Maio v Roer
2018 NY Slip Op 30264(U)
February 9, 2018
Supreme Court, Suffolk County
Docket Number: 13-30574
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 13-30574
CAL. No. 17-00157OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 7-14-17 (009 & 010)
ADJ. DATE 7-14-17
Mot. Seq. # 009 - MotD
010 - MotD

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MICHAEL MAIO and DONNA MAIO,

Plaintiffs,

- against -

CRAIG ROER,

Defendant.

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DEJESU MAIO & ASSOCIATES P.C.
Attorney for Plaintiffs
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Upon the following papers numbered 1 to 66 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers 25 - 47; Answering Affidavits and supporting papers 48 - 59; Replying Affidavits and supporting papers 60 - 64; Other Sur-Reply 61 - 66; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and in his favor for the relief demanded in the first and second counterclaims, is granted to the extent indicated and is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiffs for an order pursuant to CPLR 3212, granting summary judgment in their favor for the relief demanded in the first and second causes of action and dismissing the counterclaims, is granted to the extent indicated and is otherwise denied.

This action, which was commenced on November 15, 2013, involves a dispute between adjoining owners of residential property in the Anoatok Community, which abuts Huntington Harbor. At the heart of the dispute is the plaintiffs' claim that the defendant has failed to maintain the trees and other vegetation on his property in such a way as to preserve the water view from their property.

The plaintiffs own the residential property located at 30 Cameron Drive, Huntington, New York, which they purchased in 2005. The defendant owns the adjoining residential property located at 22 Cameron Drive, Huntington, New York, which he purchased in 2004. Cameron Drive is situated on a hill overlooking West Shore Road and Huntington Harbor to the east, and that the defendant's property, which fronts on West

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Shore Road, is located north and east of the plaintiffs' property, so that the plaintiffs must look over a portion of the defendant's property in order to view the harbor.

Both properties are located within the Anoatok Community Association, established in 1945 as a 75-lot subdivision by the Huntington West Shore Corporation, and are subject to certain covenants and restrictions that run with the land, including the following:

> All construction of buildings and planting of trees or shrubbery shall be done on the premises with the idea of preserving the outstanding asset of this Community, namely, the water views. If, in the exclusive opinion of the Corporation, its successors or assigns, any tree or other planting on the premises interferes with any water view, the Corporation shall have the right to enter upon the premises and have such trees or planting topped, trimmed or removed, charging the cost thereof to the owner of the premises. Owners of the lots fronting on the West Shore Road shall keep the trees now or hereafter growing on said lots trimmed, at the Owners' expense, so that the water view from such lots and the other lots in the development shall not be obstructed.

The plaintiffs claim that the defendant has violated the relevant covenants and restrictions by allowing the trees, branches, bushes, brush, shrubs, leaves, plantings, and weeds on his property to cause a significant obstruction to their water view.

The parties' conflict had its genesis as early as 2006, when the plaintiffs first requested that the defendant remove the offending vegetation and the defendant refused. In 2007 and 2009–the defendant having again refused the plaintiffs' requests–the parties agreed to an arrangement whereby the plaintiffs hired and paid for a tree service to clear the obstructive vegetation on the defendant's property; on each occasion, the plaintiffs' water view was restored. The problem, however, persisted. In 2011, the plaintiffs again requested that the overgrowth be remedied, and the defendant responded by trimming certain bushes and weeds around his driveway which opened a small lower-level view from the plaintiffs' property but left substantially all other obstructive vegetation in place.

Finally, in 2013, the plaintiffs agreed "for the last time" to hire and pay for a tree service to top, trim or remove the obstructing growth on the defendant's property. The plaintiffs met with two landscapers, the first of whom quoted a price of between $2,000 and $2,400, and second who quoted a price of $1,200. When, according to the plaintiffs, the defendant expressed "shock and amazement" at the plaintiffs' choice to hire the second landscaper and refused to allow the work to be done, the plaintiffs advised that they would hire the first landscaper if the defendant agreed to pay the difference in price, but the defendant never responded.

In a further attempt to resolve the parties' dispute, the plaintiffs then sought the assistance of the Association's board of directors. By letter dated September 24, 2013, the plaintiffs were notified by Vivienne Wong, president of the Association, that the defendant was not in violation of the bylaws, ostensibly because the deed restriction regarding water views is specific to "new construction and plantings" and there were "no new trees planted and no new construction" at the defendant's property. This action followed.

The plaintiffs allege three causes of action in their complaint, with the third pled in the alternative. The first, for "breach of real covenant," alleges that the defendant intentionally obstructed the plaintiffs' water views in violation of the subject covenant, resulting in is a diminishment of their property value and of their use and enjoyment of the water views, and seeks recovery of no less than $650,000.00, together with a permanent injunction restraining the defendant's continued violation of the covenant. The second is for private nuisance, based on the claim that the defendant's intentional interference with the plaintiffs' use and enjoyment of their property consitutes an unreasonable use of his property, and likewise seeks recovery of no less than $650,000.00 as well as permanent injunctive relief. The third sounds in breach of contract, based on the defendant's violation of his agreement to permit the plaintiffs' landscaper onto his property, at the plaintiffs' expense, to top and trim all obstructing growth, seeks recovery of no less than $150,000.00.

The defendant, in his answer, raises a myriad of affirmative defenses, and also pleads two counterclaims: the first, alleging abuse of process, and the second, for prima facie tort.

Now, discovery having been completed and a note of issue having been filed on January 27, 2017, the defendant moves and the plaintiffs cross-move for summary judgment.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here the defendants have established through documentary evidence, namely, a deed filed and recorded on September 15, 2005, that Donna Maio is not an appropriate party to this action, as she is not a titled owner of the property commonly known as 30 Cameron Drive, Huntington. The defendants, however, have failed to establish prima facie entitlement to summary judgment dismissing the complaint and have failed to establish any affirmative defense or counterclaim. Accordingly, as discussed below, the motion is granted to the extent indicated and is otherwise denied.

Initially, the defendant's argument that the cross motion cannot be considered, as it was made more than 120 days after the filing of the note of issue, is rejected. Here, the cross motion seeks relief on the same issues raised in the defendant's timely motion (***Lennard v Kahn***, 69 AD3d 812, 893 NYS2d 572 [2010]; ***Lapin v Atlantic Realty Apts. Co., LLC***, 48 AD3d 337, 851 NYS2d 543 [1st Dept 2008]). In any event, on a motion for summary judgment the court is empowered to search the record in the course of deciding the timely motion and award summary judgment to a nonmoving party (CPLR 3212 [b]; ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]).

The plaintiffs have established prima facie entitlement to summary judgment on the first cause of action alleging breach of real covenant. The documentary evidence submitted by the parties establishes that the defendant is the owner of real property located at 22 Cameron Drive in Huntington, New York, that the property is in the Anoatok Community, and that the subject property was encumbered with restrictions and covenants that run with the land.

The plaintiffs have not established that the first restrictive covenant, which relates to new construction or new landscaping, has been violated. The plaintiffs have also failed to establish that the Association, with regard to the second restrictive covenant, has determined that any tree or other planting interferes with any water view. In fact, Vivienne Wong, president of the Anoatok Community Association, avers that the Association takes the position that the second restrictive covenant refers only to new plantings of trees and new construction of homes, and has declined to assert its rights under the second covenant. The plaintiffs, however, have established that the defendant violated the third restrictive covenant. Documentary evidence establishes that the subject property fronts West Shore Road, and that the trees "now and hereafter growing," which is inclusive of both new and older growing trees, have obstructed the plaintiffs' water view. Restrictive covenants run with the land and are enforceable where the restrictions continue to serve a legitimate purpose, including open and unobstructed views (***Broadway-Flushing Homeowners' Assn., Inc. v Dilluvio***, 97 AD3d 614, 948 NYS2d 386 [2d Dept 2012]). The plaintiffs are not entitled to topping, removal of the trees, or money damages, as the plain language of the third restrictive covenant, requires only that the defendant, at his own cost, trim the trees (***Ford v Rifenburg***, 94 AD3d 1285, 942 NYS2d 285 [3d Dept 2012]). The plaintiffs also have established that in 2013 the defendant breached an oral agreement to permit the plaintiffs' landscaper to trim and remove growth on defendant's property at plaintiffs' expense. The cause of action, however, is moot, as the expense of the trimming, pursuant to the third restrictive covenant, shall be borne by the defendant.

As to the second cause of action, to constitute a private nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property or to render its enjoyment specially uncomfortable or inconvenient (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]; ***Kaplan v Inc. Vil. of Lynbrook***, 12 AD3d 410, 784 NYS2d 586 [2d Dept 2004]). The plaintiffs have not established prima facie entitlement to summary judgment, as they do not aver that the loss of a water view rendered or caused an appreciable injury to the property or that the use of the property was less enjoyable. In any event, the cause of action is duplicative of the plaintiffs' cause of action for breach of the third restrictive covenant. Accordingly, it is dismissed.

In opposition, and in support of his own motion, the defendant has failed to raise a triable issue of fact as to the first cause of action. The defendant's position that RPAPL 1951 extinguishes the restrictive covenant is without merit, as a portion of that statute applies to restrictions created on or after September 1, 1958, and the documentary evidence here establishes that the subject restriction was created in 1948. More importantly, as to the "restrictions on the use of land created at any time" in that statute, the plaintiffs have established that the restriction sought to be enforced is of actual and substantial benefit to them. The defendant's first, fourth, and nineteenth affirmative defenses that the plaintiffs' own conduct caused damage to their own property or that they assumed the risk are not supported by the record and are dismissed. The defendant's second affirmative defense that the action is barred by the statute of limitations is also dismissed, as the statute of limitations does not bar a restrictive covenant running with the land, which is a continuing right that exists so long as there is occasion for its exercise (***Orange & Rockland Util. v Philwold Estates***, 52 NY2d 253, 437 NYS2d 291 [1981]). The defendant's third affirmative defense of in personam jurisdiction has previously been addressed in a traverse hearing, and two prior written decisions. The defense is dismissed. The defendant's fifth affirmative defense that the complaint fails to state a cause of action is dismissed. As to defendants' sixth and seventh affirmative defenses claims asserted on behalf of Donna Maio are dismissed on the ground she lacks capacity to sue. The defendant's eighth, twelfth and thirteenth affirmative defenses of waiver, res judicata, and collateral estoppel are dismissed, as they are not

supported by the record. The defendant's ninth, tenth, and eleventh affirmative defenses related to waiver, consent, and failure to join parties are dismissed as unsupported by the record. The defendant's fourteenth affirmative defense that the plaintiffs' causes of action violate the law is without merit and is dismissed. The defendant' remaining affirmative defenses, numbered fifteen through twenty-six, lack merit, are unsupported by the record, and are dismissed.

As to the defendant's first counterclaim alleging abuse of process, to establish a claim for abuse of process, a party must prove three essential elements, to wit, regularly-issued process either civil or criminal, an intent to do harm without excuse or justification, and the use of process in a perverted manner to obtain a collateral objective (*see* ***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466 [1984]; ***Marks v Marks***, 113 AD2d 744, 493 NYS2d 206 [2d Dept 1985]). However, where the complaint fails to allege some irregular activity in the use of judicial process for a purpose not sanctioned by law, or that the process unlawfully interfered with the plaintiff's property, an action to recover damages based upon the alleged abuse of process must fail (*see* ***Curiano v Suozzi***, *supra*; ***Williams v Williams***, 23 NY2d 592, 596, 298 NYS2d 473 [1969]; ***Mago LLC v Singh***, 47 AD3d 772, 851 NYS2d 593 [2d Dept 2008]). In addition, "the institution of an action is not process capable of being abused, regardless of the . . . plaintiffs' motives" (*see* ***Curiano v Suozzi***, 63 NY2d at 116-117, 480 NYS2d at 468 [1984]; ***Roberts v 112 Duane Assoc.***, 32 AD3d 366, 368, 821 NYS2d 33, 36 [1st Dept 2006]).

Here, the defendant has not established or pled (CPLR 3211) sufficient facts to indicate that the plaintiffs did anything more than commence the instant action. Accordingly, the defendant's first counterclaim is dismissed (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]).

The defendant's second counterclaim alleges prima facie tort. The elements of a cause of action for prima facie tort are: (1) the intentional infliction of harm; (2) causing of special damages; (3) without lawful excuse or justification; and (4) by an act or series of acts that would be otherwise unlawful (*see* ***Freihofer v Hearst Corp.***, 65 NY2d 135, 490 NYS2d 735 [1985]; ***Curiano v Suozzi,*** 63 NY2d 113, 480 NYS2d 466 [1984]). There can be no recovery under this theory unless malevolence is the sole motive for the defendant's otherwise lawful act (*see* ***Burns Jackson Miller Summit & Spitzer v Lindner***, 59 NY2d 314, 464 NYS2d 712, 721 [1983]; ***Lynch v McQueen***, 309 AD2d 790, 765 NYS2d 645 [2nd Dept 2003]). Because the complaint does not allege that the defendants' sole motivation was disinterested malevolence, the prima facie tort cause of action must fail (*see* ***Burns Jackson Miller Summint & Spitzer v Lindner,*** 59 NY2d 314, 464 NYS2d 712, 721 [1983]; ***Wiggins & Kopko, LLP v Masson***, 116 AD3d 1130, 983 NYS2d 665 [3d Dept 2014]; ***Avgush v Town of Yorktown,*** 303 AD2d 340, 755 NYS2d 647 [2d Dept 2003]). Accordingly, the defendant's counterclaim for prima facie tort also is dismissed.

Dated: 2-9-18

Hon. Denise F. Molia

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**