



ACTION TO ENFORCE AN EASEMENT/COST SHARING AGREEMENT



WESTCHESTER COUNTY, NY:

Highland Meadows Senior Housing Development Fund Company, Inc., v. Westchester County Health Care Corp., 226 A.D.3d 883 (2d Dept. 2024). Decided April 17, 2024.

The parties own adjoining parcels that are each encumbered by a reciprocal easement agreement concerning an O-shaped private road providing access to the parcels. The easement agreement contains a cost-sharing provision stating that the defendant shall pay 51.4% of the actual costs for: (1) “any maintenance, repairs or service” that is “required to sustain and extend the useful life of the Common Access Drive, and keep the Common Access Drive useable and open for safe vehicle passage,” and (2) “any action relating to the Common Access Drive which may be required by any law, regulation, ordinance or governmental authority.” The easement agreement provides that for any improvements costing more than \$10,000, the plaintiffs are required to provide notice and a description of the work to the defendant for its concurrence in the proposed work, “which concurrence shall not be unreasonably withheld, conditioned or delayed.”

In 2016, the plaintiffs sent notice to the defendant describing proposed work on the common access drive totaling \$480,997.17 and stating that the defendant's 51.4% share was \$247,232.55. The proposed work included work to reclaim the existing pavement, install foundation, binder, and top course, seal and stripe, as well as work to install new curbing, signage, and lighting along the common access drive. Defendant objected and stated that it was not responsible for the costs of the proposed work because it was not included in the scope of the easement agreement.

Plaintiffs commenced this action alleging a breach of the easement agreement for defendant's failure to concur with the proposed work and to pay 51.4% of the costs of the work to the common access drive. Plaintiffs moved for summary judgment on the complaint. The defendant argued that the easement agreement only included routine maintenance items. The lower court denied plaintiffs' motion. Plaintiffs appeal. The Second Department provided law on easement disputes.

When determining a dispute based on an easement agreement, a court must first look to the language of the easement agreement. As with any contract, unambiguous provisions of an easement agreement must be given their plain and ordinary meaning, the parties' intent must be found within the four corners of the document, and interpretation is a question of law for the court (citations omitted).

(Continued on next page)



ACTION TO ENFORCE AN EASEMENT/COST SHARING AGREEMENT (CONTINUED)



The Second Department pointed out that the parties conceded that there was no ambiguity as to the plain meaning of the cost-sharing provision that required the defendant to pay 51.4% of the costs associated with maintaining, repairing, and servicing the common access drive. As a result, the Second Department, inter alia, modified the lower court's order and granted plaintiffs summary judgment on liability related to the work to reclaim the existing pavement, install foundation, binder and top course, seal and stripe; declaring that this work was covered by the easement agreement and that defendant must pay for his share of those categories of work. Contrary to the defendant's contention, the Second Department found that the easement agreement also included any costs associated with reconstructing, regraveling, and repaving the common access drive in order to sustain and extend its useful life and keep it useable and open for safe vehicle passage. However, the Second Department held that plaintiffs failed to establish that the costs related to signage, lighting and curbing were covered by the Easement Agreement's cost sharing provisions.

Major takeaway – A buyer must always review easements before purchasing a property so that it is aware of the rights and obligations to be assumed. Buyers do not want to be surprised for costs and obligations after closing.

226 A.D.3d 883

Supreme Court, Appellate Division, Second
Department, New York.

HIGHLAND MEADOWS SENIOR HOUSING
DEVELOPMENT FUND COMPANY, INC., et al.,
appellants,

v.

WESTCHESTER COUNTY HEALTH CARE
CORPORATION, respondent.

2020-01212

(Index No. 61400/17)

Argued—October 19, 2023

April 17, 2024

Synopsis

Background: Owners of property that, together with adjoining property, was encumbered by a reciprocal easement deceleration, restrictive covenant, and consent agreement brought action against adjoining property's owner, asserting claims for breach of easement agreement's terms regarding cost-sharing provisions for common access drive and for a judgment declaring that, pursuant to the agreement, adjoining owner was responsible for 51.4% of the costs of owners' proposed work on the drive. Adjoining owner asserted affirmative defense that it was not bound by the agreement because it did not run with the land. The Supreme Court, Westchester County, [Gerald E. Lochr, J.](#), denied owners' motion for summary judgment. Owners appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- [1] dismissal of affirmative defense was warranted;
- [2] owners established their prima facie entitlement to judgment as a matter of law as to costs for work on drive's surface and subsurface;
- [3] affidavit and report submitted by adjoining owner was insufficient to raise triable issue of fact as to costs for work on drive's surface and subsurface;
- [4] owners failed to establish their prima facie entitlement

to judgment as a matter of law as to costs related to new signage, lighting, and curbing for the drive; and

[5] record was insufficient to establish the actual cost of the work for which owners demonstrated their entitlement to summary judgment, requiring remittal to trial court for a hearing on damages.

Affirmed as modified and remitted.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (9)

[1] Easements By express grant or reservation

When determining a dispute based on an easement agreement, a court must first look to the language of the easement agreement.

[2] Easements By express grant or reservation Easements Trial

As with any contract, unambiguous provisions of an easement agreement must be given their plain and ordinary meaning, the parties' intent must be found within the four corners of the document, and interpretation is a question of law for the court.

[3] Pretrial Procedure Property in general; deeds and leases; eminent domain

Dismissal was warranted of adjoining property owner's affirmative defense alleging that it was not bound by reciprocal easement agreement because it did not run with the land, in property owners' action asserting that adjoining owner breached the agreement, where adjoining owner

conceded that it was bound by the agreement.

[4] Easements → Maintenance and repair

Cost-sharing provision in easement agreement, which governed costs relating to common access drive that provided access to property and adjoining property, both of which were encumbered by the easement, unambiguously required adjoining property's owner to pay 51.4% of the costs associated with maintaining, repairing, and servicing the drive, including routine maintenance and any costs associated with reconstructing, regravelling, and repaving in order to sustain and extend the drive's useful life and keep it useable and open for safe vehicle passage, and thus provision was to be given its plain and ordinary meaning, in property owners' action alleging that adjoining owner breached the agreement.

[5] Summary Judgment → Easements

On motion for summary judgment on property owners' claim for breach of easement agreement's cost-sharing provision regarding a common access drive that provided access to property and adjoining property, affidavit and report from professional engineer submitted by owners was sufficient to establish their prima facie entitlement to judgment as a matter of law with respect to adjoining owner's withholding its concurrence and refusing to pay its share of costs for work on drive's surface and subsurface; engineer observed deterioration on drive's surface and opined that upper layers would continue to exhibit surface failures and that proposed work was required to repair drive, demonstrating that the costs were required to sustain and extend drive's useful life, as required to fall under cost-sharing provision.

[6] Summary Judgment → Easements

On motion for summary judgment on property owners' claim for breach of easement agreement's cost-sharing provision regarding a common access drive that provided access to property and adjoining property, affidavit and report from professional engineer submitted by adjoining owner was insufficient to raise a triable issue of fact as to adjoining owner's breach for withholding its concurrence and refusing to pay its share of costs for work on drive's surface and subsurface; engineer conceded that a portion of the work was covered by the provision, and for the remainder of the work, engineer's opinion was conclusory and failed to rebut assertions of owners' engineer that substandard material and deficient thickness of drive's subsurface needed to be corrected to address reason for its failing surface.

[7] Evidence → Weight and Sufficiency as to Particular Subjects of Expert Evidence
Summary Judgment → Easements
Summary Judgment → Conclusions

On motion for summary judgment on property owners' claim for breach of easement agreement's cost-sharing provision regarding common access drive that provided access to property and adjoining property, expert affidavits submitted by owners were conclusory and were therefore insufficient to establish their prima facie entitlement to judgment as a matter of law with respect to costs related to new signage, lighting, and curbing for the drive; experts stated that the new features were required by the city, but they did not cite any provision of the city's codes or regulations, nor did they cite or provide any direction from the city substantiating the statements.

[8] Easements → Damages

WOOTEN, DEBORAH A. DOWLING, JJ.

Amount of damages sustained by property owners as a result of adjoining owner's breach of easement agreement by failing to pay its share of work to improve the surface of common access drive by reclaiming existing pavement, installing foundation, binder, and top course, sealing, and striping was the amount that would place owners in the same position as they would have been in if agreement had not been breached, requiring a determination of the actual cost of the work, where purpose of the agreement was to require adjoining owner to pay 51.4% of the actual cost of the work to maintain the drive.

[9] Appeal and Error — Damages or other relief

Upon appellate court's partial reversal of the denial of summary judgment to property owners on a portion of their claim against owner of adjoining property alleging that adjoining owner breached easement agreement's cost-sharing provision regarding common access drive that provided access to property and adjoining property, record was insufficient to establish the actual cost of the work for which owners demonstrated their entitlement to summary judgment, requiring remittal to trial court for a hearing on damages, where record was unclear whether the work performed by owners that was covered by cost-sharing provision could have been done at another cost.

Attorneys and Law Firms

The Law Offices of Patrick J. Higgins, PLLC (Mischel & Horn, P.C., New York, NY [Scott T. Horn and Lauren E. Bryant], of counsel), for appellants.

Morrison Cohen LLP, New York, NY (Y. David Scharf, Kristin T. Roy, and Michael Mix of counsel), for respondent.

MARK C. DILLON, J.P., ROBERT J. MILLER, PAUL

DECISION & ORDER

****1 *883** In an action to recover damages for breach of an easement agreement and for declaratory relief, the plaintiffs appeal from an order of the Supreme Court, Westchester County (Gerald E. Loehr, J.), entered December 30, 2019. The order, insofar as appealed from, denied those branches of the plaintiffs' motion which were for summary judgment on the complaint and dismissing the defendant's second affirmative defense.

ORDERED that the order is modified, on the law, by deleting the provisions thereof denying those branches of the plaintiffs' motion which were for summary judgment (1) on the issue of liability on so much of the cause of action to recover damages for breach of the easement agreement as related to work on the common access drive to reclaim existing pavement; install foundation, binder, and top course; seal; and stripe, (2) declaring that this work is covered by the easement agreement and that the defendant is required to pay its 51.4% share of costs related to those categories of work, and (3) dismissing the second affirmative defense, and substituting therefor provisions granting those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings, including a hearing on the issue of damages in accordance herewith, and thereafter for the entry of a judgment, inter alia, making appropriate declarations in accordance herewith.

The plaintiffs and the defendant own adjoining parcels of property in Beacon that are both encumbered by a reciprocal easement deceleration, restrictive covenant, and consent agreement dated November 13, 2013 (hereinafter the easement agreement). The easement agreement concerns, inter alia, an O-shaped private road that provides access to both parties' parcels (hereinafter the common access drive). The easement ***884** agreement contains a cost-sharing provision stating that the defendant shall pay 51.4% of the actual costs for (1) "any maintenance, repairs or service" that is "required to sustain and extend the useful life of the Common Access Drive, and keep the Common Access Drive useable and open for safe vehicle passage," and (2) "any action

relating to the Common Access Drive which may be required by any law, regulation, ordinance or governmental authority.” The easement agreement provides that for any improvements to the common access drive costing more than \$10,000, the plaintiffs are required to provide notice and a description of the work to the defendant for its concurrence in the proposed work, “which concurrence shall not be unreasonably withheld, conditioned or delayed.”

In October 2016, the plaintiffs sent notice to the defendant describing proposed work on the common access drive totaling \$480,997.17 and stating that the defendant’s 51.4% share was \$247,232.55. The plaintiffs listed the items of work being proposed, including, among other things, work to reclaim the existing pavement; install foundation, binder, and top course; seal; and stripe, as well as work to install new curbing, signage, and lighting along the common access drive. In a letter in response, the defendant stated that it was not responsible for the costs of the proposed work because the proposed work was not included in the scope of the easement agreement. After the exchange of additional letters in which the parties did not change their position, the plaintiffs commenced this action against the defendant to recover damages for breach of the easement agreement and for declaratory relief. The first cause of action alleged that the defendant breached the easement agreement by failing to concur with the proposed work on the common access drive and failing to pay for 51.4% of the costs of that work. The second cause of action sought a judgment declaring that the defendant is responsible for 51.4% of the costs of the proposed work on the common access drive pursuant to the easement agreement, plus an award of attorneys’ fees, costs, and expenses incurred in this action. In its answer, the defendant asserted, as a second affirmative defense, that it was not bound by the easement agreement because it does not run with the land.

****2** Following the completion of discovery, the plaintiffs moved, inter alia, for summary judgment on the complaint and dismissing the defendant’s second affirmative defense. In an order entered December 30, 2019, the Supreme Court, among other things, denied those branches of the plaintiffs’ motion, concluding that triable issues of fact precluded an award of summary judgment. The plaintiffs appeal.

***885** ^[1] ^[2]When determining a dispute based on an easement agreement, a court must first look to the language of the easement agreement. As with any contract, unambiguous provisions of an easement agreement must be given their plain and ordinary meaning, the parties’ intent must be found within the four

corners of the document, and interpretation is a question of law for the court (see *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 760, 114 N.Y.S.3d 100; *Goodman v. CF Galleria at White Plains, LP*, 39 A.D.3d 588, 589, 833 N.Y.S.2d 617).

^[3]Here, the Supreme Court should have granted that branch of the plaintiffs’ motion which was for summary judgment dismissing the defendant’s second affirmative defense, alleging that the defendant is not bound by the easement agreement because it does not run with the land, as the defendant concedes that it is bound by the easement agreement (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

^[4]Moreover, as the parties concede, there is no ambiguity as to the plain and ordinary meaning of the cost-sharing provision in the easement agreement that required the defendant to pay 51.4% of the costs associated with maintaining, repairing, and servicing the common access drive. Contrary to the defendant’s contention, the easement agreement did not include only routine maintenance items, but also included, inter alia, any costs associated with reconstructing, regravelling, and repaving the common access drive in order to sustain and extend its useful life and keep it useable and open for safe vehicle passage.

^[5]The plaintiffs established, prima facie, that the defendant breached the easement agreement by withholding its concurrence and refusing to pay its share of the costs for work on the common access drive to reclaim existing pavement; install foundation, binder, and top course; seal; and stripe. The plaintiffs’ evidentiary submissions demonstrated that these costs were included in the easement agreement’s cost-sharing provision because this work was “required to sustain and extend the useful life of the Common Access Drive, and keep the Common Access Drive useable and open for safe vehicle passage.” The plaintiffs submitted an affidavit and a report from a licensed professional engineer who observed deterioration on the surface of the common access drive, including numerous potholes, cracking, and moving and breaking asphalt. The engineer opined, based on coring samples of the common access drive, that because the subsurface material of the common access drive was substandard and of an insufficient thickness, the upper layers would continue to exhibit ***886** surface failures, and that the proposed work was appropriate and necessary to repair the common access drive.

^[6]In opposition, the defendant submitted an affidavit and a report from a professional engineer. Rather than raise a triable issue of fact, the defendant’s engineer conceded

that, at most, a portion of this work totaling \$77,178.11 was covered by the easement agreement's cost-sharing provision (see *Wize Eyes of Syosset, Inc. v. Turnpike Corp.*, 66 A.D.3d 884, 885, 888 N.Y.S.2d 88). For the portion of this work that the engineer did not concede was covered by the easement agreement, his opinion was conclusory, and he failed to rebut the assertions of the plaintiffs' engineer that the substandard material and deficient thickness of the common access drive's subsurface needed to be corrected to address the reason for its failing surface (see *Hanley v. City of New York*, 139 A.D.3d 800, 802, 32 N.Y.S.3d 261). Accordingly, the Supreme Court should have granted those branches of the plaintiffs' motion which were for summary judgment on the issue of liability on so much of the cause of action alleging breach of the easement agreement as related to work on the common access drive to reclaim existing pavement; install foundation, binder, and top course; seal; and stripe, and declaring that this work is covered by the easement agreement and that the defendant is required to pay its 51.4% share of costs related to those categories of work.

****3** ^[7]The plaintiffs, however, failed to establish, prima facie, that the costs related to signage, lighting, and curbing were covered by the easement agreement's cost-sharing provision requiring the defendant's contribution for work required by a law, regulation, ordinance, or governmental authority. The plaintiffs submitted affidavits from experts who stated that the new lighting, signage, and curbing were required by the City of Beacon, but these statements were conclusory because the experts did not cite any provision of the City's codes or regulations, nor did they cite or provide any direction from the City substantiating the statements (see *Zabawa v. Sky Mgt. Corp.*, 183 A.D.3d 430, 431, 123 N.Y.S.3d 577; *Hanley v. City of New York*, 139 A.D.3d at 802, 32 N.Y.S.3d 261). As the plaintiffs failed to meet their prima facie burden, we need not consider the sufficiency of the defendant's opposition papers with respect to these items of work (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

^[8] ^[9]The amount of damages sustained by the plaintiffs as

a result of the defendant's breach of the easement agreement with respect to work to improve the surface of the common access drive by reclaiming the existing pavement; installing foundation, binder, and top course; sealing; and striping is the ***887** amount that would place them "in the same position as [they] would have been in if the contract had not been breached" (*DRS Optronics, Inc. v. North Fork Bank*, 43 A.D.3d 982, 986, 843 N.Y.S.2d 124, quoting *Wai Ming Ng v. Tow*, 260 A.D.2d 574, 575, 688 N.Y.S.2d 647). Since the purpose of the easement agreement was to require the defendant to pay 51.4% of the "actual cost" of the work to maintain the common access drive, computation of the plaintiffs' damages requires a determination of the actual cost for this work. The record is insufficient to establish the actual cost for this work, as it is unclear whether the work performed by the plaintiffs covered by the easement agreement could be done at another cost. Accordingly, we remit the matter to the Supreme Court, Westchester County, for a hearing on damages with respect to items for which the plaintiffs established their entitlement to summary judgment on the issue of liability and, since this is, in part, a declaratory judgment action, for the entry of a judgment thereafter, inter alia, declaring that the aforementioned items of work are covered by the easement agreement and that the defendant is required to pay its 51.4% share of those associated costs to the plaintiffs (see *Lanza v. Wagner*, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670).

The parties' remaining contentions are without.

DILLON, J.P., MILLER, WOOTEN and DOWLING, JJ.,
concur.

All Citations

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