Fenton v Floce Holdings LLC

2022 NY Slip Op 34836(U)

November 15, 2022

Supreme Court, Nassau County

Docket Number: Index No. 616053/2021

Judge: David P. Sullivan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID P. SULLIVAN
Supreme Court Justice

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JEREMY STUART FENTON,

Plaintiff,

FORECLOSURE PART

INDEX NO.: 616053/2021
Motion Seq. Nos.: 001,002,003
Motion Date: 6/9/22

-against-

FLOCE HOLDINGS LLC, NASSAU COUNTY CLERK,

Defendants.

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Upon the foregoing e-filed documents, the applications interposed by the plaintiff, Jeremy Stuart Fenton, for an order pursuant to CPLR §§ 6301 and 3025 (b) granting a preliminary injunction and leave to amend the within complaint (Sequence #001,003) and the motion interposed by the defendant, Floce Holdings LLC [hereinafter Floce], for an order pursuant to CPLR §§ 3211 (a) (1) and (7) dismissing the complaint (Sequence #002), are determined as set forth hereinafter.

The plaintiff and defendant are adjoining owners of real property located within the City of Long Beach. The parcel owned by defendant, Floce, is landlocked. By a Judgment issued after trial, and entered April 1, 1986, Floce's predecessor in interest was granted "an easement over the northeast corner" of the property presently owed by the plaintiff for the purpose of vehicular ingress and egress [hereinafter the 1986 Judgment]. The 1986 Judgment also permanently enjoined the plaintiff's predecessor in interest from interfering with the easement recognized thereby.

On December 23, 2021, the plaintiff commenced the underlying action setting forth causes of action seeking relief declaring the 1986 Judgment to be invalid and that any easement created thereby to have been abandoned. The plaintiff now moves for, inter alia, a preliminary injunction in opposition to which the defendant moves for an order dismissing the within complaint.

As to the plaintiff's application, in order "[t]o obtain a preliminary injunction, the moving party must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor" (*Zoller v HSBC Mortg. Corp. (USA),* 135 AD3d 932, 933 [2d Dept 2016]).

As to the defendant's application, to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR § 3211 (a) (1), "the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Gould v Decolator*, 121 AD3d 845, 847 [2d Dept 2014]). "In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable" (*Granada Condo. III Ass'n v. Palomino*, 78 AD3d 996, 996–97 [2d Dept 2010][internal quotation marks omitted]). As to a motion to dismiss interposed pursuant to CPLR § 3211 (a) (7), the Court must "'accept the facts as alleged in the cotmplaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007] quoting *Leon v Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The plaintiff's First, Second, Sixth and Seventh causes of action seek an order declaring that the easement is unenforceable and invalid as it was never properly recorded. The well established doctrine of "[r]es judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently re-litigating any questions that were already decided" (*B.Z. Chiropractic, P.C. v Allstate Ins. Co.*, 197 AD3d 144, 152 [2d Dept 2021]). While "'the term privity does not have a technical and well-defined meaning'", it "'includes those who are successors to a property interest'" (*Matter of Juan C. v Cortines*, 89 NY2d 659, 667 [1997] quoting *Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]). Here, the plaintiff's predecessor in interest had a full and fair opportunity to litigate the validity of the easement recognized by the 1986 Judgment and accordingly is now precluded from revisiting those matters determined thereby (*id.*; *B.Z. Chiropractic, P.C. v Allstate Ins. Co., supra* at 152).

The plaintiff's Third and Eighth causes of action seek an order declaring the easement to be invalid as the 1986 Judgment was not submitted within 10 days of the Memorandum Decision which preceded same. Here, the Memorandum Decision dated, December 20, 1985, directed that the Judgment be submitted "on ten (10) days notice" and *not* within ten days of the date of the Memorandum Decision. Moreover, even assuming, as is argued by the plaintiff, that the 1986 Judgment was submitted beyond the 60 day time period as set forth in 22 NYCRR 202.48, the court has discretion to accept a judgment beyond the prescribed time frame (*Curanovic v Cordone*, 134 AD3d 978, 979 [2d Dept 2015]).

