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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

EDWARD P. BRAUN.

Plaintiff.

- against -

ALFRED BECKMANN and DOROTHY BECKMANN.

Defendants.

Sequence No.: 001, 002 & 003
Index No.: 016150/06

The following named papers have been read on this motion:

	Papers Numbered
Order to Show Cause and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Defendants move for an order granting defendants 1) leave to serve an amended answer; and 2) a preliminary injunction enjoining plaintiff from use, occupancy, construction, etc. of the portion of defendants' property which is the subject of this action for adverse possession and prescriptive easement. Plaintiff cross-moves for a preliminary injunction enjoining defendants from 1) denying plaintiff and the local sanitation department access to defendants' driveway in order to remove refuse from plaintiff's side yard; 2) interfering with plaintiff's landscapers and contractor from completing certain cement/masonry work and landscaping on the disputed parcel; and 3) interfering with plaintiff's use and/or occupancy of the disputed parcel. Plaintiffs also move for contempt against defendants for violating this court's temporary restraining order dated January 19, 2007.

The following facts are undisputed. Plaintiff and defendants are neighbors (in at best, strictly speaking, the most technical of ways), plaintiff residing at 1769 Broadway, Hewlet, New York and defendants residing at 1767 Broadway. Defendants' driveway runs along the east side of their property and adjoining the driveway on its east side and running for a length of ninety eight feet with a width ranging from approximately six to nine inches is a stretch of land that borders plaintiff's western boundary, title to which is held by defendants (hereinafter "disputed parcel").

Plaintiff alleges to have developed, used and/or occupied the disputed parcel for a

sufficient period of time to entitle plaintiff to a judgment of adverse possession and/or prescriptive easement. Plaintiff commenced this action for adverse possession and prescriptive easement over the disputed parcel. Defendants, initially as pro-se litigants answered the complaint. The parties now move for the relief set forth above.

Defendants' Motion For Leave To Serve An Amended Answer

Defendants each filed and served answers herein in which certain portions of the complaint are denied, admitted or denied as to knowledge or information sufficient to form a belief as to the truth of the allegations. Each sets forth an affirmative defense based upon lack of jurisdiction.

Defendant Alfred Beckmann avers that after plaintiffs retained their present attorney they "wished" he would serve an amended answer in order to make plaintiffs' answers "more accurate and supplement it with subsequent occurrences." Defendants' attorney affirms that despite his attempted service of an amended answer, plaintiff's attorney rejected same.

Generally, leave to serve amended pleadings should be freely given. CPLR 3025(b). The motion will be denied, however, where, as here, the movant fails to annex a copy of the proposed amended pleading to the motion. Branch v. Abraham and Strauss Department Store, 220 A.D.2d 474 (2nd Dep't 1995); Goldner Trucking v. Stoll Packing Corp., 12 A.D.2d 639 (2nd Dep't 1960). Neither do defendants or their attorney set forth the bases of the proposed amendments. Thus, this branch of defendants' motion is denied with leave to resubmit upon proper papers.

Motions For Preliminary Injunctions

Plaintiff and defendants are essentially maintaining motions for preliminary injunctions with mirroring impacts. Both parties seek an injunction pending final resolution of this action prohibiting the other party from interfering with the movant's use and/or occupancy of the disputed parcel. Plaintiff seeks more specific relief pertaining to work to be performed by contractors and landscapers as well as seeking an injunction prohibiting defendants from denying plaintiff access over defendants' driveway so that garbage can be collected from plaintiff's property.

A party moving for a preliminary injunction must demonstrate 1) a likelihood of success on the merits; 2) irreparable harm in the absence of the relief sought; and 3) that a balancing of the equities favors granting the injunction. Aetna Insurance Company v. Capasso, 75 N.Y.2d 860 (1990); J.A. Preston Corporation v. Fabrication Enterprises, Inc., 68 N.Y.2d 397 (1986); Grant v. Sgroi, 52 N.Y.2d 499 (1983).

In his affidavit in support of his motion, plaintiff avers in relevant part that:

1) the property at which he now lives was purchased by his mother-in-law in 1962 and at

that time plaintiff and his wife moved into the home thereat;

2) after the death of plaintiff's mother-in-law in 1966 title to said property passed to plaintiff's wife;

3) In 1978 plaintiff's wife passed title to plaintiff and his wife as tenants by the entirety;

4) after the death of plaintiff's wife in 2004 title passed to plaintiff as the surviving tenant by the entirety;

5) beginning in 1962 plaintiff's predecessor in interest as well as plaintiff himself took over control and dominion over the disputed parcel;

6) in 1962 plaintiff and his predecessor in interest installed a lawn and shrubs in the front side yard portion of the disputed parcel;

7) in 1967 they installed a sprinkler system thereat;

8) either the occupants of plaintiff's present premises or their landscapers thereafter maintained that front lawn area by watering, mowing, raking, feeding, fertilizing and shoveling snow from it;

9) In 1962 plaintiff's predecessor in interest, his mother-in-law, cemented over a portion of the rear area of the disputed parcel and plaintiff and his predecessors in interest have used this area for the storage and pick up of garbage since that date;

10) in July, 2006 plaintiff removed some of the cement in the rear portion of the parcel with the intent to change the pitch of the cement and prevent water from flowing into plaintiff's basement;

11) at no time since 1968 when they moved in to their adjoining property have defendants entered or used the disputed parcel;

12) defendants' predecessors in interest never made claim to the disputed parcel;

13) it was not until August, 2006 when defendants made claim to title to the disputed parcel via letter from their attorney; and

14) that due to a local prohibition against placing garbage cans in the street in Hewlet it is necessary for the local sanitation collectors to use defendants' driveway in order to access the area where plaintiff keeps his garbage cans.

Frank Atrusa, Jr., plaintiff's landscaper avers that he has provided landscaping services

on the disputed parcel since 1985 including mowing, fertilizing, planting shrubs, etc. At no time, avers Mr. Atrusa, did defendants object to his performing such work or request that he not enter the disputed parcel. Mary A. Papa, a neighbor of plaintiff's avers that she believed the disputed parcel was plaintiff's property for the nearly twenty years she has lived in the vicinity of the parties' premises.

In support of defendants' motion Mr. Beckmann avers that beginning in 1968 to the present "plaintiff has made several attempts to steal our property by threatening and harassing us...". Further, Mr. Beckmann states that defendants had demanded that plaintiff 1) remove the sprinklers and "other belongings" from the subject property; 2) cease and desist from trespassing on defendants' property; and 3) not use defendants' driveway for access to plaintiff's garbage for pick up. Mr. Beckmann asserts that in the summer of 2006, plaintiff hired a contractor to install pavers, remove bushes maintained by plaintiff and install spikes "to puncture my automobile tires should I ever attempt to enter my own driveway."

In opposition to plaintiff's motion defendants submit the affidavit of defendant Dorothy Beckmann in which she avers that when she and her husband moved into their property plaintiff's mother-in-law planted some shrubs in the disputed parcel. When title to the property was taken over by plaintiff's wife (which, it is undisputed, occurred in 1978) she requested that defendants permit her to keep the shrubs on the disputed parcel which defendants did as an accommodation. Defendants would occasionally trim plaintiff's shrubs. In the summer of 2006, avers Mrs. Beckmann, plaintiff removed the shrubs with the intention of improving that portion of plaintiff's property which adjoined defendants' driveway. When Mrs. Beckmann informed plaintiff that defendants intended to widen their driveway, she asserts that plaintiff put in pavers and spikes which permitted plaintiff to continue using defendants' property and prevented defendants from "cooperating with plaintiff."

In order to be entitled to adverse possession of the disputed parcel, plaintiff must demonstrate by clear and convincing that they possessed the disputed parcel and the said possession was hostile, under claim of right, open and notorious, exclusive and continuous for the applicable statutory period. See, Roy v. Beacon Hudson Mtn. Corp., 88 N.Y.2d 154 (1996). Where the period claimed commences prior to September 1, 1963 plaintiff must demonstrate such possession for a period of fifteen years. West Center Congregational Church v. Eistathiou, 215 A.D.2d 753 (2nd Dep't 1995). Such possession and hostility may be proven by demonstrating actual, open, notorious and exclusive possession by improvement and landscaping. See, Fatone v. Vona, 287 A.D.2d 854 (3rd Dep't 2001); Birnbaum v. Brody, 156 A.D.2d 408 (2nd Dep't 1989). The standards for a cause of action for prescriptive easement are identical except that plaintiff must prove use instead of possession of the disputed parcel. See, Montfort v. Benedict, 199 A.D.2d 923 (3rd Dep't 1993).

Plaintiff has demonstrated by clear and convincing evidence that he and/or his predecessors in interest had continuously occupied, maintained, improved and landscaped the property without objection from defendants or any predecessor of defendants' for forty-four

years. Nothing contained in defendants' opposition leads this court to conclude that there are issues of fact as to such possession. The court also finds that plaintiff has made a *prima facie* demonstration of entitlement to a prescriptive easement for the disputed parcel.

Thus, the court finds that plaintiff has demonstrated a likelihood of success on the merits.

The court further finds that plaintiff would suffer irreparable harm in that he would lose the use of the parcel during the pendency of this action.

A balancing of the equities also favors granting plaintiff this relief. It appears that the inconvenience of losing forty years of continuous use of property outweighs the delay to defendants to expand their driveway.

Thus, based upon the foregoing, plaintiff's motion is granted to the extent that defendants are enjoined from interfering with plaintiff's occupancy and use of the disputed parcel set forth above pending final determination of this action. Plaintiff is directed to post an undertaking in the sum of $1,500.00. To the extent plaintiff seeks a preliminary injunction enjoining defendants from interfering with plaintiff's landscapers and/or contractors in the performance of work on the disputed parcel, said relief is part and parcel of a directive that defendants may not interfere with plaintiff's use and occupancy.

The motion is denied to the extent plaintiff seeks an order enjoining defendants from preventing plaintiff and/or local sanitation services from using defendants' driveway for purposes of accessing defendants' garbage from the disputed parcel. Having reviewed the complaint, the court sees no cause of action for a prescriptive easement for the use of defendants' driveway itself. All causes of action are restricted to the strip of property between defendants' driveway and plaintiff's boundry line and not the driveway itself.

Contempt

On January 19, 2007 this court executed a temporary restraining order which read as follows:

> "ORDERED, that pending the hearing and determination of the within application, the parties, their agents, servants and employees are hereby enjoined and restrained from any further use occupancy, demolition construction renovation, alteration interference with as well as to be enjoined from any further complaints to Nassau County regarding the tract of land in dispute."

Plaintiff avers that:

1) defendants have continuously parked the front tire of their vehicle on the disputed parcel since the inception of this action;

2) defendants have driven their vehicle over the strip with the intention of breaking plaintiff's sprinkler heads (it should be noted that the Court will not consider speculation as to why defendants drove over the parcel);

3) defendants have placed obstructions near the disputed parcel to interfere with the sanitation department;

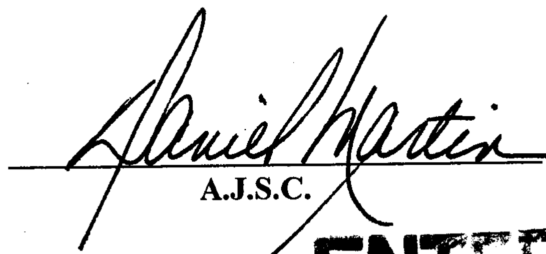
4) defendants have parked vehicles in their driveway to block sanitation workers from picking up garbage cans on the disputed parcel; and

5) every morning that sanitation workers come to pick up plaintiff's garbage defendants yell at them to stay off their driveway.

At the outset, the court shall not consider the third through fifth allegations set forth above. Each of these pertain to defendants' use of the paved driveway which, as set forth above, is not in issue herein. As to the other contentions, the court views these as violations of the temporary restraining order. In opposition defendants claim in Mrs. Beckmann's affidavit that any intrusion on the disputed parcel was inadvertent.

The court shall accept defendants' explanation at this point, especially as plaintiff has not alleged suffering any injuries as a result of defendants' behavior. The motion is therefore denied but all parties are warned that the court shall not countenance another such violation of the temporary restraining order no matter how trivial.

So Ordered.



A.J.S.C.

Dated: February 1, 2008

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NASSAU COUNTY
COUNTY CLERK'S OFFICE