To commence the 30 day statutory time period for appeals as of right (CPLR 5512[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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VILLAGE OF MONROE and TOWN OF MONROE,

Plaintiffs,

-against-

JOSEPH GREENFELD, JUDITH GREENFELD, JOEL WEISENFELD, BOARD OF MANAGERS OF 131 FOREST AVENUE CONDOMINIUM, JOHN DOE WERCZBERGER, ANTHONY (TONY) MONGELLI INDIVIDUALLY and as owner of A.M.J. TRUCKING, INC. and OMRI GALLAY, INDIVIDUALLY and as owner of GALLAY, INC.,

Defendants.

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DECISION & ORDER

Index No. EF004685-2018

Sequence Nos. 3-6
Motion Date: 6/15/2022

HYER, J.S.C

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On April 27, 2018, Plaintiffs Town and Village of Monroe commenced this action for compensatory damages to recover the costs of remedial restoration for Town/Village property and for equitable relief, requiring Defendants to remove materials allegedly deposited on the Village

parcel, including but not limited to dirt, rocks, and portions of trees, as well as to remove any "nuisance" conditions upon the property.

The real property at 131 Forest Avenue ("Condo Property" or "Property") consists of a two-unit, two-story residential building and surrounding lands. It is a condominium managed by Defendant Board of Managers of 131 Forest Avenue ("Condo" or "Condominium") occupied by Defendants Joseph Greenfeld, Judith Greenfeld, and Joel Wiesenfeld ("Unit Owners") and their families. According to Plaintiffs, in or about April 2015, in order to level the yard, Unit Owners arranged for large amounts of soil to be trucked to the Condo Property and placed in the side yard along the boundary between the Condo Property and the Village parkland. Plaintiffs claim that Unit Owners/Condominium unlawfully cleared, filled, and graded the Condo Property and in doing so, left some material and debris on the Village Park parcel.

On February 14, 2020, Plaintiffs filed an Amended Complaint, adding Defendants Bennie Wercberger,[1] Anthony Mongelli individually and as owner of AJM Trucking, and Omri Gallay, individually and as owner of Gallay, Inc. According to the Amended Complaint, Plaintiffs allege five causes of action: (1) trespass; (2) intentional trespass; (3) nuisance; (4) violation of the Town's Code and Laws; and (5) nuisance *per se* (NYSCEF Doc. No. 29). Plaintiffs demanded (NYSCEF Doc No. 29 at 12):

1. Defendants remove all debris materials, unlawfully deposited on the Village Park Parcel, including without limitation, dirt and debris, rocks, boulders, stumps, trees, and portions of trees.

2. Defendants restore the Village Park Parcel to its natural state as it was prior to Defendants' unlawful trespass, or as close to its natural state as possible under the supervision of the Village Engineer.

[1] The Court notes that there are different spellings of Werczberger utilized throughout the litigation. The Court will use the spelling Wercberger in this Decision and Order.

3. Defendants seed and stabilize the slope between the Village Park Parcel and Defendants' property under the supervision of the Village Engineer.

4. Defendants pay the Village compensatory damages for the actual cost of any remedial restoration required to restore the Village Parcel to its natural state as it was prior to Defendants' unlawful trespass, or as close to its natural state as possible under the supervision of the Village Engineer.

5. Defendants pay to the Town and the Village all costs incurred by the Town Engineer as it relates to the restoration of the Village Parcel, including, but not limited to, review, supervision and inspection fees of the Village Engineer.

6. Defendants pay the Village punitive damages in an amount of $100,000.00 for the intentional and malicious trespass and damage to Village parkland property.

7. Defendants comply with all Town Code requirements, including obtaining a building permit for unauthorized activities.

8. Defendants remove any nuisance conditions upon the Property.

9. Defendants be enjoined from continuing the aforesaid nuisance and damage to the health, safety and welfare of residents of the Town and Village.

10. The Town and Village and their residents have such other, further and different relief as to the Court may seem just and proper, together with the recovery of Attorney fees as well as costs and disbursements of this action.

Issue was joined by Unit Owners/Condominium on July 23, 2020. Wercberger filed an Answer on July 29, 2020, and Gallay filed an Answer on October 16, 2020. According to the court file, Mongelli is in default.

Plaintiffs filed the Note of Issue and Certificate of Readiness for Trial on November 3, 2021. The Court now has four summary judgment motions, which were deemed fully submitted on June 15, 2022.

Background Information

Benny Wercberger

Wercberger explained that he is the principal of Be & Yo Realty, Inc., a corporation through which he conducts all construction work, and he does not conduct construction work personally (Wercberger Affidavit at ¶¶3-5). He co-owns Be & Yo with Joel Brach (NYSCEF Doc. No. 105 at 7-10). In 2015, Be & Yo was constructing a residential real estate project in Kiryas Joel, which required excavation of fill (Wercberger Affidavit at ¶6). Wercberger understood that Joseph need fill to grade a portion of his residence, so to save money, Be & Yo leased trucks to cart the fill from the construction project to the Property, and he assigned one of his employees, Levi Schwartz, to represent the company on the jobsite (Wercberger Affidavit at ¶¶8-10; NYSCEF Doc. No. 105 at 39-43, 45, 49-50, 73). Joseph did not pay Wercberger for the fill, and Wercberger did not pay him to dump it there (NYSCEF Doc. No. 105 at 46-47, 69-70). Be & Yo leased the bulldozer from Gallay, Inc. to spread the fill (Wercberger Affidavit at ¶¶11, 13-14; NYSCEF Doc. No. 105 at 77). Any work performed on the site was performed by Be & Yo, not by Wercberger personally (Wercberger Affidavit at ¶12, 14; NYSCEF Doc. No. 105 at 43). Joseph and/or Shea Greenfeld directed Be & Yo as to where to deposit the fill, and Be & Yo followed their instructions, believing that it was depositing fill on the Condo Property (Wercberger Affidavit at ¶15). Neither Wercberger nor Be & Yo was charged with violating the Town of Monroe Building Code or any Town or Village ordinances for failing to obtain a permit (Wercberger Affidavit at ¶¶16-17; NYSCEF Doc. No. 105 at 28). Wercberger has no knowledge of Be & Yo depositing any fill on Village property (Wercberger Affidavit at ¶22), but even if it was, it was done by Be & Yo and not him personally (Wercberger Affidavit at ¶23), and at the direction of Joseph and/or Shea (Wercberger Affidavit at ¶24).

Omri Gallay

In 2015, Gallay, Inc. rented an operator and bulldozer to Be & Yo (NYSCEF Doc. No. 106 at 8-10, 15). The day before the dirt was to be delivered, Gallay personally met Wercberger at the Condo Property. Wercberger told Gallay that he was going to truck and deliver dirt to the Property, and he wanted Gallay to spread it (NYSCEF Doc. No. 106 at 25). Gallay visited the site during the work, but he did not give his employee any directions, rather the homeowner and Be & Yo did (NYSCEF Doc. No. 106 at 30, 33, 39). Gallay testified that he was not required to pull permits for this work (NYSCEF Doc. No. 106 at 32). Gallay was present when Judith told his operator that she wanted to "make side of house wider and less of slope" (NYSCEF Doc. No. 106 at 48). The fill was clean and came from one of Wercberger's jobs (NYSCEF Doc. No. 106 at 51). Gallay did not know that the property on which the fill was placed was Village-owned (NYSCEF Doc. No. 106 at 55), and it was not his job to look for survey flags or markings – it was the homeowner's "[b]ecause I just give them a straight rental. They make all the decisions" (NYSCEF Doc. No. 106 at 56). Gallay assumed Wercberger and the homeowner knew where the property line was because they told him "not to worry about it," that they were "going to take care of it" (NYSCEF Doc. No. 106 at 62). According to Gallay, Wercberger told him that he was going to be there and take care of the project and direct everyone (NYSCEF Doc. No. 106 at 65).

Joseph Greenfeld

Joseph testified that at no time in 2015 did he seek to level or fill in a portion of the Condo Property located at 131 Forest Avenue (NYSCEF Doc. No. 121 at 23). He received an April 30, 2015 Notice of Violation from the Town of Monroe for "[t]he company was dropping sand on my property" (NYSCEF Doc. No. 121 at 23-24, 45, 52). Shea said "[t]hat people came to the property

and asked to stop putting sand on my property" (NYSCEF Doc. No. 121 at 24, 66). Joseph had been in Hungary on vacation "a few days before, the day before" (NYSCEF Doc. No. 121 at 25). Someone had previously spoken to Shea about asking to fill the slope on his Property (NYSCEF Doc. No. 121 at 28-29). He told Shea that if it went on his Property, it would be fine (NYSCEF Doc. No. 121 at 29). He understood that it was going to be placed on the slope, which was "still my property" (NYSCEF Doc. No. 121 at 30). The purpose was to level it out (NYSCEF Doc. No. 121 at 31). Joseph did not need to level it out, but Shea "asked me to do it, and I told him no problem" (NYSCEF Doc. No. 121 at 31). Other than the one call from Shea, Joseph had not had any contact with anyone regarding the material placed on his Property (NYSCEF Doc. No. 121 at 41). Joseph did not pay for any of the dirt, and he did not have a written contract for it (NYSCEF Doc. No. 121 at 33-34, 43, 56, 67).

Judith Greenfeld

Judith Greenfeld asked Shea about the dump truck on the Property, and he told her that "he wants to level out a little bit in the front there, just to look nice. There was a ditch over there, so I said fine" (NYSCEF Doc. No. 123 at 22-23, 27, 41; NYSCEF Doc. No. 124 at 13). Her husband was not home (NYSCEF Doc. No. 124 at 17-18, 29). Her son told her that "Benny was going to have extra sand, and he told him that he could fill the slope on the property, in my own property," which Judith agreed with (NYSCEF Doc. No. 124 at 13). Judith understood that the fill was delivered only to her Property (NYSCEF Doc. No. 124 at 14-15). "I'm not sure if it was on my property. On my property I told him he can put the material. Where he put it, I don't know" (NYSCEF Doc. No. 124 at 15). Shea did not tell her who was bringing the material (NYSCEF Doc. No. 123 at 23-24). Judith did not think there would be a cost for the material (NYSCEF Doc.

No. 123 at 24, 28). She did not know from where it was coming and she did not consult her husband about it (NYSCEF Doc. No. 123 at 24-25, 28-29). Judith did not give any direction about leveling out what was being dumped (NYSCEF Doc. No. 123 at 25, 41). Judith later learned from her husband that Wercberger brough the material to the Property (NYSCEF Doc. No. 123 at 34-35). Judith never spoke to Wercberger about the material brought to her Property (NYSCEF Doc. No. 123 at 37).

