

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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DAVID MENASHI and BETTY BERENSON MENASHI,

Plaintiffs,

-against-

123 CUSHMAN LOT, LLC and
VILLAGE OF SCARSDALE,

Defendants.

Index No.: 57987/2020

DECISION and ORDER

Motion Sequence No. 3

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RUDERMAN, J.

The following papers were considered in connection with the motion by plaintiffs for a preliminary injunction enjoining defendants from performing construction work or disturbing the soil upon the real property commonly known as 123 Cushman Road, Scarsdale, New York:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affirmation, Exhibits 1 - 5	1
Village of Scarsdale Affidavit in Opposition	2
Affirmation in Opposition, Exhibits A - M, Ben-Simon Affidavit, Exhibits A - L, and Memorandum of Law	3

Plaintiffs commenced this action by summons and complaint filed August 3, 2020, seeking to enjoin the owner of the property located at 123 Cushman Road in Scarsdale, New York, from developing its lot – as well as to enjoin the Village of Scarsdale from allowing such development – pending determination of their adverse possession action, *Menashi v 123 Cushman Lot, LLC* (Index No. 54207/2019), which concerns a 15-foot-wide strip of land on the southern portion of 123 Cushman. Plaintiff’s motion for summary judgment on their adverse

possession claim was denied in a decision and order (Hon. Lawrence H. Ecker, J.) dated December 21, 2020.

The other action bearing some relevance to this action is a private nuisance action related to noises caused by the operation of an electrical generator on the southern border of 123 Cushman's property, which action was ultimately settled by a stipulation in which the owner of the 123 Cushman lot agreed to refrain from keeping a generator or other equipment which generates noise on its property within 100 feet of the plaintiff's property, except that in the event that the property is being developed, the contractor or the defendant shall be permitted to place heavy equipment within that 100-foot area on an as-needed basis (*Menashi v KOSL Building Group, LLC* [Sup Ct, Westchester County, Index No. 52569/2019, NYSCEF Doc. No. 28]).

At the time the present action was commenced in August 2020, plaintiffs submitted, as justification for this separate action and in support of the name used for the defendant, an "Application & Building Permit Form" for construction of a new single-family house to be constructed at 123 Cushman Road, which application form had been submitted to the Village of Scarsdale Engineering & Building Department. The applying property owner's name given on the application form was "123 Cushman Rd. LLC," as opposed to 123 Cushman Lot LLC, which created confusion ultimately resolved in telephone conferences and by a stipulated amendment to the caption and withdrawal of a default motion. The reasoning the complaint provides for this action is that if plaintiffs prevail on their adverse possession claim, the 123 Cushman property will be reduced by 2,166.15 square feet, and the lot coverage computations and floor area ratios that must be applied to its application for a building permit would be affected, and therefore no building permit should be issued until the boundary dispute between plaintiffs and defendant 123

Cushman is resolved.

In the present motion for injunctive relief, brought in November 2020, plaintiffs seek an order enjoining the performance of construction work or the disturbance of the soil on 123 Cushman Road. In support, they submit photographs of the property, which counsel states were taken on November 10, 2020, and which he says establish that construction and disturbance of the soil have been initiated on the lot. No further information is supplied about either the source of the photographs, the perspective from which they were taken, or the distances of the objects photographed from the property boundaries. Counsel asserts in the moving papers that defendant owner “is in default, has acted in violation of local zoning ordinances, and time and again has thumbed its nose at the directives of this Court,” and suggests that “a temporary restraining order is necessary to prevent Defendant from doing permanent and irrevocable damage to property that this court may ultimately find to be outside the scope of Defendant’s legal authority.”

In opposition, defendants have submitted photographs, footage, and affidavits establishing that the manner in which 123 Cushman is being used is as a staging location for the construction work being performed on 125 Cushman, in accordance with permits issued by the Village. While dirt is being moved, and noise-making machinery is being employed, it is not due to construction of a building on 123 Cushman.

The requirements for preliminary injunctive relief are (1) a likelihood of success on the merits; (2) irreparable harm in the absence of injunctive relief; and (3) a balancing of the equities in the movants’ favor (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 (1981); *Herczl v Feinsilver*, 153 AD3d 1338, 1388 [2d Dept 2017]). In addition, “absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the

ultimate relief to which he or she would be entitled in a final judgment” (*Berman v TRG Waterfront Lender, LLC*, 181 AD3d 783, 784-85 [2d Dept 2020]; see also *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]). Where a plaintiff seeks preliminary relief providing all the relief sought as a final judgment, it bears an even heavier burden in demonstrating its entitlement to such preliminary relief (see e.g. *Russian Church of Our Lady of Kazan v Dunkel*, 34 AD2d 799, 801 [2d Dept 1970]).

Here, plaintiffs’ motion seeks essentially the same relief as the ultimate relief they seek in this action: an order enjoining defendants from “engaging in construction work upon the building lot known as 123 Cushman Road, Scarsdale, New York,” as compared to the cause of action seeking an “injunction against 123 Cushman Road from developing its property.” Thus, the three-pronged analysis for injunctive relief must be applied with particular scrutiny.

Plaintiff’s showing on this motion is insufficient for a preliminary injunction. Their submissions have established neither a likelihood of success, nor irreparable harm absent the sought relief. None of the activities in which 123 Cushman Lot has been shown to be engaging involve the construction of a building on 123 Cushman, let alone on the disputed portion of the lot. The submissions establish only that the complained-of activities that are taking place on 123 Cushman are in support of the permitted construction work on 125 Cushman Road, in accordance with issued permits allowing such use of 123 Cushman. Plaintiff has offered no reasoning that would justify preventing such permits.

Plaintiffs’ claim in this motion that the owner has acted in violation of local zoning ordinances has not been supported, and has been shown to be inaccurate. Finally, to the extent plaintiffs rely on the alleged violation of the so-called “generator settlement,” they have raised

that in a motion filed the earlier action, and this Court will not address or resolve it in the context of this action.

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for preliminary injunctive relief is denied, and it is further

ORDERED that the parties are directed to appear in the Preliminary Conference Part of the Supreme Court, Westchester County on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 12, 2021


HON. TERRY JANE RUDERMAN, J.S.C.