At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of October, 2008

P R E S E N T:

HON. LAURA LEE JACOBSON,
Justice.

----------X

ANTONY CHOU & MING CHOU,

Plaintiffs,

- against - Index No. 30893/06

HASAN OZCAN,
Defendant.

----------X

HASAN OZCAN,
Third-Party Defendant,

-against- Index No. 75211/08

SUTTON LAND SERVICES, LLC AND FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Third-Party Defendants,

----------X

SUTTON LAND SERVICES, LLC AND FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Fourth-Party Plaintiffs,

-against- Index No. 75608/08

JOSEPH NICOLETTI ASSOCIATES, PROFESSIONAL LAND SURVEYORS, P.C.,

Fourth-Party Defendants,

----------X

The following papers numbered 1 to 28 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-17
Opposing Affidavits (Affirmations)	18-21
Reply Affidavits (Affirmations)	22-28
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiffs Antony Chou & Ming Chou (plaintiffs) move, pursuant to CPLR 3212, for summary judgment against defendant Hasan Ozcan (Ozcan). Ozcan cross-moves for summary judgment under his third-party complaint against third-party defendants Sutton Land Services, LLC (Sutton) and Fidelity National Title Insurance Company (Fidelity). Sutton and Fidelity cross-move for summary judgment dismissing Ozcan's third-party complaint. In a separate motion brought by order to show cause, Sutton and Fidelity move, pursuant to CPLR 3025, for an order granting them leave to amend their answer so as to assert an affirmative defense alleging that plaintiffs' underlying action is time-barred under RPAPL § 611 (2). In a separate cross-motion, Ozcan seeks leave to amend his answer to assert this same statute of limitations defense against plaintiffs. Ozcan further seeks leave to amend his third-party complaint so as to assert a cause of action for legal fees against Sutton and Fidelity.

Background Facts and Procedural History

Plaintiffs Antony and Ming Chou are brothers who own the premises located at 1652 E. 12th Street in Brooklyn, New York (plaintiffs' premises).[1] The premises itself is a semi-detached, two-story house that shares a side party wall with an abutting building located at 1650 E. 12th Street (defendant's premises). Prior to 2003, the roofs of these two buildings also shared a "joint," which attached the buildings' respective roofs along the abutting sides of the buildings. Thus, the roofs were constructed in such a way that they formed a mutually dependant water stoppage system that kept rain water from leaking into the buildings.

According to the sworn affidavit of plaintiff Antony Chou (hereinafter Chou), in or about July of 2003, he noticed that a construction crew was removing the existing roof from defendant's premises. When Chou questioned the-then owner of defendant's premises (i.e., Ozcan's predecessor) about this work, he was informed that a third-story was being added to defendant's premises and that all necessary construction permits had been obtained. Once the roof was removed, Chou noticed that a blue tarp was placed over defendant's premises at night which was removed when construction work was taking place during the day. According to Chou, he also observed "that the construction crew was constantly standing on my roof and that they placed heavy tools and other equipment on my roof."

---

[1] At all relevant times, Antony Chou has resided at plaintiffs' premises along with his wife and children. In addition, plaintiffs have rented the second floor of their premises to Antony Chou's in-laws.

Shortly after he noticed the tarp on the roof of defendant's premises, Chou was awakened during the night by the sound of running water. Chou determined that it was raining and that water was entering his premises from the roof along the party wall shared with defendant's premises. Chou then proceeded to defendant's premises and informed the then-owner about the leak, whereupon this owner proceeded to the roof of his premises and determined that the tarp had loosened. The tarp was then tied down again, which soon stopped the water from leaking into plaintiff's premises. The following day, the former owner of defendant's premises apologized for the leak and assured Chou that the tarp would be securely fastened during construction operations. However, despite these assurances, water leaked into plaintiff's residence on several more occasions during the fall of 2003 due to the tarp coming loose.

According to Chou, in November 2003, he noticed a strong odor of mold and mildew in his premises and realized that the constant water leaks had caused more severe damage than he first suspected. Thereafter, Chou contacted his homeowner's insurance carrier, which sent an inspector to his residence to assess the damages. When the inspector arrived at plaintiffs' residence, Chou accompanied him to the roof where they observed missing shingles and footprints left in a sealant which had been applied along the area where the two premises abutted. The inspector informed Chou that the construction workers had damaged his roof and that the improper materials had been used to join the area where plaintiffs' roof met the partially constructed third floor of defendant's premises and that the area was not

properly sealed. The inspector further told Chou that this was causing the water leaks in his premises. Ultimately, the insurance company issued Chou a $12,000 check in order to fix his roof and to repair the damage inside plaintiffs' premises caused by the leaks.

Subsequently, Chou used the $12,000 to have his roof re-shingled and re-sealed. Nevertheless, the next time it rained, water again leaked into plaintiffs' residence. Assuming that his new roof had been improperly sealed, Chou called the roofer back to his premises. However, after conducting tests, the roofer concluded that the water had to be entering through the party wall area, which was covered by the new third floor added to defendant's premises. The roofer further advised Chou that the new structure was encroaching onto plaintiffs' premises and the leak could not be fixed from plaintiffs' premises. When, in or around December 2003, Chou complained to the then-owner of defendant's premises about these issues, he was ignored.

Subsequently, Chou lodged numerous complaints with the New York City Department of Buildings (DOB) regarding the encroachment and water damage. However, when DOB inspectors appeared at defendant's residence to investigate the complaints, they were purportedly denied access to the building. According to Chou, on one occasion, a DOB inspector observed from inside the attic of plaintiffs' premises that part of the external wall of the new third floor of defendant's premises impermissibly contained pieces of wood, which qualified as a fire hazard.

On May 19, 2006, Ozcan purchased defendant's premises from its former owner for the sum of $890,000.00. At the time of purchase, Ozcan received a title insurance policy issued by Fidelity, with Sutton acting as Fidelity's agent. By summons and complaint dated October 10, 2006, plaintiffs commenced the instant action against Ozcan. The complaint alleges causes of action sounding in private nuisance, nuisance, and trespass based upon the alleged encroachment of the new third floor of defendant's premises and the resultant water damage sustained in plaintiffs' residence. The complaint also seeks a "declaratory judgment ordering [Ozcan] to remove and/or repair said nuisance, together with compensatory damages" and further seeks removal of the encroaching structure pursuant to RPAPL § 871. Finally, the complaint seeks an order granting plaintiffs access to defendant's premises for the limited purposes of remediating the water leaks and resurrecting fire walls. On March 16, 2007, Ozcan transferred title to defendant's premises (*i.e.*, 1650 East 12th Street, Brooklyn, NY) to Ozcan NY Management LLC (the LLC).

On or about January 14, 2008, plaintiffs filed the instant motion for summary judgment against Ozcan. While plaintiffs' motion was pending, Ozcan commenced a third-party action against Sutton and Fidelity seeking reimbursement for any judgment that might be rendered against him in plaintiffs' first party action based upon the title insurance policy issued by Fidelity. Specifically, the third-party complaint alleges that, in obtaining the title insurance, a survey of the defendant's premises was conducted by fourth-party defendant Joseph Nicoletti which failed to indicate any encroachment onto plaintiff's premise.

Thereafter, unbeknownst to Ozcan, Nicoletti conducted a second survey of defendant's premises which was forwarded to Sutton. However, Sutton never advised defendant of this second survey. Accordingly, Ozcan maintains that he proceeded to close on the sale of the premises unaware of the encroachment. As a result, the third-party complaint alleges that Sutton and Fidelity must indemnify Ozcan for any judgment rendered against him due to their failure to warn Ozcan of the encroachment onto plaintiffs' premises.

After Sutton and Fidelity answered the third-party complaint, Ozcan made the instant cross motion for summary judgment against Sutton and Fidelity in his third-party action. In opposition to Ozcan's motion, and support of its instant cross motion for summary judgment dismissing Ozcan's third-party action, Sutton and Fidelity alleged, among other things, that plaintiffs' first party action was time-barred under RPAPL 611 (2). Ozcan then submitted a reply affirmation which joined in Sutton and Fidelity's assertion that plaintiffs' action is time-barred. In response, plaintiffs submitted opposition papers which noted that neither Ozcan nor Sutton and Fidelity had affirmatively pleaded statute of limitations as an affirmative defense. On the July 15, 2008 return date for the motions, Ozcan and Sutton and Fidelity made applications for an adjournment so as to allow them to move for leave to amend their answers to assert statute of limitations defenses. The court denied these applications and advised the parties that any such motion would have to be brought by order

to show cause. Thereafter, Sutton and Fidelity and Ozcan filed the instant motions seeking leave to amend their respective answers.[2]

Plaintiffs' Summary Judgment Motion and the Motions to Amend

Plaintiffs move for summary judgment against Ozcan under their private nuisance and trespass causes of action. In addition, plaintiffs seek a declaratory judgment that the third floor addition encroaches onto plaintiffs' premises, a judgment ordering the removal of defendant's third floor addition, damages in the amount of $48,500 to pay for repairs to plaintiffs' premises, and compensatory damages in an amount to be determined at a hearing. In support of their motion for summary judgment, plaintiffs submit the aforementioned affidavit of Antony Chou which sets forth the factual background of the dispute which was recited by the court above. Plaintiffs also submit an expert affidavit by fourth-party defendant Joseph Nicoletti which indicates that his company was hired in April of 2006 to perform a survey of defendant's premises. According to Nicoletti, the initial survey performed by his company was inaccurate inasmuch as it indicated that the building abutting defendant's premises (i.e., plaintiffs' premises) was a three story brick and stucco building, when in fact, plaintiffs' premises is a two-story building with an attic. When this mistake was discovered, a corrected survey dated April 19, 2006 was prepared and thereafter

---

[2] Sutton and Fidelity also commenced a fourth-party action against Joseph Nicoletti Associates, Professional Land Surveyors, P.C., the surveyor which purportedly certified to Ozcan, Sutton and Fidelity that a survey of defendant's premises did not show any encroachment.

submitted to Sutton as an agent for Fidelity.[3] Nicoletti also avers that the newly constructed third story on defendant's premises was built onto and over the party wall and encroaches onto plaintiffs' premises.

Plaintiffs also submit an expert affidavit by John Ferrantello, a licensed land surveyor, in which he states that his company performed a survey of plaintiffs' property on March 23, 2007 which determined that the "third story addition to Defendant's Residence was built onto and over the party wall shared by the Residences and in fact encroaches onto Plaintiff's Residence by three inches along the party wall." Plaintiffs' papers contain a copy of this survey.

In addition, plaintiffs submit an expert affidavit by Sheldon Pulaski, a professional engineer who inspected plaintiffs' premises on April 6, 2007, and who also examined the engineering drawing for the construction of the additional level at defendant's premises. According to Pulaski, his inspection revealed that defendant's premises includes no water stops or flashing where plaintiffs' roof meets the newly constructed floor. As a result, water seeps into plaintiffs' premises. Pulaski further maintains that this water leakage has caused a dangerous build up of mold and fungus in plaintiffs' premises which presents a health risk and has caused significant damage to the walls and ceilings in plaintiffs' premises.[4]

---

[3] Sutton and Fidelity deny that they received a copy of the corrected survey.

[4] A copy of Pulaski's inspection report is annexed to plaintiffs' papers.

Plaintiffs also submit an expert affidavit by John Sullivan, a contractor who specializes in structural repair and waterproofing residential buildings. According to Sullivan, he inspected plaintiffs' premises on March 12, 2007 and prepared a proposal listing the work and materials that would be necessary to fix the water damage sustained at plaintiffs' premises. This proposal estimates the cost of this work would be $48,500. However, Sullivan states that no work should take place until the encroachment issue is resolved since plaintiffs' premises will be subject to continual leaks until such time as this underlying problem is corrected.

Finally, plaintiffs submit an expert affidavit by Peter Bacarella, a licensed real estate agent who works exclusively in Brooklyn and is knowledgeable about the real estate market in which the subject premises are located. According to Bacarella, the unsightly and readily observable encroachment, along with the structural damage caused by the encroachment, would make it extremely difficult to sell plaintiffs' premises. In fact, Bacarella avers that, to the extent that it can be sold at all, plaintiffs' premises would only find a purchaser at far less than market value.

According to plaintiffs, this evidence demonstrates that they are entitled to summary judgment under their private nuisance causes of action since there has been a clear demonstration that Ozcan has encroached upon their land and that this encroachment has resulted in plaintiffs' residence sustaining repeated and continuous water damage, a mold and fungus problem, a fire hazard, a loss of property value, and continued annoyance and

inconvenience for those residing at plaintiffs' premises. Plaintiffs also argue that the nuisance is both intentional and unreasonable inasmuch as Ozcan has been repeatedly made aware of the problem but has failed to take any actions to address the situation, and has actively sought to maintain the encroachment.

Plaintiffs further argue that their evidence establishes that they are entitled to summary judgment under their trespass claim since there has been an encroachment onto their land which interferes with their ability to use and enjoy their residence.

Lastly, plaintiffs maintain that they are entitled to injunctive relief removing the encroaching structure pursuant to RPAPL § 871. In this regard, plaintiffs note that this statute specifically allows for injunctions directing the removal of encroaching structures. Plaintiffs also argue that the equities clearly weigh in favor of granting this relief given the severe and continuing damages the encroachment has caused them to sustain. Furthermore, plaintiffs claim that they are likely to succeed on the merits inasmuch as Ozcan has no defense to their claims.

In his initial opposition to plaintiffs' summary judgment motion, Ozcan argues that plaintiffs are precluded from maintaining this action pursuant to the doctrine of latches. Specifically, Ozcan claims that plaintiffs inexcusably delayed bringing the instant lawsuit, which caused him unfair prejudice. In support of this argument, Ozcan notes that plaintiffs initially became aware of the encroachment and water leakage in July 2003 but unreasonably waited three years to commence this action. Ozcan further maintains that this delay worked

to his disadvantage inasmuch as he was an innocent purchaser of the defendant's premises and he would not have purchased this building had plaintiffs commenced their action in a timely manner (i.e., before he bought the premises in May, 2006). Ozcan also contends that the affidavits submitted by plaintiffs are insufficient to demonstrate that plaintiffs are entitled to summary judgment.

In their subsequent motions seeking leave to amend their answers, Ozcan and Sutton and Fidelity raise an additional argument in opposition to plaintiffs' summary judgment motion. In particular, these parties argue that plaintiffs' action is barred by the one-year statute of limitations imposed by RPAPL § 611 (2). According to Sutton and Fidelity and Ozcan, this statute sets a one-year statute of limitation where there is an encroachment of six inches or less upon plaintiff's property as a result of defendant's construction of the exterior wall of a building, and after the one year period, any claim based on the encroachment is time-barred and a prescriptive easement arises in favor of defendant. These parties further claim that RPAPL § 611 (2) is applicable here inasmuch as plaintiffs' action is based upon the erection of a third-story to defendant's premises which, according to plaintiffs' own expert, only encroaches upon plaintiffs' premises a distance of three inches. Moreover, Sutton and Fidelity, as well as Ozcan, maintain that the one-year statute of limitations has clearly expired inasmuch as plaintiffs' own allegations indicated that encroachment first took place in 2003. Finally, these movants argue that their respective motions to amend their answers cannot be denied based upon any purported undue prejudice that plaintiffs would

sustain. In this regard, Sutton and Fidelity and Ozcan note that plaintiffs were aware of facts which form the basis of their proposed amendment (i.e., that the encroachment was only three inches) since the inception of this action. In addition, these parties point out that no discovery has taken place in this case and that Sutton and Fidelity were only made parties to the action in April, 2008. Accordingly, Sutton and Fidelity and Ozcan aver that plaintiffs will not be prejudiced by the proposed amendment to their answers.

In response to the arguments raised against their summary judgment motion, and in opposition to Sutton and Fidelity and Ozcan's motions to amend their answers to assert a statute of limitations defense, plaintiffs raise several arguments. First, plaintiffs maintain that the doctrine of laches is inapplicable in this case. Specifically, plaintiffs note that the encroachment was open and obvious at the time Ozcan purchased defendant's premises and it was Ozcan's own lack of due diligence, and/or the negligence of his title company, which led to his lack of knowledge regarding the encroachment. In addition, plaintiffs argue that, inasmuch as the statute of limitations has not expired on their claims, it would be improper to apply the doctrine of laches. Furthermore, plaintiffs aver that Ozcan stepped into the shoes of the former-owner of defendant's premises and he cannot differentiate himself from the prior owner in order to defeat plaintiffs' claims.

Plaintiffs' also argue that their motion for summary judgment should not be denied based upon an RPAPL 611 (2) defense and that Sutton and Fidelity and Ozcan's motions to amend their answers to assert this defense should be denied. In this regard, plaintiffs aver

that the defense is patently lacking in merit inasmuch as RPAPL 611 (2) is inapplicable in this case. In support of this argument, plaintiffs note that by its express language, the statute only applies to circumstances involving external walls built by an abutting landowner to encroach upon a "strip of land." In contrast, the instant case involves the erection of a third story which encroaches three inches over a party wall and on top of plaintiffs' premises. In addition, plaintiffs contend that the crucial consideration in RPAPL § 611 (2) is whether the location of a boundary line between two properties has been changed as a result of a ground-level encroachment. Here, the encroachment does not change the practical location of the dividing boundary, namely the party wall separating the premises.

Plaintiffs also argue that even if RPAPL § 611 (2) did apply in this case, their action was still timely commenced. In particular, plaintiffs point out that the one-year statute of limitations only begins to run "after the completion of the erection of such wall." According to plaintiffs, DOB records indicate that a permit renewal application for the construction of the third-floor structure was filed on June 14, 2006, which demonstrates that the construction was still not completed less than one year prior to the commencement of this action in October, 2006.

Lastly, plaintiffs contend that the motions for leave to amend Ozcan and Sutton and Fidelity's answers should be denied because plaintiffs would be unduly prejudiced by the granting of such leave. Specifically, plaintiffs maintain that the encroachment has caused them to be subject to continuing damage in the form of floods and leaks. Were the court to

grant leave to amend her, plaintiffs argue that it will result in an undue delay and extend the time plaintiffs are required to live with the damaging encroachment.

"To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct" (*Kaplan v Incorporated Village of Lynbrook*, 12 AD3d 410, 412 [2004]; *see also Mangusi v Town of Mt. Pleasant*, 19 AD3d 656, 657 [2005]). At the same time, "the essence of trespass is the invasion of a person's interest in the exclusive possession of land" (*Zimmerman v Carmack*, 292 AD2d 601, 602 [2002]).

Here, plaintiffs have submitted sufficient evidence to make a prima facie showing of their entitlement to summary judgment under their private nuisance cause of action. In particular, Antony Chou's affidavit, along with the expert affidavits of Sheldon Pulaski, John Sullivan, and Peter Bacarella demonstrate that plaintiffs' premises has been subject to continuing water leakage entering through the party wall which separates plaintiffs' premises from defendant's premises. This evidence further indicates that the leaks have caused serious structural damage to the inside of plaintiffs' premises, as well as problems with mold and mildew, all of which have rendered certain parts of the premises uninhabitable and have further reduced the property value of the premises. In addition, plaintiffs' evidence indicates that the leaks to their property have been caused by the erection of the third story to defendant's premises inasmuch as this addition encroaches onto plaintiffs' premises and

inasmuch as substandard and inadequate water sealing on the new addition allows water to seep into the party wall and subsequently enter plaintiffs' premises. Finally, plaintiffs' evidence is sufficient to establish that Ozcan's (and the former owner) interference is intentional inasmuch as the addition was intentionally constructed and Ozcan and the former owner have repeatedly been made aware of the underlying problem but have refused to address the situation.

Plaintiffs' evidence is also sufficient to make a prima facie showing of their entitlement to summary judgment under their trespass cause of action. In particular, the affidavit by John Ferrantello, as well as the copy of the survey prepared by his company, both indicate that the third story addition to defendant's premises encroaches onto plaintiffs' premises by three inches along the party wall.

Accordingly, the burden shifts to Ozcan to submit evidence sufficient to raise a triable issue of fact with respect to plaintiffs' private nuisance and trespass causes of action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In his initial opposition to plaintiffs' motion, Ozcan argues that plaintiffs' claims against him are precluded under the doctrine of laches. However, there is no merit to this defense. "Laches applies where there has been a considerable delay resulting in a change of position, intervention of equities, loss of evidence or other disadvantage" (*Klein v Gutman*, 12 AD3d 417, 419-420 [2004]). Here, Ozcan's predecessor in interest (*i.e.*, the former owner of defendant's premises) was put on notice of the water leakage as soon as it began to occur. In addition, numerous complaints regarding the new construction were registered with the DOB (*see Turner v Caesar*, 291 AD2d 650,

652 [2002]). Furthermore, Antony Chou's uncontroverted affidavit indicates that he was unaware that defendant's premises was put up for sale or that Ozcan was purchasing the premises. Consequently, there is no basis in equity for punishing plaintiffs for failing to advise Ozcan of the problem prior to his purchase of defendant's premises. Moreover, it is undisputed that the encroachment was readily observable and could have been discovered prior to the purchase date through ordinary due diligence.

Ozcan, as well as Sutton and Fidelity also oppose plaintiffs' motion by moving to amend their respective answers so as to assert a statute of limitations defense under RPAPL 611 (2). Upon the granting of such leave, these parties maintain that plaintiffs' motion for summary judgment must be denied inasmuch as there exists a valid affirmative defense to plaintiffs' action.[5] It is well-settled that leave to amend a pleading should be freely granted absent undue surprise or prejudice provided that the proposed amendment is not patently lacking in merit (CPLR 3025 [b]; *39 College Point Corp. v Transpac Capital Corp.*, 27 Ad3d 454 [2006]; *Whitney-Carrington v New York Methodist Hosp.*, 289 AD2d 326, 327 [2001]). With respect to the merit requirement, "[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Sample v Levada*, 8 AD3d 465, 467-468 [2004]).

---

[5] Notably, neither Ozcan nor Sutton and Fidelity move to dismiss plaintiffs' action based upon the proposed statute of limitations defense should leave to amend be granted. Rather, at this point, these parties simply rely upon the statute of limitations defense as a basis for opposing plaintiffs' summary judgment motion.

Initially, plaintiffs have failed to demonstrate that they will be prejudiced by the proposed amendment. In this regard, the court notes that to date, no discovery has taken place in this case (*Hudock v Village of Endicott*, 28 AD3d 923, 924 [2006]). Moreover, Sutton and Fidelity moved for leave to amend a mere three months after being brought into this action. Finally, there is no authority for the proposition that a court may deny a motion to add a potentially meritorious affirmative defense merely because it may delay a plaintiff in seeking to obtain a judgment.

Turning to the merits of the proposed amendment to Ozcan and Sutton and Fidelity's answers, RPAPL § 611 (2) provides, in pertinent part, that an action to recover real property cannot be maintained:

> "Where the real property consists of a strip of land not exceeding six inches in width upon which there stands the exterior wall of a building erected party upon said strip and partly upon the adjoining lot, and a building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall . . . If an action for the recovery of real property or damages is not brought within the period hereby limited therefor, the person in possession of such lands shall be deemed to have an easement in said strip of land so long as the said wall partly erected thereon shall stand, and no longer."

Thus, pursuant to RPAPL 611 (2), "where there is an encroachment of six inches or less upon plaintiff's property as a result of defendant's construction of 'the exterior wall of a building,' the prescriptive period is one year. Plaintiff may bring an action for damages within that

period, but thereafter such claim is time-barred and a prescriptive easement arises in favor of defendant" (*Sova v Glasier*, 192 AD2d 1069, 1070 [1993]).

In the instant case, it cannot be said that Ozcan and Sutton and Fidelity's proposed affirmative defense is patently lacking in merit with respect to plaintiffs' trespass claim. In this regard, the court initially notes that RPAPL § 611 (2) is a somewhat obscure statute, with few reported cases addressing its application. However, the above-cited *Sova* case, which is the most recent Appellate Division decision dealing with RPAPL § 611 (2), is analogous to the instant case. In *Sova*, the defendant constructed a garage near an adjoining parcel of land owned by plaintiff. An overhanging eave on the roof of the garage encroached onto plaintiff's property a distance of either .08 inches or eight inches (the record was unclear), and thereby created a storm water drainage problem on plaintiff's property. More than one year after the completion of the garage, the plaintiff commenced an action alleging causes of action sounding in, among other things, private nuisance and trespass. The Appellate Division, Fourth Department, determined that if it was ultimately determined that the encroachment was only .08 inches, plaintiffs' trespass claim would be time-barred under RPAPL 611 (2) since the defendant would have a prescriptive easement over the plaintiff's property (*see Sova*, 192 AD2d at 1069).[6]

---

[6] It is well-settled that an action for trespass may not be maintained where the purported trespasser has acquired an easement of way over the land in question (*Kaplan v Incorporated Village of Lynbrook*, 12 AD3d 410, 412 [2004]).

Similarly, in the instant case, a new third floor has been constructed onto defendant's premise directly adjacent to plaintiffs' adjoining premises. This new structure includes a wall built on top of the existing party wall which, according to plaintiffs' own expert, encroaches a distance of three inches onto plaintiffs' property, and has thereby caused problems in the form of water leaking into plaintiffs' premises. Given the parallels between these facts and those in the *Sova* decision, with respect to plaintiffs' trespass claim, the inapplicability of RPAPL § 611 (2) is not clear and free from doubt.[7]

Accordingly, Ozcan and Sutton and Fidelity's respective motions for leave to amend their answers to assert an affirmative statute of limitations defense based upon RPAPL § 611 (2) are granted. Furthermore, given the existence of a viable affirmative defense to plaintiffs' trespass claim, that branch of plaintiffs' motion which seeks summary judgment under their trespass cause of action is denied (*Lodol v Arbus*, 46 AD3d 765 [2007]).

While the statute of limitations defense asserted by Ozcan and Sutton and Fidelity is sufficient to defeat plaintiffs' motion for summary judgment on their trespass claim, the same does not hold true with respect to plaintiffs' private nuisance cause of action. In particular, as stated above, should it ultimately be determined that RPAPL 611 (2) applies, a prescriptive easement will arise in Ozcan's favor with respect to the encroachment which will preclude

---

[7] Plaintiffs also argue that the one-year statute of limitations set by RPAPL § 611 (2) has yet to run because construction is ongoing. However, plaintiffs have failed to establish that construction of the subject wall is still ongoing. At most, this is a factual issue that has yet to be resolved.

plaintiffs' trespass claim (*Sova*, 192 AD2d at 1070; *see also Kaplan*, 12 AD3d at 413). However, it does not follow that this easement would serve as a defense to plaintiffs' private nuisance claim. Even an outright owner of a piece of land will be liable for a condition maintained on this land which constitutes a nuisance to an abutting land owner. Indeed, a careful reading of the *Sova* decision, upon which Ozcan and Sutton and Fidelity heavily rely, demonstrates that the potential prescriptive easement created under RPAPL § 611 (2) would have no effect upon the plaintiffs' private nuisance claim. Specifically, the *Sova* court ruled that the plaintiff's trespass claim would be time-barred under the statue if it was ultimately determined that the encroachment was six inches or less. With respect to the plaintiff's nuisance claim, the *Sova* court definitively ruled that the claim was not time-barred regardless of whether the encroachment was more or less than six inches (*Sova*, 192 AD2d at 1070). Thus, RPAPL § 611 (2) does not apply to private nuisance causes of action.

Accordingly, with respect to plaintiffs' private nuisance cause of action, in response to plaintiffs' prima facie showing, Ozcan and Sutton and Fidelity have failed to meet their burden of demonstrating the existence of any triable issues of fact. Accordingly, that branch of plaintiffs' motion which seeks summary judgment under their private nuisance cause of action is granted on the issue of liability.[8]

---

[8] The damages caused to plaintiffs by the private nuisance must be determined at trial.

Plaintiffs' Claims for Injunctive Relief

Plaintiffs also move for an injunction ordering the removal of the encroaching third floor of defendant's premises pursuant to RPAPL § 871. In support of this branch of their motion, plaintiffs' point to the aforementioned evidence, which indicates that the addition to defendant's premises encroaches upon their premises. Plaintiffs further note that RPAPL § 871 specifically authorizes owners to bring an action for the removal of structures which encroach onto their land. In addition, plaintiffs maintain that the equities strongly weigh in favor of ordering the removal of the structure in question. Specifically, plaintiffs note that the water leaks in their premises have already caused extensive damage and that this damage cannot be repaired until the leaks are stopped.

"RPAPL § 871 expressly authorizes an action by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Whether an injunction should issue depends on all the equities between the parties, and the facts and circumstances of the particular case" (*Hullar v Gilder Oil Co., Inc.*, 219 AD2d 825, 825-826 [1995]). However, here, the court has already determined that Ozcan has a viable affirmative defense based upon his claim that he has a prescriptive easement with respect to the encroachment under RPAPL § 611 (2). No injunctive relief can be granted pursuant to RPAPL § 871 until the easement issue is resolved (*compare Christopher v Rosse*, 91 AD2d 768 [1982]). In any event, there is insufficient evidence before the court to allow for a proper balancing of the equities. In particular, while it is clear that the water leaks in

plaintiffs' premises has resulted in substantial damage and hardship, the complete removal of the third story of defendant's premises is a drastic remedy. Thus, evidence must be presented as to whether the leaks can be abated using less drastic means such as improved waterproofing or redesigning the roof of the third-floor structure before relief is granted under RPAPL § 871.

Ozcan's Third-Party Claims

Ozcan cross-moves for summary judgment under this third-party indemnification action against Sutton and Fidelity. In a separate motion, Ozcan moves for leave to amend his third-party complaint to assert a claim for attorney's fees. In turn, Sutton and Fidelity move for summary judgment dismissing Ozcan's third-party complaint.

In support of his cross motion for summary judgment, Ozcan points to the undisputed fact that Fidelity issued a title insurance policy to him. Ozcan further notes that nothing within the title policy indicated the existence of the encroachment that underlies plaintiffs' action against him. Moreover, Ozcan maintains that had he known about the encroachment prior at the time of closing, he would not have completed the transaction for the sale of defendant's premises or he would otherwise have taken steps to make certain that the encroachment was removed prior to closing. Accordingly, Ozcan argues that Fidelity and Sutton must reimburse him for any judgment plaintiffs obtain against him.

In opposition to Ozcan's cross motion, and in support of their own cross motion for summary judgment dismissing the third-party complaint, Sutton and Fidelity maintain that

Ozcan lacks standing to sue for relief under the title insurance policy. In this regard, Sutton and Fidelity note that the title policy states, in pertinent part, that the "policy shall continue in force as of the Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land." Here, Ozcan transferred the property to Ozcan NY Management, LLC on March 16, 2007. Thus, Sutton and Fidelity argue that coverage ceased under the policy and there is no coverage with respect to the alleged encroachment.

Alternatively, Sutton and Fidelity maintain that because plaintiffs' first-party action is time-barred under RPAPL § 611 (2), Ozcan's third-party indemnification claim has been rendered moot.

Sutton and Fidelity also note that the gravamen of Ozcan's claim is that he would not have purchased defendant's premises had the encroachment been accurately recorded in the survey attached to the title commitment. However, according to Sutton and Fidelity, the title commitment was solely for the benefit of the insurer and may not be relied upon by Ozcan. Accordingly, Sutton and Fidelity argue that, to the extent that Ozcan claim is based on the allegation that he was misled by the title commitment, there is no basis for the third-party action. In addition, Sutton and Fidelity maintain that they may not be held liable based upon Ozcan's claim that they failed to advise him about the second survey conducted by Nicoletti. In this regard, Sutton and Fidelity submit an affidavit by Sutton's general counsel, Scott Spinner, in which he maintains that Sutton and Fidelity never received the corrected survey. In any event, Spinner notes the corrected survey also fails to indicate existence of the subject

encroachment. Thus, Sutton and Fidelity maintain that even if they had received a copy of the corrected survey, they may not be held liable for failing to advise Ozcan about the encroachment.

In reply to Sutton and Fidelity's cross motion/opposition, Ozcan notes that section 32 of the New York State Title Insurance Rate Manual provides for a continuation of title insurance where title to the underlying property has been transferred from a named individual insured to a limited liability company provided that "as a result of such transfer . . . there is no change in the beneficial ownership as the result of such transfer of title, and further provided that any transfer described above is made for no consideration." Ozcan further submits his own affidavit in which he avers that he transferred title to defendant's premises to Ozcan NY Management LLC on March 16, 2007 and that he is the sole beneficial owner of the LLC. Accordingly, Ozcan maintains that the title insurance remains in effect notwithstanding the transfer to the LLC. In addition, Ozcan maintains that regardless of the fact that the survey was completed for Sutton and Fidelity's benefit, the title insurance policy itself was issued for his own benefit. The policy in question failed to indicate that there was an encroachment upon plaintiffs' premises and had he been aware of this encroachment, he would not have completed the transaction. Under the circumstances, Ozcan argues that Sutton and Fidelity must indemnify him for any damages that result from the encroachment.

In reply to Ozcan's opposition, Sutton and Fidelity note that the rule regarding the continuation of title insurance upon transfer of title from an individual to an limited liability

corporation set forth in section 32 of the New York State Title Insurance Rate Manual only applies when the transfer is made "as part of the named insured's capital contribution to the limited liability company." According to Sutton and Fidelity, there is no evidence that Ozcan transferred title to the LLC as part of a capital contribution. In fact, Sutton and Fidelity maintain that the transfer could not have been part of Ozcan's capital contribution to the LLC since the records of the Secretary of State indicate that the LLC was formed on March 22, 2006, nearly one year before title was transferred to the LLC on March 16, 2007.

As a threshold matter, the court must determine whether the transfer of the premises from Ozcan to the LLC deprives him of standing to bring the third-party action against Sutton and Fidelity. Paragraph 2 of the "Conditions and Stipulations" section of the policy provides, in pertinent part, that "[t]he coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land . . . This policy shall not continue in force in favor of any purchaser from the insured of . . . an estate or interest in the land." As Ozcan notes, section 32 of the New York State Title Insurance Rate Manual does provide for a continuation of title insurance where title to the underlying property has been transferred from a named individual insured to a limited liability company provided that "as a result of such transfer . . . there is no change in the beneficial ownership as the result of such transfer of title, and further provided that any transfer described above is made for no consideration." However, the same provision requires that the transfer be made "as part of the named insured's capital contribution to the

limited liability company." Although Ozcan has submitted an affidavit in which he indicates there has been no change in the beneficial ownership as the result of such transfer of title and that the transfer to the LLC was made for no consideration, there is no evidence before the court as to whether the transfer was made as part of Ozcan's capital contribution to the LLC. Under the circumstances, Ozcan's cross motion for summary judgment under his third-party complaint must be denied as there is an issue as to whether Ozcan has standing to maintain the action.

Turning to Sutton and Fidelity's cross motion for summary judgment dismissing the complaint, Sutton and Fidelity initially argue that Ozcan lacks standing to maintain the third-party action given the transfer of defendant's premises to the LLC. As stated above, this is dependent upon whether the transfer was made as part of Ozcan's capital contribution to the LLC. Although Ozcan has failed to demonstrate that the transfer was made as a capital contribution, in seeking summary judgment dismissing the third-party complaint, the burden rests with Sutton and Fidelity to submit evidence proving that the transfer was not made as a capital contribution. Sutton and Fidelity have failed to meet this burden as there is no evidence before the court regarding this issue.

Alternatively, Sutton and Fidelity maintain that Ozcan's third-party actions should be dismissed as moot inasmuch as plaintiffs' claims are time-barred under RPAPL § 611 (2). In granting Sutton and Fidelity leave to amend their answers to assert a statute of limitations defense, the court merely determined that this defense was not patently lacking in merit as

respects plaintiffs' trespass claim. However, the court did not rule that this affirmative defense required the dismissal of plaintiffs' trespass claim as a matter of law. Indeed, no such dismissal motion is before the court. Accordingly, it cannot be said that Ozcan's third-party action has been rendered moot by virtue of Sutton and Fidelity's defense under RPAPL § 611 (2).

Finally, Sutton and Fidelity argue that there is no basis for Ozcan's third-party action because the survey which failed to reveal the encroachment was not prepared for Ozcan's benefit. It is true that, absent some separate commitment, a title insurance company will not be held liable under a negligence theory based upon a buyer's reliance upon an inaccurate title search or survey conducted by a third-party (*see Citibank, N.A. v Chicago Title Ins. Co.*, 214 AD2d 212, 219 [1995]). However, unless otherwise excluded, a title insurer is liable under the policy for unknown defects in title to the extent that the defects result in the loss in value of the title (*id.* at 221). Here, if it is ultimately determined that title insurance remained in effect after the transfer of defendant's premises to the LLC, Ozcan will have a viable claim against Sutton and Fidelity to the extent that the encroachment results in the loss in value of Ozcan's title.

Accordingly, Sutton and Fidelity's cross motion to dismiss the third-party complaint is denied.

Ozcan's Motion to Amend to Assert a Claim for Legal Fees

Ozcan also seeks an order granting him leave to amend his third-party complaint to assert a claim for legal fees against Sutton and Fidelity. In support of this motion, Ozcan argues that, as his title insurers, Sutton and Fidelity should have assumed his defense in plaintiffs' action against him but have refused to do so.

In opposition to Ozcan's motion, Sutton and Fidelity argue that the proposed amendment is patently without merit inasmuch as under the so-called "American Rule," absent a contractual agreement, each party is required to bear its own litigation costs. Here, the title insurance policy does not contain a clause requiring that Sutton and Fidelity pay for Ozcan's legal fees.

It is well-settled that an insurer's duty to defend is broad and arises whenever the four corners of the complaint suggest a reasonable possibility of coverage (*26 Adar N.B. Corp. v Stewart Title Ins. Co.*, 202 AD2d 370 [1994]). Given this rule, Ozcan's proposed claim that Sutton and Fidelity are required to defend him against plaintiffs' claims and reimburse him for the attorney's fees he has already expended in defending against plaintiffs' claims are not patently without merit. Accordingly, Ozcan's motion for leave to amend his third-party complaint to assert a claim for attorney's fees against Sutton and Fidelity is granted.

Summary

In summary, the court rules as follows: (1) plaintiffs' motion for summary judgment against Ozcan is granted with respect to their private nuisance cause of action, and otherwise denied; (2) Ozcan and Sutton and Fidelity's respective motions for leave to amend their

answers to assert an affirmative defense under RPAPL 611 (2) are granted; (3) Ozcan's cross motion for summary judgment against Sutton and Fidelity under his third-party complaint is denied; (4) Sutton and Fidelity's cross motion for summary judgment dismissing Ozcan's third-party action is denied; and (5) that branch of Ozcan's motion which seeks leave to amend his third-party complaint to assert a claim for attorney's fees against Sutton and Fidelity is granted.

This constitutes the decision and order of the court.

ENTER,

HON. LAURA JACOBSON

J. S. C.