A chain link fence was installed on Judith's Property to protect the children (NYSCEF Doc. No. 124 at 21-22). When the material was being deposited, Judith did not have a conversation with anyone about the process of depositing the material (NYSCEF Doc. No. 124 at 25-26).

Shea Greenfeld

Shea Greenfeld explained that Wercberger, who operated Be & Yo Realty, deposited material at the Condo Property in April 2015 (NYSCEF Doc. No. 161 at 13, 49, 51). Wercberger was there with dump trucks and Shea told him that it was okay to deposit material there (NYSCEF Doc. No. 161 at 13), to fill the uneven spot on his land (NYSCEF Doc. No. 161 at 15, 17, 20-22, 26-27). Prior to that, Shea did not have a conversation with either of his parents about it (NYSCEF Doc. No. 161 at 14), although he "spoke" to them, and one of them gave "their okay" (NYSCEF Doc. No. 161 at 17-20).

Shea was not there when the filling happened (NYSCEF Doc. No. 161 at 22). Shea spoke with Wercberger at the Condo Property when he was already depositing the dirt or other material (NYSCEF Doc. No. 161 at 36-37). Shea and Wercberger did not discuss where the materials were to be deposited on the Condo Property (NYSCEF Doc. No. 161 at 22). Nobody directed

Wercberger as to where to deposit the material (NYSCEF Doc. No. 161 at 27). Neither his mother nor father were home when the materials were delivered (NYSCEF Doc. No. 161 at 29).

Shea also testified that "[o]bviously [Wercberger] didn't just put sand on our property without telling anyone. So obviously he spoke with someone and I don't remember to whom he spoke originally in the first beginning" (NYSCEF Doc. No. 143 at 31). Shea acknowledges that he might have called his father and said that Wercberger had sand to put down and fill the small piece of property (NYSCEF Doc. No. 143 at 34, 36). After speaking with his father and Wercberger, the "next thing I know was a dump truck over there," filling the spot (NYSCEF Doc. No. 143 at 38). Shea could not say who gave Wercberger permission, and Shea had no interest in leveling off the Condo Property (NYCEF Doc. No. 143 at 67, 69).

Joel Weisenfeld

Joel Weisenfeld testified that he was aware of the violation for backfilling the Condo Property, but he was not involved (NYSCEF Doc. No. 125 at 18-19, 36; NYSCEF Doc. No. 126 at 14). He saw the dump truck backing up and dumping the dirt (NYSCEF Doc. No. 125 at 19-20, 22). Joseph or Judith subsequently told him that the Condo Property had a big ditch and the backfill was "to straighten it out" (NYSCEF Doc. No. 125 at 21-23, 26; NYSCEF Doc. No. 126 at 12, 17, 25-26, 33). Weisenfeld explained that the Property has a metal fence running on both sides of it to the back and a black fence in front (NYSCEF Doc. No. 126 at 10-11). The backfilling took place on the outside of the metal fence (NYSCEF Doc. No. 126 at 11, 13). Today, the part of the Property where the backfilling took place is level and has grass (NYSCEF Doc. No. 126 at 27). The metal fence was moved so the level grassy area is now inside the metal fence (NYSCEF

Doc. No. 126 at 28). Weisenfeld recalled Joseph being present at times while the area was being backfilled (NYSCEF Doc. No. 126 at 31-32).

Mark Edsell

Mark Edsell is the consulting engineer for the Town of Monroe (NYSCEF Doc. No. 107 at 7). Edsell did a field review in connection with the subject property (NYSCEF Doc. No. 107 at 6-7, 9). He "observed soils that were on a slope, which are the subject of the photos, some other debris and other materials on that same slope, and reviewed those with the representative from the commission, which I took the photos, and I was tasked to make a recommendation for restoration of that area" (NYSCEF Doc. No. 107 at 13). The debris was stone material, plant material, and soil (NYSCEF Doc. No. 107 at 14). Edsell's understanding was that the soil on the slope was imported to the site (NYSCEF Doc. No. 107 at 14). The mitigation restoration plan that Edsell prepared encompassed cleanup and stabilization of the slope (NYSCEF Doc. No. 107 at 6-18, 21, 23-24, 28).

Edsell observed "siltation at the base of the slope on the, let's call it the flat portion of the bottom of the slope, which indicated to me that there was some erosion occurring" (NYSCEF Doc. No. 107 at 17). He did not conclude that it was "a condition of collapse but it would, my observation was that the soil surface was not vegetated and stable and that erosion would continue," but it did not pose a risk of imminent peril (NYSCEF Doc. No. 107 at 17).

Mayor Dwyer

Neil Scott Dwyer, mayor of Village of Monroe since 2018 and a former village trustee (NYSCEF Doc. No. 109 at 6-7), observed rocks, boulders, soil, branches, trees, and weeds in the

area of the subject material (NYSCEF Doc. No. 109 at 16-17, 23, 30). To Mayor Dwyer's knowledge, no fill has been removed and the Property has not been regraded (NYSCEF Doc. No. 109 at 35). He saw at least a dozen deciduous trees cut down on the Park's land (NYSCEF Doc. No. 109 at 35-36). Mayor Dwyer opined from his observation that the placement of the soil was intentional because it "was soil that was placed over and over again to bring the grade up from the original low spot on the property in the park" (NYSCEF Doc. No. 109 at 84).

Benigno Maldonado

Benigno Maldonado, Town of Monroe's building inspector, issued the April 30, 2015 Notice of Violation in connection with the subject property after conducting a site visit with Paul Truax, a former employee of the parks commission (NYSCEF Doc. No. 130 at 6-8, 11-12). When he visited the site that day, Maldonado observed "obvious work done to that property," consisting of "[g]rading and filling" (NYSCEF Doc. No. 130 at 12, 14). A bulldozer was being used (NYSCEF Doc. No. 130 at 15-16).

On May 20, 2015, Maldonado heard from Joseph, or someone on his behalf (NYSCEF Doc. No. 130 at 20). Maldonado met Joseph and told him that anything to the left of the markers needed to be removed (NYSCEF Doc. No. 130 at 20). The work was never done (NYSCEF Doc. No. 130 at 21). Maldonado never formed an opinion as to whether the presence of the fill material on the parkland created a condition of imminent peril (NYSCEF Doc. No. 130 at 29). Joseph did not object to the stop work order or to what Maldonado identified as the property boundary (NYSCEF Doc. No. 130 at 32).

Summary Judgment Motions

Seq. #3

On January 28, 2022, Gallay moved for summary judgment, seeking dismissal of the Amended Complaint and all cross claims on the ground that as lessor of the bulldozer and its operator to Be & Yo Realty (hereinafter "Be & Yo"), it did not owe a duty to the Town or Village. Gallay argues that its duty was to provide the lessee, Be & Yo, with a bulldozer in good working order and an operator, who could carry out the directions given to him by Be & Yo. Gallay did not direct or supervise the use of the bulldozer; rather the operator was entirely under the direction of Be & Yo and/or the homeowner.

In support of its motion, Gallay proffered, *inter alia*: (1) the pleadings; (2) a copy of the invoice for the bulldozer rental; (3) Bennie Wercberger's deposition testimony; (4) Omri Gallay's deposition testimony; (5) Mark Edsell's deposition testimony; (6) Neil Scott Dwyer's deposition testimony; and (7) Omri Gallay's Affidavit.

Seq. #4

On January 31, 2022, Unit Owners/Condominium collectively (aka "Condo Defendants") moved for summary judgment, arguing that they did not hire Gallay and/or AJM Trucking to do the work; rather they were hired by Wercberger. Condo Defendants also argue that none of them supervised, directed, or controlled them in connection with the hauling, dumping, and pushing of the dirt around on the Property. Further, they did not pay anyone for the work or dirt – they were doing Wercberger a favor. They assert that the area where the fill was placed is undeveloped, and there is no evidence of contamination or threat of imminent peril. Finally, Condo Defendants argue that the individual Unit Owners cannot be personally liable for the actions taken with respect

to the common elements. They argue that it is undisputed that the area of the Property associated with Plaintiffs' claims is part of the common elements, and that Plaintiffs have failed to allege in their Amended Complaint a theory of piercing the veil of the Condo Board to reach any individual Unit Owner. As such, Condo Defendants argue that the individual Unit Owners are entitled to summary judgment, dismissing the Amended Complaint as to them.

In support of their motion, Condo Defendants proffered, *inter alia*: (1) Joseph Greenfeld's 2019 deposition transcript; (2) Joseph Greenfeld's 2021 deposition transcript; (3) Judith Greenfeld's 2019 deposition transcript; (4) Judith Greenfeld's 2021 deposition transcript; (5) Joel Weisenfeld's 2019 deposition transcript; (6) Joel Weisenfeld's 2021 deposition transcript; (7) Omri Gallay's deposition transcript; (8) Mark Edsall's deposition transcript; (9) Benigno Maldonado's deposition transcript; (10) Neil Scott Dwyer's deposition transcript; (11) August 17, 2015 letter from William Going; and (12) December 23, 2015 Letter from William Going.

Seq. #5

On or about February 1, 2022, Defendant Wercberger moved for summary judgment (seq. #5), arguing for dismissal of the claims as they name him personally and not his company. He also asserted that the First, Second, Third, and Fifth Causes of Action are time barred as to him.

In support of his motion, Wercberger proffered, *inter alia*: (1) Wercberger's Affidavit; (2) Gallay, Inc.'s invoice; (3) Omri Gallay's deposition transcript; (4) Joseph Greenfeld's 2021 deposition transcript; and (5) Shea Greenfeld's 2021 deposition transcript.

Seq. #6

Finally, Plaintiffs moved for summary judgment, asserting that the debris was indisputably brought on the Village's property by and through the intentional and reckless acts of all Defendants and all the debris remains on the Park Property. Plaintiffs argue that all elements of their causes of action have been established and request an inquest on damages. In support of their motion, Plaintiffs proffered, *inter alia*: (1) survey report; (2) photographs; (3) Joseph Greenfeld's 2019 deposition transcript; (4) Judith Greenfeld's 2019 deposition transcript; and (5) Shea Greenfeld's 2019 deposition transcript.

Opposition to Motions

In opposition, Wercberger argues, *inter alia*, that Gallay's argument that he did not owe a duty to Plaintiffs is misplaced because Plaintiffs' claims are "grounded in intentional tort and violation of provision of the Town Code" (Preston Affirmation in Opposition at ¶¶16, 18). According to Wercberger, Gallay is not entitled to summary judgment regarding Plaintiffs' claims for trespass or nuisance because "he failed to establish that he or his agent/employee did not enter the Village Park Parcel or cause the fill and other materials to enter that property" (Preston Affirmation in Opposition at ¶26). In fact, according to Wercberger, Gallay did not deny that he or his employee physically entered Plaintiffs' property (Preston Affirmation in Opposition at ¶29), and it is undisputed that Gallay's operator was responsible for leveling and depositing the fill (Preston Affirmation in Opposition at ¶¶30-33). Moreover, Wercberger argues that Gallay made no factual or legal argument regarding intentional, negligent, or reckless conduct – all of which can provide the basis for a nuisance cause of action. Finally, Wercberger asserts there is a question

of fact as to whether Gallay directed or controlled his employee while the work was being performed (Preston Affirmation in Opposition at ¶39).

In opposition to Plaintiffs', Wercberger's, and Gallay's summary judgment motions, Condo Defendants, through Joseph, assert that "it is not disputed by anyone that neither I, nor any of the other Condo Defendants, hired co-Defendants Werczberger [sic], Gallay, or Anthony Mongelli/AJM Trucking to do any work" (NYSCEF Doc. No. 195 at ¶¶3-4). Plaintiffs offer no proof that there was any trespass on the Park's property, as they did not prove where the boundary line is, and they did not prove that any fill material spilled onto the Park (NYSCEF Doc. No. 195 at ¶¶7-8). In addition, according to Joseph, "[n]ot a single witness reports that they actually heard myself or my wife direct anyone to dump dirt onto the Park or to push dirt onto the Park" (NYSCEF Doc. No. 195 at ¶12-14, 16, 18, 24; Joseph Greenfeld Affidavit at ¶¶11-12). This is the same for the other Condo Defendants (NYSCEF Doc. No. 195 at ¶13). Further, "none of the Condo Defendants wanted fill material to be pushed onto the Park" (NYSCEF Doc. No. 195 at ¶¶15, 29). Joseph stated that they only wanted the area within the chain link fence filled, which is the Condo's Property (NYSCEF Doc. No. 195 at ¶¶20-23).

Gallay argues in opposition that whether the Condo Defendants supervised, directed, or controlled the operation as landowner/homeowners is the crux of this matter and is "entirely in dispute." Gallay also argues that it is in the business of renting equipment, with or without an operator, and is not vicariously liable for the acts of its employees.

And Plaintiffs oppose Gallay's, Condo Defendants', and Wercberger's motions for summary judgment, arguing that, *inter alia*, Joseph knew about the placement of the material on the Condo Property for his benefit and failed to order the work to stop. Plaintiffs argue that there are issues of fact to be decided at by the trier of fact.

Legal Analysis

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; *see also Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

"'The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist'" (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 201 [2d Dept 2019], quoting *Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]). Accordingly, "'[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned'" (*Bank of New York Mellon v Gordon*, 171 AD3d at 201, quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). "'[W]here credibility determinations are required, summary judgment must be denied'" (*Bank of New York Mellon v Gordon*, 171 AD3d at

201-202, quoting *People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012], *aff'd* 21 NY3d 439 [2013]).

1. **Statute of Limitations**

"[A] trespass that constitutes an unlawful encroachment on a plaintiff's property will be considered a continuous trespass giving rise to successive causes of action" (*Bloomingdales, Inc. v New York City Transit Authority*, 13 NY3d 61, 66 [2009]). "Thus, for purposes of statute of limitations, suits will only be time-barred by the expiration of such time as would create an easement by prescription or change of title by operation of law" (*Bloomingdales, Inc. v New York City Transit Authority*, 13 NY3d at 66). Causes of action for nuisance and trespass have a three-year statute of limitations (CPLR § 214[4]).

Here, the unrefuted evidence is that the fill, which was placed in the subject location sometime in April 2015, has never been removed. Because it is well settled that trespass and nuisance are continuing wrongs, giving rise to successive causes of action (*Bloomingdales, Inc. v New York City Transit Authority*, 13 NY3d at 66, citing *509 Sixth Avenue Corp. v New York City Transit Authority*, 15 NY2d 48 [1964]), the commencement of this action on April 28, 2018, was timely and the matter is not time barred. Further, because the fill has never been removed, under the same principal that the trespass and nuisance are continuing wrongs, the addition of Wercberger to the action in 2020 is not time barred.

2. **Personal liability of Wercberger**

According to the Amended Complaint, Plaintiffs allege that Benny Wercberger (s/h/a John Doe Wercberger) arranged with co-Defendants to dump material/unknown fill and/or debris upon

the Condo Property and the Village Parcel. Wercberger argues that he is not personally liable for any damages and that the action should be dismissed because he only acted in his corporate capacity, Be & Yo Realty, Inc. Wercberger asserts that there is no evidence that his actions pierced the corporate veil, and the Amended Complaint is silent as to this issue.

"The general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009]). "The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation" (*id.*). "A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetuating a wrong that resulted in injury to the plaintiff" (*id.*, citing *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140-141 [1993]).

The Amended Complaint is silent as to any allegations of piercing of the corporate veil. Further, any cross claim lodged against Wercberger also fails to allege the piercing of the corporate veil. The unrefuted evidence is that Be & Yo Realty was the entity involved in the actions at issue here, not Wercberger personally. Wercberger denied being present on the property at the time of the purported dumping, stating his manager was there (NYSCEF Doc. No. 149 at 50, 54). His company hired the trucks to haul the material, and Gallay's company's bulldozer and operator to push the material (NYSCEF Doc. No. 127 at 54-55, 69; NYSCEF Doc. No. 104). Gallay maintained that it was Be & Yo that directed his employee (NYSCEF Doc. No. 97 at 18). Finally,

Plaintiffs do not even address this legal argument in their opposition papers. Accordingly, summary judgment is granted in favor of Wercberger and the Amended Complaint and all cross claims as to him personally are dismissed.

3. Personal Liability of Unit Owners

The Record Owner/Declarants of Defendant 131 Forest Avenue Condominium are Joseph Greenfeld, Judith Greenfeld, and Joel Wiesenfeld ("Unit Owners") (NYSCEF Doc. No. 118 at 1). As Unit Owners, they are not permitted to alter the landscaping located on the common elements (NYSCEF Doc. No. 118 at 9). There is no dispute that the subject area of the Condo Property is part of the common elements of the Condominium (NYSCEF Doc. No. 116 at ¶3). According to the Declaration, "the common elements of the Community will consist of all of the Community, except the Units, including, but without limitations, ... the land, building and improvements (other than the Units) comprising the Community (including the land under the Units and under the improvements), all utility or other pipes and material located outside of the Units" (NYSCEF Doc. 118 at 5).

"'[C]ondominium common elements are solely under the control of the board of managers'" (*Lewis v Lester's of N.Y., Inc.*, 205 AD3d 796, 797-798 [2d Dept 2022], quoting *Pekelnaya v Allyn*, 25 AD3d 111, 120 [1st Dept 2005]). "In keeping with the vesting of exclusive control of a condominium's common elements in the board of managers, it is well established that a cause of action arising from the condition or operation of the common elements does not lie against the individual units; the proper defendant on such a cause of action is the board of managers" (*Lewis v Lester's of N.Y., Inc.*, 205 AD3d at 798, citing *Pekelnaya v Allyn*, 25 AD3d at 113).

Here, the Unit Owners established *prima facie* entitlement to judgment as a matter of law dismissing the Amended Complaint and any cross claims against them individually as the acts at issue involve landscaping and altering the common area of the Condominium. In opposition, Plaintiffs and Co-Defendants failed to raise a triable issue of fact. More importantly, none of them even addressed this argument, thereby conceding that no question of fact exists (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 762 [2d Dept 2019], citing *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975] [where a party fails to oppose some or all matters on motion for summary judgment, facts as alleged in movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists]). As such, summary judgment is granted in favor of Defendants Joseph Greenfeld, Judith Greenfeld, and Joel Weisenfeld and the Amended Complaint and all cross claims are dismissed as they pertain to them individually.

4. Trespass & Intentional Trespass

"[A] trespass claim represents an injury to the right of possession (see 104 NY Jur 2d, Trespass, § 10 at 471), and the elements of a trespass cause of action are an intentional entry onto the land of another without permission" (*Ivory v International Bus. Machines Corp.*, 116 AD3d 121, 129 [3d Dept], *lv denied* 23 NY3d 903 [2014]). "Regarding intent, the defendant must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he or she willfully does, or which he or she does so negligently as to amount to willfulness" (*City of Albany v Normanskill Cr., LLC*, 165 AD3d 1437, 1439 [3d Dept 2018] [quotation marks omitted]; *see Ivory v International Bus. Machines Corp.*, 116 AD3d at 129). "Physical invasion of another's property does not necessarily imply an actual breaking or entering by the wrongdoer in person but may be accomplished by the casting of

substances or objects upon the plaintiff's property from outside its boundaries, irrespective of any question of care or negligence, so long as the invasion is intentional" (104 NY Jur 2d, Trespass § 18). "However, since a trespass necessarily involves an invasion by an act of the trespasser, a defendant cannot be held liable for trespass where the objects cast upon the plaintiff's property, although belonging to the defendant, were cast onto the plaintiff's land by the act of a third party" (*id.*).

"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" (*Double M Dev., LLC v Khrom*, 189 AD3d 1227, 1228 [2d Dept 2020] [internal citations, bracket, and quotation marks omitted]). "Both nuisance and trespass require some intentional act on the part of the alleged tortfeasor" (*Double M Dev., LLC v Khrom*, 189 AD3d at 1228, citing *211-12 N. Blvd. Corp. v LIC Contr., Inc.*, 186 AD3d 69, 82-83 [2d Dept 2020]). "Regarding intent, the defendant must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he or she willfully does, or which he or she does so negligently as to amount to willfulness" (*City of Albany v Normanskill Cr., LLC*, 165 AD3d at 1439 [quotation marks omitted]; *see Ivory v International Bus. Machines Corp.*, 116 AD3d at 129). "Although nuisance is often discussed in terms of intentional conduct, 'such a claim [is] actionable upon proof that [the] defendant's invasion was either intentional, negligent or reckless, or otherwise involved abnormally dangerous activities'" (*DelVecchio v Collins*, 178 AD3d 1336, 1337 [3d Dept 2019], quoting *517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC*, 156 AD3d 1187, 1191 [3d Dept 2017]).

As to trespass, Gallay failed to establish a *prima facie* case that he did not intend to trespass or interfere with Plaintiffs' property. Gallay focuses on the purported lack of duty he had to Plaintiffs. The Court notes that duty is inapplicable with the intentional cause of action of trespass. As such, the Court need not consider the opposing papers and it denies Gallay's motion for summary judgment as to the First and Second Causes of Action.

Because the Unit Owners and Wercberger have been granted summary judgment, the Court must examine the evidence as it pertains to the two remaining Defendants and Plaintiffs, who each claim that they are each entitled to summary judgment on the trespass causes of action. However, upon this Court's review of the evidence before it in support of each party's respective motion, the Court concludes that there are significant questions of fact as to which Defendant placed and directed the material and if those Defendants possessed the requisite intent to commit trespass, and questions of credibility – all of which cannot be resolved on a motion for summary judgment.

5. Nuisance

With respect to the Third Cause of Action for nuisance, Plaintiffs allege that "Defendants' intentional and negligent depositing of debris material increased the slope of the Village Park Parcel and substantially increased stormwater runoff from Defendants' property to the Village Park Parcel, causing erosion of Village property that is continuous in nature" (Amended Complaint at ¶62). Plaintiffs further allege that "Defendants knew or should have known that increasing the slope of the Village Park Parcel would result in increased stormwater runoff, damaging Village property and interfering with Village's use and possession of its property" (Amended Complaint at ¶63).

The Court notes that Plaintiffs fail to specify if the alleged nuisance is public or private. "The elements of a private nuisance cause of action are: (1) an interference substantial in nature with a person's property right to use and enjoy land, (2) that is intentional in origin and unreasonable in character, and (3) caused by another's conduct in acting or failure to act" (*Sullivan v Keyspan Corp.*, 155 AD3d 804, 807 [2d Dept 2017]). "It is actionable by the individual person or persons whose rights have been disturbed" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977]). A public nuisance, however, "'is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency' and 'consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all ... in a manner such as to ... endanger or injure the property, health, safety or comfort of a considerable number of persons'" (*State of N.Y. v Shore Realty Corp.*, 759 F2d 1032, 1050 [2d Cir 1985], quoting *Copart Insdustries, Inc. v Consolidated Edison Co. of N.Y.*, 41 NY2d at 568 [citations omitted]). "Public and private nuisance bear little relationship to each other. Although some rules apply to both, other rules apply to one but not the other" (*State of N.Y. v Shore Realty Corp.*, 759 F2d at 1050]).

"New York public nuisance law is clear that, in an action brought by the State in the exercise of its police powers for either abatement or restitution fault is not an issue, the inquiry being limited to whether the condition created, not the conduct creating it, is causing damage to the public" (*State v Fermenta ASC Corp.*, 160 Misc2d 187, 195 [Sup Ct, Suffolk County 1994] [internal quotation marks and citations omitted]). "While generally nuisance actions are brought against landowners, everyone who creates a nuisance or participates in the creation or maintenance of a nuisance are liable jointly and severally for the wrong and injury done thereby. Even a non-landowner can be liable for taking part in the creation of a nuisance upon the property of another"

(*id.* [internal citations, quotation marks, and ellipses omitted]; *see State of N.Y. v Shore Realty Corp.*, 759 F2d at 1052-1053). "Where 'a nuisance has its origins in negligence, negligence must be proven'" (*Cangemi v United States*, 13 F4th 115, 136 [2d Cir 2021], quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d at 569 [internal quotation marks omitted]).

As a threshold matter, the Court finds, based on the facts before it, that Plaintiffs are asserting Defendants' actions constitute a public nuisance (*see New York Trap Rock Corp. v Town of Clarkstown*, 299 NY 77, 81 [1949] [plaintiffs are alleged in counterclaim to be performing acts that have injured the health of the citizens of town; such acts would be unlawful and a public nuisance]). "Whether conduct 'constitutes a public nuisance must be determined as a question of fact under all the circumstances'" (*City of Rochester v Premises Located at 10-12 S. Washington St.*, 180 Misc2d 17, 21 [Sup Ct, Monroe County 1998], quoting *New York Trap Rock Corp. v Town of Clarkstown*, 299 NY 77 at 80).

Gallay's argument that he had no duty to Plaintiffs in the context of a nuisance claim is misplaced, and arguably irrelevant (see *State v Fermenta ASC Corp.*, 160 Misc2d at 195). His duty stems from the fact that he is a member of the general public who cannot cause harm to the municipality's property. Further, there are questions of fact as to whether Defendants' conduct offended public morals, interfered with the use by the public of a public place, or endangered or injured the property, health, safety, or comfort of a considerable number of persons (*State v Fermenta ASC Corp.*, 160 Misc2d at 195). The specific portion of the Village Property at issue is in the woods. While Edsell performed a field review of the location and observed soil and debris on the slope. He could not conclude that the slope was in danger of collapsing or that the condition posed a risk of imminent peril. He did not recommend that the soil be removed (NYSCEF Doc. No. 107 at 12-13, 16, 19). He confirmed that he had an email exchange with Town Attorney

Steven Gaba where he informally suggested that some cleanup and grassing of the area, possibly with plantings and silt fences, would be sufficient (NYSCEF Doc. No. at 23). The soil was tested and found to be free of any evidence of contamination (NYSCEF Doc. No. 108 [Going Report]). Mayor admitted that the bandstand is not visible from the subject location (NYSCEF Doc. No. 131 at 13; NYSCEF Doc. No. 109 at 13, 17-18). Mayor did not know if the fill or material impaired the park's usefulness (NYSCEF Doc. No. 109 at 18).

6. Town Code Violation

Plaintiffs move for summary judgment against all Defendants on the Fourth Cause of Action, alleging violation of Town Code § 23-11, "Building permits required; applications":

> A. No person, firm, corporation or association shall commence or cause to be commenced * * * nor shall any person, firm, corporation or association do any earth work, such as excavating, filling, blasting, changing the grade of any land * * * without first obtaining a separate building permit from the Building Department * * *.
>
> B. No person, firm, corporation or association shall commence or cause to be commenced any earth work or earthmoving activities whatsoever, such as excavation, clearing, stripping, filling, grading or removal, in preparation for any use of the land different than its current use without first making an application to and obtaining approval of the Town Building Department to do so.
>
> * * *
>
> E. Applications shall be made by the owner or lessee or agent of either or by the architect, engineer or builder employed in connection with the proposed work.
> * * *

It is undisputed that no Defendant applied for, and obtained, a building permit for the subject work. Gallay insists that he was not required to obtain the permit. The plain reading of the Code supports Gallay's position, and the Court finds that summary judgment is granted in Gallay's favor as to the Fourth Cause of Action. However, as there is no factual dispute as to the

Condominium's failure to obtain a building permit, the Court grants Plaintiffs summary judgment in their favor as to the Fourth Cause of Action as to the Condominium.

7. **Nuisance per se**

"Nuisance per se is a nuisance based on an act which is unlawful, even if performed with due care" (*State of New York v Fermenta ASC Corp.*, 238 AD2d 400, 403 [2d Dept 1997]). "In an action based on a theory of nuisance per se, the plaintiffs need only establish a violation of law, and need not show that the nuisance was intentional or negligent. They must still, however, establish the remaining elements of the cause of action, which include proof of a situation created by the defendants which endangers or injures the property, health, safety, or comfort of a considerable number of persons" (*id.*).

Here, as the Court found above, the Condominium failed to comply with the Town Code by not procuring a building permit; however, as stated previously, there are triable issues of fact as to the remaining elements of nuisance. Thus, summary judgment is denied with regard to the Fifth Cause of Action (*see Overocker v Madigan*, 113 AD3d 924, 926-927 [3d Dept 2014] [showing that horse pen was unlawful excuses defendants only from proving that plaintiffs' actions were negligent or intentional; other elements of nuisance cause of action must still be shown and defendants offered no proof that horse pen's placement caused substantial or unreasonable interference]).

Accordingly, it is hereby

ORDERED that Defendant Gallay's motion (seq. #3) is granted in part and denied in part; and it is further

ORDERED that the Fourth Cause of Action is dismissed as to Defendant Gallay; and it is further

ORDERED that Condo Defendants' motion (seq. #4) is denied in part and granted in part to the extent summary judgment is granted and the Amended Complaint and all cross claims are dismissed as to Joseph Greenfeld, Judith Greenfeld, and Joel Weisenfeld, individually; and it is further

ORDERED that Defendant Wercberger's motion (seq. #5) is granted for the reasons stated herein and the Amended Complaint and all cross claims are dismissed as to Defendant Benny Wercberger s/h/a John Doe Werczberger; and it is further

ORDERED that Plaintiffs' motion (seq. #6) is denied in part and granted in part to the extent summary judgment is granted as to the Fourth Cause of Action in Plaintiffs' favor as it pertains to the Defendant Board of Managers of 131 Forest Avenue Condominium, and the issue of damages is deferred to trial on the remaining causes of action; and it is further

ORDERED that any issue not directly addressed herein is denied; and it is further

ORDERED that the remaining parties and counsel are to appear before the undersigned **in person** on Monday, October 31, 2022 at 10:00 a.m. for a settlement conference in Courtroom 4. All parties are to appear in person and be prepared to engage in detailed settlement discussions with the Court.

The foregoing constitutes the Decision and Order of the Court.

Dated: Goshen, New York
September 27, 2022

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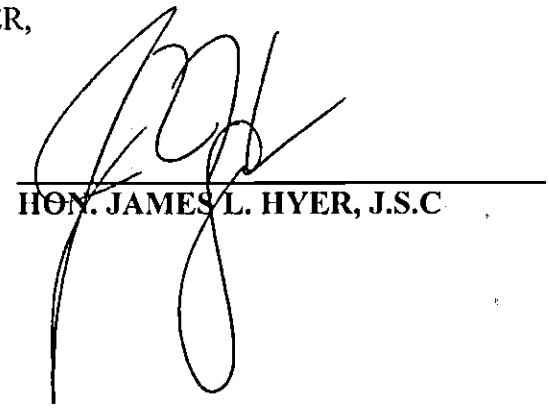

HON. JAMES L. HYER, J.S.C

To: Counsel of Record via NYSCEF