Rosen v Schonbrun
2018 NY Slip Op 33715(U)
April 11, 2018
Supreme Court, Kings County
Docket Number: Index No. 501391/16
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 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 11th day of April, 2018.

P R E S E N T:

HON. CAROLYN E. WADE,
Justice.

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BLIMI ROSEN A/K/A BLIMA ROSEN,

Plaintiff,

- against -

Index No. 501391/16

ROBERT M. SCHONBRUN AND FAIGIE SCHONBRUN,

DECISION AND ORDER

Defendants.

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The following papers numbered 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 2, 3
Opposing Affidavits (Affirmations)	4, 5
Reply Affidavits (Affirmations)	6, 7

Plaintiff, Blimi Rosen a/k/a Blima Rosen ("Rosen"), by order to show cause, dated September 13, 2017, motion sequence 3, seeks an order of this court (a) enjoining and restraining defendants, Robert M. Schonbrun and Faigie Schonbrun ("the Schonbruns"), and all those working in concert with them, or on their behalf, from parking their vehicle(s) in the common driveway between the parties' properties; and (b) authorizing Rosen to arrange for a reputable tow truck company to remove the Schonbruns' vehicle(s) from the common driveway, at their expense. The Schonbruns have opposed this application.

Background Facts and Procedural History

The parties herein are neighbors of adjoining properties with a shared or common driveway. Rosen owns the premises located at 1724 53rd Street in Brooklyn, New York, having acquired this property by deed dated May 13, 2015, and recorded in the City Registrar's Offices under City Register File Number 2015000177993 on May 28, 2015, from non-party Yeshiva of Kings Bay, Inc. On the other hand, the Schonbruns have owned the premises located at 1726 53rd Street in Brooklyn since September 4, 1991, having acquired the property by deed from Herbert and Suzi Basch, and recorded in the City Registrar's Offices under Liber (reel) 2741 Page 1081-1083.

Shortly after purchasing her property, Rosen commenced construction and renovation work on her premises, which included brickwork and siding work to the facade of her home, which led to some friction between her and the Schonbruns.

In her Verified Complaint, Rosen alleges that the Schonbruns illegally constructed a garage that extends onto her property. She asserts four causes of action, to wit: trespass, private nuisance, permanent injunction and a declaration of property interests, in accordance with RPAPL Article 15. The Schonbruns, by Verified Answer, deny the four causes of action, assert twelve affirmative defenses, and allege seven counterclaims; to wit: nuisance, negligence, an action pursuant to RPAPL 871 for removal of encroaching structures, a permanent injunction, RPAPL Article 15, adverse possession, and trespass. In particular, the Schonbruns allege that Rosen is performing construction, which is illegally converting her two family home into a four family residence. They further claim that Rosen has extended the side of her house "which prevents access to the structure where Plaintiff's

garage would be should it [sic] ever desire to build one [...]" (paragraph 16, page 5 of the Verified Answer).

On May 12, 2017, Rosen filed an Order to Show Cause for, *inter alia*, an Order: 1) enjoining and restraining the Schonbruns from impeding construction work being done on her property; 2) enjoining and restraining the Schonbruns from parking their vehicle in the common driveway between the parties' properties; and 3) directing the immediate removal of the Schonbruns' 2003 Chrysler minivan, currently parked in the driveway between the parties' properties.

By Order, dated May 19, 2017, this Court issued an Order directing: 1) Rosen to remove the construction fence currently in the parties' common driveway by May 23, 2017; 2) the Schonbruns removal of their vehicle in the driveway to the back, in front of their garage by May 25, 2017, and that 3) Rosen's construction work be unobstructed (Exhibit "G" of Rosen's Order to Show Cause). Several months later, the instant application ensued.

Discussion of Rosen's Instant Order to Show Cause

(1)

Rosen's application seeks an order enjoining the Schonbruns from parking their vehicles upon the common driveway, and permitting her to have them removed at their cost and expense, if they refuse. Rosen asserts that after the issuance of this Court's May 19, 2017 ruling, the Schonbruns have treated the "Order as a license to use our common driveway as their personal parking area." In particular, she alleges that the Schonbruns park their vehicle so closely to her property that it impedes her tenants' ability to access their apartment from the side door. Rosen notes that the Schonbruns acknowledge in paragraph 9 of their Verified Answer that each of the parties "have a four-foot easement over each

other's driveway *solely to* drive a personal vehicle on to access their respective garages." However, Rosen contends that the deeds do not contain language which mentions any right to park in the common driveway.

In opposition to this Order to Show Cause, the Schonbruns note that their predecessors' deed, which was filed on March 20, 1980, makes reference to both parties' respective easements. A subsequent correction deed, dated December 27, 2016, was filed, which reflects that a correction was made to Schedule A, which had omitted the pre-existing easement (Exhibit "B" of the Schonbruns' opposition). Schedule A, in pertinent part, states:

> Subject to an easement or right of way over the most westerly 4 feet of the premises herein described for the purpose of ingress and egress for pleasure autos to and from garage in the rear in favor of the owner of the premises immediately adjoining on the west.
>
> Together with an easement or right of way over the most easterly 4 feet of the premises adjoining on the west for the purpose of ingress and egress for pleasure autos to and from the garage in the rear.

The Schonbruns contend that since taking ownership of their property in 1991, they have used the shared driveway to park their cars, and for ingress and egress to access their garage at the rear of the shared driveway. They maintain that the parking spot located in front of their garage at the rear of the driveway is exclusive of the easement, and is entirely owned by them. The Schonbruns aver that since Rosen performed construction and modified her house, the driveway has become narrow, which makes it impossible for her car to maneuver into the driveway. Alternatively, they argue that Rosen's application be denied because they have the right to use the driveway, by way of adverse possession, as they have used it openly, notoriously, exclusively, hostilely and continually since they purchased their home in 1991.

To rebut the Schonbruns' adverse possession counterclaim, Rosen submits an affirmation from Simch Klor ("Klor"), the representative of Yeshiva of Kings Bay, Inc., her predecessor-in-interest (Exhibit "A" of Rosen's reply). Klor states that although the respective easements were solely for ingress and egress, his father accommodated the Schonbruns by allowing them to park in the common driveway. Klor further avers that when the roof of their garage fell, the Schonbruns called "311" to have it "forcibly removed," and then encroached on their property.

While not denominated as an application for a preliminary injunction or a temporary restraining order, this order to show cause is governed by CPLR §6301, which "may be granted . . . when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Doe v Axelrod,* 73 NY2d 748, 750 [1988]). Preliminary injunctions should be considered a drastic remedy which must be used cautiously to maintain the status quo (*see e.g., Uniformed Firefighters Assn. of Greater NY v City of New York,* 79 NY2d 236 [1992]).

After an extensive examination of the parties' respective submissions, the court finds that there are several outstanding issues, which must be developed by way of testimony, and admissible evidence, including: 1) the dimensions of the driveway, and its relation to the parties' respective easements; 2) the dimensions of the Schonbruns' parking space in front of their garage, and whether it is exclusive of the easement; and 3) whether adverse possession has been established by the Schonbruns.

Accordingly, it is

ORDERED that Rosen's Order to Show Cause for an order enjoining and restraining defendants, Robert M. Schonbrun and Faigie Schonbrun ("the Schonbruns"), and all those working in concert with them, or on their behalf, from parking their vehicle(s) in the common driveway between the parties properties ; and (b) authorizing Rosen to arrange for a reputable tow truck company to remove the Schonbruns' vehicle(s) from the common driveway, at her neighbors' expense, pendente lite, is **GRANTED SOLELY to the extent** that a framed issue hearing be held by a Part 82 Special Referee or JHO. At that time, a determination will be made whether Rosen is entitled to the relief requested herein.

The attorneys are directed to contact chambers to arrange a conference call.

This constitutes the Decision and Order of the court.

E N T E R,

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

A. J. S. C.

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