

A.U.S 85th St., F.L.P. v Nuera Contr., Inc.

2022 NY Slip Op 31351(U)

April 13, 2022

Supreme Court, Kings County

Docket Number: Index No. 521593/2021

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS: PART 99

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 A.U.S 85TH STREET, F.L.P.,

Plaintiff,
 -against-

NUERA CONTRACTING, INC. and LINDA
 CATALANO,

Defendant.

DECISION/ORDER

Index No.: 521593/2021
 Motion Date: 3/23/2022
 Motion Cal. No.:
 Mot. Seq. 1, 2

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 After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Plaintiff's Order to Show Cause seeking a temporary restraining order and preliminary injunction, dated 10/8/2021 (NYSCEF #41), Plaintiff's Emergency Affirmation in Support of Order to Show Cause (NYSCEF #15), Attorney Affirmation of Dimitrios Kourouklis, Affirmed on 9/30/2021 (NYSCEF #16), Exhibits (NYSCEF #17-37), Plaintiff's Memorandum of Law (NYSCEF #38),	41, 15-38
Defendant CATALANO's Affidavit in Opposition duly sworn to on 3/16/2022 (NYSCEF #79), Exhibits (NYSCEF #80-86), Attorney Affirmation of Jordan M. Hyman in Opposition, Affirmed on 3/16/2022 (NYSCEF #87).....	79-87
Plaintiff's Notice of Motion to Dismiss Defendant's Counterclaims, dated 10/25/2021 (NYSCEF #44), Attorney Affirmation of Dimitrios Kourouklis, Affirmed on 10/25/2021 (NYSCEF #45), Exhibits (NYSCEF #46-72), Plaintiff's Memorandum of Law (NYSCEF #73)	44-73
Defendant CATALANO's Attorney Affirmation of Jordan M. Hyman in Opposition, Affirmed on 3/16/2022 (NYSCEF # 76), Exhibit (NYSCEF #77), Defendant CATALANO's Affidavit in Opposition to Plaintiff's Motion to Dismiss Defendant's Counterclaims sworn to on 3/16/2022 (NYSCEF #78).....	76-78
Plaintiff's Attorney Reply Affirmation of Dimitrios Kourouklis, Affirmed on 3/22/2022 (NYSCEF # 89), Exhibit (NYSCEF #90)	89-90

Plaintiff A.U.S. 85th Street, F.L.P. commenced the action by filing a summons and complaint on August 23, 2021 seeking a preliminary injunction restraining and enjoining Defendant Catalano from continuing construction work on her home and driveway located at 1047 85th Street, Brooklyn, New York 11228. Plaintiff asserts claims of trespass, negligence, property damage, and continuing nuisance. Issue was joined with service of an answer on September 13, 2021. The answer was amended on October 3, 2021.

In June 2021, Defendant Catalano began a construction project on her home and hired Defendant Nuera Contracting to remove concrete from her driveway and repave the same. Plaintiff alleges that in performing these tasks, Defendants damaged Plaintiff's two door gate and removed fifty feet of what the Plaintiff describes as a retaining wall and what Defendant Catalano refers to as a brick curb.

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In Motion Sequence #1, Plaintiff seeks a temporary restraining order and a preliminary injunction restraining Defendant Catalano from continuing construction work on her home and driveway and directing Defendant Catalano to immediately remove all of Defendant Catalano's materials, structures, and appurtenances from Plaintiff's property. In Motion Sequence #2, Plaintiff filed a Motion to Dismiss Defendant Catalano's Counterclaims found in the amended complaint for intentional infliction of emotional distress, trespass, negligence and property damage, tortious interference with contract, violation of N.Y. Civ. Rights Law § 52-a, and requested Plaintiff pay Defendant Catalano's legal fees.

Regarding Motion Sequence #1, it is well settled that to be entitled to a preliminary injunction, a plaintiff must show "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862, 552 N.E.2d 166, 167 (1990). Plaintiff contends that it will be successful on the merits pursuant to New York City Administrative Code § 28-305.1.1, which reflects the following:

Structures located on the lot line of adjacent properties and partially on both properties. The owners of adjacent properties shall be responsible jointly for the proper maintenance and repair of retaining walls, partition fences and other site structures, or portions thereof, that are located along the common lot line and on both their properties; and each such owner shall be responsible for one-half of the costs of maintaining and repairing such fences, retaining walls and other site structures, or such portions thereof. Where an owner elects to remove temporarily a retaining wall or partition fence that is required to support a grade differential between the two properties, or for any other reason is required by this code, such owner shall protect the adjacent property, shall not impair its safe use, and shall replace the retaining wall or partition fence at his or her own cost.

Plaintiff's New York State licensed land surveyor Saeid Jalilvand surveyed the land on September 15, 2021, and submitted an affidavit, sworn to on September 30, 2021, that a portion of the retaining wall is located on Plaintiff's property. Defendant Catalano uploaded a stamped survey from Surveyor Reuter Louis W. Jr. Inc. dated April 20, 1990 that shows the retaining wall, referred to as a brick curb, entirely on Defendant Catalano's property. Additionally, the parties submitted photographic evidence showing markers placed in different locations by different surveyors. Based on the contradictory evidence regarding the property line, Plaintiff argues that the PVC fence that Defendant Catalano recently installed is encroaching on Defendant Catalano's property. Defendant Catalano also alleges that Plaintiff's hedges, the hedge's root system, and gate are encroaching on Defendant Catalano's property. A hearing will be held to determine whether Plaintiff has shown entitlement to injunctive relief, i.e., a likelihood of success on the merits, irreparable injury, and a balance of the equities in Plaintiff's favor. The Court will make a determination as to whether the object described as a retaining wall is common or solely within the borders of one the parties.

With respect to Motion Sequence #2, Plaintiff's Motion to Dismiss Defendant Catalano's first counterclaim alleging intentional infliction of emotional distress is granted. Defendant Catalano failed to show that

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Plaintiff's conduct was extreme and outrageous, the first element required to establish the tort of intentional infliction of emotional distress. *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121, 612 N.E.2d 699 (1993).

The branch of Plaintiff's Motion to Dismiss Defendant Catalano's second counterclaim alleging trespass is denied. The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission. *See Korsinsky v. Rose*, 120 A.D.3d 1307, 1309-1310, 993 N.Y.S.2d 92 (2d Dep't 2014). Defendant Catalano alleges that Plaintiff's hedges are encroaching on Defendant Catalano's property, and that Plaintiff unlawfully trespassed by physically placing his or her hands in front of the encroaching hedges on Defendant Catalano's property while Defendant Nuera Contracting was attempting to trim said hedges. *See Id.* Even if Defendant Catalano is only entitled to nominal damages, Defendant Catalano has alleged a prima facie claim for trespass that satisfies the liberal pleading standards under CPLR § 3026.

The branch of Plaintiff's Motion to Dismiss Defendant Catalano's third counterclaim alleging negligence and property damage is denied. A prima facie case of negligence requires that the plaintiff prove 1) that defendant owed a duty to plaintiff, 2) that the duty was breached, and 3) injury proximately resulted from the breach. *Friedman v. Anderson*, 23 A.D.3d 163, 164, 803 N.Y.S.2d 514 (1st Dep't 2005). Here, Defendant Catalano alleges that Plaintiff failed to maintain its root system and hedges, allowed the roots and hedges to encroach onto Defendant Catalano's property, removed survey marker stakes installed by Defendant Catalano's surveyor, and that these actions caused Defendant Catalano damage, and that Plaintiff is liable for monetary damages. Similar to the second counterclaim, even if Defendant Catalano is only entitled to nominal damages, Defendant Catalano has alleged a prima facie claim for negligence and property damage that satisfies the liberal pleading standards under CPLR § 3026.

The branch of Plaintiff's Motion to Dismiss Defendant Catalano's fourth counterclaim alleging tortious interference with contract is granted. This case involves a dispute between neighbors regarding boundaries and to the extent both parties seek a determination of those rights there cannot be an intentional procurement of a breach of contract with a third party. *Pink v. Half Moon Co-op. Apartments*, 68 A.D.3d 739, 891 N.Y.S.2d 107 (2d Dep't 2009).

Plaintiff's Motion to Dismiss Defendant Catalano's fifth affirmative defense alleging a violation of N.Y. Civ. Rights Law § 52-a is granted. There are no facts in the record that Plaintiff installed the video cameras with the requisite "purpose of video taping or taking moving digital images of the recreational activities which occur" on Defendant's property or with the requisite intent to "harass, annoy or alarm [Defendant], or with intent to threaten [Defendant] or property of [Defendant]." N.Y. Civ. Rights Law § 52-a (McKinney). Plaintiff provided receipts for and testifies that the cameras were purchased in 2016 and 2017 and were installed near or around that time for security purposes, years before the events that gave rise to this litigation. While there is very little case law regarding N.Y. Civ. Rights Law § 52-a, other trial courts have noted that there is "[n]othing in the statute . . . [that] suggests that Civil Rights Law § 52-a was enacted in any part to curtail the rights of property owners to secure their property through the use of security cameras." *Ienopoli v. Lent*, No. 606251/19, 2019 WL 4458162, at *2 (N.Y. Sup. Ct. Aug. 23, 2019). Finally, the legislative history of Civil Rights Law § 52-a indicates that "[this] law sought to expand protections of

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privacy to include incidents where voyeurs used new types of technology,” which is not the case here. (See legislative history).

Finally, the branch of Plaintiff’s Motion to Dismiss Defendant Catalano’s sixth counterclaim is granted and Defendant Catalano’s sixth counterclaim requesting Plaintiff pay Defendant’s legal fees is denied. “A party may not recover attorney’s fee from the losing party except where authorized by statute, agreement, or court rule.” *Ins. Co. of Greater New York v. Clermont Armory, LLC*, 84 A.D.3d 1168, 1171, 923 N.Y.S.2d 661, 663–64 (2d Dep’t 2011) (citing *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597–598, 789 N.Y.S.2d 470, 822 N.E.2d 777 (2004)).

Based on the foregoing, it is

ORDERED, that Plaintiff’s Motion to Dismiss Defendant CATALANO’s first, fourth, fifth and sixth counterclaims is GRANTED, and these counterclaims are DISMISSED (Motion Sequence #2); and it is further

ORDERED that Plaintiff’s Motion to Dismiss Defendant CATALANO’s second and third counterclaims is DENIED; (Motion Sequence #2); and it is further

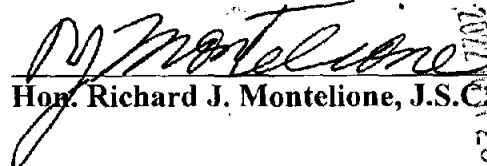
ORDERED that the parties will appear before the Court for an in-person hearing on April 27, 2022 at 2:30 PM before Part 99, Room 277 at the courthouse located at 360 Adams Street, Brooklyn, New York 11201 to address Motion Sequence #1, to determine the temporary restraining order and preliminary injunction application, to set a bond if a preliminary injunction is issued (CPLR 6312 [b]), and/or to determine the legal boundaries and issues regarding the retraining wall and all encroachments, if any.

This constitutes the decision and order of the Court.

Dated:

APR 13 2022

ENTER


Hon. Richard J. Montelione, J.S.C.

2022 APR 25 AM 10:02
KINGS COUNTY CLERK
FILED