

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

478

CA 16-01721

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

RICHARD J. WALLENHORST, II, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JAMES R. WALLENHORST, MICHAEL R. WALLENHORST,
SHELIA WALLENHORST, RICHARD J. WALLENHORST, RITA
WALLENHORST, ELAINE L. BERG, CARL B. ARNOLD, RICK
MAIER, DEFENDANTS-RESPONDENTS,
AND THOMAS N. PRIME, JR., DEFENDANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

ANTONUCCI LAW FIRM LLP, WATERTOWN (DAVID P. ANTONUCCI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS JAMES R. WALLENHORST, MICHAEL R. WALLENHORST,
SHELIA WALLENHORST, RICHARD J. WALLENHORST, RITA WALLENHORST AND RICK
MAIER.

Appeal from an order of the Supreme Court, Jefferson County
(James P. McClusky, J.), entered May 4, 2016. The order denied
plaintiff's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting the motion in part and
dismissing the third counterclaim of defendants James R. Wallenhorst,
Michael R. Wallenhorst, Shelia Wallenhorst, Richard J. Wallenhorst,
Rita Wallenhorst, and Rick Maier, and as modified the order is
affirmed without costs.

Memorandum: This action arises out of the use of beach property,
also referred to as lot 28, that is owned by plaintiff and defendants
as tenants in common. Plaintiff constructed a concrete retaining wall
and deck pavers on a portion of the property, and thereafter commenced
this action seeking a declaration confirming his right to construct
the wall, thereby preventing defendants from damaging or interfering
with his use of the wall. Plaintiff moved for summary judgment
seeking, inter alia, the above declaration and dismissal of the second
and third counterclaims of James R. Wallenhorst, Michael R.
Wallenhorst, Shelia Wallenhorst, Richard J. Wallenhorst, Rita
Wallenhorst, and Rick Maier (defendants). Supreme Court denied the
motion.

We agree with plaintiff that the court erred in denying that part
of his motion seeking dismissal of defendants' third counterclaim,

which alleges breach of contract, and we therefore modify the order accordingly. Plaintiff met his initial burden on the motion by establishing, inter alia, that there is no homeowners' association relating to the joint ownership of the beach property and that there is no written or oral agreement regarding any expenses associated with the property, and defendants failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). We otherwise affirm the order for reasons stated in the decision at Supreme Court.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court