

Mateus v Fu Rong 106 LLC

2021 NY Slip Op 31938(U)

February 9, 2021

Supreme Court, Queens County

Docket Number: 719125/2019

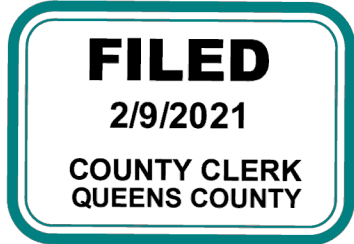
Judge: Leslie J. Purificacion

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MEMORANDUM

NEW YORK SUPREME COURT : QUEENS COUNTY
IA Part 39



MATEUS,	x
Plaintiff	
- against -	
FU RONG 106 LLC, ET AL.,	x
Defendants	

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MOTION SEQ. NO. 1

BY: Hon. Leslie J. Purificacion
J.S.C.

In this action for injunctive and other related relief, plaintiff seeks to enjoin and restrain defendants from: (a) interfering with plaintiff's use and possession of his property, (b) blocking the driveway abutting plaintiff's property and (c) interfering with plaintiff's use of the easement associated with the driveway abutting plaintiff's property.

On a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, a likelihood of success on the merits, irreparable injury if a preliminary injunction is not granted and a balance of equities in his or her favor. (CPLR § 6301; *see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d 1165, 1166-67 [2d Dept 2020].) The purpose of a preliminary injunction is to maintain the status quo and not to determine the parties' ultimate right. (*538 Morgan Ave. Properties, LLC v 538 Morgan Realty, LLC*, 186 AD3d 657, 658 [2d Dept 2020]; *Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Group, LLC*, 177 AD3d 924, 927 [2d Dept 2019].) The determination whether to grant a motion for a preliminary injunction rests within the sound discretion of the

Supreme Court.” (*Jones v State Farm Fire & Cas. Co.*, 189 AD3d 1565, 1566 [2d Dept 2020] [citation omitted]; see *Doe v Axelrod*, 73 NY2d 748, 750 [1988].)

Plaintiff and defendant Fu Rong 106 LLC are owners of adjacent properties located on 37th Avenue in Corona, Queens. Defendant Chen De Jin is a member of Fu Rong 106 LLC (hereinafter together the landlord defendants). Plaintiff contends that he has an easement over the driveway he shares with the landlord defendants, with rights of ingress and egress, and his tenants have not been able to use the driveway to access the backyard because the landlord defendants and defendant Victor’s Refrigeration Services have blocked the driveway with various kitchen appliances. Plaintiff avers that his attorney sent a cease and desist letter dated August 28, 2019 to defendants, asking them to stop blocking the driveway with vehicles and/or refrigerators. In support of his application, plaintiff submits, inter alia, his affidavit, a copy of the relevant deeds, a copy of the August 28, 2019 cease and desist letter and photographs of the driveway and backyard. The photographs submitted depict various appliances in the driveway and backyard.

In opposition, the landlord defendants do not contest plaintiff’s claim to the easement. Rather, they aver that they leased the ground floor of their property to Victor Guaba, doing business as Victor’s Refrigeration Services. They further argue that they owe no duty to plaintiff since they do not occupy, control or use the common driveway; and the appliances belong to Guaba, who operates a business repairing and selling household appliances. Victor’s Refrigeration Services did not interpose an answer to the complaint or otherwise appear in the action.

Upon review of the evidence submitted, plaintiff has sufficiently demonstrated the likelihood of success on his cause of action for trespass and that the continued inability to access

the driveway would result in irreparable harm. (See *XXXX, L.P. v 363 Prospect Place, LLC*, 153 AD3d 588, 591 [2d Dept 2017]; *84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.*, 91 AD3d 702, 702 [2d Dept 2012]; see generally *91-54 Gold Rd., LLC v Cross-Deegan Realty Corp.*, 93 AD3d 649, 650 (2d Dept 2012); *Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011].) The balancing of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action. (See *538 Morgan Ave. Properties, LLC v 538 Morgan Realty, LLC*, 186 AD3d 657, 658 [2d Dept 2020]; *Cong. Machon Chana v Machon Chana Women's Inst., Inc.*, 162 AD3d 635, 638 [2d Dept 2018].)

With respect to the branch of plaintiff's application for attorney's fees, as a general rule, attorneys' fees are incidents of litigation and the prevailing party may not collect them from the losing party unless an award is authorized by agreement between the parties or by statute or court rule. (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986].) The court, in the exercise of its discretion, decline to award attorney's fees on this application.

The court will now turn to the separate cross motion by the landlord defendants to dismiss the complaint pursuant to CPLR 3211 (a) (7). "In considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Beach 50th St., LLC v Peninsula Rockaway Ltd. Partnership*, 187 AD3d 1114 [2d Dept 2020]; see *MJK Bldg. Corp. v Fayland Realty, Inc.*, 181 AD3d 860, 861 [2d Dept 2020].) "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is

not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.” (*MJK Bldg. Corp. v Fayland Realty, Inc.*, 181 AD3d at 861; *XXXX, L.P. v 363 Prospect Place, LLC*, 153 AD3d at 590.)

Here, the proffered evidence failed to conclusively establish that plaintiff did not have causes of action for trespass and interference with easements or rights-of-way. (*See Panday v Allen*, 187 AD3d 775 [2d Dept 2020]; *Froehlich v 66 Shore Dr., LLC*, 162 AD3d 746, 747 [2d Dept 2018].) The landlord defendants’ contentions, that they have no duty to plaintiff because they do not occupy, control or use the common driveway and the appliances belong to their tenant, are without merit. The landlord defendants, as the servient tenement of the easement, have a duty to refrain from interfering with plaintiff’s rights to use the easement. (*See Scappa v Herzig*, 92 AD3d 751, 752 [2d Dept 2012]; *Green v Mann*, 237 AD2d 566, 567-68 [2d Dept 1997].)

The parties’ remaining contentions and arguments, are either without merit or need not be addressed in light of the foregoing determinations.


Prior to the granting of a preliminary injunction, plaintiff is required to give an undertaking in an amount to be fixed by the court, for all damages and costs that may be sustained by reason of the injunction. (CPLR 6312 [b]; *see Hofstra Univ. v Nassau County, N.Y.*, 166 AD3d 863, 865 [2d Dept 2018]; *Chao-Yu C. Huang v Harry An-Ling Shih*, 164 AD3d 1298, 1298 [2d Dept 2018].) “The amount of the undertaking must not be based upon speculation and must be ‘rationally related to the [amount of potential] damages’ which the defendant might

suffer if it is later determined that the injunction was unwarranted.” (*Hofstra Univ. v Nassau County, N.Y.*, 166 AD3d at 865, quoting *Olympic Ice Cream Co., Inc. v Sussman*, 151 AD3d 872, 874 [2d Dept 2017].)

Accordingly, plaintiff’s application for a preliminary injunction is granted, to the extent that, during the pendency of this action, defendants are enjoined and restrained from interfering with plaintiff’s use of the driveway for purposes of ingress and egress, including but not limited to blocking the driveway with vehicles and appliances. The foregoing is conditioned upon plaintiff’s filing of an undertaking in accordance with CPLR 6312, in an amount to be fixed by the court in the order to be entered hereon. The parties shall submit proof and recommendations as to the amount of the undertaking upon settlement of the order. The landlord defendants’ cross motion to dismiss is denied in its entirety.

Settle order.

Dated: February 9, 2021



Hon. Leslie J. Purificacion, J.S.C.

