

**Scutari v Drapala**

2021 NY Slip Op 34297(U)

January 4, 2021

Supreme Court, Westchester County

Docket Number: Index No. 71003/2018

Judge: Mary H. Smith

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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.

P R E S E N T:

**HON. MARY H. SMITH  
JUSTICE OF THE SUPREME COURT**

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JONATHAN SCUTARI and BESNIK ISLAMI,

Plaintiff(s),

- against -

**DECISION & ORDER**

Index No.: 71003/2018

DESIREE DRAPALA, 777 HUDSON STREET  
PROPERTIES, LLC, VILLAGE OF CROTON-ON-  
HUDSON, JOHN M. DRAPALA, and TARA B.  
DRAPALA,

Defendant(s).

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Defendants Desiree Drapala and 777 Hudson Street Properties, LLC move (Motion #5) for summary judgment. Plaintiffs move (Motion #6) for summary judgment against defendants Desiree Drapala, 777 Hudson Street Properties, LLC, John M. Drapala, and Tara B. Drapala (collectively, Drapala Defendants).

The following papers were read:

**Motion ## 5 and 6**

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Affirmation in Opposition, Exhibit, and Memo of Law	13-15
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By way background, plaintiffs reside in a house located at 172 Grand Street, Village of Croton-on-Hudson, New York (Premises). In 2014, a neighboring house (Neighboring Premises) burned down, allegedly causing some damage to the Premises. Subsequently, an application to build another house (Modular House) on the Neighboring Premises was approved by the Village Planning Board by way of a resolution (Resolution). In July 2018, plaintiffs complained that work on the Neighboring Premises was causing damage to their Premises. The Village Engineer issued a “stop work” order, which was later lifted. On

December 26, 2018, plaintiff commenced this action against defendants Desiree Drapala and 777 Hudson Street Properties, LLC, the alleged owners of the Neighboring Premises (Owner Defendants). The complaint was later amended to add defendant Village of Croton-on-Hudson (Village). Defendants John M. Drapala and Tara B. Drapala were later added as party defendants, as the alleged new owners of the Neighboring Premises. The amended complaint alleges, among other things, claims for nuisance against all defendants (First Cause of Action), trespass against the Owner Defendants (Second Cause of Action), negligence against the Owner Defendants (Third Cause of Action), a declaratory judgment against all defendants (Fifth Cause of Action), and a permanent injunction against all defendants (Sixth Cause of Action). Now, defendants Desiree Drapala, 777 Hudson Street Properties, LLC (Hudson), John M. Drapala, and Tara B. Drapala (collectively, Drapala Defendants) and plaintiffs move for summary judgment.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of their motion, the Drapala Defendants submit three arguments. First, the Drapala Defendants contend that the Fifth and Sixth Causes of Action must fail. The Fifth Cause of Action seeks a declaration that the Owner Defendants violated the Resolution and Zoning Code. The Sixth Cause of Action seeks an injunction, compelling the Owner Defendants to remove the Modular House as well as its foundation. The Drapala Defendants contend that plaintiffs failed to challenge the Village Engineer's determination and, as a such, they are now barred by their failure to exhaust their administrative remedies. As plaintiffs seek the removal of the Modular House and its foundation, the Drapala Defendants contend plaintiffs must demonstrate that the irreparable harm to themselves must substantially outweigh the injury to the Drapala Defendants, which, the Drapala Defendants contend, it does not. Next, the Drapala Defendants contend that plaintiffs have failed to produce evidence of their alleged damages. Lastly, the Drapala Defendants contend that the action against the individual defendants must be dismissed as plaintiffs do not allege any wrongful action on the part of the individual defendants and, to the extent that any wrongful action is alleged, it took place while defendant 777 Hudson Street Properties, LLC was the owner of the Neighboring Premises.

The Drapala Defendants have failed to make a *prima facie* showing. Plaintiffs do not allege that the Village erred by issuing the Resolution, but that the Defendant Owners have violated it and the Zoning Code in the construction of the Neighboring Premises. Thus, as the action is framed by plaintiffs, there was no need to exhaust any administrative remedies. The Drapala Defendants' argument that plaintiffs have not produced evidence of damages is not sufficient to satisfy their burden as the moving party. It is the moving

party's burden "to demonstrate affirmatively the merits of a defense, which cannot be sustained by pointing out gaps in the plaintiff's proof" (*Iannucci v Kucker & Bruh, LLP*, 161 AD3d 959, 960 [2d Dept 2018]).

As to the Drapala Defendants' argument that the action against the individual defendant must be dismissed is also without merit. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court is to afford the pleading a liberal construction (*see* CPLR 3026), accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and simply determine whether the alleged facts fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Court of Appeals has explained that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Harris v Barbera*, 96 AD3d 904, 906 [2d Dept 2012]). Under this liberal standard, plaintiffs' claims are sufficiently pleaded.

To the extent not specifically addressed herein, the Court finds the remaining arguments of the Drapala Defendants to be without merit. Accordingly, the motion of the Drapala Defendants is denied. Next, the Court considers plaintiffs' motion.

In support of their motion, plaintiffs submit various arguments. First, plaintiffs contend that it is clear that the Drapala Defendants violated the Resolution and certain variances (Grandfathered Variances)<sup>1</sup> with the construction of the Modular House. Plaintiffs proffer, among other things, the expert affidavit of Stephen Hoppe, a licensed land surveyor. Mr. Hoppe performed a survey of the Neighboring Premises to compare the location of the Modular House with the dwelling that burned down. Mr. Hoppe concluded that the Modular House is larger in various ways and located outside the prior foundation. Based in part hereon, plaintiff contend that they are entitled to a declaration under the Fifth Cause of Action that the Drapala Defendants violated the Resolution and a mandatory injunction under the Sixth Cause of Action directing the removal of the Modular House.

Second, plaintiffs proffer some evidence that the Drapala Defendants and their subcontractors repeatedly entered upon plaintiffs' Premises without authority from October 2018 through December 2018. As such, plaintiffs contend that they are entitled to summary judgment on the issue of liability on their Second Cause of Action for trespass.

Third, plaintiffs proffer, among other things, the deposition testimony of plaintiff Jonathan Scutari to support their position that, due to the Drapala Defendants' construction work along plaintiffs' driveway, damage was caused to their driveway, which now must be completely replaced and repaired. In addition, plaintiffs assert that the Drapala Defendants' construction work also caused damage to the façade of plaintiffs' Premises.

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<sup>1</sup> Plaintiff indicate that variances were granted in 1977 and reinstated in 1980 and 1984.

Plaintiffs assert other various damage to their property. As such, plaintiffs contend that they are entitled to summary judgment on the issue of liability on the Third Cause of Action for negligence as they have established that their Premises was damaged due to the Drapala Defendants' negligence.

Fourth, plaintiffs assert that, based on the foregoing, they have established that they are entitled to summary judgment on the issue of liability on the First Cause of Action for nuisance.

In response, the Drapala Defendants note that, in its motion (Motion #3), the Village demonstrated that there was no and is no violation of any zoning laws, codes, or ordinances committed by them. The Drapala Defendants note that the Village Engineer so found. In support of their motion, the Drapala Defendants proffered, among other things, the affidavit of defendant Desiree Drapala. Ms. Drapala disputes the property damage that plaintiffs assert that they suffered as a result of the construction. Ms. Drapala does not dispute that the Drapala Defendants and some of their subcontractors entered upon plaintiff's Premises during the construction of the Neighboring Premises.

As to plaintiffs' claim for nuisance, a plaintiff must establish an interference that is "(1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, and (5) caused by another's conduct in acting or failure to act" (*Gedney Commons Homeowners Ass'n, Inc. v Davis*, 85 AD3d 854, 855 [2d Dept 2011]). The Second Department has explained that, with the exception of a plaintiff's property interest, "each of the other elements is a question for the jury, unless the evidence is undisputed" (*id.*, internal quotations marks omitted). Accordingly, plaintiffs' motion for summary judgment on the issue of liability on the First Cause of Action for nuisance is denied.

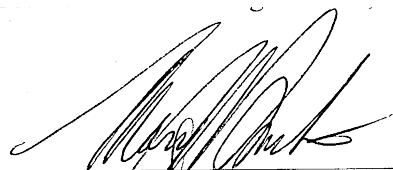
Plaintiffs have made a *prima facie* showing on their claim for trespass (*see Curwin v Verizon Communications (LEC)*, 35 AD3d 645, 645 [2d Dept 2006]). The Drapala Defendants have failed to raise a material issue of fact. Accordingly, plaintiffs' motion for summary judgment on the issue of liability on the Second Cause of Action for trespass is granted.

As to plaintiffs' claim for negligence, it is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dept 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dept 2001] ["Resolution of issues of credibility of both expert and lay witnesses and the accuracy of their testimony are matters within the province of the jury."]). Accordingly, plaintiffs' motion for summary judgment on the issue of liability on the Third Cause of Action for negligence is denied.

As to plaintiffs' claims for declaratory relief and permanent injunction, it is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc.*, 212 AD2d at 596). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias*, 282 AD2d at 651 [2d Dept 2001]). Here, although plaintiffs' have proffered the expert affidavit of Mr. Hoppe, the Drapala Defendants have referred the Court to the evidence from the Village Engineer. Viewing that evidence in the light most favorable to the non-moving party, the Drapala Defendants have succeeded in raising a material issue of fact. Accordingly, plaintiffs' motion for summary judgment on the Fifth Cause of Action for declaratory relief and the Sixth Cause of Action for a permanent injunction is denied.

This matter is referred to the Settlement Conference Part in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York. The parties will be notified when the date and time of the conference is scheduled.

Dated: January 4, 2021  
White Plains, New York

  
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HON. MARY H. SMITH  
Justice of the Supreme Court