Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Eugene Racanelli Inc., Eugene Racanelli and 62 E. Main Realty, LLC,

Plaintiffs,

-against-

Incorporated Village of Babylon,

Defendant.

Index No.: 13433/2011

Motion Sequence No.: 004; MD
Motion Date: 2/10/15
Submitted: 4/22/15

Motion Sequence No.: 005; XMOT.D
Motion Date: 3/6/15
Submitted: 4/22/15

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Clerk of the Court

Upon the following papers numbered 1 to 60 read upon this motion for summary judgment and cross motion for leave to amend reply: Notice of Motion and supporting papers, 1 - 42; Cross Motion and supporting papers, 43 - 58; Replying Affidavits and supporting papers, 59 - 60; Other, defendant's memorandum of law; defendant's reply memorandum of law; it is

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment (i) dismissing the complaint, (ii) in its favor for the equitable relief demanded in its counterclaims, by directing the plaintiffs to remove their construction fence erected within and

obstructing the defendant's easement, or by allowing the defendant to enter onto the plaintiffs' land and remove the fence, (iii) allowing the defendant to enter upon the plaintiffs' land and pave the easement within its proper boundaries, and (iv) allowing the defendant to enter upon the plaintiffs' land and remove the asphalt which was installed by the defendant outside the boundaries of the easement, is denied; and it is further

ORDERED that the cross motion by the plaintiffs for an order (i) pursuant to CPLR 3025 (b), granting leave to amend their reply to assert an affirmative defense based on the doctrine of unclean hands, and (ii) pursuant to CPLR 3212, granting summary judgment in their favor on the issue of liability as to their first and second causes of action, is granted to the extent of granting leave to amend their reply in the proposed form annexed to their moving papers and deeming the amended reply served upon service of a copy of this order with notice of its entry, and is otherwise denied.

This is an action to recover damages and for declaratory and injunctive relief relating to the defendant's use and occupancy of a strip of property located just to the north of the southern boundary of the plaintiffs' property at 62 East Main Street, Babylon, New York.

By letter dated September 24, 2003, the defendant granted the plaintiffs' application to reconstruct a commercial building at the premises on the condition, *inter alia*, that the plaintiffs grant the defendant an easement for public use connecting a parking area adjoining the premises to the west to a parking area adjoining the premises to the east. The parties subsequently executed an easement agreement granting a public right-of-way across the southern portion of the property. The easement strip runs east and west, with its southern boundary located approximately 14½ feet north of the southern property line.

In connection with the proposed construction, the defendant, by letter dated March 23, 2004, requested that the plaintiffs erect a temporary fence "along the North edge of the connecting driveway." The plaintiffs acknowledge that they promptly complied with the request and that the fence is situated within the easement, extending east and west across the length of the easement, and enclosing that portion of the easement located to the north of the fence, rendering it inaccessible to the public.

According to the plaintiffs, in or about 2005, the defendant paved a strip running east and west across the plaintiffs' property, the southernmost portion of which was located only three to five feet north of the southern property line. It is undisputed that the boundaries of the paved strip are not coextensive with the boundaries of the easement. The plaintiffs claim that the paved strip encroaches on the southern boundary of their property by approximately 9½ to 11½ feet for a length of 160 feet. The defendant claims that the area of the alleged encroachment, located between the southern boundary of the easement and the southern property line, corresponds with a "paved parking area" depicted on the site plan, designed to consist of a row of parallel parking spaces.

The plaintiffs claim that in or about October 2005, they applied for an extension of their building permit, and that they began construction of the building in or about December 2005 or

January 2006. However, by letter dated January 12, 2006, the defendant rejected the plaintiffs' request for an extension of the building permit and issued a stop-work order.

In May 2007, the plaintiffs commenced an action against the defendant to recover damages, *inter alia*, for breach of contract, alleging that the September 24, 2003 letter constituted an agreement between the parties which the defendant breached by issuing the stop-work order (*Eugene Racanelli, Inc. v Incorporated Vil. of Babylon*, Sup Ct, Suffolk County, Index No. 07-14164). By order dated August 8, 2010, this court (Molia, J.) granted summary judgment dismissing the complaint on the ground that the plaintiffs had failed to comply with the notice of claim requirements set forth in CPLR 9802 and General Municipal Law § 50-e. It appears that the August 8, 2010 order was subsequently affirmed on appeal (92 AD3d 635, 938 NYS2d 192 [2012]), that a motion for leave to appeal to the Court of Appeals was denied (19 NY3d 805, 949 NYS2d 343 [2012]), and that the action has been marked "disposed."

On September 20, 2010, the plaintiffs sent a letter to the defendant demanding that the defendant remove the blacktop pavement encroaching onto their property south of the easement and cause the public to cease trespassing on that portion of the paved area south of the easement (hereinafter the "disputed strip"). The defendant failed to comply. The defendant claims that in May 2011, the plaintiffs erected guide rails along the southern boundary of the easement at its eastern and western access points, blocking vehicular access to the easement. This action followed.

The plaintiffs allege five causes of action in their complaint. The first is to recover damages on the theory that the defendant's wrongful encroachment onto the disputed strip has rendered the property unmarketable. The second is to recover damages based on the defendant having permitted the general public to continuously trespass on the disputed strip and having refused the plaintiffs' demand to cease using the disputed strip as a public right-of-way. The third, which is premised on the claim that by installing oil-based blacktop, the defendant caused the property to be polluted, is for an order directing the defendant to remove the blacktop from the property and to pay for all remediation costs relating to the contamination of the property. The fourth is for an injunction prohibiting the defendant from continuing its encroachment on the property and further prohibiting the defendant from allowing the public to trespass on the disputed strip. The fifth is for judgment declaring that the easement is vacated.

The defendant, in its answer, pleads two counterclaims. The first is to abate a public nuisance by directing that the plaintiffs remove the fence obstructing the easement. The second, alleging a continuing trespass, is to enjoin the plaintiffs from interfering with the defendant's right to enter and maintain the easement.

By order dated September 27, 2011, the court denied the parties' respective motions for preliminary injunctive relief; by order dated April 16, 2012, the court denied the defendant's motion to dismiss the complaint.

Now, discovery having been completed and a note of issue having been filed on August 19, 2014, the defendant timely moves for summary judgment, and the plaintiffs cross-move for summary judgment as well as for leave to amend their reply to assert an affirmative defense based on the doctrine of unclean hands.

As a preliminary matter, it is noted that notwithstanding the breadth of relief requested in the defendant's notice of motion, it is apparent from its memorandum of law that, to the extent its motion is directed to the complaint, it seeks summary judgment only as to plaintiffs' causes of action for trespass (*i.e.*, the second and fourth) and for vacatur of the easement (*i.e.*, the fifth).

The court finds that the defendant is not entitled to summary judgment dismissing the second and fourth causes of action. In support of its motion, the defendant contends that the plaintiffs knew of but failed to object to its use of the disputed strip for five years prior to the commencement of this action, and that such conduct is tantamount to consent, which is a defense to an action for trespass. Based on the affidavit of Eugene Racanelli, however, it appears that the plaintiffs did not learn of the encroachment until 2010, while preparing an application for a new building permit. Even assuming, then, that consent may be inferred from a failure to object under these circumstances, the court finds an issue of fact, sufficient to defeat summary judgment, whether the plaintiffs knowingly acquiesced to the defendant's use of the disputed strip.

Nor is the defendant entitled to summary judgment dismissing the plaintiffs' fifth cause of action. As can best be gleaned from the complaint (as supplemented by the affidavit of Eugene Racanelli), the theory underlying this cause of action is that permitting the plaintiffs to construct an office building on the property was the quid pro quo for the granting of the easement, so that by withdrawing its permission to construct the building, the defendant effectively forfeited its right to the easement. Such relief is in the nature of rescission, which "is usually only applicable where, because of fraud, misrepresentation, or mistake, there is an absence of the requisite meeting of the minds to the contract" (***Surlak v Surlak***, 95 AD2d 371, 380, 466 NYS2d 461, 469 [1983] [internal quotation marks omitted]). Rescission, however, may also be based on a breach of a contract so substantial and fundamental as to defeat its very purpose (***Babylon Assoc. v County of Suffolk***, 101 AD2d 207, 475 NYS2d 869 [1984]). If, as the plaintiffs allege, the defendant refused in bad faith to extend the building permit, issued a stop-work order, and then effected an amendment of its zoning code requiring any proposed construction in excess of 1,000 square feet to obtain approval from both the Planning Board and the Zoning Board of Appeals–the last of which, they claim, "virtually guaranteed * * * a rejection of any building size near the 19,200 square foot building approved in 2003 as part of the quid pro quo deal"–it cannot be said as a matter of law that rescission does not lie. The defendant's further claims that rescission is barred by the doctrines of unclean hands and *res judicata* have been examined and found without merit; as to *res judicata*, the court is constrained to note that it previously rejected this claim in its April 16, 2012 order.

The defendant's remaining requests for summary judgment on its claims for equitable relief–removal of the fence, paving of the easement within its proper boundaries, and removal of the asphalt on the disputed strip–are denied as well. As to the fence, while it is undisputed that it is

located within the easement, the defendant has failed to demonstrate that its presence has impaired vehicular access in and over the easement, as required to compel its removal (*see* ***Lewis v Young***, 92 NY2d 443, 682 NYS2d 657 [1998]). The defendant's request to enter upon the plaintiffs' land and pave the easement is similarly flawed, as it is far from clear on the record which party may be entitled or obligated to pave the easement, or even that paving is incident or necessary to the use and enjoyment of the easement (*see* ***Herman v Roberts***, 119 NY 37, 23 NE 442 [1890]). Finally, to the extent the defendant seeks an order permitting it to enter the plaintiffs' land in order to remove the asphalt installed by the defendant outside the boundaries of the easement, the court deems it prudent at this juncture not to exercise its authority in such a manner but only to suggest that any such work be done subject to the plaintiffs' consent.

The plaintiffs' cross motion, to the extent it is for summary judgment, is denied as untimely, having been made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see* CPLR 3212 [a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Absent a showing of good cause, "a court has no discretion to entertain even a meritorious, nonprejudicial summary judgment motion" (***Hesse v Rockland County Legislature***, 18 AD3d 614, 795 NYS2d 339, 340 [2005]); it appears, moreover, that the existence of a factual question on the issue of consent, as discussed previously, would bar the granting of summary judgment in any event.

The plaintiffs' further request to amend their reply to assert an affirmative defense based on the doctrine of unclean hands, based on the defendant's alleged trespass, is granted, as it cannot be said that the proposed amendment is palpably insufficient or patently devoid of merit (***Giunta's Meat Farms v Pina Constr. Corp.***, 80 AD3d 558, 914 NYS2d 641 [2011]; ***Pansini Stone Setting v Crow & Sutton Assoc.***, 46 AD3d 784, 850 NYS2d 133 [2007]; *see* CPLR 3025 [b]). A court will not examine the legal sufficiency or merits of a proposed amendment unless the insufficiency or lack of merit is clear and free from doubt (***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2008]).

Dated: December 3, 2015

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION