Ormandy v Georgiou
2010 NY Slip Op 32564(U)
September 13, 2010
Supreme Court, Queens County
Docket Number: 10196/08
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

CARL ORMANDY in his capacity as Executor of the ESTATE OF GLORIA SAWICKI, Plaintiff, -against- PANTELIS GEORGIOU and MARIA GEORGIOU, Defendants.	Index No. 10196/08 Motion Date June 29, 2010 Motion Cal. No. 51 Motion Sequence No. 1

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Upon the foregoing papers it is ordered that plaintiff's motion for an order pursuant to CPLR 6301 granting plaintiff a preliminary injunction enjoining and restraining the defendants, by and through defendants' agents, via various construction companies, representatives, employees, independent contractors, or anyone defendants have control, from preventing the plaintiff's full and complete use of that certain walkway which is situated entirely within the County of Queens and lies in and is part of Lot 37, in Block 889, of Queens County, and is bounded and described on the Survey as the 25 foot area directed by the arrow on the survey is hereby granted.

DISCUSSION

"The law is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate `"(1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position"'(*Barone v. Frie,* 99 AD2d 129, 132, [2d Dept 1984] *quoting from Gambar Enterprises v. Kelly Servs.,* 69 AD2d 297, 306, 418 [2d Dept 1979); *Aetna Ins. Co. v. Capasso,* 75 NY2d

860, 552 [1990]; and *W.T. Grant Co. v. Srogi,* 52 NY2d 496, 517, [1981]; *see also*, *Merscorp, Inc. v. Romaine,* 295 AD2d 431, 562 [2d Dept 2002]; and *Neos v. Lacey,* 291 AD2d 434, [2d Dept 2002]). The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the *status quo (U.S. Reinsurance Corp. v. Humphreys,* 205 AD2d 187, 192, 618 [1st Dept 1994]); *see also*, CPLR 6312[c]; and *Albany Medical College v. Lobel,* 296 AD2d 701,702 [3d Dept 2002]). The determination as to whether to issue a preliminary injunction is a matter left to the sound discretion of the Court (*see*, *Doe v. Axelrod,* 73 NY2d 748, 750 [1988]). Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant (*First Nat. Bank of Downsville v. Highland Hardwoods,* 98 AD2d 924, 926, 471 NYS2d 360; *accord 607 Buegler v. Walsh,* 111 AD2d 206; *Orange County v. Lockey,* 111 AD2d 896, 897 [1985]; *William M. Blake Agency, Inc. v. Leon,* 283 AD2d 423, 424 [2d Dept 2001]; and *Peterson v. Corbin,* 275 AD2d 35, 36 [2d Dept 2000]). As the court stated in *Tucker v. Toia*, 54 AD2d 322, 325-326, however, "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (*Hoppman v. Riverview Equities Corp.*, 16 AD2d 631; *Weisner v. 791 Park Ave. Corp.*, 7 AD2d 75, 78-79; *Peekskill Coal & Fuel Oil Co. v. Martin*, 279 App Div 669, 670; *Swarts v. Board of Educ.*, 42 Misc 2d 761, 764, *supra*; *cf. Walker Mem. Baptist Church v. Saunders*, 285 NY 462, 474)."

To prevail on an application for preliminary injunction relief the first prong of the test is a demonstration by plaintiff of a likelihood of success on the merits. Here, the plaintiff has asserted a cause of action for adverse possession. A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show, by clear and convincing evidence: first, that the possession is hostile and under claim of right, second, that the possession is actual, third, that it is open and notorious, fourth, that it is exclusive, and fifth, that the possession is continuous for the statutory period of 10 years (*Beyer v. Patierno,* 29 AD3d 613, [2d Dept 2006]).

This court finds that plaintiff has made a sufficient showing of likelihood of success. As to likelihood of success, "(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 (citations omitted)"

(*Tucker v. Toia*, *supra*, 54 AD2d at 326). Plaintiff has set forth facts supporting his claim for adverse possession of the Walkway for a period of more than 10 years. Accordingly, upon the record presented and in the exercise of its discretion, the Court concludes that the plaintiff has demonstrated a reasonable likelihood of success on the merits.

With regard to the second prong of the test, the plaintiff has demonstrated that he will suffer an irreparable injury if the preliminary injunction is not granted. The plaintiff's allegations that "the Defendants threatened that they would build a brick wall that would extend to the garage on the Residence which, essentially, would block [his] use of the Walkway" and "the Walkway is [his] only means of egress from the Residence", constitutes an immediate injury which cannot be adequately compensated by monetary damages, and qualifies as an irreparable injury supporting an award of injunctive relief.

With regard to the third prong of the test, the plaintiff has demonstrated that equity is balanced in his favor. Where, as here, the plaintiff seeks to obtain by the issuance of this preliminary injunction the same injunctive relief sought in the complaint, a preliminary injunction will not be granted unless the plaintiff demonstrates, upon clear and undisputed facts, that such relief is imperative and because without it, a trial would be futile (*Xerox Corp. v. Neises*, 31 AD2d 195 [1968]). The Court, having weighed the drastic nature of the relief sought against the plaintiff's allegations of adverse possession and irreparable injury, against the defendants' failure to allege any prejudice, finds that the plaintiff demonstrated the existence of the extraordinary circumstances which would tip the balance of equity in his favor (*Di Marzo v. Fast Trak Structures, Inc.*, 298 AD2d 909 [2002]; *Penfield v. New York*, 115 AD 502 [1st Dept 1906]).

Moreover, upon review of the parties' factual averments, the Court concludes that the equities balance in favor of maintaining the *status quo* pending resolution of the underlying dispute (*Merscorp, Inc. v. Romaine, supra; Alside Div. of Associated Materials Inc. v. Leclair,* 295 AD2d 873, 875 [3d Dept 2002]; and *State v. City of New York,* 275 AD2d 740, 713 NYS2d 360 [2d Dept 2000]). That is, the harm to be suffered by plaintiff by the loss of the use of the Walkway outweighs the harm to defendants resulting from the granting of the requested injunctive relief. Further, the Court notes that by denying the requested injunction, defendants would be able to build a structure on the Walkway which could render an ultimate decision herein academic.

Finally, CPLR 6312(b) directs the court to fix the undertaking in an amount that will compensate the defendants for damages incurred "by reason of the injunction", in the event it is determined that the plaintiff was not entitled to the injunction (*see, Margolies v. Encounter, Inc.*, 42 NY2d 475, [1977]; and *Schwartz v. Gruber,* 261 AD2d 526 [2nd Dept 1999]). The fixing of the amount of an undertaking is a matter which rests within the sound discretion of the court (*Clover Street Associates v. Nilsson,* 244 AD2d 312, 313 [2d Dept 1997]). Upon a review of the papers submitted on the motion by the parties, the Court is unable to determine the amount of undertaking that will be reasonable and adequate under the circumstances presented. Accordingly, the Court's determination on this issue is reserved pending compliance with the directives set forth hereinafter.

Accordingly, it is,

ORDERED, that the plaintiff's motion for a preliminary injunction, enjoining and restraining the defendants, by and through defendants' agents, via various construction companies, representatives, employees, independent contractors, or anyone defendants have control, from preventing the plaintiff's full and complete use of that certain walkway which is situated entirely within the County of Queens and lies in and is part of Lot 37, in Block 889, of Queens County, and is bounded and described on the Survey as the 25 foot area directed by the arrow on the survey is hereby granted; and it is further

ORDERED , that the plaintiff shall post a bond in an amount to be determined upon the serving and filing of a motion by plaintiff to fix the bond amount pursuant to CPLR 6312(b) within fifteen (15) days of entry of this decision. Defendants may submit their position on the amount of the bond in the form of opposition or a cross motion. Alternatively, the parties may stipulate to the waiver of a bond or as to the amount and nature of the bond. If such undertaking is not posted or if such motion to fix the bond amount is not filed within fifteen (15) days of entry of this decision, this motion is denied. Such undertaking shall be in the form of surety, deposited with the Queens County Clerk or in a joint interest bearing escrow account.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: September 13, 2010

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Howard G. Lane, J.S.C.

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