

Early LLC v India St. Props., LLC
2016 NY Slip Op 33007(U)
April 4, 2016
Supreme Court, Kings County
Docket Number: 511762/15
Judge: Genine D. Edwards
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FILED: KINGS COUNTY CLERK 04/14/2016

NYSCEF DOC. NO. 68

INDEX NO. 511762/2015

RECEIVED NYSCEF: 05/03/2016

FILED
KINGS COUNTY CLERK
2016 APR 14 AM 9:03

At an IAS Term, Part 80 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 4th day of April, 2016.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----X

EARLY LLC, KRYSZYNA MALIK and MIROSLAWA CZERNEK,

Plaintiffs,

- against-

Index No. 511762/15

INDIA STREET PROPERTIES, LLC, JOE BROMSON and JANE DOE,

Defendants.

-----X

The following papers numbered 1 to 7 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Papers Numbered

1-3

Opposing Affidavits (Affirmations) _____

4-5

Reply Affidavits (Affirmations) _____

6-7

Plaintiffs, Early LLC (Early), Krystyna Malik (Malik) and Miroszlawa Czernek (Czernek), move, by order to show cause (OSC), for an order, pursuant to CPLR 6311, granting them a preliminary injunction preventing defendants, India Street Properties, LLC (India Street Properties), Joe Bromson (Bromson) and Bromson’s wife (s/h/a “Jane Doe”), from trespassing upon the property at 967 Manhattan Avenue in Brooklyn (Premises), including the fully enclosed outdoor courtyard in the back of the Premises (Courtyard).

Background

By this OSC, plaintiffs seek a permanent injunction enjoining their neighbors from trespassing upon their Premises.

The Premises And Courtyard

Plaintiffs Malik and her daughter, Czernek, owned the Premises since 2004.¹ According to Radoslaw Kucharski,² Early's managing member, Early has been a tenant of the first floor of the Premises (including the Courtyard) under a five-year commercial lease since July 1, 2014.³ "Early runs a café with the same name on the Premises and uses the Courtyard for additional seating for its customers" (Kucharski Affidavit at ¶ 3).

Kucharski describes the Courtyard as "wholly enclosed – surrounded on three sides by the walls of the adjacent buildings and on the fourth side by a tall chain link fence, which I keep padlocked. The only way into the Courtyard is to walk through the café, or with a key through the padlocked fence. The front door of the café is on 967 Manhattan Avenue. The padlocked fence opens onto India Street" (*id.* at ¶¶ 4 and 5).

¹ See Exhibit A to the September 24, 2015 affidavit of Krystyna Malik in support of plaintiffs' motion (Malik Affidavit).

² See ¶ 2 of the September 24, 2015 affidavit of Radoslaw Kucharski in support of plaintiffs' motion (Kucharski Affidavit).

³ Although the Kucharski Affidavit states that a copy of the July 1, 2014 lease between Early, Malik and Czernek is attached as Exhibit A, plaintiffs apparently forgot to annex the lease or the other exhibits referenced in the Kucharski Affidavit.

Defendants' Alleged Trespass

According to plaintiffs, Bromson and his wife reside at 130 India Street in Brooklyn, a building adjacent to the rear of the Premises, which Bromson's company, India Street Properties owns (Kucharski Affidavit at ¶ 6; Malik Affidavit at ¶ 3).

Kucharski attests that "Bromson and his wife, defendant Jane Doe, continuously use the Courtyard as a shortcut to a back entrance into their India Street property." . . . I repeatedly have requested that Defendants cease walking through Early's Courtyard, through oral conversations, texts, etc. I have never given Defendants permission to walk through the Courtyard" (Kucharski Affidavit at ¶¶ 7 and 8).

Kucharski further attests that defendants "have cut off the padlock used to secure the chain link fence enclosing the Courtyard" (*id.* at ¶ 9). Specifically, Kucharski attests that:

"On August 10th, 2015, I arrived at Early Café to find that someone had cut the padlock from the chain link fence, entered the Courtyard, cut open bags of potting soil and strewn dirt around the patio. I believe the vandalism was done by Bromson and or his wife" (*id.* at ¶ 10).

Malik also attests that Bromson and his wife "do not have any easement or right of way through the Courtyard or any other part of the Premises" and that she has "never given permission to any of the Defendants to use the Courtyard or any other part of the Premises to access their property at 130 India Street" (Malik Affidavit at ¶¶ 4 and 5).

Plaintiffs' Complaint

Plaintiffs' complaint alleges that: (1) "[o]n or about July 1, 2014, Early LLC entered into a five-year commercial lease with Kristina Malik and Krystyna Czernek, giving it use

of the entire first floor of the Premises, including the adjoining small garden courtyard in the back of the building . . . for which Early LLC pays the Owner Plaintiffs a monthly rent” (complaint at ¶ 8); (2) “Defendants Bromson and Jane Doe are in the habit of accessing the back of their residence at 130 India Street by taking an unauthorized shortcut through Plaintiff’s Courtyard” (*id.* at ¶ 12); (3) “Plaintiff has advised Defendants Bromson and Jane Doe that by taking that shortcut they are trespassing on Plaintiff’s property without any right or authority to do so, and without Plaintiff’s consent. Plaintiff repeatedly has requested that Defendants cease trespassing on its property” (*id.* at ¶ 13); and (4) “[d]espite Plaintiff’s numerous requests, Defendants have continued to enter Plaintiff’s property without its consent and without any right or authority to do so” (*id.* at ¶ 14).

In addition, the complaint alleges, “[u]pon information and belief,” that defendants “have cut the padlock used to secure the door in the Courtyard’s fence in order to continue their unauthorized access and thus thwarting Plaintiffs’ attempt to secure the property” and “vandalized the Courtyard on at least one occasion, during which Defendants caused intentional damage to Plaintiff’s property. Chairs and tables in the Courtyard were tipped over and bags of potting soil were ripped open and left in the Courtyard” (*id.* at ¶¶ 15-16).

Plaintiffs also allege that defendants’ continued misconduct “will result in irreparable harm to Plaintiffs, in that, if left unrestrained, it will result in the imposition of a servient easement in favor of Defendants across the land, thereby posing a threat to Plaintiffs’ good and marketable title to the property” (*id.* at ¶ 17).

The complaint asserts three causes of action against defendants: (1) the first cause of action for trespass upon the Premises (*id.* at ¶¶ 18-26); (2) the second cause of action for nuisance, alleging that “[d]efendants’ actions form a pattern of recurring objectionable conduct and constitute a continuous invasion of Plaintiffs’ rights in the Premises that substantially and unreasonably interfered and continues to interfere with Plaintiffs’ use and enjoyment of the property” (*id.* at ¶¶ 27-31); and (3) the third cause of action for “trespass to chattels” based on the allegation that “Defendants willfully and intentionally physically interfered with Plaintiff’s possession of the personalty in the Courtyard by throwing around tables and chairs and cutting open bags of soil” (*id.* at ¶¶ 32-34).

The “Wherefore” clause in the complaint seeks, among other things: (1) a declaratory judgment that “Defendants have no right of way or easement across any part of the Premises”; (2) a preliminary injunction, pursuant to CPLR 6301, 6311 and 6313, that “directs Defendants to cease and desist forthwith from all further unauthorized entries onto Plaintiffs’ property”; and (3) a permanent injunction “banning Defendants from further unauthorized intrusions upon Plaintiffs’ property.”

Defendants’ Opposition

Bromson submits a November 9, 2015 affidavit “in response to the claims of the Plaintiffs in this matter” (Bromson Opposition Affidavit) in which he counters that the Kucharski and Malik Affidavits are “deficient” because they fail to establish “‘use’ of the

Courtyard even once, let alone continuous! - by me or any anyone else. They have not identified me or my wife in those pictures” (Bromson Opposition Affidavit at ¶ 2 [e]).

Bromson also contends that plaintiffs’ affidavits “are deficient” because they fail to prove that: (1) Early is licensed to serve beer to their customers in the Courtyard, and (2) Early has a right to padlock the fence in the Courtyard (*id.* at ¶ 2 [a]-[d]).

While Bromson admits that he is the owner of India Street Properties and his counsel admits that India Street Properties owns 130 India Street,⁴ he denies that he and his wife reside at 130 India Street (*id.* at ¶¶ 1 and 2). Bromson also denies responsibility for the vandalism in the Courtyard, which he claims are “unsupported by a single shred of evidence” (*id.* at ¶ 3).

The defense challenges plaintiffs’ standing and argues that plaintiffs “fail to establish that they are proper parties to this action . . .” (Hymowitz Opposition Affirmation at ¶ 6). Regarding Malik and Czernek, defense counsel contends that an owner who is out of possession lacks standing to commence a trespass action, as a matter of law (*id.* at ¶¶ 7-9). Regarding Early, counsel contends that “Plaintiffs do not establish who has ‘exclusive legal possession’ of the premises, noting that plaintiffs’ moving papers erroneously reference yet omit Early’s lease, proving his right to exclusive control of the Premises (*id.* at ¶¶ 12-13).

In addition to standing, defense counsel argues that the Kucharski Affidavit is “flawed and fails to make the burden” because it:

⁴ See ¶ 20 of the November 9, 2015 affirmation of Charles M. Hymowitz, Esq., submitted in opposition to Plaintiffs’ OSC (Hymowitz Opposition Affirmation).

“fails to establish ‘use’ of the Courtyard even once, let alone continuous! . . . by JOE BROMSON or whomever the affiant believes JANE DOE to be. The affiant fails to provide a single date and time where any alleged use has occurred. . . . The affidavit fails to establish any time where this Plaintiff can state, to a certainty, that the defendants ‘trespassed’. There is no language identifying or describing the defendants. . . .” (*id.* at ¶ 15 [e] and [g]).

Finally, defense counsel contends, “upon information and belief,” that “the fence that plaintiffs admitted to locking is not theirs to lock! . . . It appears to belong to the owners of 969 Manhattan Ave. [who] have not been named (or served) . . . in these proceedings [and] are a necessary party herein as the Plaintiffs need to show that they have the right to place a lock on a fence that is not theirs!” (*id.* at ¶ 20).

Plaintiffs’ Reply

Plaintiffs, in reply, submit the November 12, 2015 affirmation of Paul T. Sabaj, Esq., in further support of their OSC (Sabaj Reply Affirmation), in which counsel contends that “Defendants are wrong that plaintiff Early LLC needs to establish standing through [the] lease, since [the] owner of the fee simple in deed, swear in her affidavit that Early LLC is the lessee [and] has the exclusive right and control” (Sabaj Reply Affirmation at ¶ 8). In any event, plaintiffs submit a copy of Early’s commercial lease for the Premises that was accidentally omitted from their moving papers (*see* Sabaj Reply Affidavit, Exhibit C).

Additionally, plaintiffs submit the November 12, 2015 affidavit of Jameel Almohamadi (Almohamadi Affidavit), the principal of J&J Gourmet, the grocery store adjacent to the Premises. Almohamadi, the “lessee of the entire store with access to the backyard and main gate . . .” attests that “[o]n the back of the Grocery Store and Early LLC

is a courtyard which is wholly enclosed . . .” (Almohamadi Affidavit at ¶¶ 1-2). Almohamadi attests that “[w]e are in agreement with Early LLC’s contentions as to the backyard” and that he has never given defendants permission to “use the gate as an alternative entrance into their India Street property” (*id.* at ¶ 4).

Discussion

(1)

It is well-established that a party seeking a preliminary injunction must demonstrate, by clear and convincing evidence: (1) a likelihood of success on the merits; (2) the danger of irreparable harm absent an injunction; and (3) a balancing of the equities in the movant’s favor (*Alayoff v Alayoff*, 112 AD3d 564, 565 [2013]; *Kurlandski v Kim*, 111 AD3d 676, 677 [2013]; *Joseph v Joseph*, 108 AD3d 597, 598 [2013]). “The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits” (*Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2005]). “The decision whether to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court” (*84-85 Gardens Owners Corp. v 84-12 35th Ave. Apartment Corp.*, 91 AD3d 702, 702 [2012]).

“Liability for civil trespass requires the fact-finder to consider whether the person, without justification or permission . . . intentionally entered upon another’s property” (*Long Island Gynecological Servs., P.C. v Murphy*, 298 AD2d 504, 504 [2002]). “Entering upon the property of another without permission, even if innocently or by mistake, constitutes

trespass” (*Hill v Raziano*, 63 AD3d 682, 683 [2009]). Notably, “[t]he threat of continuing trespass entitles a property owner to injunctive relief where irreparable injury may result” (*Murphy*, 298 AD2d at 504). Importantly, “nominal damages are presumed from a trespass even where the property owner has suffered no actual injury to his or her possessory interest” (*Hill*, 63 AD3d at 683).

(2)

As a preliminary matter, defendants’ contention that plaintiffs’ motion must be denied because “Plaintiffs do not establish who has ‘exclusive legal possession’ of the premises” is not entirely true (Hymowitz Affirmation at ¶ 12). While it is true that Malik and Czernek lack standing to maintain an action for trespass because they are owners who are not in possession of the subject Premises (*see* Prosser and Keeton, Torts, Intentional Interference with Property, § 13, at 77-78 [5th ed]), plaintiffs have sufficiently evidenced Early’s right to exclusive legal possession of the Premises.

Plaintiffs’ moving submission included uncontroverted testimonial evidence that Early’s five-year commercial lease with Malik and Czernek granted Early “exclusive use of the entire first floor of the premises . . . including an enclosed courtyard at the back of the property . . .” (*see* Kucharski Affidavit at ¶ 2). Plaintiff subsequently submitted Early’s lease, which confirmed Kucharski’s testimony (Sabaj Reply Affirmation, Exhibit C). Accordingly, Early has the requisite standing to maintain this action for trespass and nuisance.

Regarding the merits, Early has submitted sufficient testimonial evidence of defendants' continuous trespasses warranting the issuance of a preliminary injunction to maintain the status quo pending the hearing and determination of this action. The complaint alleges that defendants have continuously trespassed upon Early's Premises despite Early's repeated requests that they stop (complaint at ¶¶ 12-17) and Kucharski attests that "Bromson and his wife . . . continuously use the Courtyard as a shortcut into their India Street property"; that he has repeatedly "requested that Defendants cease walking through Early's Courtyard through oral conversations, texts, etc." and that he has "never given Defendants permission to walk through the Courtyard" (Kucharski Affidavit at ¶¶ 7-8).

Notably, while defendant Bromson contends that the Kucharski Affidavit is "deficient" because "[t]he affidavit fails to establish 'use' of the Courtyard even once, let alone continuous! - by me or any anyone else. They have not identified me or my wife in those pictures" (Bromson Opposition Affidavit at ¶ 2 [e]), Bromson *does not attest that he and his wife never access their India Street Property by cutting through the Courtyard*. Regardless, Early is not required to submit photographic evidence of the trespass; testimonial evidence is sufficient to establish a likelihood of success on the merits.

Finally, as the Court of Appeals has long-held, "where the injury is permanent in character, and the damages resulting therefrom continuous in their nature, and especially where, from the nature of the act and the injury suffered, it is impossible, or difficult, to ascertain or determine the extent of the injury which may flow from a continuance of the

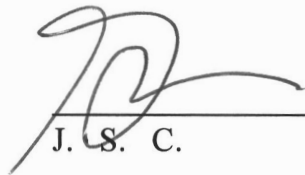
wrong, an injunction is the proper remedy” (*Poughkeepsie Gas Co. v Citizens’ Gas Co.*, 89 NY 493, 497-498 [1882]). Accordingly, it is

ORDERED that plaintiff Early’s OSC seeking a preliminary injunction preventing defendants from trespassing upon the Premises is granted and Defendants are hereby directed to cease and desist all further unauthorized entries onto Early’s Premises; and it is further

ORDERED that plaintiffs Malik and Czernek’s OSC seeking a preliminary injunction preventing defendants from trespassing upon the Premises is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.


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