

Torre v Town of Tioga
2018 NY Slip Op 30131(U)
January 22, 2018
Supreme Court, Tioga County
Docket Number: 44933
Judge: Eugene D. Faughnan
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At a Submitted Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 17th day of November, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

SUSANNE M. TORRE and LOUISE DECAMILLO,

Plaintiffs,

vs.

DECISION AND ORDER

Index No. 44933
RJI No.

TOWN OF TIOGA, LEWIS W. ZORN, Town of Tioga
Supervisor in his Official Capacities,

Defendants.

APPEARANCES:

Counsel for Plaintiffs:

Ronald R. Benjamin, Esq.
LAW OFFICE OF RONALD R. BENJAMIN
126 Riverside Drive, PO Box 607
Binghamton, NY 13902-0607

Counsel for Defendants:

David H. Walsh, Esq.
BARTH SULLIVAN BEHR
224 Harrison Street- Suite 208
Syracuse, NY 13202

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court on a motion by Defendants Town of Tioga and the Town of Tioga Supervisor, Lewis W. Zorn, (“Defendants”) seeking dismissal of Plaintiffs’ Amended Complaint pursuant to CPLR 3211. Plaintiffs, Susanne M. Torre (“Torre”) and Louise Decamillo (“Decamillo”), have also filed a cross-motion seeking denial of the Defendants’ motion to dismiss, and for Summary Judgment on the issue of title, and for leave to file a late notice of claim, as well as leave to serve a Second Amended Complaint to add an allegation of compliance with General Municipal Law §50-e.

BACKGROUND FACTS

Plaintiffs filed a Summons and Complaint on July 18, 2014, seeking damages they alleged that the Town of Tioga and its supervisor, Lewis Zorn (“Zorn”) had caused to Plaintiffs’ property. Plaintiffs purchased property located at 1236 Straits Corners Road in 2007, and claim that the Town constructed a Town Road across their property, without authority. This new Town Road, known as Graham Road, was allegedly built to benefit Chad Deming (“Deming”), a relative of Zorn’s; Deming had purchased property on Graham Road in 2008 and built a single family residence there.

Plaintiffs’ Complaint asserted causes of action for the unlawful taking of property in violation of the Fifth Amendment and 42 USC §1983, as well as trespass, encroachment, nuisance and conversion. Based upon the existence of federal claims, Defendants removed the case to the United States District Court, and subsequently moved to dismiss the Complaint. Plaintiffs then withdrew all their federal claims, and thereafter, the District Court declined to exercise jurisdiction over the remaining state law claims. Accordingly, the case was remanded back to this Court.

A Note of Issue was filed by Plaintiff and a trial date was set. However, Defendants filed a motion to strike the Note of Issue, and obtain discovery, and Plaintiffs sought leave to file an Amended Complaint. Those motions were granted, and the trial which had been scheduled was adjourned. Plaintiff filed an Amended Complaint in November, 2016, still raising all the original causes of action, and adding a claim for breach of contract, as well as dropping Chad Deming as a named Defendant.¹ Subsequently, the parties made these respective motions.

LEGAL ANALYSIS AND DISCUSSION

Plaintiffs original Complaint contained six causes of action, listed here in the order and description as in the Complaint: 1) due process denial and 42 U.S.C. 1983; 2) trespass; 3) encroachment; 4) governmental taking of private property, 5th Amendment violation; 5) nuisance, and 6) conversion. The Amended Complaint contains the same six causes of action and added a seventh cause of action for breach of contract.

A. Plaintiff's First, Fourth and Sixth Causes of Action

After the case was removed to the District Court, Defendants made a motion to dismiss the Plaintiffs' Complaint. Plaintiffs opposed that motion and made a cross motion to leave to file a late notice of claim. Plaintiff's counsel also noted in that cross motion that Plaintiffs were withdrawing their First, Fourth and Sixth Causes of Action, and by Order dated March 10, 2015, the District Court deemed those Causes of Action as withdrawn.

On the motion before this Court, Defendants argue that those 3 causes of action should be dismissed based upon law of the case, or collateral estoppel. Defendants contend that these are

¹The District Court had found that Deming was not made a party to the action, and the District Court issued a text order terminating Deming as a Defendant, and the District Court removing his name from the caption. The Plaintiffs' Amended Complaint did not list Deming as a party, and therefore, the Court has removed his name from the caption as well.

the same 3 causes of action which were dismissed by the District Court when that court exercised jurisdiction over this case, and that the District Court's denial was with prejudice, thereby precluding Plaintiff from raising and litigating those causes of action at this point. In response, Plaintiffs' Memorandum of Law stated that they did not contest Defendants' allegations about the federal claims regarding these causes of action. Further, the Plaintiffs' Proposed Second Amended Complaint does not include the federal claims, or the claim for conversion. Accordingly, the Court deems that those causes of action have been abandoned and/or withdrawn by the Plaintiffs.

