**To commence the 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 WESTCHESTER**
**PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

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FZ REALTY, LLC,

Plaintiff,

Index No. 59992/2020

– against –

**Motion Seq. No. 4**

BH SHIPPING, LLC

Defendant. **DECISION & ORDER**

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In an action for declaratory relief, the defendant moves for a default judgment against the plaintiff on the counterclaims or, in the alternative, for summary judgment dismissing the complaint, and for attorneys' fees (motion seq. 4):

**Papers Considered** **NYSCEF Doc. 78-107; 110-117; 119-129**

1. Order to Show Cause/Affirmation of Dan M. Rice, Esq./Affirmation of Andrew Landesman/Affidavit of Elias Everett/Fee Affirmation of Dan M. Rice, Esq./Exhibits 1-19;
2. Affirmation of Joseph M. Becker, Esq./Affidavit of Luis Diaz/Exhibits A-E;
3. Reply Affirmation of Dan M. Rice, Esq./Reply Affidavit of Andrew Landesman/Exhibits 1-8.

**Factual and Procedural Background**

The plaintiff FZ Realty, LLC has been the owner of real property located at 140-142 School Street, Yonkers, New York since 2011. The defendant BH Shipping, LLC is the owner of the adjoining two parcels of real property located at 150 School Street and 150 School Street Rear, in Yonkers, New York.

There is a 6-unit apartment building located on the plaintiff's property and a parking lot in the rear of the building. The only way to access the parking lot is a driveway that runs through the defendant's building. The defendant posted a sign on the property stating "Effective September 15, 2020, the driveway entrance to the neighbor's lot will be closed. Any cars or personal property left behind will be your responsibility. Please act accordingly".

As a result, the plaintiff commenced this action against the defendant by the filing of a summons and complaint. The complaint seeks a judgment declaring that the plaintiff has acquired a prescriptive easement or an easement by necessity and that the

defendant is not entitled to block the plaintiff's access to and from the parking lot. The complaint also seeks sanctions against the defendant.

The defendant joined issue with the service of its answer. The defendant asserted counterclaims in its answer for a judgment declaring that the plaintiff does not have an easement over the defendant's property and for trespass.

The plaintiff previously moved for a preliminary injunction enjoining the defendants from otherwise obstructing the plaintiff or it's tenants from accessing the parking lot. In an order dated November 23, 2020, the Supreme Court, Westchester County (Giacomo, J.) granted the plaintiff's motion for a preliminary injunction enjoining the defendant, or anyone on its behalf, from obstructing the plaintiff or the plaintiff's tenants from accessing the parking lot. The Court also directed the plaintiff to post an undertaking in the amount of $10,000. After further motion practice, the plaintiff ultimately filed a bond with Surety Suretec Insurance Company.

The defendant now moves for a default judgment on its counterclaims and for a reasonable attorneys' fee. In the alternative, the defendant moves for summary judgment dismissing the complaint. The defendant argues that there is no prescriptive easement because there are photographs from 2009 which show that a wall separated the properties, and therefore, the plaintiff is unable to prove continuous hostile use of the defendant's property for ten continuous years.

Andrew Landesman, the principal of the defendant, submits an affidavit in support of the motion. Attached to the affidavit are photographs of the properties in 2009 and 2012 from the City of Yonkers website. Landesman states that he is personally familiar with the properties from the time the defendant purchased the building in October 2017. Referring to one of the photograph exhibits from 2009 (NYSCEF Doc. 88), Landesman states that there is a wall depicted along the northern boundary of the defendant's property separating it from the plaintiff's property. Landesman also attaches photographs from 2012 which he asserts depict the wall as having been removed.

In opposition, the plaintiff argues that the counterclaims asserted in the answer merely controvert the legal theories in the complaint, and therefore, a reply was not necessary. The plaintiff further argues that the defendant failed to demonstrate entitlement to summary judgment because issues of fact exist such as to whether there was a wall separating the properties in 2009.

The plaintiff submits, inter alia, an affidavit of Luis Diaz, a tenant in the defendant's building for thirty years. Diaz attests that the tunnel leading from 150 School Street to the rear is used by the tenants of both buildings to reach the parking area located behind the building. Diaz states that there is no other access to the parking area other than the tunnel. The tunnel had been used in that capacity for the entire time that Diaz was a tenant, and he has never observed a wall across the back of the building blocking access to the parking area. During his entire tenancy, Diaz never observed anyone ask permission to use the tunnel. He always believed that the tenants at 140-142 School

Street had a right to use the tunnel because the area behind that building has always been used for parking.

**Discussion**

The defendant seeks a default judgment against the plaintiff arguing that its answer with counterclaims was served and filed and that the plaintiff failed to serve a reply to the counterclaims.

The complaint seeks a judgment declaring that the plaintiff has acquired a prescriptive easement or an easement by necessity over the defendant's property. The defendant's counterclaims seek a judgment declaring that the plaintiff does not have an easement over the defendant's property and trespass. While the plaintiff has failed to serve a reply to the counterclaim, inasmuch as the counterclaims merely controvert the legal theory underlying the complaint and the same relief, no responsive pleading was required (*see Iovine v Caldwell*, 256 AD2d 974, 977 [3d Dept 1998] [finding that "(s)erving the function of a denial or, at most, a defense, the purported counterclaim strikes us as harmless surplusage"]). In any event, the defendant failed to set forth the facts constituting the claim as set forth below.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]).

In order to acquire an easement by prescription, the plaintiff must show that the use was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of ten years (*see Panday v Allen*, 187 AD3d 775 [2d Dept 2020];

*Ciringione v Ryan*, ,162 AD3d 634 [2d Dept 2018]). Generally, "where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive'" (*Ciringione v Ryan*, 162 AD3d at 634, *quoting Carty v Goodwin*, 150 AD3d 812 [2d Dept 2017]). "This presumption, however, does not arise 'when the parties' relationship was one of neighborly cooperation or accommodation'" (*Colin Realty Co., LLC v Manhasset Pizza, LLC*, 137 AD3d 838 [2d Dept 2016] *quoting Ward v Murariu Bros., Inc.*, 100 AD3d 1084 [3d Dept 2012]).

The defendant argues that it established that the plaintiff is not entitled to a prescriptive easement. In support, the defendant asserts that there was a wall separating the properties in 2009 and that both properties were controlled by the non-party Frank Vairo from 2011 through 2014. As a result, the defendant argues that the plaintiff cannot prove a ten year period of hostility. The defendant further argues that there is no easement by necessity because the plaintiff's property abuts a public road and is not landlocked, and there is therefore, no necessity of access.

Here, the defendants failed to demonstrate the facts constituting the claim or entitlement to summary judgment dismissing the complaint. Issues of fact exist, including but not limited to, whether the plaintiff's use of the tunnel was hostile or permissive. While Landesman attaches photographs to the motion stating that a wall existed between the properties in 2009, the photograph is entirely unclear. Moreover, in opposition, the plaintiff submitted an affidavit of a tenant who has lived in the defendant's building for thirty years and has used the rear lot and has never observed the purported wall.

The Court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is

**ORDERED** that the defendant's motion for a default judgment on the counterclaims and for attorneys' fees, or in the alternative, for summary judgment dismissing the complaint, is DENIED.

Counsel for all parties are directed to appear virtually in the **Compliance Part on December 1, 2021, at 10:00 a.m.** as previously scheduled.

Dated: White Plains, New York
November 24, 2021

HON. ALEXANDRA D. MURPHY, J.S.C.

H: CIVIL ALPHABETICAL MASTER/FZ Realty, LLC v BH Shipping