Disp __x___ Dec _____ Seq. No. _2 _ Type __SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

———————————————————————X

ROBERT CORRERA and REGINA SANTOSPIRITO-CORRERA,

Index No. 67812/2019

Plaintiffs,

-against-

DECISION AND ORDER

60 MILLWOOD PARTNERS, LLC,

Defendant.

———————————————————————X

The following papers numbered 1 to 6 were read on this motion:

Papers	Numbered
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Memorandum of Law	2
Affidavits, Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Reply Affirmation	5
Reply Memorandum of Law	6

Defendant brings its motion seeking summary judgment dismissing this prescriptive easement action. Defendant also seeks summary judgment in its favor on its counterclaims, for a declaration that plaintiffs have no right over its property, and damages for trespass. The Court reviewed the entire NYSCEF docket for this matter, and does not see that defendant uploaded

its answer. Nor did defendant submit a copy of its answer as part of its motion for summary judgment. The Court thus must deny defendant's request for summary judgment on the counterclaims. Indeed, since defendant failed to file the answer, the counterclaims are dismissed.

The Court previously denied defendant's motion to dismiss the action. Now that discovery has been completed, defendant filed this motion. In their opposition papers, plaintiffs point out that defendant fails to submit with its motion a Statement of Material Facts as required by the Rules of Court. It also fails to submit the word count affirmation, also required by those same Rules. Counsel is warned that it must comply with these, and all other applicable rules; should it fail to follow the Rules in future, the Court may deny a noncomplying motion summarily.

The facts are as follows. Plaintiffs own property in Millwood, and have since 1988. Since 1988, they have used a right of way that passes over several properties before it gets to defendant's property. This is not the only way that they can access their property. When, over the years of the time period in question (1988-1998), the disputed access has been blocked by defendant's predecessor, Millwood Fire Company No 1 (the "Fire Company"), plaintiffs were able to access their property via the other access route. Once they traverse defendant's property,

plaintiffs have one more property, which is owned by the Town, to cross before getting to the public road.

According to the complaint, plaintiffs have openly, adversely, continuously, notoriously, under a claim of right and hostilely used the right of way for more than the prescriptive period, all prior to defendant's purchase of its property in 2015. At some point thereafter, however, defendant began to block plaintiffs' way through its property. This action ensued.

On this motion, defendant submits to the Court affidavits from non-parties who were members of the Fire Company during the applicable time period. They state that the Fire Company "permitted its neighbors to use and access the Alleged Right of Way, as a neighborly gesture, when the rear parking lot was not being used by the Fire Company." They explain that at various times throughout each year,[1] the Fire Company would block off the area in question for certain time periods ranging from a few hours to a day or so so that the Fire Company could tend to its equipment, run drills or host events for its members or the community at large. Mr. Correra testified that even when the Fire Company blocked vehicular access to the alleged right of way, he could still access it by foot. The fact that he could not access it by car was "not an issue" for him, so he never

[1]Plaintiff Robert Correra testified at his deposition that the Fire Company would block off the area "sporadically" over the years.

spoke to anyone at the Fire Company about the blockade. There is no dispute that the Fire Company never asked plaintiffs' permission before blocking access, at any point in the ten-year period (or at any time before or after).

At his deposition, Mr. Correra testified that over the years, he witnessed other people accessing the alleged right of way, "Mostly the Longhitanos," his neighbors. He further testified that he did not believe that he was the only one with the right to use the area. When he was asked if he ever asked anyone else to stop using the alleged right of way, he said that he did not, because he had "no cause or reason to tell them to stop using it."

Mr. Correra also testified that although he did maintain the area, including plowing and fixing potholes when necessary, he was not the only one who did so. He testified that he never performed any improvements in the area.

Analysis

"An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period, which is 10 years (see RPAPL 501). Where the use has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the

alleged prescriptive easement to show that the use was permissive." *315 Main St. Poughkeepsie, LLC v. WA 319 Main, LLC*, 62 A.D.3d 690, 691, 878 N.Y.S.2d 193, 193-94 (2d Dept. 2009). If plaintiffs do not make such a showing, then the burden never shifts to defendant to demonstrate that it was permissive.[2] Contrary to defendant's assertions, plaintiffs need not demonstrate that their use of the area was exclusive. *Almeida v. Wells*, 74 A.D.3d 1256, 1259, 904 N.Y.S.2d 736, 739 (2d Dept. 2010) ("a party seeking to acquire a right by prescription need not demonstrate that use of the property was exclusive."). This is important, since plaintiffs cannot make such a showing.[3]

Plaintiffs also cannot establish, by clear and convincing evidence, *CSC Acquisition-NY, Inc. v. 404 Cty. Rd. 39A, Inc.*, 96 A.D.3d 986, 987, 947 N.Y.S.2d 556, 558 (2d Dept. 2012), that their use of the area was continuous and uninterrupted. This is

---

[2] "[P]ermission can be inferred where, as here, the relationship between the parties is one of neighborly cooperation and accommodation and, in such case, the presumption of hostility does not arise. In fact, where permission can be implied from the beginning, no adverse use may arise until the owner of the servient tenement is made aware of the assertion of a hostile right." *Allen v. Mastrianni*, 2 A.D.3d 1023, 1024, 768 N.Y.S.2d 523, 525 (3d Dept. 2003). In this action, the nonparties state that the Fire Company always allowed the neighbors to access the area as a "neighborly accommodation."

[3] Although plaintiffs need not prove exclusivity on their affirmative case, they do if they are to rebut a showing of permissiveness. The Second Department has explained that "the presumption of hostility is inapplicable when the use by the claimant is not exclusive. In this regard, exclusivity is not established where a claimant's use is in connection with the use of the owner and the general public." *Colin Realty Co., LLC v. Manhasset Pizza, LLC*, 137 A.D.3d 838, 840, 26 N.Y.S.3d 606, 608 (2d Dept. 2016).

because the Fire Company at all relevant times controlled the area, blocking it at will when it suited its purposes. According to plaintiffs themselves, the Fire Company never asked their permission – or even notified them – before blocking access. Nor did plaintiffs ever contact the Fire Company to register a complaint when the Fire Company blocked the area. This demonstrates that plaintiffs never had control over the area, let alone continuous and uninterrupted control. *See generally J.C. Tarr, Q.P.R.T. v. Delsener*, 19 A.D.3d 548, 551, 800 N.Y.S.2d 177, 179 (2d Dept. 2005).

Moreover, even if plaintiffs had met their onerous burden, defendant demonstrated, by its non-party witnessses, that the Fire Company allowed all of the neighbors to access the area when it was not using it for Fire Company, or community, purposes. Although there is a presumption of hostility "once the other elements of the claim are established," the "presumption does not arise, however, when the parties' relationship was one of neighborly cooperation or accommodation." *Ward v. Murariu Bros.*, 100 A.D.3d 1084, 1085, 952 N.Y.S.2d 850, 851 (3d Dept. 2012). *See also 315 Main St. Poughkeepsie, LLC v. WA 319 Main, LLC*, 62 A.D.3d 690, 691, 878 N.Y.S.2d 193, 194 (2d Dept. 2009) ("the defendant established as a matter of law that the plaintiff's use of the purported easement was permitted as a matter of willing accord and neighborly accommodation.").

Accordingly, the Court finds that plaintiffs have not established a prescriptive easement over defendant's property during the time that it was owned by the Fire Company. The complaint is dismissed in its entirety. All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
August 9, 2021

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Cuddy + Feder LLP
Attorneys for Plaintiffs
445 Hamilton Ave., 14th Fl.
White Plains, NY 10601

Dorf & Nelson LLP
Attorneys for Defendant
555 Theodore Fremd Ave.
Rye, NY 10580