State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 18, 2021 530136

ELM LANSING REALTY CORP.,
Appellant-
Respondent,

v

GEORGE S. KNAPP,
Respondent- MEMORANDUM AND ORDER
Appellant,

and

GARY J. EDIE et al.,
Respondents,
et al.,
Defendants.

Calendar Date: February 9, 2021

Before: Garry, P.J., Egan Jr., Pritzker, Reynolds Fitzgerald and Colangelo, JJ.

James W. Hyde IV, Wells, for appellant-respondent.

Linda S. Leary, Albany, for George S. Knapp, respondent-appellant.

Miller, Mannix, Schachner & Hafner, LLC, Round Lake (Thomas W. Peterson of counsel), for Gary J. Edie, respondent.

Bartlett Pontiff Stewart & Rhodes, PC, Glens Falls (Mark E. Cerasano of counsel), for North Tract Properties, LLC and another, respondents.

Colangelo, J.

Cross appeals from an order of the Supreme Court (Muller, J.), entered September 4, 2019 in Warren County which, among other things, granted defendant Gary J. Edie's cross motion for summary judgment on his counterclaim and cross claim and for summary judgment dismissing the complaint against him.

In the 1950s, E. Louis Bauer owned real property on the shore of Lake George in Warren County. The lakeshore portion of the property was subdivided into nine lots that are bordered to the east by a road, beyond which lay a portion of the property without lake frontage. As portions of the property without lake frontage were sold over time, the purchasers were deeded lake access via a 15-foot right-of-way located along "the southerly portion of Lot No. 7" in the subdivision and, in some cases, explicitly granted the right to build a dock along the shore (hereinafter referred to as the original easement). Thereafter, the original easement featured prominently in a 1966 transaction involving the sale of lot No. 8, as well as a portion of lot No. 7 burdened by the easement, by E. Louis Bauer's successors-in-title, Robert Bauer and Doris Bauer (hereinafter collectively referred to as the Bauers). As part of that transaction, the owners of the properties without lake frontage deeded the original easement back to the Bauers, who, in return, conveyed a new easement running 10 feet north of the original one.

Plaintiff now owns the parcel purportedly burdened by the easement, while defendants North Tract Properties, LLC, Casa Rocce, LLC, Gary J. Edie and George S. Knapp (hereinafter collectively referred to as defendants) own the dominant parcels. Plaintiff commenced this action seeking, among other things, a declaration that the easement that was granted to defendants in 1966 was invalid and that they had no right to traverse or use its property. Defendants answered and each asserted a counterclaim and cross claim alleging that they had valid easement rights over plaintiff's property. Plaintiff then moved for summary judgment on the issue of liability and a bifurcated trial on damages. North Tract and Casa Rocce cross-moved for summary judgment dismissing the complaint against them

and granting their cross claims and counterclaims. Edie cross-moved for similar relief, as did, in relevant part, Knapp.[1] Supreme Court thereafter issued an order in which it, among other things, granted Edie's cross motion and otherwise denied the parties' requests for summary judgment. Plaintiff appeals and Knapp cross-appeals.

Addressing plaintiff's arguments first, inasmuch as it failed to annex many of the pertinent deeds to its motion papers and provided no proof in admissible form to show that defendants lacked a valid easement over its property, Supreme Court properly determined that plaintiff had not made "a prima facie showing of entitlement to judgment as a matter of law" and denied its motion without reference to the papers submitted in opposition (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see White Sands Motel Holding Corp. v Trustees of Freeholders & Commonalty of Town of E. Hampton, 142 AD3d 1073, 1074 [2016]). As for plaintiff's contention that Supreme Court erred in granting Edie's cross motion for summary judgment,[2] Edie documented how the Bauers conveyed his property with the original easement to his predecessors-in-title in 1965. In 1966, Edie's predecessors-in-title deeded that easement back to the Bauers, who, in return, deeded them a relocated easement over a portion of lot No. 7 that is now plaintiff's property. It is the 1966 attempt to convey a new easement that plaintiff primarily attacks, as the Bauers "could not create an easement benefiting land [they] no longer owned" (Carter v Heitzman, 198 AD2d 649, 650 [1993], lv denied 83 NY2d 751 [1994]; see Matter

[1] Knapp styled his cross motion, in relevant part, as a request for a declaration that he has a valid easement over plaintiff's property. Supreme Court treated that request as one for summary judgment, as do the parties on appeal, and we will do the same.

[2] Although Edie and Knapp failed to annex copies of all pleadings to their motion papers as required (see CPLR 3212 [b]), we will overlook that procedural defect given that the record includes a complete set of the pleadings (see Matter of Warren, 143 AD3d 1110, 1111 n [2016]; Greene v Wood, 6 AD3d 976, 977 [2004]).

of Estate of Thomson v Wade, 69 NY2d 570, 573 [1987]; Sam Dev. v Dean, 292 AD2d 585, 585-586 [2002]).

The 1966 deed granting the easement specified that the course of the new easement was 10 feet northward from that of the original easement – thereby allowing the Bauers to contemporaneously deed the southernmost 10 feet of lot No. 7 free and clear – and that the new easement was being granted "in consideration of [the owners of land benefitted by the original easement] reconveying their right, title and interest" in the original easement to the Bauers via another deed. The conveyance must be construed with those related deeds in mind (see Riegel v Larnard, 178 App Div 355, 356 [1917]), its language "must be so interpreted and applied as to be meaningful and valid, and the intent of the parties, as evidenced by the deed and the circumstances surrounding the making thereof, must be given expression wherever it is possible to do so without violating law and reason" (328 Owners Corp. v 330 W. 86 Oaks Corp., 8 NY3d 372, 381 [2007] [internal quotation marks and citation omitted]; see Matter of Flaherty, 65 AD3d 745, 746 [2009]). Applying those principles here leaves no doubt that, although Edie's predecessors-in-title deeded the original easement to the Bauers in return for a deed conveying a new easement, the goal of that transaction was simply to relocate the easement and facilitate the conveyance of a portion of lot No. 7. The dominant and servient landowners were free to agree to that relocation and, like Supreme Court, we interpret the deeds as such an agreement instead of a legally flawed effort to create a new easement that would frustrate their intent (see Rosen v Mosby, 148 AD3d 1228, 1232 [2017], lv dismissed 30 NY3d 1037 [2017]; Anzalone v Costantino, 145 AD3d 1236, 1237 [2016]).

Plaintiff also suggests that the 1966 deed from the Bauers granted a personal license or easement in gross rather than an easement appurtenant that ran with the land but, given both the evident intent of the parties to relocate the original easement and the grant of the relocated easement to the dominant landowners' "heirs and assigns forever," we do not agree (see Maicus v Maicus, 156 AD3d 1019, 1022 [2017]; Cronk v Tait, 305 AD2d 947, 948-949 [2003]). Plaintiff further suggests that Edie

failed to use the relocated easement for its intended purpose of reaching the lakefront from the dominant parcel, but "nonuse of an established easement does not equate to abandonment" as required to terminate it (Auswin Realty Corp. v Klondike Ventures, Inc., 163 AD3d 1107, 1110 [2018]; see Dutcher v Allen, 93 AD3d 1101, 1103 [2012]). Plaintiff's remaining arguments, to the extent that they are preserved for our review, are no more persuasive. In short, Edie has a valid easement over plaintiff's property for lake access that was relocated by agreement in 1966, and Supreme Court properly granted his cross motion for summary judgment.

Turning to the cross appeal of Knapp, he argues that he was entitled to summary judgment because the 1966 transaction had no impact upon the original easement benefitting his property. Knapp specifically came forward with a 1965 deed from William Bacas – which, having been recorded more than 10 years earlier, was "prima facie evidence of its contents" – reciting that Bacas had acquired the property and original easement via a recorded deed from the Bauers and conveying that interest to Louis Didio (CPLR 4522; see Bergstrom v McChesney, 92 AD3d 1125, 1126 [2012]). Didio and his wife also owned other property benefitted by the original easement as tenants by the entirety, and they were among those who participated in the 1966 transaction conveying the original easement to the Bauers in return for a relocated easement. That said, Didio and his wife only deeded the original easement "heretofore conveyed [to them] . . . by the parties of the second part" – that is, the Bauers. The language of that deed is "plain and unambiguous, [its] meaning and effect cannot be changed or overturned by the unexpressed intention of the parties," and we agree with Knapp that it cannot be read to convey an easement conveyed by Bacas instead of the Bauers (City of Geneva v Hudson, 195 NY 447, 464-465 [1909]; see Gross v Cizauskas, 53 AD2d 969, 970 [1976]).

Knapp went on to document how the property passed into his sole ownership via a series of deeds that continued to reference the original easement, as well as how he utilized the easement over time. Further, although Knapp uses and maintains a dock within the bounds of the easement that is not expressly

authorized, "[t]he installation of a dock at the end of an easement of this type 'is a reasonable use incidental to the purpose of the easement' and is therefore permissible" (Hush v Taylor, 84 AD3d 1532, 1535 [2011], quoting Higgins v Douglas, 304 AD2d 1051, 1055 [2003]). Contrary to Supreme Court's conclusion, this proof was sufficient to make out a prima facie case for Knapp's entitlement to summary judgment (see Will v Gates, 89 NY2d 778, 784-785 [1997]; M. Parisi & Son Constr. Co., Inc. v Adipietro, 21 AD3d 454, 455-456 [2005]). Plaintiff raised no material question of fact in response and, thus, that part of Knapp's cross motion seeking summary judgment should have been granted.[3]

Garry, P.J., Egan Jr., Pritzker and Reynolds Fitzgerald, JJ., concur.

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[3] With regard to Knapp, because the 15-foot wide original easement was not relocated and continues to run on the southern border of lot No. 7, 10 feet of it runs over land that was conveyed in the 1966 transaction and is owned by a nonparty. Knapp only moved for a declaration that he has easement rights over plaintiff's property, ameliorating any concerns that he failed to implead a necessary party (see Holst v Liberatore, 115 AD3d 1216, 1217 [2014]). To the extent that Knapp now seeks a declaration that he has a valid easement over the nonparty's property as well, that argument is improperly raised for the first time on appeal and will not be considered (see Burns v Childress, 189 AD3d 1939, 1940 n 2 [2020]).

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as denied that part of defendant George S. Knapp's cross motion for summary judgment (1) dismissing the complaint against him and (2) granting his counterclaim and cross claim; cross motion granted to that extent, and it is declared that the easement described in the deed of William A. Bacas to Louis J. Didio dated December 3, 1965 is valid insofar as it runs over plaintiff's property; and, as so modified, affirmed.

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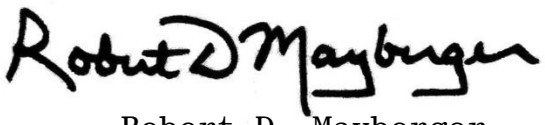

Robert D. Mayberger
Clerk of the Court