

<b>Groysman v Pometko</b>
2022 NY Slip Op 31811(U)
June 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 0506853/2016
Judge: Lawrence Knipel
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At an IAS Part \_\_\_\_\_ of the Supreme Court of the State of New York, County of Kings, at the Courthouse thereof, located at 360 Adams Street, Room \_\_\_ Brooklyn, New York on the day of June, 2022

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

*KNIPPEL*

Index Number: 0506853/2016

GRIGORIY GROYSMAN,  
As Administrator of the Estate of Miron Bendersky

Plaintiff

vs

Decision and Order

VICTOR POMETKO

Defendant

The following papers, numbered as set forth below, were read on this motion and cross motion for decision and order:

Defendant's Notice of Motion, No.51, Affirmation and Affidavits, Nos.52-55, Exhibits, 56-59; Plaintiff's Notice of Cross Motion, No., 60, Affirmation, No. 61, and Exhibits, Nos. 62-68; Defendant's 'Opposition to Cross Motion, Affirmation, No.76, Exhibit, No. 77, Affidavit, No. 78,79 and documents Nos.86,87.

Upon the forgoing papers, Defendant's Motion for summary judgment pursuant to CPLR Section 3212 was granted and Plaintiff's complaint is dismissed; Plaintiff's cross motion for summary judgment pursuant to CPLR Section 3212 is denied; Defendant's counter-claim one, three and four are also granted as follows:

Procedural history

The parties are neighbors. In April, 2016, Plaintiff commenced this action alleging private nuisance as against Defendant for allegedly illegally occupying a certain parcel of land,

the disputed plot, located between the Plaintiff's house and the Defendant's house, as well as allegedly causing construction violations which interfered with the Plaintiff's property rights, and seeking abatement and injunction for such private nuisance of use and occupancy of that specific parcel of land, and additionally seeking a declaratory judgment that the Defendants' occupancy and use of that disputed plot of land is illegal.

Defendant answered and counter claimed, also alleging private nuisance as against their neighbors, for allegedly illegally erecting a fence on a land between their two houses in 2009 which kept Defendant away from utilizing a portion of the disputed plot of land which Defendant claim is exclusively theirs to use due to the certain recorded easement; Defendants also allege that Plaintiffs commenced an unapproved house extension construction, which is contradictory to the certificate of occupancy, carries numerous uncured violations and poses danger to Defendant and his children for allegedly unapproved electric work performed within the dwelling and for the improper drainage, next door to the Defendant's house; Defendant also claim intentional infliction of emotional distress, his and his spouse's, during and post Plaintiff's construction of the house enlargement, plus trespass due to the Plaintiff un-permitted entry upon, use and usurpation of land. Additionally, Defendants seek a declaratory judgment, declaring that Plaintiff's have no right to use the disputed plot of land, granted to Defendants via the recorded easement.

On April 20<sup>th</sup>, 2019, Defendant filed his motion for summary judgment as to all counts and counterclaims. On may 20<sup>th</sup>, 2019, Plaintiff filed their opposition and Cross moved. On July 10<sup>th</sup>, 2019, Defendant filed the Opposition to the Cross motion. After the motions were fully briefed, oral arguments were held.

Factual Background.

Defendant purchased a house located on 176 Oxford Street, Brooklyn, N.Y., on July 5, 2006. In 2009, the presently deceased Mr. Bendersky purchased an adjacent house located at 180 Oxford Street, Brooklyn, NY. Some time after Mr. Bendersky passed away, this litigation was commenced by his heirs. The matter is thus titled *Gregory Groysman, as Administrator of the Estate of Miron Bendersky v. Victor Pometko*. The depositions revealed that the decedent never traveled to the US before passing in 2015.

There is a plot of land running lengthwise between the two neighboring houses, which is at the crux of this matter. Plaintiff claims that he has the right to 50% of that parcel just because it's situated adjacent to his house. Defendant claims that Plaintiff has no such rights because the entirety of the plot betwixt the two houses is his to utilize in accord to a certain recorded easement granted to the owners of his house, but none was granted to the Defendant's demised property.

There is a recorded easement dated 1946 (recorded in 1947) as well as a recoded 1946 survey reflecting both the building structures erected and the placement of the easement, which includes the piece of land located between the parties' houses, the so called 'disputed' plot; which by its terms is to be used by the owners/dwellers of 176 Oxford Street, Brooklyn, N.Y., the Defendant.

That recorded easement was granted in perpetuity by a none party to this action to a set certain of residences, with each grantee or recipient specifically enumerated in the body of the easement, with the said easement covering a number of streets; the easement included the Defendant's 176 Oxford Street, Brooklyn, NY but **not** the Plaintiff's 180 Oxford Street, Brooklyn New York.

The specific easement pertains to, inter alia, 116, 118, 120, 122, 124, 126, 130, 132, 136, 138, 140 142, 144, 146, 148, 150, 154, 156, 160, 164, 168, and 176 Oxford Street, Brooklyn, New York, and 1614, 1618, 1620 and 1624 Shore Boulevard, Brooklyn, New York, their heirs, successors and assigns... The easement is Not granted for the benefit and use by 180 Oxford street, Brooklyn N.Y., the Plaintiff's place. Throughout the Plaintiff's allegations there is a constant thread regarding its claim to 50% ownership of the strip of land betwixt the two houses. Defendant strongly rejects any such claim plus insists on removal of the Plaintiff's recent fence which precludes Defendant's rightful use.

Just prior to the purchase of the decedent (Plaintiff) of his house in late 2009, his predecessor without any consent by the Defendant erected a fence 3.5 feet wide and 79 feet long intruding into that plot of land betwixt the two houses. In his counter claims interposed in 2016 Defendant requested that the offending fence be removed as it constitutes a private nuisance and by impermissibly constantly entering upon that land Plaintiff is engaging in continuous trespass.

After obtaining all necessary permits, Defendant commenced limited construction project on his premises. Said was completed in 2017 and the property was successfully inspected by the Department of Buildings, the DOB. During the limited construction project, defendant alleges that his then 'very' pregnant wife and the unborn child sustained emotional distress intentionally and negligently inflicted upon them by Plaintiff thru the actions of its' agents by, inter alia, contacting DOB with unfounded complaints regarding the limited construction project and numerous threats regarding the matter. Defendant demands judgment in the defendant's favor and against the plaintiff in the amount to be determined at trial, awarding compensatory and punitive damages for the plaintiff's intentional, extreme and outrageous conduct causing severe emotional distress to the defendant and his family members, together with any reasonable costs,

attorney fees and disbursements.

Plaintiff in turn does not dispute contacting the Department of Buildings which, according to the exhibits submitted by Defendants never found and never issued any violations against the Defendant's construction project. On the other hand, Defendants presented numerous exhibits evidencing numerous uncorrected violations both past and ongoing as against the Plaintiff's property and the existing house expansion.

In its Complaint, Plaintiff seeks abatement and injunction of the alleged private nuisance which arose due to the Defendant's limited construction project, which was fully completed and inspected by the DOB in 2017. On his part, Defendant alleges private nuisance caused by Plaintiff's construction project plus the need to account for the violations of record which the presented DOB records reflected as ongoing.

Upon the review of the court of pleading, the motions, the attached thereto affidavits, affirmations and Exhibits the Court finds as follows:

#### Discussion

"Pursuant to CPLR 3212 ... a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, 'that there is no defense to the cause of action or that the cause of action or defense has no merit.' Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (Marine Midland Bank v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2nd Dept 1990))" (People ex rel. Spitzer v Grasso, 50 AD3d 535, 544 (1st Dept 2008)). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. Alvarez v Prospect Hospital, 68 NY2d 320

(1986).

Declaratory Judgment Claims

Plaintiff seeks a Declaratory Judgment for a declaration that Defendant has no right to the adjacent 15 foot lot located betwixt 176 Oxford Street and 180 Oxford Street.

Defendants seek a declaratory judgment against Plaintiff declaring that it illegally constructed a fence fencing off 3.5 feet in width by 79 feet in length within that same strip of land running along the Plaintiff's house side and such fence must be removed because Plaintiff has no legal right to that plot of land but Defendant does, by the virtue of the recorded easement.

The parcel and the usage and enjoyment thereof is governed by the recorded easement. There is also affidavits of witnesses attesting to a continuous use of that plot by Defendants and their predecessors by following the easement. Plaintiff failed to submit any evidence regarding it's entitlement to use or enjoyment of any portion of that plot of land. As such, Plaintiff must remove the fence as the right to use and enjoy that entire plot belongs to Defendant.

Private Nuisance Claims

Citing to an alleged unjustifiable and illegal use and occupancy of the above referenced 15 feet wide plot of land between their two houses, Plaintiff alleges that Defendant was engaged in private nuisance by occupying that plot of land and caused construction violations. As noted, the Department of Building after numerous check-ups called in by the Plaintiff, did not find any violations and the project was completed years ago, in 2017, plus, the plot of land in question is rightfully used and utilized by Defendant, as noted above, with Defendant not encroaching on any part of the plaintiff's land. As mentioned in the Defendant's moving papers, during his deposition the Administrator, the sole deponent on part of the Plaintiff's camp, stated that he

visited the site 3 or 4 times during that period of time and observed some noise, smell and dust. If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odor and confusion incident to city life" Nussbaum v. Lacopo, 27 NY2d 311, 315 (1970).

Plaintiff further seeks abatement and injunction against Defendants for the same activity and their use of the plot. For the reasons just mentioned, these claim as against Defendants must fail as well.

Defendant also alleges private nuisance in his pleadings, along with trespass. Plaintiffs usurped and fenced off a chunk of property which Defendants had a recorded right to use and enjoy and Plaintiffs called-in numerous Department of Buildings check ups of the Defendant's construction project which were all found unfounded. Defendants proffered the said documents in their Exhibits to the Motion for summary judgment and the opposition to the cross motion. The submission was not called into question. Defendant proffered his construction permits and the Department of Building reports and all were in order according to the DOB records.

The courts have stated that the essence of a private nuisance is the creation or maintenance of a condition on one property that causes a compensable injury to something or someone on another property. Zainzok v. 650 Park Ave. Corp., 80 Misc.2d 573 (Sup.Ct. NY Co. 1974). As such, a private nuisance is interference with the use or enjoyment of land that causes an injury in relation to an ownership right in the land. Copart Industries, Inc. v. Consolidated Edison Co., 41 NY2d 564, 568 (1977); Turner v. Coppola, 102 Misc.2d 1043 (1980). Furthermore, nuisance imports a continuous invasion of rights- a pattern of continuity of objectionable conduct" frank v park Summit Realty Corp., 175 AD2d 33, 34 (1<sup>st</sup> Dep't 1991).

Plaintiff engaged in the following continuous conduct, such conduct being ongoing: Plaintiff removed Defendant's fence and subsequently erected an illegal fence 3.5 feet wide and 79 feet deep within the Defendant's plot to which Defendant has the right of use and enjoyment, as well as the

Plaintiff's well documented refusal to address numerous violations placed upon his dwelling by the DOB for the unapproved house expansion, involving various electric work, right next door to Defendants house making it potentially unsafe for Defendant and his wife and children to dwell just 15 feet away. Plaintiff placed defendant and his family in a potentially dangerous condition which might injure them and caused personal discomfort, inconvenience and annoyance.

The Appellate Division has enumerated the standard for finding a private nuisance as follows; "In order to prevail upon a cause of action for private nuisance, the Petitioner must demonstrate (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct." Vacca v. Valerino, 16 A.D.3d 1159, 1160 (4<sup>th</sup> Dept. 2005) quoting Hitchcock v. Boyack, 277 A.D.2d 557,558 (3<sup>rd</sup> Dept. 2000) (Internal Citations Omitted). Plaintiff's behavior exhibited each one of the enumerated elements.

#### Trespass Claims

Defendants proved their claim of common law trespass. After Plaintiff's removal of the Defendant's fence in 2014 his workers routinely intruded upon the Defendant's property. The intrusion was not permitted as Defendant maintains that Plaintiff has no rights to any use or enjoyment of any property between the neighbors' houses. The elements of a common law trespass are two-fold: Specific intent to enter another's land or engage in an act where it is substantially certain that entry onto the land will result and entry upon land in possession of another. Shiffman v. Empire Blue Cross, 681 N.Y.S.2d 511 (N.Y. App. Div. 1998). Defendant has met his burden of proof with respect the claim for trespass. The legal and factual bases for a claim sounding in common law trespass as against the Plaintiff are satisfied.

There exists only one triable issue of fact as far the Defendant's claim for private nuisance and trespass, and that is the amount of damages and expenditures , which may be ascertained at inquest,

together with reasonable costs and disbursements.

Intentional infliction of Emotional Distress.

Note of Issue filed by Plaintiff does not contain a request for a Jury Trial. Defendant in his opposition to cross motion papers indicated that he will be presenting this count to court and is not seeking a determination of this claim via a summary judgment motion as the claim is not suitable for the motion. The court agrees with this position. Defendant in his opposition papers maintains that he will meet his burden of proof with respect to this claim.

In New York, the tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress. See Howell v. New York Post Co., 81 N.Y.2d 115, 121, (1993). Plaintiff's pleadings, including counterclaims, puts forth allegations of various actions undertaken by the Administrator and his agents during the time when Defendant and his spouse were expecting their first child. These actions surrounded Defendant's house remodeling and events leading to commencement of this action. Trial on the merits is the proper venue for determining this claim.

**WHEREAS**, upon the forgoing papers and oral arguments,

**ORDERED** that Defendant's motion for summary judgment against Plaintiff as to all of the Plaintiff's claims/counts is granted and that the Complaint is dismissed, as are the Plaintiff's defenses to the Defendant's counterclaims; and it is further,

**ORDERED** that the Plaintiff's cross-motion for summary judgment against Defendant as

to the Defendant's counterclaims is denied; and it is further,

**WHEREAS**, it appearing to the Court that Defendant is entitled to judgment on liability as to its counts on private nuisance and trespass and that the only triable issue of fact on that branch of the Defendant's motion for summary judgment relate to the amount of damages to which Defendant is entitled to, it is

**ORDERED** that the Defendant's motion for summary judgment against Plaintiff is granted to the extent of granting partial summary judgment in favor Defendant and against Plaintiff as follows:

1. Plaintiff is found liable to Defendant on second and third counterclaims causes of action for private nuisance and trespass and the issue of the amount or the extend of damages, legal fees, costs and disbursements shall be determined before the court ; and
2. Ordered that an immediate trial of the afore said issues of fact shall be had before the court, and it is further
3. Ordered that Defendant shall within 20 days from the entry of the Order serve a copy of this Order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Court of the Trial Support Office and shall file with said Clerk a note of issue and certificate of readiness, if not filed before, and said clerk shall cause the matter to be placed upon the calendar for such trial; and it is further
4. Ordered that this action shall continue as to the Defendant's fourth counterclaim cause of action on intentional infliction of emotional distress; and
5. Ordered that counsel are directed to appear for a status conference on \_\_\_\_\_, 2022

at \_\_\_\_\_ a.m./p.m.; and it is further,

**ADJUDGED**, as far as the declaration of the rights over the parcel of land laying betwixt 176 Oxford Street and 180 Oxford Street, Brooklyn New York, Plaintiff has no rights of ownership, use, occupancy or enjoyment of that parcel of land; and it is further

**ADJUDGED** that Defendant possesses the right to use, occupancy and enjoyment of that parcel of land situated betwixt the two buildings; and it is further

**ORDERED**, that Plaintiff must remove any fence between the two houses within 30 days of the signed Order and correct any damage caused by any such removal.

This constitutes the Decision and Order of this Court.

Dated:

6/6/22



J.S.C.

**HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE**