To commence the statutory time period for appeals as of right (CPLR 5513 [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 WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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CITY OF NEW ROCHELLE,

Plaintiff,

Index No. 54190/2016

– against –

DECISION & ORDER
Seq. 1 & 2

FLAVIO LAROCCA, MARIA LAROCCA, FLAVIO LA ROCCA & SONS, INC. a.k.a F. LAROCCA & SONS, INC. and FMLR REALTY MANAGEMENT, LLC.,

Defendants.

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The following papers were read and considered on this motion by defendants (Seq. 1) for an Order granting them summary judgment dismissing plaintiff's Complaint, pursuant to CPLR 3212 and severing defendants' two (2) counterclaims set forth in their Answer for trial; and on this motion by plaintiff (Seq. 2) for an Order pursuant to CPLR 3025 permitting plaintiff to amend its Reply to defendants' counterclaims to assert the defenses of statute of limitations, failure to comply with notice of claim requirements and laches; and pursuant to CPLR 3212 granting summary judgment in favor of plaintiff on plaintiff's claims for trespass, negligence and public nuisances; and dismissing defendants' counterclaims, ordering the removal of the encroachment onto City of New Rochelle property, enjoining defendants from further encroachment and imposing statutory penalties pursuant to New Rochelle City Code Section 111-40 of at least $7,500.00, plus $50.00 for each day the encroachment has not been remedied; and for such other and further relief as this Court deems just and proper:

Papers Considered NYSCEF Doc. No. 46-202

Seq. 1

1. Notice of Motion/Statement of Material Facts/Exhibits 1-61/Affidavit of Flavio LaRocca/Memorandum of Law.
2. Affirmation of Peter A. Meisels, Esq. in Opposition/Exhibits 1-7/Response to Statement of Material Facts/Memorandum of Law/Exhibits 1-20.
3. Defendants' Response to plaintiff's Additional Facts/Exhibit 62/Affidavit of Flavio LaRocca in Reply/Exhibit A/Memorandum of Law in Reply.

Seq. 2

1. Notice of Motion/Statement of Material Facts/Memorandum of Law/Affirmation of Peter A. Meisels, Esq.in Support/Exhibits 1-44/Affidavit of Service.
2. Response to Statement of Material Facts/Exhibits 1-20/Memorandum of Law in Opposition.
3. Memorandum of Law in Reply.

In this action by plaintiff City of New Rochelle ("the City"), asserting causes of action sounding in trespass, negligence, nuisance, conversion and violations of Real Property Actions and Proceedings Law §861, defendants move for summary judgment and to sever their counterclaims for trial and plaintiff moves for an Order pursuant to CPLR 3025 permitting it to amend its Reply to defendants' counterclaims to assert the defenses of statute of limitations, failure to comply with notice of claim requirements and laches; and pursuant to CPLR 3212 granting summary judgment in favor of plaintiff on plaintiff's claims for trespass, negligence and public nuisances; and dismissing defendants' counterclaims, ordering the removal of the encroachment onto City of New Rochelle property, enjoining defendants from further encroachment and imposing statutory penalties.

Factual and Procedural Background

Plaintiff commenced this action by filing a Summons and Complaint on April 1, 2016[1]. On April 30, 2019, defendants filed their Answer with Affirmative Defenses and Counterclaims[2]. On May 17, 2019, plaintiff filed its Reply to Counterclaims[3].

The court has condensed the facts based upon the Material Statements of Facts submitted by the parties and the voluminous amounts of exhibits submitted on these motions. Plaintiff's claims involve two areas of land in New Rochelle, ie. 1) East Street, a "paper street" and 2) what has been referred to by the parties in this litigation as the "Parcel", which is part of "Flowers Park". Defendants Maria and Flavio La Rocca ("Flavio" and "Maria") purchased real property known as 436 Fifth Avenue in the City of New Rochelle ("subject property"), on or about September 18, 2002. The property is a corner lot located on Fifth Avenue, a public street and an unnamed "paper street" known as East Street. The entrance onto the subject property is from East Street. On January 30, 2008, Maria and Flavio conveyed the property to FMLR Management LLC. ("FMLR"). Maria and Flavio are both members of FMLR. The properties along East Street are all contractor's yards. Defendants submit that the City has never issued a resolution accepting East Street. Although East Street appears on the City's current zoning map, East Street does

[1] See Summons and Complaint and exhibits filed to NYSCEF as Doc.1-5.
[2] See Answer with Affirmative Defenses and Counterclaims filed to NYSCEF as Doc. No. 23. Defendants assert two (2) Counterclaims, one for conversion of certain jersey barriers and the second to recoup the costs involved in the maintenance, repair and improvement of East Street from 2022 through the present.
[3] See Reply to Counterclaims filed to NYSCEF as Doc. No. 25.

not appear as a named street on the City's tax map. Furthermore, defendants aver that the City does not maintain East Street, ie. snow plowing, street cleaning, trash removal, paving and asphalting work and other routine maintenance or upkeep. Defendants submit that the property owners along East Street have been solely responsible for cleaning debris, sweeping, snow plowing and repairing the road, when necessary. Further down from defendants' property along East Street and on the opposite side of the street is the "Parcel" and it abuts a skate park.

Defendant further submit that at the time Maria and Flavio purchased the property in 2002, the existing contractor's yard on the property extended on to East Street and defendants have done nothing to alter the existing fences and gates on East Street since they purchased the property. It is undisputed that an As-Built survey from 2000 filed with the City depicts the property's fencing, gates and other portions of the property extending onto East Street.

Eliot Senor of Gabriel E. Senor, P.C., a licensed surveyor and engineer testified that a 2000 As-Built survey contained dimensions indicating that the gate fencing extends on to East Street between 10.7 feet on one end of the property to 12.9 feet on the other end of the property. Defendants maintain that based on the City's records, the 2000 As-Built survey was accepted by the City and a Certificate of Occupancy was issued based upon that same survey which depicted the encroachment onto East Street. When defendants purchased the property in 2002, they submit there were no open or pending violations that had been issued by the City.

On May 19, 2003, defendants filed for a building permit from the City for removal and regrading an area of rock outcrop, which was approved and signed by the City's building official. Defendants argue that the City approved the removal of rock outcrop even though the plan depicted that the contractor's yard extended on to East Street. Seven (7) years after defendants purchased the property and six (6) years after the City issued defendants a permit to remove rock at the property based upon the marked up As-Built survey, the City first raised the issue of a potential encroachment onto East Street. By letter dated June 22, 2009, the City advised defendants that the legal nonconforming contractor's yard at the aforementioned location is encroaching on City property, specifically the public right of way along East Street, and defendants were directed to remove the encroachment within thirty (30) days. Defendants did not agree that there was any impermissible encroachment of the fencing as it was in the same location when defendants purchased the property and in the same location when the City issued the permit to defendants for the rock removal. After a meeting with City representatives, defendants were advised to obtain a survey. Gabriel Senor, P.C. a licensed surveying and engineering company was retained to produce a survey sketch. Gabriel Senor, P.C. staked out the property along East Street and produced a stakeout sketch dated September 10, 2009. Senor testified that the two stakes placed by Gabriel Senor, P.C. were not actually placed on the property's corners but rather on the stakeout sketch. The two (2) markers were placed to extend beyond both side property lines four (4) feet from the intersection of Fifth Avenue and East Street. After that survey was submitted the City did not proceed further.

Defendants submit that the City did not raise anything further about an alleged impermissible encroachment onto East Street for years until alleged false claims were made after the City undertook and completed construction of a skate park located directly across East Street from defendants' property.

Apparently, based upon a video and photographs from a local news website, a complaint was issued that alleged that on or about May 16, 2015, defendants entered the Parcel with landscaping equipment and began clearing the land to create a parking lot. Defendants' actions were alleged to have included cutting down numerous full-sized trees on the Parcel, leaving wood chips on the site and that using a steamroller to create a parking surface.

Additionally, it was alleged that as part of this process, defendants deposited potentially contaminated materials on the cleared area. Defendants argue that while the allegations against them are based upon a video from "Talk of the Sound", the video does not depict defendants cutting down trees on the parcel, leaving wood chips or creating a parking lot. Instead, defendants maintain that the video depicts defendants' employees raking and smoothing out gravel on the Parcel with rakes and a compactor machine. They also maintain that the video depicts a pile of wood chips which were already on the Parcel and nothing in the video depicts the wood chips being placed there by defendants. Defendants further aver that they could not have created a parking lot, as multiple witnesses have testified in this litigation that the Parcel served as a parking lot and staging area for a construction company that worked for the City, prior to May 16, 2015.

Flavio testified, *inter alia*, that starting in around 2012 or 2013, F. LaRocca & Sons began raking out the Parcel, to remove displaced gravel which resulted from snow plowing over the winter, once or twice a year in or around April or May. Thereafter, the City retained an engineering firm to take samples and conduct testing of the material defendants were alleged to have dumped on the parcel. The retained engineer produced a letter report to the City dated October 8, 2015, which concluded that there was no contamination. Subsequent to May 16, 2015, the City fenced in the parcel area with a black fence after the above claims were made by Robert Cox of "Talk of the Sound". Subsequently, defendants received correspondence from the City about the alleged encroachment by letter dated November 18, 2015, that the City completed an examination of the area and the review revealed that certain improvements, such as a fence with gates and rows of hedges, a concrete wall and a metal shelf used for storage of materials and equipment encroaches and intrudes on and over City owned real property.

The City alleges that, to date, defendants have not removed the encroachments onto City property and that they have declined to apply for a license for the use of any part of East Street.

Defendants now move for summary judgment and argue that at a minimum, plaintiff's Complaint should be dismissed entirely as to Maria, in her individual capacity. As to the remaining defendants, defendants argue that the First through Fifth Causes of

Action in plaintiff's Complaint should be dismissed, as they involve false and unfounded allegations that were initiated and based upon a website called "Talk of the Sound" and its owner/blogger Robert Cox. The allegations were that defendants cut down numerous full-sized trees and cleared land to create a parking lot and, in the process, potentially deposited contaminated materials on the cleared land which abut East Street. Defendants submit that plaintiff's Complaint in this action attaches photographs from the aforementioned local news website. Additionally, they assert that the City did not conduct its own due diligence before suing a local property owner and business owner and prior to making allegations in a sworn document, as the photographs and video taken by Robert Cox do not support the Complaint's allegations.

Furthermore, defendants submit that the evidence shows that the Parcel was used as a parking area long before May 16, 2015, even as early as 2002 or 2003. Therefore, defendants maintain that a parking lot could not have been created by defendants or by any of their employees, as allegedly took place on May 16, 2015. Defendants aver that numerous witnesses, including an owner of another contractor's yard on East Street, testified that the Parcel was used for parking before May 16, 2015. Defendants additionally submit that not a single bit of evidence has been produced by the City proving that defendants' company or any of their employees or agents cut down trees, deposited wood chips, cleared land or deposited potentially contaminated materials on the Parcel. Flavio submits that his company employees annually raked out and smoothed out gravel that had already been there for years, which would become dislodged due to rain and snow plowing that defendants' company performed as part of the routine maintenance of East Street.

As to the Sixth Cause of Action, defendants argue that this should also be dismissed as East Street is a private street known as a "paper street". Defendants contend that the City provides no municipal services on East Street, which leaves the abutting property owners to provide the road with maintenance and other necessary services. Further, defendants argue that on the one hand the City claims East Street is a public street, where it can enforce the removal of encroachments, but on the other hand the City claims East Street is not a public street when it comes to maintaining it and providing services like the City does on all public roads within the City. Defendants also submit that East Street is a private road and therefore the City cannot seek damages relating to it and cannot enforce removal of alleged encroachments. Moreover, defendants argue that the City cannot enforce the removal of any encroachments from East Street, as a matter of law, because the City never accepted East Street when given the opportunity and therefore the City did not acquire title through dedication. Furthermore, defendants proffer that any alleged encroachments on East Street have existed now for over twenty (20) years.

In addition, as to the public road of Fifth Avenue, defendants allege that there are no unlawful encroachments on Fifth Avenue. They further submit that the City does not want defendants to remove the substantial screening that was erected to block the view of the contractor's yard from Fifth Avenue. Defendants also claim that City officials have indicated that they actually appreciate the property's extensive screening along Fifth

Avenue. Finally, defendants argue that the City cannot maintain any claim for nuisance public, private or otherwise and there is no basis for the City's claims purportedly brought under New Rochelle City Code §111-38, and therefore, the Sixth Cause of Action as it relates to East Street, at minimum, must be dismissed as a matter of law.

In opposition and in support of its motion, plaintiff argues that defendants have not established *prima facie* entitlement to summary judgment. Moreover, plaintiff submits that its first three causes of action for trespass, negligence and nuisance still lie even if the court were to accept defendants' arguments that they did not cut down trees and that other individuals parked on the Flowers Park Parcel prior to May 16, 2015. Plaintiff contends that these arguments are irrelevant to the City's claims as those arguments do not negate the underlying elements of trespass, negligence and nuisance. In contrast, the City claims it is entitled to summary judgment on these claims. Plaintiff also states that it has not moved for summary judgment on its Fourth and Fifth Causes of Action.

Also, the City submits that based on the deposition testimony of Robert Cox and Paul Vacca, there are triable issues of fact as to whether defendants removed trees and other vegetation during their work on the Flowers Park Parcel on May 16, 2015 and therefore summary judgment on the City's Fourth and Fifth causes of action is improper. In addition, plaintiff argues that defendants failed to establish entitlement to summary judgment on the City's Sixth Cause of Action for encroachment and nuisance as defendants do not dispute that their contractor's yard extends over ten (10) feet beyond their property line, nor have they produced any evidence that would rebut the City's ownership of East Street. The City avers that even though East Street is not designated as a public road, this is irrelevant to its ownership and the City's claim that defendants have encroached onto public property.

In addition, plaintiff asserts that upon being granted leave to amend its Reply to Counterclaims, that it is entitled to summary judgment on defendants' counterclaims based upon defendants' failure to file a Notice of Claim and based upon statute of limitations and laches grounds.

As to Maria LaRocca, the City agrees in its papers to withdraw the First through Fifth causes of action against her, in her individual capacity. However, the City does not agree to withdraw its Sixth Cause of Action against Maria because it argues that the evidence demonstrates that she was aware of the ten (10) foot plus encroachment onto East Street, personally communicated with the surveyor who confirmed the encroachment and continued to refuse to remove the encroachment or apply for a permit for the encroachment from the City. Plaintiff argues that defendants prefer to continue to use public property for the benefit of a private business.

As to the Sixth Cause of Action for Encroachment/Nuisance in violation of City Ordinance §111-38, defendants do not dispute plaintiff's contention that Fifth Avenue is a public street that is controlled and maintained by plaintiff. However, defendants submit that the encroachment is *de minimus* and does not present a nuisance to the City.

As to the alleged encroachment on East Street, the City argues that defendants' contractor's yard extends over ten (10) feet beyond their property line. Defendants argue in opposition that while the City claims it owns East Street, it is a private road that was never accepted by the City by resolution and was never formally dedicated to the City and was therefore never designated as a public street. As it is a private street as a matter of law, defendants maintain that the City's Sixth Cause of Action as it relates to East Street must be dismissed. In addition to never accepting East Street as a public street, defendants also submit that the record is overwhelmingly clear that the City never engaged in any other activities that would indicate ownership, such as snow plowing, repairing or otherwise maintaining the street, which are activities identified in the case law. Defendants also submit that it is irrelevant whether the public may use East Street, as this alone does not make it a public street.

Furthermore, defendants maintain that the City's claims are barred because East Street is a private street and the City lacks standing to bring a nuisance claim or any other claim relating to encroachments with regard to a private street.

Plaintiff submits that it is not required that East Street be a public street to maintain an action for encroachment, only that it be public property. The City also argues it is the owner of East Street, as evidenced by a recorded deed for East Street. Multiple surveys show the yard encroaches over ten (10) feet onto East Street and East Street is used as a public right of way. Plaintiff proffers that defendants do not dispute that their contractor's yard extends ten (10) feet over the property line. While it may not be public street, plaintiff argues that East Street has not become private property.

Discussion

As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing party and where the amendment is not palpably insufficient or patently devoid of merit. *See Davis v South Nassau Communities Hosp*, 26 NY3d 563, 580 [2015]; CPLR 3025(b); *Assevero v Hamilton & Church Props, LLC*, 154 AD3d 728 [2d Dept 2017]; *Schelchere v Halls*, 120 AD3d 788 [2d Dept 2014].

