SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Supreme Court Justice

THERESA SUGARMELE and DOROTHY HOLLMAN,	**TRIAL/IAS, PART 21** **NASSAU COUNTY** **INDEX NO.: 613238/17**
Plaintiff(s),	**MOTION SUBMISSION DATE: 6-17-19**
-against-	**MOTION SEQ: 008**
JPMC SPECIALTY MORTGAGE LLC and FAY SERVICING LLC,	**XXX**
Defendant(s).	

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation/Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Defendant, Fay Servicing, LLC (Fay), moves this court for an order granting them summary judgment and dismissing the remaining causes of action in the complaint. Plaintiffs, Theresa Sugamele (Sugamele) and Dorothy Hollman (Hollman) opposes the motion. The factual and procedural history of this matter have been recounted in prior orders and need not be restated herein. What is relevant to note for this order is that Defendants entered the subject property at times and placed a lock on the garage and front door, allegedly interfering with Plaintiffs' ability to enjoy the property. By short form

order dated April 11, 2018, this court largely granted Defendants' motion to dismiss the complaint. Of the six causes of action, the court dismissed four completely, and two partially. The only remaining claims are for conversion of the subject residence and for private nuisance, limited to the time period of December 15, 2016 through July 12, 2017. Fay now moves for summary judgment to dismiss the remaining causes of action.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 [1979]; *Zuckerman v. City of New York,* 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

To prove conversion, a plaintiff must show that she has a possessory right or

interest in the property and that a defendant's dominion over the property interfered with plaintiff's rights. (*Pappas v. Tzolis*, 20 NY3d 228 [2012])

The elements of a private nuisance are a substantial interference with a person's right to use and enjoy land, such interference is intentional and unreasonable and is caused by another's actions. (*Sullivan v. Keyspan Corp.*, 155 AD3d 804 [2d Dept. 2017]).

In the prior order, Fay relied upon Real Property and Proceedings Law (RPAPL) §1307(1) and (2) to justify entering the property and securing it with locks. RPAPL §1307(1)(and (2) hold, in pertinent part:

> 1. A plaintiff in a mortgage foreclosure action who obtains a judgment of foreclosure and sale pursuant to section thirteen hundred fifty-one of this article, involving residential real property, as defined in section thirteen hundred five of this article, that is vacant, or becomes vacant after the issuance of such judgment, or is abandoned by the mortgagor but occupied by a tenant, as defined under section thirteen hundred five of this article, shall maintain such property until such time as ownership has been transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded...
>
> 2. Such plaintiff shall have the right to peaceably enter upon such property, or to cause others to peaceably enter upon the property for the limited purpose of inspections, repairs and maintenance as required by this section, or as otherwise ordered by court...

Based upon RPAPL §1307(1) & (2), the court found Fay was justified in entering the

property and inspecting it, but had not established entitlement to secure it until Plaintiffs wrote them a letter dated July 6, 2017 directing them to secure it. Fay now argues they were entitled to secure the property.

In support of their motion, Fay relies upon, *inter alia*, the affidavit of Vonterro White, a Trial and Mediation Specialist for Fay, the affidavit of Paul Swindle, Vice President for Mortgage Contracting Services (MCS), and the inspection reports filed by MCS. Ms. Vonterro states that Fay hired MCS as their property preservation vendor for the subject property. As part of the contract, MCS was required to make regular inspections of the property. During the first inspection on August 18, 2016, MCS reported to Fay that the property was "vacant and unsecured". MCS then made monthly inspections thereafter, and on May 11, 2017, MCS placed a padlock on the garage and a lock box on the front door.

Mr. Swindle confirms MCS was hired by Fay to preserve the subject property. Mr. Swindle denies that MCS ever entered the house. He confirms that the property appeared vacant and unsecured during the first inspection on August 18, 2016. MCS took pictures of the property that day and included them with their report. The pictures show the front of house and the house itself appearing unkempt. MCS then inspected the house on September 16, 2016, October 20, 2016, November 20, 2016, December 22, 2016, January 23, 2017, February 24, 2017, March 24, 2017, April 25, 2017, May 23, 2017 and June 23, 2017. For each visit, pictures were taken and a report was issued. Further, as

the property continued to appear vacant during each visit, MCS filled out and filed a "Vacant Certificate" for each inspection. On May 11, 2017, after the property appeared vacant for eight months, MCS put the padlock on the fence and the lock box on front door. Photos were taken on May 11, 2017 documenting the locking of the garage and front door.

Based upon the affidavits of Ms White and Mr. Swindle, together with MCS's inspections reports, the court finds Fay has established entitlement to summary judgment as matter of law. For conversion, Fay has established that the property had been vacant for eight months, and therefore Fay's exercising dominion over the property did not interfere with Plaintiffs' rights. Regarding private nuisance, Fay has established that placing locks on the vacant property was not unreasonable. The burden shifts to Plaintiffs to raise a material issue of fact requiring a trial of the action.

In opposition, Plaintiffs only offer the affirmation of counsel and a series of exhibits, most of which are the prior orders of this court. The only other exhibit offered is the July 6, 2017 letter from Plaintiffs which, in light of Fay's evidence, appears to establish that the property had been secured by locks for almost two months before Plaintiffs realized it. Regardless, the letter does not raise an issue of fact, and Plaintiffs offer no other admissible evidence in opposition to the motion. Counsel's affirmation is made without firsthand knowledge of the facts of the case and therefore lacks probative value, rendering it insufficient to raise an issue of fact. (*1375 Equities Corp. v.*

Buildgreen Solutions, LLC, 120 AD3d 783 [2d Dept 2014]).

Accordingly, it is hereby

ORDERED, that Fay's motion for summary judgment is GRANTED. The complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: August 15, 2019
Mineola, New York

JAMES P. McCORMACK, J.S.C.