

**Takeshige v Kao**

2015 NY Slip Op 31879(U)

September 15, 2015

Supreme Court, Queens County

Docket Number: 702144/15

Judge: Timothy J. Dufficy

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This opinion is uncorrected and not selected for official publication.

**ORIGINAL**

**Short Form Order**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS**

**Present: HON. TIMOTHY J. DUFFICY  
Justice**

**IAS PART 35**

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**TAKEKO TAKESHIGE, UMEKO TAKESHIGE,  
and YOSHIKO TAKESHIGE,**

**Index No. 702144/15**

**Motion Date: 8/28/15**

**Plaintiffs,**

**- against -**

**Motion Cal. No. 132**

**LIE-JUN KAO,**

**FILED**  
**SEP 16 2015**  
**Defendant COUNTY CLERK  
QUEENS COUNTY**

**Mot. Seq.: 3**

The following papers numbered EF 4 to 36 read on this motion by defendant for an order, *inter alia*, granting summary judgment in her favor dismissing plaintiffs' complaint; and the cross-motion by plaintiffs for identical relief.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	EF 4 - 23
Notice of Cross-Motion - Affidavits - Exhibit.....	EF 24 -33
Affirmation In Opposition to Cross-Motion and In Support of Motion-Exhibits.....	EF 34 - 36

Upon the foregoing papers, the motion and cross-motion are denied.

This action involves a contentious property dispute between two neighbors over an approximately four-foot strip of land adjacent to the defendant's driveway on the south side of defendant's property. The defendant purchased the property first in time, and the plaintiffs purchased the adjacent property about a year later. The use of the four-foot strip of land next to the defendant's driveway permits the defendant to comfortably exit and enter a vehicle in her driveway, and then to enter her house by the south entrance. The plaintiffs' claim, and the defendant concedes, that the plaintiffs' deed shows the contested

area as part of their property on the north side of their house. The defendant claims that the previous owner ("Gensel") had placed a gate which covered both his driveway and the disputed area, and had utilized the disputed portion as part of his driveway for years. When they moved in, the plaintiffs removed half of the defendant's gate, and placed a fence down the property line, apparently reflecting the deeded property boundaries. The subject fence prevented the defendant from opening the car door to exit.

Subsequently, civility was thrown to the wind as both sides tried to claim the disputed four-foot area. The defendant removed the plaintiffs' fence, and replaced the original gate. In 2009, the dispute apparently became physical, requiring police intervention. Plaintiff Yoshiko Takeshige claims that the aggravation caused by the continuing altercation between her and her neighbor caused her to suffer a stroke on March 20, 2014.

It is well established that on a motion for summary judgment the court is to decide only matters of law (see S.J. Capelin Associates, Inc. v Globe Manufacturing Corp., 34 NY2d 338 [1974]), accepting "as true the evidence presented by the opposing party" (Hotopp Associates, Ltd. v Victoria's Secret Stores, Inc., 256 AD2d 285 [1st Dept 1998]), drawing all reasonable inferences in favor of the non-moving party (see Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580, 580 N.Y.S.2d 294 [1st Dept 1992]), and basing its decision "on the version of the facts most favorable to" that party (McLaughlin v Thaima Realty Corp., 161 AD2d 383, 384 [1st Dept 1990]). It is the jury which shall decide questions of fact, and where "competing inferences may reasonably be drawn" they shall be drawn by the jury (Myers v Fir Cab Corp., 64 NY2d 806, 808 [1985]).

Where there is conflicting testimony, a summary judgment motion must be denied since the court may not pass on issues of credibility (Communications & Entertainment Corp. v Hibbard Brown & Company, Inc., 202 AD2d 191 [1st Dept 1994]). Since summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (Andre v Pomeroy, 35 NY2d 361, 364 [1974]; Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]), and should not be granted where the issue is even arguable (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957], reargument denied 3 NY2d 941 [1957]). "[F]actual disputes are not enough; they must relate to

material issues" (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 312 [2004]). The existence of a material issue must be established by "evidentiary proof in admissible form," not "rank speculation" (Tungsupong v Bronx-Lebanon Hospital Center, 213 AD2d 236, 237 [1st Dept 1995]). "[W]hen there is nothing more than a metaphysical doubt as to the material facts, summary judgment is proper" (Pemrick v Stracher, 67 F Supp 2d 149, 160 [EDNY 1999]).

The facts contained in the affidavits of the parties are highly disputed. Nonetheless, both sides have moved for summary judgment before depositions have been held<sup>1</sup>, ignoring the Sisyphean realities of the task before them. Both motions are denied in their entirety, since numerous issues of fact exist at this juncture, which preclude this Court from granting either side summary relief.

Initially, the defendant has failed to demonstrate that the plaintiffs' causes of action are untimely. An unlawful encroachment has been consistently characterized as a continuous trespass giving rise to successive causes of action, and the statute of limitations would only bar recovery of damages more than three years prior to commencement of the action (see CSC Acquisition-NY, Inc. v 404 County Rd. 39A, Inc., 96 AD3d 986, 987 [2d Dept. 2012]; Bloomington, Inc. v New York City Tr. Auth., 52 AD3d 120, 123 [2d Dept. 2008] affirmed 13 NY3d 61 [2009]). Submission of a survey without a surveyor's affidavit explaining the metes and bounds is ineffectual to establish when, in fact, the defendant's gate was constructed by the previous owner. The plaintiffs allege that their fence was removed on November 15, 2010, and this action was commenced within three years, on October 31, 2013. Moreover, to acquire a prescriptive easement, a party must establish by clear and convincing evidence that the use of the property was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years (see Martin Weiszberger in Trust v Husarsky, 114 AD3d 731 [2d Dept. 2014]; Old Town Tree Farm, Inc. v Long Is. Power Auth., 101 AD3d 692 [2d Dept. 2012]). In the absence of any proof whatsoever from the prior owner as to the circumstances under which the existing gate was installed, a prescriptive easement cannot

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<sup>1</sup> Multiple summary judgment motions are disfavored in this department (see American Equity Ins. Co. v A & B Roofing, Inc., 106 A.D.3d 762, 763 [2d Dept. 2013])

be established.

In her affidavit, the defendant states that “according to the Plaintiff’s deed, a narrow concrete strip of my driveway is situated on Plaintiff’s property” (see affidavit of Lie-Jun Kao at paragraph 14). Thus, absent proof of the establishment of a prescriptive easement, the defendant essentially admits that she is trespassing on the plaintiffs’ property. The defendant suggests that, if the plaintiffs wish to access their property from the northern side, they should open her gate, “effectively climb over their tall backyard chain-link fence, and scale over a bush” (see affidavit of Kao at paragraph 21). The defendant then states that the plaintiffs allowed her husband to remove their “illegal fence,” and reattach her gate.

As to the measure of monetary relief requested by the ad damnum, the plaintiffs are entitled to allege whatever monetary relief they feel provides reasonable compensation.

The plaintiffs’ third cause of action, asserting intentional infliction of emotional distress, is subject to a one-year limitations period (CPLR 215 [3]; Brasseur v Speranza, 21 AD3d 297, 298 [2005]). The plaintiffs’ complaint alleges that the conduct complained of continued through August 2013. Hence the cause of action is facially timely. The tort of intentional infliction of emotional distress “has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. The first element — outrageous conduct — serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff’s claim of severe emotional distress is genuine” (Howell v New York Post Co., Inc., 81 NY2d 115, 121 [1993]). “Liability arises only when defendant’s conduct is extreme and outrageous, measured by the reasonable bounds of decency tolerated by decent society” (Hughes v Pacienza, 35 Misc 3d 1207[A] [Sup Ct, Kings Co, Rivera, J, 2012], citing Marmelstein v Kehillat New Hempstead, 11 NY3d 15 [2008]). The emphasis is not on plaintiffs’ subjective reactions to the offensive conduct, but on how outrageous the conduct is in objective terms (see Stormes v United Water N.Y., Inc., 84 AD3d 1351 [2d Dept. 2011]). To survive a motion to dismiss, a cause of action for intentional infliction of emotional distress must allege conduct so outrageous in

character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (see Robinson v Way, 57 AD3d 872, 873 [2d Dept. 2008]).

The averments in the plaintiffs' affidavits that the defendant spit on the plaintiffs, slapped them, and threaten to kill them, support the theories of battery, intentional infliction of emotional distress, and a request for punitive damages for behavior that is outrageous and malicious.

The Court has reviewed the balance of the defendant's motion and finds it unavailing. For the identical reasons set forth, the plaintiffs' cross-motion is denied.

Parenthetically, although it is readily apparent that discovery remains outstanding, a fact conceded by the plaintiffs on their Certificate of Readiness, dated February 10, 2015, the plaintiffs did file their Note of Issue as required by the terms of this Court's Preliminary Conference Order, dated March 25, 2014, and Compliance Conference Order, dated September 10, 2014. Accordingly, vacating the plaintiff's Note of Issue is not warranted. The balance of the discovery outstanding shall be scheduled below.

Accordingly, based upon the foregoing, it is,

**ORDERED**, that the motion and cross-motion for summary judgment are denied in all respects; and it is further,

**ORDERED** that the plaintiffs shall provide a fully executed verification to their supplemental response to the defendant's demand for a verified bill of particulars, within twenty (20) days of service of the within Order with Notice of Entry; and it is further,

**ORDERED** that the depositions of plaintiffs Umeko Takeshige and Yoshiko Yakeshige shall commence on or before, but in no event later than, October 30, 2015, with said depositions to continue from day to day until completed; and it is further,

**ORDERED** that the defendant's deposition shall commence immediately upon the completion of the depositions above-referenced, and shall continue from day to day until completed; and it is further,

**ORDERED** that there shall be no adjournment of depositions whatsoever; and it is further,

**ORDERED** that the failure of a party to appear for depositions shall result in that

party being precluded from testifying at the time of trial, without further need of application to this Court; and it is further,

**ORDERED** that any demands for disclosure arising out of the depositions shall be served within ten (10) days of the deposition of the party upon whom the demand is made, and shall be responded to within thirty (30) days of receipt; and it is further,

**ORDERED** that physicians to conduct the independent medical examination(s) of plaintiff Yoshiko Takeshige shall be designated by no later than fifteen (15) days after the completion of said plaintiff's deposition, with said independent medical examination(s) to be completed by no later than thirty (30) days after designation, with the reports generated as the result of said independent medical examination(s) to be served upon plaintiffs' counsel by no later than thirty (30) days after the completion of said independent medical examination(s) ; and it is further,

**ORDERED** that the failure to designate physicians to conduct the independent medical examination(s) by the date set forth above shall result in the defendant waiving any right he may have to said independent medical examination(s); and it is further,

**ORDERED** that the failure to appear for independent medical examination(s) shall result in plaintiff Yoshiko Takeshige being precluded from offering any evidence at trial with regard to injuries; and it is further,

**ORDERED** that the plaintiffs shall provide a CPLR 3101(d)(1) compliant response to the defendant's demand for expert witness information by setting forth and providing the name(s) of any expert witnesses that the plaintiffs intend to call to offer testimony and evidence at the time of trial, within forty-five (45) days of service of the within Order with Notice of Entry, plaintiffs' Note of Issue having been filed over six (6) months ago, this matter having already appeared on the calendar in the Trial Scheduling Part (TSP) of this Court, on August 12, 2015, and a motion for summary judgment having been brought by the defendant and been fully submitted for this Court's consideration on August 18, 2015; and it is further

**ORDERED** that upon a review of the plaintiffs' supplemental responses, all dated April 7, 2015 and attached as exhibits to their papers in opposition, the defendant's claims of insufficiency are without merit except for the limited matters set forth above; and it is

further,

**ORDERED** that counsel herein shall appear and answer the TSP calendar of this Court. on January 25, 2016, the date on which this action is next scheduled to appear and be heard on said calendar; and it is further

**ORDERED** that all other applications not specifically addressed herein are denied.

The foregoing constitutes the decision and order of this court.

**Date: September 15, 2015**



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**TIMOTHY J. DUFFICY, J.S.C.**

**FILED**  
**SEP 16 2015**  
**COUNTY CLERK**  
**QUEENS COUNTY**