

**Matter of Iskhakbayev v Mondaca**

2009 NY Slip Op 31838(U)

August 3, 2009

Supreme Court, Queens County

Docket Number: 4453/09

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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In the Matter of the Application of ALEKSANDR  
ISKHAKBAYEV and LYUDMILA  
MIRZAKANDOVA,

Index No: 4453/09  
Motion Date: 5/6/09  
Motion Cal. No: 14  
Motion Seq. No: 2

Petitioners,

For an Order and Judgment pursuant to Article 4  
of the Civil Practice Law and Rules and Section 881  
of the Real Property Actions and Proceedings Law  
for Access to Adjoining Property,

-against-

RICARDO MONDACA,

Respondent.

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The following papers numbered 1 to 17 read on this petition for an order, pursuant to RPAPL § 881 and Article 4 of the CPLR, granting petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova, a temporary license to gain access to the adjoining property of respondent Ricardo Mondaca, located at 82-81 164<sup>th</sup> Place, Jamaica, New York, in order for petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova to complete certain construction work in and on their property and future residence located at 82-83 164<sup>th</sup> Place, Jamaica, New York; and upon completion, allowing the surveyor of petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova to access respondent Ricardo Mondaca's property to certify a final survey to the New York City Department of Buildings; and upon this cross-motion by respondent Ricardo Mondaca, dismissing the complaint, pursuant to CPLR § 3211(a)(1), as the defense is founded upon documentary evidence; pursuant to CPLR § 3211(a)(2), as the Court lacks jurisdiction of the subject matter for failing to name Maria Mondaca, respondent Ricardo Mondaca's wife, as a necessary party; and pursuant to CPLR § 3211(a)(7), as the petition fails to state a cause of action; or in the alternative, requiring the filing of a surety bond in the sum of \$50,000.00, naming respondent Ricardo Mondaca as payee; issuing a preliminary injunction enjoining petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova and their agents, contractors and employees from trespassing and creating a private nuisance; and permitting respondent Ricardo Mondaca to

commence a third-party action against Shifra Construction Corp., the contractors of petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova, pursuant to CPLR § 401.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits-Memorandum.....	1 - 7
Notice of Cross-Motion-Affidavits-Exhibits.....	8 - 11
Answering Affidavits-Exhibits-Memorandum.....	12 - 14
Reply.....	15 - 17

Upon the foregoing papers, it is hereby ordered that the petition and cross-motion be disposed of as follows:

This is a special proceeding commenced pursuant to Real Property Actions and Proceedings Law (“RPAPL”) § 881 and Article 4 of the CPLR, seeking an order granting petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova (“petitioners”), owners of the property located at 82-83 164<sup>th</sup> Place, Jamaica, New York, a temporary license to gain access to the adjoining property of respondent Ricardo Mondaca (“respondent”), located at 82-81 164<sup>th</sup> Place, Jamaica, New York, in order for petitioners to complete certain construction work on their property. Petitioners contend that in order to finalize improvements to the stucco work on their property in a manner that complies with the requirements of their revised and amended Building Plan, in accordance with all applicable laws, petitioners require limited access to respondent’s property to do certain work along the adjoining property line. Petitioners further contend that on numerous occasions, they have attempted to seek respondent’s permission to access his property, to no avail.

Thus, it is upon the foregoing that petitioners seek an order granting them a temporary license to gain access to respondent’s adjoining property to complete construction work upon petitioners’ property, and upon completion of same, allowing petitioners’ surveyor to access respondent’s property to certify a final survey to the New York City Department of Buildings, pursuant to RPAPL § 881. Respondent, in opposition to the motion, cross-moves for an order dismissing the complaint, pursuant to CPLR § 3211(a)(1), as the defense is founded upon documentary evidence; pursuant to CPLR § 3211(a)(2), as the Court lacks jurisdiction of the subject matter for failing to name Maria Mondaca, respondent’s wife, as a necessary party; and pursuant to CPLR § 3211(a)(7), as the petition fails to state a cause of action; or in the alternative, requiring the filing of a surety bond in the sum of \$50,000.00, naming respondent as payee; issuing a preliminary injunction enjoining petitioners and their agents, contractors and employees from trespassing and creating a private nuisance; and permitting respondent to commence a third-party action against Shifra Construction Corp., petitioners’ contractors, pursuant to CPLR § 401. Here, as the relief sought in the cross-motion may be dispositive on the motion, the Court will first consider respondent’s cross-motion for, inter alia,

dismissal.<sup>1</sup>

Generally on a motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Reid v. Gateway Sherman, Inc., 60 A.D.3d 836 (2<sup>nd</sup> Dept. 2009); Edme v. Tanenbaum, 50 A.D.3d 624 (2<sup>nd</sup> Dept. 2008); Enriquez v. Home Lawn Care and Landscaping, Inc., 49 A.D.3d 496, (2<sup>nd</sup> Dept. 2008); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2<sup>nd</sup> Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2<sup>nd</sup> Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2<sup>nd</sup> Dept.2000). The determination to be made is whether plaintiff has a cause of action, not whether one was stated. See, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Walker v. Kramer, 63 A.D.3d 723 (2<sup>nd</sup> Dept. 2009); Gershon v. Goldberg, 30 A.D.3d 372 (2<sup>nd</sup> Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2<sup>nd</sup> Dept.2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. See, Fitzgerald v. Federal Signal Corp., 63 A.D.3d 994 (2<sup>nd</sup> Dept. 2009); Farber v. Breslin, 47 A.D.3d 873 (2<sup>nd</sup> Dept. 2008); International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2<sup>nd</sup> Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2<sup>nd</sup> Dept. 2005). Here, in viewing the instant petition in its most favorable light, this Court finds that there are viable claims asserted, thereby warranting denial of this branch of the cross-motion.

Likewise denied is the branch of the cross-motion seeking dismissal on the ground that a defense is founded upon the documentary evidence. It is well settled that “[a] motion pursuant to CPLR 3211(a)(1), to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted).” Ruby Falls, Inc. v. Ruby Falls Partners, LLC, 39 A.D.3d 619 (2<sup>nd</sup> Dept. 2007); Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005); Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); 30th Place Holdings, LLC v. 474431 Associates, 54 A.D.3d 753 (2<sup>nd</sup> Dept. 2008); Levenherz v. Povinelli, 14 A.D.3d 658 (2<sup>nd</sup> Dept. 2005). “In order to prevail on a motion to dismiss pursuant

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<sup>1</sup> The order to show cause presented to this Court for signature contained provisions that any opposition or reply papers shall be served by overnight mail to the respective party by a date certain, as directed by this Court. Those provisions were stricken from the order prior to this Court’s execution, and as a result of this striking, incredulously, petitioner argues that respondent’s cross-motion is improper as this Court’s striking thereof represented a prohibition to any response from respondent. Quite to the contrary of this narrow interpretation, respondent clearly had a right, and indeed properly exercised his right, to interpose responsive papers to the petition. Consequently, petitioner’s objections to the submission and consideration of the cross-motion are completely misplaced, and the cross-motion, properly before this Court, will be considered in its entirety.

to CPLR 3211(a)(1), the document relied upon must conclusively dispose of the plaintiff's claim (citations Omitted).” Mest Management Corp. v. Double M Management Co., Inc., 199 A.D.2d 479, 480 (2<sup>nd</sup> Dept. 1993); see also, Goshen v Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); Montes Corp. v Charles Freihofer Baking Co., 17 A.D.3d 330 (2<sup>nd</sup> Dept. 2005); New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2<sup>nd</sup> Dept. 2003).

Here, respondent contends, inter alia, that a defense founded upon documentary evidence exists as he owns his premises as a tenant by the entirety with his wife, who is not a named party in this action. Thus, respondent states that “this proceeding should be dismissed, pursuant to CPLR § 3211(a)(2), due to the fact that petitioners have failed to name a necessary party[.]” Notwithstanding this contention, “dismissal is not warranted where, as here, the interests of the named party and the nonjoined party are so intertwined that there is virtually no prejudice to the nonjoined party (citations omitted).” Long Island Contractors' Ass'n v. Town of Riverhead, 17 A.D.3d 590 (2<sup>nd</sup> Dept. 2005). Thus, as the interest of respondent and his wife are so inextricably intertwined, there can be no prejudice warranting dismissal of the petition for the failure to join a necessary party.

In the alternative, respondent seeks an order requiring the filing of a surety bond in the sum of \$50,000.00, naming respondent as payee, issuing a preliminary injunction enjoining petitioners and their agents, contractors and employees from trespassing and creating a private nuisance, and permitting respondent to commence a third-party action against Shifra Construction Corp., petitioners’ contractors, pursuant to CPLR § 401. The purpose of a preliminary injunction is to preserve the status quo of an action pending trial. See, Kelley v. Garuda, 36 A.D.3d 593 (2<sup>nd</sup> Dept. 2007). As such, the granting of a preliminary injunction is a drastic remedy which is to be used sparingly, and such remedy will not be granted “unless a clear right thereto is established.” Doe v. Poe; 189 A.D.2d 132 (2<sup>nd</sup> Dept. 1993). To prevail on a motion for preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence: (1) the likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) that a balancing of equities favors movant’s position. See, Aetna Ins. Co. v Capasso, 75 N.Y.2d 860 (1990); Mar v. Liquid Management Partners, LLC, 62 A.D.3d 762, (2<sup>nd</sup> Dept. 2009); Coinmach v Alley Pond Owners Corp., 25 A.D.3d 642 (2<sup>nd</sup> Dept. 2006); Cruz v. McAneney, 29 A.D.3d 512 (2<sup>nd</sup> Dept. 2006); Ocean Club v Incorporated Vil. of Atlantic Beach, 6 A.D.3d 593 (2<sup>nd</sup> Dept. 2004).

Moreover, the party seeking injunctive relief must demonstrate that he or she will sustain irreparable injury absent the granting of the preliminary injunction, which in this context means any injury for which money damages are insufficient. See, Credit Index, L.L.C. v. Riskwise Intern. L.L.C., 282 A.D.2d 246 (1<sup>st</sup> Dept. 2001). Additionally, it must be shown that the irreparable injury to be sustained is more burdensome to that party than the harm caused through the imposition of the injunction (citation omitted), and such injury is imminent, not remote or speculative. See, Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC, 42 A.D.3d 420 (2<sup>nd</sup> Dept. 2007); Village/Town of Mount Kisco v. Rene Dubos Center for Human Environments, Inc., 12 A.D.3d 501 (2<sup>nd</sup> Dept. 2004). Moreover, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. See, City of Long Beach v. Sterling American Capital, LLC,

40 A.D.3d 902 (2<sup>nd</sup> Dept. 2007); Glorious Temple Church of God in Christ v. Dean Holding Corp., 35 A.D.3d 806 (2<sup>nd</sup> Dept. 2006); Ruiz v. Meloney, 26 A.D.3d 485 (2<sup>nd</sup> Dept. 2006).

Here, aside from conclusory statements, respondent has failed to demonstrate a clear right to his entitlement to injunctive relief. Respondent's cross-moving papers are bereft of any allegations which would demonstrate a likelihood of success on the merits, and there has not been a proper showing that respondent will sustain irreparable injury for which money damages are insufficient. Thus, the branches of the cross-motion for a preliminary injunction and the filing of a bond in the sum of \$50,000.00, hereby are denied.

Lastly, respondent seeks to commence a third-party action against Shifra Construction Corp., petitioners' contractors, pursuant to CPLR § 401, which states, in relevant part that after a special proceeding is commenced, "no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court." See, also, Barrett v. Dutchess County Legislature, 38 A.D.3d 651 (2<sup>nd</sup> Dept. 2007); Board of Educ. of Florida Union Free School Dist. v. DePace, 301 A.D.2d 521 (2<sup>nd</sup> Dept. 2003). Respondent seeks leave to implead Shifra Construction Corp., based upon the following allegations:

As a result of petitioners' ongoing construction activity, the rear steps and stoop as well as my foundation to my property have been destroyed. My foundation to my rear steps have been compromised due to petitioners' excavation and construction activity [performed by Shifra Construction Corp.]. Moreover, I have obtained an estimate for the repair of the rear steps to my property [] for a total sum of \$14,000.00.

Notwithstanding these allegations, the instant petition seeks permission to access respondent's property for a finite period in order to complete construction on petitioners' property. However, respondent's claim for damages, though allegedly related to the underlying construction being performed by Shifra Construction Corp. on petitioners' property, is best suited in a main action, rather than an impleader action in this matter, which would only seek to delay the disposition of this special proceeding. Thus, that branch of the cross-motion for leave to commence a third-party action is denied.

With regard to the order to show cause, petitioners seek an order granting them a temporary license to gain access to respondent's adjoining property to complete construction work upon petitioners' property, and upon completion of same, allowing petitioners' surveyor to access respondent's property to certify a final survey to the New York City Department of Buildings, pursuant to RPAPL § 881, which states:

When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an

adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

In the case at bar, petitioners have demonstrated their entitlement to the relief requested. Petitioners are seeking to make improvements to their property by having stucco work done on their premises. Pursuant to the affidavit of Rafi Manor, the contractor for the work being performed, “in order to complete and finalize the stucco work in a manner that complies with the requirements of the Building Plan and all applicable local laws, rules and regulations, petitioners require limited access to respondent’s property.” He further states that upon completion of the stucco work, “petitioners’ surveyor will require limited temporary access to respondent’s property in order to view petitioners’ and respondent’s property and take all measurements to ensure that the construction has been performed in accordance with the Building Plan as well as all applicable laws, rules and regulations.” Lastly, he asserts that completion of the stucco work will require no more than three consecutive clear weather days, and notwithstanding this minimal intrusion, respondent has continually refused petitioners access to his property on several occasions.

In response to the motion, respondent does not deny any of these assertions, instead contending, inter alia, that he refused access due to the damage that his property has already sustained as a result of the construction and excavation work that petitioners have performed to date, which has not been repaired by petitioners. He further contends that prior to the commencement of this proceeding, he tried to resolve the issue by proposing that petitioners pay the cost of his repairs for the damage he sustained to the rear steps, post a \$50,000.00 bond to assure against any future damages to his property, and have the survey guaranteed to the parties and his wife. Respondent states that despite these conditions for permission to access his property, “petitioners have simply refused and ignored all our reasonable requests. Further, respondent contends that such work would create an “encroachment, encumbrance and cloud on title of at least 3/4 [inch] of stucco on my property[.]” Respondent further states that petitioners have received numerous complaints and violations from the Department of Buildings and the Environmental Control Board, respectively.

Notwithstanding these contentions to the contrary, the allegations in opposition do not preclude petitioners from seeking, and this Court from granting, a temporary license for access to respondent’s premises, as the criteria for such access, pursuant to RPAPL § 881, have been met. Accordingly, petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova, having commenced this special proceeding pursuant to Real Property Actions and Proceedings Law § 881, and said proceeding having regularly come before this Court, and the proofs of all parties having been adduced, and after due deliberation having been held thereon, and upon this written decision and judgment of this

Court, it is

**ORDER, ADJUDGED AND DECREED**, that petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova are hereby granted a license to enter upon a portion of respondent Ricardo Mondaca's land, located at 82-81 164<sup>th</sup> Place, Jamaica, New York, upon such terms and conditions that petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova and respondent Ricardo Mondaca may agree upon within fifteen (15) days after notice of entry of this decision; and it is further

**ORDER, ADJUDGED AND DECREED**, that in the event there fails to be an agreement between the parties as to the terms and conditions of the license granted herein within the aforementioned time period, but no later than August 31, 2009, the conditions of such license shall be as follows:

1. Petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova, and their agents, shall be entitled to use for a period of thirty (30) consecutive days, commencing on September 1, 2009, a strip of land near the property line of their premises, located at 82-83 164<sup>th</sup> Place, Jamaica, New York, and respondent Ricardo Mondaca's adjacent premises, located at 82-81 164<sup>th</sup> Place, Jamaica, New York, on the southerly portion of respondent Ricardo Mondaca's property, being approximately seven (7) feet in width; and shall not otherwise interfere with the means of ingress and egress of respondent Ricardo Mondaca.
2. Petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova will cause to be placed a protective barricade along such license area during the term of the license.
3. A hearing shall be held before this Court, upon presentment of an affirmation attesting to the necessity thereof, at the expiration of the term of the license granted herein to determine the actual damages, if any, incurred by respondent Ricardo Mondaca as the result of the entry on September 1, 2009, of petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova, and their agents upon respondent Ricardo Mondaca's land pursuant to said license; and it is further

**ORDER, ADJUDGED AND DECREED**, that immediately upon expiration of such terms of the license, respondent Ricardo Mondaca's land within the license area shall be returned to existing grade, all materials used in construction and any resultant debris shall be removed from the license area; and it is further

**ORDER, ADJUDGED AND DECREED**, that all damaged areas within such license shall be repaired at the sole expense of petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova, and petitioners Aleksandr Iskhakbayev and Lyudmila Mirzakandova shall be held liable to respondent Ricardo Mondaca for any other damages which he may suffer as a result of the granting of this license.

Dated: August 3, 2009

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J.S.C.