

**BSD Hester LLC v Fontana Realty Corp.**

2025 NY Slip Op 33818(U)

October 7, 2025

Supreme Court, New York County

Docket Number: Index No. 162114/2024

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 12M

Justice

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INDEX NO. 162114/2024

BSD HESTER LLC, BSP HESTER LLC, DS HESTER LLC

MOTION DATE 03/07/2025

Plaintiff,

MOTION SEQ. NO. 001

- v -

FONTANA REALTY CORP.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISS

This case arises from a dispute between adjoining property owners in the Little Italy District. Plaintiffs BSD Hester LLC, BSP Hester LLC, and DS Hester LLC (collectively "Plaintiffs") own the properties located at 185 Hester Street, 187 Hester Street, and 189 Hester Street, New York, New York 10013 ("Plaintiffs' Property") and Defendant Fontana Realty Corp. ("Defendant") owns the property located at 183 Hester Street, New York, New York 10013 ("Defendant's Property"). Plaintiffs' Property and Defendant's Property contain residential buildings located in the back lots, which are separated from the street-facing buildings by an interior courtyard. The only way to access the interior courtyard and residential buildings are through passageways between the buildings.

The complaint alleges that Plaintiffs' Property and Defendant's Property were previously part of the same estate and that, during this time, both properties used a passageway on the Defendant's Property to access the street (the "Passageway"). Plaintiffs assert that when they purchased Plaintiff's Property, they acquired an easement by necessity to use the Passageway to access the street. Plaintiffs further assert that on or around January 3, 2019, Defendant installed a

wall, blocking Plaintiffs' access to the Passageway. As such, Plaintiffs seek a declaratory judgment declaring that they possess an easement by necessity and an easement by implication of prior existing use for the Passageway. Plaintiffs also assert a claim of trespass based on Defendant's interference with their easement.

Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), arguing that the alleged easement is not necessary because there are two other passageways that provide street access to Plaintiffs' Property. Defendant also argue that the declaratory judgment claim for an easement by implication must be dismissed because the prior easement was not intended to be permanent. Lastly, Defendant argues that Plaintiff's trespass cause of action must be dismissed because the land at issue is owned by Defendant.

#### Legal Standard

A party seeking relief pursuant to CPLR 3211(a)(1) on the ground that its defense is founded upon documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). "A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the document evidence resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claims" (*J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652, 653 [2d Dept 2014]; *Fortis Fin. Servs. V Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]).

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the facts alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine simply whether plaintiff's facts fit within any cognizable legal theory (*see Leon*, 84 NY2d at 87-88; *Siegmund Straus, Inc. v. East 149<sup>th</sup> Realty Corp.*, 104

AD3d 401 [1st Dept 2013]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Zurich Am. Ins. Co. v City of New York*, 176 AD3d 1145, 1147 [2d Dept 2019], quoting *EBC I, Inc. v Goldman Sacks & Co.*, 5 NY3d 11, 19 [2005]).

### Discussion

“The party asserting 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’s property was necessary” (*Liberty Sq. Realty Corp. v Doe Fund, Inc.*, 202 AD3d 55, 69 [1st Dept 2021]). “The necessity must exist in fact and not in mere convenience, and must be indispensable to the reasonable use of the adjacent property” (*Liberty Sq. Realty Corp. v Doe Fund, Inc.*, 202 AD3d 55, 69 [1st Dept 2021]).

“An easement may be implied from pre-existing use upon severance of title when three elements are shown: (1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious to manifest as to show that it was meant to be permanent, and (3) the use must be necessary to the beneficial enjoyment of the land retained” (*Bonadio v Bonadio*, 200 AD3d 747 [2d Dept 2021] [quoting *West End Props. Assn. of Camp Mineola, Inc. and Anderson*, 32 AD3d 928, 929 [2d Dept 2006]). An implied easement must be “a reasonable necessity, rather than a mere convenience” (*Bais Yoel Ohel Feige v Congregation Yetev Lev D’Satmar of Kiryas Joel*, 65 AD3d 176, 1179 [2d Dept 2009]).

Here, Plaintiffs have sufficiently alleged a cause of action for easement by necessity and easement by implication from prior use. Plaintiffs allege that Plaintiffs’ Property and Defendant’s Property were previously part of the same estate and that, during this time, the Passageway was used to provide access between the street and the residential buildings. Plaintiffs further allege

that access to the Passageway is necessary as a second means of egress from the residential buildings, which is required by the New York State Fire Code. None of the documentary evidence put forth by Defendant utterly refutes these allegations.


Additionally, the complaint sufficiently asserts a claim for trespass as it alleges that Defendant interfered with Plaintiffs' easement (see *Froehlich v 66 Shore Dr., LLC*, 162 AD3d 746, 748 [2d Dept 2018] ["[I]nterference with a plaintiff's easement can give rise to a cause of action alleging trespass"]; see also *Bogan v Town of Mt. Pleasant*, 278 AD2d 264, 264 [2d Dept 2000]).

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss is denied.

This constitutes the decision and order of the Court.

10/7/2025  
DATE

  
HON. LESLIE A. STROTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

J.S.C.

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE