Asian Am. HDFC, Inc. v 110 Ridge St. Venture LLC
2018 NY Slip Op 31627(U)
July 12, 2018
Supreme Court, New York County
Docket Number: 155157/2018
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**
Justice

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ASIAN AMERICAN HDFC, INC.,

Plaintiff,

- v -

110 RIDGE ST. VENTURE LLC,

Defendant.

INDEX NO. 155157/2018

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 3, 22, 23, 24, 25, 26, 27, 28, 29, 31

were read on this application for a preliminary injunction

By order to show cause, plaintiff seeks an order pursuant to CPLR 6301 for a preliminary injunction: (1) enjoining defendant from blocking or impeding its secondary egress in case of emergency from its rear yard on real property located at 89 Pitt Street in Manhattan (Pitt Street property) into the rear yard of defendant's property located at 110-114 Ridge Street in Manhattan (Ridge Street property); (2) directing defendant to remove and/or modify the fence on its property so as not to interfere with and block plaintiff's secondary egress; and (3) directing defendant to reimburse plaintiff the cost of retaining a fire watch guard at its property until the guard is no longer required by the New York City Department of Buildings (DOB). Defendant opposes.

In its complaint, plaintiff alleges that it has owned the Pitt Street Property since June 9, 2009, when it acquired it from El Coqui Limited Partnership, the property owner since December 6, 1991. In 1993, a new certificate of occupancy was issued. Plaintiff also alleges, based on information and belief, that in order to obtain the new C of O, the DOB requires that the building's fire escapes in the back of the building have a secondary means of egress, which consists of access to the rear yard of the Ridge Street property, and that this egress is reflected in the architectural plans filed with the DOB for the C of O. Plaintiff additionally claims, based on information and belief, that the secondary egress was established when fire escapes were first installed on the Pitt Street property in or about 1902. (NYSCEF 1).

According to plaintiff, defendant acquired the Ridge Street property on April 15, 2015, and thereafter installed a fence in its rear yard, separating its yard from that of the Pitt Street property. On or about April 19, 2018, the New York City Fire Department (FDNY) issued plaintiff a violation for failing to maintain the required secondary egress, and on May 4, 2018, it issued a violation for failing to provide an unobstructed exit or passage way absent a means of egress or a passageway from the rear yard. The DOB required plaintiff to retain a fire watch guard for the Pitt Street property to direct occupants from the building in case of fire. (*Id.*).

Plaintiff thus seeks a judgment declaring that it possesses an easement appurtenant to the rear yard of the Ridge Street property, thereby entitling it to a right of way and/or access from its rear yard to the yard of the Ridge Street property in case of an emergency, or alternatively, that it has an easement by implication and/or prescription, or an equitable easement by necessity, directing defendant to remove and/or modify its fence to not block plaintiff's easement, and directing defendant to reimburse it for the cost of the fire watch guard and pay plaintiff's reasonable attorney fees and costs. (*Id.*).

In support of its application, plaintiff submits the following:

(1) deed of El Coqui and its 1993 certificate of occupancy;

(2) architectural plans allegedly filed with the DOB by El Coqui;

(3) FDNY summons issued on or about April 19, 2018, reflecting that plaintiff failed to provide required egress from the rear yard, as the rear yard fire escape empties into a rear yard that is only 20 feet deep and has no means of egress from it;

(4) DOB summons issued on or about May 4, 2018, reflecting the same violation as in the FDNY summons, and providing as the remedy that plaintiff remove the "obstruction";

(5) summons issued by DOB's Environmental Control Board (ECB) to defendant on or about May 11, 2018, which provides that defendant failed to maintain its building in a code-compliant manner as "an existing egress gate at the rear yard of [the Pitt Street property] is an existing legal means of egress per the NB 738 of Year 1898";

(6) various "I-cards" issued for the building in the late 1800s and early 1900s, which show that as of 1902, the building had rear fire escapes; and

(7) a construction survey for the Ridge Street property.

(NYSCEF 8-15).

Defendant maintains that before buying the Ridge Street property, it conducted a title search that revealed that there was no easement recorded against the property relating to secondary egress into its yard from the Pitt Street property. (NYSCEF 25). It also contends that the fence in its yard, which has no door in it, was there when it purchased the property in 2015, and since at least 2003, as shown by a 2003 survey. (NYSCEF 28). Defendant thus argues that plaintiff knew of the doorless fence's presence for at least 15 years and did not protest it until after it received the summonses, and that it is now relying on the alleged easement to transfer to it the cost of complying with the summonses instead of using other readily available and less invasive means to create the required secondary egress. (NYSCEF 24).

At oral argument, plaintiff argued that the fence on the Ridge Street property originally had a door in it, which provided the required secondary egress, but that the door had been

removed, and asked that defendant at least modify the fence to include a door. Plaintiff denied that it had any other reasonable or readily available means of creating the egress through its own property. Defendant alleged that plaintiff had submitted no evidence of an easement or that a door in the fence had ever existed, and observed that since at least 2003 there has been no door.

To be entitled to a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and that the equities weigh in its favor. (CPLR 6301). It is undisputed that there is no writing related to the alleged easement, and thus plaintiff does not demonstrate the existence of an easement appurtenant. (*See Biles v Whisher*, 160 AD3d 1159 [3d Dept 2018] [easement appurtenant created by written conveyance, signed by grantors of easement]).

An easement by implication requires evidence that there was unity and subsequent separation of title, among other facts. (*Biles*, 160 AD3d at 1160). No such unity and subsequent separation has been alleged or established. (*See Young v Crosby*, 87 AD3d 1308 [4th Dept 2011] [court should have dismissed claim for express or implied easement as defendant showed that dominant and servient parcels did not have common grantor]).

Similarly, an easement by necessity requires proof by the plaintiff that its property was at one time titled under the same deed as the defendants' and, when severed, its parcel became landlocked. There is no evidence that the properties were ever titled under the same deed. (*Lew Beach Co. v Carlson*, 77 AD3d 1127 [3d Dept 2010]).

To establish an easement by prescription, the party asserting the easement must show that the use of the servient property was open, notorious, continuous, and hostile for the prescriptive period. (*Id.* at 1161). The evidence submitted by plaintiff does not show that an easement existed between its rear yard and the yard of the Ridge Street property or that there was a door in

defendant's fence, and defendant submits proof that since at least 2003, there has been no door. Moreover, plaintiff's claim that access to the rear yard had been permitted by the prior owners for years negates the required element of hostility. (*See Vadaas vYeshivath Kehilath Yakov, Inc.*, 89 AD3d 700 [2d Dept 2011] [allegation that other owner permitted use negated creation of prescriptive easement]). Moreover, absent an expert's explanation of the construction survey and the architectural plans, it is unreadable.

Plaintiff thus fails to establish a likelihood of success of any of its claims related to an easement. (*Arm v 2148 Ocean Ave., LLC*, 31 AD3d 355 [2d Dept 2006] [preliminary injunction properly denied as plaintiff did not demonstrate likelihood of succeeding on easement causes of action]). Absent proof of an easement, on this application, there is no basis for directing defendant to modify or remove its fence.

Given the daily presence of the fire watch guard, plaintiff does not show that irreparable harm may or will occur from the lack of the secondary egress through defendant's fence. Moreover, plaintiff's costs related to the guard may be reimbursed through money damages. (*See Norton v Dubrey*, 116 AD3d 1215 [3d Dept 2014] [fear that someone may be injured on premises was remote and speculative and did not establish irreparable harm; in any event movant had adequate remedy at law and could be fully compensated by damages]; *Rowland v Dushin*, 82 AD3d 738 [2d Dept 2011] [request for preliminary injunction properly denied, as plaintiff did not establish any imminent and non-speculative harm that would occur in absence of injunction, or demonstrate that potential injuries would not be compensable by money damages]).

Nor does plaintiff demonstrate that the equities weigh in its favor, as defendant shows that the fence has not had a door in it since at least 2003, and that plaintiff took no action until it was issued fines, or any evidence, other than counsel's assertion, that requiring defendant to

install a door is the only way to cure the violations issued to plaintiff. (*See eg, Town of Amherst v Rockingham Estates, LLC*, 56 AD3d 1298 [4th Dept 2008] [equities not in favor of plaintiff on motion for preliminary injunction on easement claim as it would suffer no prejudice by awaiting adjudication on merits]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a preliminary injunction is denied; it is further

ORDERED, that defendant is directed to serve and file its answer within the time provided for in the CPLR; and it is further

ORDERED, that the parties are directed to appear for a preliminary conference on September 12, 2018 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

7/12/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE