

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT**

SUFFOLK, ss.

No. 24 MISC 000507 (KTS)

CROSSROADS PRESENTS, LLC,)
)
Plaintiff,)
)
v.)
)
HOLOCAUST LEGACY FOUNDATION, INC.,)
)
Defendant.)

DECISION ON MOTION FOR PRELIMINARY INJUNCTION

Crossroads Presents, LLC operates the Orpheum Theatre — a music venue that opened in Boston in 1852. The theater is located at the end of Hamilton Place, a private way that looks like an alley, dead ends at the front door of the theater, and is the sole means of access for the musicians who perform there and the patrons who pay to watch. Holocaust Legacy Foundation, Inc. owns the property at 125 Tremont Street, located at the corner of Tremont Street and Hamilton Place. The Foundation is currently constructing a building that will eventually be the home of the Holocaust Museum Boston. The parties now find themselves at odds over who has rights in Hamilton Place and the extent to which each may exercise those rights.

Crossroads filed suit on September 3, 2024, requesting that the court declare that it holds a prescriptive easement to use Hamilton Place for access to its property. It has moved for a preliminary injunction that would prevent the Foundation from interfering with its use of Hamilton Place during certain time periods on the days when it is preparing for and carrying out

its business of hosting live music events. The Foundation opposes the motion, sort of. It does not concede that Crossroads has acquired prescriptive rights in Hamilton Place, but it argues that an injunction is unnecessary because it has cooperated with Crossroads' use of the way in the past and will continue to do so on days or evenings when Crossroads hosts events in the future.

Notwithstanding the Foundation's pledge of cooperation, an agreement that would allow these parties to peacefully coexist and, perhaps, thrive has eluded them. Now, Crossroads seeks an injunction, the scope of which would allow:

“(1) the use by Crossroads and its invitees of the full width of Hamilton Place for 75 foot long WB-67 tractor trailer access, tour bus access, vehicular access, and pedestrian access, from 6:00 a.m. on the morning of events and/or the evenings prior to the days of events until all vehicles have left after removing equipment associated with the performance acts, and (2) the control of access to Hamilton Place by the Orpheum Theatre personnel on days that the Orpheum Theatre is hosting a performance event.”

The motion came before the court for a hearing on September 18, 2024. The court received supplemental affidavits from Crossroads on September 25, 2024. For the reasons set forth in this decision, Crossroads' motion is DENIED.

Discussion

The familiar standard for consideration of a request for a preliminary injunction is as follows:

[W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.

Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980); see also *GTE Prods. Corp. v. Stewart*, 414 Mass. 721, 722-723 (1993).

The following facts appear in the record and are credited by the court solely for the purpose of considering the motion for preliminary injunction.

1. Crossroads operates the Orpheum Theatre, which is located at the dead end of Hamilton Place.¹ It is the sole means of access to the theater.

2. At the other end of Hamilton Place, at its intersection with Tremont Street, is the building owned by the Foundation which is known as 125 Tremont.

3. According to a plan from 1950, Hamilton Place is approximately 216 feet long with a variable width ranging from 34 feet wide at its intersection with Tremont Street to approximately 39 feet at its terminus. In its current configuration, it is paved to a width of 21 feet, 6 inches, with sidewalks on each side.

4. Crossroads holds no rights to use Hamilton Place as a matter of title. However, it has used Hamilton Place for many years as the access way for vehicles and pedestrians associated with its business – tractor trailers, tour buses, delivery trucks, and patrons.

5. According to the affidavits submitted by Crossroads, the theater hosts between 40 and 50 events per year. In the past, the preparation for each event has followed the same basic protocol. Early on the morning of a concert, a WB-67 tractor trailer backs down Hamilton Place to the door of the theater, where equipment used by the performers is unloaded. Later in the day, a delivery truck carrying supplies to be used or sold at that night's event backs down the way to

¹ Crossroads leases the Orpheum Theatre property from its owner, Winsum Limited Partnership.

unload those supplies. Finally, closer to the time that the event is scheduled to start, a tour bus carrying the performers backs down Hamilton Place and drops them off. At some point during this process, Orpheum Theatre employees place barricades across Hamilton Place to control the flow of vehicles and pedestrians traveling down the way. When and where they place these barricades is dependent on certain variables, including whether the parking garage for the Suffolk University Law School is open as its entrance and exit are on Hamilton Place. As the start time of an event approaches, the barricades are moved to the intersection of Hamilton Place and Tremont Street to control all access to Hamilton Place.

6. Crossroads contends that its ability to use Hamilton Place in this specific way is critical to the survival of its business.

7. The Foundation has owned 125 Tremont since March 1, 2023. It also owns Hamilton Place from Tremont Street extending approximately 80 feet down the way to the rear boundary of its property. The next section of Hamilton Place, which extends from the Foundation's property to the Orpheum Theatre, is owned by a different entity that holds title to the building behind the Foundation's property. That owner is not a party to this action.

8. The Foundation is in the process of constructing a museum that will commemorate the Holocaust. The project contemplates demolishing the four-story brick building that currently exists and replacing it with a new six-story building. During the construction process, the Foundation's contractor needs to use Hamilton Place to varying degrees depending on the phase of the project.

9. As part of obtaining its approvals for the project, the Foundation was required to develop a construction management plan ("CMP") for approval by the Boston Transportation

Department, the purpose of which is to minimize the impacts of the construction process on the surrounding roadway network and to provide a safe pedestrian environment. The Boston Transportation Department approved the Foundation's CMP in February 2024.

10. Among other things, the CMP requires the Foundation's contractor to maintain at all times a travel lane on Hamilton Place that is, at least, ten feet wide.² The CMP also requires the Foundation to coordinate its construction activities with abutters on Hamilton Place, presumably to limit any interference by the construction activity with surrounding business operations.

11. Construction activity began at 125 Tremont in the Spring of 2024. Based on the photographs submitted by both parties, during the initial phase of the project, a chain link fence was erected along the side of Hamilton Place closest to the Foundation property, ostensibly to exclude pedestrians from walking into the construction zone. More recently, the chain link fence has been removed and staging has been erected along the façade of the building closest to Hamilton Place from street level to the roof line. The staging extends horizontally over the sidewalk and several feet into Hamilton Place. Both sets of photographs demonstrate that there is room left on Hamilton Place for a large vehicle to pass the fencing or scaffolding in order to get to the theater – probably wider than the ten foot lane mandated by the CMP plans.

12. The Orpheum Theatre's concert season has commenced—it has already hosted two shows, on September 8, 2024, and September 17, 2024. Both shows went off without a hitch because of the cooperation between employees of the Orpheum Theatre and employees of the Foundation's contractor. Still photographs and a video were submitted from one or both

² Currently, there is a temporary sign at the end of Hamilton Place that says that the Suffolk University Law School parking garage is open during construction.

events, which depict a WB-67 tractor trailer successfully backing down Hamilton Place toward the front door of the theater. In the foreground of the video, two tour buses are parked along the left (southwest) side of Hamilton Place, leaving only a ten to twelve foot lane for the WB-67 to finish its route to the front door of the theater. I mention this because the buses parked in that configuration extend into Hamilton Place the same distance, maybe more, as the staging that is currently erected along the façade of 125 Tremont.

1. Likelihood of Success on the Merits

The core dispute in this case is whether and to what extent Crossroads has acquired a prescriptive easement to use Hamilton Place for access to the Orpheum Theatre in connection with its operation of a live music venue. As framed by Crossroads, this is a more complicated question than it first appears. It is not just that Crossroads and previous Orpheum Theatre operators have acquired an easement to pass and repass over Hamilton Place based on their regular use of the way for more than the 20-year prescriptive period. Rather, Crossroads asserts that the prescriptive easement includes a right to *exclusively use* Hamilton Place on the day of each scheduled music show, beginning at 6:00 a.m. when trucks start delivering equipment to the theater, and continuing until late that evening after the performers and their equipment have packed up and left the theater following the show. Crossroads further claims that its right to exclusive use of Hamilton Place includes a right to block or cordon off the way for “security purposes” for the entire day leading up to the evening of the show.

General Laws Chapter 187, § 2 sets forth the requirements for the acquisition of an easement by prescription as follows: “[n]o person shall acquire by adverse use or enjoyment a right or privilege of way or other easement from, in, upon or over the land of another, unless such use or enjoyment is continued uninterruptedly for twenty years.” To establish such an

easement, a party must prove that he or she used the area in question “in a manner that has been (a) open, (b) notorious, (c) adverse to the owner, and (d) continuous or uninterrupted for a period of no less than twenty years.” *Boothroyd v. Bogartz*, 68 Mass.App.Ct. 40, 44 (2007); see also *White v. Hartigan*, 464 Mass. 400, 413 (2013); *Ryan v. Stavros*, 348 Mass. 251, 263 (1964); *Smaland Beach Ass’n v. Genova*, 94 Mass.App.Ct. 106, 114 (2018); *Houghton v. Johnson*, 71 Mass.App.Ct. 825, 835 (2008). Because an easement is defined as a nonpossessory interest in the land of another, a party claiming an easement by prescription need not prove exclusive use of the land in question. *Labounty v. Vickers*, 352 Mass. 337, 349 (1967).

To be open, the use “must be without attempted concealment.” *White v. Hartigan*, 464 Mass. at 416. To be notorious, the use “must be sufficiently pronounced so as to be known, directly or indirectly, to the landowner if he or she maintained a reasonable degree of supervision over the property.” *Boothroyd*, 68 Mass.App.Ct. at 44. On the element of adversity, the uninterrupted use of land for a continuous period of twenty years creates a presumption in favor of the party claiming adverse use, unless the use is controlled or explained. *Flynn v. Korsack*, 343 Mass. 15, 18 (1961); *Rotman v. White*, 74 Mass.App.Ct. 586, 589 (2009); *Houghton*, 71 Mass.App.Ct. at 836 (discussing two ways by which easements by prescription may be established: by use with knowledge of the owner or by use so notorious that knowledge of the claim of right is presumed). Once the presumption arises, the landowner has the burden of rebutting it by showing that the use was permissive. *Rotman*, 74 Mass.App.Ct. at 589; *Houghton*, 71 Mass.App.Ct. at 842; *White v. Hartigan*, 464 Mass. at 414, n. 19. Continuous use does not necessarily mean constant use. Seasonal or periodic use of a way may be considered continuous if the activities engaged in by the interloper demonstrate a pattern of regularity. *Stagman v. Kyhos*, 19 Mass.App.Ct. 590, 593 (1985).

The extent of an easement acquired by prescription is fixed by the actual use through which it was created. *Baldwin v. Boston & Me. R.R.*, 181 Mass. 166, 168 (1902); *Lawless v. Trumbull*, 343 Mass. 561, 562-563 (1962); *Glenn v. Poole*, 12 Mass.App.Ct. 292, 295 (1981). “Yet, the use made during the prescriptive period does not fix the scope of the easement eternally. It may change over time and uses satisfying the new needs are permissible ... [b]ut the variations in use cannot be substantial; they must be consistent with the general pattern formed by the adverse use.” *Glenn*, 12 Mass.App.Ct. at 293 (citations omitted).

Once a party establishes that it holds an easement by prescription, his or her right to use the easement is governed by the Massachusetts common law of express easements. As in all easement cases, both the servient and dominant estate owners have rights to use the easement area. “The owner of a servient estate may make such use of his land as is consistent with the easement of another.” *Highland Club of W. Roxbury v. John Hancock Mut. Life Ins. Co.*, 327 Mass. 711, 714 (1951). “[B]ut the corollary of that rule is that he may not use his land in a manner inconsistent with the easement.” *Id.* at 715.

Based on the record before the court, it appears that Crossroads, and its predecessor operators of the Orpheum Theatre, have openly used Hamilton Place for passage by trucks, buses, and other vehicles, and by patrons for access to the theater on the days or nights of live music shows for, at least, twenty years. Thus, Crossroads has established a prima facie case that it holds a prescriptive easement to use Hamilton Place for access to the theater

However, Crossroads requests more than just a general right to pass and repass over the way. It seeks an order that would give it *exclusive* use of Hamilton Place on days when it hosts events. Indeed, Crossroads seeks to exclude the Foundation from using the section of Hamilton Place that it owns, for 24 to 36 hours on and around the 40 or 50 days of the year that the

Orpheum Theatre hosts events, so that Crossroads can continue to operate its business in the same manner now as it did before the Foundation started construction. That means unfettered access to and control over the first section of Hamilton Place as if Crossroads, and not the Foundation, was the fee owner. Aside from the fact that the affidavits do not support a finding of exclusive use, the activities that Crossroads points to in support of its request conflate Crossroads' preferred manner of business operations with the type of use of a way that typically gives rise to the acquisition prescriptive rights. Equally problematic is that Crossroads' request for exclusive control by prescription is not supported by any law cited in its motion papers nor is the court aware that such law exists.

The nature of an easement requires the owners of the servient and dominant estates to, at least, peacefully coexist so that each can enjoy their respective rights of ownership. The situation at Hamilton Place is no different. At this early stage of the proceeding, Crossroads has demonstrated that it is likely to prevail on its claim that it, and its invitees, have a general right to pass over Hamilton Place for access to the Orpheum Theatre, but it has not established that it has a right to exclude the Foundation from that area on the days of concerts.³

2. Irreparable Harm

Crossroads asserts that it will be irreparably harmed without the injunction because the Foundation has "threatened" to block Crossroads' use of the way on concert days which, in the future, will force Crossroads to cancel shows and, ultimately, cease business operations at the Orpheum Theatre altogether. However, Crossroads offers no tangible evidence that the Foundation will, in fact, block its use of Hamilton Place in the future. Actually, the evidence is

³ It is important to note that, at least according to the CMP, construction of the Foundation museum will be completed by December 2025. Thereafter, Hamilton Place will be free of construction material and equipment.

to the contrary. Crossroads has already hosted two events this concert season, both of which were serviced over Hamilton Place by WB-67 tractor trailers and tour busses in the hours leading up to the start of each event. Although Hamilton Place is a little tighter to navigate due to the presence of staging along the façade of 125 Tremont, the photographs and video provided to the court depict trucks successfully backing down the way to complete their delivery of equipment, supplies, and people. During these two events, the Foundation did not interfere with Crossroads' use of Hamilton Place and, moving forward, the Foundation's President and CEO, Jody Kipnis, has professed a willingness to continue "to make reasonable accommodations" to Crossroads that do not require [the Foundation] to suspend construction" on the days of concerts. Affidavit of Jody Kipnis, ¶ 16.

Based on the record, Crossroads has established that it will be inconvenienced by the Foundation's project, but not irreparably harmed if the injunction, as requested, is not issued. Thus, it has not met the second prong of the test for a preliminary injunction.

3. Balance of Harms

The balance of harms at this early stage tips in favor of the Foundation. If the court were to issue the injunction requested by Crossroads, the Foundation's construction operations would have to be suspended for a day or two every time the Orpheum Theatre hosted a show. Not only would that impose the extraordinary cost of shutting down and remobilizing construction every week or so, but it could have the domino effect of causing construction delays, extending the construction schedule, and adding unnecessary costs of delay to the project. On the flip side, denial of the injunction will not cause harm to Crossroads to the extent that it predicts. As previously stated, the parties have proven that they can work together so that the Orpheum Theatre can hold live music shows and the Foundation can continue the construction of its

museum – even if that cooperation came from the workers on the ground on each concert day and not through a written agreement between the powers that be for each entity. If that cooperation continues for the remaining 18 or so music shows currently on the Orpheum Theatre schedule, half of which will occur on a Saturday or Sunday night, neither party will be harmed in a way that justifies the court’s intervention.

Conclusion

Both parties in this case have a lot at stake. However, the evidence submitted to the court suggests that they both can achieve their desired goals without the court’s imposition of an injunction that would undoubtedly be inadequate to coordinate the day-to-day operations of a major construction project with the running of a storied live music venue that holds shows on 40 to 50 nights a year. Although the court will not issue the injunction as requested by Crossroads, it must be emphasized that Crossroads will likely be able to prove at trial that it has an easement of passage over Hamilton Place that is wide enough to accommodate the large vehicles and the scores of patrons that have used the way each time the Orpheum Theatre has hosted an event in the past. The Foundation should respect that right going forward and follow through with the cooperation pledged by its President and CEO.

Accordingly, it is

ORDERED that the motion for preliminary injunction of Crossroads Presents, LLC is DENIED.

It is further

ORDERED that, within seven days of the entry of this order, the parties shall confer for the purpose of agreeing on a date for a case management conference during the week of October 14th and report back to the court on the agreed date.

So Ordered.

By the Court. (Smith, J.)

/s/ Kevin T. Smith

Attest:

/s/ Deborah J. Patterson

Deborah J. Patterson

Recorder

Dated: September 26, 2024