

**Dormitory Auth. of the State of N.Y. v Roman
Catholic Church of St. Ignatius**

2016 NY Slip Op 31116(U)

January 5, 2016

Supreme Court, Kings County

Docket Number: 504285/2015

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

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At an IAS Term, Part 64 of the Supreme Court of the State of New York held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5TH day of January, 2016.

PRESENT:
HON. KATHY J. KING,

Justice.

-----X
DORMITORY AUTHORITY OF THE STATE
OF NEW YORK and CITY UNIVERSITY
OF NEW YORK,

Index No.: 504285/2015

Plaintiff,

DECISION AND ORDER

- against -

ROMAN CATHOLIC CHURCH OF SAINT
IGNATIUS and 1267 RODGERS AVENUE, LLC,

Defendants.
-----X

The following papers numbered 1 to 6 read herein:
Numbered

Papers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	_____	<u>1-2</u>
Opposing Affidavits (Affirmations)	_____	<u>3</u>
Reply Affidavits (Affirmations)	_____	<u>4</u>
Affidavit (Affirmation)	_____	
Other Papers (Plaintiff's Memo of Law; Prior Motion Papers)	_____	<u>5, 6</u>

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KINGS COUNTY CLERK

Upon the foregoing papers, plaintiffs, Dormitory Authority of the State of New York ("DASNY") and City University of New York ("CUNY") move, pursuant to Civil Practice Laws and Rules ("CPLR") §§ 6311 and 6313 for a temporary restraining order and a preliminary injunction restraining and enjoining defendants, Roman Catholic Church of Saint Ignatius ("Saint Ignatius") and 1267 Rogers Avenue, LLC, from any further construction along the property line between the real property owned by plaintiffs

located at 1150 Carroll Street, Brooklyn, New York and the real property owned by defendants located at 267 Rogers Avenue, Brooklyn, New York. Defendants oppose the requested relief and cross move for dismissal of plaintiffs' complaint and vacatur of plaintiffs' notice of pendency pursuant to CPLR §§ 3211 (a)(7) and 6514.

BACKGROUND

In this action pursuant to Real Property Actions and Proceedings Law ("RPAPL") Article 15, plaintiff, DASNY is the fee owner of the real property located at 1150 Carroll Street, Brooklyn, New York ("School Property"). Plaintiff, CUNY occupies the School Property pursuant to an agreement with DASNY. Defendant, Saint Ignatius, is the owner of real property located at 267 Rogers Avenue, Brooklyn, New York ("Development Property") which adjoins the School Property. Defendant, 1267 Rogers Avenue, LLC ("the Developer") is the tenant of the Development Property pursuant to a long term lease with St. Ignatius. Title to the respective properties can be traced to one common owner, Brooklyn Preparatory School ("Brooklyn Prep"). On June 30, 1927, Brooklyn Prep conveyed 267 Rogers Avenue, Block 1289, Lot 1 to St. Ignatius. The deed contained an express covenant that the property was conveyed free from encumbrances. On July 20, 1971, Brooklyn Prep conveyed 1150 Carroll Street, Brooklyn, NY, Block 1289, Lot 25 to DASNY. No express easements were recorded against the Development Property in the 1971 deed.

The two properties share a common north-south boundary ("Property Line") between Carroll Street and Crown Street. Presently, there is a four-story brick building ("School Building") on the School Property which has been in existence since the Development Property was conveyed from Brooklyn Prep to Saint Ignatius in 1927. The

west wall of the School Building abuts the Property Line between the School Property and the Development Property. There are windows along the west wall of the School Building and a cornice on the west wall of the School Building that extends approximately one foot, nine and one-half inches over the property line onto the Development Property. There is also a door along the west wall of the School Building that opens onto the Development Property.

Defendants are currently in the process of constructing a new building on the Development Property. The new building abuts the Property Line.

On April 10, 2015, plaintiffs commenced the within action for declaratory judgment, and filed a notice of pendency in connection therewith. By its complaint, plaintiffs assert that, defendants, in order to erect their new building, are obstructing the use of an emergency egress door¹ in the School Building that opens onto the Property Line and the adjoining Development Property; will demolish the cornice of the School Building; and will obstruct the windows and air vents on the wall of the School Building which impairs plaintiffs enjoyment of light and air. Finally, plaintiffs assert that the new building will obstruct a right of way enjoyed by plaintiffs over the southeasterly portion of the property.

Based on these contentions, plaintiffs' complaint asserts three causes of action. The first cause of action seeks a declaratory judgment that the School Property has (1) an easement by implication over so much of the Development Property as necessary to permit the continued existence of the cornice; (2) an easement by implication over so much of the Development Property as necessary to permit the continued use of the egress

¹ It is undisputed that there is a door located on the west wall of the School Building. However, Plaintiffs refer to this door as an "emergency egress door" or "egress door". Defendants, on the other hand, refer to this door as a "side door".

door; and (3) an easement by implication over so much of the Development Property as necessary to continue to enjoy light and air from the school windows. The second cause of action seeks a declaratory judgment that the School Property has an easement by implication over so much of the southeasterly portion of the Development Property so as to permit the continued use of the right of way. Plaintiffs' third cause of action seeks a permanent injunction prohibiting defendants from blocking the egress door.

Plaintiff now moves by order to show cause for a temporary restraining order and a preliminary injunction restraining and enjoining defendants from any further construction along the Property Line. Upon the signing of the order to show cause, the court denied plaintiff's application for a temporary restraining order pursuant to CPLR § 6311. The court now considers plaintiffs' request for a preliminary injunction.

MOTION FOR PRELIMINARY INJUNCTION

The law is well settled that to prevail on a motion for a preliminary injunction, the moving party must establish that (1) there is a likelihood of success on the merits of the action; (2) it will suffer irreparable injury if the preliminary injunction is not granted; and (3) the balance of the equities is in its favor (*Ricca v. Ouzounian*, 51 AD3d 997 [2d Dep't 2008]; CPLR § 6301). A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a "clear right" to relief under the law and the undisputed facts (*Popack v Rice*, 261 AD2d 463 [2d Dep't 1999]; *Related Properties, Inc., v Town of Harrison*, 22 AD3d 587 [2d Dep't 2005]). When there is an adequate remedy at law and a litigant can be fully compensated by an award of money damages, a preliminary injunction will not be granted (*Dana Distributors, Inc., v Crown Imports, LLC*, 48 AD3d 613 [2d Dep't 2008]). Moreover, injunctive relief is also inappropriate where it would

have the effect of granting the ultimate relief sought (*Bobrose Developments, Inc., v Jacobson*, 251 AD 825 [2d Dep't 1937]).

Plaintiffs argue that their submissions meet the three part test for issuance of a preliminary injunction. In this regard, plaintiffs assert that they have a strong likelihood of success on the merits because an easement by implication exists based on public records that show a unity of ownership at one time, an established use that was plainly and physically apparent, and a showing that said use affects the value of the benefited estate. Plaintiffs contend that if the injunction is not granted, they will be irreparably harmed since money damages will not be able to replace the use of the land subject to the easements. If construction continues, plaintiffs assert that they will be irreparably damaged since the egress door will be obstructed and cannot be used as an emergency fire exit for the daycare center in the School Building, the cornice on the School Building will be damaged, the school windows will be obstructed resulting in loss of light and air to the School Building, and access to the right of way will be impeded, all of which will be irreplaceable. Finally, plaintiffs assert that the balancing of the equities weigh in favor of granting the preliminary injunction because defendants commenced construction with the full knowledge of the claims in this case and notice of pendency.

In opposition, defendants assert that plaintiffs have failed to demonstrate a likelihood of success on their claims because there is no evidence that the claimed easements existed prior to the separation of the lots on June 30, 1927, and there is no showing that the use of said easements were so obvious to show it was intended to be permanent, or that the use of said easements was necessary for the beneficial use of plaintiffs' property. Defendants also assert that there is no evidence as to when the side

door facing defendants' property was built. Based on these assertions, defendants contend that plaintiffs fail to demonstrate that they would be irreparably harmed if they are denied injunctive relief. Additionally, defendants assert that plaintiffs have not shown a balancing of the equities in their favor, since plaintiffs fail to show why an award of monetary damages would not adequately compensate them under the facts of this case, especially based on plaintiffs delay in seeking injunctive relief and their non-use of the alleged easements. Finally, if a preliminary injunction is granted, defendants assert that plaintiffs would receive the ultimate relief to which they would be entitled to in a final judgment.

In the case at bar, the court finds that plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims.

In order to establish an easement by implication based upon pre-existing use, three elements must be present: (1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary for the beneficial enjoyment of the land retained. An easement by implication must be established by clear and convincing evidence of each element (*see Abbott v Herring*, 62 NY2d 1028 [1984]), and each element must be present at the time the unitary parcel, or part of it, is sold (*see* 49 NY Jur 2d Easements 64 [May 2015]).

In the instant case, plaintiffs submit no dispositive evidence that the implied easements over defendants' property existed prior to the separation of the lots on June 30, 1927, and had so long continued before that period and been so obvious to be permanent, or that the use of said easements is necessary for the beneficial use of plaintiffs' property.

Plaintiffs, in support of the motion, provide the affidavit of Gary Johnson, Executive Legal Counsel of Medgar Evers College at CUNY, however, a review of the affidavit indicates that it is conclusory in nature, and thus, has little probative value. Plaintiff's unverified complaint, annexed to the moving papers are equally lacking in probative value since it is unverified and based largely on information and belief without reference to the source of the information. While the Sanborne Maps from 1908 (Exhibit F, Plaintiffs' Order to Show Cause) show the existence of the School Building at its current location, the court finds that the best evidence of any encumbrances on the School Property would be the 1927 deed from Brooklyn Prep to Saint Ignatius. However, this deed expressly conveys the property "free from encumbrances." Similarly, while the 1971 deed from Brooklyn Prep to DASNY expressly permits continuance of an existing encroachment upon DASNY's property for the benefit of the adjoining property owned by Saint Ignatius, the deed is silent as to any easement or encumbrance for the benefit of DASNY upon the Development Property. Given plaintiffs' submissions, a likelihood of success on the merits has not been established regarding a grant of an easement by implication as to the cornice, school windows and right of way.

Additionally, plaintiffs have not demonstrated a likelihood of success on the merits that the door located on the west wall of the School Building is in fact, a fire exit for the child care center. Indeed, it appears that plaintiffs have self-characterized the door on the west wall of the School Building as an "emergency egress door," without any evidentiary showing as to when it was built or its intended purpose. On the other hand, defendants in opposition submit the affidavit of Dia Onizawa, Director of Development of Heights Advisors, the developer of the project at 267 Rogers Avenue. Mr. Onizawa

states that at his first meeting to discuss the development of 267 Rogers Avenue, he was taken on a tour of the property with representatives from Medgar Evers College. He further stated in his affidavit that he did not see an “Exit” sign on the door in the day care center. Instead, he saw evacuation instructions stating that the door was “Not an Exit” and directing students not to use that door in case of an emergency. Significantly, defendants submit documentary evidence by way of floor plans for the child care center dated October 7, 2013 which show three other exits at the School Building, *i.e.*, at the rear of the School Building toward Crown Street, at the front of the building onto Carroll Street, and at the east side of the building onto Nostrand Avenue, therefore, providing alternative means of egress and ingress other than the egress door. The court notes that while the floor plan clearly shows that the west side of the School Building abuts the Property Line, the floor plans do not show the door located on the west wall of the School Building as an exit.

Finally, plaintiffs’ contention that an easement by implication exists as to the cornice and school windows along the west wall of the School Building because they provide light and air is without merit, since it is settled in New York that easements for light, air and view cannot be acquired by implication, but must be expressly granted (*Cohan v Fleuroma, Inc.*, 42 AD2d 741 [2d Dep’t 1973]). The 1927 deed which records when the property was originally conveyed to DASNY, contains no express grant to impose a servitude on defendants’ property preserving light and air.

Since plaintiffs have not established a likelihood of success on the merits of their claims, the Court need not reach the remaining elements of the test for a preliminary injunction. Accordingly, plaintiffs’ order to show cause for a preliminary injunction is

denied in its entirety.

DEFENDANTS' CROSS-MOTION TO DISMISS

On a CPLR § 3211(a)(7) motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Nonnon v City of New York*, 9 NY3d 825, 827 [2009]; citing, *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]).

Defendants interpose three arguments for dismissal of plaintiffs' complaint. First, defendants assert that the complaint fails to state a legally cognizable cause of action, in that, plaintiffs do not allege an easement by implication based upon preexisting use. Second, the complaint is primarily based upon "information and belief". Lastly, defendants assert that plaintiffs' requested relief for a preliminary injunction is based upon a defective complaint.

In opposition, plaintiffs argue that they have stated a cause of action for an easement by implication over certain portions of defendants' property because the complaint amplified by the affidavit of Gary Johnson, clearly demonstrates that the complaint is based on public records, to wit, deeds to the subject properties and Sanborn Maps. Thus, plaintiffs argue that they have set forth facts sufficient to withstand defendants' motion to dismiss.

Firstly, since easements for light, air and view cannot be acquired by implication in New York, the court finds that plaintiffs' complaint as to its first cause of action regarding the cornice and school windows is not actionable.

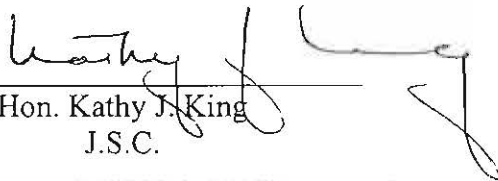
Plaintiffs submit the affidavit of Gary Johnson as to their remaining causes of

action. In opposition to a motion to dismiss, CPLR § 3211(c) allows [a] plaintiff to submit affidavits to supplement the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *DeCosta v Trade-Winds Environmental Restoration, Inc.*, 61 AD3d 627 [2d Dep't 2009]). While the complaint is largely based on information and belief, the affidavit of Gary Johnson cites public records in support of plaintiffs' claims. According plaintiffs every possible favorable inference of the facts contained in the Johnson affidavit, the court finds that plaintiffs have set forth a cause of action of an easement by implication for the door on the westerly wall of the School Building and the right of way.

Based on the foregoing, defendants' cross-motion to dismiss is granted to the extent that plaintiffs' cause of action for declaratory judgment seeking an easement by implication for the cornice and school windows along the west wall of the School Building is dismissed. In all other respects, the cross-motion is denied.

This constitutes the Decision and Order of the Court.

ENTER:



 Hon. Kathy J. King
 J.S.C.

HON. KATHY J. KING
JSC

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