

**Sprague v Malayev**

2007 NY Slip Op 33653(U)

November 7, 2007

Supreme Court, Queens County

Docket Number: 0017640/2007

Judge: David Elliot

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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 14

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JOHN PETER SPRAGUE	x	INDEX NO. 17640/07
-against-		MOTION SEQ. NO. 1
YURIY MALAYEV, et al.		BY: ELLIOT, J.
		DATED: NOVEMBER 7, 2007

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x

Plaintiff John Peter Sprague has moved for a preliminary injunction directing defendant Yuriy Malayev and defendant Margarita Rabiyeva to remove obstacles from a driveway and alleyway located between his premises known as 151-11 85<sup>th</sup> Avenue and their premises known as 151-15 85<sup>th</sup> Avenue, Jamaica, New York. The defendants have cross-moved for an order pursuant to CPLR 3211(a)(7) dismissing the complaint.

The plaintiff's parents purchased a one-family home located at 151-11 85<sup>th</sup> Avenue on July 21, 1944, and he acquired title on January 1, 1995. The defendants purchased an adjoining one-family home located at 151-15 85<sup>th</sup> Avenue, Jamaica, New York on August 6, 1999. The plaintiff's driveway lies next to the defendants' alleyway located between the two homes. The plaintiff alleges that since 1944 his family has used a part of the defendants' alleyway for the purpose of automobile ingress, egress, and parking.

On June 6, 2007, the plaintiff objected to the defendants that their son had been using his driveway to enter and leave their property with his automobile. The defendants allegedly reacted by placing a ladder and crates filled with concrete rubble upon their alleyway, thereby allegedly making it difficult for him drive his automobile upon his property and to park there. The plaintiff allegedly must now park on the street.

The plaintiff began this action for, inter alia, the declaration of a prescriptive easement over the defendants' alleyway on or about July 16, 2007.

The defendants deny that the plaintiff needs their alleyway to safely enter and leave his property. They allege that several months ago, they removed steps near their home and reconstructed the walkway next to the plaintiff's driveway. Once they removed the stairs, the plaintiff allegedly began to use more and more of their walkway to park his car. Although they placed barriers upon their alleyway, the defendants allege that the plaintiff still has room to move his car over his own driveway and to park there. The defendants further allege that the plaintiff has a garage in which he can park his car.

The defendants' cross motion for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them is denied. The court notes initially that although the cross motion papers do not adequately set forth the grounds for dismissal (see,

CPLR 2214[a], 2215; Rubin v Rubin, 72 AD2d 536), the defendants' attorney asserts that "the plaintiff has not set forth a cause of action for a prescriptive easement." "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference\*\*\*." (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) Whether the plaintiff's case can withstand a motion for summary judgment is a matter not taken into consideration here. (See, Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34.) Plaintiff Sprague has adequately stated a cause of action for the declaration of a prescriptive easement. An easement may be created by prescription. (See, Beutler v Maynard, 80 AD2d 982, affd 56 NY2d 538.) The plaintiff has alleged the adverse, open and notorious, continuous and uninterrupted use of the adjoining alleyway by him and his family for the prescriptive

period. (See, Di Leo v Pecksto Holding Corp., 304 NY 505; J.C. Tarr, Q.R.R.T. v Delsener, 19 AD3d 548; Hryckowian v Pulaski, 249 AD2d 511; 5 Warren's Weed, New York Real Property § 40.23.) The prescriptive period is 10 years. (See, Allen v Mastrianni, 2 AD3d 1023; Posnick v Herd, 241 AD2d 783; 5 Warren's Weed, New York Real Property § 40.24[1].) An existing easement appurtenant will pass to the grantee of a dominant estate even if his deed does not expressly refer to the easement. (See, Will v Gates, 89 NY2d 778; M. Parisi & Son Const. Co., Inc. v Adipietro, 21 AD3d 454; Fischer v Anger, 283 AD2d 865.) "An easement is not a personal right of the landowner but is an appurtenance to the land benefitted by it (the dominant estate). It is inseparable from the land and a grant of the land carries with it the grant of the easement\*\*\*." (Will v Gates, supra, 783.)

The plaintiff's motion for a preliminary injunction is granted to the extent that the defendants are directed to remove the barriers from their alleyway on condition that the plaintiff does not park in the alleyway. The parties may submit affidavits concerning the appropriate amount of the undertaking at the time of the settlement of the order. In order to obtain a preliminary injunction, plaintiff Sprague had to show (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a weight of the equities in his favor. (See, Aetna Insurance Co. v Capasso, 75 NY2d 860.) He

successfully carried this burden insofar as traveling over his driveway is concerned. In regard to the first requirement, "[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\*\*\*." (Tucker v Toia, 54 AD2d 322, 326; Time Square Books, Inc. v City of Rochester, 223 AD2d 270; Bingham v Struve, 184 AD2d 85; Gambar Enterprises, Inc. v Kelly Services, Inc., 69 AD2d 297.) In the case at bar, plaintiff Sprague showed prima facie that he has a prescriptive easement over the defendants' alleyway. Although factual issues may exist in this case, such as whether there was a neighborly permissive use of the alleyway (see, Allen v Mastrianni, supra), they do not in themselves preclude the issuance of a preliminary injunction. (See, CPLR 6312[c]; Egan v New York Care Plus Ins. Co., 266 AD2d 600; Board of Managers of 235 East 22nd Street Condominium v Lavy Corp., 233 AD2d 158.) In regard to the second requirement, the plaintiff has alleged that the barriers placed in the alleyway by the defendants interfere with the safe passage of his vehicle, thus making human safety a factor. (See, Doe v Dinkins, 192 AD2d 270.) In regard to the third requirement, plaintiff Sprague demonstrated that the alleged irreparable injury to be sustained by him in traveling over his driveway is more burdensome than the harm that will be caused to the defendants through imposition of the injunction. (See, Reuschenberg v Town of

Huntington, 16 AD3d 568; Credit Index, L.L.C. v Riskwise Intern. L.L.C., 282 AD2d 246; Mr. Natural, Inc. v Unadulterated Food Products, Inc., 152 AD2d 729; McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc., 114 AD2d 165; Metropolitan Package Store Ass'n, Inc. v Koch, 80 AD2d 940; Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp., 70 AD2d 1021; 67A NY Jur 2d, "Injunctions" § 31.) Finally, it is noted that "[in] the exercise of its discretionary powers with respect to injunctive relief, a court may impose such reasonable terms or conditions in granting such relief as the justice and equities of the case require." (67A NY Jur 2d, "Injunctions" § 167; see, Witbeck v Lockport Light, Heat & Power Co., 214 App Div 371.) Since plaintiff Sprague can park his car in his garage or entirely within his own driveway or on the street, he need not park in the defendants' alleyway during the pendency of this action.

Settle order.

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J.S.C.