SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

ROSLYN REALTY & MANAGEMENT CORP.,

Plaintiff,

- against -

PARK EAST, LLC, DRF HOSPITALITY MANAGEMENT, LLC, HOSPITALITY SOLUTIONS INC., THE GROUND ROUND, INC. and COUNTY OF NASSAU,

Defendants.

TRIAL/IAS PART 13
NASSAU COUNTY

INDEX NO. 7855/11

MOTION SUBMISSION
DATE: 8/8/11

MOTION SEQUENCE
NOS. 1, 2, 3

The following papers read on this motion:

Order to Show Cause and Affidavits.....	X
Notice of Cross-Motions.....	X
Affirmations in Opposition.....	X
Reply Affirmations.....	X

RELIEF REQUESTED

The plaintiff, Roslyn Realty & Management Corp., (hereinafter referred to as "Roslyn Realty"), moves by way of Order to Show Cause for an order enjoining and prohibiting the defendants, Park East, LLC, (hereinafter referred to as "Park East"), and DRF Hospitality, (hereinafter referred to as "DRF"), from engaging in any demolition, alteration or construction activity, or taking any other steps or commencing any activity to alter or demolish the existing grade of the property of Park East along the Western edge of the easement that exists between the properties of the plaintiff and the defendant, Park East, and or to construct a retaining wall at and along the easement line. The plaintiff, by way of Order to Show Cause, obtained an order from the undersigned, on July 25, 2011, directing the defendants, Park East and DRF, and their agents, servants, employees, contractors and any and all other persons or entities acting on their behalf, or in concert with them, be temporarily enjoined and restrained from taking any steps or action with reference to the alteration or demolition of the grade of the property of the defendant, Park East, that adjoins the plaintiffs property along the western edge of the easement between Lots 810 and 811 and/or from constructing a retaining wall at, or near or along the easement line, and the plaintiff was

further directed to post an undertaking in the amount of seven hundred thousand and 00/100 dollars, ($700,000.00), on July 27, 2011 and forward proof of such undertaking to the defendants and this Court on July 28, 2011, and it was further ordered that should the plaintiff not post the undertaking as directed, the temporary restraining order would lapse, be void, and no longer be in effect.

As the plaintiff failed to submit proof of an undertaking in accordance with the directives of the Order to Show Cause, the temporary restraining order had elapsed, was void, and was no longer in effect.

The defendant, Park East, cross-moves for an order pursuant to CPLR §3211(a)(1) and (7), and §6514, cancelling the Notice of Pendency filed by plaintiff against the property of Park East, and submits opposition to the plaintiff's Order to Show Cause. The plaintiff, cross-moves, for an order pursuant to CPLR §3212 granting plaintiff summary judgment declaring the existence of easements in favor of plaintiff's property, permanently enjoining the defendants, Park East and DRF, from engaging in any demolition, construction, or alteration of the existing grade and pavement, or access along the line of the existing deeded easement between the plaintiff's property and the property of the defendant, Park East, that would alter, prevent or interfere with the plaintiff's continued use of the easements so declared and granted by this Court to exist to the benefit of the plaintiff's property, and to the plaintiff's continued use of its deeded easement. The defendant, DRF, submits opposition to plaintiff's Order to Show Cause, and moves for summary judgment, supports the cross-motion by Park East, and adopts the arguments of co-defendant, Park East, but also addresses DRF's opposition to the net leases of the premises, and puts forth the circumstances that DRF would endure should this Court grant the plaintiff's motion, and/or cross-motion. The plaintiff, and defendant, Park East, submit reply affirmations.

BACKGROUND

The plaintiff's property, known as 1032 Northern Boulevard, Roslyn, New York, (Lot 810), is adjacent to the property of the defendant, Park East, known as 1024 Northern Boulevard, Roslyn, New York, (Lots 808, 809 and 811). The defendant, DRF, is a tenant on the Park East property.

The plaintiff's property is a 25 ft. x 100 ft. lot improved with a single story stand alone commercial building. The plaintiff's property, and Park East's property, are adjacent to one another along a common boundary line running the entire 100 foot length of the plaintiff's property, on its westerly side of lot 810, with the easterly side of defendant, Park East's, lot 811. A paved driveway exists on the plaintiff's property that leads into a paved parking area in the rear of the building, and has yellow stall markings for four vehicles.

A written recorded deeded easement, dated January 19, 1951, exists granting plaintiff a five-foot, non-exclusive easement over the easterly end of Park East's property, permitting the plaintiff to use the easterly five feet of Park East's property for ingress and egress of motor vehicles and persons from North Hempstead Parkway. Additionally, a four-foot non-exclusive easement was allotted over the westerly end of the plaintiff's property for the ingress and egress of motor vehicles and persons from North Hempstead Turnpike. Accordingly, the deeded easement provides "a total easement of 9 feet in width front and rear and 100 feet along the sides for the ingress and egress". The 9-foot express easement is mutual.

The foregoing is not in dispute.

As already provided, the plaintiff's building provides stall markings for four vehicles. Alongside the paved driveway that leads to the rear of plaintiff's building, into a paved parking area with stall markings for four vehicles, is the 4-foot and 5-foot easement, (total of 9-feet). Approximately 2' 11" from the 9-foot easement, a construction fence has been erected, a total of 2' 11" from the easement line.

Prior to DRF's tenancy, Park East's property was occupied by restaurants known as Howard Johnson, The Ground Round, and Hospitality. DRF, as part of its development plan, has demolished the existing building previously occupied by The Ground Round, and intends to operate a new restaurant. DRF provides that the project has been ongoing for approximately two and a half years, and as part of the development plan, DRF intends to regrade the easterly end of Park End's property "up to but not including the [9-foot] easement granted to Roslyn Realty". DRF submits that the [9-foot] express easement area will remain intact.

The plaintiff maintains that DRF's project, which involves approximately, a one (1) foot rise above the grade level of plaintiff's property, topped with a protective railing or fence rising above the wall, will significantly reduce, restrict and limit the area previously available to the plaintiff for turning and maneuvering vehicles on the plaintiff's property. The plaintiff provides that the alteration of the existing common grade of the parking lot area along and abutting the deeded easement, and construction of a retaining wall located at the easement line "would reduce the available width on the plaintiff's driveway and rear parking area to such a degree as to effectively render the deeded easement for ingress and egress of motor vehicles to the rear of the plaintiff's property, unusable".

The plaintiff submits the report of an engineer who avers that the proposed development will reduce plaintiff's driveway to 9 feet in width, which is comprised of 4 feet of plaintiff's property and 5 feet of a deeded easement from the adjoining property. The engineer submits that 9 feet is inadequate since there will be a retaining wall where drivers will "shy away" from such wall, restricting drivers from using "two feet or more of the adjoining property's parking lot". As a result, the engineer provides that drivers will have difficulty in entering and exiting the very narrow driveway, and maneuvering into and out of parking spaces. The engineer submits that an additional 5 feet is needed to allow vehicles to maneuver, beyond the existing deeded easement, (adjacent to the parking spaces), and an additional 2 feet is needed beyond the existing deeded easement, (adjacent to the existing building).

The plaintiff, by way of the instant action, seeks a judgment declaring that the property of the defendant, Park East, is subject to an easement in favor of the plaintiff's property, claiming a prescriptive easement for five (5 ft.) foot wide by forty-two (42 ft.) foot deep area located to the west of and adjacent to the westerly most boundary of the deeded easement, beginning at the parking lot of the plaintiff's property, and running south parallel to the deeded easement, and for a two (2 ft.) foot wide strip of land located to the west of and adjacent to the westerly most boundary of the deeded easement, and running parallel along the driveway for the distance that such driveway is adjacent to the plaintiff's building structure.

Plaintiff seeks, by way of this action, and by way of Order to Show Cause, a permanent injunction, enjoining the defendants from engaging in any demolition, construction, or altercation of the existing grade and pavement, or access which would alter, prevent, or interfere with plaintiff's continued use of the prescriptive easements and deeded easements. Plaintiff also seeks, by way of cross-motion, an order pursuant to CPLR §3212 granting plaintiff summary judgment declaring the existence of easements, (deeded and prescriptive), in favor of plaintiff's property, and the aforementioned permanent injunction. The defendants, Park East and DRF, seek, by way of cross-motion, an order dismissing plaintiff's verified complaint pursuant to CPLR §3211(a)(1) and (a)(7), and an order cancelling the Notice of Pendency filed by the plaintiff against Park East's property.

APPLICABLE LAW

"An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period." (*315 Main St. Poukeepsie, LLC v. WA 319 Main, LLC*, 62 AD3d 690, citing *Turner v. Baisley*, 197 AD2d 681; *Weinberg v. Shafler*, 68 AD2d 944; and *Hassinger v. Kline*, 110 Misc2d 14.) "Where the use 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 alleged prescriptive easement to show that the use was permissive." (*Id.*, citing *Frumkin v. Chemtop*, 251 AD2d 449; *Turner v. Baisley,* 197 AD2d at 682; and *Wechsler v. New York State Dept. of Envtl. Conservation*, 193 AD2d 856).

"Permission, for purposes of defeating [a] claim for prescriptive easement over real property, can be inferred where the relationship between the parties is one of neighborly cooperation and accommodation; in such case, the presumption of hostility does not arise." (*Air Steam Corp. v. 3300 Lawson Corp.*, 84 AD3d 987). A "[b]usiness owner's use of adjacent business's loading dock was not 'hostile', as required to demonstrate prescriptive easement over the servient property, where the relationship between the parties was one of neighborly cooperation and accommodation, and use during the prescriptive period was with adjacent business's permission." (*Id.*)

"Generally, the question of implied permission is one for the factfinder to resolve", (*Barra v. Norfolk S. Ry. Co.*, 75 AD3d 821, citing *Country-Wide Ins. Co. v. National R.R. Passenger Corp.*, 6 NY3d 172; and *Barlow v. Spaziani*, 63 AD3d at 1227), "and, therefore, the vast majority of appellate cases addressing this issue in the context of a prescriptive easement claim have done so on appeals following trials." (*Id.*, citing *Weir v. Gibbs*, 46 AD3d 1192; *Duckworth v. Ning Fun Chiu*, 33 AD3d 583; *McNeill v. Shutts*, 258 AD2d 695-696; *Sleasman v. Williams*, 187 AD2d 852; *Susquehanna Realty Corp. v. Barth*, 108 AD2d 909; *Hassinger v. Kline*, 91 AD2d 988; and *Jansen v. Sawling*, 37 AD2d 635). "The rare case in which implied permission is established on summary judgment normally involves irrefutable proof of "a history of cooperation and accommodation", such as an admission of that fact by a party seeking the prescriptive easements", (*Id.*, citing *Allen v. Mastrianni*, 2 AD3d at 1024), "or a circumstance under which a prevailing presumption in favor of permissive use is invoked, such as where the parties are "related by blood or part of a select group of friends". (*Id.*, citing *Wechsler v. New York State Dept. of Envtl. Conservation*, 193 AD2d at 860).

In the *Manouselis* case, after trial, the Second Department found that the plaintiff did not have a prescriptive easement over a portion of the defendant's property. (*Manouselis v. Woodworth Realty, LLC*, 83 AD3d 801). "Here, there is a "valid line of reasoning and permissible inferences" which could lead a rational jury to conclude, as did the jury here, that the plaintiffs failed to establish that they have a prescriptive easement over the defendants' property." (*Id.*, citing *Cohen v. Hallmark Cards*, 45 NY2d 493; *Eskenazi v. Sloat*, 40 AD3d at 578; and *Gannon v. All Car Movers, Ltd.*, 18 AD3d 702). "In this case, the public's use of the subject property rendered the presumption of hostility inapplicable." (*Id.*, citing *Burcon Props. v. Dalto*, 155 AD2d 501; *Susquehanna Realty Corp. v. Barth*, 108 AD2d 909).

The Second Department in *Almeida v. Wells*, 74 AD3d 1256, found that triable issues of fact existed as to plaintiff's claim of an easement by prescription warranting the denial of summary judgment. The plaintiff's submissions, including a deposition transcript of a predecessor in interest, and an affidavit and survey from a surveyor was insufficient to demonstrate a *prima facie* showing of a prescriptive easement. (*Id.*) However, the Second Department in *315 Main St. Poukeepsie, LLC v. WA 319 Main, supra*, found that the defendant made a *prima facie* showing of entitlement to summary judgment, and affirmed the lower court's judgment declaring that the plaintiff did not have a prescriptive easement over the property owned by the defendant. The Court held that the "defendant established, as a matter of law that plaintiff's use of purported easement was permitted as a matter of willing accord and neighborly accommodation". (*Id.*) The Court found evidence that "plaintiff's use of the defendant's parking lot for the purpose of gaining access [to] its own parking lot was open, notorious, continuous, and undisputed, [and] the defendant established as a matter of law that the plaintiff's use of the purported easement was permitted as a matter of willing accord and neighborly accommodation". (*Id.*)

DISCUSSION

In the case at bar, the plaintiff's president and sole shareholder, Simeon S. Patestas, maintains that he, as well as several of plaintiff's employees, clients and colleagues, as evidenced by plaintiff's submission of nine affidavits, has enjoyed thirteen uninterrupted years of access to the disputed portion of Park East's property, as a necessity to maneuver and enter plaintiff's driveway, as well as the rear of plaintiff's lot, and park, and maneuver vehicles into and out of the parking spaces. This use of the adjoining property, as per the plaintiff, has been open, plainly visible, without the fence restriction. The defendants, Park East and DRF, maintain that the documentary proof submitted by the defendants, *to wit*, ariel photographs of the two properties at the pertinent time, and the deeds, establish that the plaintiff has not acquired an easement by prescription, and has used Park East's property to gain access to plaintiff's driveway and rear parking lot with Park East's permission. Park East submits the affidavit of its managing member, Anthony Dalto, who avers that plaintiff's use of the purported prescriptive easement was a "neighborly accommodation". Mr. Patestas avers that he never asked Park East, or Mr. Dalto, and never obtained, permission to use Park East's property, and had no conversation whatsoever with Mr. Dalto, an absentee landlord concerning such use, and denies purported neighborly accommodation.

Here, several issues of fact exist concerning plaintiff's use of Park East's property, and whether there has been a neighborly accommodation with respect to plaintiff's purported prescriptive easement. Upon the record herein, it cannot be established, as a matter of law, whether the plaintiff's purported easement was permissive and/or adverse for the prescriptive period. Therefore, plaintiff's motion seeking summary judgment pursuant to CPLR §3212, must be denied. Additionally, the defendant's motion seeking dismissal of plaintiff's action under CPLR §3211(1), based upon documentary evidence, must fail. The documentary evidence submitted by the defendants does not definitively contradict plaintiff's factual allegations to conclusively dispose plaintiff's claim.

Additionally, that branch of the defendant's motion seeking dismissal pursuant to CPLR §3211(a)(7) is denied. This being a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the Court starts with the presumption that the allegations contained in the plaintiff's pleadings are true. (*Becker v. Schwartz*, 46 NY2d 401). A motion for failure to state a cause of action will fail if from its four corners, the factual allegations are discerned which taken together maintain any cause of action cognizable of law, regardless of whether the plaintiff will ultimately prevail on the merits. (*Gruen v. County of Suffolk*, 187 AD2d 564).

In view of the foregoing, this Court being only concerned with the sufficiency of the plaintiff's pleadings, and not evidentiary matters, finds that the plaintiff has stated a causes of action sounding in prescriptive easement and injunctive relief against the defendants. Accordingly, the defendants' motion to dismiss for failing to state a cause of action is denied.

Additionally, here, as plaintiff has elected to file a notice of pendency, plaintiff is precluded from obtaining a preliminary injunction. (*La Carrubba v. Naclerio*, 1 AD3d 571). In any event, as already provided, while plaintiff, by way of Order to Show Cause obtained a temporary injunction, such injunction was null and void as plaintiff failed to post the requisite undertaking in accordance with the directives of the Order to Show Cause.

In light of the foregoing, it is hereby

ORDERED that the prior temporary injunction, by way of order dated July 25, 2011, lapsed, was void, and no longer in effect as the plaintiff failed to post an undertaking in accordance with the directives of the Order to Show Cause, and it is hereby further

ORDERED that the plaintiff's Order to Show Cause seeking a temporary restraining order and preliminary injunction is denied, and it is hereby further

ORDERED that Park East's cross-motion seeking dismissal of the plaintiff's verified complaint pursuant to §3211(a)(1) and (a)(7), and order cancelling the Notice of Pendency pursuant to CPLR §6514 is denied, and it is hereby further

ORDERED that the plaintiff's cross-motion for summary judgment pursuant to CPLR §3212 is denied, and it is hereby further

ORDERED that the parties are hereby directed to appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 26th day of October, 2011, at 9:30 A.M. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants.

ENTER:

J.S.C.

Dated: October 7, 2011

cc: Charles J. Chiclacos, Esq.
Dollinger, Gonski & Grossman, Esqs.
Lawrence W. Rader, Esq.
John Ciampoli, Esq.