

Ridge Blvd. Realty, Ltd. v Zisimopoulos

2020 NY Slip Op 31256(U)

May 7, 2020

Supreme Court, Kings County

Docket Number: 33178/03

Judge: Kathy J. King

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At an I.A.S. Part 64 of the Supreme Court of the State of New York, held in the County of Kings at the Courthouse, 360 Adams Street, Brooklyn, New York, on the 7th day of May, 2020.

PRESENT: HON. KATHY J. KING,
Justice.

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RIDGE BLVD. REALTY, LTD. CARMINE
GARGANO AND ROSA GARGANO,

Plaintiffs,

DECISION/ORDER

- against -

Index No. 33178/03

CHRISANTHY ZISIMOPOULOS, STEVEN
GAMBINO, STEVEN GAMBINO ARCHITECTS, P.C.,
SAMIR MAKO, MICHELE MAKO, MARKOS
KYPRIOTUS, URANIA KYPRIOTUS, JGN
CONSTRUCTION MANAGEMENT, LLC, JGN
CONSTRUCTION CORP.,

Defendants.

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The following papers numbered 1-22 read herein:
Notice of Motion/Order to Show Cause/
Petition/Cross-Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

Papers Numbered:

1-2, 3-4, 5-6,7-8
9, 10,11, 12,13, 14, 15, 16, 17, 18
19, 20, 21, 22

In the instant action, plaintiffs sue the respective defendants for monetary and equitable relief arising from the demolition of a retaining wall and construction of a replacement wall separating adjoining properties.

Upon the foregoing papers, the Court considers the following motions:

- 1) Defendants, Steven Gambino and Steven Gambino Architect P.C. (collectively “Gambino”), move for leave to reargue their prior motion for summary judgment and, upon the

granting of leave, seek dismissal of plaintiffs' complaint¹ ("the complaint"), and cross-claims by Chrisanthy Zisimopoulos (Mot. Seq# 24);

2) Plaintiffs, Carmine Gargano and Rose Gargano (collectively "plaintiffs")², move for leave to reargue their prior cross-motion for summary judgment, and upon the granting of leave, move for judgment as a matter of law against defendant Chrisanthy Zisimopoulos ("Zisimopoulos") and Gambino as to the trespass, nuisance, fraud and conversion causes of action contained in their complaint (Mot. Seq #25);

3) Zisimopoulos cross-moves for leave to reargue her prior motion for summary judgment and upon the granting of leave, seeks dismissal of the complaint as to causes of action for trespass, nuisance, fraud and conversion (Mot. Seq# 26);

4) Defendants, JGN Construction Corp. and JGN Construction Management, LLC ("JGN Defendants") and Samir Mako and Michele Mako³ (collectively "Mako Defendants") cross-move for leave to reargue their prior motion for summary judgment, and upon the granting of leave, seek dismissal as to the causes of action for trespass, nuisance, and conversion and move for sanctions against plaintiffs. (Mot. Seq#28)

Plaintiffs submit opposition to the motions of defendants Gambino and the cross-motions of Zisimopoulos, the JGN Defendants and Mako Defendants. Gambino, JGN, and Mako

¹ The initial underlying action commenced by plaintiffs was supplemented/amended to add additional defendants; pursuant to plaintiffs filed second amended verified complaint dated July 24, 2008, plaintiff's added JGN Construction Management, as defendants. It appears that plaintiffs, in error, referenced the July 24, 2008 complaint as the second amended complaint. In fact, it was the third amended complaint. Reference to "the complaint" in this document refers to the third amended verified complaint which contains all party defendants.

² Ridge transferred its ownership of the property to plaintiffs Carmine and Rosa Gargano on June 24, 2013. Ridge was legally dissolved on September 8, 2015.

³ The Court notes that pursuant to Judge Bunyan's October 4, 2016 order, the complaint was dismissed in its entirety as to Mako defendants. Thus, the Court will consider the arguments raised solely by the Mako defendants, in opposition, solely as to plaintiff's motion.

defendants, Zisimopoulos, and Markos and Urania Kypriotus (“Kypriotus Defendants”) oppose plaintiffs’ motion.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Ridge Blvd Realty, Ltd. (“Ridge”) is the former owner of the property located at 215 84th Street also known as 8311 Ridge Boulevard (Block 6016, Lot 1) in Brooklyn, New York. Ridge transferred its ownership of the property to plaintiffs Carmine and Rosa Gargano on June 24, 2013. The property adjoining plaintiffs is 223 84th Street (Block 6016, Lot 67). The retaining wall separating the properties at 215 84th Street and 223 84th Street has been the subject of protracted litigation, dating back to 1999. Plaintiffs initially commenced an action regarding the retaining wall against Catherine Durakis (“Ms. Durakis”), who was the owner of 223 84th Street in 1999. Plaintiffs’ complaint alleged that the retaining wall had collapsed, causing debris to fall upon and damage plaintiffs’ property. In 1999, Ms. Durakis agreed to construct a new retaining wall in place of the existing wall to resolve the lawsuit and contracted with Gambino to provide architectural services for the construction of the wall. However, Ms. Durakis sold the property in 2000 to Zisimopoulos, who also retained Gambino to provide architectural services with respect to the retaining wall.

Subsequently, Zisimopoulos brought an action against the plaintiffs (Index No. 28202/2000) seeking an order granting a license to enter upon plaintiffs’ premises for the purpose of repairing and/or replacing the retaining wall. By order dated September 15, 2000 (J. Knipel), the Court granted Zisimopoulos a limited license for access to the plaintiffs’ property for 30 days “for the purpose of repairing and/or replacing” a certain retaining wall adjoining both properties. Plaintiffs’ motion to enjoin the work pending appeal was denied by the Appellate Division, Second Department on November 17, 2000. New York City Department of Buildings (“DOB”) approvals were obtained, and construction of a new retaining wall started. Upon

completion, around January 1, 2001, the DOB approved the new retaining wall on January 11, 2001, as constructed. On or about August 2003, Zisimopoulos sold the property, to the Mako Defendants. On July 6, 2005, the property was divided into two separate lots, each being 40 feet by 100 feet. Thereafter, in 2005, the Mako defendants conveyed title to the lot immediately adjacent to plaintiffs' property to the Kypriotus defendants and title to the second lot to JGN Construction Management LLC. The Kypriotus defendants, subsequently retained JGN Construction Corp, to build their residence on the lot.

In September 2003, plaintiffs commenced an action against Zisimopoulos, in which plaintiffs alleged in their complaint that Zisimopoulos is, *inter alia*, liable for trespass (first and second causes of action); nuisance (third cause of action); fraud (fourth cause of action); and conversion (sixth cause of action).

Thereafter, in 2004, a supplemental summons and verified complaint was filed, adding Gambino as defendants. In December 2004, Zisimopoulos answered and asserted a cross-claim against Gambino for indemnification/contribution, after which defendant Gambino moved for summary judgment. By court order dated September 15, 2005 (J. Bunyan), the court denied defendant Gambino's motion for summary judgment as premature without prejudice to renew, after discovery.

On or about March 21, 2006, a second supplemental summons and verified amended complaint was filed adding the Kypriotus defendants, JGN Construction Management LLC and defendant John Nicholis. Thereafter, JGN Construction Management LLC and John Nicholis moved for summary judgment. On or about July 24, 2008, plaintiffs filed a verified second amended complaint severing John Nicholis from the complaint and adding JGN Construction Corp., in which responsive pleadings containing an answer and cross-claims were filed by

Zisimopoulos, the JGN defendants, and the Mako defendants. Plaintiffs replead all causes of action contained in the initial complaint in the supplemental/amended versions of the complaint.

The note of issue was filed on or about September 2015, whereupon the respective parties in the action moved for summary judgment. The court (J. Bunyan), by order dated October 4, 2016, consolidated five motions/cross-motions and issued the following dispositions:

1) Gambino's motion for summary judgment was granted to the extent of dismissing the complaint, and the cross-claims against Gambino, as to defendants Mako, Kypriotus, JGN defendants and denying the cross claims by Zisimopoulos against Gambino;

2) Zisimopoulos' cross-motion for summary judgment was granted to the extent of dismissing the complaint against her as to the fifth (permanent injunction), seventh (depreciation in value of property), and eighth (punitive damages) causes of action and denied as to first and second causes of action for trespass, third cause of action for nuisance, fourth cause of action for fraud. and sixth cause of action for conversion;

3) Mako defendants' cross-motion for summary judgment was granted dismissing the complaint in its entirety;

4) Plaintiffs' cross-motion for summary judgment for entry of judgment as a matter of law was denied against Zisimopoulous and Gambino as to the causes of action for trespass, nuisance, fraud and for conversion.

5) JGN defendants cross-motion for summary judgment was granted to the extent of dismissing the complaint as to the fourth cause of action (fraud), fifth cause of action (permanent injunction), seventh cause of action (depreciation in value of property), and eighth cause of action (punitive damages), and denied regarding the causes of action for trespass, nuisance, and destruction and conversion;

6) Kypriotus defendants' motion for summary judgment was granted dismissing the complaint in its entirety and all cross-claims.

Thereafter, the instant motions for leave to reargue followed, which the Court now considers.

DISCUSSION

MOTION TO REARGUE STANDARD OF REVIEW

Pursuant to CPLR 2221[d][2], a motion to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact offered on the prior motion” (CPLR 2221[d][2]). The Court has the discretion to determine whether to grant a motion for leave to reargue (*see Barnett v Smith* 64 AD3d 669, 670 [2d Dept 2009] [internal citations omitted]). However, a motion to reargue “is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Anthony J Carter, DDS PC v Carter*, 64 AD3d 669 [2d Dept 2011] [internal citations omitted]).

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is a drastic remedy that deprives a litigant of his day in court and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept. 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. Of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). “[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to

require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

PLAINTIFFS’ CROSS MOTION TO REARGUE

The Court shall first consider plaintiffs’ cross-motion for leave to reargue, since the remaining motions/cross-motions would be rendered moot, if plaintiffs’ cross-motion were granted.

The within cross-motion for re-argument is based on the denial of plaintiffs’ previous motion against Zisimopoulos and Gambino for causes of action contained in plaintiffs’ complaint including trespass, nuisance, fraud, and property damage. A review of the moving papers in support of reargument establishes that the Court did not err in denying plaintiffs’ motion, since plaintiffs did not establish prima facie entitlement to summary judgment as a matter of law as to said causes of action.

Plaintiffs’ first cause of action for trespass alleges that due to the construction of the retaining wall, defendant Zisimopoulos and Gambino are liable for diversion of rain and storm waters onto plaintiffs’ property which caused damage to plaintiffs’ garage resulting from the construction of the subject retaining wall. Plaintiffs’ second cause of action for trespass alleges that defendants Zisimopoulos and Gambino allegedly piled excavated fill along plaintiffs’ lot line causing damage to plaintiffs’ garage.

“The essence of trespass is the invasion of a person's interest in the exclusive possession of land” (*Zimmerman v Carmack*, 292 AD2d 601, 602 [2d Dept 2002] [internal citations

omitted]). Further, it is well settled that a landowner will not be held liable for damages to abutting property caused by the flow of surface water due to improvements to his or her land provided that the improvements were made in good faith to fit the property for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes or ditches (*see, Tatzel v Kaplan*, 292 AD2d 440, 441 [2d Dept 2002] citing *Kossoff v Rathgeb-Walsh, Inc.*, 3 NY2d 583, 589-590).

The Court finds that plaintiffs failed to establish prima facie entitlement to summary judgment as a matter of law regarding its first and second causes of action sounding in trespass since the record demonstrates that Zisimopoulos' access to the adjoining property to construct the new retaining wall was obtained pursuant to a court ordered license. Here, the record establishes that the newly constructed retaining wall was properly designed, constructed, and did not cause damage to the plaintiffs' property. Significantly, Timothy Lynch, Principal Engineer of the DOB Forensic Engineering Unit, opines in a June 29, 2006 DOB field inspection report, that the porous pipe and free draining sand are draining the site adequately. Additionally, the DOB report establishes that no lateral pressure is applied to the garage from the new retaining wall.

Plaintiffs' third cause of action for nuisance, alleges that Zisimopoulos and Gambino's construction of the retaining wall interfered with plaintiffs' right to use and occupy their property, constituting a private nuisance.

Plaintiffs, similarly, failed to establish prima facie entitlement for its claim for private nuisance, since plaintiffs failed to demonstrate diversion of water from the adjoining property onto plaintiffs' property. Plaintiffs' moving papers fail to show that defendants intentionally and

unreasonably interfered with a plaintiffs' interest in the private use and enjoyment of their land (see *Zimmerman v Carmack*, 292 AD2d 601, 602 [2d Dept 2002] citing *Copart Industries v Consolidated Edison of New York*, 41 NY2d 564, 569 [1995]). The opinions proffered by plaintiffs' experts were based on assumptions, not field verification, and fail to raise a triable issue of fact as to plaintiffs' entitlement for summary judgment.

Plaintiffs' fourth cause of action for fraud, alleges that Zisimopoulous and Gambino made false representations of fact and concealed information for the purpose of deceiving the DOB in completing their applications for various permits. Plaintiffs claim that they were forced to defend against wrongfully issued DOB violations.

The Court did not err in denying the plaintiffs' motion for summary judgment for causes of action for fraud against Zisimopoulos and Gambino. Plaintiffs contend that defendants Zisimopoulos and Gambino allegedly made false statements and concealed information from the DOB and obtained a fraudulent DOB work permit application which listed the wrong address, plaintiffs' address, instead of the adjoining property, resulting in plaintiff defending against various DOB/ECB violations. A fraud cause of action requires; 1) a material misrepresentation of a fact; (2) knowledge of its falsity; (3) intent to induce reliance; (4) justifiable reliance by plaintiff; and (5) damages (see *YDRA v Mitchell*, 123 AD3d 1113 [2d Dept]).

Notwithstanding the errors within the topographical report from the DOB and continued use of the DOB reports and surveys containing said topographical errors, the Court finds plaintiffs failed to submit evidence in admissible form to support a showing of any misrepresentation made to plaintiffs by defendants Zisimopoulos and Gambino with a justifiable reliance thereon. The record further establishes that during the pendency of the within action.

plaintiff brought an Article 78 proceeding against the City of New York and DOB, et al. concerning the issuing of the DOB permits used for the construction of the retaining wall and alleged violation of various provisions of the NYC Administrative code and New York City Zoning resolutions which ultimately was resolved per stipulation of settlement with prejudice. The Court notes that plaintiffs did not appeal from the stipulation of the Article 78 proceeding concerning, *inter alia*, the issuing of the DOB permits for the construction of the new retaining wall, or exhausted all administrative remedies concerning the DOB's determinations regarding the work permits used for the construction of the retaining wall.

The Court also notes that the Board of Standard Appeals has the exclusive jurisdiction regarding DOB determinations including but not limited to the issuing or correction of work permits (NYC Charter 645[b]). The record further demonstrates that the retaining wall underwent numerous inspections and was audited by the DOB with a finding that the retaining wall was properly designed and constructed in accordance to plans approved by the DOB. Thus, Court properly denied plaintiffs' prior motion for summary judgment for fraud against Zisimopoulos and Gambino.

Plaintiffs' sixth cause of action for property damage⁴, alleges that Zisimopoulos and Gambino, fraudulently and illegally constructed of the retaining wall causing plaintiffs' garage to crack.

The Court did not err in denying plaintiffs' prior motion for summary judgment for the cause of action for conversion against Zisimopoulos, JGN, and Gambino. A conversion is the unlawful exercise of dominion and control over plaintiff's property and does not require actual

⁴ While plaintiff pled property damage as its sixth cause of action, the courts October 4, 2016 decision deemed this cause of action to be one sounding in conversion.

physical possession of the property (see *General Elec Co v American Export Isbrandtsen Lines, Inc*, 37 AD 2d 959 [2d Dept 1971]). Further “a wrongful intent is not an essential element of a conversion. It is enough in this action that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it” (*Id.*).

The subject matter of a conversion cause of action “ ‘must constitute identifiable tangible personal property’; real property and interests in business opportunities will not suffice” (*C & B Enterprises USA, LLC v Koegel*, 136 AD3d 957 [2d Dept 2016]; *ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 931-932 [2012], quoting *Roemer & Featherstonhaugh v Featherstonhaugh*, 267 AD2d 697, 697 [1999]). Plaintiffs have not established *prima facie* entitlement to summary judgment as a matter of law for conversion, since plaintiffs fail to demonstrate an identifiable tangible personal property that Zisimopoulos, Gambino, and JGN had exerted dominion or control over. Rather the Court finds that the subject retaining wall is real property as it is an appurtenance of the adjoining property.

Based on the foregoing, plaintiff’s cross-motion for leave to reargue pursuant to CPLR 2221 is denied.

GAMBINO’S MOTION FOR SUMMARY JUDGMENT

Upon review of the moving papers and supporting papers annexed thereto, Gambino defendants established that the court erred in its 2016 order denying Gambino’s previous motion for summary judgment, thus, reargument is granted.

Upon reargument, the Court finds that Gambino has established *prima facie* entitlement for summary judgment⁵ dismissing plaintiffs’ first and second causes of action for trespass. The

⁵ The Court adheres to the order dated October 4, 2016, to the extent of granting Gambino’s motion for summary dismissing the complaint, and the cross-claims against Gambino, as to defendants Mako, Kypriotus, JGN defendants.

record shows that Gambino's contract for services with Ms. Durakis and Zisimopoulos were limited to architectural services only, and that Gambino never entered upon plaintiffs' property.

Further, Gambino has established prima facie entitlement to dismissal of plaintiffs' nuisance claim as the June 29, 2006 DOB field inspection report shows no causal relation between the flooding of plaintiffs' garage and/or damage therein, and constitutes proof in admissible form that Gambino did not intentionally or unreasonably interfere with plaintiffs' interest in the private use and enjoyment of their land.

Gambino has demonstrated a prima facie entitlement for judgment as a matter of law dismissing the fourth cause of action for fraud. The record establishes that the defendants did not intentionally or knowingly use the wrong block and lot number to acquire the work permits from the DOB, and is devoid of any specific misrepresentations or omissions made to the plaintiffs together with justifiable reliance by the plaintiffs on any specific misrepresentations or omissions made by Gambino to the plaintiffs. The documentary evidence demonstrates that Gambino received the wrong information from a survey of the adjoining property and/or due to a DOB error. Thus, there is no basis in which plaintiffs can impute reliance on the incorrectly stated information.

The Court finds that plaintiffs have failed to raise a triable issue regarding Gambino's prima entitlement to summary judgment as to their first, second, fourth, and sixth causes of action.

Gambino has made prima facie showing for the dismissal of plaintiffs' sixth cause of action for conversion as a matter of law, since conversion applies to personal and not real property (*C & B Enterprises USA, LLC v Koegel*, 136 AD3d 957, 958 [2d Dept 2016]).

Finally, Gambino moves for dismissal of plaintiffs' fifth cause of action for injunctive relief, seventh cause of action for depreciation of value, and eighth cause of action for punitive damages. The record establishes that plaintiffs' fifth, seventh, and eighth causes of action are not cognizable independent causes of action under New York Law. (*see, e.g., Brandenburg v Blue Cross and Blue Shield of Greater New York*, 78 AD2d 534, 534 [2d Dept 1980]). Plaintiffs fifth, seventh, and eighth causes of action are, therefore, dismissed as a matter of law.

Accordingly, Gambino's motion for summary judgment for dismissal of plaintiffs' complaint, and defendant Zisimopoulos' cross-claims for contribution and indemnification is granted.

ZISIMOPOULOS' MOTION FOR SUMMARY JUDGMENT

Upon review of the moving papers and supporting papers annexed thereto, Zisimopoulos defendants established that the court erred in its 2016 order denying to the extent Zisimopoulos previous motion for summary judgment⁶, thus, reargument is granted.

Upon reargument, the Court finds that Zisimopoulos has established a prima facie entitlement for dismissal of the first and second causes of action for trespass, since the record establishes that Zisimopoulos made improvements to the adjoining property pursuant to a court ordered license to repair/replace the 6' historic unstable stone wall with a new retaining wall in good faith and for a rational use as the old historic wall had collapsed (*see Tatzel v Kaplan*, 292 AD2d at 440).

⁶ The Court adheres to the order dated October 4, 2016 to the extent of granting Zisimopoulos' motion for summary dismissing the complaint against her as to the fifth (permanent injunction), seventh (depreciation in value of property), and eighth (punitive damages) causes of action.

Further, Zisimopoulos submitted evidence which demonstrates that Zisimopoulos' construction did not divert water causing the continuous flooding to plaintiffs' garage as alleged by plaintiffs, since the demonstrable evidence shows permits and approvals were obtained for the design and construction of the new retaining wall. The DOB letter dated November 9, 2007 to Rosa Gargano from the DOB Deputy Borough Commissioner states that the construction work on the new wall is in conformance with approved plans based on the inspection of the new wall by DOB personnel numerous times as of October 27, 2007. Both the DOB June 29, 2006 field report and letter from the DOB Deputy Borough Commissioner establishes that the new retaining wall is adequately designed and constructed to support the imposed loads of the backfill from the adjoining property.

Further, Zisimopoulos has made prima facie entitlement for dismissal of the third cause of action for nuisance, since the submitted evidence establishes that the alleged flooding and cracking of plaintiffs' garage on plaintiffs' property is not causally related to the performance of the new retaining wall in accordance. Therefore, Zisimopoulos' construction of the new retaining wall did not constitute a nuisance as Zisimopoulos did not intentionally or unreasonably interfere with plaintiffs' private use and enjoyment of their land as they properly constructed the new retaining wall in accordance to plans approved by the DOB. The Court finds that plaintiffs have failed to raise a triable issue of fact and rebut Zisimopoulos' prima facie showing, therefore, plaintiffs' first and second cause of action for trespass and third cause of action for nuisance are dismissed.

Zisimopoulos has demonstrated a prima facie entitlement for dismissal as a matter of law of the fourth cause of action for fraud as plaintiffs are collaterally estopped from raising the

arguments set forth in the within motion for summary judgment since they were previously litigated in an Article 78 proceeding commenced by plaintiffs entitled *Ridge Blvd Realty LTD, Carmine Gargano, & Rosa Gargano v The City of New York, DOB, ECB, Commissioner of DOB, and Zisimopoulos et al.* In this proceeding, plaintiffs sought to dismiss and re-issue numerous DOB/ECB violations, compel DOB and ECB to take corrective actions with respect to issued work permits, and for an order finding defendants liable for various NYC admin Code, building code, NYC Zoning Resolution violations. Ultimately, the parties resolved the Article 78 proceedings per stipulation with prejudice.

“Collateral estoppel, or issue preclusion, ‘precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party [or those in privity], whether or not the tribunals or causes of action are the same’ ” (*S & R Development Estates, LLC v Feiner*, 132 A.D.3d 772, 773-774 [2d Dept 2015] [internal citations omitted]). “This doctrine applies only ‘if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party to be bound] had a full and fair opportunity to litigate the issue in the earlier action’ ” (*Id.* at 774). Here, plaintiffs are collaterally estopped, as a matter of law, from bringing their fraud claims against Zismopoulos.

Plaintiffs also fail to establish a claim for conversion against Zisimopoulos for alleged damage to their garage from the construction of the new retaining wall and the destruction of a stone wall that was located on plaintiffs’ property, since an action for conversion applies to personal and not real property (see *C & B Enterprises USA, LLC v Koegel*, 136 AD3d 957, 958

[2d Dept 2016]). Therefore, plaintiffs have failed to establish a claim against Zisimopoulos for conversion and plaintiffs' sixth cause of action for conversion against Zisimopoulos is dismissed.

Finally, as to plaintiffs' fraud claim, plaintiffs failed to appeal the DOB determinations, and alleged various violations of the NYC admin code and NYC Zoning resolutions concerning the retaining wall which were not brought before the New York City Board of Standards and Appeals ("BSA"). "The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution" (*Toys R Us v Silva*, 89 NY2d 411, 418-19 [1996]; see, NY City Charter §§ 659, 666). The Board of Standard Appeals also has the exclusive jurisdiction regarding DOB determinations including but not limited to the issuing or correction of work permits (NYC Charter 645(b); 666[6][A]). It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power" (*Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). The Court finds that plaintiffs failed to exhaust all administrative remedies concerning the DOB determinations, and as a result, fails to rebut defendant's prima facie entitlement to summary judgment regarding plaintiffs' cause of action of fraud.

Accordingly, Zisimopoulos' motion for summary judgment for the dismissal of plaintiffs' complaint is granted in its entirety.

JGN'S CROSS-MOTION FOR SUMMARY JUDGMENT

Upon review of the moving papers and supporting papers annexed thereto, JGN defendants established that the court erred in its 2016 order as to the denial of JGN's previous motion for summary judgment⁷ to dismiss plaintiff's complaint, thus, reargument is granted.

Firstly, the Court overlooked the submitted evidence and misapprehended facts concerning, *inter alia*, the distinction between JGN Construction Corp. and JGN Construction Management, LLC, as separate legal entities as set forth in the respective filings of the JGN defendants with the New York Secretary of State Department of Corporations .

JGN Construction Corp. established *prima facie* that it had no role in the continuing trespass of storm and rainwater flooding and cracking of plaintiffs' garage nor illegally raising the grade of plaintiffs' property, since its only relation to plaintiff's property was the construction of the Kypriotus home, which took place four years *after* the construction of the new retaining wall. Plaintiffs' failed to raise a triable issue of fact as to whether JGN Construction Corp.'s construction work performed after the construction of the retaining wall resulted in rainwater flooding, cracking of plaintiffs' garage, or causing the illegal raising of plaintiffs' property grade. Thus, demonstrating *prima facie* entitlement for dismissal of first and second cause of action for trespass and third cause of action for nuisance.

As to defendant, JGN Construction Management, LLC, plaintiff has failed to raise a triable issue of fact regarding its role in constructing the retaining wall or the alleged continuing trespass of storm and rainwater flooding and cracking of plaintiffs' garage nor illegally raising the grade of plaintiffs' property, since no evidence has been submitted that JGN Construction

⁷ The Court adheres to its prior order dated October 4, 2016 to the extent of granting JGN's motion for summary judgment dismissing the complaint against them as to the fraud, permanent injunction, depreciation in value of property and punitive damages causes of action.

Management LLC acted outside its capacity as title owner of Lot 67. The Court misapprehended the law as it applies to conversion, since under New York law conversion claims only apply to personal property not real property.

Accordingly, the court erred to the extent of denying JGN defendants' motion for summary judgment for the dismissal of the first and second causes of action for trespass, third cause of action for nuisance, and the sixth cause of action for conversion.

Based on the foregoing, it is hereby:

ORDERED that Gambino's motion for leave to reargue is granted (Mot. Seq# 24). Upon reargument, Gambino's motion for summary judgment dismissing plaintiffs' complaint and all cross-claims is granted in its entirety; and it is further,

ORDERED that plaintiffs' cross-motion for leave to reargue their prior cross-motion for summary judgment is denied (Mot. Seq# 25); and it is further

ORDERED that Zisimopoulos' cross-motion for leave to reargue is granted (Mot. Seq# 26). Upon reargument, Zisimopoulos' motion for summary judgment dismissing plaintiffs' complaint and all cross claims is granted in its entirety; and it is further,

ORDERED that JGN defendants cross-motion for leave to reargue is granted (Mot. Seq# 28). Upon reargument, JGN defendants' motion for summary judgment dismissing plaintiffs' complaint and all cross claims is granted in its entirety. In all other respects, the motion of JGN defendants is denied.

The foregoing constitutes the decision and order of the court.

ENTER,


HON. KATHY KING
J.S.C