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SHORT FORM ORDER

INDEX No. 09-25098

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 7-14-09
ADJ. DATE 8-19-09
Mot. Seq. # 001 - MG

HARBOR COUNTRY DAY SCHOOL,

Plaintiff,

- against -

KRISTEN RYAN and MARK KOLLMER and BOX HILL GARDEN COMPANY,

Defendants.

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Upon the following papers numbered 1 to 32 read on this motion for an order to show cause ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-9 ; Notice of Cross Motion and supporting papers (003) 10-20 ; Answering Affidavits and supporting papers 21-27; 28-30 ; Replying Affidavits and supporting papers 31-32; Other 33; 34-39 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the order previously issued on this motion (001) by way of an order to show cause by the plaintiff, Harbor Country Day School, for an order granting a preliminary injunction, which was previously denied without prejudice to renew within thirty days of the date of this order upon submission of the Summons and Complaint and Boundary Agreement, is hereby vacated, and upon this Court having received the summons and complaint and the Boundary Agreement and the Stipulation submitted by the parties, renewal of motion (001) is hereby granted, and upon consideration upon renewal, it is further

ORDERED that this motion (001) by way of an order to show cause, the plaintiff, Harbor Country Day School, for an order granting a preliminary injunction directing the defendants to cease parking and storing trucks and trailers, good and equipments, other than up to two passenger vehicles on the property of the school during the pendency of this action is granted.

The complaint of this action sets forth that the plaintiff Harbor County Day School (school) is located at 17 Three Sisters Road, Head of the Harbor, New York in the Incorporated Village of Head of the Harbor, New York and the defendants are Kristen Ryan and Mark Kollmer, owners as tenants-in-common, of the premises located at 21 Three Sisters Road, Head of the Harbor, who purchased the

premises in July 2004. The properties are adjacent to one another and each front on Three Sisters Road, in an area zoned residential under the Code of the Village of Head of the Harbor. 21 Three Sisters Road was previously owned by Peter and Lynn Johnson who sold the premises to Deborah Miller and her husband Lawrence Baxter on September 29, 1989. Miller/Baxter sold the property to Colin Clarke and Kara Clarke on October 29, 1997. The Ryan/Kollmer defendants purchased the property from the Clarkes on July 23, 2004. Pursuant to a survey performed for Peter Johnson on September 28, 1981, it was established that a portion of the driveway used for access to the school from Three Sisters Road encroached upon a portion of the property of 21 Three Sisters Road. The area of encroachment is paved, triangular, approximately eight feet wide, or one-half the width of the driveway at Three Sisters Road, and extends up the drive approximately 45 feet, narrowing in width until the driveway begins to run with the record boundary line between the two properties. The driveway is bordered at the entrance on Three Sisters road by two 7-foot brick columns, one of which is located on the school's property and the other on the defendants' property. The driveway had been established and regularly used by the school for a period of time prior to September 1981. At some time during the ownership of 21 Three Sisters Road by Deborah Miller and Lawrence Baxter, the school allowed Ms. Miller and her husband to park up to two passenger vehicles in the area of the school property approximately twenty feet wide, just off the driveway after the entrance on an as-needed basis primarily when guests were visiting. On October 23, 1997, Arthur Strawbridge, as Headmaster of the school, executed a boundary agreement prepared by Ms. Miller with respect to the use of the driveway, including the area of encroachment on the premises of 21 Three Sisters Road, and the parking of vehicles on school grounds by Ms. Miller, but did not inform the Board of Trustees of the school of the proposed Boundary Agreement prior to signing it. It is claimed the Board did not authorize Mr. Strawbridge to execute the Boundary Agreement or to alienate any interest in real property held in title by the school. It sets forth that the legal owner of the premises at 17 Three Sisters Road is Harbor Country Day School, not Harbor Country Day School, Inc. as set forth as the owner of the property in the Boundary Agreement. The Boundary Agreement was recorded in the office of the County Clerk on November 3, 1997. When Colin and Kara Clarke lived at 21 Three Sisters Road for seven years they parked their passenger automobiles in the area of the school grounds formerly used by Ms. Miller and continued to allow the driveway to remain in its encroached location and be used by the school.

The plaintiff argues that the privilege to park on school grounds conveyed by the Boundary Agreement is a revocable license and not a permanent right or interest in real property, and that the defendant Box Hill is not a party to any agreement with the plaintiff and has been granted no right to enter upon the land of the plaintiff for any reason, and that the parking of commercial vehicles, equipment and goods is in excess of the scope of the revocable license for parking granted to the predecessor in interest of the Boundary Agreement.

The plaintiff further argues that the school structure and grounds is registered as an historic site with the Village of Head of the Harbor pursuant to §59-17 of the Village Code and may not be altered, rehabilitated, restored, reconstructed, demolished, have new construction or, inter alia, make any material change in the appearance of the property, including its light fixtures, signs, sidewalks, fences, steps, paving or other exterior elements which affects the outward appearance and cohesiveness of the historic structure or historic district without first obtaining a certificate of appropriateness of the Architectural Review Board. The plaintiff asserts that the defendant's use of the school's property for

storage and as a staging area for trucks, trailers, earth-moving vehicles, and other goods and equipment is illegal pursuant to this Code.

The plaintiffs alleged the defendants are in breach of the terms of the Boundary Agreement. They further allege the defendant's unauthorized use of the school premises constitutes a nuisance and safety hazard to staff, parents, children and other lawful users of the plaintiff's property, and constitutes a trespass

The plaintiff seeks a declaratory judgment declaring that the Boundary Agreement made between the parties conveys no easement or other interest in real property to either party, but confirms the intent of the parties to recognize the existing recorded boundaries of their respective properties; that the Boundary Agreement constitutes reciprocal, revocable licenses given by each party to the other; that the Boundary Agreement contains no express provision stating that the duration of the licenses to the driveway or to park is perpetual and is construed to be terminable at the will of either party upon reasonable notice to the other; that the plaintiff wishes to relocate its driveway to a position at which it does not encroach upon the land of the defendants and to terminate and revoke the reciprocal licenses granted to each party by the other in the Boundary Agreement. The plaintiffs further seek permanent injunctive relief for so long as the Boundary Agreement remains in effect, restraining and enjoining the defendants from parking and storing trucks, trailers, goods and equipment on the property of the plaintiff, from parking any vehicles in any area of the plaintiff's property not previously used or intended for use by the parties making the Agreement, and from parking more than two passenger automobiles in the area intended for parking by the parties making the Agreement. The plaintiffs also seek monetary damages from the defendants in the amount in excess of $25,000 for the cost of repairing and repaving the driveway of the school and the repair and restoration of the lawn area unlawfully used by defendants based upon their breach of the Agreement.

By way of motion (001), by order to show cause, the plaintiff seeks a preliminary injunction during the pendency of this action restraining and enjoining the defendants from parking and storing trucks, trailers, goods and equipment on the property of the plaintiff, from parking any vehicles in any area of the plaintiff's property not previously used or intended for use by the parties making the Agreement, and from parking more than two passenger automobiles in the area intended for parking by the parties making the Agreement.

Arthur L. Strawbridge sets forth in his supporting affidavit that he was Head of School at Harbor Country Day School from 1993 through 2006 and was responsible for the administration of the academic program and day to day physical management of the school and reported to the Board of Trustees. In 1992, the neighboring property located at 21 Three Sisters Road was occupied by Deborah Miller and her husband Lawrence A. Baxter. Their home had a driveway located on the west side of the house opening onto Three Sisters Road and was used by the Millers for parking their automobiles. However, in that their driveway parking space was limited to two automobiles, they had an informal understanding with Harbor Country Day School that they would be allowed to occasionally park their cars inside the school's grounds when house guests were visiting in that the Village Code prohibits overnight parking on the street. This arrangement continued for the next few years and the privilege was exercised only occasionally at holidays or when relatives were visiting and at no time were there ever more than two

vehicles parked on the schools property. In 1997, after the death of her husband, Mrs. Miller contacted Strawbridge to advise him that she was selling her house and that her survey showed that the school's driveway cut across a portion of the northeastern corner of her lot. Mr. Strawbridge and Mrs. Miller then entered into a Boundary Agreement to confirm that the recorded boundary lines of their respective properties would be respected and that the past practice of the school permitting her to park vehicles on the school's property would be continued and would also permit the school driveway to remain as it was.

Christopher C. Pryor, Head of School at Harbor Country Day School, states to the effect that since 2007 he has been responsible for the administration of the academic program and day-to-day physical management of the school and reports to the school's Board of Trustees. This elementary school has been located at 17 Three Sisters Road for the last 51 years, has 130 students enrolled in grades Kindergarten through eight (ages five through 13), and they employ forty one full and part-time faculty and staff. Students arrive at and leave the school by bus, parent's automobiles, bicycle or walking. The faculty and employees typically drive and park their vehicles in a lot on the eastern side of the school property or along the driveway. He avers that the use of the school's property by the defendants, who own the property at 21 Three Sisters Road, for parking and storage of a variety of plants, stone, sand and other material, and the regular use of the full driveway across school grounds has become a significant problem for the operation of the school and materially diminishes the ability of the school to use and enjoy its property. The trucks and trailers stored by the defendants on the school property have commercial license plates and the trucks have the name Box Hill Garden Company with the defendants' home telephone number painted on the door. Mr. Pryor avers that the intensive use of the school's property by the defendants interferes with the operation of the school and has caused damage to the school's lawn and driveway, and the storage of the great variety of commercial vehicles and equipment is an eyesore which is visible to every visitor to the school. The regular movement of the trucks and equipment across the front of the school interferes with traffic and the drop-off and pick-up of children by their parents and school buses, and most importantly creates a safety hazard particularly for small children for which safety parents have voiced concern. During the summer when the school's day camp program is operating with 200 children attending, the children are outside much of the time, primarily in the field located to the rear of the main school building. Although Mr. Pryor, the Trustees of the school, many of whom are parents, have asked the defendants on many occasions to remove the trucks and equipment from the school's property, the defendants have refused, citing the Boundary Agreement which they claim grants them a right to park vehicles without limit on the school grounds. It is the plaintiffs' argument that there is nothing in the Boundary Agreement that contemplated the current abuse of the license to park automobiles that Ms. Miller requested and received as a neighborly accommodation in 1997, and did not contemplate the illegal use of school property as a storage yard for a commercial enterprise. The school, he avers, seeks to restore the status quo prevailing at the time the Boundary Agreement was executed to limit the parking of vehicles by the defendants to their personal automobiles in the area originally set aside for such parking, and to direct them to remove all trucks, trailers and other equipment pending determination of this action.

Mr. Pryor, by way of a further affidavit avers that since this action was commenced, the defendants have introduced newer, even larger vehicles to the school's property and have expanded the area appropriated for parking and storage. Photographs have been submitted in support of the claim. On July 28, 2009, the Village of Head of the Harbor served Mark Kollmer with a summons alleging the

violation of §165-23 of the Village Code for operating a landscaping business in a residential zone.

Mark Kollmer sets forth in his affidavit that he owns a landscape design and construction company and has operated it as a sole proprietorship. In 2005, he purchased a Hummer H1 and an equipment trailer, both registered in his name, and the Hummer was registered as a commercial vehicle. In 2006 he purchased a Ford F550 truck, and as he acquired each of these vehicles, began parking them on a portion of Harbor Country Day Schools' property. He avers that this was pursuant to the recorded easement agreement. He claims that visitors at the school were parking vehicles on his property in 2005, inches from his windows, so he sought approval from the Village Architectural Review Board to construct a seven foot high brick wall along the portion of the property that borders the driveway he shares with the school and was granted approval. He states that construction of the wall effectively enclosed their home and he relies on the continued existence of the easement agreement. He states that the school erected a "private parking sign" in the easement area so that it would be reserved for their exclusive use. In 2007 he entered into a partnership with his father-in-law but states that the partnership is no longer in existence and that he filed a corrective certificate of doing business indicating Box Hill's status as a sole proprietorship. He further avers that he and his wife use his Ford, Hummer and Acura SUV to travel between home and work and for personal use. He does not see or receive customers at his home and has no employees who report to work at that location. Although he does not store landscape plants or materials for customers on his property or the easement area, the area has been used on occasions to unload plants and other materials for landscaping his home. Typically, the numerous trucks he owns are stored elsewhere, and he often keeps a bobcat or other brand skidster at his property for use with tasks at his home. He also has a GMC dump truck at his yard which is usually stored off-premises.

Kristen Kollmer has set forth in her opposing affidavit that when she and Mark Kollmer purchased the property at 21 Three Sisters Road in July 2004, they were informed that parking for their property was located on abutting property owned by the Harbor Country Day School pursuant to a recorded easement agreement, and without the easement, they would never have purchased the home as they would have no vehicular access to their home. She avers the school's driveway is U- shaped with their end of the driveway labeled "enter only" and the other end "exit only" and that they generally abide by that and have no way to exit their property or the easement unless they utilize the school's "exit only" portion of the driveway. Because of traffic on the driveway and the driveway being only one car width, they often have to wait to get out of the driveway as often traffic backs up in front of their home along Three Sister's Road. She states that in 2007 the school offered to buy their home, but the negotiations failed over price. She avers that the prior owners constructed a seven-foot brick wall on the westerly side of their property making access from their property on that side impossible. In 2007, they constructed a seven-foot brick wall on the easterly side of their property for greater privacy, as well as a wrought iron fence with a rolling gate to effectively enclose their property preventing parking of more than one of their three vehicles at a time.

The Boundary Agreement dated October 23, 1997, entered into between Deborah Miller and Arthur L. Strawbridge refers to the properties located at 17 Three Sisters Road owned by the plaintiff Harbor Country Day School, and at 21 Three Sisters Road, then owned by Deborah Miller. The Agreement provides that the existing encroaching driveway shall be allowed by Miller to remain in its present location and in consideration, Harbor Country agrees that the driveway shall never form the basis

of any claim by adverse possession or prescriptive easement. In consideration of Miller's agreement, Harbor County will continue to permit Miller to park vehicles on the westerly portion of their property, east of the driveway, and the parties shall abide in all other respects by the record lines of their respective properties. Miller shall have no responsibilities whatsoever for the upkeep or maintenance of the encroaching driveway portion.

It is noted that the Building Structure Inventory Form for the school reveals that the structure, now being used as the school, was originally built in 1912 as a private home for William A. Minott as a wood-frame, clapboard house with a gambrel roof and was turned into an English Country house by Alice T. McLean in the 1920's for a visit by the Prince of Wales.

Preliminary injunctions are commonly granted to preserve the status quo even though the plaintiff's right to ultimate relief has not been proven. A preliminary injunction may be justified in the first instance, but after it is ultimately determined that the plaintiff has no cause of action, the defendant should be entitled to recompense for any damages he sustained by being enjoined from doing what he had a right to so. The granting of a temporary injunction serves only to hold the matter as status quo until opportunity is afforded to decide upon the merits. The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for (see, ***Preston Corporation et al v Fabrication Enterprises, Inc. et al,*** 117 AD2d 997 [4th Dept 1986]). A party is not entitled to a temporary injunction, unless the right is plain from the undisputed facts. If the right depends upon an issue which can only be decided upon a trial, the injunction cannot be granted. Where the facts are in sharp dispute, a temporary injunction will not be granted (***Family Affair Haircutters, Inc. v Nina Detling,*** 110 AD2d 745 [2nd Dept 1985]). Where a litigant can be fully recompensed by a monetary award, a preliminary injunction will not issue (***Dana Distributors, Inc. et al v Crown Improts, LLC et al*** *48 AD3d 613 [2nd Dept 2008]).*

The tripartite test for preliminary injunctive relief requires that the moving party establish: (1) a likelihood of success on the merits; (2) irreparable harm if the injunction is denied; and (3) a balance of the equities in favor of the injunction (***Yong Fung Moy v Mohi Umeki et al,*** 10 AD3d 604 [2nd Dept 2004]; ***Livas v Mitzner,*** 303 AD2d 381 [2nd Dept 2003]). In a preliminary injunction context, all that must be shown is the likelihood of success; conclusive proof is not required (***Yong Fung Moy v Mohi Umeki et al,*** supra). The mere fact that there may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction, for even when facts are in dispute, a nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be conclusive (***Yong Fung Moy v Mohi Umeki et al,*** supra).

A motion for a temporary injunction opens the record and gives the court authority to pass upon the sufficiency of the underlying pleading. However, the inquiry is limited to whether the plaintiff has a cause of action, and the court's power does not extend to an evaluation of conflicting evidence (***Livas v Mitzner***, supra). A preliminary injunction is addressed to the court's discretion. It is a drastic remedy. It should by awarded sparingly, and only where the party seeking it has met its burden of proving both the clear right to the ultimate relief sought, and the urgent necessity of preventing irreparable harm (***City of Buffalo v Mangan et al,*** 49 AD2d 697 [4th Dept 1975]). Because preliminary injunctions prevent the

litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, they should be issued cautiously and in accordance with appropriate procedural safeguards (***Grossman et al v Pharmhouse Corp. et al,*** 167 Misc 2d 654 [Supreme Court of New York, Oneida County 1995]).

In the instant action the parties are not in dispute that there was a Boundary Agreement entered into between Mr. Strawbride and the prior owner of the premises at 21 Three Sisters Road. "It is elementary that there can be no agreement unless all of the parties involved intended to enter into one. Moreover, it is well-established contract law that in determining whether the parties possessed the necessary intention to contract, an objective test is generally to be applied. That means, simply, that the manifestation of a party's intention rather than the actual or real intention is ordinarily controlling. An agreement by conduct does not differ from an express agreement , except in the manner by which its existence is established. Thus, it is clear that an express agreement or understanding can arise from the conduct or acts of parties as well as from their words" (***Bellmore-Merrick Central High School District, Town of Hempstead v Bellmore-Merrick Untied Secondary Teachers, Inc.*** 85 Misc2d 282 [Supreme Court of New York, Special Term, Nassau County 1975]). Based upon the evidentiary submissions, it is determined that an agreement was entered into between Mr. Strawbridge from Harbor Country Day School and Ms. Miller which demonstrates their intent to permit Ms. Miller to park her vehicles on the property. It has been established by the plaintiff, and unrefuted by the defendants, that Ms. Miller parked her vehicles on her property and used the designated area for parking of usually up to two vehicles when she had visitors to her home. It has been established that the premises of both parties are zoned residential. The defendant Mark Kollmer admits to having more than one personal vehicle with commercial plates, used by his business as well as personally, at his home to perform certain improvements to his property as well as sometimes being kept there. He admits to parking more than just a car or two cars on the disputed property, including bobcats and other equipment and supplies. The various photographs submitted demonstrate occupied and unoccupied heavy equipment and supplies over a period of time on the school property in support of the claim that the property was being used beyond the terms of the Agreement.

The plaintiff has demonstrated a likelihood of success on the merits based upon the evidentiary submissions. The plaintiff has demonstrated irreparable harm if the injunction is denied in that there are serious issues concerning the safety of the children attending the school and others utilizing the property and the movement of large commercial vehicles and equipment in and over the parking area and driveway. The school property has been designated an historical site and it is asserted that the overall characteristics and appearance of the building and property cannot be altered without permission from the Village. A balance of the equities in favor of the injunction has been demonstrated in that based upon the evidentiary submissions and affidavits, the designated parking area and driveway has been demonstrated as being used for more purposes other than parking personal vehicles in a residential area and by utilizing the school driveway for commercial vehicles, equipment and supplies. Although there may be factual issues to be determined at trial concerning other issues such as whether the Agreement is a revocable license, it is determined that those factual issues do not preclude the issuance of a preliminary injunction in this action.

Accordingly, the plaintiff's application is granted directing the defendants to cease parking and

storing trucks and trailers, good and equipments, other than up to two passenger vehicles on the property of the school, during the pendency of this action.

Fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the trial court, CPLR 6312(b), which clearly and unequivocally requires the party seeking an injunction to give an undertaking.

Accordingly, the plaintiff is directed to serve a copy of this order with Notice of Entry upon the defendants and the Clerk of the Calendar Department of Supreme Court within thirty days of the date of this order, and the Clerk is directed to place this matter on the Court's calendar to fix the appropriate undertaking before the Hon. Joseph C. Pastoressa.

Dated: December 16, 2009

HON. JOSEPH C. PASTORESSA

_____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION