

Ribao Xiao v Cheung
2022 NY Slip Op 30670(U)
March 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 511805/2018
Judge: Francois A. Rivera
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At an IAS Term, Part 52 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 1st day of March 2022

HONORABLE FRANCOIS A. RIVERA

-----X
RIBAO XIAO,

Plaintiff

DECISION, ORDER & JUDGMENT

Index No. 511805/2018

- against -

NINA CHEUNG,

Defendant.

-----X

The following is the decision, order, and judgment after a non-jury trial in the above captioned matter.

THE PARTIES

Plaintiff Ribao Xiao (hereinafter plaintiff or Xiao) and defendant Nina Cheung (hereinafter defendant or Cheung) are owners of neighboring real estate. Plaintiff owns a house located at 1836 West 11th Street, Brooklyn, New York 11223, and defendant owns a house located at 1832 West 11th St in Brooklyn, New York, 11223. The parties' houses are positioned in such a manner that there is a driveway running vertically and parallel to their properties from the street into the backyard.

BACKGROUND

On June 7, 2018, plaintiff, proceeding pro se, commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO).

The verified complaint alleges fifteen allegations of fact in support of two causes of action. The first cause of action is for a permanent injunction. The second cause of action is for a declaratory judgment.

On July 2, 2018, defendant filed an answer with the KCCO. The answer asserts twelve affirmative defenses, four denominated counterclaims and two cross claims. The first denominated counterclaim is for a declaratory judgment. The second is for equitable relief. The third counterclaim sounds in nuisance. The fourth counterclaim is for trespass. Inasmuch as there is only defendant the cross claims are disregarded (*see* CPLR 2001).

THE TRIAL

A non-jury trial was conducted via Microsoft Teams on June 14, 2021, June 16, 2021, June 21, 2021, June 28, 2021, and June 30, 2021. Plaintiff's wife, Jian Xiao, testified first. She did not, however, return for cross examination. Consequently, her testimony was stricken at the request of the defendant. Xiao also testified and rested at the conclusion of his testimony. Cheung testified and then rested. At the close of all evidence the defendant moved for a directed verdict in her favor on her counterclaims. The Court reserved decision and directed the parties to submit requests for findings of fact in accordance with CPLR 4213. Both parties complied.

FINDINGS OF FACT

Plaintiff owns a house located at 1836 West 11th Street, Brooklyn, New York, and defendant owns a house located at 1832 West 11th St in Brooklyn, New York. Standing

and facing in the front street entrances of the two properties, the plaintiff's house is on the left and the defendant's house is on the right.

The parties' houses are positioned in such a manner that there is a driveway running vertically and parallel to their properties from the street into the backyard (hereinafter referred to as "driveway in dispute").

The driveway in dispute located between the plaintiff's and defendant's houses does not entirely belong to either party; however, each party owns a part of it. The plaintiff purchased his house on April 9, 2010. At the time of the plaintiff's purchase of his house, the prior owner (plaintiff's property) maintained and owned a black gate the width which extended from the wall on the right side of plaintiff's property to the wall on the left side of the defendant's property. The black gate was in front of and aligned with the building line of the two properties.

Sometime after April 9, 2010, and prior to July 11, 2011, the plaintiff obtained the permission of the prior owner of the defendant's property to replace the black gate. On July 11, 2011, plaintiff replaced the black gate with a new red gate in the exact same position.

On July 25, 2011, the defendant purchased her house. Without the plaintiff's consent, the defendant removed the part of the red gate that was on her part of the driveway in dispute. Defendant did so by lifting that part of the gate off the hinge on the post. Defendant then returned that portion of the gate to the plaintiff.

In May of 2018, the defendant put up a twenty feet long chain link fence (hereinafter the vertical fence) running vertically along the driveway in dispute by the boundary line. The vertical fence extended five feet past the front of the parties building line and extended back fifteen feet into the driveway behind the driveway in dispute behind the front of the building line.

On consent, the parties admitted into evidence three surveys of the 1832 and 1836 West 11th St, Brooklyn, New York properties. The defendant submitted exhibit U and V and the plaintiff submitted exhibit 4. The two surveys submitted by the defendant demonstrate that defendant's portion of the driveway runs 3.5 feet (or 42 inches) horizontally from the southerly wall of her house towards the plaintiff's house and 100 feet vertically. All three surveys in evidence show that the defendant has a fire escape on the southerly side of her house that overhangs in her portion of the driveway. All three surveys in evidence show that the defendant's fire escape does not encroach onto the plaintiff's boundary line of the driveway.

Defendant credibly testified that she has pulled down the fire escape in 2015 when she was renovating the second floor and the ladder came down to the ground and the ladder lands directly on her portion of the land. Plaintiff has a fire escape on the southerly side of his house that overhangs his portion of the shared driveway with the owner of 1840 West 11th St. Defendant's deed and survey do not list any easements.

Plaintiff concedes that neither the Plaintiff's deed nor the Defendant's deed include any language related to ownership of an easement over the driveway in dispute.

LAW AND APPLICATION

Plaintiff seeks an order and judgment for the following relief. Plaintiff seeks a judgment declaring that the plaintiff has an easement over the defendant's property in the driveway in dispute. Plaintiff also seeks a judgment declaring that he has a right to restore the red gate as it was before the defendant removed a part of it and that the defendant must pay for the restoration. Plaintiff also seeks an order permanently enjoining and restraining the defendant from placing or maintaining a vertical fence in the driveway in dispute based on the plaintiff's easement.

Defendant seeks, inter alia, an order and judgment declaring the following relief. Defendant seeks a judgment declaring that the plaintiff does not have an easement over her portion of the driveway in dispute and that the plaintiff has the right to build and maintain the vertical fence on her portion of the driveway in dispute. Defendant also seeks damages for injury to her property caused by the installation of the red gate and for trespass and creation of a nuisance by the plaintiff.

Pursuant to CPLR 3001, the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. To constitute a justiciable controversy, there must be a real dispute between adverse parties,

involving substantial legal interests for which a declaration of rights will have some practical effect (*see Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2nd Dept 2010]).

The primary purpose of a declaratory judgment is to stabilize an uncertain or disputed jural relationship with respect to present or prospective obligations (*Village of Woodbury v Brach*, 99 AD3d 697, 699 [2nd Dept 2012], citing *Chanos*, 74 AD3d at 1008). “Where there is no necessity for resorting to the declaratory judgment it should not be employed” (*Hesse v Speece*, 204 AD2d 514, 515 [2nd Dept 1994], citing *James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). Furthermore, a declaratory judgment is *ex vi termini* a judgment on the merits (*Dupigny v St. Louis*, 115 AD3d 638, 640 [2nd Dept 2014]). Until disputed questions of fact necessary to be determined before judgment can be rendered are settled, it is plain that rights and legal relations cannot be determined, defined and declared (*id.*).

A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 [2nd Dept 2009], quoting *Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2nd Dept 2005]). Injunctive relief is to be invoked only to give protection for the future ... to prevent repeated violations, threatened or probable, of the plaintiff's property rights (*Merkos L'Inyonei Chinuch, Inc.*, 59 AD3d at 408).

Easement Appurtenant

An easement appurtenant is created when such easement is: (1) conveyed in writing, (2) subscribed by the person creating the easement, and (3) burdens the servient estate for the benefit of the dominant estate (*Franklin Park Plaza, LLC v V & J Nat. Enterprises, LLC*, 57 AD3d 1450 [4th Dept 2008]). A writing purporting to create an easement appurtenant must establish unequivocally the grantor's intent to give for all time to come a use of the servient estate to the dominant estate (*id.*).

Easement by prescription

To establish an easement by prescription, the plaintiffs are required to show by clear and convincing evidence that the use was adverse, open, and notorious, continuous, and uninterrupted for the prescriptive period (*Mee Wah Chan v Y & Dev. Corp.*, 82 AD3d 942, 943 [2nd Dept 2011]). The prescriptive period is 10 years (*Asche v Land & Bldg. Known as 64-29 232nd St.*, 12 AD3d 386, 387 [2nd Dept 2004]). 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 (*J.C. Tarr, Q.P.R.T v Delsener*, 19 AD3d 548, 550 [2nd Dept 2005], *see also Duckworth v Ning Fun Chiu*, 33 AD3d 583 [2nd Dept 2006], *Coverdale v Zucker*, 261 AD2d 429 [2nd Dept 1999]).

Easement by express grant

For an easement by grant to be effective, the dominant and servient properties must have a common grantor (*Garson v Tarmy*, 187 AD3d 1149 [2nd Dept 2020]). To

create an easement by express grant, plain and direct language must be used which evidences the grantor's intention to permanently give a use of the servient estate to the dominant estate (*Dichter v Devers*, 68 AD3d 805, 806–07 [2nd Dept 2009] citing *Marino v Mazzuocola*, 191 AD3d 969 [2nd Dept 2021]). For an easement by grant to be effective, the dominant and servient, properties must have a common grantor (*see Simone v Heidelberg*, 9 NY3d 177, 181–182 [2007]).

Easement by Implication

To establish an easement by implication from pre-existing use, there must be unity and a subsequent separation of title, the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and the use must be necessary to the beneficial enjoyment of the land retained (*see Abbott v Herring*, 97 AD2d 870 [3rd Dept 1983]; *see also West End Props. Assn. Of Camp Mineola, Inc., v Anderson*, 32 AD3d 928 [2nd Dept 2006]).

Easement by Necessity

The party asserting that it has an easement by necessity bears the burden of establishing by clear and convincing evidence that there was a unity and subsequent separation of title, and that at the time of severance, an easement over the servient estate was absolutely necessary to obtain access to the party's land. The necessity must exist in fact and not as a mere convenience and must be indispensable to the reasonable use of the adjacent property (*Creagan v Stein*, 191 AD3d 942 [2nd Dept 2021] citing *Faviola, LLC v Patel*, 114 AD3d 823, 824 [2nd Dept 2014]).

On April 9, 2010, the plaintiff purchased his property and on June 7, 2018, he commenced the instant action. The plaintiff did not present any evidence of the prior use of the driveway in dispute by the prior owner of his property. While he did establish that the prior owner of his property maintained a black gate in front of the driveway in dispute, he did not establish whether the black gate was adverse to the defendant's prior property owner or permissive. Consequently, the plaintiff did not demonstrate, by clear and convincing evidence that his use of the defendant's portion of the disputed driveway was adverse, open, notorious, continuous, and uninterrupted for the prescriptive period of ten years (*Asche*, 12 AD3d at 387).

Here, the plaintiff submitted no documentary evidence showing that his portion and the defendant's portion of the driveway in dispute had a common grantor. Also, the plaintiff did not submit documentary evidence establishing an easement appurtenant (*Franklin*, 57 AD3d 1450). The plaintiff's testimony and documentary submission failed to establish the existence of an easement over any portion of the driveway in dispute.

Plaintiff's first cause of action is for a permanent injunction and the second cause of action is for a declaratory judgment. Both causes of action are premised on the plaintiff's claim that he has an easement over the defendant's property in the driveway in dispute. He does not have such an easement, consequently he has not established his entitlement to a permanent injunction or a declaratory judgment. In particular, plaintiff's claims seeking a judgment declaring that he has an easement over the defendant's property in the driveway in dispute is denied. His claim for a judgment declaring that he has a right to restore the red gate as it was before the defendant removed a part of it is

denied. His claim that the defendant must pay for the restoration of the red gate is denied. His claim for an order permanently enjoining and restraining the defendant from placing or maintaining a vertical fence in the driveway in dispute is denied.

Defendant has plead four counterclaims against the plaintiff. The first is for a declaratory judgment, the second is denominated as one for equitable relief, the third counterclaim sounds in nuisance and the fourth counterclaim is for trespass.

The elements of a private nuisance cause of action are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act (*Curry v Matranga*, 194 AD3d 1011, 1012–13 [2nd Dept 2021]). The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission (*Double M Dev., LLC v Khrom*, 189 AD3d 1227, 1228 [2nd Dept 2020]). Both nuisance and trespass require some intentional act on the part of the alleged tortfeasor (*Curry*, 194 AD3d at 1012–13).

Plaintiff credibly testified that he replaced the black gate with a new red gate before the defendant owned her property. He also credibly testified that he did so with the permission of the prior owner of defendant's property. Under these circumstances the plaintiff's placement of the red gate in such a manner that it was partially on the defendant's portion of the disputed driveway does not support a claim of trespass or nuisance. While the placement of the red gate was an intentional act, it was permissive, and therefore not unreasonable and not an intentional intrusion or entry onto the

plaintiff's property (*see 1212 Ocean Ave. Hous. Dev. Corp. v Brunatti*, 50 AD3d 1110, 1112 [2nd Dept 2008]).

When the defendant took ownership of her property, the red gate had already been installed. While the defendant was free to withdraw her permission to have part of the gate situated on her property, she should not have used self-help measures to remove the objectionable portion of the red gate before seeking a judicial determination of the parties' respective rights or before pursuing injunctive relief. Inasmuch as the placement of the red gate was permissive and the prior owner of defendant's property had no apparent quarrel with the work done, the defendant may not pursue damages for injury to property premised solely on the placing of posts and support on her property to build the gate before she owned the property.

Furthermore, defendant's claim of trespass and nuisance premised on the allegedly few occasions that the plaintiff drove his vehicle through the driveway in dispute to his garage in the back and may have passed on top of the defendant's portion of the disputed driveway do not make a prima facie showing of either trespass or nuisance. Plaintiff has not demonstrated that the occasional and fleeting passage of plaintiff's vehicle was intentional or unreasonable in character or that it was without justification.

The branch of the defendant's cause of action seeking a judgment declaring that the defendant has a right to build or maintain the vertical fence on defendant's property in the driveway in dispute is decided as follows. Owners and possessors of land generally have a right to make law use and alterations to their property as they see fit subject to the law, statutes and regulations governing the subject property and potentially subject to the

rights of their neighbors for the quiet enjoyment of their own property. The Court is not aware of all the laws, statutes, code, or regulation pertaining to the erection and maintenance of fences on residential property that the defendant maybe subject to. In addition, the defendant has not presented any evidence regarding same and her compliance therewith. Therefore, the Court cannot and may not issue a judicial declaration that the vertical fence currently in place is lawful or that the defendant's intention to extend the fence is lawful.

Rather, the Court does declare that the vertical fence as it exists, is on the defendant's property line and not the plaintiff's property. Furthermore, the Court has determined that the plaintiff does not have an easement over the defendant's portion of the driveway in dispute. Consequently, the plaintiff is not entitled to a mandatory injunction to have the vertical fence removed on that basis.

In other words, the existence of the vertical fence, does not constitute a violation of the plaintiff's property rights claim over the driveway in dispute.

CONCLUSION

Plaintiff's causes of action for a declaratory judgment declaring that plaintiff has an easement over the defendant's portion of the driveway in dispute is denied.

Plaintiff's cause of action for a declaratory judgment declaring that he has a right to restore the red gate as it was before the defendant removed a part of it and that the defendant must pay for the restoration is denied.

Plaintiff's cause of action for a permanent injunction preventing the defendant from maintaining or erecting a vertical fence on her property in the driveway in dispute is denied.

Defendant's counterclaim for a declaratory judgment declaring that the plaintiff does not have an easement over her portion of the driveway in dispute is granted.

Defendant's cause of action for a declaratory judgment declaring that the defendant has the right to build and maintain the vertical fence on her portion of the driveway is granted to the extent that the Court declares that the plaintiff does not have an easement over the defendant's portion of the driveway in dispute. Consequently, the plaintiff is not entitled to a mandatory injunction to have the vertical fence removed on that basis.

Defendant's cause of action for damages based on the plaintiff's alleged acts of trespass is denied.

Defendant's cause of action for damages based on the plaintiff's alleged acts of nuisance is denied.

The foregoing constitutes the decision order and judgment of this court

ENTER:



J.S.C.