

**Tedesco v Elio**

2019 NY Slip Op 35236(U)

August 14, 2019

Supreme Court, Putnam County

Docket Number: Index No. 500718/2017

Judge: Victor G. Grossman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the 30 day 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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF PUTNAM**

-----X  
DAVID TEDESCO and SHARON A. TEDESCO,

**DECISION, ORDER AND  
JUDGMENT AFTER TRIAL**

Plaintiffs,

Index No. 500718/2017

-against -

ANDREW ELIO,

Defendant.

-----X  
**GROSSMAN, J.S.C.**

This action involves a property line dispute. The Complaint contains allegations of: trespass; removal of boundary markers; encroachment of a deck from Defendant’s property onto Plaintiffs’ property as a continuing trespass; the construction by Defendant of a decorative wall and retaining structure on Plaintiffs’ property without consent; the planting of shrubs and vegetation by Defendant on Plaintiffs’ property; the installation of a sprinkler system and propane tanks by Defendant on Plaintiffs’ property; the use of a stairway by Defendant that encroaches on Plaintiffs’ property; the reported parking of vehicles by Defendant on Plaintiffs’ property; and the entry by Defendant on Plaintiffs’ property without permission or consent.

Defendant initially denied the allegations, and interposed a counterclaim, alleging adverse possession and trespass. Plaintiffs have denied the counterclaims and interposed several affirmative defenses.

Following pre-trial disclosure, on the eve of trial, the parties stipulated to the following facts:

1. Plaintiffs presently own the property commonly known as 149 W. Lakeshore Drive, in the Town of Kent, County of Putnam, and State of New York, which bears Tax Map ID number 33.49-1-2 ("Plaintiffs' Property").
2. Defendant presently owns and resides at the property commonly known as 155 W. Lakeshore Drive, in the Town of Kent, County of Putnam, and State of New York, which bears Tax Map ID number 33.49-1-3 (hereinafter "Defendant's Property").
3. Plaintiffs' Property and Defendant's Property are adjacent to each other, and share a common boundary line (depicted on the survey map prepared on August 7, 2018; see Plaintiffs' Exhibit "3").
4. Plaintiffs purchased Plaintiffs' Property in or about 1997.
5. Defendant purchased Defendant's Property in or about 1999.
6. Defendant's deck, which is further described in the Third Cause of Action in Plaintiffs' Complaint (identified and labeled "Frame Deck" on Plaintiffs' Exhibit "3"), presently encroaches upon Plaintiffs' Property. Defendant has agreed to remove the deck, to the extent it encroaches upon Plaintiffs' Property, from Plaintiffs' Property.
7. Defendant's decorative wall/stone masonry wall, situated towards the rear (or western boundary) of the Plaintiffs' Property and Defendant's Property, and which is further described in the Fourth Cause of Action in Plaintiffs' Complaint (identified and labeled "Stone Masonry Retaining Wall" on Plaintiffs' Exhibit "3"), presently encroaches upon Plaintiffs' Property. Defendant has agreed to remove the decorative wall/stone masonry wall, to the extent it encroaches upon Plaintiffs' Property, from Plaintiffs' Property.
8. Any vegetation planted by Defendant on Plaintiffs' Property, further described in the Fifth Cause of Action in Plaintiffs' Complaint (unidentified on Plaintiffs' Exhibit "3"), presently encroaches upon Plaintiffs' Property. Defendant has agreed to remove the plant vegetation, to the extent it encroaches upon Plaintiffs' Property, from Plaintiffs' Property.
9. Defendant's water sprinkler system, further described in the Sixth

- Cause of Action in Plaintiffs' Complaint (unidentified on Plaintiffs' Exhibit "3"), presently encroaches upon Plaintiffs' Property. Defendant has agreed to remove the sprinkler system, to the extent it encroaches upon Plaintiffs' Property, from Plaintiffs' Property.
10. Defendant's propane tanks, further described in the Seventh Cause of Action in Plaintiffs' Complaint (identified and labeled "Propane Tanks" on Plaintiffs' Exhibit "3"), presently encroach upon Plaintiffs' Property. Defendant has agreed to remove the propane tanks, to the extent they encroach upon Plaintiffs' Property, from Plaintiffs' Property.
  11. Defendant's concrete stairs, further described in the Eighth Cause of Action in Plaintiffs' Complaint (identified and labeled "Concrete Steps" on Plaintiffs' Exhibit "3"), are located along the shared boundary of Plaintiffs' Property and Defendant's Property. Plaintiffs have agreed to permit the concrete stairs to remain in the same location, even to the extent that they may encroach upon Plaintiffs' Property.
  12. Defendant has agreed to refrain, and has agreed to refrain from directing anyone on his behalf, from parking automobiles or other vehicles on Plaintiffs' Property.
  13. Defendant presently owns three dogs, which dogs reside at Defendant's Property.

The Stipulation of Agreed Facts contains a reference to the common boundary line depicted on a survey map dated August 7, 2018, and admitted into evidence as Exhibit 3.<sup>1</sup>

The survey map clearly shows encroachments by Defendant's deck, stone masonry wall, and a separate retaining wall at the rear of, and onto, Plaintiffs' Property. These encroachments are part of a history of Defendant's brazen invasion of Plaintiffs' property rights. Defendant placed a dumpster on Plaintiffs' Property, without consent, while his Property was being

---

<sup>1</sup> In addition, the parties submitted proposed Findings of Fact. CPLR §4213(a). To the extent the Court adopted these proposed Findings of Fact, they are incorporated herein.

renovated. Defendant frequently used Plaintiffs' driveway for overnight parking, without consent. Defendant arranged for propane delivery on Plaintiffs' driveway. In 2016, when Defendant began constructing the rear retaining wall, which extended 21 feet onto Plaintiff's Property, he excavated and placed dirt on Plaintiffs property. Plaintiffs advised the contractor of the encroachment, and Plaintiffs' counsel wrote to Defendant, requesting that he cease construction of the wall. Survey stakes were removed after Plaintiffs hired a surveyor to survey the Property. At one point, Plaintiffs challenged Defendant's actions. Defendant claimed there was no encroachment, and that he had a survey to support his claim, but he never produced it. Plaintiffs' witness, Larry Reynolds, the owner of a tree service, testified that he performed tree trimming and removal work for Plaintiffs, and that prior to September 2016, he did not observe any stone wall between Plaintiffs' property and Defendant's property.

Plaintiffs' testimony was supported by photographs. Many photos were taken in September and October 2016. The photographs depicted the encroachment of Defendant's deck, excavation of Plaintiffs' property, the underground sprinkler system on Plaintiffs' property, the excavation of the L-shaped wall, and Defendant's car in Plaintiffs' driveway. A photograph from 2018 depicted an opening in the L-shaped wall, enabling Defendant to open the door to his house and allow his dogs to run freely on Plaintiffs' property.

Defendant claimed the L-shaped wall was present when he purchased the Property. According to Defendant, it was stacked stone without mortar, and he "re-stacked" it in 2000. The L-shaped wall was not depicted on his survey. He stated in 2010-2012, the wall started to buckle and fall. He claimed he only used rock from the original wall, and that the size and location of the wall was the same. In one instance, Defendant denied seeing the people depicted

in a particular photograph (Exhibit F), and did not recognize himself. He also claimed that Plaintiffs' tenants gave him permission to use the driveway, but the hearsay objection was sustained. He denied removing the boundary pins. He also claimed that his dogs currently did not go on Plaintiffs' Property, but that Plaintiffs gave their permission for the dogs "a long time ago" - a claim Plaintiffs denied. Defendant also asserted that there were a lot of dogs in the neighborhood and that any one of them, or many of them, may have traveled onto Plaintiffs' Property. Defendant testified to an opening in the wall, which he remedied by putting a gate or blockade to keep the dogs from Plaintiffs' Property, although exactly why he did so remains unclear, since he claimed he had permission for the dogs to enter Plaintiffs' Property. A gate would be necessary if Defendant did not have permission, or if permission was revoked.

On cross-examination, Defendant admitted he worked in the security field. He had security cameras on the property, including one depicting the area of the L-shaped wall, but he failed to produce any photographs or footage showing the "replacement" of the L-shaped wall. Despite owning a camera and a smart phone, Defendant offered no photographs depicting the L-shaped walls during the entire 20 years he lived there. He claimed the security cameras were installed after the wall went up, but he failed to produce any photographs depicting the wall. Defendant also claimed he hired an individual named Santiago to build the wall, but had no last name, contact number, or address for him. He claimed that the rear retaining wall built by Santiago encroached onto Plaintiffs' land by 21 feet due to a language barrier. Apparently, however, Santiago had no difficulty comprehending the instructions for the L-shaped wall.

Defendant also called a neighbor, Jackie Callahan-Stewart, who testified there was no wall between the properties. While questioned about an L-shaped wall, she responded, "it was "a

pile of rocks” not “a wall” until Defendant built it in 2016.

Plaintiffs have established Defendant’s trespass, encroachments and right to relief. Defendant has failed to establish his claim of adverse possession. The encroachment occurred in 2016 when Defendant began his construction and renovation. Plaintiffs responded promptly, and in any event, any adverse claim did not ripen onto ownership. In addition, Defendant’s actions in naked derogation of Plaintiffs’ property rights are equaled only his brazen lack of credibility in attempting to justify his conduct. The Stipulation of Agreed Facts admits to a pattern of encroachments, but Defendant would have the Court believe the most significant encroachment is non-existent. He would have this Court believe that his dogs did not enter onto Plaintiffs’ property despite animal footprints leading from Defendant’s door to Plaintiffs’ property.

Plaintiffs’ Complaint contains eleven (11) causes of action – nine (9) of which seek injunctive relief, and two (2) of which seek damages. One cause of action seeks damages due to the removal of survey stakes, but the proof that Defendant removed the stakes is inconclusive. However, the second cause of action seeking redress for the creation of a nuisance, its abatement, and removal has been established. Domen Holding Co. v. Aranovich, 1 N.Y.3d 117 (2003); Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 564, 570 (1977). A fair interpretation of the evidence supports the conclusion that Defendant, in the course of his activities, repeatedly accessed Plaintiffs’ property without consent, caused damage to, and deprived Plaintiffs of the use of, their property, and damages for such conduct are recoverable. Volunteer Fire Assn. of Tappan Inc., v. County of Rockland, 101 A.D.3d 853, 855-56 (2<sup>nd</sup> Dept. 2012). Although Defendant was responsible for physical damage to Plaintiffs’ Property, including constructing a 21-foot retaining wall, and a sprinkler system, which arguably interfered

with Plaintiffs' right to use and enjoy their property, damages in the form of loss of monetary value were not established. Copart Industries, supra.; Vacca v. Valerino, 16 A.D.3d 1159 (4<sup>th</sup> Dept. 2005); Zimmerman v. Carmack, 292 A.D.2d 601 (2<sup>nd</sup> Dept. 2002); Behar v. Quaker Ridge Golf Club, Inc., 54 Misc.3d 358 (Sup.Ct. [Westchester] 2016). Based on these conclusions, the Court awards Plaintiffs damages in the amount of \$7,500.00, in addition to the injunctive relief awarded herein.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that Defendant, and anyone acting on Defendant's behalf, is forthwith and permanently enjoined, restrained, and prohibited from entering into, upon, or under Plaintiffs' Property, which property is commonly known as 149 W. Lakeshore Drive, in the Town of Kent, County of Putnam, and State of New York, identified by Tax Map ID No. 33.49-1-2; and it is further

**ORDERED, ADJUDGED and DECREED** that Defendant, and anyone acting on Defendant's behalf, is forthwith and permanently enjoined, restrained, and prohibited from permitting any domestic animals from entering into or upon Plaintiffs' Property; and it is further

**ORDERED, ADJUDGED and DECREED** that Defendant is directed to remove, at his cost and expense, within thirty (30) days of the date of this Order, any encroachments (including any structures on which the encroachments are situated) which remain on Plaintiffs' Property, which encroachments are detailed in the Stipulation of Agreed Facts, which was executed by the attorneys for the respective parties on May 14, 2019, and submitted to the Court on May 16, 2019, and to provide proof of removal of same to Plaintiffs' attorneys with sixty (60) days of the date of this Order; and it is further

**ORDERED, ADJUDGED and DECREED** that Defendant is directed to remove at his cost and expense, within thirty (30) days of the date of this Order, the L-shaped wall, which was the subject of the trial in this matter, from Plaintiffs' Property, and provide proof of removal of same to Plaintiffs' attorneys within sixty (60) days of the date of this Order; and it is further

**ORDERED, ADJUDGED and DECREED** that Plaintiffs, with an address of 4 Cornish Road, Carmel, New York 10512, do recover of Defendant, with an address of 155 W. Lakeshore Drive, Carmel, New York 10512, damages on their cause of action for nuisance in the amount of \$7,500.00, and that Plaintiffs have execution therefor.

Judgment entered in accordance with the foregoing this 14<sup>th</sup> day of August, 2019.

The foregoing constitutes the Decision, Order, and Judgment of the Court.

Dated: Carmel, New York 10512  
August 14, 2019

  
HON. VICTOR G. GROSSMAN, J.S.C.

To: Ellen A. Faulkner, Esq.  
Craig T. Bumgarner, P.C.  
Attorneys for Plaintiffs  
1118 Route 52, Suite F  
Carmel, New York 10512

Michael V. Caruso, Esq.  
Michael V. Caruso, P.C.  
Attorneys for Defendant  
3871 Danbury Road  
Brewster, New York 10509

08/14/2019

  
Putnam County Clerk