Brown v Town of Pitcairn

[*1] Brown v Town of Pitcairn 2004 NY Slip Op 51125(U) Decided on October 5, 2004 Supreme Court, St. Lawrence County Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 5, 2004
Supreme Court, St. Lawrence County

RANDY BROWN and PATRICIA BROWN, Plaintiffs,

against

TOWN OF PITCAIRN, GEORGE M. HART, LELAND RYAN, SUSAN SMITH, HELEN MANCHESTER, and ROD FRASER, Defendants.

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Conboy, McKay, Bachman & Kendall, LLP (Scott B. Goldie, Esq., of counsel), attorneys for Plaintiffs; Hancock & Estabrook, LLP (Wendy A. Marsh, Esq., of counsel), attorneys for Defendants.

David Demarest, J.
Defendants seek dismissal of Plaintiffs' complaint pursuant to New York C.P.L.R. 3211. The first cause of action alleges the Defendant Town of Pitcairn (hereinafter "Defendant Town" or "Town") improperly widened Vrooman Road, unlawfully appropriating Plaintiffs' real property; the second cause of action alleges Vrooman Road has been abandoned;

the third cause of action requests injunctions restraining Defendant Town's trespass and use of their real property; the fourth and final cause of action alleges civil rights violations under color of federal law pursuant to 42 U.S.C. §§1983, 1988, requesting recompense of the costs, expenses, and attorney fees associated with this lawsuit. Plaintiffs purchased their real property in 1987 and built their residence in 2001, the same year Vrooman Road was widened.

Defendants note this is Plaintiffs' third lawsuit against the Town. The prior two lawsuits successfully challenged the Town's Local Laws which permitted All Terrain Vehicle (ATV) travel on Town highways in accordance with New York VTL §2405. The Court takes judicial notice that Plaintiffs' prior lawsuits alleged, among other things, they were aggrieved by the Town Board's decision to permit ATV travel upon the dead-end Town road where they reside, i.e. Vrooman Road. Further, within the context of Plaintiffs' two challenges to the Town's Local Laws permitting ATV use on its highways, there was never any allegation, averment, or statement questioning or challenging the existence of Vrooman Road as a public highway.

Vrooman Road was one of twenty-five roads which were designated public highways pursuant to New York Town Highway Law §189 by formal resolution of the Pitcairn Town Board on November 7, 1963. Once a highway is established, it is presumed to continue. The proponent seeking abandonment of a highway by non-use bears the burden of proving its non-use for six years. Disparate recreational use by snowmobilers, [*2]bicyclists, cross country skiers and pedestrians has been held sufficient "use" to overcome a finding of abandonment by non-use. See Matter of Faigle v. Macumber, 169 A.D.2d 914 (3d Dep't 1991); Matter of VanAken v. Town of Roxbury, 211 A.D.2d 863 (3d Dep't 1995), lv. den. 85 N.Y.2d 812 (1995); Katz v. Town of Brookhaven, 15 A.D.2d 534 (2d Dep't 1961), app. den. 11 N.Y.2d 644 (1962); Smigel v. Town of Rensselaerville, 283 A.D.2d 863 (3d Dep't 2001), Town of Leray v. New York

Cent. R.R. Co., 226 N.Y. 109, 113 (1919). Even were Plaintiffs' assertions that Defendant Town failed to maintain Vrooman Road unassailed and they are by competent, admissible, evidentiary proof a municipality's failure to maintain a highway is not solely determinative of the issue of non-use. Id. It is notable that Plaintiffs failed to advance the theory of abandonment in their prior lawsuits. Even accepting the allegations as true and interpreting them in a light most favorable to Plaintiffs as must be done on a motion to dismiss Plaintiffs' second cause of action seeking to establish abandonment of Vrooman Road by the Town must fail.

While the Court acknowledges that in Jones v. Cederquist, 1 Misc. 2d 1020 (N.Y. Supreme Court, Chautauqua County, 1956), and VanAllen v. Town of Kinderhook, 47 Misc. 2d 955 (N.Y. Supreme Court, Columbia County, 1965), New York Highway Law §189 was interpreted to mean that the width of a public highway is determined by the extent of its use thus depriving the statute of its ordinary meaning these cases rely on dictum from Walker v. Caywood, 31 N.Y. 51 (1865), and People v. Sutherland, 252 N.Y. 86 (1929). See Desmond v. Town of Summit, 82 Misc.2d 669 (County Court, Scoharie County 1975). Specifically, the Van Allen court relied, in part, on the fact that Schillawski v. State of New York, 9 N.Y.2d 235 (1961), recited dictum from Sutherland, supra, that the width of a highway by user is determined by width of improvement.

In point of fact, Schillawski enlarged a road's width from 20 to 99 feet "...in accordance with the widely recognized rule that, where a highway is defectively laid out under color of statutory authority, it will be deemed to create a prescriptive right to the width prescribed by the statute, although greater than the extent of actual user." The statute, the Court said, "...was notice to all that the road was three rods in width on either side of the center line." Employing the same rationale (i.e. notice is afforded by statute) the court in Desmond held that "...section 189 of the Highway Law...is notice to all that the road being developed...by user, would

on passage of the statutory period [of use]...be a road at least three rods...in width." Desmond went on to hold that subsequent purchasers of property lying adjacent to an existing public highway may not be permitted to complain "when the town later makes use of its full statutory authorized easement to improve or reconstruct the road bed....as was done in Jones v. Cederquist ...and... VanAllen v. Town of Kinderhook...." Desmond at p. 674.
The court, in Desmond, cites to Ashland Oil & Refining Co. v. State of New York, 26 N.Y.2d 390 (1970), and Heyert v. Orange & Rockland Utilities, 17 N.Y.2d 352 (1966), and their reliance on the rule of law enunciated in James v. Sammis, 132 N.Y. 239 (1892). The holding in James was founded upon the common-law doctrine of dedication to the public by virtue of the real property owner's acquiescence in the public's use as a highway, together with the public authorities' maintenance efforts and improvements during the period of time for which title may be claimed by adverse possession. The court, in Heyert, noted that the acquiring of a town highway by user in accordance with Highway Law §189 was founded upon such common law and that it was not a conveyance of a fee, but rather transference of an easement to the public for purpose of a highway. In reliance on Heyert, the court in Desmond ascribed §189 with its ordinary meaning: after the ten-year statutory period of public use, a highway is a public highway with the same force and effect as if it had been duly laid out and recorded as a public highway, and the town superintendent shall open it to the width of at least three rods. Desmond further supports this interpretation of §189 by noting the Legislature's amendment in 1936: If the Legisla[*3]ture intended that the width of a highway should be governed by the width of user, there would have been no need for the Legislature to amend the Highway Law in 1936 to change the minimum width of a highway by user to 'at least three rods' from 'at least two rods'.Desmond at p. 675.[*4] The Third Department, in Flacke v. Strack, 98 A.D.2d 881 (1983), affirmed the St. Lawrence County Supreme Court's

holding, wherein Desmond was cited with approval: "...once a highway is established by public use, it should be opened and considered opened to the statutorily mandated width." Flacke v. Town of Fine, 113 Misc. 2d 56, 60.
Danial v. Town of Delhi, 185 A.D.2d 500 (3d Dep't 1992), and Hill v. Town of Horicon, 176 A.D.2d 1169 (3d Dep't 1991), both state that a town highway, designated as so by its use for the statutory period, is limited in width to the extent of its use. It is important to note, however, that in these cases, private individuals were attempting to compel towns to widen the roads to the statutory 3-rod minimum, thus foreclosing any finding that condemnation of private property was for a public purpose. Nor was there any evidence in either case that either road was a subject of a resolution deeming them 'public highways' by any town board.
It is important to note, the Pitcairn Town Board passed a resolution November 7, 1963 deeming, among others, Vrooman Road a public highway pursuant to New York Highway Law §189. As such, residents and landowners were provided record notice of the highway's existence. This fact, coupled with the lack of proof of its abandonment, permitted the Town Highway Superintendent to widen the road to three rods in pursuance of Highway Law §189. The easement's existence does not foreclose any ownership rights Plaintiffs may have acquired twenty-four years later. But rather, Plaintiffs' use(s) thereof are limited only by any such use which would be inconsistent with the Town's easement. Damages for things such as removal of obstacles to accomplish this task need not be recompensed.
Mindful that this is a motion to dismiss and not a summary judgment motion, the Court is not inclined to make any determination as to the original centerline of Vrooman Road on the record before it. Defendants failure to proffer admissible proof on this point either by way of a survey or first-hand knowledge sworn to in an affidavit made by someone who was involved in widening the road is not fatal. Defendants challenge is limited to the sufficiency of

Plaintiffs' pleading. A review of the complaint reveals allegations of an improper taking of Plaintiffs' property without compensation by virtue of the widening of Vrooman Road. There are no allegations that the widening was otherwise done with negligence or an intention to improperly relocate the road by shifting the centerline so as to unequally burden Plaintiffs' real property. In point of fact, the complaint at paragraph "12" states: "On or about April 17, 2001 the Town of Pitcairn Highway crews began widening the Vrooman Road and [*5]clearing its shoulders. The roadway surface was widened to twenty (20) feet. The shoulders were cleared of trees and brushes to more than fifteen feet on either side of the road." Coupled with Plaintiffs' assertion that even if it is the Town's right to open Vrooman Road to its statutory 3-rod width, the widening activities may only occur on the road's westerly side in accordance with the tax map, any belated argument as to the 'centerline' is contradicted by the pleadings.

In light of the above, the third and fourth causes of action are, likewise, dismissed. Notwithstanding dismissal of Plaintiffs' fourth cause of action, it should be noted that the Court of Appeals has recently held that money damages against a municipality under the federal civil rights statute, 42 U.S.C.A. §1983, premised upon 'due process' and/or 'equal protection' violations, are inappropriate in all cases but those involving "egregious conduct that implicates federal constitutional law." Bower Associates v. Town of Pleasant Valley and Home Depot, U.S.A., Inc. v. Dunn, 2 N.Y.3d 617 (May 13, 2004).

SO ORDERED DATED: October 5, 2004, at Chambers, Canton, New York.

DAVID DEMAREST, J.S.C. ENTER: