Joglo Realties, Inc. v Marionovsky
2015 NY Slip Op 30754(U)
May 7, 2015
Sup Ct, Kings County
Docket Number: 20502/13
Judge: Mark I. Partnow
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At an IAS Term, Part 43 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 23rd day of April, 2015

P R E S E N T:

HON. MARK PARTNOW,
Justice.

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JOGLO REALTIES, INC. AND ROBERT I. TOUSSIE,

PLAINTIFFS,

- against - Index No. 20502/13

ELI MARIONOVSKY,

DEFENDANT.

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	5-6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiffs Joglo Realties, Inc. (Joglo) and Robert I. Toussie (Toussie), collectively plaintiffs, move, pursuant to CPLR 3211 (a) (7), to dismiss the counterclaims of defendant Eli Marionovsky (defendant). Defendant cross-moves, pursuant to CPLR 3212, for summary judgment against plaintiffs, seeking damages, attorney's fees, costs, disbursements, and sanctions.

The main issue in this matter is whether the complaint constitutes a strategic lawsuit against public participation (hereinafter a SLAPP suit), as defined in Civil Rights §§ 70-a and 76-a, and whether defendant has asserted a viable anti-SLAPP counterclaim.

Facts and Procedural History

The complaint alleges that Joglo owns a 40 x 1000 foot parcel of property known as the Esplanade, running from Ocean Avenue through to Beaumont Street, along the Atlantic Ocean in Manhattan Beach, Brooklyn. Toussie owns a parcel of property located at the corner of the Esplanade and Exeter Street, one block west of Ocean Avenue Beach, and approximately 300-400 feet from Joglo's property. Defendant owns real property known as 4290 Ocean Avenue (Block 8743, Lot 95), also in Brooklyn, which is a 30 x 100 foot zoned Residence (R-31).

The complaint alleges that plaintiffs have offered their property for sale or rent by several real estate professionals "for a period of time." Defendant, however, has allegedly told numerous parties, including potential purchasers or tenants of plaintiffs' properties, that Joglo does not own the Esplanade and cannot give anyone the rights to use it.

Defendant has also allegedly trespassed continuously on Joglo's property; has illegally paved his entire front yard without a permit; upon information and belief, built his house above the heights allowed by law and/or illegally finished his basement, surreptitiously installing the pavement over his front yard after municipal inspectors had left the site and issued a Certificate of Occupancy; and "is not properly containing his water," all of which

"detracts from the residential effect of the neighborhood and negatively affects prospective buyers or renters of [p]laintiffs' properties." Further, the construction by defendant on his property allegedly violates the Zoning Code of the City of New York, which was enacted to allow groundwater to be absorbed from rain and storms and which mandates at least 25% of the front (of the property) to be plant material. By paving the entire property, defendant "cause[s] flooding down Ocean Avenue and onto the Esplanade and into the Atlantic Ocean going over . . . [Joglo's property], adversely affecting its value to anyone who sees the flow of water . . . [which] compromises the sale or rental of any property on [Joglo's] street."

The complaint goes on to allege that defendant "has appeared in front of Community Groups such as The Manhattan Beach Civic Association on October 23, 2013, and upon information and belief at other times, told the entire assembled audience and residents, both at the Hearings and outside the Hearings, that . . . Joglo . . . does not own the Esplanade," and that plaintiffs "did not have private and exclusive use of the Esplanade," telling everyone that it was open to public use, which is untrue.

Further, defendant allegedly stated that the seawalls and breakers plaintiffs recently restored - after Hurricane Sandy caused substantial damage along the coast - were constructed shoddily and improperly, and were designed improperly, that defendant claimed he was an engineer to make people believe him, but in fact "all the construction was done properly and with Permits issued pursuant to designs by licensed architects and engineers."

Defendant also allegedly stated to numerous people, portraying himself as a conservationist, that plaintiffs "have improperly destroyed seagull habitats, which was false . . . [and] was simply said to defame the reputation and the rentability or saleability of [p]laintiffs' property, and to otherwise injure [p]laintiffs." In this regard, the complaint alleges that "Joglo . . . is the owner of the Esplanade, seawall and breakwaters of the property [and] [t]he construction was [done] in accordance with municipal permits."

The complaint further alleges that "[t]he behavior of the [d]efendant herein has affected prospective customers or tenants of the [p]laintiffs' property, frustrating the rental or sale of properties along the Atlantic Ocean which requires exclusive use of the Promenade as one of their major financial components." In this regard, the complaint alleges that: "[d]erogating the site and the use of the property . . . [and] declaring it to be public property when it is not; are all actions that have adversely affected the [p]laintiffs." In this regard, defendant allegedly attempted to intimidate prospective buyers or tenants of plaintiffs' property and did everything to frustrate and terminate these transactions, causing economic harms to plaintiffs. "The actions of the [d]efendant herein who is falsely denying plaintiffs' claim to their property, is casting aspersions on [p]laintiffs' property claiming it is unsafe, shoddily constructed and owned by someone else, adversely affecting the value of" plaintiffs' property," such that reasonable third parties "would be turned away from this property" because defendant, claiming to be an engineer, said there were defects on the property, and that in fact, actual sales or rentals were thwarted as a result.

According to the complaint, defendant's actions were done maliciously and viciously with intent to harm plaintiffs; that defendant has made his statements to the public, both at the Public Meetings of the local civic association and outside of the meetings to individual members of the community, and/or to prospective purchasers or tenants; that defendant circulated slanderous petitions and other writings which were inflammatory and derogatory to plaintiffs' property and the use of their property; and that defendant's conduct has continued for a "period of years." Finally, the complaint alleges that defendant ignores fences and signs and continuously trespasses on plaintiffs' property, by himself, with family, and with guests and other people in violation of plaintiffs' private property rights, that he incites others to trespass on plaintiffs' property and violates plaintiffs' quiet enjoyment of their property.

The complaint alleges five causes of action: trespass, nuisance (defendant's concreted yard allowing water to run over plaintiffs' property), tortious interference with economic advantage (discouraging prospective buyers and renters from purchasing or renting plaintiffs' property), slander of title and property (defaming the title to plaintiffs' property), and indemnification.

In his answer, defendant generally denies the allegations of the complaint, pleads thirty affirmative and other defenses, and asserts four counterclaims: New York Civil Rights Law §§ 70-a and 76-a, nuisance, malicious prosecution, and frivolous action.

With respect to the anti-SLAPP counterclaim, defendant alleges that New York State or another governmental entity, such as the New York State Office of General Services, owns parkland located across the street from his property, which extends southwest down Ocean Avenue to the waterfront. Defendant states that "[t]he ownership of the waterfront property at the southwest end of Ocean Avenue (adjacent to and contiguous to the parkland) is unknown by [him] but upon information and belief it is likely owned by the New York State Office of General Services or other such government agency." Defendant alleges that he has been advised by the New York State Department of Environmental Conservation (DEC) that plaintiffs do not own the land or under water lands located seaward of the promenade at the end of Ocean Avenue and that upon information and belief, plaintiffs do not own their property or that the property is not completely owned by them.

The counterclaim further alleges that at the southwest end of Ocean Avenue, plaintiffs built a concrete wall approximately six to seven feet high and fifty feet long (the Wall), blocking the waterfront, and also undertook other construction which elevated the shore line (the Additional Construction). According to defendant, the Wall and the Additional Construction:

> "create extremely hazardous conditions for the local property owners, including but not limited to, Marianovsky, and their property in that the drainage and ability to recede of excess water from rain and/or other severe storms and/or other conditions resulting in excess water flow, is and would be severely impeded thereby. These conditions *would* result in the flooding of the local properties causing severe property damage" (emphasis added)."

According to the counterclaim, defendant and other residents of Ocean Avenue, acting in good faith, and exercising their right to participate in the public forum with respect to issues which are of public concern, contacted the DEC about issues involving the Wall and the Additional Construction, as well as safety issues resulting therefrom to all local residents, with the reasonable belief that their concerns were true. The DEC found that the construction of the Wall and the Additional Construction were not built in accordance with the DEC Permit, and issued a Notice Of Violation and stop work order. The DEC also issued notices of violation in connection with the Wall and the Additional Construction for shoddy construction because the work did not meet standards for permit issuance in tidal wetlands, navigable waters in New York State, and in a coastal erosion hazard area.

According to the counterclaim, following defendant's public participation as noted above, plaintiffs retaliated against him and other local residents, by filing meritless complaints with the New York City Building Department (the DOB) against defendant regarding his property, filing the instant action, and the filing of a similar action against another local resident.

The counterclaim further alleges that since plaintiffs allege that they possessed the requisite permits for the construction of the Wall and for the Additional Construction from the government bodies having jurisdiction thereof, or since plaintiffs made an application for a construction permit of the Wall and the Additional Construction, have a permit or were required to apply and possess a permit for this construction, they are "public applicant(s) or

permittee(s)" within the meaning of Civil Rights Law § 76-a (b). Lastly, the counterclaim alleges that the within action was brought by plaintiffs in retaliation for defendant's reporting on, commenting on, ruling on, challenging or opposing any application or permission required for the construction of the Wall and/or the Additional Construction, that the action was commenced for the sole purpose of harassing and intimidating defendant and inhibiting his free exercise of speech and petition in violation of Civil Rights Law § 70-a; that the action is wholly lacking in merit and has no substantial basis in fact and law; and that defendant is entitled to compensatory damages, punitive damages, costs, disbursements, attorney's fees, and sanctions.

The remaining counterclaims are nuisance (construction of the Wall/the Additional Construction causing property damage), malicious prosecution (filing of this action in retaliation against defendant for public participation in communicating legitimate public concerns with respect to the Wall/the Additional Construction), and frivolous lawsuit (bringing groundless suit to harass and intimidate defendant).

Subsequently, plaintiffs made the instant motion to dismiss the counterclaims pursuant to CPLR 3211 (a) (7). Defendant cross-moved for summary judgment dismissing the complaint, seeking compensatory and punitive damages, costs, disbursements, attorney's fees and sanctions.

Discussion

"Civil Rights Law § 76-a was passed to protect citizens facing litigation arising from their public petitioning and participation by deterring strategic lawsuits against public participation, termed SLAPP suits" (*Southampton Day Camp Realty, LLC v Gormon*, 118 AD3d 976, 977 [2014] [internal citations omitted]). "SLAPP suits 'are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future'" (*Madison Park Dev. Assoc., LLC v Febbraro,* 2014 NY Slip Op 32932 [U], *7 [Sup Ct, NY County 2014], quoting *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 138 [1992]). "A SLAPP suit is defined by Civil Rights Law § 76-a (1) (a) as an 'action ... for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission'" (*Matter of Related Props., Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 591 [2005], quoting Civil Rights Law § 76-a [1] [a]). Section 76-a (1) (b) defines "public applicant or permittee" as "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." "Courts have held that for an action to be deemed a SLAPP action, the communication by the defendant to which the plaintiff objects must have directly challenged or commented on an application

or permission" (*Madison Park Dev. Assoc., LLC,* 2014 NY Slip Op 32932 [U], *7 [Sup Ct, NY County 2014], citing *Guerrero v Carva*, 10 AD3d 105, 117 [2004]).

"Related provisions passed in the same bill include Civil Rights Law § 70-a" (*Southampton Day Camp Realty, LLC,* 118 AD3d at 977-978). Specifically, "Civil Rights Law § 70-a provides a cause of action for alleged victims of SLAPP suits, which allows '[a] defendant in an action involving public petition and participation . . . [to] maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action'" (*Silvercorp Metals Inc. v Anthion Mgt. LLC*, 36 Misc 3d 660, 665 [Sup Ct, NY County 2012], quoting Civil Rights Law § 70-a [1] [internal quotation marks and citations omitted]).

In order to make a prima facie showing to dismiss an action as a SLAPP suit, the defendant must demonstrate that the action involved public petition and participation, that the plaintiff was a "public applicant or permittee," that the challenged statements were part of a "communication," and the action was "materially related to … efforts" by the defendants "to report on, comment on … challenge or oppose" the plaintiff's application (*T.S. Haulers, Inc. v Kaplan*, 295 AD2d 595, 596 [2002], quoting Civil Rights Law § 76-a [1] [b], [1] [c], [1] [a], respectively). "Once a party seeking relief based on the foregoing has demonstrated that the case involves public petition and participation, CPLR 3212 (h) provides that it is the plaintiff, not the moving defendant seeking dismissal of the SLAPP suit, who bears the burden on the summary judgment motion" (*Bennett v Towers*, 43 Misc 3d 661, 666 [2014]).

"The plaintiff can avoid dismissal of the action only if it can be shown that the suit has a substantial basis in fact and law, or is supported by a substantial argument for an extension, modification or reversal of existing law" (*id.,* citing CPLR 3212 [h]; *Novosiadlyi v James*, 70 AD3d 793, 794 [2010]; *T.S. Haulers, Inc. v Kaplan*, 295 AD2d at 596). "Further, in order for the plaintiff to recover, the Civil Rights Law requires not only that all necessary elements of the claims made can be established; there also must be a factual showing, by clear and convincing evidence, that any communications giving rise to the suit were made with knowledge of falsity or with reckless disregard of whether it was false, where truth or falsity is material to the cause of action (*Bennett,* 43 Misc 3d at 666, citing Civil Rights Law § 76-a [2]). Finally, "[s]ummary judgment . . . must be awarded to a defendant seeking dismissal of a plaintiff's suit and summary judgment on a counterclaim for attorney's fees unless these statutory requirements can be met, or the plaintiff can demonstrate that an issue of fact exists with regard thereto" (*id.*, citing Civil Rights Law § 70-a (1) (a); *Novosiadlyi,* 70 AD3d 794; *T.S. Haulers, Inc.,* 295 AD2d at 596).

With respect to the type of relief awarded in these cases, "defendants in SLAPP suits are given a statutory right of action to recover damages, including costs and attorneys' fees, if the action is without a substantial basis in fact and law and could not be supported by an argument for a change in the law (*Waterways at Bay Pointe v Waterways Dev. Corp.*, 2013 NY Slip Op 30460 [U], *22-23 [Sup Ct, Suffolk County 2013], citing, *inter alia* Civil Rights Law § 70-a [1] [a]). Moreover, "[d]efendants may recover other compensatory damages

upon an additional showing that the action was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of speech, petition, or association rights (Civil Rights Law § 70-a [1][b]), and punitive damages if the action was commenced or continued for the sole purpose of harassing or intimidating (Civil Rights Law § 70-a [1] [c])" (*id.* at 23).

Cross Motion for Summary Judgment

In support of his cross motion (and in opposition to plaintiffs' motion to dismiss his anti-SLAPP counterclaim), defendant's counsel first sets forth a background of this instant matter. Counsel states that in the wake of Hurricane Sandy, plaintiffs allegedly began emergency repairs on the shoreline features at Manhattan Beach in Brooklyn. However, after being cited for working without permits, Joglo applied for and was granted a special Hurricane Sandy Repair permit from the DEC to perform "in-kind/in-place repair" of the existing shore facilities on the 40 x 1000 foot strip of land known as "the Esplanade," located on top of the Manhattan Beach seawall.[1] According to counsel, this strip of land is defined by metes and bounds in a deed to Joglo, allegedly executed in 1977, that was first "mysteriously" filed with the New York City Register in 2005. Although defendant questions the authenticity of this deed, it conveys 40 feet of land, up to the pierhead or bulkhead line,

[1]Although counsel for defendant first states that only one permit was issued, he then indicates that more than one permit was issued. It appears that two permits were issued, one dated February 18, 2013 and another dated July 11, 2013. Copies of the deed, and the permits, respectively, are annexed as Exhibits A and B to defendant's cross motion.

and everything south of that line, or "seaward," is allegedly owned by either New York State or the City of New York under the Public Benefit Doctrine and the principal of littoral rights.[2]

According to the "Hurricane Sandy NYC General Permits" (the Permit) issued by the DEC, plaintiffs were allowed to perform "in-kind-/in-place repair or reconstruction of bulkheads and shoreline erosion structures that were functional before Hurricane Sandy."[3] Defendant and several of his Manhattan Beach neighbors observed private construction crews altering the shore line by covering it with boulders and soil, raising it three to four feet above street level and four to five feet above its original elevation. As a result, defendant and his neighbors notified New York City and New York State officials that plaintiffs had exceeded the Permit's authorization by altering the shore line and raising its elevation, by placing construction fill over vegetation, and constructing a six to seven foot high concrete wall blocking views of the shore, which had not existed before. Defendant and his neighbors also informed the DEC that the shore area had been a seagull habitat with shore vegetation, which plaintiffs had covered with construction fill.

On March 7, 2013, the DEC issued plaintiffs four Notices of Violation with Cease and Desist Orders, citing violations on the oceanfront, including the placement of fill, rubble, and

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[2]"Littoral rights properly refer to those rights attendant to the ownership of lands which abut lakes . . . Although our courts often use the term 'littoral' interchangeably with 'riparian', the term 'riparian' historically refers to a river, not a lake . . . Littoral rights arise by operation of law because of the proximity of the upland to the water" (*Rogers v. S. Slope Holding Corp.*, 172 Misc 2d 33, 37-38 1997] [internal citations and quotation marks omitted]).

[3]Cross motion, Exh. B, Permit item checked under "Type of Project"

debris in a regulated area without a permit.[4] A fifth Notice of Violation was issued to plaintiff Toussie, returnable July 12, 2013, for "conduct[ing] a regulated activity in a tidal wetland" and "construct[ing] a retaining wall without a permit" at the end of Ocean Avenue."[5]

In November, 2013, a complaint was filed with the DOB regarding alleged building code violations at defendant's home,[6] and plaintiffs filed this action that same month.

In support of his cross motion, defendant argues that the instant action was filed in retaliation for his attempts to have the Permit revoked or enforced; that the action is a SLAPP suit because it is an action for damages brought by plaintiffs, who applied for and received special permits to perform "in-kind/in place repair or replacement" of the structures of the shore that were functional before Hurricane Sandy; and that while the complaint artfully avoids mention of the Permit, the allegations of the complaint materially relate to his efforts to report on, comment on, challenge and oppose plaintiffs' "opportunistic" and "illegal" use of the Permit to create more land for themselves by changing the shoreline and tidal wetlands area and erecting a six-foot high concrete wall which did not exist before the hurricane.

Specifically, defendant points out that the complaint alleges that he "has appeared in front of Community Groups such as The Manhattan Beach Civic Association on October 23, 2013, and . . . at other times, told the entire assembled audience and residents, both at the

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[4]Cross motion, Exh. D.

[5]Cross motion, Exh. E

[6]Cross motion, Exh. F

Hearings and outside the Hearings, that . . . Joglo . . . does not own the "Esplanade," and that plaintiffs "do not have private and exclusive use of the Esplanade, telling everyone that the public can use it if they wish (which is untrue), it is private property;" that he stated "to numerous people as an alleged conservationist that the [p]laintiffs have improperly destroyed seagull habitats, which is also false;" that he stated that plaintiffs' construction/restoration of the seawall was shoddy and designed improperly, when "all of the construction was done properly and with Permits issued pursuant to designs by licensed architects and engineers;" that he "circulated slanderous petitions and other writings which were inflammatory and derogatory to the [p]laintiff's property and the use of the property;" that defendant's behavior herein "has affected prospective customers or tenants of the [p]laintiffs' property, frustrating the rental or sale of properties along the Atlantic Ocean . . . [d]erogating the site and the use of the property i[n] declaring it to be public property when it is not; [which] are all actions that have adversely affected the [p]laintiffs;" that defendant "is casting aspersions on [p]laintiffs' property claiming it is unsafe, shoddily constructed and owned by someone else;" and that defendant "has uttered his statements to the public, both at the Public Meetings of the local civic association and outside of the meetings to individual members of the community and/or prospective purchasers or tenants."

In sum, defendant argues that allegations of the complaint that he disputed plaintiffs' ownership of their property and their right to alter the shoreline, that he asserted that the State or City owns the shoreline, and that the unauthorized construction eliminated the vegetation

and seagull habit, are all materially related to the Permit, because he complained to the City and State (and the DEC) about work done illegally under the guise of the Permit, and his comments were made in an effort to have the Permit revoked or enforced by the DEC and other governmental agencies. Defendant argues that merely because the complaint alleges that he trespassed and violated the building code does not change the true nature and goal of the lawsuit. Based upon his prima facie showing, defendant argues that the burden shifts to plaintiffs to show that their suit "has a sound and substantial basis in fact and law."

In opposition, plaintiffs argue that they do not seek retaliation against defendant for any purported public participation, but rather for defendant's tortious conduct wholly outside of the objections he lodged with the DEC, including trespass and dissemination of false information to prospective buyers and renters. Plaintiffs contend that the mere fact that Joglo held a construction permit while plaintiffs simultaneously sued defendant for his unrelated, unlawful conduct does not instantly convert this action into an impermissible SLAPP suit. In this regard, they assert that the complaint alleges that defendant's unlawful conduct began *before* Joglo commenced its reconstruction and thus before defendant began his public participation before the DEC. Lastly, plaintiffs contend that the true motivations underlying defendant's unlawful conduct were his frustration over plaintiffs' private ownership of the oceanfront Esplanade and the diminution of the ocean breeze and view purportedly enjoyed from defendant's property, which is approximately 400 feet from the ocean.

In reply, defendant argues that plaintiffs have failed to show that any of their causes of action have a substantial basis in law. As an initial matter, defendant notes that plaintiffs do not dispute that they are a "public applicant or permittee," and only claim that their causes of action are not materially related to defendant's efforts regarding the Permit. However, defendant reiterates that he has shown the material relation between his public participation - opposing the allegedly unauthorized shoreline work and plaintiffs' abuse of the Permit - and the frivolous, retaliatory nature of plaintiffs' action, by detailing the allegations of the complaint, as noted above, which illustrate that his public participation efforts in regard to the Permit are at the very root of this litigation. Further, defendant notes that the court is not required to ignore the larger picture in which this litigation emerged, including the fact that plaintiffs never complained about defendant's purported building code violations and trespass until after defendant and his neighbors notified the City and the DEC of plaintiffs' allegedly illegal activities at the Manhattan Beach shoreline, via phone calls and a petition they circulated in June of 2013. As to the substance of the complaint, defendant argues that the four causes of action are vague and unfounded, namely lacking in any evidentiary basis, such as specific examples as to dates, times, or persons affected or interfered with.

The court finds that defendant has made a prima facie showing that this action involves public petition and participation. First, there is no dispute that plaintiffs are "public applicant[s] or permittee[s]" (Civil Rights Law § 76-a [1] [b]). Second, the statements made by defendant which are challenged by plaintiffs were part of a "communication," namely, "any

statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression" (Civil Rights Law § 76-a [1] [c]). As noted above, the complaint alleges several statements or "communications" made by defendant regarding plaintiffs' property and their alleged misuse of the Permit. Third, despite plaintiffs' claim to the contrary, the complaint is "materially related to . . . efforts" by defendant "to report on, comment on, rule on, challenge or oppose" the Permit (Civil Rights Law § 76-a [1] [a]). It alleges that defendant publicly commented at Hearings and civic association/community meetings that plaintiffs did not own the Esplanade or have exclusive use of it; that plaintiffs improperly destroyed seagull habitats; that plaintiffs' construction/restoration of the seawall was shoddy and designed improperly; that defendant "circulated slanderous petitions and other writings which were inflammatory and derogatory to the [p]laintiffs' property and the use of the property;" and that defendant's behavior affected prospective customers or tenants of the plaintiffs' property, frustrating the rental or sale of properties along the Atlantic Ocean. Further, the complaint alleges that "all of the construction was done properly and with Permits issued pursuant to designs by licensed architects and engineers," an implicit if not overt concession that the alleged defamatory communications made by defendant were materially related to defendant's efforts to comment on and oppose the Permit and the construction by plaintiffs performed thereunder. That the complaint only obliquely references the Permit, and thus only implicitly alleges that plaintiffs attempted to curtail [defendant's] participation, does not preclude the

court from finding that this action constitutes a SLAPP suit (*see Street Beat Sportswear, Inc. v National Mobilization Against Sweatshops*, 182 Misc 2d 447, 453 [1999]).

In opposition, plaintiffs have failed to demonstrate that their suit "has a sound and substantial basis in fact and law."[7] First, plaintiffs merely reiterate that the complaint seeks redress for defendant's tortious conduct perpetrated outside the scope of his efforts to challenge the Permit, including trespass and dissemination of false information to prospective buyers and renters. However, this is insufficient to demonstrate that their causes of action are viable (*Novosiadlyi,* 70 AD3d at 793-794 [where court rejected the plaintiffs' opposition to defendant's motion for summary judgment dismissing the complaint alleging defamation pursuant to Civil Rights Law §§ 70-a and 76-a, which consisted of only an affirmation of counsel, as being without probative value and insufficient to oppose the summary judgment motion]).

Second, plaintiffs cite certain cases in opposition to defendant's cross motion and in support of their own motion to dismiss defendant's Civil Rights Law counterclaim to show that their complaint is not materially related to any efforts of defendant to oppose the construction performed under the guise of the Permit. However, these cases are distinguishable from this matter. In *Silvercorp Metals Inc.* (36 Misc 3d at 667), where the court dismissed an anti-SLAPP counterclaim, there was no petition or application pending when the defendant's statements were made; in *Ansonia Assocs. Ltd. Pshp. v Ansonia Tenants' Coalition, Inc.* (253

[7]No argument is made for a change in the law cited above (CPLR 3212 [h]).

AD2d 706 [1998]), the court held that plaintiff's action was not a SLAPP suit, but there was no indication that defendants were commenting on or challenging any application or petition; in *Niagara Mohawk Power Corp. v Testone* (272 AD2d 910, 912 [2000]), the defendant's statements were not materially related to defendant's public participation as they were outside the scope of the authority issuing plaintiff's license; in *Suk Inc. v Flushing Workers Ctr.* (NY Slip Op 30490 [U], *9 [Sup Ct, NY County 2015), the defendant's statements did not directly challenge any application or permission of plaintiffs for purposes of the anti-SLAPP law; and in *Matter of Related Props., Inc. v. Town Bd. of Town/Village of Harrison* (22 AD3d 587, 591 [2005]), unlike here, the court held that one of the petitioners' causes of action had a substantial basis in law (*see infra*).

In any event, as to whether plaintiffs' causes of action are viable, the nuisance cause of action alleges that defendant's property is fully concreted without a front yard, allowing water to run toward the Atlantic Ocean, and over plaintiffs' property, which adversely affects prospective purchasers/renters of plaintiffs' property. The complaint also alleges that defendant built his house above the heights allowed by law and/or illegally finished his basement. "The elements of a private nuisance cause of action are an interference that is (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, and (5) caused by another's conduct in acting or failure to act" (*Gedney Commons Homeowners Assn., Inc. v Davis*, 85 AD3d 854, 855 [2011]). "[E]xcept for the issue of whether the plaintiff has the requisite property interest, each of the

other elements is a question for the jury, unless the evidence is undisputed" (*id.* [internal citations and quotation marks omitted]). Here, plaintiffs offer no evidentiary proof to support this cause of action. Further, they concede that while a DOB inspection was conducted at defendant's residence, only one parking violation was found. Thus, plaintiffs have failed to demonstrate interference that is substantial in nature, intentional in origin, and unreasonable in character with respect to their property rights. As such, plaintiffs have failed to show that this cause of action has a sound and substantial basis in fact or law.

With respect to the trespass cause of action, the complaint alleges, in substance, that defendant continually trespassed on plaintiffs' property, and invited others to do so, which affects plaintiffs' privacy and quiet enjoyment. "The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission" (*Marone v Kally*, 109 AD3d 880, 882-883 [2013] [internal citations and quotation marks omitted]). Here, in opposition to defendant's prima facie showing, plaintiffs have again failed to offer any specific examples or any evidentiary proof as to a date or time when these trespasses occurred, nor do plaintiffs provide any proof that these trespasses predated defendant's public participation. Plaintiffs merely rely upon the complaint and their attorney's affirmation, which fail to establish that this cause of action is viable (*Novosiadlyi,* 70 AD3d at 793-794).

Plaintiffs have also failed to provide any evidentiary support for their cause of action for tortious interference with economic advantage. This cause of action alleges that defendant

told prospective purchasers/renters that plaintiffs did not own the property, causing such prospective purchasers/renters to forego buying or renting plaintiffs' property, negatively affecting plaintiffs' business relationships and plaintiffs' property values. "To state a claim for tortious interference with business relations or with economic advantage, a plaintiff must allege that: 1) the plaintiff had business relations with a third party; 2) the defendant interfered with those business relations; 3) the defendant acted either with the sole purpose of harming the plaintiff or interfered by using means amounting either to a crime or an independent tort; and 4) damages" (*2626 BWAY LLC v Broadway Metro Assoc., LP*, 32 Misc 3d 1234 [A], 2011 NY Slip Op 51582 [U],*21 [Sup Ct, NY County 2011]). Again, plaintiffs have failed put forth any evidence to support this claim in opposition to defendant's prima facie showing, such as an affidavit naming lost buyers/renters, or proof of any dates, times or persons interfered with (*Novosiadlyi,* 70 AD3d at 793-794]). Further, plaintiffs do not provide any proof that defendant acted solely to harm plaintiffs. As such, plaintiffs have failed to show that this cause of action is substantial in fact or law.

Lastly, the cause of action alleging slander of title and property alleges that defendant claimed that Joglo did not own its property and had no exclusive use to it, that the deed indicates that plaintiffs own the property, and that defendant defamed the property claiming it was unsafe and in violation of conservation laws. "The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (*Fink v Shawangunk*

Conservancy, Inc., 15 AD3d 754, 756 [2005]). Again, plaintiffs fail to provide any evidentiary proof to demonstrate that defendant's claims are false. Moreover, plaintiffs fail to provide any proof that the claimed statements were calculated to cause harm, or that they suffered special damages. In addition, plaintiffs do not dispute that the deed to their property, annexed to the cross motion, shows that they do not own the shoreline, where at least some of the allegedly unauthorized construction took place, nor do plaintiffs provide the court with any evidence that the deed Joglo filed conveys only forty feet of land, up to the pierhead or bulkhead line, and that everything south of that line, (presumably where the seawall was built at the southwest end of Ocean Avenue), or "seaward," is owned by either New York State of the City of New York.

Finally, plaintiffs have failed to establish, by "any kind of evidence, let alone clear and convincing evidence, that the statements and other communications made by the defendant[] regarding the . . . [Property] . . . were false," a difficult showing for any plaintiff to make "given the inherently subjective nature of [defendant's] opposition [to the construction of the seawall and the elevation of the shoreline" (*Bennett,* 43 Misc 3d at 668]). Accordingly, the cross motion to dismiss the complaint is granted. In light of the foregoing, that branch of plaintiffs' motion to dismiss defendant's Civil Rights Law counterclaim is denied. With respect to damages, plaintiffs have not shown any substantial basis for the lawsuit, and in opposition to defendant's cross motion, when given the opportunity, they have failed to demonstrate that the action was not commenced for any purpose other than to intimidate, harass and punish defendant. Therefore, defendant is entitled to costs and attorney's fees, and

both compensatory and punitive damages from plaintiffs, pursuant to Civil Rights Law § 70-a (1) (a), (1) (b) and 1 (c), respectively. In light of the fact that defendant is entitled to attorney's fees and costs from plaintiffs pursuant to the Civil Rights Law, the court declines to address and award the same as sanctions under 22 NYCRR § 130-1 (*see Bennett*, 43 Misc 3d at 671).

Motion to Dismiss Defendant's Counterclaims

The court has already denied that branch of plaintiffs' motion to dismiss defendant's Civil Rights Law counterclaim. As to defendant's nuisance counterclaim, plaintiffs argue that it fails to sufficiently allege that plaintiffs have adversely interfered with the use or enjoyment of defendant's property, or that the alleged damages are not speculative. As to defendant's counterclaim for malicious prosecution, plaintiffs contend, among other things, that defendant has failed to plead the existence of any relevant, prior proceeding brought by them against defendant, let alone that such proceeding terminated in defendant's favor. Finally, plaintiffs assert that there is no independent cause of action for "frivolous lawsuit."

As to his nuisance counterclaim, defendant argues that it is viable because the cement wall built by plaintiffs, while not on his property, unreasonably interferes with his ocean view and breezes. Defendant further argues that his counterclaim for malicious prosecution is not premature because plaintiffs made false claims to the DOB, which were determined to be unfounded. Finally, defendant appears to concede that there is no independent cause of action for sanctions, albeit cites one case suggesting otherwise.

The counterclaim for nuisance alleges that:

> "the Wall and the Additional Construction create extremely hazardous conditions for the local property owners, including but not limited to, [defendant], and their property in that the drainage and ability to recede of excess water from rain and/or severe storms and/or other conditions resulting in excess water flow, is and would be severely impeded thereby . . *These conditions would result in the flooding of the local properties causing severe property damage*" (emphasis added) (Answer, ¶56).
>
> * * *
>
> "As described herein above the Wall and the Additional Construction create hazardous conditions for [defendant] and the local residents, and for their property, and in particular, including, but not limited to, with respect to the disposition of excess water" (Answer, ¶ 75).

Even assuming that the Wall and the Additional Construction interferes with defendant's ocean view and breezes, as defendant alleges in his reply (*see Broxmeyer v United Capital Corp.*, 79 AD3d 780, 783 [2010]), the counterclaim must be dismissed because it is predicated on speculative damages, namely that during storms and other conditions resulting in excess water flow, the Wall and Additional Construction "would" cause flooding of defendant's and other resident's property, causing severe property damage (*see Balunas v Town of Owego*, 56 AD3d 1097, 1098 [2008], *lv denied* 12 NY3d 703 [2009] [internal citations and quotations marks omitted] [Plaintiffs' allegation that their home would be damaged in the event of a tank rupture is speculative and theoretical, rather than known or substantially certain to result]).

The counterclaim for malicious prosecution alleges that following defendant's public participation with respect to the Permit, plaintiffs filed "unjustified and meritless [c]omplaints with the . . . [DOB] regarding [his property] and the filing of the within frivolous action" to

retaliate against him for communicating his legitimate concerns with respect to the Wall and the Additional Construction; that the action was not brought to pursue proper claims and was commenced with malicious intent; that plaintiffs acted without probable cause in bringing this action; and that defendant has been damaged (Answer, ¶¶61, 81-86).

"The elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury" (*Castro v East End Plastic, Reconstructive & Hand Surgery, P.C.*, 47 AD3d 608, 609 [2008]). The favorable termination element must be established by evidence that "the court passed on the merits of the charge or claim . . . under such circumstances as to show . . . nonliability," or evidence that the action was abandoned under circumstances "which fairly imply the plaintiff's innocence" (*id.*, quoting *Pagliarulo v Pagliarulo*, 30 AD2d 840, 840 [1968]).

Defendant does not dispute that there is no prior proceeding between the parties, which warrants dismissal of this counterclaim (*Castro,* 47 AD3d at 609; *Champagne v Shop Rite Supermarkets*, 203 AD2d 410, 411 [1994]). Notably, defendant only refers to the complaints made by plaintiffs to the DOB about his property. However, the filing a complaint with the DOB is insufficient to constitute a "prior proceeding" (*ATI, Inc. v Ruder & Finn, Inc.*, 42 NY2d 454, 460 [1977] ["The motivation plaintiff ascribes to defendants, malicious as it may be, has not been recognized as actionable in circumstances where allegations of possible

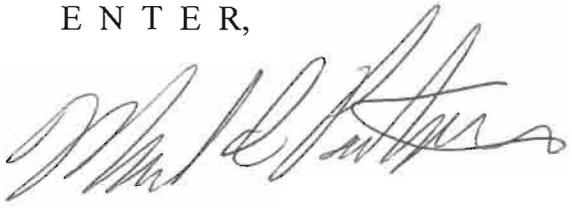
wrongdoing are acted upon by government agencies"]). In addition, inasmuch as the counterclaim fails to identify a prior lawsuit between the parties having been resolved on the merits in defendant's favor, defendant "has not sufficiently alleged the requisite lack of probable cause" to establish a claim for malicious prosecution (*Kaye v Trump*, 58 AD3d 579, 580 [2009], *lv denied* 13 NY3d 704 [2009]). The counterclaim also fails to allege interference with defendant's person or property through the use of a provisional remedy, a necessary element of a cause of action for malicious prosecution (*Niagara Mohawk Power Corp. v Testone*, 272 AD2d 910, 913 [2000]). Finally, the counterclaim does not allege any special damages (*Kaye,* 58 AD3d at 580), namely "some concrete harm that is considerably more cumbersome than the physical, psychological, or financial demands of defending a lawsuit" (*id.* [internal citations and quotation marks omitted]). Notably, no penalty was imposed by the DOB despite the finding of a single parking violation.

The counterclaim for frivolous lawsuit alleges that plaintiffs' action is groundless; that it was brought solely to harass, intimidate and annoy defendant; and that defendant is entitled to damages, i.e. sanctions and attorney's fees based upon the assertion that the action is frivolous. However, New York does not recognize a separate cause of action to impose sanctions (*Greco v Christoffersen*, 70 AD3d 769, 770-771 [2010]; *Liberty Mutual Insurance Company v Mirage Limousine Services, Inc.*, 2008 NY Slip Op 30372, *3 [U] [Sup Ct, Queens County] [a counterclaim for attorney's fees and sanctions based upon the assertion that the action is frivolous is improper]). Accordingly, this counterclaim is dismissed.

In summary, plaintiffs' motion is granted to the extent of dismissing defendant's counterclaims for nuisance, malicious prosecution, and frivolous lawsuit, and is otherwise denied. Defendant's cross motion for summary judgment is granted, and counsel for the parties, via conference call, promptly contact chambers for the purpose of scheduling a hearing to determine defendant's compensatory damages, punitive damages, costs, disbursements, and attorney's fees pursuant to Civil Rights Law § 70-a and 76-a.

This constitutes the decision and order of the court.

E N T E R,



J. S .C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE