

Litvin v Borochoy

2011 NY Slip Op 32883(U)

October 24, 2011

Supreme Court, Nassau County

Docket Number: 13704/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MICHAEL LITVIN,

Plaintiff,

- against -

INESSA BOROCHOV, ELIAHU BOROCHOV, MARTINS'
MASONRY and XYZ CORPORATIONS, their true
identities being unknown to plaintiff,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 13704/10
Motion Seq. Nos.: 02, 03
Motion Dates: 06/24/11
08/30/11

The following papers have been read on these motions:

	<u>Papers Numbered</u>
<u>Notice of Motion (Seq. No. 02), Affidavit and Exhibits and Memorandum of Law</u>	<u>1</u>
<u>Amended Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits</u>	<u>2</u>
<u>Reply Memorandum of Law in Further Support of Motion (Seq. No. 02) and Opposition to Cross-Motion (Seq. No. 03) and Exhibits</u>	<u>3</u>
<u>Reply Affirmation in Support of Cross-Motion (Seq. No. 03)</u>	<u>4</u>
<u>Sur-Reply Affirmation to Reply Affirmation in Support of Cross-Motion</u>	<u>5</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting him summary judgment against defendant Inessa Borochov.

Defendant Inessa Borochov opposes the motion and cross-moves (Seq. No. 03), pursuant to CPLR §§ 3211(a)(5) and (7), for an order dismissing plaintiff's claims surrounding the damages to his existing retaining wall, as well as any claims for punitive damages. Plaintiff

opposes the cross-motion.

This is an action for, *inter alia*, trespass and nuisance. As best as can be determined from the papers submitted herein, the facts are as follows:

Plaintiff and defendant Inessa Borochov are neighbors. Plaintiff has resided at 38 Hawthorne Lane in Great Neck, New York since 1983. Defendant Inessa Borochov purchased the adjacent lot also known as 36 Shore Cliff Terrace, Great Neck, New York on August 23, 2005.

In the fall of 2009, defendant Inessa Borochov began constructing a trespassing/retaining wall (herein referred to as the "Wall") on the eastern end of her property and the western end of plaintiff's lot. The construction of the Wall forms the basis of this litigation and, more specifically, plaintiff's instant motion for summary judgment against defendant Inessa Borochov.

In bringing this suit, plaintiff alleges that defendant Inessa Borochov constructed the Wall on *his* lot. Plaintiff claims that the nature of the trespass of the Wall is evident through the surveys commissioned by both plaintiff and defendant Inessa Borochov and both, before and after its construction. Specifically, plaintiff alleges that, based on a survey commissioned by defendant Inessa Borochov, herself, before the construction of the Wall even began, she was, or should have been, aware of the property dimensions and borders well before the commencement of said construction. Citing to a Town of North Hempstead Violation Report, plaintiff claims that defendant Inessa Borochov also failed to obtain a permit to build the Wall which, he claims, would have been denied since the Wall was not on her property.

Plaintiff also alleges that, in excavating the land to build the Wall, defendant Inessa Borochov cut through the roots of several of plaintiff's trees (that had been standing near the property border for at least decades) at the base of their trunks and directly at the base of their roots.

This, plaintiff claims, was done in bad faith and constituted reckless and willful conduct.

Further, plaintiff alleges that defendant Inessa Borochov's construction and demolition activities caused a separate retaining wall, preexisting on his property and adjacent to the Wall at issue, to become compromised.

Apparently, plaintiff previously filed for a preliminary injunction in this case seeking to prevent defendant Inessa Borochov from engaging in construction, excavation or demolition activities within fifteen (15) feet of plaintiff's retaining wall because, as plaintiff alleged, those activities could destroy the retaining wall preexisting on his property. However, this motion was withdrawn because the parties entered into a "So-Ordered" Stipulation on December 13, 2010, in which defendant Inessa Borochov acceded substantially to the relief sought in plaintiff's motion for a preliminary injunction.

In opposing plaintiff's motion (Seq. No. 02), and in support of her cross-motion (Seq. No. 03) for dismissal of plaintiff's claims, defendant Inessa Borochov relies principally, if not exclusively, upon the sworn examination before trial of plaintiff. Specifically, defendant Inessa Borochov notes the following: plaintiff testified that he noticed a crack measuring approximately six inches wide in the existing retaining wall, which he observed "way before" the 2009 calendar year. *See* Defendant Inessa Borochov's Cross-Motion Affirmation in Support Exhibit A pp. 19-20. Further, plaintiff testified that he, himself, performed "many" repairs on the existing retaining wall on his property. *Id.* at p. 17. Defendant Inessa Borochov notes that plaintiff also testified and admitted that he was aware of the construction activities taking place on defendant Inessa Borochov's property since she acquired it in 2005. *Id.* at pp. 20, 21, 28, 29, 43, 58, 59. Plaintiff also testified that the prior owners of defendant Inessa Borochov's property performed demolition activities thereat.

Based upon the sworn testimony of the plaintiff, defendant Inessa Borochov bases her cross-

motion for dismissal upon the following. First, having noticed damage to the existing retaining wall on his property sometime in 2006, plaintiff's claim for damages to the retaining wall are barred by the applicable statute of limitations, which defendant Inessa Borochov submits is three years per CPLR § 214(4). *See* CPLR § 3211(a)(5). And, second, defendant Inessa Borochov argues that, since plaintiff has failed to establish that the alleged harmful conduct was intentional, malicious, outrageous or otherwise grossly negligent, any claim for punitive damages by plaintiff must fail. *See* CPLR § 3211(a)(7).

Further, in opposing plaintiff's motion for summary judgment, counsel for defendant Inessa Borochov, without submitting or relying upon any affidavit by defendant Inessa Borochov herself (*see Roche v. Hearst Corp.*, 53 N.Y.2d 767, 439 N.Y.S.2d 352 (1981)), argues the following: as there is testimony by plaintiff that he also performed "many" repairs to the existing retaining wall on his property and that he noticed a six inch crack in the existing retaining wall in 2006, there remain questions of fact as to causation of the property damages and therefore plaintiff's motion (Seq. No. 02) must be denied. *See* Defendant Inessa Borochov's Cross-Motion Affirmation in Support ¶¶ 29-30. Defendant Inessa Borochov also argues that plaintiff has failed to prove that she intended to commit any act which lead to the claimed intrusion allegedly constituting the trespass. *Id.* at ¶ 36. Also, defendant Inessa Borochov argues that there exist questions of fact as to whether any construction activities performed on her behalf can be deemed a trespass. *Id.* at ¶ 39. Finally, defendant Inessa Borochov argues that, as there are no witnesses to the alleged cutting of trees on plaintiff's property, plaintiff's claims pursuant to Real Property Actions and Proceedings ("RPAPL") § 861 fail. *Id.* at ¶ 45.

In bringing suit, plaintiff asserts eight causes of action; to wit, (1) Violation of New York RPAPL § 861; (2) Trespass to Land; (3) Conversion; (4) Negligence; (5) Private Nuisance; (6) Intentional Infliction of Emotional Distress; (7) Negligent Infliction of Emotional Distress; and (8) Punitive Damages.


Before this Court is a motion (Seq. No. 02) made pursuant to CPLR § 3212 and a cross-

motion (Seq. No. 03) made pursuant to CPLR §§ 3211(a)(5) and (7). The cross-motion was made after the service of defendant Inessa Borochov's responsive pleading, namely, the Answer, in which it asserted both the statute of limitations and failure to state a cause of action as affirmative defenses. See Plaintiff's Affidavit in Support Exhibit 3 ¶¶ 23, 25.

Although some cases indicate that the actual interposition of an Answer waives the defendant's right to make the CPLR § 3211 motion (see, e.g., *Incorporated Village of Laurel Hollow v. Laverne, Inc.*, 43 Misc.2d 248, 250 N.Y.S.2d 951 (Supreme Ct. Nassau County 1964), *mod'd* 24 A.D.2d 615, 262 N.Y.S.2d 622 (2d Dept. 1965); *Wahrhaftig v. Space Design Group, Inc.*, 29 A.D.2d 699, 286 N.Y.S.2d 442 (3d Dept. 1968)), pursuant to CPLR § 3211(c), and under the circumstances of this case, this Court herewith treats defendant Inessa Borochov's cross-motion (Seq. No. 03) as one for summary judgment. See *Rich v. Kefkovits*, 56 N.Y.2d 276, 452 N.Y.S.2d 1 (1982); *Connell v. Hayden*, 83 A.D.2d 30, 443 N.Y.S.2d 383 (2d Dept. 1981).

Therefore, defendant Inessa Borochov's cross-motion (Seq. No. 03) is reinstated to the motion calendar of this Court for November 15, 2011, at 9:30 a.m. to schedule the submission by both parties of such other proof as would be appropriate on a motion for summary judgment. Plaintiff's motion (Seq. No. 02) is held in abeyance.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 24, 2011

ENTERED
OCT 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE