

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - December 2, 2011

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2010-08211

DECISION & ORDER

Peter Thomson, et al., respondents, v Ashok Nayyar,
et al., appellants.

(Index No. 13800/08)

Law Office of Mario DeMarco, P.C., Port Chester, N.Y., for appellants.

Hogan & Rossi, Brewster, N.Y. (David Simon of counsel), for respondents.

In an action, inter alia, for ejectment, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Loehr, J.), entered July 14, 2010, as granted those branches of the plaintiffs' motion which were for summary judgment declaring that the plaintiffs are the owners of a portion of the subject real property upon which a fence, tree, shrubs, and flowers encroached, ejecting them from that portion of the real property, directing them to remove the encroachments and restore the property to its pre-encroachment condition, and enjoining them from continuing to encroach or trespass upon the plaintiffs' property.

ORDERED that on the Court's own motion, the notice of appeal by the defendant Ashok Nayyar dated August 11, 2010, is deemed also to be a notice of appeal by the defendant Nalene Nath Nayyar (*see* CPLR 2001; *Matter of Tagliaferri v Weiler*, 1 NY3d 605); and it is further,

ORDERED that the order is reversed insofar as appealed from, on the law, and those branches of the plaintiffs' motion which were for summary judgment declaring that the plaintiffs are the owners of a portion of the subject real property upon which a fence, tree, shrubs, and flowers encroached, ejecting the defendants from that portion of the real property, directing the defendants to remove the encroachments and restore the property to its pre-encroachment condition, and

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enjoining the defendants from continuing to encroach or trespass upon the plaintiffs' property are denied; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

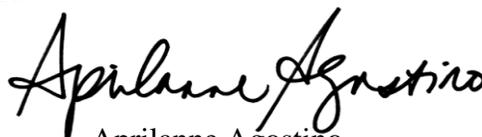
The plaintiffs own a parcel of real property in North Salem. The defendants own an adjacent parcel of real property. In June 2008 the plaintiffs commenced this action, inter alia, for ejectment, alleging, among other things, that the defendants owned a fence, a tree, shrubs, and flowers which encroached on the plaintiffs' property. After the defendants joined issue, the plaintiffs moved for summary judgment. In an order entered July 14, 2010, the Supreme Court, inter alia, granted those branches of the plaintiffs' motion which were for summary judgment declaring that they are the owners of a portion of the subject real property upon which a fence, tree, shrubs, and flowers encroached, ejecting the defendants from that portion of the real property, directing the defendants to remove the encroachments and restore the property to its pre-encroachment condition, and enjoining the defendants from continuing to encroach or trespass upon the plaintiffs' property. We reverse the order insofar as appealed from.

In support of their motion, and to establish the defendants' alleged encroachment, the plaintiffs submitted a survey by a certified surveyor which depicted, among other things, the property lines and the defendants' fence allegedly encroaching on the plaintiff's property. However, this survey did not constitute competent evidence of the alleged encroachment, as it was not accompanied by an affidavit of the surveyor (*see Greenberg v Manlon Realty*, 43 AD2d 968, 969; *see also Seaman v Three Vil. Garden Club, Inc.*, 67 AD3d 889, 890; *City of New York v Gowanus Indus. Park, Inc.*, 65 AD3d 1071, 1073; *Patterson v Palmieri*, 284 AD2d 852, 853). Moreover, to the extent that the other evidence submitted by the plaintiffs in support of their motion addressed the issue of the defendants' alleged encroachment onto the plaintiffs' property, the relevant assertions and depictions were based on the inadmissible survey and the boundary markers placed in connection therewith. Accordingly, the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on their motion. Since the plaintiffs failed to meet their prima facie burden, we need not review the sufficiency of the defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

In light of our determination, we need not reach the parties' remaining contentions.

ANGIOLILLO, J.P., DICKERSON, HALL and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court