

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEORGE R. PECK

Supreme Court Justice

X TRIAL/IAS, PART 16
NASSAU COUNTY

DONALD ANSON and JUNE ANSON,

Plaintiffs,

INDEX NO. 8375-2015
MOTION SEQ. 005 & 006
MOTION SUBMIT
DATE 3-6-18

-against-

INCORPORATED VILLAGE OF FREEPORT,
A municipal corporation organized and existing
under the laws of the State of New York,
Defendants.

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Motion by plaintiff, Donald Anson and June Anson, for an order granting leave to renew its prior motion for summary judgment or granting the instant motion for summary judgment dismissing the first, second and third causes of action of the complaint pursuant to CPLR§3211(a)(5) and (7) and General Municipal Law § 50-i is denied.

Cross-motion by defendant, Incorporated Village of Freeport, for an order pursuant to CPLR §2221 granting an order for leave to renew its prior motion for summary judgment or granting summary judgment against the Plaintiffs.

The complaint advances the following three causes of action:

- “(i) The First Cause of Action seeks, under Article 15 of the New York Real Property Actions and Proceedings Law, a judicial declaration of the parties’ respective rights and obligations under the Drainage Easement (see [Complaint] ¶¶ 74-75);
- (ii) The Second Cause of Action seeks associated injunctive relief compelling defendant to maintain in proper and safe condition the Perpetual Easement Premises and to repair defendant’s wooden bulkhead located within the Perpetual Easement Premises (see [Complaint] ¶¶ 76-79); and

- (iii) the Third Cause of Action seeks associated injunctive relief restraining defendant from discharging storm water directly on to plaintiffs' real property (see [Complaint] ¶¶ 80-84)."

The Drainage Easement dated September 6, 1961 provides, in pertinent part, that the Village has "the right and privilege to construct and maintain one underground storm water drain and one tide gate accessory thereto, for drainage purposes, in and on the perpetual easement premises hereinafter described, and also the right and privilege at all times to replace and repair the said storm water drain and tide gate, and to do whatever acts may be necessary and proper in, under, over, through and across the said easement premises hereinafter described in installing, laying, repairing, replacing, maintaining and operating the said storm water drain and tide gate, and keeping up the flow of water through the said storm water drain and tide gate. This grant is not intended to convey a fee, but only an easement in perpetuity for the purposes aforesaid, and the use of said rights and privileges is to be restricted substantially to the permanent easement premises as hereinafter described, with the right of ingress and egress under, over, through and across the said easement premises for the purpose aforesaid, together with all rights and privileges incident and necessary to the enjoyment of this grant. The said perpetual easement shall run with the land."

By reason of the Anson Deed, plaintiffs are the successors-in-title to the grantors under the Easement.

The perpetual easement premises is described in the Easement as follows:

"All that certain plot, piece or parcel of land, situate, lying and being in the Incorporated Village of Freeport, County of Nassau, State of New York which is more particularly bounded and described as follows:

Beginning at a point in the southerly line of Roosevelt Avenue (Queens Street) distant 186.59 feet westerly from the westerly line of South Long Beach Avenue when measured along the southerly line of Roosevelt Avenue (Queens Street), said point being in the northerly line of Lot No. 387, as shown on the "Map of Randall Bay Estates, Section No. 2 Freeport, N. Y."; thence south 36°

12' 25" west and along a line that cuts diagonally across the dividing line between Lot No. 387 and Lot No. 388, as shown on the "Map of Randall Bay Estates, Section No. 2, Freeport, N.Y.", a distance of 65.15 feet to a point in the southerly line of Lot No. 388 aforesaid, which said line is also the northerly line of Randall Bay; thence north 57° 39' west and along the southerly line of Lot No. 388 aforesaid and along the northerly line of Randall Bay, a distance of 10.02 feet; thence north 36° 12' 25" east, a distance of 65.15 feet to a point in the southerly line of Roosevelt Avenue (Queens Street), which said point is also in the northerly line of Lot No. 388 aforesaid; thence south 57° 39' east and along the southerly line of Roosevelt Avenue (Queens Street) aforesaid, and along the northerly lines of Lot No. 388 and Lot No. 387 aforesaid, a distance of 10.02 feet to the place of beginning."

Both are now requesting the court to decide motions for summary judgment. Some discovery has been conducted. The defendant's Superintendent of Public Works has been deposed.

Based upon the procedural course charted by the parties' motions, the Court may reach the merits of plaintiffs' claims.

The Village asserts, *inter alia*, it is not required to maintain a bulkhead which is not included in the obligations outlined in the easement; "[i]t is clear that it was the intent of the parties to require the defendant to maintain the drainage pipe and not to maintain the bulkhead which is not referenced in the easement;" (¶ 5 of Reply and Affirmation in Opposition to the Plaintiffs' Motion for Summary Judgment) and plaintiffs failure to file a timely verified notice of claim as required by CPLR §9802 necessitates dismissal of the complaint.

In support of the cross-motion, plaintiffs contend, *inter alia*, that "defendant's construction of 90 linear feet of bulkhead on plaintiffs' property was and is a reasonable and incidental use of the rights and privileges granted under the drainage easement" On a motion for summary judgment, the moving party has the burden to establish "a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of

fact” (*Voss v Netherlands Ins. Co.*, 22 NY2d 728 [2014], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*Jacobsen v New York City Health & Hosps. Co.*, 22 NY3d 824 [2014], quoting *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). If the moving party meets this burden, the burden then shifts to the non-moving party to “establish the existence of material issues of fact which require a trial of the action” (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

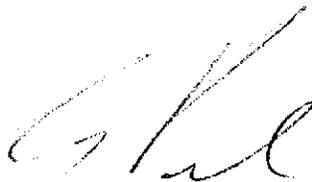
Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party’s papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 852 [1985]). The motion court is required to accept the opponents’ contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulate Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, “[t]he courts function on a motion for summary judgment is ‘to determine whether material factual issues exist, not to resolve such issues (citations omitted)’ ” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Based upon the record submitted, this Court finds that the defendant, Village of Freeport has established its *prima facie* entitlement to judgment as a matter of law. The village has shown that the bulkhead is not part of the drainage easement. The village is not responsible for the repair, maintenance or replacement of the wooden bulkhead located at or near the perpetual easement.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: April 30, 2018
Mineola, New York

ENTER:



HONORABLE GEORGE R. PECK, J. S.C.

ENTERED

MAY 01 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE