

Toporoff v Galli

2016 NY Slip Op 33227(U)

April 6, 2016

Supreme Court, Westchester County

Docket Number: Index No. 56780/2013

Judge: Orazio R. Bellantoni

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

-----X
RUTH TOPOROFF AND MICHAEL RICHMAN,

Plaintiff(s),

- against -

SUZANNE and STEFANO GALLI,

Defendant(s).
-----X

DECISION & ORDER

Index No.: 56780/2013

Motion Date: 8/7/2015

Reassigned: 1/19/2016

Plaintiffs move under CPLR 3212 for an order, granting partial summary as there exists a private nuisance as a matter of law, issuing a permanent injunction against defendants, dismissing defendants' affirmative defenses pursuant to CPLR 3211 (b) and counterclaim, and severing and allowing plaintiffs' claims for compensatory damages to proceed. Defendants move under CPLR 3212 and 6314 for an order, granting summary judgment in their favor, dismissing plaintiffs' complaint, and vacating the preliminary injunction.

The following papers were reviewed:

Motion Sequence #003

| | |
|---|-------|
| Notice of Motion, Affirmation in Support, Exhibits (31), and Affidavits (2) | 1-35 |
| Memo of Law in Support | 36 |
| Affirmation in Opposition and Exhibits (23) | 37-60 |
| Reply Affirmation, Exhibits (8), and Memo of Law | 61-70 |

Motion Sequence #004

| | |
|---|-------|
| Notice of Motion, Affirmation in Support, and Exhibits (23) | 1-25 |
| Affirmation in Opposition, Exhibits (10), and Memo of Law | 26-37 |
| Reply Affirmation | 38 |

By way of background, on May 2, 2013, plaintiffs commenced this action seeking compensatory damages and injunctive relief on a cause of action for private nuisance. Plaintiffs and defendants are neighbors; defendants Stefano Galli and Suzanne Galli are the owners of real property known as 341 Succabone Road, Bedford Corners, New York and plaintiffs are the owners of real property known as 12 Alice Road, Bedford Corners, New York. Alice Road separates the two properties. Plaintiffs allege, among other things, that defendants' storage, dumping, and spreading of their horse manure constitutes a private nuisance because it is in violation of the Town of Bedford Zoning Code, interferes with plaintiffs' ability to use and enjoy their land and home, and defendants' manure practice is intentional and unreasonable.

Simultaneously with the filing of the summons and complaint, plaintiffs moved by order to show cause for a temporary restraining order and a preliminary injunction enjoining defendants from storing manure less than fifty feet from the property lines. On May 7, 2013, the Court (per Hon. Robert M. DiBella, J.S.C.) issued a temporary restraining order enjoining defendants from the continued and/or further storage of horse manure in violation of Town of Bedford Zoning Code § 125-25 (B) (3) (b). On May 16, 2013, defendants interposed their answer with four affirmative defenses and a counterclaim. At the same time, defendants cross moved for the preliminary injunction seeking, among other things, to enjoin plaintiffs from trespassing on defendants' property. On May 23, 2013, plaintiffs filed their reply to defendants' counterclaim. After holding a four-day evidentiary hearing on the preliminary injunction motion, Justice DiBella granted plaintiffs' application for a preliminary injunction enjoining defendants from storing or spreading manure within fifty feet of any property line during the pendency of the action and denied defendants' cross-motion to enjoin plaintiffs from trespassing onto defendants' property. Plaintiffs now move for summary judgment (#003) and defendants move to dismiss (#004).

In support of their motion, plaintiffs make a number of arguments. Plaintiffs assert that the evidence supports the granting of a permanent injunction and, in support, plaintiffs cite to specific deposition testimonies, exhibits marked therein, and plaintiffs' affidavits. Regarding dismissal of defendants' affirmative defenses, plaintiffs contend that defendants set forth conclusory unsubstantiated affirmative defenses in their answer and, as such, the affirmative defenses should be dismissed as a matter of law. Regarding defendants' counterclaim for trespass, plaintiffs assert that defendants cannot produce any evidence to establish that plaintiff Ruth Toporoff (Toporoff) trespassed onto their property and, as such, the Court should grant summary judgment dismissing the counterclaim.

In opposition, defendants similarly make a number of arguments. Defendants contend that plaintiffs' motion should be dismissed in its entirety because the defendants' manure storage and handling was not substantial, intentional, nor unreasonable. In support of said assertion, defendants cite to specific deposition testimonies and various permits and certificates of compliance they received from the Town of Bedford which, they contend,

refute plaintiffs' allegations. Defendants also contend that plaintiffs' nuisance claim is barred by the doctrine of laches because plaintiffs knew of the alleged nuisance since 1999 and did nothing to safeguard their interests. Regarding laches, defendants contend that allowing plaintiffs to go forward with their claim of nuisance would be prejudicial to defendants. Regarding their counterclaim for trespass against Toporoff, defendants assert that the Court never ruled on their cross-motion for an injunction (#002). Defendants also point to defendant Suzanne Galli's affidavit that was submitted in connection with the cross-motion for an injunction which, defendants contend, demonstrates that Toporoff trespassed onto defendants' property.

In reply, plaintiffs contend, among other things, that defendants have failed to raise any triable issues of fact and, as such, plaintiffs argue that this Court should grant their motion in its entirety. In support, plaintiffs cite to Toporoff's deposition testimony and testimonies from different witnesses from the hearing on the preliminary injunction as well as an affidavit and contracts relating to defendants' property renovations. Regarding the trespass counterclaim, plaintiffs note that Justice DiBella denied defendants' cross-motion for injunctive relief and, as such, no issues of fact remain precluding this Court from dismissing defendants' counterclaim. Regarding dismissal of the affirmative defense of laches, plaintiffs assert that the nuisance has not existed since defendants' purchased the property and, plaintiffs assert, they have tried to resolve the manure issue without resorting to litigation. As such, plaintiffs contend that defendants have not been prejudiced and the laches defense fails as a matter of law.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]). It is well settled that summary judgment is a "drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues' " (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], quoting *Andre*, 35 NY2d at 364). By contrast, a motion to dismiss an affirmative defense under CPLR 3211 (b) will be granted "if the plaintiff can demonstrate that the 'defenses are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense' " (*Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC* [2d Dept 2010], quoting *Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010]).

The elements constituting 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 failing to act” (*Gedney Commons Homeowners Assn., Inc. v Davis*, 85 AD3d 854, 855 [2d Dept 2011]; see *Donnelly v Nicotra*, 55 AD3d 868, 868-69 [2d Dept 2008]; *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]). It is well settled that “except 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[]” (*Weinberg v Lombardi*, 217 AD2d 579, 579 [2d Dept 1995]; *Broxmeyer v United Capital Corp.*, 79 AD3d 780, 782-83 [2d Dept 2010]; *Schillaci v Sarris*, 122 AD3d 1085, 1087 [3d Dept 2014]). Here, plaintiffs have the requisite property interest because they allege an interference with the use and enjoyment of their land (see *Zupa v Paradise Point Assn., Inc.*, 22 AD3d 843, 844-45 [2d Dept 2005]). However, triable issues of fact remain as to whether the alleged interference was substantial in nature, intentional in origin and unreasonable in character. As such, those portions of plaintiff’s motion seeking summary judgment on the private nuisance claim, a permanent injunction, and severance as to compensatory damages are denied (see *Aristides v Foster*, 73 AD3d 1105, 1106-07 [2d Dept 2010]; *Ratner v Fountains Clove Rd. Apts.*, 118 AD2d 843, 843-44 [2d Dept 1986]).

Regarding dismissal of defendants’ first affirmative defense alleging failure to state a cause of action, the Second Department has explained that “no motion by the plaintiff lies under CPLR 3211 (b) to strike the defense[] [of failure to state a cause of action][,] as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim” (*Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]; see *Mazzei v Kyriacou*, 98 AD3d 1088, 1089 [2d Dept 2012]). As such, plaintiffs’ motion seeking dismissal of defendants’ first affirmative defense is denied. Plaintiffs’ motion seeking dismissal of defendants’ remaining affirmative defenses, namely laches, unclean hands, and equitable estoppel are, however, granted. Initially, the Court notes that defendants have not opposed that branch of plaintiff’s motion seeking dismissal of the affirmative defenses of unclean hands and equitable estoppel. Regardless, as pled, these affirmative defenses are conclusory and unsubstantiated and, as such, plaintiff is entitled to summary judgment dismissing them (see *Bruno v Sant’Elia*, 52 AD3d 556, 557 [2d Dept 2008]). Regarding the affirmative defense of laches, it is similarly defective as pled (see *id.*) and, regardless, defendants have also failed to demonstrate a sufficient showing of prejudice (see *Skrodelis v Norbergs*, 272 AD2d 316, 316 [2d Dept 2000]).

Regarding dismissal of defendants’ counterclaim for trespass against plaintiff Toporoff, triable issues of fact remain as to whether Toporoff trespassed onto defendants’ property. As such, and to that extent, plaintiffs’ motion seeking dismissal of the trespass counterclaim is denied (see *Schwegel v Chiamonte*, 4 AD3d 519, 520 [2d Dept 2004]).

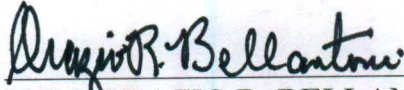
The Court now addresses defendants’ motion. As outlined above, triable issues of fact remain on the private nuisance claim and, as such, defendants’ motion is denied. That

branch of defendants' motion seeking to vacate the preliminary injunction is also denied (*see Thompson v 76 Corp.*, 54 AD3d 844, 846 [2d Dept 2008]).

Accordingly, it is hereby ordered that the motion (#003) is decided as follows: that branch of plaintiffs' motion seeking summary judgment on the private nuisance claim is denied; those branches of plaintiffs' motion seeking a permanent injunction, severance as to compensatory damages regarding the private nuisance claim, and summary judgment on defendants' counterclaim are denied; and plaintiffs' motion seeking dismissal of defendants' affirmative defenses is denied as to the defense of failure to state a cause of action, but is granted to the extent that the defenses of laches, unclean hands and equitable estoppel are dismissed. Defendants' motion (#004) seeking summary judgment and dismissal of the complaint and vacatur of the preliminary injunction is denied and the preliminary injunction shall remain in effect pending a trial of this action.

This matter is scheduled for a settlement conference on May 24, 2016 at 9:15 a.m. in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York.

Dated: April 6, 2016
White Plains, New York


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Justice of the Supreme Court

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