

Golden v Town Bd. of the Town of Oyster Bay
2021 NY Slip Op 34341(U)
November 29, 2021
Supreme Court, Nassau County
Docket Number: Index No. 602569/2021
Judge: Helen Voutsinas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19
Present: Hon. Helen Voutsinas, J.S.C.

-----X
GEORGE GOLDEN AND KRISTINA GOLDEN,

Index No.: 602569/2021

Petitioners-Plaintiffs,

Motion Seq. Nos.: 004 & 005

-against-

TOWN BOARD OF THE TOWN OF OYSTER BAY and
TOWN OF OYSTER BAY,

Short Form Order

Respondents,

FRANK MARINO AND SUSAN MARINO,

Defendants.
-----X

The following papers were read on these motions:

Notice of Motion, Affirmation and Affidavit in Support, Exhibits
and Memorandum of Law..... 1
Notice of Cross Motion, Affidavit and Affirmation in Opposition
to Motion and in Support of Cross Motion, Exhibits and
Memorandum of Law..... 2
Affidavit in Opposition to Motion for Summary Judgment, Exhibits
and Memorandum of Law..... 3
Reply Memorandum of Law in Further Support of Cross Motion 4

Plaintiffs-Petitioners, George Golden and Kristina Golden (collectively “plaintiffs” or “the Goldens”) move for an Order pursuant to CPLR §3211[a][1] and [a][7] dismissing each of the counterclaims contained in the answer of defendants-respondents Frank Marino and Susan Marino (collectively “defendants” or “the Marinos”). Defendants cross move for an Order pursuant to CPLR §3212 granting defendants summary judgment dismissing plaintiff’s complaint as against the Marinos and granting the Marinos summary judgment on their counterclaims. The motion and cross motion are determined as hereinafter provided.

Factual and Procedural Background

In this hybrid proceeding, plaintiffs seek a judgment pursuant to CPLR Article 78 against the Town Board of Oyster Bay and the Town of Oyster Bay (collectively “Town”) vacating the Town’s October 6, 2020 resolution 471-2020 (“Resolution”) which granted the Marinos a permit to perform certain work on a dock and groin, which groin plaintiffs allege is on their property. As against the Marinos, plaintiffs seek a permanent injunction under CPLR Article 63 enjoining

defendants from performing any work on plaintiff's property. Plaintiffs filed their verified petition and complaint in this hybrid proceeding on March 3, 2021.

By Order dated September 21, 2021, the Court granted the Golden's motion for a preliminary injunction to the extent that it enjoined the Marinos from "engaging in any construction, remediation or any other related activity on the property of plaintiffs located at 290 East Shore Drive, Massapequa, New York 11758 pending the determination by the Court of ownership of the Disputed Groin and whether plaintiffs may bar defendants from removing the Disputed Groin".

Plaintiffs are the owners of a parcel of real property located at 290 East Shore Drive, Massapequa, New York, designated on the Nassau County Land and Tax Map ("Tax Map") as Section 66, Block 64, Lot 67 ("Golden Property"). The Golden Property is waterfront property improved with a single-family residence in which plaintiffs reside. There is also a dock ("Golden Dock") located on the Golden Property, near its southern boundary line, which extends seaward into the Carmen River located in the Great South Bay. There is also a groin (a barrier built out into the sea to abate erosion, drifting and movement of sediment) that runs along the Golden Dock on its southern side ("Disputed Groin"). Plaintiffs claim that the Disputed Groin is located on the Golden Property.

Defendants are the owners of a parcel of real property located at 294 East Shore Drive, Massapequa, New York 11758, designated on the Tax Map as Section 66, Block 64, Lot 61-66 ("Marino Property"). The Marino property is located adjacent to and immediately south of the Golden Property. A dock is located on the Marino Property at its southerly boundary line. Defendants initially claimed that the Disputed Groin is on the Marino Property, but subsequent to the commencement of this action, the Marinos have conceded that most of the Disputed Groin is actually located on the Golden's side of the common boundary line, with a small portion of the Disputed Groin being on the Marinos' Property. This concession was based upon an updated survey. The Marinos claim title to the entirety of the Disputed Groin by virtue of adverse possession. They have been issued permits by the Town, the Army Corps of Engineers ("USACE") and the New York State Department of Environmental Conservation ("DEC"), permitting them to rebuild the Disputed Groin in place. Defendants contend that the Disputed Groin, which serves the purpose of maintaining the sand on the Marino Property as well as the Golden Property has eroded, is in dilapidated condition and must be replaced.

Plaintiff's first cause of action is asserted against the Town, pursuant to CPLR Article 78, and is not relevant on these motions. Plaintiffs' remaining causes of action are asserted against the Marinos. The second cause of action is for a permanent injunction preventing the Marinos from performing any work on the Golden Property, including the Golden Dock and Dispute Groin. Plaintiffs allege that any such work would constitute a trespass on their property. The third cause of action is for damages plaintiffs might incur if the Marinos perform work on the Golden Dock and Disputed Groin and plaintiffs have to restore the dock and groin to their previous condition.

The Marinos filed a verified answer to the petition and complaint on April 16, 2021. In the answer, defendants assert numerous affirmative defenses and several counterclaims against plaintiffs.

Plaintiffs' Motion to Dismiss the Marinos' Counterclaims

Plaintiffs move to dismiss all of the Marinos' counterclaims based upon CPLR §3211[a][1] and [7]. A motion to dismiss a claim pursuant to CPLR §3211[a][1] may be granted only if the documentary evidence submitted by the movant utterly refute the factual allegations of the complaint and conclusively establish a defense to the claims as a matter of law (*Goshen v Mutual Life Insurance Co. of NY*, 98 NY2d 314, 326 [2002]; *Basalel v Youni Gems Corporation*, 95 AD3d 914, 915 [2d Dept 2012]; *First Keystone Consultants, Inc. v DDR Construction Services*, 74 AD3d 1135 [2d Dept 2010]). Where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence", they are not presumed to be true or accorded every favorable inference. (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000]).

In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable and may include documents reflecting out-of-court transactions, such as contracts (*Fontanetta v John Doe I*, 73 A.D.3d 78, 84-86 [2d Dept 2010]; See also *Attias v Costiera*, 120 A.D.3d 1281, 1282 [2d Dept 2014]).

When deciding a motion to dismiss pursuant to CPLR §3211[a][7], the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiff the benefit of every favorable inference (see *Marcantonio v Picozzi III*, 70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 [1977]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 A.D.3d 814, 815 [2d Dept 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "CPLR 3211[a][7] dismissals merely address the adequacy of the pleading, and do not reach the substantive merits of a [party's] cause of action . . ." (*Hendrickson v. Philbor Motors, Inc.*, 102 AD3d 251, 255 [2d Dept 2012]).

After reviewing the documentary evidence and the parties' respective submissions on these motions, the Court determines that the documentary evidence presented by plaintiffs is not such that "utterly refute the factual allegations of the [counterclaims] and conclusively establish a defense to the [counterclaims] as a matter of law" (See, *Goshen v Mutual Life Insurance Co. of NY*, supra, 98 NY2d at 326; *Basalel v Youni Gems Corporation*, supra, 95 AD3d at 915), as further explained below. The Court also finds that the Marinos' allegations are sufficient to survive plaintiffs' motion to dismiss to the extent predicated on CPLR §3211[a][7].

The Marino's first counterclaim seeks a declaratory judgment pursuant to Real Property Actions and Proceedings Law ("RPAPL") Article 15, declaring that the Disputed Groin is located on the Marino Property and that the Marinos are the sole and exclusive legal and equitable title owners of the Disputed Groin.

Plaintiffs argue that documentary evidence, in the form surveys submitted, establishes conclusively that the Disputed Groin is located on the Golden Property. This Court disagrees that the evidence is sufficient to support their conclusion. Plaintiffs attach a partial copy of a survey apparently prepared by John A. Robinson. (Linda S. Agnew Affirmation in Support of Motion to Dismiss Counterclaims (“Agnew Affirmation”), Exhibit 2). The copy provided is clearly incomplete. The complete property, its boundary lines and structures are not entirely shown on this partial copy. More significantly, cut off from the copy provided is the surveyor’s signature, the survey’s date, and any indication that it was a certified or guaranteed survey. Even if the survey was complete and in proper form, it does not even appear to show the Disputed Groin. All that is shown is a “wood pier” in the area of the common boundary line, with no reference either by drawing or wording, that there is a separate structure present adjacent to the pier. A handwritten note “PIER & GROIN INSIDE PROPERTY LINE” and a typed notation “290 East Shore Drive Massapequa Survey 2014”, both obviously added to the survey subsequent to its issuance, are of no probative value.

Also submitted by plaintiffs is a letter from surveyor John A. Robinson, dated June 3, 2021. (Agnew Affirmation, Exhibit 3). Mr. Robinson states in his letter that on that same date, he took additional measurements along the Golden’s southerly property line and confirms that the groin is entirely located on the Golden Property. The letter is not in the form of an affidavit, is unaccompanied by an updated survey, and in any event would be an insufficient basis to dismiss the Marinos’ counterclaims, at this stage of the litigation.

Plaintiffs also submit the updated survey obtained by the Marinos, referenced above. (Agnew Affirmation, Exhibit 5). This survey was prepared by Paul Bolton, originally dated January 7, 2014, and updated April 12, 2021 (the “Bolton Survey”). The survey is certified to Frank and Sue Marino. Plaintiffs argue that defendants’ own survey establishes that the Disputed Groin is on the Golden Property. The survey shows a “Bulkhead” that is located, at least in two areas, 0.1’ south of the common boundary line. Both parties apparently identify the “Bulkhead” as the Disputed Groin (although, as with the Robinson Survey, there is nothing to indicate any distinction between the pier/dock, and the Disputed Groin). The Marinos contend that the Disputed Groin is 10” wide, and that the 0.1’ measurement equates to 1¼ inches. The Marinos thus state that 8¾” of the groin is on the Golden Property and 1¼” is on the Marino Property.

Based upon the Bolton Survey, the Marinos state that they withdraw the portion of their first counterclaim seeking a declaration that the Disputed Groin is located on their property, and limit the relief sought to the following items stated in their first counterclaim: (1) that the groin is partly on the Marinos’ property; (2) that the Marinos are the sole and exclusive legal and equitable title owners of the Disputed Groin; (3) that the Marinos are entitled to sole, exclusive, and unfettered use of and access to the Disputed Groin; and (4) that the Golden have no legal or equitable claim to the ownership or use of the Disputed Groin, whether by claim of legal title, adverse possession, or under any other legal or equitable doctrine or principle. As so limited, the Court finds that the first counterclaim survives the motion to dismiss.

In their second counterclaim, the Marinos seek a declaratory judgment pursuant to RPAPL Article 15 declaring that the Marinos acquired legal and equitable title to the Disputed Groin by virtue of adverse possession.

The Marinos allege that they were vested with title by adverse possession by the acts of their predecessors in interest, prior to the 2008 amendments to RPAPL Article 5. Those amendments to the adverse possession statutes are not applicable where the alleged adverse possessor's right vested prior to the enactment of the amendments. (*Estate of Clanton v. City of New York*, 153 AD3d 787, 788 [2d Dept 2017]); *Franza v. Olin*, 73 AD3d 44, 46 [4th Dept 2010]). Prior to the 2008 amendment, adverse possession was established by demonstrating the possession of the property was (i) hostile and under a claim of right, (ii) actual, (iii) open and notorious, (iv) exclusive, and (v) continuous for at least ten years. See *Estate of Becker v. Murtagh*, 19 NY3d 75, 80-81 [2012])(citing *Walling v. Przybylo*, 7 NY3d 228, 232 [2006]). The pre-2008 statute also required that the property had been "usually cultivated or improved" or "protected" by substantial inclosure." RPAPL §522 (Added L.1962, c. 312, §19. Amended L.2008, c. 269, § 5, eff. July 7, 2008). The cultivation or improvement of another's land constitutes open, notorious, and actual acts of possession that would place record owners on notice sufficient to give rise to an adverse claim to the property. (*Ray v. Beacon Hudson Mountain Corp.*, 88 NY2d 154, 160 [1996]).

Upon review of the Marinos' allegations set forth in their answer and counterclaims, the Court finds that they sufficiently plead a claim of adverse possession to survive a motion to dismiss.

In their third counterclaim, the Marinos seek a judgment declaring that the Disputed Groin and any proposed construction or maintenance does not trespass on the Golden Property; or in the event the Disputed Groin is located in whole or in part on the Golden Property, any trespass is de minimis, unintentional and the result of good faith reliance on surveys and plans indicating that the Disputed Groin was on the Marino Property and does not warrant injunctive relief or damages.

Plaintiffs argue that this counterclaim must be dismissed because the surveys in the record conclusively establish that the groin is located on the Golden Property, and that, in any event, the declaratory relief sought is not proper because defendants are asking the Court to make a factual determination. The Court disagrees. There is a dispute as to the precise location of the Disputed Groin, although it does appear that it is mostly located on the Golden Property. The Court may fashion relief it deems appropriate and equitable under the circumstances. (See *Lawrence v. Mullen*, 40 AD2d 871 [2d Dept 1972])(where the Court modified the trial court's injunction directing defendant to remove encroaching portion of garage holding "[t]here is no evidence that this encroachment was the result of a willful trespass and defendant is therefore entitled to the benefit of equitable principles in her behalf"); See also, generally *Thome v. Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009])(“fact issues certainly may be addressed and resolved in the context of a declaratory judgment action”). The Court finds that the third counterclaim is adequately pled and survives the motion to dismiss.

The fourth counterclaim seeks damages for the Goldens' alleged trespass and interference with the Marino's riparian rights. Plaintiffs argue that defendants have failed to allege any specific facts on which a claim of interference with riparian rights can be maintained. Plaintiffs erroneously state that the allegations related to this counterclaim are solely limited a "conclusory" claim that the Goldens "interfered with their riparian rights").

In their counterclaims, the Marinos incorporated by reference all previous allegations stated. These included, among others, allegations that the Goldens violated the Marinos' riparian rights by widening their pier, modifying their floating dock and moving it over the property line, adding 2 x 8 boards to the groin and mooring poles resulting in an encroachment on the Disputed Groin and trespass upon the Marino Property. In addition, if the Marinos are ultimately successful on their adverse possession claim, and they are determined to own the land under the Disputed Groin by adverse possession, they would have a viable claim that the Goldens trespassed and violated the Marinos' riparian rights by interfering with their use and access to the Disputed Groin. Finally, there is no requirement that claims for riparian rights be pled with specificity or particularity. (See CPLR §§ 3015, 3016). The Marinos' riparian rights claim is sufficiently pled with facts sufficient to give the Goldens notice. (See CPLR §3013).

The fifth counterclaim seeks damages for the Goldens' alleged tortious interference with contractual relations with the Marinos' marine contractor. The Marinos state in their papers that they are withdrawing their fifth counterclaim. Accordingly, this counterclaim shall be dismissed.

The sixth counterclaim is for a permanent injunction against the Goldens challenging title of the Disputed Groin and against the Goldens' obstructing, hindering or interfering with the Marinos from accessing and using the Disputed Groin. As discussed above, the Court has determined that the Marinos have pled viable claims for adverse possession, declaratory judgment relief, and related torts. If the Marinos ultimately prevail on some or all of the claims, they would almost certainly be entitled to some injunctive relief. Accordingly, the counterclaim for a permanent injunction is sufficiently pled to overcome a motion to dismiss.

The Marinos' Motion for Summary Judgment

It is well established that a proponent of a summary judgment motion must make a prima facie case of entitlement to judgment as a matter of law when there are no material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists. (*Id.* at 325; *Andre v. Pomeroy*, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446 [1st Dept 1992]). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Gervasio v. Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v. United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]).

In deciding a summary judgment motion the court must draw all reasonable inferences in favor of the nonmoving party (*Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]), and the evidence must be construed in a light most favorable to the party opposing the motion (*Benincasa v. Garrubbo*, 141 AD2d 618 [2d Dept 1988])). "[E]ven the color of a triable issue forecloses the remedy". (*Rudnitsky v. Rabbits*, 191 AD2d 488, 489 [2d Dept 1993]). Furthermore, the credibility of the parties is not an appropriate consideration for the Court. (*See S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

As discussed above, in order to be successful on its adverse possession claim, a party is required to prove that the possession of the property was (i) hostile and under a claim of right, (ii) actual, (iii) open and notorious, (iv) exclusive, and (v) continuous for at least ten years. See *Estate of Becker v. Murtagh*, 19 NY3d 75, 80-81 [2012](citing *Walling v. Przybylo*, 7 NY3d 228, 232 [2006]). Furthermore, where the claim to title is not founded upon a written instrument, judgment or decree the additional element that the property has either been usually cultivated or improved or protected by a substantial enclosure must be established by proof of the same quality. (RPAPL §522; *Van Valkenberg*, supra, 304 NY at 98).

The party asserting the acquisition of title by adverse possession has the burden of proving his or her claim by the heightened evidentiary standard of clear and convincing evidence. (*Van Valkenberg v. Lutz*, 304 NY 95, 98 [1952]; *Katona v. Low*, 226 AD2d 433 [2d Dept 1996]).

The party asserting the adverse possession claim is also required to establish that it “usually cultivated or improved” or that it “protected [the Contested Area] by a substantial enclosure.” (See *Murtagh*, 19 NY3d at 8). The Marinos allege that their predecessors in interest constructed and maintained the Disputed Groin in an open, notorious, and actual manner for approximately forty years, going back to 1986, when it was allegedly built. The cultivation or improvement of another’s land constitutes open, notorious, and actual acts of possession that would place record owners on notice sufficient to give rise to an adverse claim to the property. (*Ray v. Beacon Hudson Mountain Corp.*, 88 NY2d 154, 160 [1996]).

To establish “exclusivity”, the adverse possessor must alone care for or improve the disputed property as if it were their own. (*Est. of Becker v. Murtagh*, 19 NY3d 75, 83). The focus is on whether the party claiming title by adverse possession exercised exclusive possession and control of the property. (*Id.*) Allowing others to use the property does not necessarily negate “exclusivity.” (*Id.*) possession and control of the property. The Marinos allege that their predecessors in interest possession maintained the groin by adding sheathing to the Marinos’ side of the groin, without any cost sharing arrangement with the Goldens.

While the Court has determined, as discussed above, that the Marinos’ have asserted a viable adverse possession claim sufficient to withstand a motion to dismiss at this, pre-discovery phase of the litigation, the Court finds that they have not established their entitlement judgment as a matter of law. Issues of fact exist including, but not limited to, who built the Disputed Groin, whether the Disputed Groin was possessed hostilely and under a claim of right for the required statutory time period, was the possession exclusive and continuous for the requisite time period, and was there “tacking on” of defendants’ possession onto that of their predecessors?

The Marinos acquired title to the Marino Property in October 2013. Accordingly, in order to establish their adverse possession claim, they must rely on “tacking on” possession periods of their predecessors. In support of their motion, defendants submit the affidavit of Frank Marino (“Marino Affidavit”), who describes the history of the properties going back forty (40) years. He also submits uncertified copies of numerous surveys, drawings, permit applications and permits concerning both properties, and argues that these conclusively establish defendants’ adverse possession claim. However, most of the statements and description of the circumstances surrounding the permit filings and the proceedings involved therewith are hearsay. Even if

defendants' submissions were in admissible form, they would not extinguish the issues of fact raised by the parties' submissions.

In opposition to defendants' cross motion, plaintiffs have submitted the affidavit of Kristina Golden ("Golden Affidavit"). Mrs. Golden acquired the Golden Property in 1996. In her affidavit, she attests that the Disputed Groin has existed on the Golden Property since as far back as 1956. Just like defendants, plaintiffs submit numerous surveys and drawings of the subject properties, many of which do not clearly depict a "groin". However, the Court notes a survey of the Marino Property prepared by John A. Robinson and dated March 4, 1981 (Golden Affidavit in Opposition, Exhibit F). The survey was made for the Collins, the Marinos' predecessors. That survey shows, north of the common boundary line (on the Golden Property) a "Wood Pier". The survey also depicts a "Bulkhead Type Groin . . . (Groin on Line)".

The Marinos argue that the permit issued by the New York State Department of Conservation ("DEC") to Donald R. Collins ("Collins") in 1983, to construct a timber pier and groin, proves that the Disputed Groin was built by Collins, their predecessor. In his affidavit, Mr. Marino states that "in or around 1986, the Collins constructed the Disputed Groin in accordance with the 1983 Permit and the requirements of the USACE". Mr. Marino does not indicate that he has personal knowledge of the construction. In addition, no certificate of completion issued by the Town of Oyster Bay has been produced.

The Goldens have submitted a set of drawings that were apparently a part of the Collins' permit application. These were prepared May 1, 1982, by John A. Robinson. (Kristina Golden Affidavit in Opposition ("Golden Affidavit"), Exhibit G). The drawings consist of three (3) sheets and each indicate that they were prepared for Collins for a "Proposed Groin".¹ As with the March 4, 1981 survey discussed in the preceding paragraph, "Sheet 2 of 3" of the drawings show, just north of the Marinos' northerly lot line, an "Existing Wood Pier". Also depicted either just north of or on the lot line is an "Existing Bulkhead Type Groin". The property to the north is identified as belonging to "Mr. & Mrs. Edward Jehamy [the Goldens' predecessor], 290 East Shore Drive, Massapequa, New York". The drawings show a "Proposed Groin" to be built on the Marino Property, south of the common boundary line.

The Court also notes that John A. Robinson, the surveyor who prepared the above-referenced surveys and drawings of the Marino Property for their predecessor Collins in the 1980's, has also prepared more recent surveys of the Golden Property for the Goldens. In his unsworn letter of June 3, 2021 (Agnew Affirmation, Exhibit "5") discussed above, he states that "the bulkhead or groin is, where visible, found to be wholly on Lot No. 67" (the Golden Property).

Based on the foregoing, there are unresolved issues of fact as to whether the Disputed Groin presently existing was built by Collins, the Marinos' predecessor, or whether it had been built by the Goldens' predecessor. In his affidavit, Mr. Marino asserts that the Marinos proved to the USACE, then to the DEC and finally to the Town, that the Disputed Groin was built by Collins, resulting in the issuance of the respective approvals from those federal, state and local departments.

¹ The drawings are also submitted by the Marinos. (Marino Affidavit, Exhibit 11).

However, none of those agencies are the final arbiters of where the Disputed Groin is located and who ultimately owns it or the land underneath it.

In addition to the issues of fact regarding who built the Disputed Groin, the parties' affidavits and submissions also present conflicting statements and evidence as to who maintained the Disputed Groin, whether the Disputed Groin was possessed (by the Marinos and their predecessors) hostilely and under a claim of right for the required statutory time period, whether the possession was exclusive and continuous for the requisite time period, and whether there "tacking on" of defendants' possession onto that of their predecessors. Much of the resolution of the above issues involves testimony and the evaluation of and credibility of witnesses. The existing issues of fact preclude the granting of summary judgment to the Marinos on any of their counterclaims.

Accordingly, based upon all of the foregoing, it is hereby

ORDERED, that plaintiffs' motion to dismiss defendants' counterclaims is **GRANTED** in part and **DENIED** in part as follows: So much of defendants' First Counterclaim which seeks a declaration that the Disputed Groin is located on their property is **DISMISSED**, and the remaining portions of the First Counterclaim remain. Defendants' Fifth Counterclaim is **DISMISSED**. Plaintiffs' motion is otherwise **DENIED**. It is further

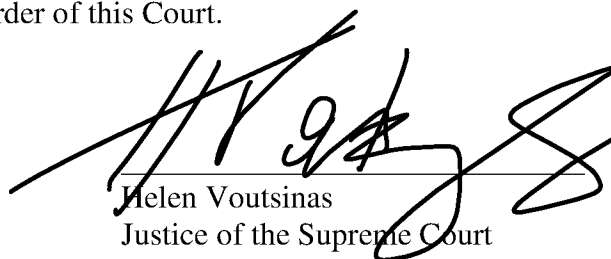
ORDERED, that defendants' cross motion for summary judgment dismissing plaintiffs' complaint and granting defendants judgment on their counterclaims is **DENIED**.

This case is scheduled for an Early ADR/Compliance Conference on December 6, 2021 at 12:00 pm via Microsoft Teams Virtual Meeting. Invitations have been sent to counsel. Any party that has not received the invitation should contact chambers via email judgevoutsinasremote@nycourts.gov.

Any other relief sought herein but not specifically ruled upon is **DENIED**.

This constitutes the decision and Order of this Court.

Dated: November 29, 2021
Mineola, NY



Helen Voutsinas
Justice of the Supreme Court

ENTERED

Dec 02 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE