

FZ Realty, LLC v BH Shipping, LLC

2020 NY Slip Op 35681(U)

November 23, 2020

Supreme Court, Westchester County

Docket Number: Index No. 59992/2020

Judge: William J. Giacomo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
FZ REALTY, LLC,

Plaintiff,

Index No. 59992/2020

– against –

Motion Seq. No. 1

BH SHIPPING, LLC

Defendant.

DECISION & ORDER

----- X

In an action for declaratory relief, the plaintiff moves for a preliminary injunction enjoining the defendants from blocking or obstructing plaintiff’s access to its parking lot:

Papers Considered

1. Order to Show Cause/Affirmation of Joseph M. Becker, Esq./Affidavit of Frank Vairo/Exhibits A-C;
2. Affirmation of Julian S. Kaufman, Esq. in Opposition/Affidavit of Andrew Landesman;
3. Reply Affirmation of Joseph M. Becker, Esq.;
4. Sur-reply Affirmation of Dan M. Rice, Esq./Exhibit A-D.

Factual and Procedural Background

Since 2011, plaintiff has been the owner of real property located at 140-142 School Street, Yonkers, New York.

Defendant BH Shipping, LLC is the owner of the adjoining two parcels of real property located at 150 School Street and 150 School Street Rear, in Yonkers, New York.

There is a 6-unit apartment building located on plaintiff’s property. In the rear of the building is a parking lot. The only way to access the parking lot at this time is a driveway that runs through the defendant’s building. Defendant posted a sign on the property stating “Effective September 15, 2020, the driveway entrance to the neighbor’s lot will be closed. Any cars or personal property left behind will be your responsibility. Please act accordingly”.

As a result, plaintiff commenced this action against the defendant by the filing of a summons and complaint. The complaint seeks a judgment declaring that plaintiff has acquired a prescriptive easement or an easement by necessity and that the defendants

FZ Realty, LLC v. BH Shipping, LLC, Index No. 59992/2020

are not entitled to block plaintiff's access to and from the parking lot. The complaint also seeks sanctions against defendants.

Upon commencing this action, plaintiff simultaneously moved by order to show cause for a preliminary injunction enjoining the defendants from otherwise obstructing plaintiff or its tenants from access to the parking lot. Plaintiff sought a temporary restraining order restraining defendant from installing a gate or other barrier blocking the driveway or taking any other action to interfere with plaintiff's use of the parking lot. After oral argument at a virtual hearing, this Court granted the temporary restraining order.

In support of its motion for a preliminary injunction, plaintiff submits an affidavit of its owner and managing member Frank Vairo. Vairo states that plaintiff is the owner of the property located at 140-142 School Street, Yonkers, New York. In addition, Vairo operates an office out of the adjoining property owned by the defendant¹. He states that he has maintained this office for over a decade.

Plaintiff's property contains a building with 6 apartment units and a parking lot in the rear of the building. Vairo states that many of the tenants in the building are elderly and have a difficult time walking long distances. The only access to the parking lot is through a driveway that runs through defendant's building. Vairo states that to his knowledge no one has ever requested permission to use the driveway either before or during plaintiff's ownership of the building. As a result, plaintiff understood that it could use the driveway to access the parking area despite never getting permission. During conversations with employees of the City of Yonkers, Vairo has been informed that various utility lines or pipes have been run through the driveway and that access must be maintained in the event that any work needs to be performed by the utilities. Vairo states that if defendant goes through with its plans to install a gate, plaintiff and plaintiff's tenants will be deprived of use of its parking lot.

In opposition, Andrew Landesman, principal of defendant, submits an affidavit stating that defendant purchased the property in 2017 from the former owner who had purchased the premises in 2014 through a tax foreclosure sale. Landesman states that Vairo was the former owner of his property that was foreclosed upon. Thus, Landesman states that it cannot be said that the use of the driveway was based on any legal easement or that during the ownership the use was adverse or hostile in any manner as the lot was owned by the same principal.

According to Landesman, since he purchased the property, he has attempted to resolve issues with the plaintiff and negotiate in good faith. He states that he never consented at any time to the use of the driveway under defendant's property by plaintiff.

Landesman states that plaintiff collects fees for vehicles of strangers to pass through his driveway. Plaintiff is not licensed and has no insurance covering defendant.

¹ Vairo states that he and defendant are involved in a landlord-tenant dispute regarding the office that he rents in defendant's building.

FZ Realty, LLC v. BH Shipping, LLC, Index No. 59992/2020

Landesman further states that the plaintiff's parking lot is not landlocked "as such property can be accessed via efforts of the Plaintiff from both School Street and Herriot Street which borders the property owned by the Plaintiff".

Landesman states that placing a gate across the driveway will not result in irreparable harm to plaintiff. Plaintiff and its tenants can park in the lot if plaintiff obtains alternative access through other roadways.

Discussion

CPLR 6301 provides:

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.

The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; CPLR 6301). "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." (*DiFabio v Omnipoint Communications*, 66 AD3d 635 [2d Dept 2009]). Economic loss, which is compensable by money damages, does not constitute irreparable harm (*see EdCia Corp. v McCormack*, 44 AD3d 991, 994 [2d Dept 2007]).

The plaintiff seeks a preliminary injunction enjoining defendant from blocking access to its parking lot. In order to acquire an easement by prescription, plaintiff must show that the use was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years (*see Panday v Allen*, ___ AD3d ___, 2020 NY Slip Op 05519, 2 [2d dept October 7, 2020]; *Ciringione v Ryan*, ,162 AD3d 634 [2d Dept 2018]). Generally, "where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive" (*Ciringione v Ryan*, 162 AD3d at 634, *quoting Carty v Goodwin*, 150 AD3d 812 [2d Dept 2017]). "This presumption, however, does not arise 'when the parties' relationship was one of neighborly cooperation or accommodation'" (*Colin Realty Co., LLC v Manhasset Pizza, LLC*, 137 AD3d 838 [2d Dept 2016] *quoting Ward v Murariu Bros., Inc.*, 100 AD3d 1084 [3d Dept 2012]).

FZ Realty, LLC v. BH Shipping, LLC, Index No. 59992/2020

“Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff’s papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists” (CPLR 6312[c]).

The plaintiff demonstrated a probability of success on the merits of its claims, that it will suffer irreparable injury absent the injunction, and that a balance of the equities weighs in its favor.

Pursuant to CPLR 6312(b), the Court may fix an undertaking in an amount that will compensate the defendant for damages incurred "by reason of the injunction," in the event it is determined that the plaintiff was not entitled to the injunction (CPLR 6312 [b]; *Gardens Owners Corp. v 35th Ave. Apt. Corp.*, 91 AD3d 702, 703 [2d Dept 2012]). The fixing of the amount of an undertaking is a matter within the sound discretion of the Court (*Gardens Owners Corp. v 35th Ave. Apt. Corp.*, 91 AD3d at 703). The Court finds that an undertaking is warranted herein.

Accordingly, it is

ORDERED that the plaintiff’s motion for a preliminary injunction is GRANTED to the extent that the defendants, or anyone on their behalf, are enjoined from obstructing plaintiff or it’s tenants’ access to and from the parking lot; and it is further

ORDERED that the plaintiff shall post an undertaking in the amount of \$ 10,000.00.

Counsel for all parties are directed to appear in the **Preliminary Conference Part, room 800**, for further proceedings at a date and time to be provided.

Dated: White Plains, New York
November 23, 2020



HON. WILLIAM J. GIACOMO, J.S.C.