"[A] party seeking leave to amend a pleading need not make an evidentiary showing of merit and leave to amend will be granted unless such insufficiency or lack of merit is clear and free from doubt [internal citations omitted]" See *Stein v Doukas*, 128 AD3d 803, 805 [2d Dept 2015]; *See* also *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). The decision whether to grant leave to amend is committed to the sound discretion of the court. See *Davis v South Nassau Communities Hospital, supra*, 26 NY3d 563 at 580; and *Castagne v Barouh*, 249 AD2d 257 [2d Dept 1998]. "Lateness alone is not a barrier to the amendment" (*Carducci v Bensimon*, 115 AD3d 694, 695 [2d Dept 2014]). "It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (internal citations omitted) (*Edenwald Contr Co v City of New York*, 60 NY2d 957, 959 [1983]). *See also, Abrahamian v Tak Chan*, 33 AD3d 947 [2d Dept 2006]; *In re Rouson*, 32 AD3d 956 [2d Dept 2006].

The party opposing the amendment bears the burden of showing prejudice or surprise. See, *Hickey v. Hutton*, 182 AD2d 801, 802 [2d Dept 1992]. "Prejudice requires that the [opposing party] has been hindered in the preparation of his case or been prevented from taking some measure in support of his position'." *RCLA, Inc v 50-09 Realty, LLC*, 48 AD3d 538, 539 [2d Dept 2008], *quoting*, *Loomis v Civetta Corinno Construction Corp*, 54 NY2d 18, 23 [1981]. See also, *Pansini Stone Setting, Inc v Crow and Sutton Associates, Inc,* 46 AD3d 784, 786 [2d Dept 2007], *quoting*, *Loomis v Civetta Corinno Construction Corp*, 54 NY2d 18, 23 [1981].

That branch of plaintiff's motion for an Order, pursuant to CPLR 3025, permitting it to amend its Reply to defendants' counterclaims, to assert the defenses of statute of limitations, failure to comply with notice of claim requirements and laches will be granted. There has been no showing of prejudice or surprise in opposition sufficient to prevent the amendment.

"It is basic summary judgment law that the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor a matter of law." See *Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]. A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *(See Winegrad v New York Univ Med Ctr*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). "Once this showing has been made ... 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" (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

With regard to defendant Maria LaRocca, the City has agreed to withdraw its First through Fifth Causes of Action against Maria, in her individual capacity.

With regard to the First through Fifth Causes of Action against the remaining defendants, the Court finds defendants have demonstrated their entitlement to partial summary judgment.

A review and a plain reading of the four corners of the Complaint clearly indicates allegations that defendants "...entered the Parcel, cut down trees, cleared the land, and created a parking lot". [See First Cause of Action]. As to the Second Cause of Action, plaintiff alleges that defendants violated New Rochelle City Ordinance §301-4 which states it is "...unlawful for any person to remove, destroy, cut, break, climb or injure any tree, plant or shrub on City Property". The Complaint further alleges that defendants cut down trees, cleared land and constructed a parking lot. The Third Cause of Action alleges that defendants created a parking lot which constitutes a nuisance. The Fourth Cause of Action claims that defendants' removal of trees and plants on the property constituted conversion of the City's trees and the Fifth Cause of Action, ie. Violation of Real Property Action and Proceedings Law §861 alleges that defendants cut down and destroyed numerous full-sized, valuable and historic trees, which was deliberate and a violation of the property rights of the City.

In opposition to defendants' motion for summary judgment, plaintiff failed to raise a material triable issue of fact by the submission of admissible evidence, that is not conclusory or speculative, as to whether defendants cut down, removed trees or vegetation, or paved the parcel in question. There is no deposition testimony or any admissible evidence from any witness who testified they personally observed defendants cutting, taking down trees or other vegetation on May 16, 2015. Therefore, the Fourth and Fifth Causes of Action will be dismissed against defendants. Likewise, as to the First through Third Causes of Action, any allegations that defendants cut down trees or "cleared the land" are dismissed.

As to the First through Third Causes of Action, the court finds there are issues of fact as to whether defendants "...created a parking lot" or placed stones or other material not previously there. While there is substantial evidence in the record that the Parcel was used as a parking area for years prior to May 2015, the court finds there are issues of fact requiring a trial as to the remaining allegations in the First through Third Causes of Action regarding the parking "lot".

As to the Sixth Cause of Action, with respect to the alleged encroachments on Fifth Avenue and plaintiff's allegations in the Complaint that they are unlawful, greatly impair the aesthetics and usefulness of Fifth Avenue, are unreasonable and constitute a nuisance, the court finds there are issues of material fact as to those claims, which preclude summary judgment. Thus, this branch of the Sixth Cause of Action should proceed to trial should plaintiff wish to pursue doing so.

As to the alleged encroachment on East Street under City Ordinance §111-38, the City also seeks injunctive relief. While the Complaint states in paragraph fifty (50) that East Street is "controlled and maintained by plaintiff", there is nothing in the record that supports that contention. By all accounts, the City has never maintained that street.

A street that is located within a municipality's geographical limits may become a city street "...either by dedication or use." See *Epg Associates v Cascadilla School*, 194 AD3d 1158 [3d Dept 2021] quoting *Town of Lake George v Landry*, 96 AD3d 1220 [3d Dept 2012]. There must also be "...some formal act on the part of the relevant public authorities...coupled with a showing that the road was kept in repair or taken in charge by public authorities" See *Epg Associates v Cascadilla, supra* quoting *Perlmutter v Four Star Development Associates*, 38 AD3d 1139 [3d Dept 2007]. Therefore, there is nothing in the record before the court demonstrating that East Street is a public road, even if included on a tap map or issuance of building permits or certificates of occupancy. See *Desotelle v Town Board of Town of Schuyler Falls*, 301 AD2d 1003 [3d Dept 2003] While plaintiff relies upon *Romanoff v Village of Scarsdale*, 50 AD3d 763 [2d Dept 763], in that case the municipality opened for public use and maintained all but the last twenty seven (27) feet of a certain roadway, which is not on point with the facts of this case. However, here there is no dispute that the City has a fee interest in East Road, See *No-Dent Props, Inc v Commissioner of Town of Hempstead Dept of Highways*, 138 AD3d

702 [2d Dept 2016]. After considering the foregoing, the Court finds there is a material issue of fact as to whether New Rochelle City Code §111-38 applies to East Street, requiring a trial.

As to plaintiff's motion for summary judgment pertaining to defendants' counterclaims, there are issues of fact as to whether defendants abandoned the jersey barriers and as to money expended by defendants to maintain East Street. Nevertheless, defendants' failure to file a Notice of Claim is fatal to their counterclaims and the court is constrained to dismiss them. See *Incorporated Village of Freeport v Freeport Plaza W, LLC*, 206 AD3d 703 [2d Dept 2022]; *County of Orange v Grier*, 30 AD3d 557 [2d Dept 2006].

All other arguments raised on these motions and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment on the First through Fifth Causes of Action in plaintiff's Complaint, as asserted against defendant Maria LaRocca, individually, is GRANTED and those causes of action are hereby dismissed against Maria LaRocca upon plaintiff's consent; and it is further

ORDERED that defendants' motion for summary judgment on the First through Third Causes of Action, as asserted against the remaining defendants is GRANTED in part, in that any and all claims which assert that the remaining defendants cut down trees or "cleared the land are hereby dismissed; and it is further

ORDERED that defendants' motion for summary judgment on the Fourth and Fifth Causes of Action in plaintiff's Complaint is GRANTED and all claims therein, as asserted against defendants, are hereby dismissed; and it is further

ORDERED that defendants' motion for summary judgment on the Sixth Cause of Action is DENIED, and it is further

ORDERED that plaintiffs' motion for summary judgment on the remaining claims in the First through Third Causes of Action is DENIED; and it is further

ORDERED that plaintiff's motion for summary judgment on the Sixth Cause of Action is DENIED; and it is further

ORDERED that plaintiff's motion for an Order, pursuant to CPLR 3025, permitting an amendment to its Reply to defendants' counterclaims to assert the defenses of statute of limitations, failure to comply with notice of claim requirements and laches is GRANTED; and it is further

ORDERED that defendants' motion to sever their counterclaims is DENIED; and it is further

ORDERED that plaintiff's motion for summary judgment on defendants' counterclaims is GRANTED and the counterclaims are hereby dismissed; and it is further

ORDERED that all other requests for relief not specifically addressed are DENIED.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 17, 2023

HON. WILLIAM J. GIACOMO, J.S.C.