

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

Zwickel v. Underhill Land LLC

Zwickel, 2026 NY Slip Op 01106 (Supreme Court of the State of New York Appellate Division Third Department 2026) · No. CV-25-0114 · Decided February 26, 2026

SUMMARY

The Appellate Division, Third Department, affirmed an order declining to vacate a preliminary injunction concerning alleged encroachment and roadway improvements on property in Greene County, New York. The court held that defendants did not establish an express, implied, or prescriptive easement, or that the disputed road was a public highway. The court also upheld the \$165,000 undertaking, finding defendants' asserted damages and request for a \$1 million undertaking speculative and insufficiently supported.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Fisher, J.; Garry, P.J.; Ceresia, J.; McShan, J.; Mackey, J.
JURISDICTION	New York Supreme Court, Appellate Division, Third Department
DECIDED	February 26, 2026
DOCKET	CV-25-0114
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order partially denying defendants' motion to vacate or modify a preliminary injunction and to increase the associated undertaking.
STANDARD OF REVIEW	Whether to vacate or modify a preliminary injunction or its undertaking is committed to the sound discretion of Supreme Court and is reviewed for abuse or improvident exercise of discretion.
PRECEDENTIAL VALUE	published
PARTIES	Underhill Land LLC, Underhill RE Holding LLC v. Claire E. Zwickel et al., as Trustees

TOPICS

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easements

prescriptive easements

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Supreme Court abused its discretion by declining to vacate the preliminary injunction based on defendants' express, implied, prescriptive, or public-highway easement theories.
2. Whether Supreme Court abused its discretion by increasing the undertaking to \$165,000 rather than the \$1 million requested by defendants.

HOLDINGS

1. Defendants did not establish a basis for vacating the preliminary injunction on an express-easement theory because the 1911 deed did not involve the owner of the Zwickel property and therefore could not convey a right-of-way over that property.
2. Defendants did not establish an implied easement because, although unity and subsequent severance of title were undisputed, they presented no evidence that the claimed use was obvious and intended to be permanent before severance or that the easement was necessary for beneficial enjoyment at the time of severance.
3. Defendants did not establish a prescriptive easement or show that the subject road was a public highway sufficient to warrant vacatur of the preliminary injunction.
4. Supreme Court did not abuse its discretion by fixing the undertaking at \$165,000 rather than \$1 million because defendants' asserted damages were conclusory and speculative and did not establish compelling or changed circumstances making continuation of the injunction inequitable.

KEY QUOTATIONS

"The determination whether to vacate or modify a preliminary injunction or the undertaking "is addressed to the sound discretion of the court and may be granted either upon compelling or changed circumstances that render continuation of the injunction inequitable or upon failure to proceed expeditiously"" ([*2])

"A party claiming a prescriptive easement must show, by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years"" ([*3])

"The amount of an undertaking "must not be based upon speculation and must be rationally related to the damages the defendants might suffer if the court later determines that the relief to which the undertaking relates should not have been granted"" ([*3])

FACTUAL BACKGROUND

Plaintiffs are trustees of a family trust that owns property in the Town of Catskill, Greene County. Defendants acquired a nearby parcel containing a four-lot subdivision, but the parcel had limited access to Underhill Road because of the terrain. Defendants began improving an old wagon road along or near the parties' property line to

provide vehicular access, and plaintiffs alleged that the work trespassed on their property. After the preliminary injunction prevented roadway improvements encroaching on plaintiffs' property, the Town of Catskill denied certificates of occupancy for defendants' lots because of inadequate access.

PROCEDURAL HISTORY

Plaintiffs, trustees of a family trust owning property in Greene County, commenced a trespass action and obtained a preliminary injunction preventing defendants from entering or making roadway improvements that encroached on the trust property. Supreme Court set a \$2,500 undertaking, later permitting defendants to seek modification if inadequate access prevented certificates of occupancy. After the Town of Catskill denied certificates of occupancy because of inadequate access, defendants moved to vacate or modify the injunction and increase the undertaking to \$1 million. Supreme Court declined to vacate the injunction but increased the undertaking to \$165,000, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- 243 AD3d 973, 976 [3d Dept 2025]
- 237 AD3d 1455 [3d Dept 2025]
- Hofstra Univ. v Nassau County, N.Y., 166 AD3d 863, 866 [2d Dept 2018]
- Matter of New York State Off. of Victim Servs. v Blue, 240 AD3d 1064, 1065 [3d Dept 2025]
- Gugino v Scripa, 228 AD3d 1112, 1113 [3d Dept 2024]
- Northwood Sch., Inc. v Fletcher, 190 AD3d 1136, 1138 [3d Dept 2021]
- Biles v Whisher, 160 AD3d 1159, 1160 [3d Dept 2018]
- LaBarge v MJB Lake LLC, 220 AD3d 1100, 1102 [3d Dept 2023]
- Sardino v Scholet Family Irrevocable Trust, 238 AD3d 1289, 1292 [3d Dept 2025]
- Curtis v Town of Galway, 50 AD3d 1370, 1371 [3d Dept 2008]
- Simone v Heidelberg, 9 NY3d 177, 182 [2007]
- McColgan v Brewer, 84 AD3d 1573, 1574 [3d Dept 2011]
- Beretz v Diehl, 302 AD2d 808, 810 [3d Dept 2003]
- U.S. Cablevision Corp. v Theodoreu, 192 AD2d 835, 838 [3d Dept 1993]
- Thomas Gang, Inc. v State of New York, 19 AD3d 861, 862 [3d Dept 2005]
- Weir v Gibbs, 46 AD3d 1192, 1193-1194 [3d Dept 2007]
- Alexy v Salvador, 217 AD2d 877, 879 [3d Dept 1995]
- Auswin Realty Corp. v Klondike Ventures, Inc., 163 AD3d 1107, 1109-1110 [3d Dept 2018]
- Petti v Town of Lexington, 92 AD3d 1111, 1113 [3d Dept 2012]
- 572 Walt Whitman Rd. Holdings, LLC v Whitman Capital, LLC, 237 AD3d 878, 883 [2d Dept 2025]
- Tahmin v Interlaken Owners, Inc., 228 AD3d 983, 985 [2d Dept 2024]

- Darwish Auto Group, LLC v TD Bank, N.A., 224 AD3d 1115, 1119 [3d Dept 2024]
- Matter of National Fuel Gas Distrib. Corp. v City of Jamestown, 108 AD3d 1045, 1047 [4th Dept 2013]
- 255 Butler Assoc., LLC v 255 Butler, LLC, 208 AD3d 829, 831 [2d Dept 2022]
- 456 Johnson, LLC v Maki Realty Corp., 177 AD3d 829, 830 [2d Dept 2019]

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