

**Kimball v Bay Ridge United Methodist Church**

2023 NY Slip Op 30900(U)

March 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 506107/2015

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23<sup>rd</sup> day of March, 2023.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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DAVID S. KIMBALL and DORCAS C. KIMBALL,

Plaintiffs,

-against-

BAY RIDGE UNITED METHODIST CHURCH,

Defendant.

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**DECISION / ORDER**

Index No. 506107/2015

Mot. Seq. # 15

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion, Affirmations and Exhibits Annexed \_\_\_\_\_

373-380

Opposing Affirmations and Exhibits \_\_\_\_\_

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Reply \_\_\_\_\_

392-394

Upon the foregoing papers, plaintiffs David S. Kimball and Dorcas C. Kimball move for an order, pursuant to CPLR 4404(b), setting aside this court’s decision after trial on the ground that the court “misapprehended plaintiffs’ theory of liability and overlooked or misapprehended pertinent facts or law” [Doc 373].

This is an action for private nuisance, which arises from the 2008 demolition of defendant’s building, which was adjacent to the rowhouse owned by plaintiffs. The demolition exposed what had been the plaintiff’s party wall, which became an end wall after

the demolition, resulting in water infiltration into plaintiffs' premises and other related damage, such as mold and peeling paint. A bench trial was conducted over eight dates, during which the court heard testimony and received evidence pertaining to, among other things, the damage to plaintiffs' property and the efforts by plaintiffs to remediate the conditions. The court's extensive findings of fact are set forth in a decision after trial dated September 12, 2022 [Document 372]. At the end of the trial, defendant's counsel moved, pursuant to CPLR 4401, for a judgment dismissing the complaint based upon defendant's second affirmative defense (in their answer to the amended complaint) of the statute of limitations. The court reserved decision at the time, and subsequently granted defendant's motion in the Court's decision after trial. The court noted that plaintiffs first became aware of the damage caused by the demolition of defendant's adjoining structure in 2008, yet did not bring this action until 2015, well past the three-year statute of limitations applicable for private nuisance cases. The court rejected plaintiffs' argument that the "continuing wrong" doctrine applied, as there was no evidence that defendant or any of its agents or contractors did anything on defendant's property following the demolition. At the time of the trial, defendant still owned the property, which has been, since the demolition, and until the trial was commenced, a vacant lot. Following the entry of the decision after trial, plaintiffs brought the instant motion to set aside the court's decision under CPLR 4404(b), which provides:

"After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue."

In their motion, plaintiffs maintain that the court misapprehended their theory of liability, alleging that “[t]his is not an action for damage to Plaintiffs’ property,” but rather “an action to recover the costs Plaintiffs’ were forced to incur to abate continuing conditions threatening the structural stability of the east wall on their building and restore Plaintiffs’ easement over Defendant’s property for support of Plaintiffs’ building” (Affirmation in Support, NYSCEF Doc No 374, at Page 3). Distilled to its essence, plaintiffs’ argument in the instant motion is a reiteration of their argument that this action was timely under the “continuing wrong” doctrine.

“An action to recover damages for injury to property must be commenced within three years of the date of the injury” (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031 [2013]; see CPLR 214 [4]; *EPK Props., LLC v Pfohl Bros. Landfill Site Steering Comm.*, 159 AD3d 1567, 1568 [4th Dept 2018]). The cause of action accrues when the damages are apparent, not when the damages are discovered (see *Cranesville Block Co. v Niagara Mohawk Power Corp.*, 175 AD2d 444, 446 [3d Dept 1991]). Where there are acts of continuous nuisance and trespass, these acts give rise to successive causes of action under the continuing wrong doctrine (see *Lucchesi v Perfetto*, 72 AD3d 909, 912 [2d Dept 2010]). However, the continuing wrong doctrine may only be predicated on continuing wrongful **acts** and not on the continuing **effects** of earlier wrongful conduct (emphasis added) (see *Gibbons v Grondahl*, 161 AD3d 590 [1st Dept 2018]; *Rowe v NYCPD*, 85 AD3d 1001 [2d Dept 2011]). It is inapplicable where there is only one tortious act complained of, since the cause of action accrues in those cases at the time that the wrongful act first injured plaintiff; the accrual date does not change as a result of continuing consequential damages (see *Town of Oyster Bay*, 22

NY3d at 1032; *New York Seven--Up Bottling Co. v Dow Chem. Co.*, 96 AD2d 1051, 1052 [2d Dept 1983], *affd* 61 NY2d 828 [1984]). Thus, claims of continuing wrongs, including those involving continuing nuisance or trespass, which are premised upon a discrete act, are not saved by the continuing wrong doctrine (*see Town of Oyster Bay*, 22 NY3d at 1032; *Naccarato v Sinnott*, 176 AD3d 1467, 1468 [3d Dept 2019]).

The evidence presented at trial showed that the (allegedly improperly performed) 2008 demolition of defendant's building, which was a "discrete act," was the cause of the damage to plaintiffs' property, including the resultant water infiltration. Any subsequent consequential damages stemming from this discrete act, such as rainstorms or hurricanes, did not give rise to new and successive causes of action, since there was no evidence of any further acts by defendant or its agents within the limitations period which can be construed to have been a continuing nuisance. As the water infiltration into plaintiffs' home following the demolition of the adjoining building was apparent more than three years prior to the commencement of this action, plaintiffs' (sole cause of) action for nuisance was untimely (*see Naccarato*, 176 AD3d at 1468; *Alamio v Town of Rockland*, 302 AD2d 842, 844 [3d Dept 2003]).

Plaintiffs' reliance on the factually distinguishable *Bloomingtons, Inc. v New York City Tr. Auth.* (13 NY3d 61 [2009]) is unavailing. In that case, a contractor, as part of a project undertaken by the New York City Transit Authority (NYCTA), cut into a working drainpipe for the Bloomingtons store while installing a conduit for the NYCTA which was encased in concrete. After the store experienced flooding in its basement when it rained, Bloomingtons hired a contractor to repair the drainpipe. The contractor discovered that the

drainpipe had been cut and had been bisected by the concrete conduit, rendering the drainpipe useless. Consequently, Bloomingdales needed to install a new drainpipe, which cost it in excess of \$165,000, and it then commenced an action against the NYCTA, setting forth causes of action for trespass and nuisance. The Supreme Court granted summary judgment to the NYCTA on the ground that the action was time-barred. The Appellate Division, in a 3-2 decision, reversed, and reinstated the trespass and nuisance causes of action. The majority ruled that Bloomingdales' claims were timely because they were not tied to the single negligent act of severing the drainpipe, but rather that the concrete-encased conduit, which physically interfered with plaintiff's drainpipe, also interfered with plaintiff's easement and right of access to the public sewer system, which "constituted a continuing trespass and resulted in successive causes of action." (*Bloomingdales, Inc. v New York City Tr. Auth.*, 52 AD3d 120, 124 [1st Dept 2008]). In its decision affirming the Appellate Division, the Court of Appeals stated:

"Here, the presence of the concrete conduit interfered with Bloomingdales' access to its drainpipe and ultimately the city sewer, and as a result, Bloomingdales was required to install a new pipe following a new path over the conduit. Notably, the actual damages sought by Bloomingdales did not arise from the mere severance of its drainpipe, but from the need to install the new drainpipe in a different location. Thus, because the conduit encroached on Bloomingdales' right-of-way, we find that the Appellate Division correctly concluded that Bloomingdales has a viable cause of action sounding in trespass, for which the statute of limitations has not yet run.

For the same reasons, we find that there is a viable claim for private nuisance, which is, in this case, simply another way of characterizing the trespass claim. There was a continuous interference with Bloomingdales' right to use and enjoy its property right, and as such the same statute of limitations as the trespass applies" (*Bloomingdales, Inc.*, 13 NY3d at 66).

While plaintiffs here contend that they have an easement “over defendant’s property for support of their building” [affidavit in support, Doc 374 ¶13], they do not have such an easement. Plaintiffs’ counsel avers that since the metes and bounds description in the plaintiffs’ deed specifies that the property line is “through a party wall,” that plaintiffs’ have an easement for purposes of the support of plaintiffs’ building, citing a few court decisions [¶17]. However, here, the New York City Buildings Department granted defendant a demolition permit, and once the building was torn down, this claimed “supporting easement” terminated.

There was no evidence presented at trial that defendant at any time after the 2008 demolition encroached on the plaintiffs’ property, or entered it, such that plaintiffs could claim defendant caused a continuous interference with plaintiffs’ right to use and enjoy their property. Indeed, plaintiffs ultimately came to court in 2015 for an order granting them permission to enter upon defendant’s property to perform work on their exterior wall. Any expenditures made by plaintiffs to stop the water infiltration were consequential damages which can only be traced to the singular event of defendant’s demolition of the adjoining building more than six years prior to the commencement of this action.

Accordingly, plaintiffs’ motion to set aside the September 12, 2022 decision after trial pursuant to CPLR 4404 (b) is denied. The proposed judgment submitted by defendant shall be entered simultaneously herewith.

The forgoing constitutes the decision and order of the court.

ENTER:



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Hon. Debra Silber, J.S.C.