

Bolognese v Bantis

2021 NY Slip Op 31176(U)

April 8, 2021

Supreme Court, Kings County

Docket Number: 512070/2017

Judge: Debra Silber

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At IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at Civic Center, Brooklyn, New York, on the 8th day of April, 2021.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

_____ **X**

RICHARD BOLOGNESE and ANITA BOLOGNESE,

Plaintiffs,

- against-

KALLIOPE BANTIS and SPIRO BANTIS,

Defendants.

_____ **X**

DECISION/ORDER

Index No. 512070/2017

Mot. Seq. # 9 and 10

The following papers were read herein:

NYSCEF Numbered

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed _____

215-226, 228-248

Opposing Affidavits (Affirmations) _____

249, 254-259

Reply Affidavits (Affirmations) _____

262-266, 260-261

Upon the foregoing papers, plaintiffs Richard Bolognese and Anita Bolognese move (in motion sequence [MS] #9), for an order, pursuant to CPLR 5251,¹ finding that defendants Kalliope Bantis and Spiro Bantis have violated the preliminary injunction

¹ This is not the correct statute, which the court has overlooked. This statute relates to the enforcement of money judgments.

issued by the Court on May 3, 2018 and November 22, 2019, which remains in place while this action is pending, and thus are in civil contempt of the Court's order, and awarding plaintiffs actual damages, counsel fees, and costs incurred in bringing this motion. Defendants cross-move (in motion sequence [MS] #10), for an order pursuant to Uniform Rule 130-1.1 awarding defendants attorneys' fees incurred as a result of plaintiffs' "frivolous" conduct in filing a motion "completely without merit in law, undertaken to harass the defendants."

A hearing was held virtually on January 12, 2021, both sides represented by counsel. Defendants did not raise any objections to service of the motion. The only witnesses called were the parties themselves. The motions were made almost a year earlier, but were adjourned many times, as one or both counsel were initially reluctant to conduct a virtual hearing. For the reasons which follow, both motions are denied.

Background

This action between the Bolognese plaintiffs and the Bantis defendants, the owners of two adjacent properties, involves a dispute regarding a shared driveway between their two homes. The Bolognese property and the Bantis property are both one-family homes on a 56-by 90-foot lot, with a separate two-car garage in the rear. Their garages are accessible solely from the driveway at issue. The Bolognese property was built with insufficient space for the Bolognese plaintiffs to access their garage without driving onto the Bantis property. It has not been established to this court's satisfaction that an easement was not expressly created when the property was subdivided. The Bolognese family bought their home in 1991. In

1995, one year before the Bantis defendants purchased the Bantis property, the Bolognese plaintiffs installed a roller fence between the two garages at the rear of the property. The photos at NYSCEF Docs 69 and 75 indicate that it enclosed the space behind the plaintiffs' property, first running parallel with the driveway, then turning at a post and then running perpendicular to the driveway until it reached the rear corner of plaintiffs' house. According to a 2017 survey of the Bantis property, the roller fence encroached five inches onto the Bantis property and the floor pavers plaintiffs installed encroached two and a half inches.

The driveway between the two houses is approximately seventeen feet wide, about ten feet of which is on the Bantis property and seven feet is on the Bolognese property. Once you drive past the houses, there is a cement floor area (part of plaintiffs has paving stones) which is designed to permit access into the two garages. However, on the Bolognese's seven-foot-wide strip of property between the houses, there are steps and "air grates" (2/8/18 tr. at 6 [first contempt motion's oral argument]) which cannot support the weight of a vehicle. On the Bantis' side, there are also steps. Thus, any vehicle which intends to be parked in either garage must drive down the center of the driveway, because with these obstructions, the driveway between the houses has approximately twelve feet of drivable width. An average car is about six feet wide, not including its mirrors. The Bolognese side of the driveway, at its narrowest point, adjacent to the air grates, is only four feet wide. The Bantis' side of the driveway, at its narrowest point, is approximately seven feet wide. Facing the houses from the street, the Bolognese property is on the left (#15, Block 5975, Lot 214, west of the Bantis

property) and the Bantis property is on the right (#17, Lot 217, east of the Bolognese property). The surveys are in the court file.

On June 20, 2017, the Bolognese plaintiffs commenced this action by filing a summons and complaint asserting three causes of action, for: (1) a prescriptive easement; (2) an easement by necessity; and (3) a declaratory judgment declaring that they have an easement over the Bantis property. Under the first and second causes of action, the Bolognese plaintiffs sought an injunction “barring and prohibiting the [Bantis] defendants and their successors in interest from interfering . . .” with their right to use the easement over the common driveway between their homes.

On June 29, 2017, the Bantis defendants answered the complaint and asserted several affirmative defenses, including that “[t]here is no common driveway” (answer at ¶ 15). The Bantis defendants also asserted a counterclaim seeking an order requiring the Bolognese plaintiffs to remove the retractable roller fence, which they alleged “encroaches 5 inches onto the[ir] property . . .” (*id.* at ¶ 19). On August 11, 2017, the Bolognese plaintiffs responded to the counterclaim, and, procedurally improperly and without leave of court, asserted an additional claim (the fourth cause of action) for adverse possession of the area of the driveway (approximately five inches by twelve feet) where the retractable roller fence was installed.

After the note of issue and certificate of readiness was filed, three summary judgment motions were filed.

The Bantis Defendants' Summary Judgment Motion on their counterclaim (MS 5)

On December 21, 2018, the Bantis defendants timely moved for summary judgment on their counterclaim, for a declaratory judgment, and an injunction directing the Bolognese plaintiffs to remove the retractable roller fence that encroaches on the Bantis Property. According to the Bantis defendants, deposition testimony revealed that the Bolognese plaintiffs “intentionally and willfully built this fence on defendants’ property without permission . . .” and that “[t]his was unknown by the [Bantis] defendants . . .” until a survey of the Bantis Property was prepared in June 2017. The surveyor provided an affidavit that the fence encroached on defendants’ property, as did the floor pavers plaintiffs had installed [Doc 76].

The Bantis defendants argued that “[t]he covenant that runs with plaintiff’s property prohibits building within five (5) feet of the property line . . .” The Bantis defendants submitted a copy of the certified chain of title for the Bolognese property, which contains the following restrictive covenant running with the land [NYSCEF Doc 143, Page 10 - the 1925 deed]:

“The grantee for himself, his heirs, executors and assigns covenant and agree to and with the grantor, its successors and assigns, that neither the said grantee nor his heirs, executors and assigns shall or will *erect or maintain upon any portion of the within granted premises any building or erection or any part thereof . . . within five (5) feet of the sides or rear of the plot.* This covenant shall be deemed to be a real covenant running with the land.” (emphasis added)

The Bolognese plaintiffs, in opposition, argued that the Bantis defendants had knowledge of the (roller fence) encroachment when they purchased the Bantis property in

1996 based on their November 2, 1995 survey. According to the Bolognese plaintiffs, “[d]espite knowledge of the encroachment, defendants thereafter made no request to remove the fence for more than 20 years until a dispute over parking occurred between plaintiffs and defendants in 2017.” Essentially, the Bolognese plaintiffs contended that they own that - inch wide portion of the Bantis property by adverse possession because they have “continuously, openly, notoriously, exclusively, and hostilely operated the fence on a portion of defendants’ property under a claim of right for more than 20 years . . .” The Bolognese plaintiffs further argued that they cultivated and improved the disputed portion of the Bantis property by removing snow and installing stone pavers and the roller fence as a “substantial enclosure.” The Bolognese plaintiffs claimed that “defendants’ conscious acquiescence to the plaintiffs’ use of the property . . . compels a finding of adverse possession.” Notably, the Bolognese plaintiffs did not mention or address the above-described restrictive covenant on the Bolognese property, which the Bantis defendants claimed was violated with the installation of their roller fence.

The Bantis defendants argued that the Bolognese plaintiffs did not establish the essential elements of a claim for adverse possession. The Bantis defendants contended that the Bolognese plaintiffs “have no claim of right” because “[m]ere occupancy for an extended period of years, even when coupled with conduct consistent with ownership, does not ripen into ownership by adverse possession absent an initial claim of right.” The Bantis defendants denied that they had notice of the encroachment because their November 2, 1995 survey erroneously depicts that the roller fence is located on the Bolognese property. Neither of the

parties' deeds managed to include the restrictive covenant language. The court found that the fence violated the restrictive covenant and that the Bolognese plaintiffs had not established the elements of a claim for adverse possession and granted defendants summary judgment on their counterclaim with regard to plaintiffs' roller fence and issued an order that it be removed. Plaintiffs appealed, and at the time of the hearing on this motion, they had removed the fence but not the post, which is installed between the garages and appears to be about six inches in diameter. Defendants claim their failure to remove the post violates the court's order, as they have not completely removed the fence from defendants' property, and submit a photograph of the post, decorated by plaintiffs for Christmas, NYSCEF Doc 237. They also submitted a copy of the Appellate Division order issued in January 2020 denying the plaintiffs a stay of the court's order pending appeal [Doc 235].

The Bolognese Plaintiffs' Summary Judgment Motion (MS 6) and The Bantis Defendants' Summary Judgment Cross Motion (MS 8)

The plaintiffs' complaint pleads four causes of action: prescriptive easement; easement by necessity; declaratory judgment of plaintiffs' right to an easement; and adverse possession. The decision on these motions granted defendants' motion to the extent that the court dismissed the plaintiffs' causes of action for a prescriptive easement and for adverse possession. The court granted only the branch of the plaintiffs' motion for a permanent injunction barring defendants from "maintaining, erecting, placing, obstructing or building anything on the five-foot-wide section of the Bantis Property that forms the western boundary line adjacent to the Bolognese Property." This language was meant to be identical to that in the chain of title and which should have been in the Bolognese's deed, and it was intended to

be a reciprocal restriction against both properties. It was a mistake, the court now acknowledges, to use slightly different wording, and it should be amended to be identical to the language in the 1925 deed, and the order should also provide that it may be recorded against both lots, if this restrictive covenant is not already in the chain of title of both parties' deeds. But that issue is not addressed in this motion, and the court may not, *sua sponte*, modify its order. Further, this "permanent injunction" does not address the issue now before the court, which is the issue of driving over the ten-foot strip (five feet on each side) or the issue of parking vehicles on the ten-foot strip. It is a restrictive covenant meant to prevent the installation of anything permanent that would interfere with ingress and egress to and from the garages. A restrictive covenant does not apply to cars or planters or hoses or other things that can be moved. An easement would apply to cars, and that is the open cause of action in this case: plaintiffs' cause of action for a declaratory judgment that they have an easement by necessity.

The court notes that this cause of action was not included in the plaintiffs' motion for summary judgment, but it was included in defendants' cross motion for summary judgment dismissing the complaint. Summary judgment dismissing this cause of action was denied, and as such, it is left for trial. Specifically, the Court stated:

"The Bantis Defendants move to dismiss the Bolognese Plaintiffs' second cause of action for an easement by necessity. To establish an easement by necessity, a party must demonstrate that "their use of the disputed strip [of property] was absolutely necessary for the beneficial enjoyment of their property" (*Asche v Land & Bldg. Known as 64-29 232nd St.*, 12 AD3d 386, 387 [2004]). The Bantis Defendants' contention that the second cause of action for an easement by necessity is defeated by the original deeds, which confirm that the Bolognese Plaintiffs had sufficient

access to “their land” is not supported by the record. The record reflects that the Bolognese Plaintiffs cannot access the garage in the rear of their property without entering and accessing the Bantis Defendants’ portion of the “common” driveway. Consequently, the Bantis Defendants have failed to establish that they are entitled to summary judgment dismissing the second cause of action for an easement by necessity.

As plaintiffs have not moved for summary judgment on this cause of action, whether the plaintiffs are entitled to a judicial declaration that they are entitled to an easement by necessity is left for the justice who is assigned to serve as the trier of the facts in the trial on this claim.”

The court notes, as an aside, that the documents in the motion papers did not completely satisfy the court with regard to this cause of action. For example, the certified deed history includes a restrictive covenant on defendants’ property that states the conveyance of #17 is “subject to covenants and restrictions, if any, contained in former deeds not violated by present structure” [NYSCEF Doc 143 at 28]. The court would need to review the prior deeds and related documents to determine whether there was an actual easement created. That is not the subject of this motion.

The Prior Order Granting Plaintiffs a Preliminary Injunction

The Court’s decision on the motion and cross motion for summary judgment, dated November 22, 2019, included the following, as relevant to this motion:

“[It is further] ORDERED that the preliminary injunction² granted in the order dated May 3, 2018 shall continue as modified herein, pending the decision and judgment [issued] following the trial in this matter, to wit:

All parties shall comply with all applicable laws, rules, and regulations, including § 25-15 of the New York City Zoning Resolution which provides that no more than three cars may be parked off-street on a lot containing a single family detached residence. All parties are prohibited from parking on or otherwise obstructing the common driveway, which runs from the curb cut

² This is the preliminary injunction which is the subject of this motion - the preliminary injunction with regard to driving vehicles on the properties.

in the sidewalk for approximately sixty feet toward the back of the property and in between the houses known as 15 and 17 Harbor Lane, so vehicles may enter or exit the garages at the back of the property.”

The order dated May 3, 2018, referenced above, which modified the earlier preliminary injunction, states:

“The Court amends paragraph one of the order dated August 5, 2017 [it was 9/5/17] to read as follows: Granting a preliminary injunction and prohibiting all parties from parking or obstructing a five-foot section on both sides of the property line between the parties’ respective properties. This runs from curb cut to the garages, so vehicles may enter or exit the respective garages pending the outcome of the underlying litigation.”

The first order the court issued, other than those contained in orders to show cause, was dated September 5, 2017. It was drafted by plaintiffs’ counsel. Defendants’ counsel submitted a counter-order, but the court signed plaintiffs’ proposal. It was issued following plaintiffs’ motion (Seq. #1), brought by order to show cause, for a preliminary injunction. It provided the following language:

“Defendants are: (1) Restrained and prohibited from interfering with Plaintiffs' use of the 17-foot wide, 110 foot long section of property that runs between 15 Harbor Lane, Brooklyn, NY and 17 Harbor Lane, Brooklyn, NY from the curb cut to the parties' respective garages (hereinafter "Driveway"), for egress/ingress of their motor vehicle(s) pending the final outcome of this litigation; (2) Restrained and prohibited from maintaining, erecting, placing, and/or building any type of barrier over the Driveway, including but not limited to placing other motor vehicles and other non-permanent structures within the Driveway, pending the final outcome of this litigation; and (3) Defendants' shall not perform any act, which interferes with Plaintiffs’ egress/ingress to the garage at 15 Harbor Lane, Brooklyn, NY with their vehicle(s) pending the final outcome of this litigation.”

After the September 5, 2017 order was issued, plaintiffs brought a motion to hold defendants in contempt of it. A hearing was held, and the court determined that the order

was so vague that defendants' violation of it could not be proved (*see Gerelli Ins. Agency, Inc. v Gerelli*, 23 AD3d 341 [2d Dept 2005]). The court then amended it to clarify it, with the order dated May 3, 2018, and incorporated the same language in the order issued on November 22, 2019. A month later, by notice of motion dated December 20, 2019, the plaintiffs' motion that is presently before the court, seeking an order holding defendants in contempt, was filed.