On the basis of law of the case, as well as Plaintiffs' own acknowledgment, the Court concludes that the First, Fourth and Sixth Causes of Action contained in Plaintiffs' Amended Complaint are DISMISSED.

B. Plaintiff's Second, Third and Fifth Causes of Action (Trespass, Encroachment, Nuisance)

Defendants move to dismiss Plaintiffs' Second, Third and Fifth Causes of Action on the basis that Plaintiffs failed to file a Notice of Claim under General Municipal Law §50-e and §50-i. General Municipal Law §50-e(1) establishes a condition precedent to commencing a tort action against a public corporation, and requires that notice be served within 90 days after the claim arises. *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531 (2006); *Hallett v. City of Ithaca*, 8 AD3d 870 (3rd Dept. 2004); *Serkil L.L.C. v. City of Troy*, 259 AD2d920 (3rd Dept. 1999). General Municipal Law §50-e(5) "also provides that under certain enumerated circumstances the court may, in its discretion, grant leave to file a late notice of claim." *Kavanaugh v. Memorial Hosp. & Nursing Home*, 126 AD2d 930, 931 (3rd Dept. 1987); *see e.g. Williams, supra*. However, the court may not "authorize the late filing of a claim or order that a later filed claim be deemed timely nunc pro tunc... where the statute of limitations has expired." *Hallett*, 8 AD3d at 871 *citing Schwinghammer v. Sullivan W. Cent. Sch. Dist.*, 2 AD3d 1126, 1126-1127 (3rd Dept. 2003) ("a court is without power to authorize the late filing of a claim or to

order that a late filed claim be deemed timely nunc pro tunc where the statute of limitations has expired.”); General Municipal Law §50-e(5). With respect to the statute of limitations, General Municipal Law §50-i(1) “requires that an action be commenced within one year and 90 days after the happening of the event upon which the claim is based.” *Serkil*, 259 AD2d at 921-922. This is true regardless of when the action accrued. *Klein v. City of Yonkers*, 53 NY2d 1011 (1981); *Nebbia v. County of Monroe*, 92 AD2d 724 (4th Dept. 1983).

Plaintiffs’ complaint does not contain any allegation of notice in compliance with General Municipal Law §50-e, nor does the Amended Complaint. Plaintiffs have yet to file any notice of claim, although their cross motion does include a proposed notice of claim, and a proposed Second Amended Complaint. However, a proposed notice of claim would only be permissible if the statute of limitations has not yet expired. (General Municipal Law §50-e(5)) Therefore, the Court will address the statute of limitations question first.

Plaintiffs argue that their claims for trespass, nuisance and encroachment are continuing torts, and therefore, each passing day starts a new cause of action. They contend that the Town’s actions constitute a continuing trespass and/or encroachment by virtue of the Town widening the road in 2010 and taking a portion Plaintiffs’ property; and that the Town continues to cause harm by performing maintenance and upkeep on the road. Plaintiffs also allege that snow removal, and use of salt to melt the snow, exposes their well water to contaminants.

“It is well-settled ... that injuries to property caused by a continuing nuisance involve a ‘continuous wrong’ and, therefore, generally give rise to successive causes of action that accrue each time a wrong is committed.” *Town of Oyster Bay v. Lizza Indus., Inc.*, 22 NY3d 1024, 1031 (2013) [citing *Jensen v. General Elec. Co.*, 82 NY2d 77, 85 (1993); *509 Sixth Ave. Corp. v. New York City Transit Auth.*, 15 NY2d 48, 52 (1964); *Covington v Walker*, 3 NY3d 287, 292 (2004), *cert denied* 545 U.S. 1131 (2005)]. Similarly, the Court of Appeals has held “that a trespass that constitutes an unlawful encroachment on a plaintiff’s property will be considered a continuous trespass giving rise to successive causes of action.” *Bloomingdales, Inc. v. New York City Tr.*

Auth., 13 NY3d 61, 66 (2009) (citing *509 Sixth Avenue Corp. v. New York City Tr. Auth.*, [supra]); *Capruso v. Village of Kings Point*, 23 NY3d 631 (2014); see e.g. *New York State Elec. & Gas Corp. v. County of Chemung*, 137 AD3d 1550 (3rd Dept. 2016), *app. dismissed* 28 NY3d 1044 (2016). An unlawful encroachment can be characterized as a continuous trespass giving rise to successive causes of action, which would be barred only by an easement by prescription or change in title by operation of law. *509 Sixth Ave. Corp.*, *supra*.

If the harm comes from “the lingering effects of a single, discrete incursion”, then it is not a continuing wrong. See e.g. *Town of Oyster Bay v. Lizza Indus.*, *supra*; *New York State Elec. & Gas Corp.*, *supra*. In *Town of Oyster Bay*, the Defendants had performed sewer construction work for the Plaintiff Town in the 1970s and 1980s. After a period of time, the area surrounding the sewer lines settled and caused damage to the adjacent roads and sidewalks. The Court of Appeals rejected the “continuing wrong” argument, finding that the alleged tortious conduct in excavation and backfilling ceases upon completion of the project even though the injuries may have been ongoing.

The allegations in this case include claims that the Plaintiffs’ title includes a portion of Graham Road, which the Town has paved and continues to maintain. Further, Plaintiffs allege that the snow removal could harm their well water. These claims are appropriately considered ongoing and continuous acts of encroachment, trespass and nuisance. They are not traceable to one, or several, discrete acts giving rise to subsequent harm, but rather, are continuing affronts to Plaintiffs ownership and use of their land. See e.g. *Bloomingdales*, *supra*; *509 Sixth Ave. Corp.*, *supra*; *New York State Electric & Gas*, *supra*. Accordingly, the Court concludes that the Plaintiffs’ tort claims are not barred by the Statute of Limitations, as they are based on continuing wrongs, giving rise to successive causes of action.

Plaintiffs have also sought leave to file a late notice of claim. “[U]nder certain enumerated circumstances the court may, in its discretion, grant leave to file a late notice of claim (General Municipal Law § 50-e [5]). The court must consider ‘in particular’ whether the

public corporation had actual knowledge of the essential facts constituting the claim (General Municipal Law § 50-e [5]). Other relevant factors include whether any prejudice will result from the delay, whether the plaintiff was incapacitated during the 90-day period, and whether a reasonable excuse was established for the delay.” *Kavanaugh v. Memorial Hospital. & Nursing Home, supra* at 931, *citing* General Municipal Law § 50-e [5], *Matter of Gerzel v. City of New York*, 117 AD2d 549, 550 (1st Dept. 1986). “While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the Town received actual knowledge of the facts constituting the claim in a timely manner.” *Henderson v. Town of Van Buren*, 281 Ad2d 872, 873 (4th Dept. 2001); *Babcock v. Walton Cent. School Dist.*, 119 AD3d 1061 (3rd Dept. 2014).

The evidence in this case shows that the dispute concerning the Graham Road property date back to at least April, 2010. The Town Board’s own minutes from that meeting show there was discussion about the Town’s deed for that property. In addition, Zorn sent a letter in April, 2010 demanding that Plaintiffs remove stakes that they had placed to mark and protect their boundary. Zorn asserted it was Town property and that Plaintiffs were actually encroaching upon the Town. Correspondence between the Town’s attorney and Plaintiffs’ attorney in September, 2010 also shows that the parties disputed ownership, and the right of way along Graham Road. The paving of Graham Road allegedly took place in October, 2010. These factors establish that the Town had actual knowledge of the occurrences and facts, as well as the injury being claimed by Plaintiffs, that the Town was allegedly improperly building a road on land belonging to the Plaintiffs. Further, Defendants have not claimed, or shown, any prejudice as a result of the delay, and given their actual notice, it is unlikely that any prejudice could be established. *See e.g., Kavanaugh, supra*. Accordingly, the Court finds sufficient reason and grounds to grant Plaintiffs’ application for leave to file a late notice of claim with respect to its tort claims.

Plaintiffs have also argued that the notice of claim requirement does not apply because their suit is one seeking equitable relief, and such claims are exempt from the notice requirement. Defendants contend that the Plaintiffs actual request is primarily for money damages, and that

any equitable claims are either illusory or unsupported. In light of the Court's findings above with respect to allowing the filing of a late notice of claim, the Court need not rule on Plaintiffs' argument that their suit is one based in equity thereby eliminating the requirement to file a notice of claim.

C. Plaintiffs' claim for breach of contract

After this case was remanded from District Court, Plaintiffs filed an Amended Complaint, adding a new cause of action for breach of contract. They allege that on November 12, 2010, Zorn and Decamillo entered into a handshake agreement that Graham Road would be used by the Town, under certain conditions, which included Graham Road remaining a 12 foot road, and the road would not be made any wider, or encroach further onto Plaintiffs' property. The agreement also allegedly included terms about snow removal and how the snow plows were to be used, so as to protect Plaintiffs' land.

Plaintiffs allege that "as soon as the snow fell", the Town proceeded to plow in a manner that was not consistent with the agreement that had been reached. The Amended Complaint does not specify the date when the plowing began, which allegedly breached the oral agreement. The Amended Complaint also alleges various further actions by the Town constituting breach of the verbal contract, and claiming that Plaintiffs are entitled to compensation.

Town Law §65(3) provides that "no action shall be maintained against a town upon or arising out of a contract entered into by the town unless * * * commenced within eighteen months after the cause of action thereof shall have accrued, nor unless a written verified claim shall have been filed with the town clerk within six months after the cause of action shall have accrued." See, *Wm. H. Clark Mun. Equip., Inc. v. La Grange*, 170 Ad2d 831 (3rd Dept. 1991). "A properly verified notice of claim is a condition precedent to maintaining an action to recover damages for breach of contract against a town (see Town Law § 65 [3])... In contrast to other notice statutes, Town Law § 65 (3) contains no provision allowing the court to excuse

noncompliance with its requirements.” *ADC Contr. & Constr., Inc. v. Town of Southampton*, 45 AD3d 614, 615 (2nd Dept. 2007), quoting *Aqua Dredge v Little Harbor Sound Civic Improvement Assoc.*, 114 AD2d 825, 826 (2nd Dept. 1985).

In contrast to the torts causes of action, which were “continuing wrongs” leading to successive causes of action, the breach of contract claim is traceable to actions occurring “as soon as the snow fell” after the November 12, 2010 agreement. Thus, any alleged breach occurred in late 2010 or early 2011. Although the injuries complained of could be recurring, that would not transform this claim for money damages into a situation of continuing wrongs. The Plaintiffs have submitted no evidence that they filed a notice of claim, or that they commenced the action within the applicable time frames of Town Law §65(3). Plaintiffs failure to satisfy this condition precedent with respect to their breach of contract claim requires dismissal of that cause of action.

D. Plaintiffs Motion to File a Second Amended Complaint

Plaintiffs also seek to serve and file a Second Amended Complaint to add an allegation of compliance with General Municipal Law §50-e. “Provided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR 3025 (b) should be freely granted.” *Smith v. Haggerty*, 16 AD3d 967, 967-968 (3rd Dept. 2005), quoting *State of New York v. Ladd's Gas Sta.*, 198 AD2d 654, 654 (3rd Dept. 1993). Based on the discussion above, the Court discerns no prejudice to Defendants, and further finds that the Amendment is not lacking in merit, although the breach of contract cause of action has been determined to be untimely. The Court finds that Plaintiffs are allowed to serve and file a Second Amended Complaint, subject to the dismissal of the causes of action determined above (to wit, Plaintiffs’ First, Fourth, Sixth and Seventh causes of action).

E. Plaintiffs' cross motion for Summary Judgment

Plaintiffs seek summary judgment on the issue of title. In support, Plaintiffs have submitted various deeds, maps and affidavits to support a claim of ownership over the disputed property. Defendants object and assert that such a claim should be the subject of a quiet title action under RPAPL Art 15, or in the alternative, that there should be discovery on the matter.

The Court agrees with Defendants that a motion for Summary Judgment is premature at this time. Defendants motion was made under CPLR 3211, claiming that Plaintiffs failed to comply with a condition precedent. Plaintiffs are requesting Summary Judgment relief under CPLR 3212, but discovery has not yet been conducted. Accordingly, Plaintiffs' motion for Summary Judgment is denied, without prejudice to renewal after completion of discovery.

CONCLUSION

Based on the discussion above: Defendants' motion to dismiss Plaintiffs' First, Fourth and Sixth causes of action is GRANTED; Defendants' motion to dismiss Plaintiffs' Second, Third and Fifth causes of action is DENIED. Further, Plaintiffs' motion for leave to file a late notice of claim is GRANTED; Plaintiffs' motion to file and serve a Second Amended Complaint is GRANTED, but subject to the DISMISSAL of the causes of actions noted above. Lastly, Plaintiffs' motion for summary judgment on the question of title is DENIED, without prejudice to renewal after discovery.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: January 22, 2018
Owego, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice