

**Riker v Trazzera**

2014 NY Slip Op 33868(U)

October 15, 2014

Supreme Court, Suffolk County

Docket Number: 13-17393

Judge: Joseph C. Pastorella

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

**PRESENT:**

**PUBLISH**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

Mot. Seq. # 001 - MD  
# 002 - XMG; CASEDISP

-----X

SHIRLEY RIKER, FOR HERSELF AND  
OTHERS WITH ADVERSELY AFFECTED  
PROPERTY AND USE RIGHTS,

Plaintiff,

- against -

SALVATORE TRAZZERA and UNKNOWN  
OTHERS,

Defendant.

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Upon the following papers numbered 1 to 58 read on this motion for preliminary injunctive relief; cross motion for dismissal; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 34 - 47; Answering Affidavits and supporting papers 9 - 11; 48 - 55; Replying Affidavits and supporting papers 12 - 33; 56 - 58; Other       ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by plaintiff for, inter alia, a preliminary injunction enjoining defendant Salvatore Trazzera from interfering with plaintiff's use of a common driveway is denied; and it is

**ORDERED** that the cross motion by defendant for an order dismissing the complaint and cancelling a notice of pendency is granted; and it is further

**ORDERED** that the Suffolk County Clerk, upon service of a copy of this order with notice of entry, is directed to cancel and discharge the notice of pendency filed by plaintiff on August 6, 2013 against the real property known as 470 Woodbury Road, Cold Spring Harbor, New York.

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Plaintiff Shirley Riker and defendant Salvatore Trazzera are the owners of contiguous lots of residential property created by the subdivisions of a tract of land located on Woodbury Road in the hamlet of Cold Spring Harbor, Town of Huntington. Plaintiff owns the lot known as 472 Woodbury Road, and defendant owns the lot known as 470 Woodbury Road. A common driveway is used to access the parties' properties and the property known as 474 Woodbury Lane, which is owned by nonparties Robert Gilchrist and Loraine Gilchrist. On July 3, 2013, this Court (Martin, J.) granted plaintiff's ex parte application, brought on by an order to show cause, for temporary restraining orders directing defendant to remove obstructions from the common driveway, to refrain from interfering with the use of the common driveway, and to stop trespassing on plaintiff's property. The order to show cause, which seeks the same preliminary injunctive relief, allegedly was prompted by defendant's installation in late June 2013 of a steel traffic bollard in the center of the common driveway and three spherical concrete bollards along a portion of his property abutting such driveway, as well as by the presence of "unknown traffic using the driveway to access defendant's property, with such vehicles interfering" with plaintiff's use of such driveway. An affidavit of service avers the order to show cause and supporting papers were served on defendant at 206 Fallwood Parkway, Farmingdale, New York, on July 9, 2013.

Papers filed by defendant in opposition to the motion contend that injunctive relief must be denied for lack of jurisdiction on the ground that no summons had been served in the action. Defendant also argues the claim for injunctive relief related to the installation of the traffic bollard is moot, as it was removed from the driveway after the issuance of the order to show cause. In addition, defendant argues plaintiff failed to comply with the requirements for temporary restraining orders when she presented the order to show cause to the Court.

Subsequently, on August 6, 2013, plaintiff filed a summons and complaint in this action, as well as a notice of pendency against defendant's property at 470 Woodbury Road. The complaint alleges, among other things, that surveyors and workers employed by defendant trespassed on plaintiffs' property and cleared trees and bushes from the land without permission; that defendant erected a "spite fence" on July 18, 2013; that the "spite fence" and the concrete bollards installed by defendant constitute a dangerous nuisance; and that "one-half of the six inch diameter" of the concrete bollards are trespassing on plaintiff's property. In addition to seeking damages for trespass and nuisance, the complaint asserts a claim to quiet title based on adverse possession. According to the affidavit of service, the summons and complaint were served on a receptionist at the law offices of defendant's attorney, Daniel Olivieri, on August 6, 2013. The submission date of plaintiff's motion for injunctive relief was adjourned at the request of plaintiff's counsel to August 28, 2013.

Defendant now cross-moves for an order dismissing the complaint, arguing, among other things, that no personal jurisdiction was obtained over him, as he was never served with the summons and complaint, and that documentary evidence shows the fence and concrete bollards at issue were installed on his property. Defendant also seeks an order cancelling the notice of pendency filed against his property by plaintiff. Plaintiff opposes the cross motion, arguing that it is untimely, that the order to show cause constituted the "initiating papers" for this action, and that service of the summons and complaint on defendant's counsel was proper. It is noted that the sur-reply filed by defendant without leave of court was not considered in the determination of these motions (see CPLR 2214; McMullin v Walker, 68 AD3d 943; Flores v Stankiewicz, 35 AD3d 804).

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When a motion is made under CPLR 3211 (a) (8) for dismissal of a complaint based on lack of personal jurisdiction, the ultimate burden of proving that personal jurisdiction was acquired over a defendant rests with the plaintiff (see Waggaman v Arauzo, 117 AD3d 724; Goel v Ramachandran, 111 AD3d 783; Castillo v Star Leasing Co., 69 AD3d 551; Wells Fargo Bank, NA v Chaplin, 65 AD3d 588). However, a plaintiff opposing a motion made under CPLR 3211 (a)(8) must make only a prima facie showing that the defendant was subject to the personal jurisdiction of the court (Daniel B. Katz & Assoc. Corp. v Midland Rushmore, LLC, 90 AD3d 977, 978; Lang v Wycoff Hgts. Med. Ctr., 55 AD3d 793, 794; Cornely v Dynamic HVAC Supply, LLC, 44 AD3d 986, 986).

While CPLR 308 provides a variety of methods for effectuating personal service of process on a natural person, courts require strict compliance with those methods, as proper service of process is necessary to achieve personal jurisdiction over a defendant (see Macchia v Russo, 67 NY2d 592, 592-593; Pierce v Village of Horseheads Police Dept., 107 AD3d 1354; Estate of Waterman v Jones, 46 AD3d 63). Notice of a lawsuit "received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (Macchia v Russo, 67 NY2d 592; see Ross v Lan Chile Airlines, 14 AD3d 602), and all subsequent proceedings are a nullity absent personal jurisdiction over the defendant (see Krisilas v Mount Sinai Hosp., 63 AD3d 887; Cartier v County of Nassau, 281 AD2d 477; McMullen v Arnone, 79 AD2d 496). Further, when a plaintiff chooses to serve a defendant using personal delivery, the service must be made "by delivering the summons within the state to the person to be served" (CPLR 308 [1]; Macchia v Russo, 67 NY2d 592, 592-593).

In addition, a temporary or preliminary injunction may only be granted in a pending action (see CPLR 6301; Uniformed Firefighters Assn. of Greater N.Y. v City of New York, 79 NY2d 236; Happy Age Shops v Matyas, 128 AD2d 754). Thus, when a plaintiff moves for injunctive relief before jurisdiction has been obtained over the defendant, the motion must be denied (see Hart Is. Committee v Koch, 150 AD2d 269; Happy Age Shops v Matyas, 128 AD2d 754).

Initially, the Court rejects plaintiff's argument that the cross motion must be denied as untimely, as the return date for both motions was adjourned to October 2, 2013. Here, in opposition to the cross motion, plaintiff failed to present prima facie proof that defendant was served in accordance with CPLR 308 (1). In fact, it is undisputed that the summons was served on defendant's attorney, not defendant. Personal jurisdiction, therefore, was not obtained over defendant (see Green v Gross & Levin, LLP, 101 AD3d 1079; Khanal v Sheldon, 55 AD3d 684). Plaintiff's argument that the order to show cause should be regarded as the initiating paper of this action, and that personal service of the order to show cause was sufficient to achieve personal jurisdiction over defendant, is rejected, as is her argument that defendant was not prejudiced because he actually received the summons and complaint (see Raschel v Rish, 69 NY2d 694; County of Nassau v Letosky, 34 AD3d 414; Monks v Pandolfi, 274 AD2d 381; cf. Staskoski v Government Empls. Ins. Co., 138 AD2d 587). "When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" (Raschel v Rish, 69 NY2d 694, 697). Accordingly, as the Court lacks personal jurisdiction over defendant, plaintiff's motion for injunctive relief is denied, and the branch of the cross motion seeking dismissal of the complaint for lack of personal jurisdiction is granted.

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Finally, the branch of the cross motion seeking cancellation of the notice of pendency filed by plaintiff against defendant's property at 470 Woodbury Road is granted. A notice of pendency may only be filed in an action seeking a judgment that would directly "affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501; 5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313). No lis pendens, then, may be filed in an action involving simply an encroachment or wrong perpetrated by the defendant against the plaintiff's property (Braunston v Anchorage Woods, 10 NY2d 302, 305; see Rajic v Sarokin, 214 AD2d 663). Moreover, when the filing of a notice of pendency occurs before the summons is served, such notice is effective only if, within 30 days of such filing, a summons is served on the defendant or a first publication of the summons is made pursuant to a court order and publication is subsequently completed (CPLR 6512; see NYCTL 1999-1 Trust Chalom, 47 AD3d 779). A court, upon motion of a person aggrieved, shall direct the cancellation of a notice of pendency by the county clerk "if service of the summons has not been completed within the time limited by CPLR 6512" or if the action has been "settled, discontinued or abated" (CPLR 6514 [a]). Here, the notice of pendency at issue is invalid, as plaintiff failed to serve a copy of the summons on defendant within 20 days of the filing of such notice with the County Clerk (see NYCTL 1999-1 Trust Chalom, 47 AD3d 779). Further, defendant is entitled to cancellation of such notice based on the dismissal of this action for lack of personal jurisdiction (see Alvaro v Faracco, 85 AD3d 1072; RB Hempstead, LLC v Incorporated Vil. of Hempstead, 34 AD3d 552; Gallagher Removal Serv. v Duchnowski, 179 AD2d 622).

Dated: October 15, 2014

  
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HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION