

<b>Luk v Briedj</b>
2019 NY Slip Op 31556(U)
April 17, 2019
Supreme Court, Queens County
Docket Number: 700288/2019
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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James Luk,

Index No. 700288/2019

Plaintiff,

Motion

Date: March 6, 2019

-against-

Motion Cal. No.: 27

Djamal Briedj, Fadhila Briedj, John Doe#1,  
Jane Doe #1, John Doe # 2 and Jane Doe #2

Motion Sequence No.: 1

Defendants.

**FILED**  
MAY - 6 2019  
COUNTY CLERK  
QUEENS COUNTY

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The following e-file paper numbered 6 submitted with no opposition and considered on this Order to Show Cause by plaintiff James Luk (hereinafter referred to as "Plaintiff") seeking a preliminary injunction pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 6301 against defendants Djamal Briedj, Fadhila Briedj, John Doe#1, Jane Doe #1, John Doe # 2 and Jane Doe #2 (hereinafter referred to as "Defendants") from parking or allowing anyone to park their vehicle in the rear of the their property located at 2109 80<sup>th</sup> Street, East Elmhurst, NY 11369 (hereinafter referred to as the "Premises") and an Order directing Defendants to pay Plaintiff's costs associated with bringing and enforcement of this motion.

Order to Show Cause- Affidavits-Exhibits.....  
Papers  
Numbered  
EF 6

This action was brought by Plaintiff to have the Defendants enjoined from blocking Plaintiff's use of his alleged right of way on the Premises so that Plaintiff may access his property located at 2110 81<sup>st</sup> Street East Elmhurst, NY 11369 with his car. According to the Plaintiff, both properties adjoin each other and share a common boundary line therefore, there is a right of way recorded allowing use of both properties rear for purposes of ingress and egress. Plaintiff alleges the Defendants are aware of the right of way but continue to obstruct Plaintiff's use since Plaintiff's purchase of the property in 2017.

Plaintiff states he has given the Defendants verbal and written notice of their obstruction of

Plaintiff use multiple times. Plaintiff claims he can not access his property with his vehicle unless the obstruction is removed. That, a preliminary injunction will not prejudice the Defendants, Defendants will still be able to utilize and enjoy the Premises.

### Existence of Easement

Plaintiff refers to and attaches a copy of an easement that was purportedly granted to Plaintiff's predecessor in interest that states "... common driveway for the purpose of ingress and egress for pleasure automobiles... and garages erected and to be erected... it shall be maintained and kept open and unobstructed by the respective owners..."

However, the Court was unable to read the copy of the easement that was provided. Further research on the Automated City Registering Information System ("ACRIS") revealed that the easement was entered in 1946 and a legible copy was not found by this Court. Therefore, a determination on the validity of the easement will not be made.

Nonetheless, Plaintiff at the very least is entitled to an easement by necessity. In *Asche v. Land and Building*, plaintiffs' claimed they were entitled to permanent easement over a portion of the defendants' property, the portion had been used by plaintiffs' and their predecessors as a driveway since 1951. (*Ron Asche v. Land and Building known as 64-29 232<sup>nd</sup> Street etc., et al.*, 12 A.D.3d 386, 387 (2<sup>nd</sup> Dept 2004)). The Second Department stated to establish an easement by necessity or easement by implication the movant must prove that their use of the disputed strip was absolutely necessary for the beneficial enjoyment of their property and for the latter that their use was reasonably necessary for such enjoyment. (*Id.*) The Second Department held the plaintiffs' failed to show the disputed use would provide anything more than convenience taking into account lack of a garage in the rear. (*Id.*)

This case is distinguishable from *Asche*, in that the Plaintiff is seeking access to his garage. In fact, Plaintiff alleges "I have been forced to locate my vehicle on the street as a result and have not been able to use my property to store my vehicle for the past year and a half". At the very least, Plaintiff has established his use of the disputed strip is "reasonably necessary" for the "beneficial enjoyment" of his property. (*Id.*) Plaintiff has sufficiently established use of the disputed strip is "absolutely necessary" to his enjoyment of his property. Therefore, this Court finds that Plaintiffs have an easement by necessity.

### Preliminary Injunction

CPLR 6301 states:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has

demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

Essentially CPLR 6301 grants a preliminary injunction when there is an act that violates the plaintiff's rights in relation to the property or when defendants actions would cause injury to the plaintiff.

To prove entitlement to a preliminary injunction the movant must establish: "1. likelihood of success on the merits, 2. irreparable injury absent the granting of the preliminary injunction and 3. that a balancing of the equities favors the moving party's position." (*Anil Mangar v. Shelly Deosaran*, 121 A.D.3d 650 [2<sup>nd</sup> Dept 2014]). In *Mangar*, the plaintiff ultimately sought to permanently enjoin the defendant from interfering with plaintiff's alleged easement. (*Id*). At issue was whether plaintiff was entitled to a preliminary injunction, the court found the plaintiff failed to meet its burden of establishing irreparable harm and that a balance of equities weighed in favor of its position. (*Id* at 651).

Here, as stated above, at the very least, Plaintiff has an easement by necessity affording it ingress and egress through the Premises for vehicular access to its garage. Plaintiff alleges, despite repeated requests both written and verbal that Defendant cease from obstructing Plaintiff's vehicular access to his garage, Defendant has not complied. Therefore, Plaintiff alleges it has been relegated to parking its vehicle on the street for the past year and a half. Consequently, Plaintiff alleges his car was broken into due to his parking on the street and that he has incurred loss of use of his property as a result of Defendants' actions. Finally, in the interest of equity Plaintiff states a preliminary injunction will not prejudice the Defendants' from enjoying the use of the Premises.

Therefore, Plaintiff has sufficiently proven prima facie entitlement to a preliminary injunction against the Defendants. The following Order to Show Cause was submitted without opposition. Therefore it is,

**ORDERED**, that based on the foregoing, Plaintiff's motion for a preliminary injunction is granted to the extent that Defendants' are temporarily enjoined from obstructing or directing others to obstruct Plaintiff's utilization of the Premises for all purposes of ingress and egress including vehicular ingress and egress until further Order of the Court, and it is further;


**ORDERED**, that the Plaintiff is directed to file an undertaking in the amount of \$5,000.00 within fifteen (15) days of the filing of this Order. The undertaking shall be in the form of surety, deposited with the Queens County Clerk. The bond is meant to cover the branch of Plaintiff's Order to Show Cause to preliminarily enjoin Defendants from obstructing the Premises; and it is further

**ORDERED**, that the Plaintiff shall serve a copy of this Order within twenty (20) days of the filing of this Order with notice of entry on the Defendants; and it is further,

**ORDERED**, that the branch of Plaintiff's motion seeking an Order that Defendants pay Plaintiff's costs associated with bringing and enforcement of this motion is denied in its entirety.

The foregoing constitutes the decision and Order of this Court.

Dated: April 17, 2019

  
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**Hon. Chereé A. Buggs, JSC**

**FILED**  
MAY - 6 2019  
COUNTY CLERK  
QUEENS COUNTY