

**Smiley Realty of Brooklyn v Excello Film Pak**

2008 NY Slip Op 31372(U)

May 15, 2008

Supreme Court, Kings County

Docket Number: 3097/2004

Judge: Lawrence Knipel

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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15<sup>th</sup> day of May, 2008.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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SMILEY REALTY OF BROOKLYN, INC.,

Plaintiff,

Index No. 3097/2004

-against-

EXCELLO FILM PAK, INC., Defendant.

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The following papers numbered 1 to 4 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and Affidavits (Affirmations) Annexed

1-4

Opposing Affidavits (Affirmations)\_\_\_\_\_

5

Reply Affidavits (Affirmations)\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_Affidavit (Affirmation)\_\_\_\_\_

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Other Papers\_\_\_\_\_

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Upon the foregoing papers, defendant Excello Film Pak, Inc. (“Excello”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Smiley Realty of Brooklyn, Inc. (“Smiley”) as against it, or, alternatively, for an order granting defendants a mandatory preliminary injunction ordering and directing plaintiff to construct, at its option, a second means of egress from the premises located at 767 Third Avenue, Brooklyn, New York and subsequently dismissing the complaint with prejudice. Smiley moves, by order to show cause, for an order, pursuant to CPLR 3025(b), permitting it to

amend the Summons and Complaint to include a cause of action for property damage and for a Declaratory Judgement of an Easement by Necessity.

As contained in the Court's November 3, 2004 Decision, the facts are as follows. Plaintiff and defendant own adjoining properties. Smiley owns a two-story factory building located at 155 26<sup>th</sup> Street (also 763/767 Third Avenue), and leases space on the first and second floors to Frame It & Company ("Frame It"). Excello owns a one-story factory building at 164/66 25<sup>th</sup> Street, which is located northeast of Smiley's building. Excello is adjacent on the west to a building at 160 25<sup>th</sup> Street owned by an entity called 25<sup>th</sup> Street Third Avenue Corp, referred to as the Hose McCann Building.

On April 8, 1947 a written agreement between the prior owner of Smiley's property and the owners of the Hose McCann building provided (1) an open area between their buildings that would be enclosed by using an existing wall for support; and (2) for the use of a corridor in the area to be used as a fire egress ("the Passageway").<sup>1</sup> The agreement was recorded and expressly stated that it would benefit all successors in interest. According to Smiley's complaint (until Excello's construction), Frame It routinely used a rear fire door which leads down a covered stairway to the covered passageway over the first floor roof of the Hose McCann building and down a fire escape into a rear interior yard which leads to an alleyway providing access to 25<sup>th</sup> Street.

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<sup>1</sup>Between 1947 and 1954, the open area was subsequently enclosed with a roof containing a roof hatch which provided access to the roof of the Hose McCann building.

Smiley asserts that Excello has been engaging in construction which illegally obstructs Frame It's Passageway through the interior yard, thereby removing Frame It's means of fire egress, impairing Smiley's property rights, and violating Zoning Resolution 43-26. According to Smiley, Excello cemented over the fire door, removed the stairway which was attached to Smiley's property, and constructed a metal roll-down gate blocking egress to 25<sup>th</sup> Street.

Smiley subsequently commenced this action by Order to Show Cause, seeking a temporary restraining order directing Excello to remove all construction and to restore the property in accordance with applicable building and zoning ordinances and plans filed with the City of New York. On November 3, 2004, the Court (Hon. Gloria Cohen Aronin) granted plaintiff's preliminary injunction, stating:

So long as traverse across Excello's property represents the sole existing means of exit for the tenants in Smiley's building, Smiley has shown that it is likely to succeed on the merits . . . While other means might be constructed to provide an alternate means of exit, they do not currently exist and until alternate means become available, if ever, Smiley's tenants need an existing means of fire egress. Excello is required to preserve the route and fulfill its duty not to cause its property to be used in a way that causes harm to its neighbors . . .

Excello presently moves to dismiss plaintiff's complaint.<sup>2</sup>

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<sup>2</sup>In doing so, Excello also seeks to further vacate the November 3, 2004 preliminary injunction.

In seeking to dismiss Smiley’s complaint and preliminary injunction, Excello contends that a prescriptive easement cannot exist here, where there has never been actual use of the Passageway, which is unlit and contains exposed telephone conduits, as an alleged easement. In support, it cites to the affidavit of Excello’s owner, Robert Ehrman (“Mr. Ehrman”), where he states that, during the years since 1972,<sup>3</sup> no one had exited through the Passageway into Excello’s property and driveway, conducted a fire drill, or attempted to use any portion of it’s property. Excello also cites to the deposition testimony of Jerry Greenberg (“Mr. Greenberg”), the owner of Frame It, where he states that, in over 35 years of Frame It’s tenancy in Smiley’s building, Frame It workers had never used the Passageway, he never went into the interior yard or the driveway to 25<sup>th</sup> Street, he was not aware whether or not the driveway was blocked by a gate, and there had never been any fire drills during Frame It’s tenancy at the Smiley property. Excello also attaches the affidavit of Carl Campagna (Mr. Campagna), a shareholder of Campagna & Sons, Inc., which is located next door to the Excello building at 186 25<sup>th</sup> Street, where he states that, since his family purchased the property in the early to mid-1970s there has never been unobstructed access to the driveway on 25<sup>th</sup> Street adjoining the Excello property, and at all times the entrance was blocked by a fence.<sup>4</sup> Mr. Campagna also avers that, during the period of more than 30 years when he was

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<sup>3</sup>According to Ehrman, his parents owned the Excello property prior to his ownership.

<sup>4</sup>Mr. Campagna avers that there presently exists an overhead gate in front of the driveway on the Excello property.

working next door to what became the Excello property, he never observed unobstructed access to or egress from the driveway.

Moreover, Excello asserts that a prescriptive easement cannot exist here, where there was inferred permission to use the Passageway out of a relationship of neighborly cooperation and accommodation between the parties, rather than adverse use by Smiley. It argues that the prior written agreement between the former owner of Smiley's property and the owners of Hose McCann building demonstrates that there was a prior understanding that use of the Passageway was merely a permissive use granted by the predecessors of the property now owned by Excello.

In addition, Excello argues that the Passageway is not an acceptable means of egress under the New York City Administrative Code, and attaches the affidavit of its expert, Harry Meltzer, who also states that he does not believe that the existing fire passage is legal or usable at the present day. Moreover, Mr. Meltzer also avers that the New York City Administrative Code does not require plaintiff to have a second means of egress since Smiley's building contains a sprinkler system, which is a common substitute for a means of egress under § 27-5356 of the New York City Administrative Code ("Code").<sup>5</sup>

In the alternative, Excello argues that plaintiff should be ordered and directed to construct, at its option, a second means of egress on its property. They cite to the affidavits

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<sup>5</sup>Excello maintains that the Code, which was adopted in 1938, does not retroactively apply to the property, which was built prior to 1938. In support, it refers to deposition testimony of Jon Smilowitz that the premises on 26<sup>th</sup> Street were built more than 110 years ago, and that 767 Third Avenue was built shortly thereafter.

of both Frame It's owner Mr. Ehrman and defendant's expert Mr. Meltzer, which both state that there previously existed a window in the rear wall of Smiley's building which formed a part of the Passageway in the Hose McCann building that could serve a means of egress.<sup>6</sup>

Smiley, however, contends that Frame It's continued, uninterrupted, adverse, open and notorious use of the property for more than thirty six years creates a prescriptive easement. It argues that Frame It routinely inspected and maintained the Passageway, stairway and interior yard to ensure that there were no obstructions. Smiley also maintains that Frame It's use was open and notorious, as the fire escape was in plain sight and led directly into the open interior yard, and was adverse based on the fact that Excello was compelled to block the fire door, stairs and Passageway to prevent Frame It's use. In support, Smiley refers to Mr. Greenberg's affidavit, where he states that, upon initially leasing the space from Smiley, his real estate broker specifically showed him the fire door which led to the Passageway, stairwell, interior courtyard and out towards 25<sup>th</sup> Street, informing him that the Passageway was his second form of fire egress in the event of a fire emergency. Mr. Greenberg stated that Frame It relied upon the use of the fire stairs, Passageway and interior yard for approximately 36 years without interruption; he routinely inspected the stairwell and courtyard (which he always found to be "quite clear"); and he maintained the Passageway in a clean condition. Mr. Greenberg also stated that, during the disputed construction by

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<sup>6</sup>According to Excello, the window, if opened, could provide egress either through plaintiff's property or through the roof of plaintiff's building by means of a fire stairway and escape hatch.

Excello, he witnessed debris in the interior yard, and a gate or fence located in front of the driveway, thereby blocking the fire egress. Further, according to the affidavit of Smiley's expert, Walter Raktke ("Mr. Raktke"), since the property was built before December 6, 1968, the "Old Code," pursuant to the Article 7, "Means of Egress" (6.1.2.1) § C26-273.0 is the applicable section, which provides that every floor area above or below the ground floor shall have at least two required means of egress available to all the occupants.

Smiley moves to amend its complaint to include a property damage cause of action to reflect the alleged damages to date and a cause of action for a Declaratory Judgment of an Easement by Emergency, or an Easement by Necessity.<sup>7</sup> It argues that Excello will not be prejudiced by the amendments because it has been aware of the damages Excello has caused to Smiley's property, and that the Passageway is the only emergency fire egress from Smiley's property. According to Smiley, it sought to amend the complaint in a timely manner, as discovery, including all parties' depositions, have just been recently completed. Excello contends that the motion is not supported by an affidavit of anyone with personal knowledge of the facts and circumstances, and that the original pleading did not give notice of the claims that Smiley seeks to include in the amended complaint. It asserts that Smiley seeks (1) a declaration of an easement by prescription, which it had previously sought; (2)

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<sup>7</sup>In its Amended Complaint, Smiley refers to the cause of action as an Easement by Necessity, which is a clarification of its prior claim for a cause of action for an Easement by Emergency.

an “emergency easement,” which is unknown at law;<sup>8</sup> and (3) a claim of negligence leading to property damage, which does not relate back to the original complaint and is time-barred. Lastly, Excello argues that Smiley offered no reasonable excuse for the extended delay in asserting said claims, and that it will suffer prejudice by an amendment because, for example, Excello could no longer give notice to its insurance carrier to permit it to defend on plaintiff’s additional negligence claim.

Smiley counters that the amended property damage cause of action is “tolled” pursuant to the relation back doctrine, and that Excello could not be prejudiced because it was already aware of such damages. Finally, Smiley asserts that a Declaratory Judgment of an Easement by Emergency is a valid cause of action for an easement by necessity.

To establish a prescriptive easement, a party must establish use of the property that is “adverse, open and notorious, continuous and uninterrupted for a ten year period” (*Pierce v Frost*, 295 AD2d 894 [2002]). To establish an easement by necessity, a party must establish unity of title and at the time of subsequent separation of title, it must be shown that easement over defendant’s property existed as a necessity and not as a mere convenience (*see e.g. Leonard v Igoe*, 178 Misc.2d 385 [1998]).

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<sup>8</sup>Excello contends that, although the amended complaint asserts a cause of action for prescriptive easement for an emergency fire egress, the Court previously granted plaintiff’s motion for preliminary injunction and does not need to add said cause of action.

Here, there are several questions of fact that are not resolved by the parties' papers. While Smiley claims that it has a prescriptive easement over the Passageway based upon Frame It's use, Excello raises a question as to whether Frame It continuously used the Passageway, and therefore whether a prescriptive easement exists. Defendant has also raised a question of whether Frame It's use of the disputed property was adverse because it alleges that defendant and its predecessors-in-interest permitted such use as a neighborly accommodation. Moreover, defendant has raised a question as to whether Frame It's use established an easement by necessity. Clearly, defendant's contentions are inconsistent with plaintiff's claim of right to access the Passageway as a means of fire egress. Accordingly, defendant's motion for summary judgment is denied (*Krog v Village of Ellicottville*, 1 Misc.3d 552 [2003]).

The Court also denies Excello's alternative request seeking a mandatory preliminary injunction ordering and directing plaintiff to construct, at its option, a second means of egress from the premises located at 767 Third Avenue. To be entitled to a preliminary injunction pursuant to CPLR 6301, a party must demonstrate: (1) a probability of success on the merits; (2) danger of irreparable injury in the absence of an injunction; and (3) a balance of the equities in their favor (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990] [citation omitted]). As stated above, Excello has not demonstrated a likelihood of success on the merits, rather, it has raised numerous factual issues that require denial of its summary judgment motion. Excello has an adequate remedy at law, and it does not assert that Excello

would not be sufficiently compensated by an award of money damages (*see Elpac, Ltd. v Keenpac N. Am., Ltd.*, 186 AD2d 893, 895 [1992]; *Lawrence H. Morse, Inc. v Anson*, 185 AD2d 505, 506 [1992]). Finally, the balance of the equities weighs in favor of denying injunctive relief.

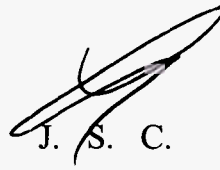
Smiley's motion seeking leave to serve an amended complaint is granted. CPLR 3025 (b) provides that leave to amend pleadings shall be freely given (CPLR 3025[b]; *see Edemwald Contracting Co. v New York*, 60 NY2d 957 [1983]). The decision to permit or deny an amendment is entrusted to the sound discretion of the court (*see Murray v City of New York*, 43 NY2d 400, 404-405 [1977]). Lateness is not a barrier to the amendment; it must be lateness coupled with significant prejudice to the other side which would bar an amendment (*see Edemwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). The Court finds that Smiley's property damage cause of action results from the same conduct already pled in the original complaint, thereby relating back to said cause of action (*see Yaniv v Taub*, 256 AD2d 273 [1998]). The Court grants leave to amend the complaint, as the amendment is not palpably insufficient, does not prejudice Excello, and is not patently devoid of merit (*see Santori v Met Life*, 11 AD3d 597 [2004], citing *Otega v Bisogno & Meyerson*, 2 AD3d 607 [2003]).

For the foregoing reasons, Excello's motion for summary judgment is denied. Smiley's motion to amend is granted, and the proposed "Amended Complaint" annexed to it's motion papers is deemed served. Excello shall have 30 days after service of a copy of

this Decision with Notice of Entry to amend it's answer.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be 'J. S. C.', written over the printed name 'J. S. C.' below it.

J. S. C.