

Joglo Realities, Inc. v Tortorella
2021 NY Slip Op 30542(U)
February 24, 2021
Supreme Court, Kings County
Docket Number: 20503/13
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

-----x

JOGLO REALITIES, INC.,
AND ROBERT I. TOUSSIE,

Plaintiff,

Decision and order

- against -

Index No. 20503/13

MERILYN TORTORELLA & OTTAVIO TORTORELLA
d/b/a TORTORELLA LANDSCAPING,

Defendants,

February 24, 2021

-----x

MERILYN TORTORELLA & OTTAVIO TORTORELLA
d/b/a TORTORELLA LANDSCAPING,

Counterclaim-Plaintiffs

- against -

JOGLO REALITIES, INC., & ROBERT I. TOUSSIE,
Counterclaim-Defendants

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Counterclaim-Defendant

-----x

PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §2221 seeking to renew and reargue a decision and order dated September 5, 2018. The plaintiff's have moved seeking to dismiss counterclaims filed by the defendants. The counterclaim defendant the New York State Department of Environmental Conservation has moved seeking to dismiss all counterclaims asserted against it. The motions have been opposed respectively and papers submitted by all parties. After reviewing the arguments of all parties this court now makes the following determination.

As recorded in prior orders, the defendants Marilyn and Ottavio Tortorella own property located at 4316 Ocean Avenue in

Kings County. Following damage to the property caused by Hurricane Sandy, the defendants entered into a contract with plaintiffs wherein the defendants agreed to pay the plaintiffs \$8,950 to clean debris upon defendants property. The plaintiffs claimed they owned the southerly adjoining property which measured approximately forty feet by over a thousand feet in length, a strip running from the east side of Ocean Avenue to the east side of Beaumont Avenue along the Atlantic Ocean. The contract further provided the defendants would perform lawn maintenance for the plaintiffs at five locations at no charge. This lawsuit was filed wherein the plaintiffs alleged a cause of action for breach of contract asserting the defendants failed to perform the lawn maintenance as promised and failed to pay \$200,000 based upon an oral modification to the contract. The defendants have counterclaimed based on a claim of adverse possession concerning a certain portion of land and associated claims of partition and to quiet title. Discovery materials have been sought by the plaintiff regarding the adverse possession claim and in further pursuit of the plaintiff's claims. The defendant has objected to the production of such discovery. This motion has been filed wherein the plaintiff argues the defendants had such documents in their possession and spoliated the evidence and thus the plaintiff seeks a sanction in this regard. The defendants oppose that request and generally oppose the discovery sought. The court will now address all the issues.

Conclusions of Law

It is well settled that sanctions may be imposed where a party has negligently disposed of evidence before the opposing party has had an opportunity to inspect such evidence (Hartford Fire Insurance Co., v. Regenerative Building Construction Inc., 271 AD2d 862, 706 NYS2d 236 [3rd Dept., 2000]). Moreover, it must be demonstrated that the party without access to the evidence is "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (Foncette v. LA Express, 295 AD2d 471, 744 NYS2d 429 [2d Dept., 2002]). The court has broad discretion regarding whether, and to what extent, spoliation of physical evidence should give rise to sanctions (Iannucci v. Rose, 8 AD3d 437, 778 NYS2d 525 [2d Dept., 2004]), and Allstate Ins. Co. v. Kearns, 309 AD2d 776, 765 NYS2d 806 [2d Dept., 2003]). Factors properly considered by the court include the extent of the prejudice imposed on the party due to the missing evidence and the degree of willfulness of the spoliator (Iannucci, supra, at 438).

In this case there has been no evidence presented the documents sought, namely closing documents, title insurance policies, surveys, title reports, affidavits executed at closing of title and tax bills from 2010 through the present for the home located at 4316 Ocean Avenue, were even negligently spoliated at all. The defendants have produced evidence which is uncontroverted the documents sought were all destroyed during Hurricane Sandy which clearly cannot give rise to any sanction.

More importantly, the very basis for requesting the documents, namely to undermine the adverse possession claim requires analysis.

In order for a party to succeed upon a claim of adverse possession the party must prove that the possession of the disputed parcel was in fact hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutorily prescribed ten years (Asher v. Borenstein, 76 AD3d 984, 908 NYS2d 90 [2d Dept., 2010], RPAPL §521 and §311). "Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (Brand v. Prince, 35 NY2d 634, 364 NYS2d 826 [1974]). The adverse possession must be proven through a standard of clear and convincing evidence (SLC Coram, LLC v. 543 Middle Country Road Realty LLC, 161 AD3d 1122, 78 NYS3d 173 [2d Dept., 2018]). In Walling v. Przybylo, 7 NY3d 228, 818 NYS2d 816 [2006] the Court of Appeals rejected an argument that adverse possession cannot exist when the adverse possessor knew they did not possess legal title to the land. The court explained that "conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessor" (id). Thus, even if the Tortorellas knew, through the various sought after documents, they did not own the disputed parcel it would not destroy their adverse possession claim at all. Thus, the tax documents sought do not advance any claims in this

lawsuit. Therefore, the motion seeking any sanction is denied and the motion requiring any further search or the production of any of those documents is denied.

Next, the plaintiff seeks business records of Tortorella Landscaping from 2011 through 2016 in efforts to discover the value of services contained in the contract entered between the parties. Whether these documents were previously requested an independent examination of this request is warranted. The plaintiff concedes that they have been provided with certain redacted invoices, however, those invoices concerned "customers for something called "lawn care," which is a different term from the term "lawn maintenance" specified in the Agreement" (see, Reply Affirmation, ¶51). Thus, random invoices will not precisely define the value of the agreement in this case. This is especially true since the size of the lawn determines the price of the lawn maintenance. The plaintiff seeks "business records, invoices, contracts and correspondence regarding lawn maintenance work performed by either of the Defendant(s) for customers in Manhattan Beach, Brooklyn from 2011 through the date the lawn maintenance business ceased operating" (Affirmation in Support of Motion ¶42) however, that request is clearly overbroad. Thus, the defendants shall provide the plaintiff with two or three invoices for properties that are substantially the same size as the property


that is the subject of the agreement. The fee charged for those invoices will be a reasonable guide for the value of the lawn maintenance in this case.

Concerning the last item in dispute, namely documents evidencing when the Tortorellas ceased operating the landscaping business, the defendants have provided testimony when such termination happened. The plaintiffs seek documentary proof substantiating such assertions. The plaintiffs are entitled to verify the termination of the business. Therefore, the defendants shall present any evidence supporting the assertion the termination occurred in December 2016.

So ordered.

ENTER:

DATED: February 24, 2021
Brooklyn NY



Hon. Leon Ruchelsman
JSC