

**Lewis v Steiner**

2022 NY Slip Op 32710(U)

August 2, 2022

Supreme Court, Kings County

Docket Number: Index No. 13540/2015

Judge: Carolyn E. Wade

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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: HON. CAROLYN E. WADE

-----X  
GLORIA LEWIS,

Plaintiff,

Index No. 13540/2015

- against -

**DECISION AND ORDER**

ANDRES STEINER, CONSTRUCTION CLASSIC CORP.,  
LARRY NASS, THE THREE G GROUP LLC, THE THREE  
G GROUP LLC d/b/a BLUELINE CONTRACTORS, INC.,  
GREENWAY BUILDERS INC. and ELI ROGATSKI,

**Motion Segs. 12, 13, 14**

Defendants.

-----X  
ANDRES STEINER,

Third-Party Plaintiff

- against -

THE THREE G GROUP LLC, THE THREE G GROUP LLC  
d/b/a BLUELINE CONTRACTORS, INC., and  
GREENWAY BUILDERS INC.,

Third-Party Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of  
Plaintiff's, Defendants', and Defendant/Third-Party Plaintiff's Motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....NYSCEF #'s	112, 113, 114, 115, 159, 160, 216, 193, 194, 195, 196
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	130, 151, 217
Reply Affidavits/Affirmations.....	152, 220
Memorandum of Law.....	161, 197

Upon the foregoing cited papers, and after virtual oral argument; 1) defendants, Construction Classic Corp. ("CCC") and Larry Nass' ("Nass") (collectively, "Defendants") motion, pursuant to CPLR § 3212, to dismiss Plaintiff's Second Amended Complaint, and Defendant/Third-Party Plaintiff, Andreas Steiner's ("Steiner") cross-claims (Motion Seq. No. 12); Steiner's motion pursuant to CPLR § 3212, dismissing all of the claims and cross-claims asserted against him (Motion Seq. No. 13); and 3) Plaintiff, Gloria Lewis' ("Plaintiff") cross-motion to amend the Second Verified Complaint (Motion Seq. 14) are decided as follows:

The underlying action arises out of a construction project at Steiner's property located at 428 Hart Street, Brooklyn, New York ("Subject Premises"). Plaintiff alleges that the construction caused substantial damage to her adjacent home located at 430 Hart Street, Brooklyn, New York, ("Plaintiff's Home"). Following the commencement of the instant action, Steiner commenced a third-party action against defendants, The Three G Group, LLC d/b/a Blueline Contractors, Inc. ("Blueline"), and Greenway Builder's Inc. ("Greenway"), alleging causes of action for common law indemnification, and contribution.

On November 11, 2011, Steiner contracted with defendant/third-party defendant, Blueline, and defendant, Nass, to perform renovations on the Subject Premises. Nass is the principal and owner of defendant CCC, who did not have a contract with Steiner to perform work at the subject premises. However, CCC was the entity named on the permits and filings for the work to be done at the subject premises. On May 17, 2012, Steiner then contracted with defendant/third-party defendant, Greenway, and defendant, Eli Rogatski, ("Rogatski"), to perform the renovations at the Subject Premises. This effectively relieved Defendant/Third-Party Defendant, Blueline, and Defendant Nass from performing any work on Steiner's property, and they no longer appeared on any filings or permits.

### Relevant Procedural History

Plaintiff commenced this action on November 16, 2015. Thereafter, Plaintiff was granted leave to amend her complaint twice. By Order dated, March 22, 2019 ("March 2019 Order"), this Court granted Plaintiff's first motion to amend the complaint (Seq. 6) which added defendants, Blueline and Rogatski. In an order, dated December 2, 2019 ("December 2019 Order"), this Court granted Plaintiff's second motion to amend (Seq. 8) to the extent that the nuisance and negligent infliction of emotional distress causes of action were added. Plaintiff was also permitted to incorporate allegations of piercing the corporate veil against defendants, Nass and Rogatski in the trespass claim (First Cause of Action).

Defendants' prior motions included a motion to dismiss and for summary judgment (Seq. 5), and a motion for summary judgment (Seq. 7). This Court's March 2019 Order denied Defendants' motion to dismiss and for summary judgment on all claims and cross-claims (Seq. 5). Defendants' second motion to dismiss (Seq. 7), was granted by the Court's December 2019 Order to the extent that the negligence (Second Cause of Action) and piercing the corporate veil (Third Cause of Action) causes of action against defendant Nass were dismissed. The December 2019 Order denied Defendants' motion to dismiss the trespass claim, as it pertained to events that occurred on or after January 27, 2013.

#### Defendants CCC and Nass' Motion for Summary Judgment (Seq. 12)

Defendants CCC and Nass move for summary judgment to dismiss Plaintiff's Second Amended Complaint, and Steiner's cross-claims. Defendants claim that CCC was not the general contractor of record at the time that Plaintiff's alleged nuisance, negligent infliction of emotional distress ("NIED"), and trespass claims accrued on January 27, 2013. Specifically, Defendants assert that they never performed any work or renovations at the Subject Premises, and that they were last involved with the project in May 2012. Thus, they contend that the trespass, nuisance, and NIED claims should be dismissed against them.

In opposition, Plaintiff and Steiner both contend that Defendants' motion should be denied on the grounds that it violates the successive motions rule. Plaintiff further argues that this motion is premature, as discovery and Defendants' depositions remain outstanding. Alternatively, Steiner argues that should this motion be granted, Plaintiff's trespass claim should be dismissed against him.

In rebuttal, Defendants allege that the instant motion does not violate the successive motions rule. Defendants contend that the Court's March 2019 Order did not address Defendants' last date of involvement on the construction of the subject premises. Moreover, the instant motion seeks to dismiss Plaintiff's Second Amended Complaint, which supersedes Plaintiff's prior complaints.

"Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" (*Coccia v Liotti*, 101 AD3d 664, 666 [2d Dept 2012] [citations omitted]).

Here, Defendants' summary judgment motion is successive as to the trespass claim, but not as to the negligent infliction of emotional distress and nuisance causes of action. To wit, Defendants' previous motion for summary judgment on the trespass claim was denied by this Court's March 2019 Order. However, sufficient cause exists to entertain Defendants' instant motion for summary judgment on Plaintiff's trespass claim. "Exceptions are permitted to the rule against successive summary judgment motions...when 'other sufficient cause' for the subsequent motion exists (*Varsity Tr., Inc. v Bd. of Educ.*, 300 AD2d 38, 39 [1st Dept 2002]). If the motion "demonstrates that the matter can be further disposed of without burdening the resources of the court and movants with a plenary trial" and "a dispositive point can be reached, it should be." *Id.*

In the instant motion, this Court finds that there is sufficient cause to hear the branch of Defendants' motion for summary judgment, which seeks dismissal of the trespass claim. Specifically, the trespass cause of action was initially pled in Plaintiff's original complaint, and in the subsequent

amended complaints. Each complaint alleges that the trespass claim accrued on January 27, 2013. The nuisance and negligent infliction of emotional distress causes of action were then added to Plaintiff's second amended complaint. These causes of action all relate back to the trespass claim, which allegedly accrued on January 27, 2013. Thus, this Court finds that all three causes of action can be decided herein on the merits.

Defendants contend that they never performed work on Steiner's property, and were not involved with the Project on January 27, 2013, the date the alleged trespass, nuisance, and negligent infliction of emotional distress claims accrued. In support of this contention, Defendants submit documentary evidence, such as New York City Department of Buildings ("DOB") filings which show they were last involved with the Project in May of 2012 (Defendants' Exhibit "C", "D", "E"). Plaintiff and Steiner do not contest Defendants' allegation. In fact, Steiner submits a contract he entered into with the new contractor, Blueline, which is dated May 17, 2012, and is consistent with Defendants' assertions (Steiner's Opposition, Exhibit "P").

Thus, this Court finds that Defendants have met their prima facie burden for summary judgment dismissal of the nuisance and negligent infliction of emotional distress causes of action against them. The trespass cause of action is dismissed on the same grounds. Denying summary judgment dismissal of the trespass claim cause of action, as being successive, would lead to inconsistent results, and burden the Court's resources.

Accordingly, Defendants' summary judgment motion for an order granting dismissal of Plaintiff's claims and Steiner's cross-claims against them is GRANTED.

#### **Steiner's Motion for Summary Judgment (Seq. 13)**

Steiner moves, pursuant to CPLR § 3212, for summary judgment, dismissing Plaintiff's trespass claim, the only remaining cause of action asserted against him, and all cross-claims. Steiner asserts that

the trespass claim is time barred, as the latest it could have occurred is around May of 2012, well before the alleged January 27, 2013, date of trespass. In support of his motion, Steiner relies on three site safety violations issued by the DOB with respect to the Project. The last was issued on May 22, 2012, and noted to be resolved on June 15, 2012 (Steiner's Exhibit "Q"). Moreover, Steiner alleges that the Plaintiff has not presented any evidence to support his allegation that the trespass occurred on or after January 2013.

In opposition, Plaintiff argues that her trespass claim arises out of Steiner's continuous trespass from January 27, 2013 onward. Plaintiff alleges that on or about January 27, 2013, the defendants entered her home and removed a fence in her backyard. The trespass allegedly continued through 2013 and 2014, where defendants entered Plaintiff's backyard and roof to carry out their construction activities. To buttress her contentions of continuous trespass, Plaintiff submits the affidavit of Keith Lewis, her son ("Mr. Lewis"); DOB records reflecting multiple job filings and work permits; including an "Alt 1 work permit" for the Property, that was renewed on March 24, 2013, and signed off on March 4, 2015; as well as a Certificate of Occupancy, dated August 5, 2013.

Generally, an action to recover damages for nuisance and trespass to real property must be commenced within three years of accrual (*see* CPLR 214[4] (*Lucchesi v Perfetto*, 72 AD3d 909, 911 [2d Dept 2010])). A cause of action alleging property damage accrues "when the damage [is] apparent" (*Russell v Dunbar*, 40 AD3d 952, 953 [2d Dept 2007] [internal citations omitted]).

"[A] trespass claim represents an injury to the right of possession, and the elements of a trespass cause of action are an intentional entry onto the land of another without permission" (*C & B Enters. USA, LLC v Koegel*, 136 AD3d 957, 959 [2d Dept 2016]). A trespass that is continuous constitutes an unlawful encroachment on a plaintiff's property, which gives rise to successive causes of action (*see Bloomingdales, Inc. v NY City Tr. Auth.*, 13 NY3d 61, 66 [2009]). Thus, "for purposes of

the statute of limitations, suits will only be time-barred by the expiration of such time as would create an easement by prescription or change in title by operation of law." *Id.*

Here, Plaintiff submits documents that raise triable issues of material facts as to whether the trespass accrued on January 27, 2013, and continued through 2015. Mr. Lewis' affidavit states that from 2013 through 2015, the defendants continued to enter Plaintiff's property, pile up construction debris in her backyard, and used it to access portions of the Project. Moreover, Plaintiff submits the above-referenced DOB records, as evidence that construction was on going during the alleged trespass period. Thus, Plaintiff has raised a triable issue of material fact as to whether Steiner's trespass was continuous.

Accordingly, Steiner's summary judgment motion to dismiss Plaintiff's trespass cause of action is DENIED.

#### **Plaintiff's Cross-Motion to Amend the Complaint (Seq. 14)**

Plaintiff cross-moves to amend her Complaint to add breach of contract, and encroachment/RPAPL § 871 claims. Plaintiff contends that her breach of contract claim arises out of a letter that was produced by Steiner's previous counsel at depositions. The letter allegedly memorialized an access agreement ("Agreement"), by which Plaintiff granted Steiner and his contractors, access to the Property in exchange for repairing two sheds in her backyard (Plaintiff's Exhibit "N"). Plaintiff alleges that Steiner did not repair the sheds and is in breach of this agreement. As for the proposed encroachment/RPAPL § 871 claim, Plaintiff alleges that the defendants used Plaintiff's roof to store construction materials and debris, provide a staging ground to build an additional/expansion of the roof or 4<sup>th</sup> floor for the project, and support an encroachment that was built on her property.

In opposition, Steiner notes that Plaintiff has already amended her complaint twice, and now seeks to amend it again. Steiner argues that the proposed breach of contract claim lacks merit, and would be prejudicial due to her delay in asserting it. Specifically, Steiner indicates that Plaintiff testified at her

deposition that she did not know who prepared the alleged Agreement, never signed it, and did not receive it directly. Yet, Plaintiff admitted that she saw the Agreement around January 31, 2012. Steiner also argues that the encroachment/RPAPL § 871 claim is prejudicial because it is duplicative of Plaintiff's existing trespass claim.

Plaintiff, in rebuttal, asserts that although she does not recall who prepared the Agreement, she did acknowledge its existence and had previously seen it. As to Steiner's argument that the RPAPL § 871 claim is duplicative, Plaintiff argues that trespass claims are routinely asserted with encroachment/RPAPL § 871 claims.

"Leave to amend a pleading 'shall be freely given' (CPLR § 3025 [b]), provided that the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*HSBC Bank v Picarelli*, 110 AD3d 1031, 1031 [2d Dept 2013]). "Leave to amend is subject to the discretion of the trial court" (*Lennon v 56th & Park (NY) Owner, LLC*, 199 AD3d 64, 71 [2d Dept 2021]). "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered" (*McIntosh v Ronit Realty, LLC*, 181 AD3d 579, 579-580 [2d Dept 2020] [internal citations omitted]).

"The burden of proof in establishing prejudice or surprise, or that the proposed amendment lacks merit, falls to the party opposing the motion for leave to amend (*Lennon v 56th & Park (NY) Owner, LLC*, 199 AD3d 64, 71 [2d Dept 2021]).

Here, Steiner satisfies his burden of prejudice or surprise. Plaintiff stated at her deposition that she knew about the purported Agreement since 2012. This contradicts Plaintiff's argument in the instant motion, where she claims she first learned of the agreement at her deposition (Steiner's Motion to Dismiss, Exhibit "L"). Plaintiff knew about the purported Agreement before the commencement of this

action, and throughout motion practice, which included two prior motions to amend the complaint. Moreover, Plaintiff offers no reason as to why she failed to bring the breach of contract claim in either her initial complaint or the subsequent amended complaints. Instead, Plaintiff contends that the delay in bringing the instant motion to amend was due to a fruitless mediation that was scheduled in October of 2021.

As to the merits of the proposed breach of contract claim, it "is well settled that where the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (*Bong Hyun Lieu v Goller Place Corp.*, 192 AD2d 634, 634-635 [2d Dept 1993]). Here, since the purported access agreement is not signed by both parties, Plaintiff is unlikely to succeed on her breach of contract claim (Plaintiff's Exhibit "N"). After an examination of the parties' respective contentions, this Court hereby denies Plaintiff's request to add a breach of contract claim.

Moreover, the proposed encroachment/RPAPL § 871 cause of action is duplicative of the trespass cause of action. RPAPL § 871(1) provides that an "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. Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify" (*City of NY v Prudenti's Rest. on the Riv., Inc.*, 203 AD3d 1127, 1128 [2d Dept 2022]). An unlawful encroachment has been consistently characterized as a continuous trespass giving rise to successive causes of action (*CSC Acquisition-NY, Inc. v 404 County Rd. 39A, Inc.*, 96 AD3d 986, 987 [2d Dept 2012]). "The threat of continuing trespass entitles a property owner to injunctive relief where irreparable injury may result." *Id.* A trespass claim is also "an action to recover damages for an injury to property" (*Ferran v Williams*, 194 AD2d 962, 963 [3d Dept 1993]).

In the instant case, Plaintiff seeks to add an encroachment claim because portions of Steiner's new building encroach upon hers. Moreover, Plaintiff alleges that Steiner stored construction debris on her roof and built an additional/expansion of the roof or 4<sup>th</sup> floor of the project, which encroached on her property. The continuous trespass and the proposed encroachment/RPAPL § 871 causes of action arise from the same factual allegations. The injunctive and/or monetary relief, which Plaintiff seeks, is available under the trespass cause of action. Therefore, the proposed encroachment/RPAPL § 871 is duplicative of Plaintiff's trespass claim.

Accordingly, based upon the above, defendants CCC and Nass' summary judgment motion (motion seq. #12), for an order granting dismissal of Plaintiff's claims and Steiner's cross- claims against them is **GRANTED**;

Steiner's summary judgment motion to dismiss (motion seq. #13) Plaintiff's trespass cause of action is **DENIED**; and further

Plaintiff's cross-motion for leave to amend the complaint (motion seq. #14) as to include breach of contract and encroachment claims are **DENIED**.

This constitutes the Decision and Order of the Court.

DATED: 8/2, 2022

  
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HON. CAROLYN E. WADE, J.S.C.

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