

**91-54 Gold Rd. LLC v Cross-Deegan Realty Corp.**

2010 NY Slip Op 33783(U)

July 1, 2010

Supreme Court, Queens County

Docket Number: 4837/10

Judge: John Elliott

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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 14

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91-54 GOLD ROAD LLC, et al.

x

INDEX NO. 4837/10

MOTION SEQ. NO. 1

-against-

BY: ELLIOT. J.

CROSS-DEEGAN REALTY CORP., et al.

DATED: JULY 1, 2010

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x

Plaintiff 91-54 Gold Road LLC (the plaintiff owner) and plaintiff TJ Auto Sales of Queens, Inc. (the plaintiff tenant) have moved for a preliminary injunction, inter alia, prohibiting defendant Cross-Deegan Realty Corp.(the defendant owner) and defendant Howard Beach Car Wash Corporation (the defendant tenant) from constructing a wall that blocks the plaintiffs' gate that is on the boundary line of the parties' properties. The defendants have cross-moved for summary judgment dismissing the complaint against them.

By deed dated July 15, 2009, Michael Casillo and Gloria Castillo conveyed title to premises located at 91-54 Gold Road, Ozone Park, New York (Block 11373, Lot 38) to the plaintiff owner. The plaintiff owner rents Lot 38 to the plaintiff tenant, which is in possession. Defendant Cross-Deegan Realty Corp. owns premises located at 135-18 Cross Bay Boulevard, Ozone Park, New York (Block 11373, Lot 75) (Lot 75) which it rents to defendant Howard Beach Car Wash Corporation.

The defendant owner's Lot 75 lies to the south and east of the plaintiff owner's Lot 38, and the properties are contiguous along the plaintiff owner's eastern border. A fence separates the east boundary of the plaintiff owner's Lot 38 from the west boundary of the defendant owner's Lot 75 where the parcels are contiguous, and the plaintiffs allege that from 1976 there has been a gate, at least 25 feet wide, within the fence. The plaintiffs allege that from 1976 to the present, the Casillos, the plaintiff owner, and the plaintiff owner's tenants have entered upon Lot 38 by crossing over the curb on the west side of Cross Bay Boulevard, traveling across Lot 75, and passing through the gate that forms part of the fence separating the properties. The plaintiffs further allege that this use of Lot 75 has been hostile, open, notorious, and continuous since at least 1976. According to the plaintiffs, while they can gain entry to their property from Gold Road, it is impractical to do so because the road is a residential one-way street unsuitable for use by the plaintiff tenant's tow trucks and other large vehicles. The plaintiffs assert that access to their property across the defendant owner's property is necessary for the operation of their business.

On the other hand, the defendants allege that in 1997, The City of New York proposed to sell demapped portions of Linden Boulevard designated as Parcel 7A, Parcel 7B, and Parcel 8 to the Casillos and to the defendant owner and that the Casillos acquired Parcel 7A and Parcel 8 and the defendant owner acquired Parcel 7B. Parcel 7A and Parcel 8 became part of Lot 38, and Parcel 7B became part of Lot 75. The parties acquired these parcels by deed on or about December 14, 1998. The plaintiffs claim an easement allowing

them to cross the area designated as Parcels 7A and 7B, which are contiguous parcels, with 7B fronting onto Cross Bay Boulevard. However, Richard A. Hofflich, Esq., an attorney for the defendants, alleges that on December 8, 1997, he met with the late Yaakov Wiczuk, one of the defendant owner's principals, Gloria Casillo, and her son, Jim Casillo, and that during the meeting the Casillos expressed their concern about continuing to cross over the defendant owner's property once the city sold Parcels 7A, 7B, and 8. Wiczuk allegedly rejected the Casillos' request for an easement, but offered them a temporary license subject to conditions.

Gloria Casillo denies that the plaintiffs have been crossing the defendants' property with their consent. She denies attending a meeting with Hofflich and Wiczuk in which they discussed a right of way across the defendant owner's property. Moreover, according to Casillo, in or about January 1999, John Lage, a principal of the defendant tenant, informed her that he no longer wanted the plaintiffs to cross his property, but they continued to do so. On the other hand, John Lage swears that "[t]he first instance of antagonistic conduct was when Plaintiffs interfered with Howard Beach's new construction on Lot 75 and Parcel 7B."

In January 2010, the defendants allegedly built a wall along approximately 50 feet of their western boundary line and, in doing so, blocked the gate that the plaintiffs used to gain access to their Lot 38. Although the defendants have allegedly removed part of the wall because it encroached on the plaintiffs' land, they have expressed an intent to rebuild

it in a manner which would prevent the plaintiffs from utilizing their alleged easement across Lot 75.

Summary judgment is not warranted where there is an issue of fact which must be tried. (*See, Alvarez v Prospect Hospital*, 68 NY2d 320.) The continuous, open, and notorious use of another's land for 10 years, adverse to the interests of the owner of the adjoining property, gives rise to a prescriptive easement. (*See, Jhae Mook Chung v Maxam Properties, LLC*, 73 AD3d 505; *Weir v Gibbs*, 46 AD3d 1192.) A claim of a prescriptive easement may be defeated by a showing that the use of the adjoining land was by permission. (*See, Weir v Gibbs, supra; Gravelle v Dunster*, 2 AD3d 964.) In the case at bar, the conflicting evidence in the record concerning whether the plaintiffs crossed the defendants' property with the permission of the latter has created issues of fact and credibility which preclude summary judgment. (*See, Janoff v Disick*, 66 AD3d 963; *Dayan v Yurkowski*, 238 AD2d 541; *T&L Redemption Center Corp. v Phoenix Beverages, Inc.*, 238 AD2d 504; *First New York Realty Co., Inc. v DeSetto*, 237 AD2d 219.)

Accordingly, the defendants' cross motion for summary judgment dismissing the complaint against them is denied.

In order to obtain a preliminary injunction, the plaintiffs had to show (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a weight of the equities in their favor. (*See, Aetna Insurance Co. v Capasso*, 75 NY2d 860; *McNeil v Mohammed*, 32 AD3d 829). The plaintiffs successfully

carried this burden. In regard to the first requirement, the plaintiffs established a likelihood of ultimate success on the merits by making a prima facie showing that they can prove one of their causes of action. (*See, McNeil v Mohammed, supra; Trimboli v Irwin*, 18 AD3d 866; *Four Times Square Associates, L.L.C. v Cigna Investments, Inc.*, 306 AD2d 4.) “To acquire an easement by prescription, it must be shown that the use was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period [of ten years]\*\*\*.” (*Asche v Land and Bldg. Known as 64-29 232nd Street*, 12 AD3d 386, 387; *see, In re Perry*, 33 AD3d 704; *Morales v Riley*, 28 AD3d 623; *Gravelle v Dunster*, 2 AD3d 964; *Cannon v Sikora*, 142 AD2d 662.) The plaintiffs submitted sufficient evidence to establish each of these elements prima facie. Although there may be issues of fact in this case, they do not preclude a finding of the likelihood of ultimate success on the merits. (*See, Ruiz v Meloney*, 26 AD3d 485.) In regard to the second requirement, the plaintiff demonstrated that equitable relief is a more efficient remedy than monetary damages. (*See, People by Abrams v Anderson*, 137 AD2d 259; *Poling Transp. Corp. v A & P Tanker Corp.*, 84 AD2d 796.) In regard to the third requirement, the loss of the plaintiff tenant’s ability to safely transport vehicles onto its premises if a preliminary injunction is not granted outweighs the inconvenience to the defendant tenant from a delay in constructing the wall.

Accordingly, the plaintiffs’ motion for a preliminary injunction is granted to the extent that the defendants are prohibited from interfering with the plaintiffs’ claimed

easement until further order of this court. The parties may submit affidavits concerning the appropriate amount of the undertaking at the time of the settlement of the order.

Settle order.

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J.S.C.