Mangar v Deosaran
2012 NY Slip Op 33720(U)
September 28, 2012
Supreme Court, Queens County
Docket Number: 1159 2012
Judge: Duane A. Hart

[* 1]

Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

QUEENS COUNTY CLERK
FILED
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Present: HONORABLE DUANE A. HART IA Part 18
Justice

ANVUL MANGAR, ADESH MANGAR AKASH x Index
MANGAR AND JAAVITRI MANGAR, Number 1159 2012

Plaintiffs, Motion
-against- Date August 8, 2012

SHELLY DEOSARAN, Motion
Defendant. Cal. Number 12
x

Motion Seq. No. 2

The following papers numbered 1 to 8 read on this motion by plaintiffs to preliminarily enjoin defendant, and defendant's agents, servants and employees from interfering with their use of, and enjoyment of rights of ingress and egress of vehicular traffic on, a certain driveway located on and between plaintiffs' property and defendant's property.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-7
Letter dated August 8, 2012 of Patrick T. McGuire, Esq.	8

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action to establish by prescription[1] a driveway easement over a portion of defendant's realty and enjoin interference with such easement.

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[1] Plaintiffs make no claim of an easement by grant or implication.

Plaintiffs previously moved for a preliminary injunction enjoining defendant, defendant's agents, servants and employees from interfering with their right to ingress and egress over a driveway on and between the parties' respective properties. By order dated May 18, 2012, the motion was denied with leave to renew upon proper papers, including a copy of a survey.

In support of the instant motion, plaintiffs submit, among other things, a copy of a survey dated February 28, 2012, indicating their property's boundaries, and the fence and driveway.

It is undisputed that defendant erected the fence within the concrete driveway, albeit on her side of the lot boundary line dividing her property from the property of plaintiffs. According to plaintiffs, defendant erected the fence on January 11, 2012 (a week prior to the commencement of this action). Plaintiffs assert that the installation of the fence within the driveway has adversely affected their use of the driveway for the purposes of ingress and egress to their garage, and picking up elderly relatives from the side entrance of their home, and has caused one of their vehicles to be "trapped" in the rear of their property.

Defendant opposes the motion, contending that plaintiffs cannot establish use of the driveway for the ten-year prescriptive period, or that the use of the property was "hostile" for the entire period. According to defendant, plaintiffs and defendant's predecessor-in-title maintained a friendly, neighborly relationship, and thus, it cannot be presumed that plaintiffs' use of the driveway was hostile. In addition, defendant asserts that plaintiffs have no necessity for an easement over part of her land because plaintiffs have adequate width of their own property to drive their car to and from their garage in the rear, but for their erection of a brick wall and stoop. Defendant also asserts that plaintiffs were given an opportunity to use the driveway to remove their vehicle from the rear of their property prior to the erection of the fence, but failed to take advantage of it.

On a motion for a preliminary injunction, the movant must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor *(see Doe v Axelrod*, 73 NY2d 748, 750 [; *Automated Waste Disposal, Inc. v Mid–Hudson Waste, Inc.*, 50 AD3d 1072 []. A preliminary injunction is a drastic remedy and the respondents, to be entitled to injunctive relief, "must establish a clear right ... under the law and the undisputed facts" (*Omakaze Sushi Rest., Inc. v Ngan Kam Lee*, 57 AD3d 497 []. The purpose of any preliminary injunction is to maintain the status quo between the parties, not to determine their ultimate rights (*see Moody v Filipowski*, 146 AD2d 675 [ ).

Plaintiffs have failed to demonstrate that they will suffer irreparable injury absent the granting of injunction. Plaintiffs do not dispute they were given an opportunity to remove the "trapped" vehicle prior to the erection of the fence. Nor do they dispute that the vehicle is unregistered and uninsured. They also have failed to show they cannot park their other vehicles on the street during the pendency of this action, or that access to the side entrance to their home has been blocked by the fence and there is no other entrance.

In addition, plaintiffs have failed to demonstrate a likelihood of success on the merits. To obtain an easement by prescription, it must be established that the use of the property was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years (*see Morales v Riley*, 28 AD3d 623 [2006]). These elements must be established by clear and convincing evidence (*see id.*; *see also Rivermere Apts. v Stoneleigh Parkway*, 275 AD2d 701 [2000]).

In this instance, plaintiffs commenced this action on January 18, 2012, asserting that their use of the driveway was open, notorious and hostile, and continuous and uninterrupted from the time they took title to their property by deed dated February 1, 2002 until defendant erected the fence. Such use was just shy of the prescriptive period, and as a consequence, plaintiffs seek to tack a period of use of the driveway by their predecessor in interest to establish the element of continuous and uninterrupted use for the prescriptive period. It cannot be said based upon these submissions that plaintiffs will be able to establish, by clear and convincing evidence, the prescriptive period is satisfied by "tack[ing]" on a period of hostile use by their predecessor-in-interest (*see CSC Acquisition-NY, Inc. v. 404 County Road 39A, Inc.*, 96 AD3d 986 [2012]).

To the extent plaintiffs seek an assessment of damages, they failed to seek such relief in their notice of motion, and in any event, the request is in the nature of some of the ultimate relief sought in the action. Plaintiffs have failed to demonstrate that issue has been joined or defendant is in default in answering the complaint. Plaintiffs offer an affidavit of service indicating service of the order to show cause and supporting papers upon defendant by substituted service (CPLR 308[2]). Even assuming, for the purpose of the instant motion, that such service constituted service for the purpose of acquiring personal jurisdiction over defendant or that defendant waived any objection based upon improper service, plaintiffs have failed to demonstrate such affidavit of service was filed with the clerk of the court.[2]

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[2] The County Clerk is the "clerk of the court" in a Supreme Court action (NY Const, art VI, § 6[e]).

Thus, plaintiffs have failed to demonstrate the time period in which defendant must answer has run (CPLR 308[2]).

The motion is denied.

Dated: September 28 2012

Duane A. Hart
J.S.C.