

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 19

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CYPRESS HILLS CEMETERY,

BY: SATTERFIELD, J.
Index No.: 3267/03
Motion Date: 7/9/03
Motion Cal. No: 7

Plaintiff,

- against -

CITY OF NEW YORK, et al.,

Defendants.

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In this action to determine claims to real property under Article 15 of the Real Property Actions and Proceedings Law and for other related relief, Cypress Hills Cemetery (Cemetery) seeks to enjoin defendants from interfering with its right-of-way over two bridges (Bridges) and a tunnel/underpass (Underpass) and to direct the City of New York to maintain these thoroughfares during the pendency of this action. Defendants cross-move to dismiss pursuant to CPLR 3211(a)(1) and (7).

The Cemetery is the owner of real property located in both Queens and Kings Counties. In connection with the development of the Interborough Parkway currently known as the Jackie Robinson Parkway ("Parkway"), defendants obtained title to the land passing through the Cemetery by eminent domain. As a result, the Cemetery was divided into two parcels. During the construction of the Parkway in the 1930's, the City of New York built the Bridges and Underpass which provide access between the separate tracts at its expense. These structures have been in use for nearly 70 years. The Cemetery's general office is located on the southern parcel and

the service garage housing its equipment is situated on the northern parcel. The Bridges are primarily utilized by visitors, vehicles and Cemetery equipment to conduct the operations of the Cemetery.

On June 21, 1990, the New York City Department of Transportation notified the Cemetery that it would reconstruct the Bridges using City funds, without conceding its ownership or legal responsibility for repairs or rehabilitation. It was further stated that the Cemetery would remain responsible for maintaining the roadbeds. Thereafter, by letter dated April 9, 2002, the City indicated that no documentation existed which delineated maintenance responsibilities for the Bridges. Inasmuch as the traffic using the Bridges was private benefitting only the Cemetery, the use of public funds was deemed inappropriate. Due to the condition of the Bridges, demolition of these structures was recommended. No action has been contemplated with respect to the Underpass.

The court will initially address the cross motion for dismissal as it may be dispositive of this action. On a motion to dismiss, a challenged pleading must be liberally construed and the court must accept as true the material allegations of fact and determine whether a cause of action cognizable at law exists. (Polonetsky v Better Homes Depot, 97 NY2d 46; Leon v Martinez, 84 NY2d 83.) A dismissal may be warranted if affidavits or documentary evidence conclusively dispose of plaintiff's claim as a matter of law. (Held v Kaufman, 91 NY2d 425.)

Plaintiff has withdrawn its claim of an easement by prescription based on the City's admitted consent to use the Bridges. The remaining causes of action seek to establish an easement by implication or necessity, and an unlawful taking in violation of the Eminent Domain Procedure Law and as well as injunctive relief.

Defendants as servient owners of the Bridges would ordinarily have no duty to maintain an easement for the benefit of a dominant estate, in the absence of an agreement to the contrary. (See, Tagle v Jakob, 97 NY2d 165; Raskin v Crown-Kingston Realty Assocs., 254 AD2d 472.) However, the events upon which this action are premised occurred in the 1920's and 1930's. Essential documents relating to the condemnation proceedings, the construction of the Bridges and any formal agreements which might establish the obligation of the parties with respect to the maintenance of these structures have not been presented. As a result, the nature of the Cemetery's interest in the Bridges cannot be resolved in this procedural context. (See, Elzer v Nassau County, 111 AD2d 212.) Disclosure is required to compile a complete record and to investigate the factual circumstances pertaining to the use and necessity of the Bridges. Thus, at this juncture, the complaint is deemed sufficient to withstand dismissal. Defendants are granted 30 days after service of a copy of this order with notice of entry to serve a responsive pleading.

As to the request for injunctive relief, plaintiff must establish the likelihood of success on the merits, irreparable

injury and the balancing of equities in its favor. (Aetna Ins. Co. v Capasso, 75 NY2d 860, 862; W.T. Grant Co. v Srogi, 52 NY2d 496.) While plaintiff's ultimate success on the merits cannot presently be determined, in the absence of injunctive relief staying the demolition of these structures, a later judgment in plaintiff's favor will be rendered ineffectual. (See, Board of Mgrs. of 235 East 22nd St. Condominium v Lavy Corp., 233 AD2d 158.) Under these circumstances, the equities lie in favor of preserving the status quo. (See, Elizabeth Street Inc. v 217 Elizabeth Street Corp., 301 AD2d 481; Hicksville Props., LLC v Wollenhaupt, 268 AD2d 407.)

Accordingly, injunctive relief is granted only to the extent that defendants are stayed from demolishing the subject Bridges during the pendency of this action unless necessary to avoid a situation of imminent and immediate danger to the public. The foregoing relief is conditioned upon plaintiff providing an undertaking in accordance with CPLR 6312. The standard to be applied in fixing the undertaking is an amount that is rationally related to the damages the nonmoving party might suffer if the court later determines that the relief should not have been granted. Bennigan's of New York, Inc. v. Great Neck Plaza, L.P., 223 A.D.2d 615; Sportsplex of Middletown v. Catskill Regional Off-Track Betting Corp., 221 A.D.2d 428. As a general rule, however, the amount is fixed by the court after a hearing held for such purpose. Peron Restaurant Inc. v. Young & Rubicam Inc., 179 A.D.2d 469; Times Square Stores Corp. v. Bernice Realty Co., 107 A.D.2d 677.

Therefore, the parties are directed to appear before this Court on Wednesday, September 10, 2003, at 10:30 a.m., for a hearing on the fixing of the amount of the undertaking. Copies of this order are being sent to counsel for the parties by facsimile.

Settle order.

DATED: AUGUST 7, 2003

J.S.C.