Civil Contempt

Judiciary Law § 753 grants a court the power to hold a party in civil contempt for failing to obey a lawful mandate of the court (*see Tihanyi v Grimando*, 36 AD3d 893, 894 [2d Dept 2007]; *Gordon v Janover*, 121 AD2d 599, 600, 503 NYS2d 860 [1986]).

“Under Judiciary Law § 753, [a] court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced.

. . . [T]he elements necessary to support a finding of civil contempt [are:] First, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Second, it must appear, with reasonable certainty, that the order has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party. Fourth, prejudice to the right of a party to the litigation must be demonstrated (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015] [internal citations and quotation marks omitted]).

The moving party must establish civil contempt by clear and convincing evidence (*Id.*).

Judiciary Law § 753 does not require a showing of willfulness or monetary harm as a precondition to a finding of civil contempt (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 34-36 [2015]). Indeed, in *El-Dehdan*, the Court of Appeals specifically stated that the Court had

"not imposed a willfulness requirement" for a civil contempt finding (*id.* at 34; *Board of Directors of Windsor Owners Corp. v Platt*, 148 AD3d 645, 646 [1st Dept 2017]). Counsel fees may be awarded in addition to the statutory fine of \$250 (*see Rose v Levine*, 84 AD3d 1206 [2d Dept 2011]).

The Hearing

Plaintiff Richard Bolognese testified that both of the parties' two-car garages are old and are not wide enough for two cars to park headfirst. His accommodation is to park one car headfirst, in the spot closest to defendants' property, but to turn his second car around and park the other car rear first, facing out. He acknowledged that his space to make this maneuver is restricted due to the fact that his house, at the point that is along the driveway, extends about ten feet deeper into the property than defendants', but he denied that his installation of an outdoor "kitchen" [Doc 240, 261] behind his house, which added another three or so feet to the back of his house, reduced the room he has to park. He testified that he cannot get the second car into his garage if defendants park their second car in front of their garage, as it seems they do. The defendants' 2017 survey [Docs 158 and 192] indicates that the defendants' garage is approximately 15-foot wide and is right next to the defendants' western property line, leaving some 40 feet along the northern property line for a shed and a backyard. Plaintiffs' garage is right next to defendants' garage, on the eastern edge of their property, and is presumably the same size. Plaintiffs have not submitted a survey of their property. Mr. Bolognese was asked if it would be easier to park the car in their west-side spot head in and the one next to the defendants' property by backing it in. Plaintiff said no, because if they did

that, the driver's side door for both cars would be next to the wall of the garage and the driver couldn't get out. See also his affidavit at Doc 249. It would seem it is possible to enlarge plaintiffs' garage by adding a few feet on the eastern side so both cars could be parked head in, but that is not relief the court can grant. Nor can the court order the parties to purchase smaller, more efficient cars.

On cross examination, defendants' attorney explored the legality of the outdoor kitchen, which is connected to gas and water lines, but was not able to obtain any information from Mr. Bolognese. Plaintiff admitted that his pavers encroach 2 ½ inches onto defendants' property. He said he was unaware of the property line when he installed the pavers and the fence. He said he did remove the roller fence. He acknowledged that he has not removed the post. He testified that his family owns six cars, as his children live with him and each adult has a car.

Defendant Spiro Bantis testified that he and his wife own two cars, a Mercedes SUV and a Range Rover. They park one in the garage and one in the driveway. They have done this for almost twenty-five years since they purchased their home. He is an attorney. He installed the video camera after he broke his side view mirror by hitting his house, and cut his hand, while trying to get out of the driveway. He testified that plaintiffs' son is "unstable" and menaced his wife, which is why she called the police. He said many neighbors have had "problems" with him ("Ritchie Junior") as well. Mr. Bantis said he is aware that he was "ordered not to interfere with plaintiffs' use of the driveway" and testified that he has not done so. He said it is plaintiffs who have not complied, as they park in the driveway to unload

and to wash their cars. He said the plaintiffs have “used” defendants’ property on a daily basis and have not had any difficulty getting into or out of their garage. Mr. Bantis insisted that parking his car in front of his garage, on his property, whether three feet from the property line or five, does not prevent plaintiffs from parking in their garage. He agreed that if he pulled into the left side of his garage headfirst, it would not be possible to open the driver side door. Exhibit A to his cross motion is a one-minute-long video from his Ring camera installed at the back of his house. It was taken in December 2019 and shows one of plaintiffs’ small cars start to back out of the spot in plaintiffs’ garage closest to defendants’ garage, sees defendant’s car and stops, then defendant Ms. Bantis pulls into his spot in front of defendants’ garage and gets out of the car. Plaintiff then continues backing out onto the street. Mr. Bantis testified that this demonstrates that the way he and his wife park their car does not prevent plaintiff from going in and out. He also repeated the claim he has made before, not without merit, that plaintiffs have installed a kitchen and placed other items in their own way. Plaintiff Richard Bolognese avers in his affidavit, however, [Doc 249, ¶ 10] that “We are unable to turn into the second (back into the western side) spot because Defendants have not left five feet of space from the property line. Defendants repeated violation of This Court's orders have prevented us from parking two cars in our garage.” Mr. Bolognese drives a Jeep, which is larger than the plaintiffs’ car in the video.

The video submitted by defendants also shows the very cluttered space between the back of plaintiffs’ house and their garage. It appears that the area where a car would back into the garage is full of planters, garbage cans, and other items. The roller fence which was

removed is leaning against the side of the house, seemingly waiting for the appellate court to give them permission to put it back on the post which they have refused to remove.

In support of the cross motion, Mr. Bantis, who is an attorney, provides an affirmation, which is not permitted when the attorney is a party, as opposed to an officer of the court. It is therefore not admissible. Defendants also provide three affidavits of neighbors who all state that that the defendants have parked their car in the same place for twenty plus years and plaintiffs were always able to use their garage without a problem.

Conclusions of Law

This is an unfortunate situation. The level of animosity has risen too high and the court cannot reduce it. The police have been called by plaintiff Richard Bolognese [Doc 59], where he appears to have claimed that he cannot get into his driveway because defendants' car was blocking it, and that this was harassment by defendants and a violation of a court order. Ms. Bantis testified that she called the police about plaintiffs' son, who menaced her after one of their cars was damaged [Doc 152 at 80, 87]. Both parties have submitted photos of service vans parked in the driveway, blocking it. Defendant apparently had a sewer cleaning service on a Saturday afternoon come to his home. Plaintiffs took a photo. While defendants needed their sewer line cleared – that is an emergency– plaintiffs determined it violated the court's order. The street in front of the parties' homes is not a public street, it is a little *cul de sac*. Both parties have blocked the other from coming and going, and have taken photos of it [Docs 180, 223]. Plaintiffs wash their cars in the driveway [Doc 240]. Plaintiffs' son plowed all the snow from a recent snowstorm onto defendants' property so they could not move their cars at

all. Defendant submitted the video of this at the hearing on the motion. The neighbors have submitted affidavits claiming that defendants are model neighbors and plaintiffs are not. They claim that plaintiffs own seven cars and park them on their small street, often blocking their driveways, and provide photos [Doc 243]. They claim they are fearful of plaintiffs' son. They claim that the plaintiffs' dog is dangerous and has attacked at least one of their dogs. Three neighbors have signed affidavits for defendants' cross motion that state that defendant Spiro Bantis has parked his car in front of his garage for twenty plus years and plaintiffs have been able to get in and out of their garage without a problem the whole time. The parties have submitted numerous photos and videos with their multitude of motions. They have appealed and cross appealed the court's prior order. Plaintiffs moved in the Appellate Division for a stay pending appeal with regard to the order to remove the roller fence, which was denied. All over a driveway. In the midst of a global pandemic.

The record does not support a finding of civil contempt against the defendants. Plaintiffs have proven, by clear and convincing evidence, that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Similarly, they have proven, with clear and convincing evidence, that the order has been disobeyed. Plaintiffs have proven that the defendants, as the party to be held in contempt, had knowledge of the court's order. However, the plaintiffs have not established the fourth element, which is to prove, by clear and convincing evidence, that they were prejudiced by the defendants' "offending conduct."

Specifically, it is clear that when defendants park their car on their property, in front of their garage, some 39-49 inches from the property line (Doc 249 at 2 [plaintiffs' chart]),

they are violating the order which states that neither party shall park their vehicles closer than five feet from the property line. But it has not been established, by clear and convincing evidence, that plaintiffs would be able to back one of their cars into their westernmost garage spot if defendants' car was not parked there, nor have plaintiffs established that they cannot do so if defendants' car is parked there. With all the photos and videos, there is nothing to demonstrate that plaintiffs can park two cars in their garage under any circumstances, ideal or otherwise.

The court notes that the prior contempt motion was denied because the court determined that the order, which plaintiffs' counsel had drafted, did not clearly express an unequivocal mandate. The order was modified to specify that the court was "Granting a preliminary injunction and prohibiting all parties from parking or obstructing a five-foot section on both sides of the property line between the parties' respective properties. This runs from curb cut to the garages, so vehicles may enter or exit the respective garages pending the outcome of the underlying litigation." This order was issued on May 5, 2018. It was not intended to be permanent. It was only to remain in effect until a trial, at which time the court expected a witness to provide evidence of the amount of space needed for a car to be driven from the street into the parties' respective garages without difficulty. Here, for this motion, plaintiffs did not need an expert. But they did need proof that with their outdoor kitchen, a permanent installation of a sink and a stove/barbeque, it was possible to park two cars in their garage.

While plaintiffs introduced into evidence at the hearing numerous photographs (*e.g.* Doc 226) taken of defendants' cars and a tape measure, to demonstrate that the defendants' car was parked within the ten-foot strip circumscribed by the court's order, and summarized the measurements in an affidavit, they have not established that defendants' vehicle, when left in front of their garage instead of inside of it, prevents plaintiffs from using their garage. Defendant Spiro Bantis, an attorney and partner at the firm representing him in this matter, testified that he was "ordered" not to interfere with plaintiffs' use of his driveway, and that he has not. He said the plaintiffs "have not had any difficulty getting into their garage." Thus, it came down to one party's word against the other's. This is not enough to prove a claim of civil contempt. All four elements must be established by clear and convincing evidence.

The failure of plaintiffs to prove all of the elements of civil contempt by clear and convincing evidence must result in the court's denial of plaintiffs' motion.

Defendants cross motion, for counsel fees and to have sanctions imposed on plaintiffs for filing a "frivolous" motion, is also denied. This motion is made under Uniform Rule 130-1.1, which vests this court with discretion to award both attorneys' fees, costs, and sanctions as a result of frivolous conduct (22 NYCRR § 130-1.1 [a], [b]). Sanctions may be imposed against an attorney or a party to the litigation or against both. As much as the Lawyers' Fund for Client Protection is a worthy recipient for contributions which arise from sanctions ordered by the court, the court finds that plaintiffs' motion was not frivolous. It would have been granted had plaintiffs introduced evidence, by video or expert witness affidavit, that the

defendants' car, when parked in front of his garage, three feet (for example) from the property line, was the sole reason plaintiff was not able to park a car in his garage's westernmost spot.

Uniform Rule 130-1.1 defines conduct as "frivolous" if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

As the court has determined that plaintiffs' motion was not frivolous, defendants' cross motion must be denied.

Accordingly, it is **ORDERED** that plaintiffs' motion (MS #9) to hold defendants in civil contempt of court is denied; and it is further

ORDERED that defendants' motion (MS #10) for attorneys' fees, costs and sanctions is also denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.