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| <b>101 Ave. Ozone Park LLC v RSK Flips 2 LLC</b>                                                                                                                                                                               |
| 2023 NY Slip Op 35168(U)                                                                                                                                                                                                       |
| July 17, 2023                                                                                                                                                                                                                  |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 708801/2022                                                                                                                                                                                           |
| Judge: Timothy J. Dufficy                                                                                                                                                                                                      |
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**Short Form Order****NEW YORK SUPREME COURT - QUEENS COUNTY****PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice****PART 35**-----X  
**101 AVENUE OZONE PARK LLC,****Plaintiff,****-against-****Index No.: 708801/22****Mot. Date: 2/21/23****Mot. Seq.: 3****RSK FLIPS 2 LLC, AL-ARSH CONSTRUCTION  
CORP, CORBEX INC, FELIX APONTE, and  
STRUCTURELINE INC.****Defendants.**-----X  
The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) and CPLR 3013, dismissing defendants RSK Flips 2 LLC counterclaims and granting plaintiff's motion to dismiss RSK Flips 2 LLC 's eight (8) affirmative defenses.**PAPERS  
NUMBERED**

|                                           |                 |
|-------------------------------------------|-----------------|
| Notice of Motion-Affidavits-Exhibits..... | EF 52; EF 54-63 |
| Memorandum of Law.....                    | -----           |
| Answering Affidavits-Exhibits.....        | EF 66           |
| Replying Affidavit-Exhibits .....         | EF 67-68        |

Upon the foregoing papers, it is ordered that the motion by plaintiff is granted in part and denied in part.

Plaintiff is the owner of real property, located at 94-01 and 94-03 101<sup>st</sup> Avenue, Ozone Park, New York. Defendant RSK 2 Flips 2 LLC (RSK) is the owner of adjacent property, located at 94-07 101<sup>st</sup> Avenue, Ozone Park, New York. This matter was commenced by the filing of a Summons and Complaint filed, on April 25, 2022, which asserts seven causes of action and consists of two hundred and twenty five (225) numbered paragraphs.

In sum and substance, the plaintiff alleges that RSK, while in the process of constructing a four story building containing eight apartments on its property, has caused damage to plaintiff's property.

Plaintiff now moves to dismiss RSK's three counterclaims for encroachment: RPAPL § 871; trespass; and, private nuisance. Plaintiff also moves to dismiss RSK's eight affirmative defenses: defendants breached no duty of care; failure to state a cause of action; waiver and estoppel; unclean hands; laches; failure to join all necessary and indispensable parties; statute of limitations; and, failure to mitigate damages.

Pursuant to CPLR 3013, "[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" Furthermore, although on a motion to dismiss, allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss." (*See Godfrey v. Spano*, 13 NY3d 358, 373 [2009]).

A party may move to dismiss a defense "on the ground that a defense is not stated or has no merit" (CPLR 3211 [b]). On such a motion, defenses that consist of bare legal conclusions without supporting facts will be stricken. (*see Robbins v. Growney*, 229 AD2d 356, 358 [1st Dept 1996]). When moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*Galasso, Langione & Batter, LLP v. Liotti*, 81 AD3d 880, 882 [2d Dept. 2011]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept. 2008]; *see Courthouse Corporate Ctr. LLC v Schulman*, 74 AD3d 725, 727 [2d Dept. 2010]). "If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741 [2d Dept. 2008]).

### COUNTERCLAIM FOR ENCROACHMENT RPAPL § 871

RPAPL § 871 (1) provides that an "action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify."

In order to obtain injunctive relief, pursuant to RPAPL § 871 (1), a party is "required to demonstrate not only the existence of [an] encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to [the encroaching party] from granting such relief" (*Broser v Schubach*, 85 AD3d 957, 957 [2011]; see *Marsh v Hogan*, 81 AD3d 1241, 1242-1243, [2011]; *Town of Fishkill v Turner*, 60 AD3d 932, 933 [2009]).

Here, while the counterclaim by RSK alleges the existence of an encroachment, it does not allege that the balance of equities weigh in its favor (see *Kimball v Bay Ridge United Methodist Church* 157 AD3d 877 [2d Dept. 2017] ; *Broser v Schubach*, 85 AD3d at 957; *Town of Fishkill v Turner*, 60 AD3d at 933; see also *Wing Ming Props. [U.S.A.] v Mott Operating Corp.*, 79 NY2d 1021, 1023 [1992]).

Accordingly, the branch of plaintiff's motion to dismiss RSK's counterclaim for encroachment RPAPL § 871 is granted.

### COUNTERCLAIM FOR TRESPASS

The essential elements of a cause of action sounding in trespass are the intentional entry into the land of another without justification or permission." *Wheeler v. Del Duca*, 151 AD3d 1005, 1006-07 [2d Dept 2017].

RSK's counterclaim does allege that the plaintiff intentionally created and built encroaching structures on its property, without consent or justification. Furthermore, RSK submits evidence that individuals associated with the plaintiff were on the defendant's property appearing to do construction work. Viewing the pleadings in a light most favorably to RSK, the counterclaim adequately asserts a cause of action for trespass. Therefore, the branch of plaintiff's motion to dismiss RSK's counterclaim for trespass is denied.

### COUNTERCLAIM FOR PRIVATE NUISANCE

The elements of a private nuisance cause of action 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" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570[1977].)

Here, the counterclaim for private nuisance fails to allege these elements with sufficient specificity or facts. Accordingly, the branch of plaintiff's motion to dismiss the counterclaim for private nuisance is denied.

## **DISMISSAL OF AFFIRMATIVE DEFENSES**

### **Defendant breached no duty of care**

This is a bare legal conclusion insufficient to raise an affirmative defense (*see Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]; *Bentivegna v Meenan Oil Co.*, 126 AD2d 506, 508 [2d Dept. 1987].) Accordingly, the branch of plaintiff's motion to dismiss this affirmative defense is granted.

### **Failure to Assert a Cause of Action**

The assertion of the defense of failure to state a cause of action, while surplusage as it may be asserted at any time even if not pleaded, "should not be subject to a motion to strike." (*Riland v Todman & Co.*, 56 AD2d 350, 353 [1977]). Accordingly, the branch of plaintiff's motion to dismiss this affirmative defense is denied.

### **Waiver and Estoppel**

"An estoppel defense may also be invoked where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of that right." (*John Robert P. v Vito C*, 23 AD3d 659, 661 [2d Dept. 2005].) It is unclear how the defense of estoppel applies in this case as there is no evidence that plaintiff failed to timely bring this action. There is also no evidence that plaintiff waived its claims against RSK (*see Byer v City of New York*, 50 AD2d 771, 771 [1st Dept. 1975] [A waiver is an intentional relinquishment [of a right].".) Accordingly, the branch of plaintiff's motion to dismiss the affirmative of waiver and estoppel is granted.

### **Unclean Hands**

This is a bare legal conclusion insufficient to raise an affirmative defense (*see Robbins v Growney*, 229 AD2d 356, 358 [1st Dept. 1996]; *Bentivegna v Meenan Oil*

*Co.*, 126 AD2d 506, 508 [2d Dept. 1987]. Accordingly, the branch of plaintiff's motion to dismiss this affirmative defense is granted.

### **Laches**

This is a bare legal conclusion insufficient to raise an affirmative defense (*see Robbins v Grownney, supra; Bentivegna v Meenan Oil Co., supra*). Accordingly, the branch of plaintiff's motion to dismiss this affirmative defense is granted.

### **Failure to join necessary and indispensable parties**

RSK's answer does not indicate what other parties need to be joined to the action in order to award complete relief to the parties, or that another party's rights would be inequitably affected by a judgment in this action (*see Dimou v 125 Fulton LLC*, 2009 N.Y. Misc. LEXIS 4861 [Sup. Ct. N.Y. Cty]). Accordingly, the branch of plaintiff's motion to dismiss this affirmative defense is granted.

### **Statute of Limitations**

There is no evidence that plaintiff failed to timely commence the action. Accordingly, the branch of the motion to dismiss this affirmative defense is granted.

### **Failure to Mitigate Damages**

As the parties have not completed discovery "[u]nder such circumstances, the court should reserve decision on whether this affirmative defense should be dismissed pending completion of discovery." (*Hoeppli v Urban Interiors Mgt., Inc*, 2018 N.Y. Misc. LEXIS 1784 [Sup Ct. N.Y. Cty] quoting *Falk v Gallo*, 18 Misc. 3d 1146[A][Sup Ct, Nassau County 2008]; accord *Seiler v Ricci's Towing Servs.*, 210 AD2d 972, 973 (4th Dept 1994). Accordingly, the branch of the motion to dismiss this affirmative defense is denied with leave to renew.

Accordingly, it is

**ORDERED** that the motion by plaintiff is granted in part and denied in part, in that: it is

**ORDERED** that, as to the branches of the plaintiff's motion to dismiss defendants RSK Flips 2 LLC's counterclaims:

- the counterclaim for encroachment RPAPL § 871 is **GRANTED**;
- the counterclaim for trespass is **DENIED**; and
- the counterclaim for private nuisance is **GRANTED**

; and it is further

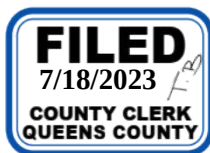
**ORDERED** that, as to the branches of plaintiff's motion to dismiss RSK Flips 2 LLC's affirmative defenses for:

- defendant breached no duty of care is **GRANTED**;
- failure to state a cause of action is **DENIED**;
- waiver and estoppel is **GRANTED**;
- unclean hands is **GRANTED**;
- laches is **GRANTED**;
- failure to join all necessary parties and indispensable parties is **GRANTED**;
- statute of limitations is **GRANTED**; and
- failure to mitigate damages is **DENIED, WITH LEAVE TO RENEW**;

; and it is further

**ORDERED** that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

**Dated: July 17, 2023**



A handwritten signature in black ink, appearing to read "T. Dufficy".

**TIMOTHY J. DUFFICY, J.S.C.**