SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

DENNIS BERNARDI and PAULINE BERNARDI,

Plaintiffs,

-against-

GEORGE HARRISON, TITLE PRO AGENCY, LLC, MARY WILCOX, ESQ., and WILSON & SCELSI, LLC.,

Defendants.

TRIAL/IAS, PART 6
NASSAU COUNTY

MOTION SEQ. NO.: 003,004, 005, 006, 007
MOTION DATE: 6/1/09

INDEX NO.: 20905/05

The following papers having been read on the motion (numbered 1-7):

Notice of Motion.....1
Notice of Motion for Partial Summary Judgment.....2
Affirmation in Opposition.....3
Notice of Cross Motion.....4
Notice of Cross Motion for Summary Judgment.....5
Reply Affirmation.....6
Notice of Motion.....7

The motion by defendant Mary Wilcox and Wilcox & Scelsi, Inc. (the "Wilcox defendants") for summary judgment on the issue of liability is determined for the reasons set forth herein.

The motion by plaintiffs for partial summary judgment declaring that the plaintiffs are fee owners of the disputed land, entitled to immediate possession and directing the third-party Spyratos defendants to remove encroachments, enjoin defendants from trespassing as well as dismissing Spyratos defendants' affirmative defenses and counterclaims is **denied** for the reasons set forth herein.

Plaintiffs are the record owners of a house and property located at 458 Nassau Avenue, Freeport, N.Y. (the "property"). They purchased the property from Harrison in

January, 2003.

The Spyratos third-party defendants are the owners of property abutting plaintiffs' property. The adddress of the Spyratos property is 452 Nassau Avenue, Freeport, N.Y. The plaintiffs (a/k/a Bernardi) allege the Spyratos defendants have encroachments onto plaintiffs' property. These encroachments consist of an encroachment of a maximum of 7.32 inch strip on the northern boundary of plaintiffs' property by a fence installed by plaintiffs' predecessor in title, consisting of blocks and/or bricks encroaching into plaintiffs' yard.

Plaintiffs allege the Wilcox defendants are guilty of legal malpractice. The Wilcox defendants represented the plaintiffs in 2003 in the purchase of property located at 458 Nassau Avenue, Freeport, N.Y. (the "premises"). Plaintiffs contend that a new updated survey of the premises would have revealed alleged encroachments on the property by the Spyratos defendants. Plaintiffs state the Wilcox defendants failed to advise plaintiffs to obtain an updated survey (the one used at the time of purchase was allegedly 30 years old). Plaintiffs state the encroachments were discovered on a subsequent new survey. The Wilcox defendants argue they suggested a new survey but the plaintiffs refused. They note the plaintiffs have title insurance (see Exhibit F annexed to the Wilcox defendants' motion) and the marketability of the property is protected. The Wilcox defendants also state the plaintiffs did not seek money damages for the property that the Wilcox defendants contend they, the plaintiffs, cannot get back.

In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that the attorney failed to exercise the care, skill and diligence commonly possessed by a member of the legal profession, the attorney's conduct was a proximate cause of the loss sustained, the plaintiff suffered actual damages as a direct result of the attorney's actions or inaction, and, but for the attorney's negligence, the plaintiff would have prevailed in the underlying action (*Lichtenstein v Barenbaum*, 23 AD3d 440). Thus, to succeed on a motion for summary judgment, the defendant/attorney must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements.

Here, plaintiffs allege that a new survey would have given the plaintiffs pause to purchase the property in the first place. Thus, plaintiffs' argument is that, but for the Wilcoxes' failure to obtain a new survey, i.e., their negligence, a survey that would have revealed the encroachments and plaintiffs might not have purchased the property and not have been subject to some of their alleged travails herein. Or the issue of the encroachments could have been raised and resolved (or not) before the purchase.

Did the Wilcox defendants properly advise the plaintiffs on the appropriate steps to take in the purchase of the property? Did the plaintiffs reject the Wilcox defendants' suggestion as to a survey? These issues preclude a summary determination for the Wilcox defendants.

In their cross motion, the Spyratos defendants allege one strip of land involved was from 1" wide to 6-7" wide and 53 feet long. They contend they have satisfied the essentials of RPAPL § 522 by mowing and tending that strip of land. This strip is outside a fence allegedly erected by plaintiffs or their predecessors in interest in the premises. The Spyratos contend they have also met the essentials of RPAPL § 522 by paving over a part of plaintiff's property for their, the Spyratos', driveway.

As to plaintiffs' contention that the Spyratos' cross motion is untimely, the court would note that where a motion such as plaintiffs' is timely, a cross motion on the almost identical grounds is made, that cross motion is deemed timely (*see Ellman v Village of Rhinebeck*, 41 AD3d 635).

Adverse possession must be proven by clear and convincing evidence and five (5) elements must be proven in that possession must be hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the required period of 10 years (RPAPL § 521; *Walling v Przybylo*, 7 NY3d 228; *Beyer v Patierno*, 29 AD3d 613).

A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel was either usually cultivated or improved or protected by a substantial enclosure (RPAPL § § 522[1][2]; *Beyer v Patierno, supra*).

Using the property of another on a daily basis over a long time frame presumes hostility (*Goss v Trombly*, 39 AD3d 1128).

Frequency and duration of activities on property are important factors in determining whether actual possession has been continuous to support an adverse possession claim (*Mayville v Webb*, 267 AD2d 711).

Use of the disputed property and the cutting of grass and keeping the disputed area "manageable" is insufficient to establish adverse possession by cultivation or improvement and a fencing in of the disputed premises does not establish adverse possession by a substantial enclosure (*see Giannone v Trotwood Corp.*, 266 AD2d 430).

Recently, although there may be an emerging view that more was required than merely taking steps to keep the site presentable; substantial and obvious alteration is required more than cutting grass, raking, cleaning debris, and planting a few trees (*RSVL, Inc. v Portillo*, 16 Misc3d 1137[A], 851 NYS2d 61).

Where landowners applied blacktop over a small strip of property inside the boundary line with neighboring property and thereafter treated the strip as their own for more than ten years thus improving and maintaining it as part of the landowners' driveway, they acquired the land by adverse possession especially where there was no evidence the use was permissive (*Kappes v Ruscio*, 170 AD2d 743).

A property owner established adverse possession of his neighbors' property by showing that he, the party claiming/seeking property by adverse possession, had erected a six-foot high chain link fence on the property and the fence had been there for more than 17 years (*see Morris v DeSantis*, 178 AD2d 515).

If a fence is erected, it must be by the adverse claimant (*see Mohawk Paper Mills, Inc. v Colaruotolo*, 256 AD2d 924).

The presence of a fence is insufficient without explanation since there must be a showing that there 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 offered by the adverse claimant since the fence's presence is not an indication of conduct openly hostile to the owner's rights (*see Koudellou v Sakalis*, 29 AD3d 640; *Mohawk Paper Mills, Inc. v Colaruotolo, supra*).

Plaintiff stated the Spyratos defendants had installed a fence with posts along with

a "brick area" located below the posts (see plaintiffs' affirmation in support dated March 1, 2009, ¶ 9, see also Exhibit P annexed to plaintiffs' motion) enroaching approximately 6" onto plaintiffs' property (¶ 39). Was this a substantial enclosure?

The type of cultivation or improvement sufficient to satisfy the requirements of adverse possession statute will vary with the character of the property (*Phillips v Sollami*, 220 AD2d 946).

Generally, an open and notorious, uninterrupted and undisputed use of a right of way is presumed to be adverse and hostile and shifts the burden to the owner of the servient estate to demonstrate that the use was by permission (*Hryckowian v Pulaski,* 249 AD2d 511).

Genuine issues of fact exist as to whether the Spyratos' use of the land in issue was *de minimus* and adverse so as to preclude any summary decision herein.

The parties allude to RPAPL § 543. Under the relatively new RPAPL § 543 (effective July 7, 2008) the existence of de minimum 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; the acts of mowing a lawn or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse. According to the Practice commentaries (McKinneys Vol 49 ½, Article 5, pg. 176) RPAPL § 543 was enacted to remove from RPAPL Article 5, minor nonstructural encroachments and property maintenance matters that have been utilized as the basis for many claims of adverse possession over the years by expressly stating that these minor matters will be deemed "permissive" and "non-adverse." So adverse possession will be more difficult to show. The matter was commenced in September, 2005, before the enactment of RPAPL § 543. It will no doubt be helpful in future disputes, but inapplicable in the instant matter.

The Court will not consider the Harrison cross motion. Harrison, as the seller of the premises, stated that the plaintiffs were familiar with waterfront property and its flooding and bulkhead problems. Harrison notes that plaintiffs hired an engineer (see Exhibit B annexed to plaintiffs' motion date March 1, 2009) and thus plaintiffs were

aware that the bulkhead was old and would need repairing in the future (see Exhibit C annexed to plaintiffs' motion dated March 1, 2009). Harrison states he did not attempt to prevent the plaintiffs' inspector from thoroughly examining the bulkhead. Also, Harrison notes that plaintiffs' claim of a "plumbing explosion" was really an old pipe that was caused by a pipe rotting away some time after the purchase of the premises (see Exhibit X, pg. 25 annexed to plaintiffs' motion dated March 1, 2009). As to plaintiffs other allegations of alleged concealment, Harrison argues there is no basis for anyone to conclude he, Harrison, failed to disclose or actively concealed anything from plaintiffs and their inspector.

"As is" means that the buyer is purchasing the property in the condition that it actually exists and not in the condition as it was represented (*see Malach v Cheng Ling Chuang*, 194 Misc2d 651).

New York adheres to the doctrine of *caveat emptor* and imposes no duty on the seller to disclose any information concerning the premises when the parties deal at arm's length unless there is some conduct on the part of the seller which constitutes active concealment (*London v Courduff*, 141 AD2d 803).

The Property Condition Disclosure Act (RPAPL § 465) does not create a specific right of action for an alleged willful misrepresentation contained on the disclosure form; it was enacted to alert the parties to aspects of the property that might require attention, and it was not intended to diminish the responsibility of a buyer to carefully examine the property prior to purchase (*see Middleton v Calhoun*, 13 Misc2d 945, 821 NYS2d 444).

The Real Property Law § 462(a) provides that the Disclosure Statement does not prevent the parties from entering a contract of sale from agreeing to the sale of property "as is" but "as is" can include the information provided by the seller in the Property Condition Disclosure Statement (PCD) for the "as is" provision encompasses the statements in the PCD statement (*see Calvente v Levy*, 12 Misc3d 38, 816 NYS2d 828).

Whether a party or its agent could have ascertained facts with reasonable diligence is a factual question for resolution by the jury (*Bethka v Jensen*, 250 AD2d 887).

The question of failure to disclose is one of fact and requires resolution by the trier

of fact (*Slavin v Hamm*, 210 AD2d 831).

Thus, as to all the summary judgment motions herein, the credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397).

Here, the Spyratos defendants' three affirmative defenses contend they have improved, cultivated or substantially enclosed the area, and thus the alleged encroachment is so insubstantial so as to be *de minimum*, and the defendants' use does not interfere with the plaintiffs' use of their property.

The Wilcox defendants in their answer (see Exhibit T annexed to plaintiffs' motion dated March 1, 2001) offer eight affirmative defenses. Harrison presents no affirmative defenses. Plaintiffs, without any specificity, offer a blanket request to dismiss all the defendants' affirmative defenses. This court requires the plaintiffs to identify which defendants plaintiffs are referring to and which specific affirmative defenses the plaintiffs seek to dismiss and set forth the plaintiffs' reasoning thereto. The plaintiff cannot offer a general fact pattern and then direct the court to dismiss all affirmative defenses.

Thus, that branch of the plaintiffs' motion to dismiss the defendants' affirmative defenses is **denied** as overly vague.

As to the property allegedly adversely possessed, plaintiffs have requested an injunction. In order to obtain preliminary injunction, a plaintiff has the burden of demonstrating likelihood of ultimate relief on the merits, irreparable injury if provisional relief is withheld, and a balancing of the equities in plaintiff's favor (*Aetna Insurance Co. v Capasso*, 75 NY2d 860; *Quinones v Bd. of Managers of Regalwalk Condominium I,* 242 AD2d 52). Bare conclusory allegations are insufficient to support a motion for preliminary injunction (*Kaufman v International Business Machines*, 97 AD2d 925, *aff'd.* 61 NY2d 930).

Plaintiffs invocation of the conclusory allegation that it will suffer irreparable

harm without the injunction is insufficient. Plaintiffs do not discuss the irreparable harm which would or even might occur.

There has been no showing that the plaintiffs would not be adequately compensated by money damages (*Leo v Levi*, 304 AD2d 621; *Mr. Dees Stores v A.J. Parker Inc, Inc.*, 159 AD2d 389). Plaintiffs have not set forth a reason why a pecuniary standard might not be applied to measure plaintiffs' damages, if plaintiffs are ultimately successful.

The Wilcox defendants allege the plaintiffs only sought the return of the property allegedly taken by Spyratos in adverse possession and not financial damages.

The appropriate measure of damages to a landowner caused by encroachment of a wall on the property was the difference between the value of the property with and without the encroachment (*Generalow v Steinberger*, 131 AD2d 634).

Also, the facts in the record are in such sharp dispute that it cannot be concluded, from an objective point of view, that the plaintiffs have established a clear right to preliminary injunctive relief (*see Advanced Digital Security Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612; *Digestive Liver Disease, P.C. v Patel*, 18 AD3d 423). For all of the above reasons, the plaintiffs' request for a preliminary injunction must be **denied.**

Plaintiffs maintain its cause of action for the intentional infliction of emotional distress should be allowed to proceed. Plaintiffs allege the Spyratos defendants cursed at the plaintiffs and dumped items on the plaintiffs' property. The Spyratos defendants flatly deny such conduct. While plaintiffs' cause of action may be viable at this point, clearly there is not enough to grant plaintiffs' request. It is still at the "they said, did; no, we did not" stage.

As to plaintiffs' request to amend their complaint, leave to amend a pleading should be freely given, and the decision as to whether to grant such leave is generally left to the sound discretion of the court (*Ford Motor Credit Co. v Dollinger*, 303 AD2d 451).

It is incumbent upon the movant seeking the proposed amendment to make some evidentiary showing that the claim has support (*Morgan v Prospect Park Assoc.*

Holdings, L.P., 251 AD2d 306). Here, the plaintiffs request to amend or offer a proposed amended complaint (see Exhibit Z-3 annexed to plaintiffs' motion dated March 1, 2009) without basis and is **denied**.

When a defense or claim by a party controverts the opposing party's position (such as an affirmative defense fails to state a cause of action) *see Pump v Anchor Motor Freight*, 138 AD2d 849.

Whether plaintiffs can ultimately prove the allegations of conduct by defendants is irrelevant in determining the sufficiency of a pleading (*Battalla v State*, 10 NY2d 237).

Plaintiffs request sanctions. Sanctions can be issued in a court's discretion if a wholly frivolous motion, one that is completely without merit in law and which could not be supported by any reasonable argument, is made (*see Ofman v Campos*, 12 AD3d 581). Plaintiffs cannot expect this court to sanction other parties in an action when those parties present arguments and allegations, viewed objectively as valid, in opposing plaintiffs' motion (*see Badillo v Badillo*, 62 AD3d 635).

Based on all the factual issues in dispute herein, the plaintiffs' motions for partial summary judgment and full summary judgment must be **denied** in their entirety as are the Wilcox defendants' motion, the Spyratos defendants' and Harrison's cross motions.

This constitutes the Order of the Court.

Dated: August 14, 2009

J.S.C.