SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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ASIAN AMERICAN HDFC, INC.

Plaintiff,

- v -

110 RIDGE ST VENTURE LLC,

Defendant.

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INDEX NO. 155157/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49-65, 67-80 were read on this motion for summary judgment.

By notice of motion, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and for summary judgment on its counterclaims. Plaintiff opposes.

I. PERTINENT BACKGROUND

By summons and verified complaint dated May 31, 2018, plaintiff alleges that since June 9, 2009, it has been the owner of the premises located at 89 Pitt Street in Manhattan (the premises). On April 19, 2018, the New York City Fire Department issued a violation against plaintiff for failing to maintain a secondary egress in the rear yard of the premises. On May 4, 2018, the Department of Buildings (DOB) issued plaintiff a violation for failing to provide an unobstructed passage from the rear yard of the premises, and as a result, required plaintiff to retain a fire watch guard for the building to direct occupants from the building in case of fire. That same day, DOB also issued a violation against defendant, the owner of the rear adjacent property, 110 Ridge Street, for blocking the premise's secondary egress with a fence, relying on building plans dating back to 1898. Plaintiff maintains that it has an easement to access the rear

yard of 110 Ridge from the premise's rear yard in case of emergency, and thus seeks a judgment declaring such and an order requiring the removal of the fence in 110 Ridge's yard. Plaintiff also seeks damages for the charges it incurred in retaining a fire watch guard and attorney fees. (NYSCEF 52).

By verified answer dated July 25, 2018, defendant advances counterclaims in which it seeks to have plaintiff remove/withdraw the notice of pendency filed against its property and for an award of attorney fees. (NYSCEF 53).

By affidavit dated June 18, 2020, a member of defendant states that defendant purchased 110 Ridge on April 15, 2015, and sold it to a nonparty on November 13, 2019; he submits supporting deeds. (NYSCEF 54, 55). Plaintiff also offers a title search of 110 Ridge dated July 12, 2014, which does not reflect an easement or right of way between the two properties. (NYSCEF 56). He denies that such an easement exists, and contends that plaintiff did not allege the existence of it until May 2018. He also submits a survey dated December 13, 2003 reflecting that a fence surrounds the rear yard of 110 Ridge (NYSCEF 61), and he maintains that defendant has not changed the fence since that time. (NYSCEF 50).

By affidavit September 8, 2020, the managing agent for the premises states that to get approval for a certificate of occupancy, the premise's previous owner submitted architectural plans reflecting a secondary means of egress from the rear fire escapes into the rear of 110 Ridge and that in addition to violations for the fence blocking the secondary means of egress, defendant also received a violation. (NYSCEF 72). The managing agent provides a DOB violation form reflecting that on May 11, 2018, defendant was issued a violation for failing to maintain the building in compliance with the building code, as the premises has an existing legal means of egress in the rear of its property, as "per the NB 738 of year 1898." The form also reflects that a

hearing on the violation was scheduled for June 28, 2018. (NYSCEF 77). The managing agent also submits an I-Card from 1902 (NYSCEF 74) and a survey dated March 6, 2000 (NYSCEF 73) reflecting the egress through a gate in the fence in the yard of the premises. (NYSCEF 68).

On Aril 14, 2021, plaintiff filed its note of issue and certificate of readiness for trial. (NYSCEF 84).

II. CONTENTIONS

A. Defendant (NYSCEF 49-64)

Defendant denies that plaintiff has an easement by agreement, absent any agreement between them, and to the extent that plaintiff claims that such an agreement exists, defendant argues that it would be barred by the statute of frauds. It also denies that there is an appurtenant easement or a perpetual easement, as no easement has been conveyed in writing. Nor is there a prescriptive easement, as the fence at 110 Ridge has been present for at least 16 years and was installed before it purchased the property. Plaintiff also has no easement by necessity, it argues, as the fire watch guard provides for the safety and welfare of the premise's occupants absent the easement, and moreover, neither property were titled under the same deed. Likewise, there does not exist an easement by implication, absent evidence of unity and subsequent separation of title.

According to defendant, as it is not responsible for plaintiff's DOB violations and absent any easement between the two properties, it is not obliged to pay for plaintiff's fire watch guard. And, as there are no issues of fact as to the existence of an easement, defendant maintains entitlement to summary judgment. It also seeks an award of fees and expenses in defending the action, and summary judgment on its counterclaims, as plaintiff never filed a reply.

B. Plaintiff (NYSCEF 67-78)

In opposition, plaintiff contends that defendant's motion is premature, as discovery has

not been completed. It argues that defendant's deposition has not been completed and more discovery is needed to prove that it had an easement before defendant erected a fence. Discovery, it claims, may reveal the history and age of the fence and gate. To the extent that defendant claims that the fence has not been altered in 16 years and that no gate was present in 2003, plaintiff relies on the 2000 survey which reflects the existence of a gate, and thus, it argues, an issue of fact exists. Plaintiff infers from the evidence that there was an easement by agreement or by consent in 1898 from the prior owner of 110 Ridge, affording the right to use the rear yard as a means of egress, and based on the parties' conduct, an easement by implication, appurtenant to the premises, was conveyed. It further argues that an easement by necessity exists for the safety and welfare of the premise's occupants. As defendant interfered with the easement, it is liable for resulting damages, including financial loss. It also argues that defendant is not entitled to summary judgment on its counterclaims because more than one year has passed since the counterclaims were served and defendant never moved for a default judgment.

C. Reply (NYSCEF 79-80)

Defendant denies that plaintiff raises a material issue of fact, as it has demonstrated that the fence has existed since 2003 and no testimony would refute that. The 2000 survey that plaintiff offers, it contends, is illegible and not probative. Defendant also submits a DOB form reflecting that the violation was dismissed. (NYSCEF 80). Moreover, it claims, discovery is incomplete is due to plaintiff's failure to prosecute this action, and maintains entitlement to summary judgment on its counterclaims, as counterclaims are not subject to dismissal under CPLR 3215(c), and in any event, its counterclaims should not be dismissed because plaintiff failed to reply to them.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

1. Plaintiff's claims

Defendant demonstrates, *prima facie*, that the two properties were never united under one title, and that there was thus no easement by necessity or by implication. (*See Simone v Heidelberg*, 9 NY3d 177, 182 [2007] [party asserting easement by necessity has burden of demonstrating unity and subsequent separation of title]; *Abbott v Herring*, 97 AD2d 870, 870 [3d Dept 1983], *affd* 62 NY2d 1028 [1984] [easement by implication requires unity and subsequent separation of title]). Plaintiff does not allege that the two properties were ever united under one title and thus, does not raise an issue of fact.

Defendant likewise demonstrates, *prima facie*, that there is no agreement or writing providing for an easement between the two properties, and thus, there is no easement by agreement or easement appurtenant. (*See Akasa Holdings, LLC v 214 Lafayette House, LLC*, 177 AD3d 103, 118 [1st Dept 2019] [easement appurtenant created through written conveyance]).

A prescriptive easement exists where "the use was adverse, open and notorious, continuous, and uninterrupted for the prescriptive period." (*Mee Wah Chan v Y & Dev. Corp.*, 82 AD3d 942, 943 [2d Dept 2011]; CPLR 212[a] [prescriptive period is 10 years before the commencement of the action]). Defendant establishes that there was no use of the alleged secondary means of egress, openly and notoriously or otherwise, for the 10-year period before plaintiff commenced this action, as there was no gate in the fence since 2003 and plaintiff had not alleged the existence of an easement until May 2018. Moreover, to the extent that plaintiff alleges that its use of the gate was permitted by previous owners, the use was not adverse or hostile. (*See e.g. Panday v Allen*, 187 AD3d 775 [2d Dept 2020] [permission from prior owners to use property negated element of hostility]).

Plaintiff fails to raise an issue of fact as it does not dispute that it did not use, attempt to use, or allege the existence of the secondary means of egress between 2003 and 2018. The architectural plans raise no issue of fact as they are illegible, and while the 2000 survey is legible, it does not contradict defendant's evidence that no gate was present in 2003. Moreover, plaintiff's request for additional discovery fails absent the identification of material issues of fact that would be revealed; plaintiff's belief that the "history" of the gate and fence would be revealed through depositions is vague and speculative, especially as the premise's managing agent does not allege that plaintiff used the purported easement at any time. (*See State ex rel. Perkins v Cooke Ctr. for Learning & Dev., Inc.*, 164 AD3d 445, 446 [1st Dept 2018], *lv denied* 32 NY3d 919 [2019] [party requesting additional discovery must state more than "a mere hope that evidence sufficient to avoid summary judgment may be uncovered"]). In any event, plaintiff's request for additional discovery is mooted by its filing of its note of issue and certificate of readiness.

As defendant did not interfere with any right of access, it is not liable to plaintiff for damages incurred in remedying the DOB violations.

2. Defendant's counterclaims

It is undisputed that plaintiff did not reply to defendant's counterclaims, and that defendant did not "take proceedings for the entry of judgment within one year after the default." (CPLR 3215[c]; *see e.g. Clemente v Clemente*, 50 AD3d 514, 514 [1st Dept 2008] [affirming dismissal of counterclaim where defendant failed to enter default judgment on counterclaim within one year of default]). That plaintiff allegedly failed to prosecute this case or reply to defendant's counterclaims is immaterial in light of defendant's failure to seek a default judgment.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted to the extent that the complaint is dismissed, and otherwise denied; it is further

ORDERED, that defendant's counterclaims are dismissed; and it is further

ORDERED, that the Clerk is directed to enter judgment.

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4/30/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE