

**MJK Bldg. Corp. v Fayland Realty Inc.**

2016 NY Slip Op 32741(U)

August 1, 2016

Supreme Court, Suffolk County

Docket Number: 15-607643

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 9-18-15  
ADJ. DATE 10-27-15  
Mot. Seq. #001- MG

-----X  
MJK BUILDING CORP., MJ KIM AGENCY,  
INC. and ALBERT MJ KIM,

Plaintiffs,

- against -

FAYLAND REALTY INC., L.M.I. COMMACK  
REALTY CORP., HESS CORPORATION,  
MARATHON PETROLEUM CORPORATION,  
SPEEDWAY L.L.C., and ISLAND PUMP &  
TANK CORPORATION,

Defendants.  
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Fayland Realty Inc., L.M.I. Commack Realty Corp., Marathon Petroleum Corporation, and Speedway L.L.C. , dated August 20, 2015, and supporting papers (including Memorandum of Law dated August 20, 2015); (2) Notice of Amended Motion by the defendants Fayland Realty Inc., L.M.I. Commack Realty Corp., Marathon Petroleum Corporation, and Speedway L.L.C., dated October 12, 2015, and supporting papers (including Memorandum of Law dated October 12, 2015); (3) Affidavit in Opposition by the plaintiff Albert MJ Kim, dated September 11, 2015, and supporting papers; (4) Supplemental Affidavit in Opposition by the plaintiff Albert MJ Kim, dated October 22, 2015, and supporting papers (including Supplemental Memorandum of Law dated October 23, 2015); (5) Reply Memorandum of Law by the defendants Fayland Realty Inc., L.M.I. Commack Realty Corp., Marathon Petroleum Corporation, and Speedway L.L.C., dated September 21, 2015; (6) Other Amended Complaint, dated September 22, 2015 (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

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UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the amended motion by defendants Fayland Realty Inc., L.M.I. Commack Realty Corp., Marathon Petroleum Corporation, and Speedway L.L.C. to dismiss the amended complaint as against them, is granted.

Plaintiffs commenced this action to enforce alleged restrictive covenants prohibiting any wall or fence blocking ingress or egress to a certain parcel of land, for a declaration that plaintiffs have an easement over some portion of defendants' property, and for property damage that allegedly occurred during construction of a gas station and convenience store. In their amended complaint, plaintiffs allege a 1977 cancellation of covenants and restrictions in a 1950 deed was invalid, that they acquired an easement of access by prescription, an easement by adverse possession, and an easement of access by estoppel. Plaintiffs also allege that a reduction to their driveway was improper, that barriers to their property are improper, that a curb-cut was improper. The amended complaint also alleges trespass, a violation of New York State Building Code §3307.1, that operation of a convenience store should be enjoined, that lowering elevations of defendants' property should be transitional, and seeks \$10,000,000.00 in damages.

Defendants Fayland Realty Inc., L.M.I. Commack Realty Corp., Marathon Petroleum Corporation, and Speedway L.L.C. (collectively referred to as the defendants) move to dismiss amended complaint based on documentary evidence, lack of standing, statute of limitations, and failure to state a cause of action pursuant to CPLR 3211 (a) (1), (3), (5), and (7). In support of the motion Speedway submits, among other things, the summons and complaint; the 1950 deed; the 1977 cancellation of covenants and restrictions in the 1950 deed; a plot map; a zoning change permit; a portion of the transcript of the hearing before the Smithtown Board of Zoning Appeals; a resolution approving certain variances; site plan approval, certificates of completion, compliance and approval; and an assignment from Hess to Speedway. In opposition to the motion, plaintiffs submit, among other things, an affidavit of Albert MJ Kim, owner of MJK Building Corp. and MJ Kim Agency.

While the motion was pending, plaintiffs served an amended complaint which superseded the original complaint (*see Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 970 NYS2d 589 [2d Dept 2013]; *Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty*, 71 AD3d 533, 895 NYS2d 824 [1st Dept 2010]). The Court will consider the dismissal motion as addressed to the amended complaint, as it is clear from subsequent filings that the Speedway defendants seek a determination under CPLR 3211 as to the new pleading (*see Sobel v Ansanelli*, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2010]).

As to the first cause of action for declaratory relief, dismissal of a cause of action under CPLR 3211 (a) (1) requires documentary proof that "utterly refutes" the factual allegations in the complaint related to such claim, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *see Melnicke v Brecher*, 65 AD3d 1020, 886 NYS2d 406 [2d Dept 2009]; *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401, 873 NYS2d 326 [2d Dept 2009]). Here, the amended complaint alleges and the parties agree that in 1950 four lots were owned by John A. Rau, and the lots 2.1, 2.4, 10, and 2.3 were all located on the south side of Jericho Turnpike, near

the corner of Harned Road in Smithtown, New York. On December 29, 1950, Rau sold lot 10 to Johnny's of Jericho, Inc. Lot 10 was later sold to L.M.I. Commack Realty Corp. and is now occupied by a restaurant named "The Spare Rib." The deed transferring ownership of lot 10 from Rau to Johnny's contained the following restrictive covenants:

Seller (Rau) covenants and agrees that, with respect to the portion of the block located on the south side of Jericho Turnpike between Smith's Lane and Harned Road, still owned by him, and now occupied by a residence (lot 2.3) and gas station (lot 2.1), (a) no wall or fence will be erected between said gas station (lot 2.1) and the parcel conveyed to purchaser (lot 10), running south from Jericho Turnpike to the rear of said gas station (lot 2.1); (b) patrons visiting purchaser's property (lot 10) may cross the property fronting the gas station (lot 2.1) without interruption and persons intending to visit the gas station (lot 2.1) may pass purchaser's property (lot 10) without interruption; (c) Seller will not sell either the gas station (lot 2.1) or the property occupied by the residence (lot 2.3) adjacent thereto without first offering said property to purchaser or successors or assigns (the property referred to shall run along Jericho Turnpike to Harned Road and thence about 200 feet south more or less); or in the event the seller shall receive a bona fide offer therefor, without first offering the purchaser, its successors or assigns, said property by an offer in writing addressed to it at the premises this day conveyed, at the price and terms of said offer, and the purchaser or its successors and assigns shall have 60 days from the date of the post mark of such notice within which to agree to purchase the same upon the terms of said offer. These covenants contained in this paragraph shall run with the land and survive delivery of the deed.

Seller agrees not to engage in the restaurant business, within a radius of five miles of the property sold by him to purchaser for a period of ten years. Seller covenants, warrants and agrees that no roadside stand or restaurant will be erected on any of the land presently owned by him and described in the deed dated October 27, 1936, recorded 11/2/36 Liber 1890 cp 1221, to him by which he acquired title thereto, and seller agrees that, should he convey said land or any part thereof, every deed will contain this restriction, which shall run with the land. (Lot numbers added for clarification.)

On September 7, 1977, Rau sold lot 2.3 to William C. Shay, Sr., and Jay Berkowitz. Lot 2.3, where MJ Kim Agency, Inc., maintains a business as a State Farm Agent, was first occupied by plaintiffs in 1993. In 1995, plaintiffs purchased such property, known as 2102 Jericho Turnpike. The deed to Shay and Berkowitz was subject to the 1950 deed restrictions, meaning that the owner of lot 2.3 was prohibited

from building a wall or fence on the east side of the property prohibiting ingress or egress to lot 10. On October 22, 1977, the owner of lot 10, N.F.J. F. Restaurant Corp., and Rau agreed to cancel the restrictions in the 1950 deed, and the cancellation was recorded in the Suffolk County Clerk's Office.

The law favors the free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them (*Witter v Taggart*, 78 NY2d 234, 237, 573 NYS2d 146 [1991]; *Ford v Fink*, 84 AD3d 725, 726, 924 NYS2d 94 [2d Dept 2011]; *Breakers Motel v Sunbeach Montauk Two*, 224 AD2d 473, 474, 638 N.Y.S.2d 135 [2d Dept 1996]). Restrictive covenants will be enforced only where their existence and scope is established by clear and convincing evidence presented by the party seeking their enforcement (*see Witter v Taggart*, 78 NY2d 234, 573 NYS2d 146 [1991]; *Greek Peak v Grodner*, 75 NY2d 981, 556 NYS2d 509 [1990]; *Butler v Mathisson*, 114 AD3d 894, 981 NYS2d 441 [2d Dept 2014]). They may be enforced by persons other than the grantor or the covenantee, and the owner of neighboring land for whose benefit a restrictive covenant is imposed by a grantor may enforce such covenant as a third-party beneficiary (*Korn v Campbell*, 192 NY 490, 495, 37 LRANS 1 [1908]; *Nature Conservancy v Congel*, 253 AD2d 248, 251, 689 NYS2d 317 [4th Dept 1999]). Further, a restrictive covenant imposed by a grantor as part of a general plan or scheme for the benefit of all grantees in a real estate subdivision or development may be enforced by any of the grantees in such subdivision or development despite the lack of privity of estate between the grantor and the neighbor (*Chesebo v Moers*, 233 NY 75, 80, 21 ALR 1270 [1922]; *Korn v Campbell*, 192 NY 490, 495, 37 LRANS 1 [1908]; *Nature Conservancy v Congel*, 253 AD2d 248, 251, 689 NYS2d 317 [4th Dept 1999]; *Graham v Beermunder*, 93 AD2d 254, 258, 462 NYS2d 231 [2d Dept 1983]).

The defendants have conclusively established that the restrictions and covenants alleged by plaintiffs to be valid and in full force and effect were for the benefit of lot 10 and lot 2.1, but not lot 2.3. Moreover, the restrictions and covenants that effected both lot 10 and lot 2.1 were cancelled in 1977. Plaintiffs' position that the restrictions and covenants were for the benefit of all Rau's properties, including lot 2.3, is without merit. The express terms of the 1950 deed benefitted lot 10, not lot 2.3. Moreover, plaintiffs have no standing to enforce restrictive covenants that were not for the benefit of lot 2.3 (*Donn v Sower*, 103 AD2d 734, 477 NYS2d 197 [2d Dept], *app. den.*, 63 NY2d 609, 484 NYS2d 1023 [1984]). Accordingly, based upon the documentary proof, plaintiffs' first, fifth, and eighth causes of action are dismissed.

When a party moves pursuant to CPLR 3211 (a)(7) for dismissal based on the failure to state a cause of action, the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181, 904 NYS2d 153 [2d Dept 2010]). "However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704, 864 NYS2d 70 [2d Dept 2008]). In assessing whether a complaint can withstand a motion made under CPLR 3211 (a)(7), a court may consider affidavits submitted to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). If such evidentiary material is considered by the court, the test is whether plaintiff has a cause of action, not whether he or she has stated one in the complaint (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d

182; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]).

The second cause of action seeks a declaratory judgement that an easement of access by prescription exists over lots 2.1 and 2.4. An easement by prescription is established by clear and convincing proof of the adverse, open and notorious, continuous, and uninterrupted use of property for a 10-year period (see *Martin Weiszberger in Trust v Husarsky*, 114 AD3d 731, 979 NYS2d 851 [2d Dept 2014]; *Ducasse v D'Alonzo*, 100 AD3d 953, 954 NYS2d 615 [2d Dept 2012]; *315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC*, 62 AD3d 690, 878 NYS2d 193 [2d Dept 2009]). A party seeking a right of use by prescription, however, need not establish that such use was exclusive (see *Almeida v Wells*, 74 AD3d 1256, 904 NYS2d 736 [2d Dept 2010]), and may tack on his or her predecessors' prior use to establish the requisite prescriptive period (see *Mihaly v Mahoney*, 126 AD2d 791, 510 NYS2d 826 [3d Dept 1987]; *Warwick Materials v J.K. Produce Farms*, 111 AD2d 805, 490 NYS2d 551 [2d Dept 1985]).

Plaintiffs' complaint fails to state a cause of action for an easement by prescription as plaintiffs failed to specify a definite and certain line of travel covered by the alleged easement. The amended complaint alleges only an easement "from the west" and "from the south." The failure to specify the portions of lot 2.1 and 2.4 that the easement covers is fatal to the cause of action (*Almeida v Wells*, 74 AD3d 1256, 904 NYS2d 736 [2d Dept 2010]). In addition, plaintiffs do not allege that the "cross-access" was continuous or uninterrupted. Moreover, the affidavit of Albert Kim describes a permitted use, as opposed to a hostile one (see *Duckworth v Ning Fun Chiu*, 33 AD3d 583, 822 NYS2d 147 [2d Dept 2006]). Accordingly, the second cause of action alleged in plaintiffs' amended complaint is dismissed.

The third cause of action seeks a declaratory judgement that an easement was acquired over lot 2.1 and 2.4 by adverse possession. To establish a claim to an easement based on adverse possession, a party must prove the common law requirements that possession of the subject property was hostile, under a claim of right, actual, open and notorious, exclusive, and continuous for a 10-year period (see *Estate of Becker v Murtagh*, 19 NY3d 75, 945 NYS2d 196 [2012]; *Walling v Przybylo*, 7 NY3d 228, 818 NYS2d 816 [2006]; *Brand v Prince*, 35 NY2d 634, 364 NYS2d 826 [1974]; *Shilkoff v Longhitano*, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]; *Ram v Dann*, 84 AD3d 1204, 924 NYS2d 482 [2d Dept 2011]). For title to vest under the doctrine of adverse possession "there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Brand v Prince*, 35 NY2d 634, 636, 364 NYS2d 826). As the acquisition of title to land by adverse possession is not favored under the law, the elements of such a claim must be proven by clear and convincing evidence (*Estate of Becker v Murtagh*, 19 NY3d 75, 81, 945 NYS2d 196; *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159, 643 NYS2d 939 [1996]).

Prior to July 2008, a party seeking to establish title by adverse possession on a claim not based upon a written instrument had to show that the land was "usually cultivated or improved" or "protected by a substantial enclosure" (RPAPL 522). The type of cultivation or improvement sufficient under the statute varied with the character, condition, location and potential uses for the property (see *Zeltser v Sacerdote*, 52 AD3d 824, 860 NYS2d 624 [2d Dept 2008]; *Blumenfeld v DeLuca*, 24 AD3d 405, 807 NYS2d 99 [2d Dept 2005]; *Barnett v Nelson*, 248 AD2d 656, 670 NYS2d 326 [2d Dept 1998]; see also *Ramapo Mfg. Co.*

*v Mapes*, 216 NY 362, 110 NE 772 [1915]), and only needed to be consistent with the nature of the property to indicate exclusive ownership (see *Gaglioti v Schneider*, 272 AD2d 436, 707 NYS2d 239 [2d Dept 2000]; *Katona v Low*, 226 AD2d 433, 641 NYS2d 62 [2d Dept 1996]; *City of Tonawanda v Ellicott Creek Homeowners Assn.*, 86 AD2d 118, 449 NYS2d 116 [4th Dept 1982], *appeal dismissed* 58 NY2d 824 [1983]). Amended by the Legislature in 2008, RPAPL 522 now states that, after July 7, 2008, a party without a claim of title based upon a written instrument making a claim of title to land based on adverse possession must establish either that the land at issue had been “protected by a substantial enclosure” or that “there have been acts sufficiently open to put a reasonably diligent owner on notice.” RPAPL 501, also amended by the Legislature in 2008, defines the common law element of “claim of right” as meaning “a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case might be.” Under RPAPL 543, the presence of “de minimis non-structural encroachments,” like fences, shrubs and sheds, is now deemed permissive, as are certain acts of routine maintenance and cultivation, like mowing the lawn. However, the Real Property Actions and Proceedings Law as amended cannot be applied retroactively to deprive a claimant of a property right that vested prior to the commencement date of the new legislation (see *Shilkoff v Longhitano*, 94 AD3d 974, 943 NYS2d 144; *Hogan v Kelly*, 86 AD3d 590, 927 NYS2d 157 [2d Dept 2011]; see also *Hammond v Baker*, 81 AD3d 1288, 916 NYS2d 702 [4th Dept 2011]; *Barra v Norfolk S. Ry. Co.*, 75 AD3d 821, 907 NYS2d 70 [3d Dept 2010]; *Franza v Olin*, 73 AD3d 44, 897 NYS2d 804 [4th Dept 2010]).

Moreover, “[s]uccessive adverse possessions of property omitted from a deed description, especially contiguous property, may be tacked if it appears that the adverse possessor intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed” (*Brand v Prince*, 35 NY2d 634, 637, 364 NYS2d 826; see *Eddyville Corp. v Relyea*, 35 AD3d 1063, 827 NYS2d 315 [3d Dept 2006]; *Gjokaj v Fox*, 25 AD3d 759, 809 NYS2d 156 [2d Dept 2006]). Stated differently, “[a]n adverse possession may be effectual for the statutory period by successive persons provided that such possession be continued by an unbroken chain of privity between the adverse possessors” (*Pegalis v Anderson*, 111 AD2d 796, 797, 490 NYS2d 544 [2d Dept 1985]; see *Belotti v Bickhardt*, 228 NY 296, 306, 127 NE 239 [1920]). Thus, where a party claiming adverse possession has not possessed the property for the statutory period, such party may “tack his [or her] adverse possession to that of his [or her] predecessor to satisfy the applicable statutory period” (*Stroem v Plackis*, 96 AD3d 1040, 1042, 948 NYS2d 90 [2d Dept 2012], quoting *Brand v Prince*, 35 NY2d 634, 637, 364 NYS2d 826; see *Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 992 NYS2d 71 [2d Dept 2014]). Conversely, absent evidence the predecessor in title intended to transfer possession of land not included in the deed description, there is no chain of privity between adverse possessors, and the party asserting title based on adverse possession is precluded from tacking on to the predecessor’s occupation time (see *Stroem v Plackis*, 96 AD3d 1040, 948 NYS2d 90; *Ram v Dann*, 84 AD3d 1204, 924 NYS2d 482; *East 13th St. Homesteaders’ Coalition v Lower E. Side Coalition Hous. Dev.*, 230 AD2d 622, 646 NYS2d 324 [1st Dept 1996]). Furthermore, a party will not be permitted to tack a predecessor’s alleged adverse use to his or her claim of adverse possession if there is no evidence the predecessor asserted made an adverse possession claim against the disputed property (see *Garrett v Holcomb*, 215 AD2d 884, 627 NYS2d 113 [3d Dept 1995]; *Meerhoff v Rouse*, 4 AD2d 740, 163 NYS2d 746 [4th Dept 1957]).

Here, as discussed above, plaintiffs do not specify the actual area of the alleged easement by adverse possession. The amended complaint also fails to allege exclusive access, and does not allege that plaintiffs cultivated or improved a portion of defendants property. Accordingly, the third cause of action in plaintiffs' amended complaint is dismissed.

The fourth cause of action seeks a declaratory judgement that an easement of access was acquired over lots 2.1 and 2.4 by estoppel. An easement by estoppel may arise if an owner of land, through specific representations, leads another to reasonably believe a permanent, alienable interest in real property has been created, and if in reliance on such representations, the other makes permanent or valuable improvements on the land. To invoke the doctrine of estoppel, it must be shown that it would be inequitable to allow the owner to interrupt the enjoyment of the easement (*see* 17 NYJur 21; *Olin v Kingsbury*, 181 AD 348, 354, 168 NYS 766 [1st Dept 1918]). The amended complaint fails to allege when "representations were made," the actual words used, the specific length and width of the easements, and what, if any, improvements were made in reliance upon the alleged representations. Accordingly, the fourth cause of action of plaintiffs' amended complaint is dismissed as it fails to state a cause of action.

The fifth cause of action alleges that work done as a result of re-zoning, a reduction of the curb cut on Jericho Turnpike, was improper. The eleventh cause of action alleges that elevation changes done as a result of result of the re-zoning were also improper. It is undisputed that the re-zoning occurred in 2013. The statute of limitations for a challenge to re-zoning is 4 months (CPLR 217 [1]). This action was commenced on July 16, 2015; thus, these causes of actions are untimely (*Matter of Eadie v Town Bd. of the Town of N. Greenbush*, 7 NY3d 306, 821 NYS2d 142 [2006]). Plaintiffs do not allege that the grading and curb cut changes violated the approved site plan and, therefore, also fail to state a cause of action. Accordingly, the fifth and eleventh causes of action of the amended complaint are dismissed.

The sixth cause of action requests removal of barriers of access, and the tenth cause of action requests enforcement of the prohibition of a roadside stand or restaurant. As discussed above, the restrictions and covenants claimed were cancelled in 1977. The express terms of the 1950 deed benefitted lot 10, not plaintiffs' property, lot 2.3. Moreover, plaintiffs have no standing to enforce restrictive covenants that were not for the benefit of lot 2.3 (*Donn v Sower*, 103 AD2d 734, 477 NYS2d 197 [2d Dept], *app. den.*, 63 NY2d 609, 484 NYS2d 1023 [1984]). Additionally, plaintiffs have not alleged that a convenience store is inclusive of "road-side stand" or "restaurant" within the meaning of the 1950 deed restriction. Accordingly, based upon documentary proof, plaintiffs' sixth and tenth causes of action are dismissed.

The seventh cause of action alleges negligence "of the work done by or on behalf of defendant Hess Corporation," and damage to plaintiffs' property caused "by the negligence of defendant Island Pump & Tank." Neither Hess nor Island Pump & Tank move herein. The seventh cause of action fails to state a claim against Fayland Reality Inc., L.M.I. Commack Realty Corp., Marathon Petroleum Corporation, and Speedway L.L.C., and is dismissed to the extent that it applies to the moving defendants.

The eighth cause of action alleges trespass by Island Pump & Tank. "Trespass is an intentional entry onto the land of another without justification or permission" (*Woodhull v Town of Riverhead*, 46

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AD3d 802, 804, 849 NYS2d 79 [2d Dept 2007]). “The essence of trespass is the invasion of a person’s interest in the exclusive possession of land” (*Zimmerman v Carmack*, 292 AD2d 601, 739 NYS2d 430 [2d Dept 2002]). An unlawful encroachment on another’s real property is considered a continuous trespass and gives rise to successive causes of action (see *509 Sixth Ave. Corp. v New York City Tr. Auth.*, 15 NY2d 48, 255 NYS2d 89 [1964]; *Wright v Sokoloff*, 110 AD3d 989, 973 NYS2d 743 [2d Dept 2013]; *CSC Aquisition-NY, Inc. v 404 Country Rd. 39A, Inc.*, 96 AD3d 986, 947 NYS2d 556 [2d Dept 2012]). As no allegations are made against the moving defendants, the cause of action fails to state a cause of action against the moving defendants, and is dismissed as it applies to them.

The ninth cause of action alleges a violation of New York State Building Code § 3307.1 and a failure by Island Pump & Tank and the Hess Corporation to protect plaintiffs’ property during construction. As no allegations are made against the moving defendants, the cause of action is dismissed as against them.

Finally, the twelfth cause of action demands \$10,000,000.00 in damages based upon impairment of plaintiffs’ business and the marketability of the future sale of the property. As no claim is set forth, the cause of action is redundant with the first through eleventh causes of actions and is dismissed (*Monroe v Long Is. Coll. Hosp.*, 84 AD2d 576, 443 NYS2d 433 [2d Dept 1981]).

Dated: August 1, 2016

  
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PETER H. MAYER, J.S.C.