The plaintiff's Fourth and Ninth causes of action seek an order declaring that the easement has been abandoned. As set forth in the complaint, the plaintiff alleges that the defendant abandoned the easement as the property referable to which it was issued was not being used between 2016 and 2020. "'[W]here an abandonment of an easement is relied upon, there

must be clear and convincing proof of an intention in the owner to abandon it as such'", independent of mere non-use (*Castle Assoc. v Schwartz*, 63 AD2d 481, 487 [2d Dept 1978] quoting *Hennessy v Murdock*, 137 NY 317, 326 [1893];*Will v Gates*, 254 AD2d 275, 276 [2d Dept 1998]). Here, given the plaintiff's failure to either establish or plead the defendant's intent to abandon the easement, the Fourth and Ninth causes of action are not cognizable (*id.*).

The plaintiff's Fifth cause of action and "Tenth Counterclaim" demand an order declaring the easement to be "discharged" and unenforceable pursuant to RPAPL § 1951, which provides, in relevant part, that "[n]o restriction on the use of land created at any time by covenant, promise or negative easement, . . . shall be enforced by injunction or judgment compelling a conveyance of the land burdened by the restriction or an interest therein, nor shall such restriction be declared or determined to be enforceable, if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement . . ." As noted, the defendant's parcel is landlocked and the easement at issue herein was granted so as to permit the defendant the "substantial benefit" of the only means by which it can achieve vehicular ingress and egress. As such the statute, by its very terms, is inapplicable.

The Tenth cause of action seeks an order permanently enjoining the defendant from "accessing the Plaintiff's Property in any for [sic] or manner." While "'it is permissible to plead a cause of action for a permanent injunction, permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted'" (*Fika Midwifery PLLC v Ind. Health Assn., Inc.*, 208 AD3d 1052, 1055-56 [4th Dept 2022] quoting *Hogue v. Village of Dering Harbor*, 199 AD3d 900, 902-903[2d Dept 2021][internal quotation marks omitted]). Consonant with the Court's above determinations, the plaintiff cannot sustain the Tenth cause of action and concomitantly the affirmative relief pursuant to CPLR §§ 6301 is equally unavailable (*Zoller v HSBC Mortg. Corp. (USA), supra* at 933).

Finally, the Court addresses that portion of the plaintiff's application seeking leave to amend the complaint. "'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" (*Oppedisano v D'Agostino*, 196 AD3d 497, 498 [2d Dept 2021] quoting *Wells Fargo Bank, N.A. v Spatafore*, 183 AD3d 853, 853 [2d Dept 2020][internal quotation marks omitted]). "The determination to permit or deny amendment is committed to the sound discretion of the trial court" (*US Bank N.A. v. Murillo*, 171 AD3d 984, 986 [2d Dept 2019]). Here, having reviewed the parties' arguments, the Court finds the defendant has established that the plaintiff's proposed amendments and augmented factual allegations to be devoid of merit (*id.*).

Based upon the foregoing, it is hereby

ORDERED, that the applications interposed by the plaintiff, Jeremy Stuart Fenton, for an order pursuant to CPLR §§ 6301 and 3025 (b) granting a preliminary injunction and leave to amend the within complaint, are hereby DENIED (Sequence #001,003); and it is further

ORDERED, that the application interposed by the defendant, Floce Holdings LLC, for an order pursuant to CPLR §§ 3211 (a) (1) and (7) dismissing the complaint, is hereby GRANTED in its entirety (Sequence #002).

The foregoing constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

ENTER

Dated: NOVEMBER 15, 2022
Mineola, New York

HON. DAVID P. SULLIVAN, J. S. C.

ENTERED
Nov 30 2022
NASSAU COUNTY
COUNTY CLERK'S OFFICE