

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 26125/07
SAMUEL IRIZARRY,	Motion
Plaintiff,	Date October 23, 2007
-against-	
6180 GRAND AVENUE ASSOCIATES, LLC.,	Motion
Defendant.	Cal. No. 11
-----	Motion
	Sequence No. 001

The following papers numbered 1 to 9 read on this motion brought by order to show cause by plaintiff for a preliminary injunction to enjoin and to restrain defendant from trespassing and engaging in any activities which interferes, alters, or otherwise modifies a strip of land situated between parcels of land known as 61-64 and 61-80 Grand Avenue, Maspeth, Queens, New York and to declare any interference with or modification of the adjoining parcels as presently constitutes amounts to trespass.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply Affirmation.....	7-9

Upon the foregoing papers it is ordered that this motion is determined as follows:

The plaintiff moves by order to show cause seeking, *inter alia*, an order declaring that plaintiff is the owner of a certain strip of land situated between plaintiff's property and property claimed to be owned by defendant Grand Avenue Associates, LLC, located at 61-80 Grand Avenue, Maspeth, New York (hereinafter referred to as the "Associates Property"), and an order, *inter alia*, granting a preliminary injunction, enjoining and restraining defendant Grand Avenue Associates, LLC from taking any steps to interfere with the disputed strip of property, including, without limitation, trespassing on the disputed strip of property. The plaintiff submits in support of this application, *inter alia*, his affidavit, a survey of the plaintiff's and defendant's property, photographs of the

plaintiff's property, a copy of a deed dated June 13, 2007 naming defendant as grantee of a premise known as 61-80 Grand Avenue, Maspeth, New York, a copy of a deed dated April 27, 1998 naming plaintiff as grantee of a premise known as 61-64 Grand Avenue, Maspeth, New York and a copy of the summons and verified complaint.

The plaintiff alleges that since April 27, 1998 he is the owner of a certain parcel of property known as 61-64 Grand Avenue, Maspeth , New York and that defendant 61-80 Grand Avenue Associates, LLC since June 13, 2007 has been the owner in fee of an adjacent parcel of land known as 61-80 Grand Avenue, Maspeth, New York. Plaintiff claims that regarding a strip of land located between the plaintiff's and defendant's property (hereinafter referred to and delineated in plaintiff's motion papers as the "Cross-Hatched Space"), "for a period in excess of ten years, the plaintiff and his predecessors in title have had open, continuous, uninterrupted and notorious actual and exclusive occupation, possession and control." (§ 4 of the Verified Complaint). The plaintiff also alleges that for a period in excess of ten years, the Cross-Hatched Space has been completely protected by plaintiff and his predecessors-in-interest by substantial enclosures and fences to the exclusion of the defendant and others. (§ 5 of the Verified Complaint). The plaintiff further alleges possession, control and use of the Cross-Hatched Space by plaintiff and his predecessors-in-interest have been hostile and under claim of right for over ten years and for a period in excess of ten years, defendant and its predecessors in title have acquiesced to plaintiff's and his predecessors in title assertion of exclusive rights to the Cross-Hatched Space. (§§ 6 and 7 of the Verified Complaint). Plaintiff claims that in or about October 18, 2007, defendant commenced demolition of a structure located on or about the location of Cross-Hatched Space and installed wooden boards and materials on the Cross-Hatched Space. The plaintiff finally alleges that the aforementioned acts by the defendant constitute trespass and a violation of plaintiff's ownership rights. The plaintiff submits a copy of the verified complaint, photographs, deeds, a survey and his affidavit in support of these allegations.

The plaintiff's affidavit incorporates by reference the allegations made in the complaint. The plaintiff seeks in the complaint a judgment declaring that plaintiff has good title in fee simple absolute and is the owner of the Cross-Hatched Space by reason of adverse possession of the Cross-Hatched Space for a period in excess of ten years. The plaintiff also seeks in the complaint a permanent injunction enjoining defendant from trespassing upon plaintiff's premises.

Defendant, by its attorney in opposition contends that the plaintiff's proof demonstrates that no trespass has occurred since the surveys submitted by the plaintiff show that the Cross-Hatched Space is entirely on defendant's land, and that plaintiff's assertion that his predecessor-in-interest had adverse possession of the Cross-Hatched Space is merely conclusory, and unsupported by any evidence. Defendant, by his attorney, further contends that plaintiff provided no factual support for his conclusion that plaintiff's predecessor-in-interest had adverse possession of the Cross-Hatched Space. Defendant avers in the affidavit of Santo D'Angelo, a member of defendant 6180 Grand Avenue Associates, LLC that defendant has a contractual obligation under a lease to turnover Associates' Property and that plaintiff's claims have caused defendant Grand Avenue Associates, LLC. to suffer damages and may suffer damages in excess of \$1,500,000.00.

Defendant argues that plaintiff's claim for adverse possession is barred by the statute of limitations. Specifically, CPLR 212(a) provides in pertinent part that " an action to recover real property or its possession cannot be commenced unless the plaintiff or his predecessor in interest was seized or possessed of the premises within ten years before the commencement of the action." Plaintiff concedes that he acquired title to property adjoining the Cross-Hatched Space (the strip of land in dispute) on April 27, 1998. Defendant argues that plaintiff's right to an action for adverse possession would not have accrued until 10 years after the date he acquired title, or April 27, 2008. Defendant further argues that although plaintiff avers that his predecessor-in-interest used the Cross-Hatched Space for over 50 years, plaintiff fails to proffer any evidence to support such bald allegation. In addition, defendant submitted a copy of a "Border Line Agreement" dated May 8, 1952 between Peter O. Geraghty and his wife and John H. Ziegler and his wife. Defendant claims that plaintiff's predecessor-in-interest, Peter O. Geraghty agreed to divest himself of any interest in and to the Cross-Hatched Space. Defendant argues that since plaintiff's predecessor-in-interest relinquished his interest in the Cross-Hatched Space in 1952, plaintiff has no right to assert a claim for adverse possession for the use of the Cross-Hatched Space for the period between May 8, 1952 and April 27, 1998, the date he acquired title to the property.

In reply, the plaintiff submits the affidavit of Peter Geraghty, a copy of a deed dated August 22, 1970 naming Peter Geraghty and Richard Geraghty as grantees of a premise known as 61-64 Grand Avenue, Maspeth, New York and the affirmation of his attorney. Peter Geraghty avers that he is the predecessor/grantor of plaintiff, that from 1970 to 1998 with regard to the Cross-Hatched Space he enclosed the space to the

exclusion of all individuals including the owner of the adjacent property, that he "jealously guarded and protected" the Cross-Hatched Space and did not permit anyone to interfere with it, that he had actual, continuous, uninterrupted and exclusive possession and control of the property. He further avers that in 1998 he sold the property along with Cross-Hatched Space to plaintiff. (¶ 7 Reply Affidavit of Peter Geraghty).

DISCUSSION

"The law is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate ""(1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position"" (Barone v. Frie, 99 AD2d 129, 132, [2d Dept 1984] quoting from *Gambar Enterprises v. Kelly Servs.*, 69 AD2d 297, 306, 418 [2d Dept 1979]; *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 552 [1990]; and *W.T. Grant Co. v. Srogi*, 52 NY2d 496, 517, [1981]; see also, *Merscorp, Inc. v. Romaine*, 295 AD2d 431, 562 [2d Dept 2002]; and *Neos v. Lacey*, 291 AD2d 434, [2d Dept 2002]). The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the status quo. (*U.S. Reinsurance Corp. v. Humphreys*, 205 AD2d 187, 192, 618 [1st Dept 1994]); see also, CPLR 6312(c); and *Albany Medical College v. Lobel*, 296 AD2d 701,702 [3rd Dept 2002]). The determination as to whether to issue a preliminary injunction is a matter left to the sound discretion of the Court (see, *Doe v. Axelrod*, 73 NY2d 748, 750 [1988]). Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant (*First Nat. Bank of Downsville v. Highland Hardwoods*, 98 AD2d 924, 926, 471 NYS2d 360; accord, *607 Buegler v. Walsh*, 111 AD2d 206, *Orange County v. Lockey*, 111 AD2d 896, 897 [1985]; *William M. Blake Agency, Inc. v. Leon*, 283 AD2d 423, 424 [2d Dept 2001]; and *Peterson v. Corbin*, 275 AD2d 35, 36, [2d Dept 2000]). As the court stated in *Tucker v. Toia*, 54 AD2d 322, 325-326, however, "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (*Hoppman v. Riverview Equities Corp.*, 16 AD2d 631; *Weisner v. 791 Park Ave. Corp.*, 7 AD2d 75, 78-79; *Peekskill Coal & Fuel Oil Co. v. Martin*, 279 App Div 669, 670; *Swarts v. Board of Educ.*, 42 Misc 2d (761,) 764, *supra*; cf. *Walker Mem. Baptist Church v. Saunders*, 285 NY 462, 474)."

To prevail on an application for preliminary injunction relief the first prong of the test is a demonstration by

plaintiff of a likelihood of success on the merits. Here, the plaintiff has asserted causes of action for trespass and adverse possession. Any unauthorized entry upon the land of another constitutes trespass (*Rager v. McCloskey*, 305 NY 75, [1953], rearg denied 305 NY 924). A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show, by clear and convincing evidence: first, that the possession is hostile and under claim of right, second, that the possession is actual, third, that it is open and notorious, fourth, that it is exclusive, and fifth, that the possession is continuous for the statutory period of 10 years (*Beyer v. Patierno*, 29 AD3d 613, [2d Dept 2006]).

It is undisputed that plaintiff has only owned his property since April 27, 1998 and that his action claiming ownership to the Cross-Hatched Space (the disputed parcel) by adverse possession was commenced in or about October 2007, or approximately nine and three-quarters years later. For plaintiff to satisfy the 10 year period requirement it is necessary for plaintiff to "tack" its adverse possession to that of his predecessor (*see, Comrie v. Holmes*, 40 AD3d 1346 [3d Dept 2007]). Arguably, plaintiff has submitted sufficient proof to make a prima facie showing of adverse possession during the period in which he owned the property and arguably the affidavit of Peter Geraghty demonstrates a showing of adverse possession for the period of his predecessor.

Moreover, notwithstanding the apparent express exclusion of the Cross-Hatched Space (the disputed parcel) from the legal description in the deed by which plaintiff received title to its property on April 27, 1998, the affidavit of Peter Geraghty supports plaintiff's claims that his predecessor in title from whom he purchased this property was in adverse possession of the Cross-Hatched Space, and did intend to convey to him the Cross-Hatched Space along with plaintiff's adjoining property by deed April 27, 1998 (*but see, Comrie v. Holmes, supra*). Accordingly, plaintiff has made a prima facie showing that he had possession for 10 years when the action was brought.

This court finds that plaintiff has made a sufficient showing of likelihood of success. As to likelihood of success, "(i)t is enough if the moving party makes a prima facie showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits (citations omitted)" (*Tucker v. Toia, supra*, 54 AD2d at 326). Plaintiff has set forth facts supporting his claim for adverse possession of the Cross-Hatched Space for a period of 10 years. Accordingly, upon the

record presented and in the exercise of its discretion, the Court concludes that the plaintiff has demonstrated a reasonable likelihood of success on the merits.

With regard to the second prong of the test, the plaintiff has demonstrated that he will suffer an irreparable injury if the preliminary injunction is not granted. The plaintiff's allegations that "defendant has commenced storing materials and debris within my parcel and this is a trespass" and "the walls also collapsed unto the sidewalk and has caused damage to my property during the demolition process" and loss of access to backyard of his residence, constitutes an immediate injury which cannot be adequately compensated by monetary damages, and qualifies as an irreparable injury supporting an award of injunctive relief.

With regard to the third prong of the test, the plaintiff has demonstrated that equity is balanced in his favor. Where, as here, the plaintiff seeks to obtain by the issuance of this preliminary injunction the same injunctive relief sought in the complaint, a preliminary injunction will not be granted unless the plaintiff demonstrates, upon clear and undisputed facts, that such relief is imperative and because without it, a trial would be futile (*Xerox Corp. v. Neises*, 31 AD2d 195 [1968]). The Court, having weighed the drastic nature of the relief sought against the plaintiff's allegations of adverse possession and irreparable injury, against the defendant's unsupported, conclusory assertion that it may suffer damages in excess of \$1,500,000.00, finds that the plaintiff demonstrated the existence of the extraordinary circumstances which would tip the balance of equity in his favor (*Di Marzo v. Fast Trak Structures, Inc.*, 298 AD2d 909 [2002]; *Penfield v. New York*, 115 AD 502 [1st Dept 1906]).

Moreover, upon review of the parties' factual averments, the Court concludes that the equities balance in favor of maintaining the *status quo* pending resolution of the underlying dispute. (*Merscorp, Inc. v. Romaine, supra*; *Alside Div. of Associated Materials Inc. v. Leclair*, 295 AD2d 873, 875 [3d Dept 2002]; and *State v. City of New York*, 275 AD2d 740, 713 NYS2d 360 [2d Dept 2000]). That is, the harm to be suffered by plaintiff by the loss of the use of a space and possible erection of a building upon it outweighs the harm to defendant resulting from the granting of the requested injunctive relief. Further, the Court notes that by denying the requested injunction, defendant would be able to build a structure on the Cross-Hatched Space which could render an ultimate decision herein academic.

Finally, CPLR 6312(b) directs the court to fix the undertaking in an amount that will compensate the defendant for

damages incurred "by reason of the injunction", in the event it is determined that the plaintiff was not entitled to the injunction (see, *Margolies v. Encounter, Inc.*, 42 NY2d 475, [1977]; and *Schwartz v. Gruber*, 261 AD2d 526 [2d Dept 1999]). The fixing of the amount of an undertaking is a matter which rests within the sound discretion of the court (*Clower Street Associates v. Nilsson*, 244 AD2d 312, 313, [2d Dept 1997]). Upon a review of the papers submitted on the motion by the parties, the Court is unable to determine the amount of undertaking that will be reasonable and adequate under the circumstances presented. Accordingly, the Court's determination on this issue is reserved pending compliance with the directives set forth hereinafter.

Accordingly, it is,

ORDERED, that the plaintiff's motion for a preliminary injunction, enjoining and restraining defendant from trespassing upon and engaging in any activities which interfere, alter or otherwise modify the boundaries of the parcel of land between plaintiff's lot and defendant's lot as depicted in a survey attached as "Exhibit C" and denoted in plaintiff's moving papers as the "Cross-Hatched Space"; and it is further

ORDERED, that the plaintiff shall post a bond in an amount to be determined upon the serving and filing of a motion by plaintiff to fix the bond amount pursuant to CPLR 6312(b) within fifteen (15) days of entry of this decision. Defendant may submit its position on the amount of the bond in the form of opposition or a cross motion. Alternatively, the parties may stipulate to the waiver of a bond or as to the amount and nature of the bond. If such undertaking is not posted or if such motion to fix the bond amount is not filed within fifteen (15) days of entry of this decision, this motion is denied. Such undertaking shall be in the form of surety, deposited with the Queens County Clerk or in a joint interest bearing escrow account.

This constitutes the decision and Order of the Court.

A courtesy copy of this order is being mailed to the parties.

Dated: October 26, 2007

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Howard G. Lane, J.S.C.