SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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HEIDI LOUISE LARSEN and VARVARA MAKRILLOS,

Plaintiffs,

- against -

BRIAN ELGART and FRANCINE ELGART,

Defendants.

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Index No.: 501041/2020
Motion Seq.: 07, 08, 10

DECISION AND ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions.

The following e-filed documents, listed by NYSCEF document number (Motion 07) 113-139; (Motion 08) 140-144; and (Motion 10) 173-178 and 190, were read on these motions for summary judgment and for a preliminary injunction.

In this real property action to, inter alia, remove encroaching structures and recover damages for negligence, the plaintiffs move for an Order (Motion 07) pursuant to CPLR § 3212(e) granting plaintiffs partial summary judgment on its first, second, and fifth causes of action. The defendants also move by order to show cause for an Order (Motion 08) granting a preliminary injunction that prevents the plaintiffs from proceeding on their motion for partial summary judgment until all discovery proceedings by the defendants have been completed including, without limitation, the depositions of each of the plaintiffs and Nomiki Makrillos, a non-party subpoenaed witness, upon the grounds that the plaintiffs' attorneys have requested adjournments of the discovery responses and the depositions. The defendants also cross move for an Order (Motion 10) pursuant to CPLR § 3212(e) granting the defendants summary judgment dismissing the complaint in this action upon the grounds that there are no issues of fact to be determined in this action with respect to the plaintiffs' causes of action. After argument and upon consideration of the parties' submissions, Motion 07 is granted and Motions 08 and 10 are denied.

The plaintiffs seek partial summary judgment (Motion 07) on the following causes of action: the removal of encroaching structures pursuant to Real Property Actions and Proceedings Law (RPAPL) § 871 (first cause of action), trespass (second cause of action), and nuisance (fifth cause of action). In support of its motion, the plaintiffs submit, inter alia, the pleadings, copies of deeds and land surveys, photographs of the properties, and the affidavits of the plaintiffs and of Vincent J. Dicce, a land surveyor.

The plaintiffs assert that it is "beyond dispute" that the defendants are trespassing and encroaching on the plaintiffs' properties, in that the defendants have taken a section of land that extends beyond the plaintiffs' properties' retaining wall that is approximately one-and-one-half feet wide and runs the entire length of both of the plaintiffs' properties (for a total of 70 feet in length) (the Strip). The plaintiffs contend that land surveys reveal that the defendants took the Strip after 1) erecting an illegal chain link fence that blocks access to plaintiffs' retaining walls;

2) digging holes near the retaining wall to erect the fence; 3) placing pavers on the Strip to extend defendants' driveway; and 4) modifying their garage roof such that its eaves encroach upon Ms. Makrillos' property. Plaintiffs further assert that the defendants' own survey shows that the Strip actually belongs to the plaintiffs, and that the defendants have no defense to the plaintiffs' claims of unreasonable trespass and encroachment. *See* NYSCEF Doc. No. 125. The plaintiffs also rely upon the affidavit of Mr. Dicce, a licensed land surveyor, who states that he conducted a survey of the property by visually surveying and measuring the property, including the property lines of adjacent properties, and specifically, among others, the property located at 190 80th Street, Brooklyn, NY, and produced a certified survey of the property. *See* NYSCEF Doc. Nos. 135, 136, and 137. Mr. Dicce asserts that the survey confirms that a chain-link fence is located one foot and one inch into the plaintiffs' property, and that the eaves and drains from the garage extend approximately two inches and six inches, respectively, into the plaintiffs' property.

In support of its cross motion (Motion 10) and in opposition to the plaintiffs' motion, the defendants submit, inter alia, a copy of a title report, photographs of the property, and copies of records from the New York City Department of Buildings. The defendants argue that the claims in the plaintiffs' complaint have been subsumed and superseded as a matter of law by the long-standing principle of "practical location." Defendants contend that the house was purchased with clean title, and that renovations of their property were all performed strictly in accordance with architectural plans and permits obtained from the New York City Department of Buildings. Defendants argue that the retaining wall needed repair because it was falling apart and was a potential source of injury to those who could be nearby, such as the defendants' grandchildren. Defendants also contend that the fence is legal and within the height prescribed by the NYC Administrative Code, as it is six feet high, and not ten feet as the plaintiffs assert. Defendants argue that there are issues of fact with regard to the location of the boundary lines between the plaintiffs' property and the defendants' property, particularly as to how long the parties and their predecessors have lived with the boundaries, which defendants assert may date as far back as 100 years ago.

In reply, the plaintiffs argue that the opposition papers fail to submit any evidence in admissible form to rebut, or otherwise dispute, the facts and documentary evidence proffered by plaintiffs. The plaintiffs assert that the defendants' submissions do not raise any triable issues of fact with regard to the boundary lines of the property. The plaintiffs further assert that the defendants' claim of "practical location" is not applicable here because it submits no evidence of an affirmative act, such as an agreement between the parties as to a boundary line. Plaintiffs also contend that the defendants do not produce any land survey to show that the plaintiffs do not own the Strip.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp*., 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co*., 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co*., 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of

fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

Pursuant to RPAPL § 871, "[a]n action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land." Furthermore, in *Double M Development, LLC v Khrom*, 189 AD3d 1227, 1228 (2d Dept 2020), the Appellate Division, Second Department stated as follows:

> The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission, while private nuisance is an intentional, unreasonable, substantial interference with a person's property right to use and enjoy land, caused by another's conduct in acting or failing to act. (Internal punctuation and quotation marks removed); *see also 211-12 Northern Boulevard Corp. v LIC Contracting, Inc.*, 186 AD3d 69 (2d Dept 2020).

"Both nuisance and trespass require some intentional act on the part of the alleged tortfeasor." *Double M* at 1228. Furthermore, there may be liability for trespass even if the defendants had a mistaken belief that they were right to enter. *See Montanaro v Rudchyk*, 189 AD3d 1214 (2d Dept 2020). Furthermore, application of the doctrine of practical location "requires a clear demarcation of a boundary line and proof that there is mutual acquiescence to the boundary by the parties such that it is 'definitely and equally known, understood and settled.'" *Jakubowicz v Solomon*, 107 AD3d 852, 852 (2d Dept 2013), quoting *McMahon v Thornton*, 69 AD3d 1157, 1160 (3d Dept 2010).

Here, the plaintiffs have established their entitlement to partial summary judgment on their first, second, and fifth causes of action through, inter alia, its land surveys and the affidavits of the plaintiffs and their expert, Mr. Dicce. Mr. Dicce states that his surveys revealed that the defendants' chain-link fence and eaves and drains from their garage all extend into the plaintiffs' property. The plaintiffs' affidavits further establish that the retaining wall is not the boundary to the property, an assertion that is uncontroverted by the defendants' submissions. In opposition, the defendants failed to raise a triable issue of fact, essentially arguing through inference that the property boundaries have existed for over 100 years and since the houses were built, and that the Court should decline to disturb this arrangement. The defendants' argument that whether the boundary lines as shown on the survey were accurate or infringed "is of no matter or consequence" is unavailing, and the defendants cite no case law in support of this assertion. Similarly unavailing is the defendants' contention that the Court should deny summary judgment on equitable grounds, in that such a finding would cause hardship to the defendants. The defendants have also failed to offer admissible evidence to support their assertion that the boundaries have been known, understood and settled for over 100 years. *See Jakubowicz* at 852. Accordingly, the plaintiffs' motion is granted.

Turning to the defendants' cross-motion for summary judgment, the Court denies the cross motion for failure to comply with Uniform Rule § 202.8-g(a). The rule became effective on February 1, 2021, and requires that:

> Upon any motion for summary judgment other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise

statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

A movant's failure to comply with § 202.8-g(a) is an omission that is not merely a technical violation, but rather is a substantive defect, which a Court cannot correct in its own discretion pursuant to CPLR §§ 2101(f) or 2001. *See Great Wall Medical, P.C. v Hye Suk Kim*, 2021 WL 3834807 (Sup Ct, NY County 2021). In *Amos Financial LLC v Crapanzano*, 73 Misc3d 448, 2021 NY Slip Op 21209 (Sup Ct, Rockland County 2021), the trial court held that:

> ... a summary judgment movant's total failure to submit a Uniform Rule 202.8-g Statement of Material Facts constitutes a violation that is neither merely technical nor without prejudice. Unlike minor technical "glitches," irregularities and harmless pleading errors that courts have substantial discretion to correct nunc pro tunc under CPLR 2101(f) and/or CPLR 2001... the total absence of a Uniform Rule 202.8-g Statement of Material Facts constitutes a substantive defect in a motion for summary judgment.

Id. at *3; *see also Reus v ETC Housing Corporation*, 72 Misc3d 479 (Sup Ct, Clinton County 2021). Accordingly, the cross motion is denied.

Lastly, at oral argument, counsel stated that depositions were completed in December 2021. Accordingly, Motion 08 is denied as moot.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiffs' motion for partial summary judgment on its first, second, and fifth causes of action (Motion 07) is GRANTED; and it is further

ORDERED, that the defendants' motion for a preliminary injunction (Motion 08) is DENIED as moot; and it is further

ORDERED, that the defendants' cross motion for summary judgment (Motion 10) is DENIED.

This constitutes the decision and order of the Court.

DATED: March 25, 2022

Lillian Wan
HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.