Children's Magical Garden v Marom
2023 NY Slip Op 33423(U)
September 30, 2023
Supreme Court, New York County
Docket Number: Index No. 654960/2019
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CHILDREN'S MAGICAL GARDEN,

Plaintiff,

- v -

DAVID MAROM, individually, and DAVID MAROM as President of THE HORIZON GROUP,

Defendants.

INDEX NO. 654960/2019

MOTION DATE N/A

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 290, 291, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Background and Procedural History

The court's prior decision which granted plaintiff's motion for sanctions, sequence number 006, provides a detailed background of the dispute, which will be supplemented as necessary for this motion.[1] (NYSCEF Doc. No. [NYSCEF] 308, October 5, 2022 decision and order [mot. seq. no. 006].)

Plaintiff Children's Magical Garden (the Garden) asserts nine causes of action all arising from defendants allegedly entering the Garden and destroying or damaging plants and trees, including the empress, mulberry, and maple trees on Lots 16, and erecting and maintaining physical barriers on Lots 16 and 18, without the Garden's consent including: (1) tortious interference with contractual and prospective business

[1] The court presumes familiarity with the case and adopts all capitalized terms as used in the court's prior decision.

relationships; (2) ejectment; (3) trespass;[2] (4) a claim arising under Real Property Actions and Proceedings Law § 861; (5) forcible entry; (6) private nuisance;[3] (7) prima facie tort; (8) declaratory judgment; and (9) injunction against defendants David Marom, individually, and as President of The Horizon Group (together, Marom).

In this motion, the Garden moves for partial summary judgment on its claims for private nuisance and permanent injunction,[4] and dismissing Marom's affirmative defenses. The Garden contends it is entitled to summary judgment on its claim for a permanent injunction because Marom's interference with Lots 16 and 18 causes irreparable harm to the Garden's mulberry tree. The Garden seeks to enjoin Marom and all persons acting on his behalf from:

(1) "damaging or encumbering the mulberry tree…", (NYSCEF 247, notice of motion at 1); and

(2) "any type of encroachment, intrusion, or interference with Lots 16 or 18[]", including but not limited to maintaining the encroaching fence (*id.* at 2) and cutting trees; and

(3) "violating City of New York Department of Parks & Recreation" (NYC Parks & Rec) Rules with respect to Lots 16 and 18, which (i) require permits if any work is performed within 50 feet of the mulberry tree; (ii) forbid construction

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[2] In motion sequence number 002, the court granted partial summary judgment in favor of the Garden for trespass caused by defendant's fence beginning the summer of 2018. (NYSCEF 245, decision and order [mot. seq. no. 002] at 3.) Damages are to be determined at trial, including a factual assessment of when the trespass began which could not be determined on this summary judgment motion.

[3] The Garden cannot reframe this claim as one for public nuisance without a motion to amend the complaint.

[4] The Garden has never sought a preliminary injunction in this action.

work unless proper tree guards and protective fencing are installed around the mulberry tree's critical root zone; and (iii) require 19 feet of radial protection such that no equipment or materials are placed in its critical root zone of the mulberry tree. (*Id.* at 2-3.)

The Garden seeks damages of "$10,000 plus $5,000 per annum in compensatory damages for site remediation and arborist services[.]"[5] (*Id.*)

The Garden contends that it is entitled to summary judgment on its private nuisance claim because Marom's littering of construction barricades, trash, and other debris caused swarms of mosquitos and a stench permeating the Garden during the 2019 season. As a result of this alleged nuisance, the Garden asserts it was deprived of use of Lots 16 and 18 during the 2019 season and that the court should award $74,589.50[6] in compensatory damages and punitive damages.

This motion also concerns the 40-foot mulberry tree that grows largely on Lots 16 and 19.[7] (NYSCEF 265, Frank S. Ferrantello[8] aff ¶ 14.) The Garden's expert, Peter Bartlett, a certified arborist and qualified tree risk assessor with over 20 years of field experience in arboriculture, visited the site on May 16, 2021 and June 14, 2021,

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[5] "I strongly recommend that the Mulberry tree and surrounding area be inspected by a certified arborist no less than once a year, every year going forward, and that measures to mitigate soil compaction and to maintain and ensure the vitality of the Mulberry tree be followed promptly. My estimate of the cost for the scope of work described above is $10,000, plus $5,000 per year going forward." (NYSCEF 263, Bartlett Report at 6.)

[6] $56,325.50 is the projected value of loss of use and enjoyment by expert Matthew J. Guzowski. (NYSCEF 266) + $18,264.00 are the "hard costs" for site cleanup by expert Orlando Ballate. (NYSCEF 264.) which sums to **$74,589.50.**

[7] Ownership over Lot 19 is the subject of another action before Justice Debra A. James, index No. 152094/2014, herein the Norfolk Action.

[8] Ferrantello is a licensed land surveyor with over 20 years of experience. (NYSCEF 265, Ferrantello aff ¶ 1.) Ferrantello stated with a "reasonable degree of certainty" that the "main trunk of the Mulberry tree is on both [L]ot 16 and 19." (*Id.* ¶ 14.)

performed an International Society of Arboriculture (ISA) Tree Risk Assessment on the mulberry tree, and reviewed photographs, videos, and other materials provided to him. (NYSCEF 263, Bartlett Report at 4–5, 10.[9]) According to Bartlett, "it appear[ed to him] that prior to 2013, the tree and plant-life in the Garden was [sic] healthy and not subject to encroachments or obstructions. Since 2013, however, the Garden has been subject to regular encroachments and obstructions[.]" (*Id.* at 8-9.) Bartlett writes that "it [was] obvious that protective measures . . . have not been followed at the site of the Mulberry tree, . . . [] as fencing, equipment, and construction materials were alongside, or within just a few feet, of the Mulberry tree." (*Id.* at 14.) During his visit, Bartlett "observed that the Mulberry tree was surrounded by numerous types of debris and other encroachments." (*Id.* at 16.) Specifically, Bartlett found that

> "fencing, traffic barriers, and sand/dirt compaction will severely affect the Mulberry tree's roots where they are most vital (the dripline and root zone) and the continued presence of fencing or other obstructions in that sensitive area pose significant danger to the Mulberry tree, and thereby pose a threat to people in the Garden, sidewalk, and street, and surrounding structures."

(*Id.*) Bartlett refers, in his report, to photographs taken during his visit. (*Id.* at 10.) One photo depicts debris and the fencing surrounding the mulberry tree:

[9] Pages refer to NYSCEF generated pagination.

(*Id.*, Appendix C, at 27.)

Bartlett opines:

> "At present, the Mulberry tree should continue to thrive. However, the land is subject to disturbances that have a deleterious effect on tree health—such as abutting fencing, the placement of traffic barriers, soil compaction, and construction debris. Without remedial action to stop continued obstruction to the Mulberry tree area, there will become an inevitable and significant risk tree failure, thereby posing a grave risk of bodily harm to people who frequent the Garden, sidewalks, streets, and surrounding structures and destruction of plant life, habitat, and ecosystems that are irreplaceable and fundamental to the character and value of this community garden."

(*Id.* at 4.)

Marom admitted to securing the fence around the three lots and admitted to entering Lot 19 to put the fence back up in August 2018, before the Garden's 2016 license expired on December 31, 2018 and thus the court granted plaintiff's motion for

summary judgment for trespass. (NYSCEF 245, decision and order at 2 [mot. seq. no. 002].) Marom proffers no expert reports.

Legal Standard

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate disputed material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Where this showing is made, the burden shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action. (*Id.*) The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), however, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citations omitted].)

Discussion

Permanent Injunction

To establish a prima facie entitlement to a permanent injunction, a plaintiff must demonstrate that there was a "violation of a right presently occurring, or threatened and imminent; that he or she has no adequate remedy at law; that serious and irreparable harm will result absent the injunction; and that the equities are balanced in his or her favor." (*Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009] [internal citation and

quotation marks omitted]; *see also Lemle*, 92 AD3d 494, 500 [1st Dept 2012] [citation omitted].) "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent in the injunction." (*Icy Splash Food & Beverage v Henckel*, 14 AD3d 595, 596 [2d Dept 2005], citing *Kane v Walsh*, 295 NY 198, 205 [1946].)

In support of the permanent injunction, the Garden asserts two forms of irreparable harm. The Garden relies on Bartlett, who opines that should "obstructions and disturbances [be] permitted to continue, the deterioration of the Mulberry tree's base poses the potential risk of hurting or even killing passersby." (NYSCEF 263, Bartlett Report at 14.) Thus, the Garden argues that the current obstructions—fencing, equipment, construction materials—and prior obstructions Marom has stored or placed within a few feet of the mulberry tree—traffic barriers, construction debris, and drilling—has created an imminent threat to the public, that is, the 40-foot tree falling down on a high-traffic street. The Garden also contends a second risk exists, that since the mulberry tree is indispensable to the ecosystem of the community garden, death of the mulberry tree would destroy the other plants and shrubs in the garden.

"Injunctive relief should be invoked only to protect against future, repeated violations of a party's rights." (*144-80 Realty Associates*, 193 AD3d 723, 725 [2d Dept 2021] [affirming grant of permanent injunction as defendant was continuing to breach the bylaws and lease despite ongoing litigation and permanent injunction was necessary to prevent continuing violations], citing *Exchange Bakery & Restaurant v Rifkin*, 245 NY 260, 264-65 [1927] ["To prevent repeated violations, threatened or probable, of the complainant's property rights, an injunction may be granted. . . . But the

basis of permissible action by the court is the probability of such interference in the future, a conclusion only to be reached through proof contained in the record. Unless the need for protection appears, equity should decline jurisdiction."].)

Importantly, the court's analysis is limited to Lots 16 and 18. It is undisputed that the Garden has a present right to the property under its current license and has had such a right since 2013 with a gap from December 2018 to April 5, 2020 when the license lapsed. (NYSCEF 110, 2013 License; NYSCEF 11, 2016 License; NYSCEF 70, April 5, 2020 License.) The rights to Lot 19 are *sub judice* before Justice James. However, regardless of who owns Lot 19, the mulberry tree cannot become a safety threat to the community. The Garden has demonstrated, prima facie, irreparable harm as Marom has failed to remove his encroaching fence after the City's Notices to Cure in 2016 and 2019 nor after this court's October 5, 2022 trespass finding. This court has already determined that the fence at the root of the trespass on Lot 16 encroaches up to five feet without justification. (NYSCEF 245, decision and order [mot. seq. no. 002] at 2.) It is undisputed that the fence endangers the life of the mulberry tree. (NYSCEF 263, Bartlett Report at 16 ["This fence imposes continuing harm on the base of the Mulberry tree in the form of compaction to the roots of the tree."].) Bartlett's uncontroverted report recommended "[r]emoval of fencing and debris; exclusion of significant weight-bearing construction activity, construction materials storage, and heavy equipment use to outside root zone; removal of fencing and debris; remediation of soil compaction." (*Id.*, Appendix B, ISA Basic Tree Risk Assessment at 24.) Bartlett further opines that "[i]f obstructions and disturbances are permitted to continue, the deterioration of the Mulberry tree's base poses the potential risk of hurting or even

killing passersby." (*Id.* at 17.) Moreover, the Mulberry tree provides "significant shade and climate control for the Garden, it yields berries, and forms an integral part of its habitat and ecosystem, which can only be achieved by growing a tree to maturity over the course of many years." (*Id.* at 18.) Thus, an injunction is necessary to prevent the ongoing harm to the mulberry tree. Accordingly, the burden shifts to Marom.

Marom fails to raise a triable issue of fact. Marom's explanation that he offered the Garden assistance in removing his encroaching fence, is insufficient and not a triable issue of fact. Likewise, the court rejects Marom's excuse that NYC Parks & Rec failed to remove the fence. Marom's statement that any party can remove the fence at any time, is blame-shifting and misses the mark. Marom further contends summary judgment should be denied because there is an issue of fact as to whether he caused the damage to the mulberry tree. However, the Court has already found trespass by Marom's fence. Marom claims that Bartlett provides no evidentiary basis for the contention that the items in the pictures (items that Bartlett blames for damage to the mulberry tree's base) belong to Marom.[10] According to Marom, Bartlett overlooks the Garden's own disturbances. For example, Marom points to the Garden's port-a-potty that is within a few feet of the mulberry tree that produces dangerous levels of methane and ammonia gasses unfit for the tree. This assertion, which appears in Marom's opposition brief, is completely unsupported factually or by an expert. Further, the court rejects Marom's arguments challenging the Bartlett Report as Marom failed to offer his own expert, instead offering his affidavit and his attorney's affirmation. Neither Marom

[10] In addition to the fence, Marom's own admissions show that some of the items causing harm or once causing harm belong to Marom, for example, traffic barriers.

nor his attorney are horticulture experts and their statements, to the extent they opine on the tree's health, do not meet the standard of evidence required to rebut the motion for summary judgment by demonstrating a triable issue of fact. (*Schaefer v Marchiano*, 193 AD2d 664, 664 [2d Dept 1993].)

The Garden has therefore sufficiently demonstrated that its rights are currently being violated, causing irreparable harm to the tree so long as the encroaching fence stands. Marom is ordered to safely remove the fence and is enjoined from maintaining the encroaching fence on Lots 16 and 18. Failure to do so by the court ordered deadline will result in a penalty for each day of noncompliance.

Next, the Garden's seeks to enjoin Marom from pruning branches and vegetation overhanging on Lot 19. Marom admits that he cut those branches in May 2019 and argues that he was within his rights to do so under New York law. However, the court is unable, at this time, to address this issue as the dispute over Lot 19's ownership is ongoing. *Ahmed v Zoghby* illuminates why this court cannot address this requested relief. (63 Misc 3d 866 [City Court, Orange County 2019].) The plaintiffs in *Ahmed* alleged that roots from defendant-neighbor's tree damaged their pavement and driveway and further claimed that the branches from the tree on defendant's property had to be trimmed as the branches produced large piles of leaves and other debris on the roof of plaintiffs' house. (*Id.* at 867-68.) Plaintiffs in *Ahmed* paid a contractor to cut tree branches that were overhanging their house and sought reimbursement under a private nuisance theory. (*Id.*) At trial, the evidence demonstrated that the tree (roots, branches, and the trunk) straddled both plaintiffs' and defendant's property line. (*Id.* at 871.) There, the court cited the "long-standing rule in New York that a 'tree is wholly the

property of him upon whose land the trunk stands.'" (*Id.* at 870 [collecting cases].) The tree in *Ahmed* was on both properties. (*Id.* at 871; NYSCEF 265, Ferrantello aff ¶ 12 ["The main trunk of the Mulberry tree in question is on both lot 16 and lot 19."].) Accordingly, the tree belonged to both plaintiffs and defendant, each owning as tenants in common, and the court held that plaintiffs were not entitled to reimbursement, but rather, because they were tenants in common, had the right to exercise self-help even if the branches did not cause "sensible damage"—that is, actual injury to a person or that person's property. (*Id.* at 872-73.) Here, while the court is unable to resolve the issue of Marom's pruning of overhanging branches on Lot 19, such activity must be done in a responsible manner so as not to threaten public safety as discussed above. Thus, the court denies that part of the Garden's request for an injunction enjoining Marom from pruning or otherwise cutting overhanging branches and vegetation over Lot 19 without prejudice. However, in light of the unrebutted testimony about a safety hazard to the community, and the possibility that the parties are tenants in common, any pruning shall be conducted by a licensed professional on 10 days' notice to the Garden.

The Garden's requested relief to enjoin Marom from violating NYC Parks & Rec rules, which is based on Bartlett's assessment that "without safeguards, work or construction activity poses a serious threat to nearby trees" (NYSCEF 263, Bartlett Report at 13), is denied without prejudice. There has been no present showing of Marom's intentions to develop or begin construction. Further, if the issue of ownership over Lot 19 is ultimately determined in favor of Marom, and to the extent Marom intends to develop the area affecting the mulberry tree, he must comply with all applicable city regulations, including but not limited to NYC Parks and Rec and New York City

Department of Buildings (e.g., Building Code §§ 1803.1, 1805.4 and 3309.4.1 are rules with respect to developing the foundation.)

Finally, the Garden seeks fees for arborist services to remedy the harm done to the mulberry tree. Although the Garden styles its request for arborist fees as compensatory damages, it is not. The fee request for professional arborist is a reparative injunction. "A reparative injunction prevents the future harmful effects of past acts; it requires the defendant to restore the plaintiff to a preexisting condition to which plaintiff was entitled." (*Lampkin v District of Columbia*, 886 F Supp 56, 62 [DDC 1995].)

Bartlett estimates that the cost for "careful, professional removal of the encroachments causing continuous damage to the Mulberry tree's roots and for activities that led to stress and further soil compaction to cease[]" is $10,000 plus an additional $5,000 per year for the tree to be "inspected by a certified arborist no less than once a year, every year going forward[.]" (NYSCEF 263, Bartlett Report at 18.) Bartlett's report is unrebutted.

Thus, the Garden's request for arborist's fees is granted upon the satisfaction of the following conditions. The Garden must submit an affidavit explaining:

(1) The length of time requested for the arborist's services and the basis for the time period, which must be related to the length of time left on the Garden's license from NYC Parks & Rec.

(2) The present value of the arborist's services in accordance with (1), which shall come from an economist or other appropriate expert.

The court cannot direct Marom to pay arborist fees indefinitely.

During the pendency of the actions, this decision should be not read in any way as an invitation to disturb any part of the mulberry tree that sits in Lots 16 and 19 during the pendency of the actions. Indeed, any and all actions taken in the vicinity of the tree must be taken with care and consistent with this decision and New York law.

Private Nuisance Claim

"The elements of a common-law claim for a private nuisance are: '(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 in acting or failure to act.'" (*Berenger v 261 W. LLC*, 93 AD3d 175, 182 [1st Dept 2012], citing *Copart Indus. v Consolidated Edison Co. of N.Y.,* 41 NY2d 564, 570 [1977].)

The Garden argues that Marom's dumping traffic barriers, debris, and other garbage on "the Garden Property" caused an infestation of mosquitos and foul stench to arise in the garden, which resulted in a reduction of the Garden's open hours and scheduled events and ultimately closure of the Garden in 2019. As such, the Garden claims that Marom's conduct deprived the Garden of use of the space for the 2019 season and ability to raise funds and receive donations. In opposition, Marom challenges the Garden's standing to pursue a nuisance claim, whether the interference was intentional, that the interference was not substantial as evidenced by the Garden's continued use of the property, and challenges the bases of the Garden's expert reports. On reply, the Garden insists that this court decided the standing issue in the trespass motion.

As to Lot 19, the court cannot address the standing issue at this time until there is a determination of the ownership over Lot 19

As to standing, Marom's objection relies on the Garden's license with the City which lapsed between December 31, 2018 and April 5, 2020. A claim "alleging private nuisance is distinguishable from a cause of action alleging trespass in that trespass involves the invasion of the plaintiff's interest in the exclusive possession of its land, while a private nuisance involves the invasion of the plaintiff's right to use and enjoyment of its land." (*Volunteer Fire Association of Tappan, Inc., v County of Rockland*, 101 AD3d 853, 856 [2010], citing *Bloomingdales, Inc. v New York City Transit Authority*, 13 NY3d 61 [2009], *Copart*, 41 NY2d at 570.) Here, the nuisance is alleged to have occurred in 2019 while the trespass occurred in 2018 or earlier; Marom admittedly erected or reinstalled the fence in 2018, while the Garden had a license. Whether a plaintiff possesses the requisite property interest to bring a private nuisance claim is a question of law. (*Schillaci v Sarris*, 122 AD3d 1085, 1087 [3d Dept 2014].) However, plaintiff fails to demonstrate such an interest in the absence of the City's license. This part of plaintiff's motion is denied without prejudice and must await trial.

Marom's Affirmative Defenses

The Garden moves to dismiss Marom's third to sixteenth affirmative defenses. "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." (CPLR 3211 [b].) "[T]he [movant] bears the heavy burden of showing that the defense is without merit as a matter of law." (*Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479, 481 [1st Dept 2015] [citation omitted].) "[T]he court should not dismiss a defense where there remain questions of fact requiring a trial." (*Granite State Ins. Co.*, 132 AD3d at 481 [citation omitted].)

The defenses are: Third, lack of standing because the Garden is a mere licensee with a revocable privilege to do one or more acts of a temporary nature on the lands of another and has no possessory interest in Lot 16 and/or Lot 18. Fourth, failure to join necessary parties to the action, including NYC Parks & Rec. Fifth, NYC Parks & Rec is the true party-in-interest as record owner and licensor of Lot 16 and 18, and any and all trees, plantings, and structures thereon. Sixth, Marom complied with New York law when he had trees pruned. Seventh, Marom is not the direct or proximate cause of damages. Eighth, damages were caused by the Garden's own conduct, or the conduct of its agents, representatives and consultants. Ninth, doctrine of unclean hands and/or its own equitable conduct. Tenth, plaintiff has failed to identify any legally cognizable damage that it has suffered as a result of the allegedly wrongful actions or inaction of Marom. Eleventh, statute of limitations. Twelfth, estoppel, waiver, abandonment, and/or laches. Thirteenth, failure to mitigate or avoid any damages allegedly sustained. Fourteenth, unclean hands or inequitable conduct. Fifteenth, unripe and claims are not justiciable. Sixteenth, plaintiff's claim are frivolous. Seventeenth, Marom reserves the right to assert any and all additional or further defense as may be revealed.

The motion is denied with respect to the sixth defense as the Norfolk Action is ongoing and the merits of the defense cannot be determined at this juncture.

As for the third, fourth and fifth defenses, the Garden contends the court already dismissed these defenses in the trespass summary judgment motion, but the court has not. The court's decision and order clearly states that "plaintiff has established it has standing to bring this action for trespass to Lots 16 and 18 against defendants." What was before the court was the summary judgment on the Garden's trespass claim and

Marom's argument that the Garden lacked possessory rights to bring the trespass claim as a licensee. (NYSCEF 102, opp brief at 8 [mot. seq. no. 002] ["B. Plaintiff Lacks Standing to Pursue Its Trespass Claim"].) Thus, the Garden's misplaced reliance on the court's summary judgment order to dismiss these defenses is insufficient for dismissal. (*South Point, Inc. v Redman*, 94 AD3d 1086, 1087 [2d Dept 2012].) The Garden's argument that the fourth and fifth defenses are conclusory, which they are not, is equally unavailing. (*See Chrysler East Building, LLC v Keenwawa, Inc.*, 2023 NY Slip Op 03193, *1 [1st Dept 2023] [citation omitted].)

The motion is granted with respect to the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth defenses.

The motion to dismiss the ninth affirmative defense of unclean hands is granted because the question of whether Marom and his employees caused the Incident was decided on motion sequence number 006 when the court drew a negative inference.[11] The seventh and eighth defenses are duplicative of the ninth defense and dismissed. The fourteenth is the same defense, verbatim, as the ninth and thus dismissed.

The tenth, eleventh, twelfth, fifteenth, and sixteenth defenses are conclusions of law without supporting facts and therefore dismissed. (*170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372, 372-73 [1st Dept 2008] [citations omitted].)

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[11] In the October 5, 2022 decision, NYSEF 308, the court granted plaintiff's motion for an adverse inference that Moales is defendants' employee and "Before this trial began, the court decided that defendants willfully destroyed and failed to preserve documents showing payment of services to Morales and all communications, emails, and/or texts regarding 157 Norfolk, and that the evidence would have been important on the issue(s) of who was responsible for the causing the Incident. You should therefore presume that had the evidence been preserved the evidence would have been against defendants' position that Marom and/or his workers did not cut down branches or trees or inserted rotting garbage in the traffic barriers on the property."

The thirteenth defense is dismissed for pleading a conclusion of law without supporting facts as Marom has not pleaded that the Garden has any duty to mitigate. To assert a mitigation defense, defendants have the "burden to establish not only that plaintiff failed to make diligent efforts to mitigate its damages, but also the extent to which such efforts would have diminished its damages. Moreover, if plaintiff reasonably made such diligent efforts to mitigate, it does not matter if, in retrospect, another, better means of limiting the financial injury was possible." (*LaSalle Bank Nat. Assn. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107-108 [1st Dept 2007] [citations omitted].) The seventeenth defense is not a defense at all and thus dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its cause of action (a) for a permanent injunction against defendants is granted, in part, to the extent indicated herein and otherwise denied; (b) for private nuisance is denied; and (c) dismissing defendants' affirmative defenses is granted, in part, with respect to defendants' seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth defenses, and is otherwise denied; and it is further

ORDERED that defendants are enjoined from maintaining the encroaching fence upon Lots 16 and 18; and it is further

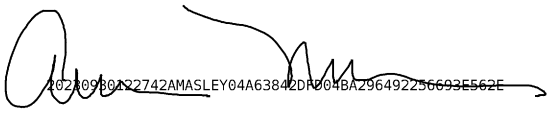
ORDERED that defendants shall remove the encroaching fence within 14 days of the date of this order. Failure to do so, by the deadline, will result in a $1,000/day fine against defendants every day thereafter until it is removed; and it is further

ORDERED THAT the Garden's request for arborist's fees is granted upon condition that within 14 days, the Garden submit an affidavit explaining:

(1) The length of time requested for the arborist's services and the basis for the time period, which must be related to the length of time left on the Garden's license from NYC Parks & Rec.

(2) The present value of the arborist's services in accordance with (1), which shall come from an economist or other appropriate expert.

ORDERED that the parties shall review the court's Part 48's trial procedures and file motions in limine within 60 days of the date of this decision; otherwise waived. The court will hold a Trial Scheduling Conference after motions in limine are decided and all appeals resolved.



9/30/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE