[* 1]

SHORT FORM ORDER

INDEX No. 09-47371

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 1-19-10
ADJ. DATE 5-12-10
Mot. Seq. # 001 - MotD
002 - XMD

ANTOINETTE GENTILE and CARLOTTA ROSSINI, Plaintiffs, - against - JOSEPH LIEB, ESQ. and 61 BAY WALK, LLC, Defendants.	BARBARA M. WELTSEK, ESQ., LLP Attorney for Plaintiffs 55 Jesse Way Mount Sinai, New York 11766 JOSEPH LIEB ASSOCIATES Attorney for Defendants 42 Academy Street, P.O. Box 1039 Patchogue, New York 11772

Upon the following papers numbered 1 to 26 read on this Order to show cause and cross petition and supporting papers (001) 1 - 12; Notice of Cross-Petition and supporting papers (002) 13-20 ; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers___; Other 21-26-defendant's answer and annexed exhibit ; (and after hearing counsel in support and opposed to the motion on January 6, 2010) it is,

ORDERED that this motion (001) by the plaintiffs, Antoinette Gentile and Carlotta Rossini, for an order pursuant to CPLR §6301 enjoining and restraining the defendants from erecting or maintaining a fence on the plaintiffs' property is granted enjoining and restraining the defendants from maintaining that portion of the fence which encroaches upon the triangular section of the plaintiffs' property and the defendants are directed to remove the same within 45 days of the date of this order; for further order quieting title to the plaintiffs' property is granted to the extent that pursuant to Real Property Actions and Proceedings Law Article 15 (hereinafter RPAPL) the defendants do not have a basis upon which to claim adverse possession of the disputed section of the plaintiffs' property as a matter of law; and for a determination that the placement of that part of the subject fence on the plaintiffs' property constitutes a continuing trespass is granted, and declaring the defendants' acts a nuisance is denied; and it is further

ORDERED that the plaintiffs are directed to serve a copy of this order with notice of entry upon all parties and the Clerk of the Calendar Department of this Court within 30 days of the date of this order, and the Clerk is directed to schedule this case for a trial on the issue of continuing nuisance and for a determination of damages for continuing trespass commencing 3 years prior to the date of commencement of this action and continuing until removal of the subject fence; and it is further

ORDERED that the cross-motion (002) by the defendants declaring that they have good title to the subject premises; that the plaintiffs be barred from all claims to an estate or interest in the premises west of the boundary line of 61 Bay Walk, Fire Island Pines, New York and that the defendants be declared to be the sole owners and in complete possession of the disputed premises and remain in possession thereof has been rendered academic based upon the determinations in motion (001) and is denied as moot.

The plaintiffs' complaint, dated November 29, 2009, alleges they are the owners of real property located at 60 Bay Walk, Fire Island Pines, New York (hereinafter 61 Bay Walk) as joint tenants with rights of survivorship. They acquired the property by deed, dated June 9, 1988. In the deed the plaintiffs' property is designated as lots 60A, 60B, 60C on Map #1901 with abstract #1976 filed on April 29, 1952 in the Suffolk County Clerk's Office known as Picketty Ruff Section of Fire Island Pines. In and around 2006, the defendants, owners of the adjacent property located at 61 Bay Walk, Fire Island Pines, New York (hereinafter 61 Bay Walk) erected a green-wire deer fence extending from the north point on the bulkhead continuing landward to the south on the plaintiffs' property, which fence encroached on the plaintiffs' property after the ground monument, then continued north and terminated more than 3 feet into the property at the bulkhead, constituting a triangular encroachment. The fence runs approximately 105.6 feet north to south-east. The plaintiffs contend that they never gave permission to the defendants to encroach on their property and that the defendants are depriving the plaintiffs of their right to exclusive possession of the property. The plaintiffs further assert that there are 2 covenants running with the land. The first covenant, created by the Town of Brookhaven (hereinafter Town), established a mandatory buffer zone south of the bulkhead line landward to where the property met the Great South Bay and expressly proscribes fencing in the buffer zone and states other restrictions as detailed in the Town Environmental Protection Agency Code. The second covenant, imposed by the State Department of Environmental Protection, (hereinafter DEP), created a mandatory 20 feet buffer zone south of the bulkhead line landward where the property met the Great South Bay and proscribes fencing in the buffer zone and other restrictions detailed by the DEP. The plaintiffs claim they are exposed to criminal and civil sanctions because of the defendants' encroachment upon their property as the encroachment is in violation of both covenants.

In their answer, the defendants admit that a fence currently exists between 60 Bay Walk and 61 Bay Walk and claim that on October 23, 1995, Joseph Lieb (hereinafter Lieb) and Melvin Goodman (hereinafter Goodman) purchased the property located at 61 Bay Walk adjacent to the plaintiffs' property from Jon R. Wilner (hereinafter Wilner). The deed of conveyance was recorded on October 27, 1995 in the Suffolk County Clerk's Office for property designated as lots 61A, 61B, and 61C. On or about March 18, 1997, Goodman transferred ownership of the property to Lieb and the deed was recorded in the Suffolk County Clerk's Office on March 27, 1997. On or about February 26, 2009 Lieb transferred ownership to 61 Bay Walk LLC and that deed was recorded in the Suffolk County Clerk's Office on March 17, 2009. Lieb is the sole member of the 61 Bay Walk LLC.

From the time of the October 23, 1995 purchase, Lieb recollects that a fence or enclosure had been erected openly, continuously, and actually along the westerly line of 61 Bay Walk in between 60 and 61 Bay Walk. The defendants believe they own the area enclosed by the fence that includes a portion of the bulkhead safeguarding that portion of the property. They claim that they had performed bulkheading repairs through the years to 61 Bay Walk. The defendants assert that the plaintiffs have failed to establish the issuance of any violation from the Town and/or the State Department of Environmental Conservation (hereinafter DEC) arising from the location and existence of the subject fence and thus the plaintiffs are not entitled to the injunctive relief they seek. The defendants further contend that the fence was erected more than 2 years prior to the filing of the present action and the right of action is therefore released under RPAPL §2001.

The defendants have also asserted a counterclaim pursuant to RPAPL Article 15 to compel the determination of claims to the real property at issue because it has been more than 14 years since the defendants and their predecessors, Lieb and Goodman, had enclosed the protected area east of the subject fence and thus have acquired title to it by adverse possession under RPAPL §501 and that no action was commenced pursuant to CPLR §212 within 10 years after the fence was established.

ADVERSE POSSESSION and STATUTE OF LIMITATIONS

An effective claim of adverse possession has 5 elements: (1) the possession must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. Since New York law has long disfavored the acquisition of title by adverse possession, those elements must be established by clear and convincing evidence (***Kimber Mfg., Inc. v Hanzus et al,*** 56 AD3d 615, 868 NYS2d 94 [2nd Dept 2008]; see also RPAPL §501). In order to acquire title to real property by adverse possession, common law requires the possessor to establish that the character of the possession is hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years (***Ray et al v Beacon Hudson Montain Corporation et al,*** 88 NY2d 154, 643 NYS2d 939 [1996]; see also, ***Gourdine v Village of Ossining et al,*** 72 AD3d 643, 897 NYS2d 647 [2nd Dept 2010]). By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner. Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors (***Hall et al v Sinclaire et al***, supra).

Hostile possession does not require a showing of enmity or specific acts of hostility. All that is required is a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights. Consequently, hostility may be found even though the possession occurs inadvertently or by mistake (***Hall et al v Sinclaire et al,*** 35 AD3d 550, 826 NYS2d 706 [2nd Dept 2006]).

Since adverse possession is a means of cutting off legal claims to title, it has historically been strictly applied and all constituent elements must be proven, with the burden resting on the adverse claimant, with the adverse possessor's acts construed against him, and every inference construed in favor of the title of the true owner. ***Joseph v Whitcombe et al,*** 279 AD2d 122, 719 NYS2d 44 [1st Dept 2001].

The defendants have not proven all the constituent elements for adverse possession and therefore they are not entitled, as a matter of law, to a determination that they have obtained title to the disputed property by adverse possession and that their possession of the disputed property is superior to the title of the true owner.

2008 Amendments to RPAPL

In 2008, the State Legislature enacted sweeping changes to those RPAPL provisions that govern circumstances under which title to real property may be acquired by adverse possession,

reversing the ruling of the Court of Appeals in ***Walling v Przysbylo,*** 7 NY3d 228, 818 NYS2d 816 [2006], wherein the Court ruled that the Wallings had acquired title to a strip of land belonging to their neighbors, the Przybylos, by treating the property as their own for the requisite 10 year period, despite the Wallings admitted knowledge of the Przybylos' record ownership of the disputed strip of land.

RPAPL §543, as amended, became effective on July 8, 2008 and applies to cases filed on or after that date, and provides in pertinent part that "1. Notwithstanding any other provision of this article, the existence of de minimus [de minimis] non-structural encroachments, including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse." It further provides, "2. Notwithstanding any other provision of this article, the acts of lawn moving or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse."

RPAPL §522 provides that the act shall take effect immediately, and shall apply to claims filed on or after such effective date. Pursuant to RPAPL §522, "For the purpose of adverse possession not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others: 1. Where there have been acts sufficiently open to put a reasonably diligent owner on notice. 2. Where it has been protected by a substantial enclosure ...", except as provided in RPAPL §543.

There has been debate concerning whether RPAPL §543 should be applied to every case filed after July 8, 2008 because, in some instances, the property right acquired by adverse possession may have vested or ripened prior to that July 8, 2008 date. While the law is evolving, the Court notes that the Appellate Division of the Supreme Court, 4th Department, has declined to apply the statute as amended to cases wherein the property right vested prior to the date of amendment (see, ***Franza v Olin,*** 73 AD3d 44, 897 NYS2d 804 [4th Dept 2010).

In ***Asher v Borenstein, et al,*** 2010 NY Slip Op, 2010 NY App Div Lexis 6723 [Supreme Court of New York, Appellate Division, 2nd Dept], the Court determined that because the action to quiet title was commenced prior to July 7, 2008, those amendments were not applicable to the action and the action was decided based upon the law as it existed prior to July 7, 2008. The instant action was commenced in 2009, after the enactment of the amendments, and therefore, this Court will determine this action pursuant to the law as amended.

Covenants

On June 13, 1986, a Declaration of Covenant (as attached as Exhibit D to movant's papers) was entered into between Declarants Marvin Gilston and Barbara Gilston, and Carlotta Rossini and Antointette Gentile, Laura Eastman, Armand Dpaiger and Mario DeMartini, Garvin Mecking, and the Fire Island Pines Property Owners' Association, Inc.. The aforementioned Declarants were the owners of real property, and filed the application with the Town for approval of a Wetlands Permit for the properties, wherein the Town imposed certain covenants upon the real properties owned by these Declarants. The properties were held subject to the following covenant: "1. A buffer zone shall be established where no disturbance to the soil or vegetation shall occur, subject to the property owners' riparian rights of access to the Great South Bay,

which buffer zone shall be established north of a line that is drawn ten (10') feet south (landward) of the bulkhead line. This covenant shall not create or countenance any public easement in said buffer zone. This covenant shall run with the land subject to the right of the Declarants and their successors and assignees with the consent of the Town to amend, annul or repeal the foregoing covenant at any time."

A Declaration of Covenants was made on December 18, 1989, by Declarants Carlotta Rossini and Antoinette Gentile, (hereinafter Plaintiffs/Declarants), on an application for approval of a Wetlands Permit upon the property wherein the State and the Plaintiffs/Declarants deemed it advisable for the best interest of the State to impose certain covenants upon the Plaintiffs/ Declarant's real property which was held subject to the following covenant: "1. No structures will be constructed in the area 20' landward of the existing bulkhead except for catwalks or boardwalks. The official tidal wetland boundary shall be established in said covenant as 20' landward of the existing bulkhead. Any regulated activity within 300' of said tidal wetland boundary shall require approval by the ... Department of Environmental Control. This covenant shall run with the land subject to the right of the Declarants and their successors and assigns, with the consent of the .... Department of Environmental Conservation to amend, annul or repeal the foregoing covenants at any time."

Substantial Enclosure and Improvements

The 20 feet landward from the subject bulkhead which the defendants claim by adverse possession is subject to the covenants prohibiting any structures from being constructed on that area, except for catwalks or boardwalks, and for 10 feet area landward not obstructing the Declarants' riparian rights of access. A 6 feet high deer fence is not included in the permissible structures provided by the aforementioned covenants and obstructs the Declarants riparian rights of access 10 feet landward of the bulkhead. The defendants have not submitted approval obtained from, or permits issued by, the DEC or the Town for the construction of such prohibited fence on the subject property encumbered by the aforementioned covenants. Because that 20 feet landward area is not to be encumbered by fencing, as a matter of law, the defendants could not lawfully obtain by adverse possession that 20 feet area landward of the bulkhead because the property which the defendants seek to possess adversely is fenced in contravention of the lawful covenants entered into between the Declarants and the Town and the State.

In ***O'Hara v Wallace,*** 83 Misc2d 383, 371 NYS2d 570 [Supreme Court of New York, Special Term, Suffolk County 1975], the Court stated "The doctrine of adverse possession, which in essence permits a person to take someone else's private property for his own use is rationalized by a number of judicially created fictions stated as presumptions. Two such presumptions, each vital to the establishment of adverse possession, do not exist when the right sought to be appropriated is an easement created by reference to a filed map." The Court continued, "Ordinarily, possession accompanied by the usual acts of ownership is presumed to be adverse until shown to be subservient to the title of another .... an easement created by reference to a filed map can be extinguished only by the united action of all lot owners for whose benefit the easement is created. In mapped street cases, the possession can only become adverse when the occupier proves that his affirmative acts of possessory ownership were known to all of the lot owners at times when each has occasion to assert a right to the use of the

servient tenement.... Plaintiffs' easement survives and it is a property right which equity can protect by injunction to the extent that the encroachments maintained by defendant interfere with the use of the right of way for pedestrian travel."

Here, the filed covenants run to the benefit of the Plaintiffs/Declarants and the Town and in the best interests of the State, respectively, wherein no structures, other than those set forth by the covenants would be permitted. The covenants further provided for no obstructions to the riparian rights of access 10 feet landward of the bulkhead. Construction of the fence and obstruction of access to riparian rights of all the Declarants of the covenants by virtue of the construction of the fence is in violation of the respective covenants. As the covenants run to the best interest of the State and to the benefit of the Town, it follows that the State and Town have an interest in the land and benefits bestowed by the covenants, and the land is thus servient to the covenants. While no case on point can be found with regard to covenants such as these, a municipality cannot lose title to real property by adverse possession when it holds the property in its governmental capacity (***Ammirati et al v Van Wicklen et al,*** 16 Misc3d 952, 839 NYS2d 685 [Supreme Court of New York, Nassau County 2007]; see also, ***Monthie et al v Boyle Road Associates, LLC,*** 281 AD2d 15, 724 NYS2d 178 [2nd Dept 2001]). Accordingly, the benefit and best interests secured by the covenants inure to the rights of the respective municipalities in their governmental capacities and cannot be lost by adverse possession of the land which is servient to the covenants. Therefore, the defendants cannot adversely possess this property right in the 20 feet section of disputed land whose benefits inure to the State and the Town. The defendants had no legal right to construct a fence on that section of disputed land.

Without the prohibited 20 feet section of fencing, it cannot be said that the property which the defendants seek to adversely possess was substantially enclosed. Whether this action is determined pursuant to RPAPL §543 and §522, or the law as it existed prior to the 2008 RPAPL amendments, the defendants have not substantially enclosed the area due to the lawful restrictions imposed by the aforementioned covenants. By not being able to lawfully enclose the 20 feet of landward property, the defendants have not protected the disputed property with an enclosure.

In ***United Pickle Products, Corp. v Prayer Temple Community Church,*** 43 AD3d 307, 843 NYS2d 1 [1st Dept 2007], the Court determined that a disputed parcel was protected by a substantial enclosure in that, inter alia, it was accessible only from the owner's property. In ***Morris v DeSantis,*** 178 AD2d 515, 577 NYS2d 440 [2nd Dept 1991], the Court held that when the possessor relies on substantial enclosure, only the area within the enclosure can be adversely possessed, and if the possessor relied on the usual cultivation or improvement element, no enclosure is needed. In the instant action, the defendants have asserted that the fence extended to the bulkhead. Pursuant to the 1989 covenant between the Plaintiffs/ Declarants and the State, the bulkhead existed in 1989 and therefore the defendants did not erect the bulkhead as an enclosure to adversely possess the subject portion of land. Therefore, the property which the defendants seek to adversely possess was not substantially enclosed. Access to it could be obtained across the pre-existing bulkhead and via the protected buffer zone as defined by the covenants which proscribed obstruction to the right of riparian access and which proscribed any structures from being built upon the 20 feet landward property pursuant to the covenants running with the land.

A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel is either usually cultivated or improved (RPAPL §522(1)) or protected by a substantial enclosure (***Hall et al v Sinclaire et al***, supra). As the Court noted in ***RSVL, Inc. and Oyster Bay Pump Works, Inc. v Portillo et al,*** 16 Misc3d 1137A, 851 NYS2d 61 [Supreme Court of New York, Nassau County 2007]);

> "A party asserting adverse possession by way of usual cultivation or improvement must show that, during the entire 10 year period, more was done than merely taking reasonable steps to keep the site presentable, as opposed to openly altering the landscape. Substantial and obvious alteration is required. Limited activities such as cutting the grass, raking, clearing the debris, and even planting or removing a few trees are thus insufficient .... Even the placement of a structure, such as a garage, is not enough to establish hostile possession by improvement if that structure is mainly on the claiming party's land and the encroachment on the disputed property is slight.
>
> Similarly, the mere presence of a fence is insufficient. There must be a showing that it was a substantial barrier erected by the party claiming adverse possession, without the consent of the owner; a fence erected by or with the consent of the owner, or its predecessor in title, cannot be utilized by the adverse possessor, because its presence can never serve as an indication of conduct or possession openly hostile to the owner's rights"

Pursuant to RPAPL §522, for adverse possession not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied where there have been acts sufficiently open to put a reasonably diligent owner on notice and where it has been protected by a substantial enclosure.

Pursuant to RPAPL §543, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse and the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse. In ***Seisser et al v Eglin,*** 7 AD3d 505, 776 NYS2d 314 [2nd Dept 2004]), the plaintiffs claimed adverse possession of a disputed parcel of land along the western boundary of their parcel which disputed parcel was in the title of their neighbor. The disputed parcel contained an old wire fence that ran parallel to the plaintiffs' deed boundary. The disputed parcel also contained a wooded area. At the tree line was a mowed lawn which the plaintiffs contend was maintained by them and their predecessors in title. The Court determined that the plaintiffs failed to present any evidence that the wooded area was cultivated or improved or protected by a substantial enclosure as required under RPAPL §522, citing ***VanValkenburgh v Lutz,*** 304 NY 95; ***Mayvill v Webb***, 267 AD2d 711; ***Simpson v Chien Yuan Kao***, 222 AD2d 666.

In the ***Manhattan School of Music et al v Solow***, 175 AD2d 106, 571 NYS2d 958 [2nd Dept 1001], the appellees had commenced an action for ejectment in January 1983 to compel the appellant to remove certain structures which encroached on their property, including a

stockade fence, a wire fence, an outdoor shower, and a wooden stairway, and further sought damages for trespass. Summary judgment was granted to the appellees and affirmed on appeal as the Supreme Court, Appellate Division, 2nd Department, stated that the appellant failed to present sufficient proof of cultivation and improvement of the property at issue, as it remained a dense grove of pine trees. The appellants made nonspecific allegations as to their purported cultivation and improvement of the disputed property which were insufficient to defeat the motion. (see, also, ***Sawyer et al v Prusky et al,*** 71 AD3d 1325, 896 NYS2d 536 [3rd Dept 2010]). The pictures submitted in the instant action show that there is a wooded area consisting of pine trees between the two properties along the fence. The defendants have not submitted any evidentiary proof to demonstrate that the disputed parcel containing pine trees was in any way cultivated or improved. Additionally, the bulkhead was existing at the time the defendants purchased their property, so they did not improve or enclose the area with a bulkhead. Accordingly, the defendants have failed to meet their burden by the submission of clear and convincing evidence that the disputed parcel was cultivated or improved with anything other than a fence.

The plaintiffs have submitted the affidavit of John C. Mayer, L.S. (Land Surveyor), (hereinafter Mayer), dated November 12, 2009, wherein Mayer states that the contents of his letter, dated July 23, 2009, to the co-plaintiff Anne Gentile are true and accurate. In the letter he advised her that on July 20, 2009 he set two nails with fluorescent orange ribbons in the bulkhead where the east and west property lines intersected said bulkhead. He also recovered two concrete monuments on the east property line-one at the intersection with the northerly line of Bay Walk and the second, 105 feet north of the first monument. There was a 6 feet deer fence running along the east property line (dividing line between filed map Lot 60C and 61A). The posts for this fence ran along the property line between the two monuments. However, north of the second monument, the fence gradually encroached onto the plaintiffs' property until it reached the bulkhead. At that point it was encroaching more than 3 feet onto the plaintiffs' property.

The plaintiffs have also submitted a copy of the survey by Jay C. Rowlinson, L.S. (hereinafter Rowlinson), dated April 24, 1990, which does not indicate a fence on the plaintiffs' property.

The plaintiffs have further submitted affidavits of Bob Howard (hereinafter Howard) and Wilner. In his affidavit, dated November 23, 2009, Howard avers that he was one of the owners of real property located at 61 Bay Walk and that on October 23, 1995, he and Wilner sold the property to Lieb, and at that time, there was no fence on the property of any nature to the west of the property.

Wilner, in his affidavit, dated November 19, 2009, avers that he was one of the owners of real property located at 61 Bay Walk and that, on October 23, 1995, he and Howard sold the property to Lieb and, at the time, there was no fence on the property of any nature to the west of the property.

The defendants have submitted a copy of a survey done by the Norton Brothers Dunn firm, dated September 25, 2003, which indicates the location of the disputed property and the

subject fence, which fence is shown to be located to the west of the defendants' property and on the plaintiffs' property from the corner of their building. When compared with the survey by Rowlinson, dated April 24, 1990, submitted by the plaintiffs, the Rowlinson survey indicates the common boundary "S.07degrees-59'-40" " with monuments located at the northern and southern points of that measurement. The defendants have submitted no survey conducted prior to this September 25, 2003 survey which demonstrates a fence on either the plaintiffs' property or their own.

The defendants have also submitted, inter alia, the affidavit of James Blumenthal (hereinafter Blumenthal), their landscaper, dated January 12, 2010, who recalled that a fence existed along 61 Bay Walk's western boundary where he repaired the existing metal deer fence in either 1995 or 1996 by replacing rotted posts with new posts in the same positions in which they had been previously located. Blumenthal further stated that the metal deer fence, which was lying on the ground, was reattached to the new posts from a cement marker in the southwest area of the property to the north to the demarcation in the bulkheading between properties in the northwest area of the property and that since then he has made a number of repairs to the fence.

Blumenthal's affidavit is conclusory and unsupported by any admissible evidence to demonstrate when he actually installed the fence, when he made repairs to the fence, and the nature of the repairs he allegedly made. It has been established that a straight section of green metal deer fence, 105.6 feet long, was erected by the defendants along the property line as shown by the defendants' survey. However, no survey has been submitted to demonstrate the location of the original fencing claimed by the defendants as having been in place at the time that Lieb and Goodman purchased their property on October 23, 1995. The previous owners have submitted affidavits in which they aver that when they sold the property to Lieb and Goodman that there was no fence on the property of any nature to the west of the property. Blumenthal avers that there were old fence posts and fencing lying on the ground, which he replaced.

The plaintiffs aver that, in July 2007, Blumenthal allegedly asked permission to construct a fence connecting the south-east portion of their building to the south-west portion of the defendants' building and that permission was refused. Thereafter, Lieb erected a green-wire deer fence extending from the north-west point on the bulkhead continuing landward to the south-west limit of his building. In July 2009, Mayer, the plaintiffs' surveyor, advised them that the deer fence was actually on the plaintiffs' property. On July 22, 2009, the plaintiffs asked Lieb to remove the fence and he agreed to do so, but then thereafter he allegedly refused to do so.

There are factual and credibility issues concerning when the fence was actually installed. However, these factual issues do not preclude this Court from making its determinations with regard to the defendants' arguments concerning adverse possession and the applicable statute of limitations. This Court has already determined that the fence was prohibited as a matter of law, that the defendants presented no evidence to demonstrate that permission or permits were obtained to construct the subject fence on the area subject to and protected by the covenants, that the bulkhead preexisted the defendants' purchase of their property, that the defendants did not substantially enclose the disputed property and that the fence and repairs to the fence were de minimis. Therefore, adverse possession was not, and could not be, established as a matter of law and the statute of limitations for adverse possession need not be considered.

Accordingly, motion (002) is denied in its entirety.

NUISANCE AND TRESPASS and STATUTE OF LIMITATIONS

Alleged acts of continuing nuisance and continuing trespass give rise to successive causes of action under the continuous wrong doctrine (***Lucchesi ,et al v Perfetto, et al,*** 72 AD3d 909, 899 NYS2d 341 [2nd Dept 2010]; ***Hale v Burns et al,*** 101 AD2d 101; 91 NYS2d 929 2nd Dept 1905]). An unlawful encroachment has been consistently characterized as a continuous trespass giving rise to successive causes of action, and the statute of limitations only bars recovery of damages occurring more than 3 years prior to commencement of the action. (***Bloomingdales, Inc v The New York City Transit Authority, et al,*** 52 AD3d 120, 859 NYS2d 22 [2nd Dept 2008]). Actions sounding in trespass and to recover damages for injury to property must be commenced within 3 years of accrual, CPLR §214(4).

The plaintiffs claim that the fence is still encroaching upon their property and the defendants claim that it has been continuously there since 1995 or 1996. Those causes of action premised upon theories of continuing trespass and nuisance prior to the 3 year period preceding the commencement of the instant action are time barred and are dismissed as a matter of law.

The essence of trespass is the invasion of a person's interest in the exclusive possession of land, and a person who enters upon the land of another without permission, whether innocently or by mistake, is a trespasser. See, ***Fells v Schneider,*** 2009 Slip Op 33130U, 2009 Misc Lexis 6488 [Supreme Court of New York, Nassau County 2009]). Based upon the evidentiary submissions by both sides, the plaintiffs have demonstrated that the defendants' fence trespasses onto the disputed portion of the plaintiffs' property and that the plaintiffs did not give permission to the defendants to place the fence at its given location. Whether the defendants initially intended to or innocently and mistakenly placed the fence on that disputed portion of the plaintiffs' property, the fence constitutes a trespass.

Accordingly, that part of motion (001) which seeks determination as a matter of law that the defendants' fence on the section of the plaintiffs' property constitutes a continuing trespass is granted, and damages will to be assessed at a hearing to be scheduled.

The elements for a cause of action for a private nuisance are: (1) an interference, substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with a plaintiffs' right to use and enjoy land; (5) caused by the defendant's conduct (***Eng et al v Shimon et al,*** 12 Misc3d 1174A, 820 NYS2d 842 [Supreme Court of New York, Queens County 2006]). To recover damages based upon the tort of private nuisance, a plaintiff must establish an interference with the use or enjoyment of land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct. Things merely disagreeable, however, which simply displease the eye, no matter how irritating or unpleasant, are not nuisances (see, generally, ***Fells v Schneider,*** *supra*; see also, ***Doin et al v Champlain Bluffs Development Corporation et al,*** 68 AD3d 1605, 894 NYS2d 169 [3rd Dept 2009]). The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of

land and the freedom from annoyance. Not every annoyance will constitute a nuisance. Nuisance imports a continuous invasion of rights-a pattern of continuity or recurrence of objectionable conduct (***Domen Holding Co. v Aranovich et al,*** 1 NY3d 117, 769 NYS2d 785 2003). A private nuisance claim arises from interference with use and enjoyment of land amounting to an injury in relation to a right of ownership in that land. One standard for measuring the degree of damage in this area is definite offensiveness, inconvenience or annoyance to the normal person in the community where the customs of the community are to be taken into account (see, ***Turner v Coppola, et al,*** 102 Misc2d 1043, 424 NYS2d 864 [Supreme Court of New York, Nassau County 1980]. Moreover, there must be an allegation that the acts complained of were calculated or done with a malicious intent to injure the plaintiffs (***Anderson et al v Elliott, et al*** 24 AD3d 400, 807 NYS2d 101 [2nd Dept 2005]).

Here the plaintiffs claim that the subject fence encroaches upon their property, that they have not given permission to the defendants to maintain the fence in its current location and that the defendants are depriving the plaintiffs of their right to exclusive possession of their property through the placement of the fence. However, there are factual issues concerning the degree and extent that the plaintiffs have been deprived of the use and enjoyment of their property and whether such deprivation was substantial, an obstruction of riparian access, and whether or not the defendants installed the fence with malicious intent or calculation to injure the plaintiffs.

Accordingly, that part of motion for a determination that the maintenance of the fence on the plaintiffs' property is a nuisance is denied.

PRELIMINARY INJUNCTION

To obtain a preliminary injunction, a party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury if provisional relief is withheld; and (3) a weight of the equities in its favor (***Ricca, etc, et al v Ouzounian, etc, et al,*** 51 AD3d 997, 859 NYS2d 238 [2nd Dept 2008]; see also, CPLR 6301; ***Haverland v Lawrence et al,*** 6 Misc3d 1026A, 800 NYS2d 347 [Supreme Court of New York, Suffolk County 2004]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. Likelihood of success need only be shown from the evidence presented. Conclusive proof is not required. Thus even where there are facts in dispute, the Court may, in its discretion, order such relief pendente lite to maintain the status quo (see, generally, ***Snyder v Crown Wisteria, Inc, et al,*** 2009 NY Slip Op 32638U, 2009 NY Misc Lexis 5205 [Supreme Court of New York, New York County 2009].

The plaintiffs have not demonstrated irreparable harm (see, generally, ***Toscano et al v Toscanso et al,*** 2003 NY Slip Op 51284U, 2003 NY Misc Lexis 1218 [Supreme Court of New York, Suffolk County 2003]). However, if a trespass is of a continuous or constantly recurring nature, a proper case for the granting of an injunctive relief may be shown (***Jensen et al v General Electric Company et al,*** 82 NY2d 77, 603 NYS2d 420 [1993]). Given the facts of this action, the Court, in its discretion, finds that the need for pendent lite relief has been established to maintain the status quo.

Accordingly, that part of the plaintiffs' application (001) for a preliminary injunction is granted as a mandatory injunction enjoining and restraining the defendants from maintaining that

portion of the fence which encroaches upon the triangular section of the plaintiffs' property and the defendants are mandated to remove the same within 45 days of the date of this order.

Dated: November 10, 2010

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**