

JOSEPH M. TROSAN and BARBARA L. TROSAN,

Plaintiffs,

- against -

DECISION and ORDER

RJI # 45-1-2008-1265

Index #2008-1759

GALWAY LAKE CAMPERS' ASSOCIATION, INC.,
LAWRENCE HELLER and ROBERT HELLER as
the sole distributees of OWEN JEFFERS, deceased
and CHARLOTTE A. JEFFERS, deceased,

Defendants.

APPEARANCES

Hoffman & Naviasky, PLLC
Attorneys for the Plaintiffs
1802 Eastern Parkway
Schenectady, New York 12309

Peterson & Thomas, P.C.
Attorneys for the Defendant Galway Lake Campers Association
49 Burlington Avenue
P.O. Box 578
Round Lake, New York 12151

STEPHEN A. FERRADINO, J.

The defendant Galway Lake Campers Association (hereinafter GLCA) has requested an order of this court pursuant to CPLR § 6301 enjoining the plaintiffs or their agents from removing the chain link fence installed by GLCA on Lot Number 22 abutting Galway Lake. The plaintiffs have cross-moved requesting an order of this court pursuant to CPLR § 6301 compelling GLCA to remove the chain link fence erected across Lot 22 and further enjoining GLCA from erecting any barrier and dismissing

GLCA's motion in its entirety. GLCA has opposed the cross-motion.

Galway Lake is a small private lake located in Saratoga County. GLCA contends that it purchased the lake property including the dam and spillway in 1980. As owner GLCA has been responsible for upkeep and maintenance of the lake. Additionally GLCA has paid the taxes on the lake property and insurance. GLCA receives dues and assessments from the property owners surrounding the lake to pay for the aforementioned expenses. The property owners' dues and assessments entitle them to use and enjoyment of the lake. This relationship between property owners and GLCA has worked well and been unchallenged for over twenty-five years.

The plaintiffs have commenced an action to challenge the GLCA's exclusive ownership of the lake. The plaintiffs seek the following relief, a declaration that Lot 22 is owned by the plaintiffs in fee by virtue of adverse possession or alternatively that they have prescriptive easement rights over Lot 22, that GLCA be directed to remove the existing fence and be barred from erecting any barrier to deny the plaintiffs access to Galway Lake for their use and enjoyment, and that the plaintiffs have the right to use the lake and have established ownership in fee to the area occupied by the dock that extends from Lot 22 into the lake. GLCA has answered and raised various affirmative defenses.

The Court has conferenced the matter in an attempt to assist the parties in reaching an amicable resolution of the matter. The plaintiffs have rejected any and all suggestions or offers to resolve this case. As a result the court will decide the pending motions.

It is well settled that a preliminary injunction, the purpose of which is to preserve the status quo pending resolution of the underlying dispute is a drastic remedy and imposes upon the party seeking such relief the burden of demonstrating a likelihood of success

on the merits, irreparable harm absent the issuance of the requested injunction and a balancing of the equities in his or her favor. *Bonnieview Holdings Inc. v Allinger*, 263 AD2d 933 [1999].

The plaintiffs have failed to provide sufficient proof to sustain their request for an order compelling the defendant to remove the fence it installed and dismissing GLCA's motion for a temporary restraining order. While the record is not well developed the plaintiffs have not demonstrated a likelihood of success in proving their adverse possession claims. To establish a claim of adverse possession, the following five elements must be proved by clear and convincing evidence: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period. *Walling v Przybylo*, 7 NY3d 228 [2006]. In particular it appears the plaintiffs will be unable to prove exclusive use as other property owners have deeded access to the lake over Lot 22.

The plaintiff's claim of an easement has potential for success. "The proponent of a prescriptive easement claim bears the burden of proving, by clear and convincing evidence, hostile, open, notorious and continuous use over the other's land for the prescriptive period." *Sadowski v Taylor*, 56 AD3d 991 [2008]. The plaintiffs have submitted a copy of their corrective deed for the Lakeview Inn granting a right-of-way across Lot 22 to the lake. The record reveals the plaintiffs paid their dues for some period of time and then stopped. The record does not reveal the rationale behind their decision to discontinue payment. The GLCA's indulgence of the plaintiffs' default has been more than generous. This is a small lake whose community of property owners provide the necessary financial support to enhance all users enjoyment of the lake.

The plaintiffs' motion for preliminary injunctive relief is denied. The defendant

GLCA's motion is granted in part. The plaintiffs' cross-motion is denied. During the course of this litigation the plaintiffs shall be provided access to the lake upon payment of all of their dues due and owing to the GLCA. GLCA is to provide access either by means of a gate in the existing fence or removal of the fence. The plaintiffs are enjoined from removing or defacing the fence on Lot 22.

Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the order of the Court. The original papers shall be forwarded to the attorney for the defendant GLCA for filing and entry.

Dated: February 4, 2009

Malta, New York



STEPHEN A. FERRADINO, J.S.C.

Papers Received and Considered:

Order to Show Cause

Affidavit of Michael Cseh, sworn to August 11, 2008

Affidavit of Neil W. Cayey, sworn to July 28, 2008

Notice of Cross-Motion dated September 2, 2008

Affidavit of Richard Trosan, sworn to September 2, 2008 with attached Exhibit 1

Affirmation of Laurence Naviasky, Esq., dated August 29, 2008 with attached Exhibits A-B

Affirmation of Alison C. Thomas, Esq., with attached Exhibits A-F

Affidavit of Joseph Gorecki, sworn to September 15, 2008

Affidavit of Jeremiah Glen Rundell, sworn to September 16, 2008 with attached Exhibits A-B

Reply Affirmation of Laurence Naviasky, Esq., dated September 18, 2008 with attached

Exhibit A

Summons and Complaint

Answer with Affirmative Defenses and Counterclaims

Answer with Affirmative Defenses

Reply