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| <b>Marte v Boerum Johnson LLC</b>                                                                                                                                                                                              |
| 2020 NY Slip Op 33701(U)                                                                                                                                                                                                       |
| October 29, 2020                                                                                                                                                                                                               |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: 518962/19                                                                                                                                                                                                       |
| Judge: Dawn M. Jimenez-Salta                                                                                                                                                                                                   |
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At an IAS Term, Part 88 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 29<sup>th</sup> day of October, 2020.

P R E S E N T:

HON. DAWN M. JIMENEZ-SALTA,  
Justice.

-----X  
EMENEGILDA MARTE, GILBERT MARTE, JR. and  
G&S AUTO REPAIR CORP.,

Plaintiffs,

- against -

Index No. 518962/19

BOERUM JOHNSON LLC,

Defendant.  
-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

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

61-77    83-94

Opposing Affidavits (Affirmations) \_\_\_\_\_

84-94    96-97

Reply Affidavits (Affirmations) \_\_\_\_\_

98        99

Upon the foregoing papers, defendant Boerum Johnson LLC (Boerum Johnson) moves (in motion sequence [mot. seq.] three) for an order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and 3212, granting it summary judgment dismissing the complaint.

Plaintiffs Emenegilda Marte, Gilbert Marte, Jr. and G&S Auto Repair Corp. (G&S Auto) (collectively, the Marte Plaintiffs) cross-move (in mot. seq. four) for an order: (1) granting them summary judgment, pursuant to CPLR 3212, and (2) granting them a right of easement and usage for the benefit property, as set forth in the March 17, 1949

easement agreement and included in the February 17, 1987 deed to plaintiff Emenegilda Marte recorded with the City Register on March 10, 1987, in Reel 1984, Page 622.

### ***Background***

#### ***The Property Dispute***

The Marte Plaintiffs claim to own the property at 215 Boerum Street in Brooklyn (Block 3073, Lot 16) (Marte Property). However, only plaintiff Emenegilda Marte has record ownership of the Marte Property by a February 17, 1987 deed recorded with the City Register on March 10, 1987, in Reel 1984, Page 622 (Marte Deed). Boerum Johnson has been the record owner of the neighboring, adjoining property at 217-219 Boerum Street in Brooklyn (Block 3073, Lot 14) (Boerum Johnson Property) since it obtained the Boerum Johnson Property pursuant to an October 30, 2018 deed.

The Marte Plaintiffs claim that they had rights to an easement for driveway purposes burdening the Boerum Johnson Property, pursuant to a March 18, 1949 grant and agreement between Hyman Mermelstein, Sholem Mermelstein, Mario Fortunato and David V. Trevas recorded with the City Register on March 18, 1949 (1949 Driveway Easement).<sup>1</sup>

#### ***The Instant Action***

On August 27, 2019, the Marte Plaintiffs commenced the instant action by filing a summons and a verified complaint. The complaint alleges that the 1949 Driveway

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<sup>1</sup> Contemporaneously with this order, on October 29, 2020, this court issued an order in a related case commenced by Boerum Johnson, holding that the 1949 Driveway Easement was extinguished by abandonment (see *Boerum Johnson v Emenegilda Marte, et al.* [Sup Ct Kings County index No. 516295/19]).

Easement created an easement over the Boerum Johnson Property for the benefit of the Marte Property, and that the 1949 Driveway Easement is described and included in the Marte Deed (complaint at ¶¶ 5-7). The complaint further alleges that “[a]t some point on or about February 17, 1987, Defendant erected a brick wall with a fence on top of the brick wall blocking the Easement” and subsequently “created an opening next to the blocked Easement and provided Plaintiffs with a key to a gate that allowed Plaintiffs access to an additional portion of the serviant property . . .” (*id.* at ¶¶ 8 and 9). Additionally, the complaint alleges that “[o]n or about April 1, 2019, Defendant changed the lock to the front gate and no longer allowed Plaintiffs access to the Disputed Property” (*id.* at ¶ 12).

The complaint asserts causes of action for: (1) adverse possession; (2) a declaration that a prescriptive easement and an easement by necessity are valid and enforceable against Boerum Johnson’s interest in the Boerum Johnson Property; (3) a permanent injunction prohibiting Boerum Johnson from blocking access to the Marte Plaintiffs’ easement by necessity and prescriptive easement; (4) a permanent injunction enjoining Boerum Johnson from blocking or disrupting the Marte Plaintiffs’ use of the prescriptive easement and the easement by necessity; (5) a declaration that the implied easement constituting the land contained on both the easement by prescription and the easement by necessity is valid and superior to Boerum Johnson’s interest; and (6) monetary damages for trespass.

On September 17, 2019, Boerum Johnson answered the complaint, denied the material allegations therein and asserted affirmative defenses, including: (1) all plaintiffs except Emenegilda Marte lack standing since they do not own the Marte Property; (3) because the Marte Property borders a public street it cannot be the beneficiary of an easement by necessity; (4) blocking a fire exit is not a basis for the creation of an easement by necessity or implication; and (5) the Marte Plaintiffs' use, possession and/or occupation of the Boerum Johnson Property was not open, notorious, actual, exclusive, hostile, adverse, continuous, uninterrupted or under claim of right or title.

***Boerum Johnson's Summary Judgment Motion***

Boerum Johnson now seeks an order granting it summary judgment dismissing the complaint. As a preliminary matter, Boerum Johnson contends that plaintiffs Gilbert Marte, Jr. and G&S Auto lack standing to prosecute any claims regarding the Marte Property because "[o]nly the owner of the Marte Property could have standing to claim the benefit of any easement benefitting the Marte Property . . ." Boerum Johnson submits a copy of Emenegilda Marte's February 17, 1987 recorded deed to the Marte Property evidencing that she is the sole record owner of the Marte Property.

Boerum Johnson also argues that the Marte Plaintiffs' claim of an easement by necessity based on a "fire exit" must fail, as a matter of law, because the Marte Property borders a public street and may be physically and legally accessed from that public street. Boerum Johnson notes that "the alleged fire exit was only constructed after Boerum Johnson took title [i]n October 2018."

Boerum Johnson further contends that there can be no easement by prescription, since paragraph 9 of the Marte Plaintiffs' complaint specifically alleges that the Marte Plaintiffs used the Boerum Property with the permission of Boerum Johnson and the predecessor owner of the Boerum Johnson Property. Boerum Johnson submits an affidavit from Zadok Zvi (Zvi), a manager of Kodez Realty LLC (Kodez), who attests that Kodez conveyed the Boerum Johnson Property to Boerum Johnson on October 30, 2018. Zvi attests that "I erected and maintained a fence completely enclosing the Premises from right after I purchased the Premises [in 1990] until the Premises was sold to Boerum Johnson . . ." Zvi further attests that "Gilbert Marte, Jr. began renting a portion of the Premises from me in connection [with] his auto repair shop until the time the Premises was sold to Boerum Johnson . . . and always acknowledged my superior ownership of the Premises." Boerum Johnson asserts that "[t]his is classic permissive use which destroys the requisite hostility element of a prescriptive easement."

Boerum Johnson further argues that the Marte Plaintiffs are not entitled to an easement by implication because they have not alleged any of the elements of an implied easement, including that the use of the Boerum Johnson Property is necessary to the beneficial enjoyment of the Marte Property.

Boerum Johnson contends that the Marte Plaintiffs' remaining claims for injunctive and declaratory relief and "trespass to an unspecified easement," all of which are dependent on their substantive claims for an easement, are subject to dismissal. Boerum Johnson asserts that "[t]he Martes have . . . failed to articulate as to why money

damages would not be sufficient relief[,]” and have not demonstrated that they will suffer irreparable harm or that they have no adequate remedy at law.

***The Marte Plaintiffs’ Opposition  
and Summary Judgment Cross Motion***

The Marte Plaintiffs, in opposition and in support of their summary judgment cross motion, submit an affidavit from defendant Gilbert Marte, Jr., who attests that he is the owner and operator of defendant G&S Auto and “the son of Defendant Emenegilda Marte, *the present owner of the property and easement . . .*” (emphasis added). Gilbert Marte, Jr. further attests that:

“The easement has been used since the property was bought in 1987. Initially, it was used as a parking lot to store cars. Eventually, the easement became a functional and important part of the autobody shop when it was opened in late 2000.”

Gilbert Marte, Jr. asserts that “the emergency exit located in the rear of the auto body shop should not be removed or blocked” because it presents a fire and safety hazard. Gilbert Marte, Jr. attests that “[t]he exit door gives direct access to the easement and removal of said access erases the use of the emergency exit and the easement that has been part of the Martes property for over thirty years . . .”

Plaintiffs’ counsel affirms that “Boerum Johnson attempts to obtain illegal relief from this court in an effort to circumvent Federal and New York City law, relief which if awarded will put human life in danger, and render the defendants’ building a firetrap.” The Marte Plaintiffs submit an expert affidavit from Vincent Florentino (Florentino), a Certified New York State Fire Inspector and a Fire and Line Safety consultant with NY

Fire Consultants, to demonstrate “how loss of this easement would result in a substantial fire hazard and public safety concern.” Florentino attests that “NY Fire Consultants were hired to personally do an inspection of the secondary door at [the Marte Property] to determine whether this constitutes a fire safety exit.” Florentino attests that “[i]t is our conclusion that this exit door should not be eliminated as it would reduce the number of fire safe exiting options from a building.”

Finally, plaintiffs’ counsel generally contends that factual disputes “as to whether the easement has been used for the prescriptive period or whether it has been extinguished by non-use and adverse possession” preclude summary judgment. Notably, however, defense counsel admits that:

“[a]ll parties agree that at some point renovations were performed which changed some of the details of the prior easement. Boerum Johnson LLC’s predecessor erected a wall by the open side of the property and an enclosing fence. Cross-Movants (Plaintiffs herein) *were given a key to the gate to freely access the back of the property*, albeit a mere few feet away from the spot of the original recorded driveway easement” (emphasis added).

### ***Boerum Johnson’s Reply and Opposition to the Cross Motion***

Boerum Johnson, in reply and in opposition to the cross motion, argues that the Marte Plaintiffs’ claim of an easement by necessity should be rejected, as a matter of law, because it is uncontested that the Marte Property borders a public street and can be “physically and legally accessed from that public street.” Boerum Johnson further argues that there is no legal authority for an easement of necessity based on a fire exit, which was only constructed after Boerum Johnson took title to the Boerum Johnson Property in

October 2018. Boerum Johnson asserts that “[t]he possible illegality or code violation of the Martes’ building does not create an estate in real property.” Boerum Johnson also notes that “[n]owhere in the affidavits from the Martes’ purported experts is it explained how the need for a fire door or the need to comply with any particular safety regulations would thereby create an estate in neighboring real property.”

### ***Marte Plaintiffs’ Reply***

The Marte Plaintiffs, in reply, submit an attorney affirmation arguing, upon information and belief, that “the rear fire exit is required by the relevant Certificate of Occupancy . . . based upon a 1949 FDNY letter . . .” Plaintiffs’ counsel explains that he has been unable to obtain a copy of this FDNY letter and argues that Boerum Johnson’s summary judgment motion should be denied as premature.

### ***Discussion***

#### ***The Summary Judgment Motion and Cross Motion***

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010]).

As a preliminary matter, plaintiffs Gilbert Marte, Jr. and his company, G&S Auto, who are tenants at the Marte Property, lack standing to seek a prescriptive easement or an easement by necessity to benefit the Marte Property because they admittedly do not own the Marte Property. Only Emenegilda Marte has standing to seek the relief sought in the complaint, as the sole title owner of the Marte Property. Notably, Emenegilda Marte has not submitted an affidavit either opposing Boerum Johnson's summary judgment motion or in support of the Marte Plaintiffs' summary judgment cross motion.

Boerum Johnson has established that Emenegilda Marte is not entitled to an easement by necessity based on the "fire exit" that she recently installed in the rear of the Marte Property because the Property borders a public street and can be physically and legally accessed from that public street (*GDG Realty LLC v 149 Glen Street Corp.*, 155 AD3d 833, 836 [2017] [rejecting claim for an easement by necessity because plaintiff "failed to allege that an easement over the adjoining property was absolutely necessary for access to the subject property, which fronts public street"])). The need for a fire door at the Marte Property, and the recent addition of that fire door, does not automatically create an estate in the neighboring property.

Furthermore, Emenegilda Marte is not entitled to a prescriptive easement since the verified complaint and Gilbert Marte, Jr.'s affidavit specifically admit that the Marte Plaintiffs' use of the Boerum Johnson Property was always permissive. "An easement by prescription is generally demonstrated by proof of the *adverse*, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period"

(315 Main Street Poughkeepsie, LLC v WA 319 Main, LLC, 62 AD3d 690, 691 [2009] [emphasis added]). Here, the verified complaint specifically alleges that Boerum Johnson “provided Plaintiffs with a key to a gate that allowed Plaintiffs access to an additional portion of the serviant property . . .” (complaint at ¶ 9). In addition, Gilbert Marte, Jr. testified that he was provided with a key and was permitted to use the Boerum Johnson Property because he had leased a portion of the Boerum Johnson Property. This is an admitted case of permissive use of the Boerum Johnson Property by Gilbert Marte, Jr., and does not create an easement by prescription.

In addition, Emenegilda Marte is not entitled to an easement by implication because she has failed to demonstrate that the use of the Boerum Johnson Property is necessary to the beneficial enjoyment of the Marte Property. “Implied easements are not favored in the law and the burden of proof rests with the party asserting the existence of facts necessary to create an easement by implication to prove such entitlement by clear and convincing evidence” (*Abbott v Herring*, 97 AD2d 870, 870 [1983]). Emenegilda Marte has failed to submit any such proof.

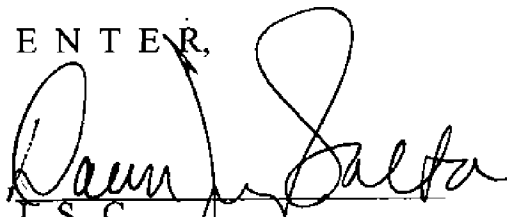
Emenegilda Marte’s remaining causes of action are similarly lacking legal merit. Plaintiff has failed to submit any evidence that Boerum Johnson has trespassed on the Marte Property and has, seemingly, abandoned that claim. Plaintiff has also failed to establish her entitlement to the injunctive and declaratory relief she seeks in the complaint. Emenegilda Marte has failed to raise any issues of fact that preclude summary judgment dismissing the complaint. Accordingly, it is

**ORDERED** that defendant Boerum Johnson's summary judgment motion (in mot. seq. three) is granted, and the complaint is dismissed; and it is further

**ORDERED** that the Marte Plaintiffs' summary judgment cross motion (in mot. seq. four) is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

  
J. S. C.  
Hon. Dawn Jimenez-Salta  
Justice of the Supreme Court