

March v Town of North Castle
2014 NY Slip Op 32905(U)
March 18, 2014
Supreme Court, Westchester County
Docket Number: 56062/2011
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LAURIE MARCH and ROBIN C. MUELLER,

Plaintiffs,

-against-

THE TOWN OF NORTH CASTLE, ROCCO RUSSO,
and ANNA RUSSO,

Defendants.
-----X

DECISION and ORDER
Sequence Nos. 1, 2, & 3
Index No. 56062/2011

CONNOLLY, J.

The following documents were read in connection with the defendants Rocco Russo and Anna Russo's motion for partial summary judgment (Sequence No. 1), the defendant Town of North Castle's cross motion for summary judgment (Sequence No. 2), and the plaintiffs' cross motion for partial summary judgment (Sequence No. 3):

Defendants Russo's Notice of Motion, Affidavits, Affirmation, Exhibits, Memo of Law	1-29
Defendant Town of North Castle's Notice of Cross Motion, Affirmation	30-31
Defendants Russo's Affirmation in Opposition and Reply, Affidavit	32-33
Plaintiffs' Notice of Cross Motion, Affirmation, Affidavits, Exhibits	34-58
Defendant Town of North Castle's Affirmation in Opposition	59
Plaintiffs' Reply Affirmation in Opposition, Affidavit	60-61

The plaintiffs commenced this action on September 26, 2011 to recover damages for the alleged diversion of water onto their property located at 9 Sniffen Road, Armonk, New York 10504. The plaintiffs allege that their neighbors, the defendants Rocco Russo and Anna Russo (hereinafter the Russos), who reside at 11 Sniffen Road, are diverting water through a series of pipes onto their property. According to the complaint, on September 5, 1978, the Russos granted the defendant Town of North Castle (hereinafter the Town) an easement over a portion of their property for the right to

discharge storm water from Sniffen Road onto a location to the rear of the Russos' property. The easement also gave the Town the right to install and maintain a drainage pipe. The plaintiffs also allege that, on or about May 2001, the Russos graded their property, extended the Town-installed metal drainage pipe, and installed underground pumps and smaller black plastic pipes that discharge to the same location as the Town drainage pipe. The plaintiffs allege that the diversion of water constitutes trespass, nuisance, and an unconstitutional taking, for which they seek both injunctive relief and monetary damages. The Town asserts a cross-claim against the Russos for indemnification.

Deposition Testimony

The plaintiff Laurie March testified that she purchased her home in 1998.¹ Her house sits on a two-acre lot and is graded downhill in the rear into a wooded area. A large metal pipe runs from the street to the rear of her property, which March believes is connected to catch basins in the road. March first noticed this pipe some time in 2001. March testified that the defendant Rocco Russo told her that he had installed this pipe, "by connecting it to . . . where the Town's water was coming onto his property in the front, by the street" (March deposition at 13-15). The Town's engineers had also indicated to her that "there was at one point an open culvert in the front where the Town's easement ends, and that Mr. Russo connected extensions somehow under the ground from where the Town's easement ends" (*id.* at 16). Since 2001, she has seen the Russos making modifications to the pipes by connecting other pipes and making extensions. There are other pipes that terminate in the same location as the large metal pipe, and the Russos have indicated to March that as many as 50 pipes have been connected on the property.

Rocco Russo testified that there is a PVC pipe, approximately 100 feet in length, which runs from his garage to the rear of his property. This pipe was installed when the house was built in the late 1970's. He also testified that the gutters of his house drain into a separate pipe, which empties into the rear of his property behind his swimming pool. Shortly after the Russos built their house, the Town installed the metal pipe that drains water from the street.

Anna Russo testified that she and her husband gave the Town an easement around the time that they built their house, and, approximately 35 years ago, the Town installed a metal pipe that drains water from a catch basin on the street to the rear of their house. She testified that when the Town originally installed this pipe, there was flooding near the front of their property, and that the Town's solution to this problem was to extend the metal pipe to the rear of their property. A number of other pipes are connected in the Russos' yard, which are also spliced together from different sources, including a drain in the front of her garage.

John Kellard, a professional engineer whose firm has served as Town engineers since 1990, testified at his deposition that, at some point prior to 2008, the Town issued a notice of violation to the Russos relating to their drainage. Kellard and the Town Building Inspector, Richard Fon, visited

¹ According to the complaint, in 2010, March, as sole owner of the property, transferred the property to "Laurie March and Robin C. Mueller" as joint tenants with rights of survivorship.

the property and observed a large pipe that drains water from the roadway, and additional black plastic piping that he believed was subsurface drainage. Kellard testified the Town is required to map its storm water system as part of its compliance with New York State storm water regulations, and the outfall has been mapped and identified as "OF-179" (Kellard deposition at 27-28). OF-179 drains "in the vicinity of the common property between lots, number nine and number 11, Sniffen Road in the vicinity of a wetland area" (*id.* at 33). The backyards of the two subject properties are located in mapped wetlands. Kellard had no personal knowledge or documentation establishing who actually installed the metal pipe, but had spoken with Anna Russo, who told him that the Town had installed it. Based upon his visit to the property, Kellard's opinion was that "the properties in that area were most likely wet at one time before the homes were built, the yards were probably filled which was likely permitted at that time and that the only way you're going to keep the properties dry is to have the proper piping that carries the runoff and the ground water and the roof runoff to the wetlands" (*id.* at 44). Kellard opined that, because of the poor-draining soil, high water table, and support for wetland vegetation, there would be wetlands on the rear of the two properties regardless of OF-179's discharges. The maps that Keller created for the Town indicate that OF-179 is entirely on the Russos' property, however, this mapping was done by visual observation without the aid of a surveyor.

On October 28, 2010, Kellard met the plaintiff Laurie March and an employee of the Department of Environmental Conservation ("DEC") at the subject location. March had requested that OF-179 be moved further toward the rear of the properties, but the DEC employee was against this proposal since it would deprive the wetland of water. Kellard testified that there are impervious surfaces on March's property, including a driveway that extends to the rear of her house, which slope downward to the same area as the OF-179 drainage point. Kellard testified that, based on his observations of OF-179, it has "most likely" been in place for 20 years (Kellard deposition at 66). The Town has a 32-foot easement over the Russos' property for the pipe, however, according to Kellard, OF-179 is much longer than 32 feet.

Michael Cromwell, the Town Building Inspector, testified at his deposition that he visited the Russos' property in either 2007 or 2008 to investigate a complaint that the Russos were digging or installing drainage in their backyard. On that visit, Cromwell observed an 18-inch pit between the Russos' house and pool that contained a sump pump, which was being cleaned of debris. The pipe let out further into the backyard in the wetland area, but, contrary to the complaint that he was investigating, there was no excavation taking place on the property. On another occasion, in 2009 or 2010, he visited March's property to investigate a report of water draining from the Russos' property onto her property. Cromwell observed a rusty metal corrugated pipe on the Russos' property, which appeared to run from the street. Additionally, he observed black plastic piping that seemed to be coming from further on the Russo property. On that day, everything was dry and he could not determine where the alleged water was coming from.

Jamie Norris, an employee of the Town highway department, testified at his deposition that the Town received a number of complaints from March regarding drainage from the Russos' property onto hers. When Norris investigated these complaints, he observed "[a] pipe coming from the town owned catch basin going through the property and multiple pipes coming from [the Russos'

house] draining in the rear of [March's property]" (Norris Deposition at 18). Norris testified that although there was once an open culvert on the Russos' property for drainage from the catch basin, he could not determine when or by whom the pipe was installed. He also observed three to four black pipes draining water onto the Russos' property, "but the water then ran over to [March's property]" (*id.* at 53). Norris conducted a dye test, whereby dye was placed in the outlet of the metal pipe, and the runoff was observed to traverse onto March's property.

The Russos' motion for summary judgment

The Russos now move for summary judgment dismissing the complaint, arguing that they are not responsible for damage caused by the metal drainage pipe, which was installed by the Town. The Russos further argue that the plaintiffs' claims against them are barred by laches, as the alleged alterations to pipes occurred in or around 2001, and the plaintiffs waited until 2011 to bring this suit. The Russos claim that the delay in commencing the suit has prejudiced them because witnesses regarding the installation of the Town pipe are not available, including the former Town Supervisor, who is deceased. The Russos also contend that any claims for damages are limited by the three-year statute of limitations.

In an affidavit in support, Anna Russo avers that the metal pipe was installed by the Town in 1980 after discussions with former Town Supervisor John Lombardi, who is now deceased. The Russos had granted the Town an easement to discharge water onto their property, but the way the Town originally installed the pipe caused the water to discharge onto both 9 and 11 Sniffen Road. The Russos and the Tavolacci's (the plaintiffs' predecessors in interest) "asked the Town if it could extend the metal pipe to discharge water into an area of their land that was undeveloped" (Anna Russo affidavit ¶ 26). Thereafter, The Town extended the pipe beyond the easement area, approximately 200 feet towards the rear of the Russos' property. Anna Russo claims that the plaintiffs' delay has made it impossible to locate other potential witnesses from that era. She further avers that she does not know who installed the smaller black pipe, but that both pipes have been open and obvious since the plaintiff March purchased her property in 1998.

In an affidavit, Rocco Russo denies that he ever told March that he had extended the Town's pipe to its present location.

The Russos' daughter, Teresa Russo, submits an affidavit claiming that she was present in 1980 when Town Supervisor John Lombardi visited their house in regard to the drainage situation. At that time, the Town's catch basin was discharging water onto the developed areas of 9 and 11 Sniffen Road. Shortly thereafter, the Town extended its pipe to its present location. Teresa Russo states that she believes that the black plastic pipe is a residential footing drain leading from the foundation of her parents' house. She also avers that there is a junction box in the middle of her parents' yard that collects water from various drains on the property. Prior to April 2, 2013, water from that junction box traveled "towards the common boundary between 9 and 11 Sniffen Road; then, at a point that is a few feet before the common boundary, the Junction Box Pipe turned in a direction going towards the rear of the Russo property" (Teresa Russo Affidavit ¶ 10). On April 2,

2013, Teresa Russo used additional piping to join the black pipe (located next to the Town pipe) together with the pipe leading from the junction box, and directed these pipes to a location approximately 40 feet away from the plaintiffs' property.

The plaintiffs also submit the expert affidavit of George Mottarella, P.E., who visited the property on November 6, 2012. Mottarella opines that, aside from water flowing from the pipes, surface water flows into the rear of the plaintiffs' property because of multiple impervious surfaces on the plaintiffs' property which are at a higher grade than the property's back yard, and that surface water flows into the plaintiffs' back yard from a non-party neighbor's property to the east. Mottarella visited the property a second time, on June 7, 2013 and, based on that visit, he opined that "neither the Foundation Drain Pipe nor the Junction Box Pipe cast water onto Nine Sniffen Road. The Metal Pipe is the only pipe on the Russo Property casting water onto 9 Sniffen Road" (Mottarella Affidavit ¶ 7).

The Russos submit a Decision and Order of the North Castle Town Court dated September 18, 2008, dismissing a charge of a violation of performing drainage construction without a permit. The order states: "The defendant [Rocco Russo] denied having performed any drainage construction on the property since the 1970s, when the Town had corrected the drainage problem" (Russo Exhibit 2).

The Town's cross motion for summary judgment

The Town cross-moves for summary judgment, incorporating the Russos' arguments by reference. Additionally, the Town argues that it acquired a prescriptive easement for the discharges, since the metal pipe was installed in or about 1980.

The plaintiffs' cross motion for summary judgment

The plaintiffs cross-move for summary judgment in their favor and for the immediate issuance of a permanent injunction. The plaintiffs argue that the Town did not acquire an easement because, as the Russos contend, the pipe was extended with the consent of their predecessors in interest, the Tavoloccis, and, therefore, the use of the property was not adverse. The plaintiffs argue that the action is not barred by laches, citing their numerous attempts to resolve the situation through the Town and by asking the Russos to remedy the problem. The plaintiffs submit the affidavit of Bethany Evans, who states that she is an expert in the field of wetlands sciences and restoration, claiming that it will cost the plaintiffs approximately \$56,000 to remediate their property.

In an affidavit in support, March avers that she moved into her home in 1998 and first discovered the drainage outfalls at issue in early 2001. She claims that she asked both the Town and the Russos to do something about the discharges. Although the Town served the Russos with several notices of violation regarding the discharges, the situation has not been remedied to her satisfaction.

DISCUSSION/ANALYSIS

I. The Russos' motion for summary judgment is granted in part and otherwise denied

As an initial matter, as the plaintiffs concede (*see* Plaintiff's Attorney's Affirmation ¶¶ 74-75), they are barred by the statute of limitations from recovering damages for contamination or other property damage that occurred prior to September 26, 2008 (*see* CPLR 214-c [2]). Accordingly, the branch of the Russos' motion which is for partial summary judgment dismissing so much of the plaintiffs' action as seeks to recover damages for alleged injuries that occurred prior to September 26, 2008 is granted.

However, with respect to the merits of the plaintiffs' remaining claims, the Russos have failed to meet their prima facie burden for summary judgment (*see Zuckerman v City of New York* [1980]).

"A landowner will not be liable for damages to abutting property caused by the flow of surface water due to improvements to his or her land, provided that the improvements were made in good faith to fit the property for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes or ditches" (*Moone v Walsh*, 72 AD3d 764, 764 [2d Dept 2010]). Thus, "[i]t is the plaintiffs' burden to establish that the improvements on the defendants' land caused the surface water to be diverted, that damages resulted, and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the defendants' property" (*id.*; *see Gollomp v Dubbs*, 283 AD2d 550 [2d Dept 2001]).

Here, viewing the evidence in the light most favorable to the plaintiffs (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dept 2009] ["in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant"]), there is evidence from which a factfinder could conclude that the Russos diverted water with artificial means onto the plaintiffs' property, resulting in damages. Accordingly, the Russos' motion must be denied regardless of the sufficiency of the opposition papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

With respect to the Russos' defense of laches, here, the plaintiffs seek both legal and equitable relief. To the extent that the plaintiffs seek to recover damages for injury to property, such relief is legal in nature, and the doctrine of laches does not apply (*see Hilgendorff v Hilgendorff*, 241 AD2d 481, 481 [2d Dept 1997] ["the doctrine of laches . . . has no application in actions at law"]; *see also Blinds To Go (US), Inc. v Times Plaza Dev., LP*, 45 AD3d 714 [2d Dept 2007]). While the doctrine of laches may constitute a defense to the plaintiffs' request for an injunction, the Russos have failed to meet their prima facie burden for summary judgment dismissing the plaintiffs' demand for equitable relief. The evidence, viewed in the light most favorable to the plaintiffs, demonstrates that the Russos have made continual changes to the system of pipes on their property, up to and during the pendency of this action. Under these circumstances, it cannot be said, as a

matter of law, that the plaintiffs' delay in commencing the action unfairly prejudiced the Russos (*see Cohen v Krantz*, 227 AD2d 581, 582 [2d Dept 1996] ["To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant"]).

II. The Town's cross motion for summary judgment is granted

While the Town cannot be held liable for water that the Russos diverted from their own property (*see Iglesias v Dazi*, 253 AD2d 515, 516-517 [2d Dept 1998]), it could be found liable for water discharging the Town-owned outfall.

However, the Town has met its prima facie burden for summary judgment dismissing the complaint on the ground that the Town has obtain a prescriptive easement for the discharge of water from the Town-owned pipe. "[A]n easement for drainage of surface water may be acquired by prescription" (*Torre v Meade*, 226 AD2d 447, 447 [2d Dept 1996]; *see Zutt v State of New York*, 50 AD3d 1133 [2d Dept 2008]; *Vinciguerra v State*, 262 AD2d 743, 745 [3d Dept 1999]). "A party claiming entitlement to an easement by prescription must demonstrate the adverse, open and notorious, and continuous use of the subject property for the prescriptive period" (*see Old Town Tree Farm, Inc. v Long Is. Power Auth.*, 101 AD3d 692, 692 [2d Dept 2012]). "Proof that use of a property was open, notorious, continuous and undisputed generally gives rise to a presumption that the use was hostile and under a claim of right, shifting the burden of proof to the servient property owner to show that the use was permissive" (*Allen v Mastrianni*, 2 AD3d 1023, 1024 [2d Dept 2003]). Here, the Town has established, by clear and convincing evidence, that the discharges from the pipe have been adverse, open and notorious, and continual since 1980. Accordingly, a presumption of hostility arises shifting the burden to the plaintiffs to demonstrate that the discharges were permissive (*see id.*).

In opposition, the plaintiffs failed to raised a triable issue of fact. The plaintiffs contend that their predecessors in interest, the Tavolaccis, gave the Town permission to relocate the pipe (Plaintiffs' attorney's affirmation in support ¶ 92). "Where permission can be implied from the beginning, no adverse use may arise until the owner of the servient tenement is made aware of the assertion of a hostile right" (*Susquehanna Realty Corp. v Barth*, 108 AD2d 909, 910 [2d Dept 1985]; *see Allen v Mastrianni*, 2 AD3d at 1024). However, Anna Russo's tenuous recollection of whether the Tavolaccis agreed to relocate the pipe is arguably inadmissible hearsay and, thus, standing alone it fails to raise a triable issue of fact on the issue of permissive use (*see Coverdale v Zucker*, 261 AD2d 429, 431 [2d Dept 1991] [reversing a judgment after trial and granting defendant's intermediate motion for summary judgment where "hearsay statement that [the plaintiff's] husband gave [the defendants] permission to use the driveway, was insufficient to overcome the presumption of a prescriptive easement"]). In any event, even if the Tavolaccis asked the Town to relocate the pipe to the rear of the properties, the pipe is wholly located on the Russos' property and, thus, their

permission was not required for the Town to relocate the pipe to its present location. Because the alleged prescriptive easement relates to the discharge of water—not the placement of the pipe—the relevant question is whether the plaintiffs have tendered evidence that the Tavolaccis explicitly or implicitly granted permission for *the discharges*.² Assuming that the Tavolaccis knew the pipe was being relocated, the plaintiffs have produced no evidence that the Tavolaccis consented to the alleged discharges traversing the boundary line from the Russos' property to theirs. Further, although “neighborly accommodation” will sometimes give rise to an inference of permissive use (*see Bookchin v Maraconda*, 162 AD2d 393, 394 [2d Dept 1990]), here, the discharges from the Town's pipe do not involve a dispute between neighbors, but between the plaintiffs and their municipal government.

Since the plaintiffs have not tendered evidence “conclusively negat[ing] any one of the elements of an easement by prescription” (*Old Town Tree Farm, Inc. v Long Is. Power Auth.*, 101 AD3d 692 [2d Dept 2012]), the Town's motion for summary judgment dismissing the complaint insofar as asserted against it is granted (*see Ducasse v D'Alonzo*, 100 AD3d 953, 954 [2d Dept 2012] [the defendants failed to raise a triable issue of fact as to whether the plaintiff's use of the driveway was permissive]; *Frumkin v Chemtop*, 251 AD2d 449, 449-450 [2d Dept 1998]).

III. The plaintiffs' cross motion for summary judgment and a permanent injunction is denied

Here, assuming that the plaintiffs met their prima facie burden for summary judgment by establishing the diversion of water onto their property by artificial means, resulting in damage (*see Moore v Walsh*, 72 AD3d at 764), in opposition, the Russos raised triable issues of fact. Specifically, the Russos submitted an expert affidavit of George Mottarella, P.E., who opined that the rear of the plaintiffs' property is naturally inundated with water, that surface water naturally flows onto the plaintiffs' property from other neighbors' properties, and that runoff from impervious surfaces on the plaintiffs' property saturates the area. Accordingly, the defendants raised a triable issue of fact as to whether the plaintiffs are even damaged by the alleged discharges (*see Broxmeyer v United Capital Corp.*, 79 AD3d 780, 783 [2d Dept 2010]).

Given that triable issues of fact remain, the plaintiffs' additional request for the issuance of a permanent injunction is denied.

Based upon the foregoing, it is hereby

ORDERED that the branch of motion of the defendants Anna Russo and Rocco Russo which is for summary judgment dismissing the plaintiffs' claims for damages sustained prior to September 26, 2008 is granted, and motion is otherwise denied; and it is further

² Likewise, although the plaintiffs claim that the pipe was not open and notorious since it is partially buried, the alleged prescriptive easement relates to the discharges (i.e., the drainage of surface water), which were plainly open and notorious (*cf. Masucci v DeLuca*, 97 AD3d 550 [2d Dept 2012]).

ORDERED that the defendant Town of North Castle's cross motion for summary judgment dismissing the complaint insofar as asserted against it is granted; and it is further,

ORDERED that the plaintiffs' motion for summary judgment and a permanent injunction is denied; and it is further

ORDERED that the remaining parties appear in the Settlement Conference Part on May 9, 2014, at 9:30 a.m., in Room 1600 of the Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
March 18, 2014


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