

**Zito v Forte**

2009 NY Slip Op 30773(U)

March 31, 2009

Supreme Court, Nassau County

Docket Number: 019806/08

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

ROSA ZITO,

Plaintiff,

- against -

JOHN FORTE, Individually; and  
97 Willets Road LLC; 97 Willets Lot 470 LLC;  
Forte Properties, their agents, servants, and/or  
employees; and Village of Old Westbury, One  
Store Hill Road, Old Westbury,

Defendants.

TRIAL / IAS PART 31  
NASSAU COUNTY

Index No. 019806/08

Motion Sequence No. 001/002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Notice of Cross Motion, Affidavits & Exhibits .....	<u>2</u>
Answering Affidavits .....	<u>3,4</u>
Replying Affidavits .....	<u>5,6</u>
Briefs: Plaintiff's / Petitioner's .....	<u>          </u>
Defendant's / Respondent's .....	<u>          </u>

The plaintiff moves to compel the determination of a certain claim to real property pursuant to RPAPL Article 5 located at 101 Willets Road, Old Westbury, New York a/k/a 101 I.U., known as Section 19, Block E, and Lot 454, to direct the defendants to restore the plaintiff's property to the condition it was prior to the defendants' encroachment, trespass, vandalism and damage to it, to permanently bar and enjoin the defendants from disturbing or interfering with the plaintiff's quiet enjoyment of the property, to order the defendants to pay for all costs associated

with the defendants' encroachment, trespass, vandalism and destruction of the plaintiff's fencing, to transfer to the Supreme Court all records, papers, memoranda, documentation and files concerning the property which the Village of Old Westbury has its control and possession, and to award the plaintiff counsel fees, disbursements, costs, compensatory and punitive damages in this action. The defendants John Forte, 97 Willets Road LLC, 970 Willets Lot 470 LLC, Forte Properties, their agents, servants, and employees oppose this motion. This Court has carefully reviewed and considered all of the papers submitted with respect to the plaintiff's motion.

The plaintiff's motion is supported by an affirmation dated October 30, 2008, by plaintiff's counsel, along with other moving papers. The plaintiff's attorney submits this motion because the defendant Village of Old Westbury seeks to issue an unlawful fence permit to the defendants allowing them to place their fence over the same ground where the plaintiff had her chain link fence for over a decade having erected it on the western boundary on or before October 2, 1996, as shown by the permit issued by the defendant Village of Old Westbury. The plaintiff's attorney states, as evidenced in the plaintiff's verified complaint, the defendants' fence was confiscated and vandalized by the defendant on about September 18, 2008. The plaintiff's attorney asserts the plaintiff has established title by adverse possession, and the plaintiff has continuous possession of the subject property since January 18, 1992, separated by the plaintiff's chain link fence for over a decade. The plaintiff's attorney claims that possession has been under claim of right, actual, open, notorious, and exclusive, and adds this strip of land was cultivated, improved, and protected by this enclosure. The plaintiff's attorney avers the plaintiff would be prejudiced without a stay, and the defendants would be allowed to seize a portion of the plaintiff's property. The plaintiff's attorney maintains the defendants engage in harassment,

intentional falsehood, fraud, conspiracy, vandalism, and unlawful acts to obtain part of the plaintiff's land. The plaintiff's attorney contends the defendant Village of Old Westbury, exceeded the scope of its authority by improper means against the plaintiff, to wit disseminating incorrect information, and failing to supervise its employees, agents and servants. The plaintiff's attorney states, upon information and belief, the defendant Village of Old Westbury knew the defendants were illegally removing the plaintiff's fence during the week of September 14, 2008, and permitted this criminal act to go unpunished. The plaintiff's attorney states the plaintiff is entitled to punitive damages since the defendants' actions have been intentional, wanton, willful, and malicious, and refers to a retainer agreement dated September 23, 2008, between the plaintiff's and the affiant.

The defense attorney for John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees submit, in an opposing affirmation dated November 12, 2008, the plaintiff fails to establish any entitlement to injunctive relief at this stage in the litigation. The defense attorney asserts the plaintiff's moving papers are devoid of any legal basis, and fail to provide any analysis of the standards required for injunctive relief. The defense attorney notes this order to show cause must be denied because it seeks the ultimate relief the plaintiff requests in this action. The defense attorney points out the plaintiff fails to demonstrate any likelihood of success on the merits where adverse possession is highly disfavored as a matter of law. The defense attorney asserts the plaintiff falls short of demonstrating clear and convincing evidence the fence location, to wit adverse possession, or the property being enclosed by a substantial enclosure pursuant to RPAPL Article 5. The defense attorney maintains there is no merit to the plaintiff's claim that the fence existed since 1996,

rather the plaintiff's installed fence with the pool was located entirely within the metes and bounds description of plaintiffs' property. The defense attorney states, it appears at some point, the fence was removed, and a new fence was erected which encroaches slightly on Lot 470. The defense attorney opines the plaintiff fails to address that the balancing of the equities favors the plaintiff, and nevertheless the balancing of the equities favors the defendants, to wit the record owners of the property at issue.

The plaintiff's attorney points, in a reply affirmation dated November 25, 2008, to the plaintiff's affidavit dated November 25, 2008, the affidavit dated November 25, 2008, by the plaintiff's landscaper, the affidavit dated November 25, 2008, by an ironworker who installed fences for the plaintiff, the affidavit dated November 25, 2008, by the plaintiff's Old Westbury neighbor, and photographs of the subject property. The plaintiff's attorney states the plaintiff is entitled to all of the relief requested in the order to show cause, and there will be irreparable harm to the plaintiff absent the relief. The plaintiff's attorney asserts the plaintiff has a claim of right as an adverse possessor, and a meritorious case. The plaintiff's attorney contends the underlying action does not involve a *de minimus* fence, as alleged by the defense. The plaintiff's attorney requests interim legal fees, compensatory damages and punitive damages because the defendants' actions have been intentional, wanton, willful and malicious. The plaintiff's attorney claims the plaintiff satisfied all of the elements with respect to the claim of adverse possession, but in the alternative, if additional evidence is required, requests a hearing regarding all issues of this action.

It is well settled that in order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a

balancing of the equities in the movant's favor (see, e.g., *Doe v Axelrod*, 73 NY2d 748; *Doe v Poe*, 189 AD2d 132 [*lv denied* 81 NY2d 711]). A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, *pendente lite*" (*Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2d 793, 794 [1995]; see also *Bachman v Harrington*, 184 NY 458, 464 [1906]; *MacIntyre v Metropolitan Life Ins. Co.*, 221 AD2d 602 [1995]) *St. Paul Fire and Marine Ins. Co. v. York Claims Service, Inc.*, 308 A.D.2d 347, 348-349, 765 N.Y.S.2d 573 (2<sup>nd</sup> Dept., 2003).

The plaintiff has not met the burden as required by law on this instant motion.

The defendant Village of Old Westbury moves to dismiss the complaint pursuant to CPLR 3211 (a) (2) and (7) for lack of subject matter jurisdiction and the failure to state a cause of action. The plaintiff opposes this motion. This Court has carefully reviewed and considered all of the papers submitted with respect to this defense motion.

The attorney for the defendant Village of Old Westbury states, in a supporting affirmation dated November 25, 2008, together with other moving papers, the complaint must be dismissed because the plaintiff failed to file a notice of claim pursuant to General Municipal Law § 50-e, which is a condition precedent to bringing the underlying action. The attorney for the defendant Village of Old Westbury states the alleged facts do not state a cause of action upon which relief can be granted against the defendant Village of Old Westbury. The attorney for the defendant Village of Old Westbury asserts the first cause of action, sounding in adverse possession, would not appear to be addressed against the defendant Village of Old Westbury. The attorney for the defendant Village of Old Westbury notes the complaint is essentially a private property dispute between adjoining property owners with little to do with the defendant Village of Old Westbury, so the plaintiff seeks, in a frivolous fashion, to bring causes of action against the defendant Village of Old Westbury for carrying out its governmental duties. The attorney for the defendant

Village of Old Westbury maintains the purpose of this defendant was to ensure compliance with the State Building Code and the laws of the Village requiring a pool have a fence enclosure to protect the health, safety and welfare of its inhabitants and the general public. The attorney for the defendant Village of Old Westbury submits the plaintiff fails, in the first and second causes of action, to allege any cognizable facts to defeat this defense motion or the requisite elements upon which a cause of action against the defendant Village of Old Westbury can be discerned in specificity pursuant to CPLR 3016, and must be dismissed. The attorney for the defendant Village of Old Westbury contends the third cause of action must be dismissed because the plaintiff fails to allege facts or present the necessary elements to establish fraud, intentional tortious interference with any purported rights of the plaintiff, and fails to show a cognizable right claim to have been violated by the defendant Village of Old Westbury. The attorney for the defendant Village of Old Westbury fourth cause of action, sounding in conspiracy and abuse of process must be dismissed because there is no substantive tort of conspiracy in New York.

The plaintiff's attorney states, in an opposing affirmation dated December 24, 2008, this sworn document responds to the format followed by the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees in their counsel's opposing affirmation. The plaintiff's attorney challenges the land surveyor's affidavit as insufficient, as a matter of law, to obtain the desired result of a dismissal under CPLR 3211 (a) (1) because there is no disagreement as to the boundaries of the respective parcels of real estate whether depicted in the defense or plaintiff's surveys. The plaintiff's attorney reiterates, in detail, the plaintiff's contentions regarding the subject premises, and points to affidavits dated November 25, 2008, by Inez Mitra, a friend and Ronald Nadolny, a landscaper

employed by the plaintiff since 1993, as support of the plaintiff's use, enjoyment, maintenance and uninterrupted possession of the disputed parcel. The plaintiff's attorney contends the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees have misguided reliance on the July 7, 2008 amendment of RPAPL § 543 (5), and ignore the plaintiff's recent installation of yet another fence after the entry and removal of the original fence by the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees. The plaintiff's attorney asserts, as long as the complaint, as a whole, manifests a cause of action recognizable under the law, it matters not that the wrong relief was pleaded. The plaintiff's attorney avers all of the causes of action are sufficiently pled, and the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees acted in concert to surreptitiously secure a permit from the defendant Village of Old Westbury, sneak upon the premises under cover of night, remove the plaintiff's fence, and in effect, set the plaintiff up for the issuance of a summons by the defendant Village of Old Westbury for installing a replacement fence without a permit. The plaintiff's attorney opines the replacement fence went up at the direction of the defendant Village of Old Westbury which issued a permit to the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees, and then claimed the plaintiff did not secure the requisite permit. The plaintiff's attorney submits sufficient cause has been demonstrated to deny the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees the relief they seek, and to permit the underlying action to proceed in an orderly progression to trial.

The defense attorney for the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees state, in a reply affirmation dated January 8, 2009, the plaintiff's opposition to the defense motion to dismiss fails to state a cause of action for adverse possession, and the plaintiff's claims are barred by documentary evidence which establishes the boundary line of the respective properties. The defense attorney for the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees points to the amended RPAPL § 543 which specifically deals with this type of situation involving a "*de minimus*" fence which spans the entire length of the common property, and slightly encroaches upon the subject property. The defense attorney for the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees challenge the plaintiff's submission, to wit an attorney affirmation without personal knowledge, as well as conclusory affidavits from a friend, an iron worker, and a landscaper. The defense attorney for the defendants John Forte, individually, 97 Willets Road LLC, 97 Willets Lot 470 LLC, Forte Properties, their agents, servants and employees points out the plaintiff wants to discontinue the action against the defendant Village of Old Westbury, and points to the proposed stipulation of discontinuance annexed to the papers.

General Municipal Law § 50-e (a) provides:

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.


This provision is a condition precedent to subject matter jurisdiction, and the commencement of an action against a municipality. The plaintiff did not meet this statutory requirement, and the action pending against the defendant Village of Old Westbury is dismissed.

Accordingly, the plaintiff's motion is denied, and the defendant Village of Old Westbury motion is granted.

So ordered.

Dated: **March 31, 2009**

ENTER:

  
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J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

**ENTERED**

APR 02 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**