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-STATE OF NEW YORK
IAS PART: ROCKLAND COUNTY
Present: HON. ROBERT M. BERLINER
Justice of the Supreme Court

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BRYAN J. MITKOWSKI,

Plaintiff(s),

Index No.: 032828/2013

-against-

ORDER

MICHAEL MARCEDA,

Motion Date: 08/09/13

Defendant(s).

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The following papers, numbered 1-9, were read on this motion by the plaintiff for an Order granting him, in effect, a temporary restraining order; and a cross motion by the defendant seeking dismissal of the complaint, pre answer:

Notice of Motion/Complaint-(Exhibits 1-5)-1-2
Notice of Cross Motion/Affirmation/Affidavit-(Exhibits A-K)-3-5
Affidavit/Affirmation in Opposition-(Exhibits 1-6; A-E)-6-7
Reply Affirmation/Affidavit- (Exhibits L-V)-8-9

The court neither read nor considered the sur reply submitted by the plaintiff.

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

The plaintiff and defendant are adjoining land owners. The dispute herein arises out of whether or not the plaintiff has the benefit of an easement over the land of the defendant. Of course, the plaintiff believes that he does, and asserts that the defendant has obstructed his use of the easement by having planted shrubs within the easement area, and having parked a car thereon, thus prohibiting the plaintiff from using the easement for the intended purposes of providing the plaintiff with access to the rear of his property. He seeks immediate relief, pending the ultimate resolution of this litigation.

The defendant, for his part, argues that the easement was created for one specific purpose; to provide the plaintiff (or more correctly, the plaintiff's predecessors) with access to a garage on the plaintiff's property from Route 9W, the public road which abuts both properties. But said garage has long since been removed, a point that neither party

disputes, and thus the easement has been extinguished. The fact that the plaintiff may still want to use the easement for access to the rear of his property, or to service a septic system located there, is irrelevant. The defendant therefor moves, pre answer, to dismiss on five different subsections of CPLR §3211(a): (1), documentary evidence; (2) lack of subject matter jurisdiction; (4) another action pending; (7) failure to state a cause of action; and (10) absence of a party. Of course, if the court found any one of the five applicable, it could dismiss.

The plaintiff has brought this application via an order to show cause, and is supported only by a copy of the verified complaint. There is no supporting affidavit, and thus the court is left to invoke CPLR §105(u). Although not specifically stated, it would appear that the plaintiff is seeking a temporary restraining order, though he sought no immediate relief. And the court has no understanding of the request for relief which asks for a return date for the complaint, and directing the defendant to answer same.

The plaintiff's burden on a temporary restraining order seeking a preliminary junction is well established.[T]o prevail on a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*Matter of 1650 Realty Assoc., LLC v. Golden Touch Mgt., Inc.*, 101 A.D.3d 1016, 1017–1018, 956 N.Y.S.2d 178; see CPLR 6301; *84–85 Gardens Owners Corp. v. 84–12 35th Ave. Apt. Corp.*, 91 A.D.3d 702, 702, 937 N.Y.S.2d 107; *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 781 N.Y.S.2d 684). "The decision whether to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court" (84–85 Gardens Owners Corp. v. 84–12 35th Ave. Apt. Corp., 91 A.D.3d at 702, 937 N.Y.S.2d 107; see *Automated Waste Disposal, Inc. v. Mid–Hudson Waste, Inc.*, 50 A.D.3d 1072, 1073, 857 N.Y.S.2d 648; *Ruiz v. Meloney*, 26 A.D.3d 485, 486, 810 N.Y.S.2d 216).N.Y.A.D. 2 Dept.,2013.Butt v. Malik, 106 A.D. 3rd 849, 965 N.Y.S.2d 540, 2013 WL (N.Y.A.D. 2 Dept.). The plaintiff does not even use these terms in his moving papers, let alone explain how he meets all these requirements. Thus, the application of the plaintiff is denied.

An examination of the cross motion requires the court to address the easement itself.The easement goes back to October, 1961, and was entered into by Good, who previously owned what is now the defendant's property, and Bauer, who owned what is now the plaintiff's. The easement specifically references a garage on the Bauer property, which is accessed via a driveway which runs through the Good property to Route 9W. Neither party disputes the existence of the 1961 easement, nor that it effects their

respective properties.

The language at issue is found at paragraph 1 of the easement:

> "The party of the first part (Good) grants to the parties of the second part(Bauer), their heirs and assigns forever, an easement in perpetuity to use that portion of said driveway which lies on the Good premises as a means of ingress and egress by foot or by vehicle only to and from the garage on the Bauer premises." (emphasis supplied)

As indicated above, there is no denying that there is no longer a garage on the Bauer premises, having been removed years ago. In fact, the house currently on the Bauer, now plaintiff's, property, sits partially where the garage was. It is for this reason that the defendant argues that easement has been extinguished. The defendant argues that the easement was a limited easement i.e. limited to provide access to the garage, as indicated by the word "only". Thus, the only purpose of the easement having been removed, the easement is no more.

For his part, plaintiff argues that the word "only" does not refer to the garage, but is meant to qualify the words "foot or vehicle". Unfortunately, the Bauers and Goods are no longer available to tell us what they meant, and thus the court is left to it's own devices.

An instrument creating an estate or interest in real property must be construed according to the intent of the parties, insofar as their intent can be determined by the language of the grant. *Gerbig v. Zumpano*, 7 N.Y.2d 327 (1960). (internal citations omitted).

The court does not believe that the plaintiff's interpretation of the word "only" makes any sense. The use of the word "only", in his opinion, is referring only to the kind of traffic that can be permitted on the driveway, i.e foot or vehicle. But for that to make sense, there would have to be some other kind of "traffic" which might possibly traverse the driveway, and this court is loathe to think of any. Thus, the only reasonable interpretation is that the word "only" refers to the fact that the driveway's only intended purpose is to access the garage.

There is no indication that the intent of the easement was to give the plaintiff a right of way for all purposes as the plaintiff argues. e.g., access the rear of his property, or service his septic system. In fact, he acknowledges that he has access to the rear of his property, when he refers to a furniture delivery, for which he paid additional money. There is no proof that the plaintiff's property is landlocked, or that he does not have access to a public street. There is no application before the court, nor a cause of action pled, for an

easement by necessity. And the court does not agree that there is any ambiguity in the easement agreement. If said agreement is read in it's totality, the only reference in it is to the garages on the respective properties. In fact, the fourth WHEREAS clause states" the parties hereto have been using said driveway for many years as a means of access to and from their respective garages and wish to grant reciprocal easements therein of record."

Thus, the cross motion, insofar as it relates to CPLR §§3211(a)(1) and (7) is granted. The complaint is dismissed.

In light of the court's finding herein, it need not consider the other basis upon which defendant seeks dismissal.

This constitutes the decision and order of the court.

Dated: New City, New York
December 18, 2013

ENTER:

ROBERT M. BERLINER, J.S.C.

To:

Rogers McCarron & Habas, P.C.
Burton Dorfman, P.C.