to refill a trench, and by using land beyond the width of the easement.

The deed restriction specifically restricts the use of the tower site “for the purpose of erecting towers and radios for voice communication for the County of Schuyler, it’s (sic) governmental departments and agencies and other political subdivisions now cooperating in and using it’s (sic) various radio systems, only.”

“It is well settled that the law favors free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them. Moreover, courts will enforce such restraints only when their application has been established by clear and

convincing proof.” *Van Schaick v. Trustees of Union College*, 285 A.D.2d 859, 860 (3rd Dept. 2001) (internal quotation marks and citations omitted).

The most stringent interpretation of the subject deed restriction limits the land to be used for the erection of a tower for the transmission of voice communication by way of radio waves. In support of their position, plaintiffs submit the affidavit of Richard Ball, a program manager for Motorola Solutions, Inc. Mr. Ball states that both the prior tower and the existing tower and the communications equipment installed on the tower are for radio transmission and voice communication. An affidavit by Mark F. Rewers, a Registered Communications Distribution Designer, an independent consultant in the design, construction, and operation of wired and wireless transmission systems, provided expert analysis of the equipment on both the former tower and the current tower and its related equipment. Mr. Rewers concludes that “it is an established scientific fact that the [tower in question] remains a conventional, analog, narrowband voice communication system . . . that are far too small to provide the internet-type applications of broadband channels.” He further states that the most recent upgrade changed the tower from a single site, simplex model to a multi-site simulcast radio system and that this upgrade “still operates via radio signals to transmit solely voice information.” He concludes that the functionality of the tower remains identical to the original system.

Plaintiffs have submitted sufficient admissible evidence to establish a prima facie case that the installation of the new tower and associated equipment does not violate the deed’s restriction that the tower be used solely for radio and voice communication. The burden shifts to defendant to produce competent admissible evidence establishing the existence of a material issue of fact which would preclude a grant of summary judgment.

In opposition, defendant submits the affidavit of Jan B. Weiss, an Independent Contractor and Consultant specializing in telecommunication network systems and their applications. The Weiss affidavit goes through great detail in the distinctions between analog and digital communication transmissions; however, Ms. Weiss concedes that it would be difficult for Schuyler County to transport non-voice traffic over the tower, and that Chemung County’s system could be configured to carry non-voice traffic. The Weiss affidavit discusses the new tower’s potential capabilities to carry data other than voice, but does not allege that the tower is currently being utilized to do so, only speculative that it may at some point be used in that manner. Defendant’s submitted evidence does not establish the existence of a material fact regarding non-voice transmission being utilized on the tower, rather it appears to concede that the tower is currently used solely for voice communication as allowed under the deed restriction.

Next, defendant alleges that plaintiffs are in violation of the deed’s restriction that the land be used for “the County of Schuyler, it’s (sic) governmental departments and agencies and other political subdivisions now cooperating in and using it’s (sic) various radio systems, only . . .” Defendant claims that this restriction prohibits Chemung County’s use of the tower. Plaintiffs submit the deposition testimony of Richard Miller. Mr. Miller owned and conveyed the parcel to Schuyler County in 1966. Mr. Miller stated that “this restriction did not include use of the tower by Chemung County or any other political entity outside of Schuyler County.” Mr. Miller believed that the term “government departments” meant only volunteer fire departments within Schuyler County.

Plaintiffs argue that the plain language of the deed restriction and the easement contained in the deed allow for Chemung County's continued use of the tower and easement. The deed states that use of the land is limited to "County of Schuyler, it's (sic) governmental departments and agencies and other political subdivisions now cooperating in and using its various radio systems." Therefore, plaintiffs argue that although Chemung County is not a political subdivision of Schuyler County, the deed allows for the use by any political subdivision that was cooperating in the use of the tower at the time of the transfer in 1966.

As such, plaintiffs assert that Chemung County is allowed to use the tower as a link to Schuyler County for mutual aid, as the counties have been mutually cooperating and using the tower since before the transfer. In support of this assertion, plaintiffs submit the affidavits and depositions of Mr. Miller, the former owner of the property, William Kennedy, Schuyler County Emergency Management Coordinator, and Michael Smith, former director of Chemung County Emergency Services. Mr. Kennedy states that the tower in question has always been used as a relay tower between the counties. Mr. Miller, the prior owner of the property, stated in his deposition that in the 1950's when he was a volunteer firefighter in Schuyler County, the tower was often used for fire protection and mutual aid between the counties. Additionally, Mr. Rewers stated that a 1954 mutual aid plan issued by the New York State Division of Safety expected adjoining counties to provide mutual aid.

The Court agrees with Plaintiffs. The evidence is uncontroverted that Schuyler and Chemung Counties have been using the tower for mutual aid and cooperation since prior to the transfer of the parcel to Schuyler County. Had the deed restriction intended to exclude Chemung County, it would have had to specifically stated as such, as Chemung County was utilizing the tower at the time of the transfer. Plaintiffs have met their burden of presenting admissible evidence entitling them to summary judgment as a matter of law. Defendant has failed to provide evidence giving rise to a material question of fact as to Chemung County's use of the tower and easement.

In addition to defendant's allegations of trespass discussed above, defendant's cross claim contends that plaintiffs violated the restrictions in the right-of-way easement during the installation of the new tower by operating their vehicles "beyond the farm lane described in the 1966." At his deposition, however, defendant was unable to provide any specific details regarding any of plaintiffs' vehicles physically going beyond the right-of-way. Defendant submits photographs alleging to show vehicle tracks on his property but fails to submit any admissible evidence that the vehicle tracks were caused by plaintiffs.

It is therefore,

ORDERED, that plaintiffs' motions for summary judgment are **granted** in their entirety; and it is further

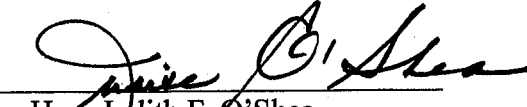
ORDERED, that defendant's motion for summary judgment is **denied** in its entirety.

This shall constitute the Decision and Order of the Court.

ENTER

Dated:

March 12, 2018.



Hon. Judith F. O'Shea
Supreme Court Justice

The parties listed below have been mailed a copy of this
Order on 3/12/18 by *L. Ammo*.

Original: Samantha A. Pike, Chief Clerk
Supreme & County Courts

Copy: Olesya Vernyi-Kellogg, Esq.
Attorney for Plaintiff County of Schuyler

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