800 N.Y.S.2d 347

6 Misc.3d 1026(A)

Michael Haverland, Plaintiff,

v.

Guy Lawrence and EAST HAMPTON, BAYBERRY, INC., Defendants.

04-4626

2004-51826

Supreme Court of New York, Suffolk County

December 1, 2004

Editorial Note:

This case is not published in a printed volume and its disposition appears in a table in the reporter.

OPINION

Daniel J. Loughlin, J.

ORDERED that this motion by plaintiff for a preliminary injunction is denied.

The plaintiff moves for a preliminary injunction directing that the defendants, Guy Lawrence (Lawrence) and East Hampton Bayberry, Inc. (Bayberry) remove from the plaintiff's property all trees, root balls, stakes and related supports installed by the defendants and restore the previous natural grade and surface water flow on and over the plaintiff's property. The plaintiff submits in support of this application, inter alia, his affidavit [1] and that of David L. Saskas (Saskas), surveys of the plaintiff's and Lawrence's property, photographs of the plaintiff's property and a copy of the summons and verified complaint.

The plaintiff alleges that Lawrence hired Bayberry to plant an eighty foot line of 12 to 14 foot high evergreen trees along the boundary between the plaintiff's and Lawrence's property. The plaintiff also alleges that Bayberry, in the process of planting these trees, drove across the plaintiff's land without his permission and knocked down five of his oak trees and construction stakes marking the site of his new house. Bayberry planted some of the trees on the property line with the root balls extending as much as three and one half feet onto the plaintiff's property. Bayberry also placed metal stakes and support wires on the plaintiff's property for some of the trees. The plaintiff further alleges that in the course of planting these trees the defendants raised the elevation of, and created a small berm on Lawrence's property near the boundary line. As a result of this change in elevation, surface water from Lawrence's property flows toward, instead of away from, the plaintiff's house. As a result of this changed flow, every time there is a substantial rainfall the twenty two foot strip of land between the plaintiff's house and the boundary line becomes flooded with a foot or more of standing water, thereby rendering that part of his property unuseable. The plaintiff finally alleges that this flooding and the fast growing roots of the trees will undermine the integrity of the foundation of his house. The plaintiff submits the photographs, the surveys and the Saskas affidavit in support of these allegations.

Saskas avers that he is a licensed land surveyor and that in October of 2002 he placed surveyor stakes on the plaintiff's property to enable the construction contractor to place stakes marking the location of the foundation of the plaintiff's house. In the course of this survey he determined that ten large evergreen trees had been planted very near the boundary line with the plaintiff's property. The trunks of five of these trees were within six inches of the line and that the holes and root balls for these trees extended two to two and one half feet into the plaintiff's property. Only two of these ten trees were planted entirely on Lawrence's property. The metal stakes and guy wires for the trees extended as much as four feet into the plaintiff's property. Saskas finally alleges that the planting of the new trees created a small berm which slightly raised the grade of the land extending into the plaintiff's property. Saskas opines that this change of grade altered the run-off pattern of surface water and "contributed" to the flooding on the plaintiff's property. Saskas refers to his survey of the plaintiff's property which shows the location of five trees either at or very close to the plaintiff's property line. [2]

The plaintiff's affidavit reiterates the allegations made in the complaint. The first cause of action in the complaint sounds in trespass and the second cause of action alleges commission of a nuisance based on a violation of the East Hampton Town Code Section 255-10-50. The plaintiff also seeks in the complaint a permanent injunction directing a restoration of the grade of Lawrence's property and of the water surface flow to their previous state and directing a removal from the plaintiff's property of all trees, root balls, and related supports installed by the defendants.

Bayberry in opposition contends that the plaintiff's proof demonstrates that no trespass has occurred since the surveys

submitted by the plaintiff show that the trunks of the trees are entirely on Lawrence's land, that plaintiff's assertion that the tree roots would undermine his foundation is merely conclusory, that Saskas does not have the requisite qualifications or data to give his opinion as to cause of the alleged flooding on the plaintiff's property and that any such flooding does not constitute irreparable injury in that this condition is minor and could be corrected through the installation of drywells.

Lawrence, by his attorney, contends in opposition that Saskas does not allege that the trunks of the trees encroached on the plaintiff's property, that Saskas provided no factual support for his conclusion that the tree root balls were approximately four feet in diameter, that Saskas in determining the cause of the alleged surface water run-off relied on improper and incomplete data regarding the change in grade, that Saskas does not give the basis for his opinion that defendants' change in grade contributed to the flooding on the plaintiff's property, that the survey of the plaintiff's property raises questions as to the cause of the alleged flooding including whether the elevation of the land near the trees may have occurred after the trees were planted, that the plaintiff's photographic exhibits do not establish the cause of the alleged flooding, that Lawrence's photographic exhibits demonstrate that plaintiff's claims of flooding after heavy rain are exaggerated, that the plaintiff's claims that tree roots will undermine his foundation is without technical or scientific support, that the plaintiff has failed to demonstrate that Section 255-1-95 of the East Hampton Town Code was violated and that equity is not balanced in the plaintiff's favor since removal of the trees and re-grading of the land is a drastic remedy and there are other and less drastic remedies available. Lawrence avers in his affidavit that he was not aware of any change in elevation of his property when the trees were planted and that the plaintiff did not request removal of the trees or complain of flooding on his property until he retained an attorney.

The plaintiff contends in reply that this is a case where planting of the trees by defendants, as opposed to their natural growth, has caused the encroachment, that self help is not an appropriate remedy since trimming the encroaching part of the trees would cause their destruction, that a balance of equities does favor the plaintiff since it is not unfair to make the defendants "pay for what they would have had to pay originally but for their illegal trespass" (reply affirmation, page 5) and that Saskas had the requisite training, experience and information to render an opinion as to the alleged diversion of water run-off and flooding.

"The law is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate '" (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position" ' (*Barone v. Frie*, 99 A.D.2d 129, 132, 472 N.Y.S.2d 119, quoting from *Gambar Enterprises v. Kelly Servs.*, 69 A.D.2d 297, 306, 418 N.Y.S.2d 818). Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant' (*First Nat. Bank of Downsville v. Highland Hardwoods*, 98 A.D.2d 924, 926, 471 N.Y.S.2d 360; accord, *607 Buegler v. Walsh*, 111 A.D.2d 206, 489 N.Y.S.2d 241)" (*Orange County v Lockey*, 111 A.D.2d 896, 897, 490 N.Y.S.2d 605,606 - 607 [1985]).

Turning to the first prong of this test, the plaintiff has asserted causes of action for trespass and nuisance. Any unauthorized entry upon the land of another constitutes trespass (*Rager v McCloskey*, 305 N.Y. 75, 111 N.E.2d 214 [1953], reh. den. 305 N.Y. 924, 114 N.E.2d 476). A cause of action for nuisance arises when a condition is maintained on one property which interferes with the use or enjoyment of the land of another (*Nalley v General Elec. Co.*, 165 Misc.2d 803, 630 N.Y.S.2d 852 [1995]; *Zamzok v. 650* Park Ave. Corp., 80 Misc.2d 573, 363 N.Y.S.2d 868 [1974]).

The plaintiff, to the extent he has alleged-and the defendants have not controverted-that the defendants, in the course of planting the trees, drove across the plaintiff's property [3], knocked down five of his oak trees and construction stakes and placed metal stakes and support wires for Lawrence's trees on plaintiff's property without his consent, has established the likelihood of success on the merits. However, as to the remainder of the complaint, defendants' submissions in opposition to the application raise numerous and significant triable issues of fact which preclude such a finding (*Data Systems Computer Centre, Inc., v Tempesta*, 171 A.D.2d 724, 566 N.Y.S.2d 955 [1991]; see *Betancourt v City of New York*, 194 A.D.2d 759, 599 N.Y.S.2d 615 [1993]).

With regard to the second prong of this test, the plaintiff has failed to demonstrate that he will suffer an irreparable injury if the preliminary injunction is not granted. The plaintiff's allegation that the trees planted by the defendants have fast growing roots, which will undermine the foundation of his house, lacks specific evidentiary support and is merely speculative and conclusory (*Nalley v General Elec. Co.*, supra, page 457). Moreover, the plaintiff's claim that his foundation will suffer irreparable damage should the flooding continue, is vitiated by his admission that the "integrity of that foundation will be gradually undermined" (plaintiff's affidavit, paragraph 36 [emphasis added]). Nor does the plaintiff's claim that he is temporarily deprived of the use of part of his property after a heavy rain due to flooding establish an irreparable injury (*Jennings v Fisher*, 258 A.D.2d 722, 684 N.Y.S.2d 680 [1999]). Finally, there

is also a sharp factual dispute with regard to the cause of the flooding as well as the frequency and extent of the flooding (*Brodsky v Brodsky*, 208 A.D.2d 669, 618 N.Y.S.2d 536 [1994]).

With regard to the third prong of this test, the plaintiff has failed to demonstrate that equity is balanced in his favor. In analyzing whether the plaintiff has satisfied this burden, the court notes that the plaintiff seeks a preliminary injunction directing, not that the defendants must abstain from some conduct, but rather that they remove planted trees and re-grade the plaintiff's property to restore the previous pattern of surface water runoff. As a general rule mandatory injunctions are not favored and will be granted in only the most extraordinary circumstances (*Rosa Hair Stylists v Jaber Food Corp.*, 218 A.D.2d 793, 631 N.Y.S.2d 167 [1995]). Furthermore, where, as here, the plaintiff seeks to obtain by the issuance of this preliminary injunction the same injunctive relief sought in the complaint, a preliminary injunction will not be granted unless the plaintiff demonstrates, upon clear and undisputed facts, that such relief is imperative and because without it, a trial would be futile (*Xerox Corp. v Neises*, 31 A.D.2d 195, 295 N.Y.S.2d 717 [1968]). The Court, having weighed the drastic nature of the relief sought against the plaintiff's conjecture that the tree roots might eventually reach his foundation and his sharply disputed claim that the defendants' planting of the trees and re-grading of his property caused extensive flooding which will undermine his foundation, finds that the plaintiff has failed to demonstrate the existence of the extraordinary circumstances which would tip the balance of equity in his favor (*Di Marzo v Fast Trak Structures, Inc.*, 298 A.D.2d 909, 747 N.Y.S.2d 637 [2002]; *Penfield v New York*, 115 A.D. 502, 101 NYS 442 [1906]). Accordingly, the plaintiff's motion for a preliminary injunction is denied.

Notes:

[1] Although this affidavit was not properly notarized, the court considered it to the extent the same allegations were raised in the verified complaint (CPLR 6312[a]; 12A Carmody Wait2d Section 78-109, page 139-140)

[2] A survey of Lawrence's property similarly shows the existence of trees in close proximity to the plaintiff's and Lawrence's property line.

[3] Lawrence admits in his affidavit filed in opposition to the motion that he authorized Bayberry to transport its equipment and the trees over the plaintiff's land without plaintiff's permission.
