

Del Vecchio v Gangi
2023 NY Slip Op 35273(U)
June 29, 2023
Supreme Court, Nassau County
Docket Number: Index No. 611263/2022
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

STEVEN M. DEL VECCHIO,

Plaintiff,

- against -

CLAIRE GANGI and EZIO SCALDAFFERI,

Defendants.

TRIAL/IAS PART 29
NASSAU COUNTY

Index No.: 611263/2022
Motion Seq. No.: 02
Motion Date: 11/18/2022
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibit, Affidavit and Exhibits,	
Memorandum of Law	<u>1</u>
Affidavit in Opposition and Exhibits	<u>2</u>
Reply Affirmation, Affidavit and Memorandum of Law	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing all, or some, of plaintiff's causes of action in the Verified Complaint, as well as plaintiff's claim for punitive damages. Plaintiff opposes the motion.

In support of the motion, defendant Ezio Scaldaferri i/s/a Ezio Scaldafferi ("Scaldaferri") asserts, in pertinent part, that, "[a]long with my life partner Claire Gangi ('Claire') I am a defendant in this suit brought by our next door neighbor Steven Del Vecchio ('Steve'). I make this affidavit principally to give the court some background and to submit documentary evidence, some of which is referred to in the complaint. As the complaint alleges, the parties reside at waterfront properties whose backyards overlook the Long Island Sound and the Village of Bayville beach, on Nassau's North Shore. After having lived in another part of the

Village since at least 1985 Steve chose to buy this lot in 2003. We purchased in 2012....

Our yards are about five stories (50 feet or so) above sea level. Steve's yard slopes toward the water in a number of levels, each retained by walls made of railroad ties, the last one of which is topped with a chain link fence. I believe Steve's property line ends there. Below that is a cement wall, below which is a seawall owned, I believe, by our Homeowners Association.

Our property line is below an 18' cement retaining wall, at a seawall which we repaired/constructed in 2017 and 2018. High tide reaches just below that seawall; at low tide the beach is about 60 feet wide. Neither we nor Steve own any part of the beach. As this part of Long Island Sound is Federally owned, the beach appears to be Federal land. When we purchased in 2012, we did extensive renovations to the house, backyard and pool, without complaints from any neighbors. Our relationship with Steve has been cordial.

For reasons best known to him, this changed in 2022. In May 2022 Steve complained that our pool pump – a standard, 1 and 1/2 horsepower Hayward which had operated for years – was too noisy.... We addressed it initially by purchasing and installing a cover specially made to reduce noise, and by covering that and a nearby heater with sound reducing blankets and other noise reducing material.... This did not satisfy Steve, and he apparently became more disturbed by events which in his perception happened in June. Perhaps riled by these phantom 'retaliatory threats,' Steve filed a complaint about the pool pump for a violation of the Village Code's noise provision.... So, at the end of June we purchased a new low-noise pump and installed it on June 30, 2022.... The Village complaint was closed a few days thereafter.

This still did not satisfy Steve, and he filed yet another complaint with the Village, as recounted in the complaint,... We have now constructed sound proof housing around the pump and filter, the Village inspected it on October 6 and issued a report confirming that the noise level is well

below the proscribed one for night operation, which is even lower than for days.... This matter is now moot, if it ever was an issue in the first place since operating a 3 standard pool pump – just like operating a window air conditioner – is not a legal nuisance.... For decades the beach in Bayville has been known for Fourth of July fireworks, much like every other beach and park in Nassau, Long Island, and the rest of the United States. Pictures and even painted renderings of the Bayville beach fireworks are offered for sale on the internet, and residents of the Village post pictures of the fireworks on the Bayville Facebook page and elsewhere.... These are facts of which Steve, a long time Bayville resident, was well aware of when he elected to buy a lot on the beach, and of which the court can take judicial notice from its own experience and from the exhibits hereto, as described below. The complaint recounts that ‘each and every year’ we allowed the discharge of fireworks ‘from or near’ our property ..., but conveniently fails to also recount that Steve and his guests enjoyed them each year, and applauded at the end of each one. Instead he now claims that the last, 2022 display morphed from an annual festivity into a private nuisance, a trespass, and an assault.... Thus, this one time, when ‘defendants caused to be discharged fireworks [not that defendants themselves fired off anything] from or near their residence’ ..., the ‘explosions and concussive blasts’ near Steve’s property caused debris to fall into his yard, and ‘caused plaintiff, his guests and any pets on the premises annoyance, inconvenience, fear, discomfort and placed them in danger of physical injury’ ... to the tune of \$200,000 compensatory and \$500,000 punitive damages.... The complaint neglects to acknowledge that 2022 was no different than prior years in Bayville. The tide was low and that fireworks displays took place all over the beach, including on the beach immediately below Steve’s residence on the east side (opposite ours).... In fact, fireworks were discharged from the beach immediately east of Steve’s property (our property adjoins him to the west)....

Notably, Steve does not allege that he and his guests sought refuge by retreating into his residence; this is only because they remained outside to watch, as did our neighbors to the west. On the other hand, the complaint does recount that Steve called the police who in fact inspected his yard and pool area, interviewed him and us, and filed a report. That report, ..., belies Steve's current suggestions that any fireworks were discharged on or from our property and/or that his property was in any way damaged. It states: 'Reporting person Delveccio (*sic*) states, at above listed time and place of occurrence, fireworks were being set off in the vicinity of the rear of 9 Oak Point Dr. North, Bayville. He stated that the fireworks were coming close to his property. Officers canvassed the yard and property of reporting person for any damage, which yielded negative results. Officers then spoke with the people at 9 Oak Point Dr North, who denied knowing anything about the fireworks. No fireworks observed at location. Reporting person is requesting report for documentation purposes only at this time, and requests no further police action.' Put simply, this police report establishes that no fireworks were fired from our property, that, at worst, Steve claimed fireworks from the beach only came 'close to' his property, and that there was no damage to Steve or his property. Accordingly, all fireworks claims – nuisance, assault, trespass – should be dismissed.... Unfortunately, the matter did not end with the police. Shortly after the 4th, Steve emailed every member of our Homeowner's Association, including some of Claire's clients, complained of the fireworks, called us criminals, demanded action from the HOA, and concluded thusly: 'If there are members of the HOA who agree that some affirmative steps should be taken to stop the illegal discharge of fireworks please contact me either privately or by a response to this group email and perhaps we can figure out a plan of action to protect the HOA.' The sole response of which we are aware came the same day from someone with a sense of humor and who apparently was

not impressed with Steve's attitude:... Not content with complaints about the pump and the fireworks, and apparently enraged by the response to his offensive letter to the HOA, on August 18, 2022 Steve sent us an email claiming a metal fence that has been there for almost ten years suddenly encroached, and demanded removal within two weeks to be done under his supervision. We were out of town, so I called him but he did not answer; I texted him and asked for a call back but got none. Finally I responded via email, asked for his surveyor's analysis so we could address the matter intelligently, suggested that we let cooler heads prevail and coexist as neighbors as we had in the past, questioned whether all this pettiness was worth it, and wondered what happened to him lately.... Steve's response? He filed the complaint two days later (even before his own two week deadline), a complaint which is of no moment since, if there is an encroachment we are prepared to either move the fence or enter into a boundary line agreement protecting Steve's property interests. There just is no controversy. What a shame! Finally, Steve alleges that he and I entered into a 'contract' in 2018 regarding repairs to a part of his retaining wall. There was no 'contract' and no consideration from his part. I voluntarily had some railroad ties placed back from where they had moved, the dirt behind them refilled, two wire fence posts placed in new cement footings, and had restored or re-righted a 10 foot section of the wire fence that had moved.... Steve inspected the repairs, was satisfied with them, and in the four years that followed never once mentioned any other needed repairs. The matter was closed; again, there is no dispute or controversy. Now, more than four years later, completely out of the blue, he alleges a formal 'contract' for minor repairs but fails to identify any. It is difficult, to say the least, intelligently to respond to such nebulous allegations." *See Defendants' Affidavit in Support Exhibits 1-15.*

In further support of the motion, counsel for defendants argues, in pertinent part, that, “[t]hings or actions that one may find disagreeable, displeasing or offensive, no matter how irritating or unpleasant, are not a legal nuisance. Here, a once noisy pool pump and a yearly fireworks display may have become displeasing or irritating to plaintiff, but they do not a legal nuisance claim make. Therefore, the first and sixth causes of action must be dismissed. The elements of a cause of action 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.’ [citation omitted]. But ‘not every intrusion will constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other . . . If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life.’ [citations omitted]. The relevant question is whether a defendant’s use of his or her property constitutes an unreasonable and ‘continuous invasion of [the plaintiffs property] rights.’ [citations omitted].... Put simply, assuming arguendo that defendants themselves conducted a fireworks show, or permitted one to take place on their property once a year for an hour or so (which is not the case), this does not constitute a ‘continuous invasion’ or ‘impairment’ of plaintiff’s rights sufficient to establish a legal nuisance claim. Indeed, even when the alleged nuisance is not minimal and is continuous, New York courts have not hesitated to dismiss on the ground that the conduct is to be tolerated in an organized community.... In sum, to state a claim for private nuisance, plaintiff must show a continuous and unreasonable invasion of one’s property rights. The conduct must be severe and not just unpleasant or irritating. Research has not revealed a single case where a New York court has recognized a private nuisance claim by a neighbor for allowing the discharge of fireworks on

the Fourth of July. Such activity would not amount to a continuous or persistent nuisance causing an unreasonable and substantial interference with one's use and enjoyment of their property. For the same reasons, an allegedly 'noisy' pool pump does not amount to a private nuisance. In any event, any 'nuisance' created by the pool pump has been abated. Finally, assuming arguendo that the Complaint states a nuisance claim, it must still be dismissed because plaintiff has incurred no cognizable damages as a matter of law." *See* Defendants' Affirmation in Support Exhibit A.

Counsel for defendants also argues, in pertinent part, that, "[t]he third and seventh causes of action are for assault, the former relating to the Fourth of July fireworks, the latter to the release of a grand total of three petards a month earlier. They, too, must be dismissed for failure to state a claim. Under New York law, a claim for the intentional tort of assault requires that the plaintiff show that another person made 'an intentional attempt, displayed by violence or threatening gesture, to do injury to, or commit a battery upon,' his or her person. [citation omitted]. Put another way, civil assault is the intentional placing of another person in fear of an imminent battery. [citation omitted]. 'To sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact'. [citation omitted]. As with the nuisance claims, research has uncovered no New York case in which the discharge of fireworks has served as a basis for a claim for civil assault. On the other hand, New York courts have not hesitated to dismiss civil assault claims even where there was threatening conduct well beyond shooting off fireworks.... Even where there is actual physical contact, a claim for assault can be dismissed where, as here, the plaintiff did not complain of the same conduct in the past. And here, plaintiff admits he did not complain about fireworks for ten years. Therefore, an assault claim cannot be maintained. [citation omitted].

In addition, here, plaintiff (and his guests) did not retreat into plaintiff's residence or otherwise take cover during the fireworks; that alone demonstrates that they were not 'in fear of an imminent battery', nor were they 'in imminent apprehension of harmful contact'.

To the contrary, for ten years plaintiff and his guests watched and enjoyed all of the fireworks on the beach in Bayville; that they returned year after year only shows that they were not concerned or afraid of any harmful conduct. In short, the assault claims must be dismissed. Plaintiff's second cause of action for trespass based upon the alleged paper debris on his property from the fireworks on July 4, 2022 must be dismissed. A trespass is an intentional physical entry onto the property of another without justification or permission [citations omitted]. 'While it is generally assumed and held that a personal entry by the actor is unnecessary for the latter to be a trespasser, his act must result in an invasion by tangible matter; otherwise, there would be no disturbance of possession. Thus, it is not a trespass to project light, noise, or vibrations across or onto the land of another because there is no occupancy of space even for a brief period.' [citation omitted]. And the entry must be substantial.... Here, there was no tangible intrusion into or onto plaintiff's property amounting to a substantial disturbance of plaintiff's possession. Indeed, the police found no damage or debris from the fireworks. Consequently, plaintiff's trespass claim must be dismissed as a matter of law. Plaintiff's fourth cause of action for breach of contract must also be dismissed. To recover damages for a breach of contract, plaintiff must prove (a) the existence of a contract; (b) plaintiff's performance; (c) defendant's breach; and (d) the damages resulting from the breach [citation omitted].... In the instant case, plaintiff alleges that the defendants orally promised to repair/restore his retaining wall, and that such promise amounted to a binding contract, which was breached. However, defendants deny that such a promise was made or that a 'contract' was intended or

created. Rather, as submitted by Mr. Scaldafferri (*sic*) in his affidavit ..., he voluntarily had some of plaintiff's railroad ties placed back, the dirt behind them refilled, two fence posts placed in new cement footings, and a 10-foot section of wire fencing re-righted. This was a voluntary act, on his part, not a binding promise. Under such circumstances, there was no definite 'offer', which, upon 'acceptance', would create a binding contract [citation omitted]. Another element of a binding contract ---consideration--- is also lacking for any 'promise' that defendants are alleged to have made. What did plaintiff give or promise as consideration for defendants' alleged promise? Plaintiff asserts in his complaint ... that, in return for defendants' promise to restore his retaining wall, he promised to forebear bringing a lawsuit or insurance claim against them. That promise on the part of plaintiff was illusory, however, since such an agreement amounts to an 'executory accord' and must be in writing to be enforceable [citation omitted]. It is an executory accord under the statute [citation omitted] because plaintiff allegedly agreed to forebear a present claim or action against defendants based upon defendants' promised future performance. Since there admittedly was no writing, defendants could not have enforced the alleged forbearance promise against plaintiff. In point of fact, plaintiff did not give any consideration... he did not legally bind himself to do anything. As his promise was illusory, there was no 'mutuality of obligation' and therefore no binding contract between the parties [citation omitted]. Without a binding contract, there obviously can be no claim for breach of contract, and the plaintiff's fifth cause of action must be dismissed." *See id.* ,

Counsel for defendants further argues, in pertinent part, that, "Plaintiff's fifth cause of action asserting promissory estoppel must also be dismissed. To begin, if the Court were to find an enforceable contract between the parties, despite the infirmities discussed above, a cause of action premised upon a claim of promissory estoppel would be precluded [citations omitted].

‘The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise was made, and an injury sustained in reliance of that promise’ [citation omitted].

Here, the plaintiff alleges in his complaint that he relied upon defendants’ ‘promise’ to repair his retaining wall in exchange for his forbearance in filing an insurance claim against his own insurance carrier. The apparent ‘injury’ suffered by plaintiff by this alleged reliance and forbearance, although not explicitly stated in his complaint, is his lost opportunity to make an insurance claim because of the lack of timely notice to his own carrier. This claim must be dismissed because of the clear lack of ‘reasonable’ reliance by plaintiff upon defendants’ alleged promise. Plaintiff, an experienced attorney, could have simply given his insurance carrier notice of a potential claim, thereby preserving his rights under his insurance policy, without actually submitting and prosecuting a claim. By the simple act of giving notice, he would not have been prejudiced or damaged by defendants’ alleged failure to perform. Since there was no reasonable reliance, there is no viable claim for promissory estoppel. Finally, to state a viable claim for promissory estoppel, the plaintiff must also allege and demonstrate ‘unconscionable injury’ [citations omitted]. Here, defendants have produced documentary evidence establishing that they repaired/restored plaintiff’s retaining wall. Further, plaintiff’s complaint does not allege, with particularity, in what manner the defendants’ alleged promise was breached. If the repair job was completed, or even substantially completed, without objection for nearly 4 years, where is the ‘unconscionable injury’? There is none. Therefore, the claim for promissory estoppel must be dismissed for that reason as well. Plaintiff’s claim for punitive damages should also be dismissed for failure to state a viable claim. With regard to plaintiff’s breach of contract and quasi contract claims (i.e. promissory estoppel),

it is well-settled that punitive damages are not available where, as here, there is no conduct ‘aimed at the public generally’ [citations omitted]. ‘Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights’ [citations omitted]. With regard to plaintiff’s ‘tort’ causes of action, the facts as pleaded by plaintiff do not rise to the level of ‘morally culpable,’ ‘malicious,’ ‘reckless’ or ‘criminal’ conduct necessary to sustain such an award [citation omitted]. In tort actions, the ‘availability of punitive damages is measured by the severity of defendant’s conduct’ and they may be awarded only where the proof establishes his conduct was ‘gross, wanton or willful’ [citation omitted]. Here, the factual allegations concerning defendants’ conduct, even if accepted as true, do not warrant an award of punitive damages and, therefore, the demand for same in plaintiff’s Complaint must be dismissed. It is clear that plaintiff suffered no bodily harm or injury; that his apprehension of harm is feigned and unreasonable; and that this action is motivated more by his malice toward defendants, rather than the other way around.” *See id.*

In opposition to the motion, plaintiff asserts, in pertinent part, that, “[t]he Verified Complaint sets forth 9 causes of action. There are two causes of action for private nuisance, two causes of action for assault, and actions for trespass, for breach of contract, promissory estoppel, to quiet title of real estate and for ejectment.... Instead of answering even the gist of allegations in the complaint, the defendant, Scaldaferri, picks and chooses the story he tells and submits a legally worthless affidavit replete with half-truths and lies but also significantly, concealment. He knows that the allegations in the complaint are true so he cannot deny them under oath. He is afraid to address them fully because he does not know what proof I have. What he tries to do is create a few issues of proof, which issues are neither raised by nor relevant to a 3211(a)(7) motion. His affidavit is of no legal consequence....

Scaldaferri's affidavit does not establish anything conclusively; it certainly does not establish that one material fact alleged in the Verified Complaint is 'indisputably'...'not a fact at all'. Scaldaferri's affidavit then hardly serves to 'establish conclusively that (the plaintiff) has no cause of action'. [citations omitted]. I should note that Scaldaferri is an owner as a tenant in common of only 12% of the defendants' property. Defendant Gangi is the owner of 88% of the property yet she did not submit an affidavit, not even one confirming Scaldaferri's allegations. This is suspicious."

Plaintiff further submits, in pertinent part, that, "CPLR 3211(a)(1) allows a party to move for judgment dismissing a cause of action on the ground that 'a defense is founded upon documentary evidence'. The defendants have moved pursuant to that provision yet, once again, there is no discussion of the law. The insurmountable first legal problem with this branch of the motion is that the defendants do not state or articulate exactly what defense they are advancing. They have chosen not to first serve an answer to the complaint before seeking relief from the court. An answer would have required defenses to be pleaded in detail and verified under oath. They chose to file a murky pre-answer motion and then they fail to identify which or what defense is founded upon which or what documentary evidence. Furthermore, the defendants utterly fail to point out, identify or articulate which 'evidence' they claim to be 'documentary'. Is it the Facebook postings? Is it the defendants' videos? Is it a boarding pass; a fence receipt or a photo of a backyard? That is the type of 'evidence' offered, yet none of those things qualify as documentary evidence."

Plaintiff further contends, in pertinent part, that, "[a]s the court can see, much of the defendants' motion papers is (*sic*) devoted to attacking the two nuisance causes of action set forth in the complaint. One nuisance cause of action pertains to the recurring illegal annual

possession, storage and discharge of dangerous fireworks by the defendants and the other pertains to a noise nuisance created by the defendants' pool equipment in 2022. It is impossible for the defendants to present intelligent, let alone persuasive, arguments about whether a nuisance cause of action is stated without a discussion of whether the conduct alleged to be a nuisance is controlled by a statute or other law. Yet, continuing their pattern of ducking the law, the defendants attempt to do so and thereby deliberately mislead the Court. The statute which is controlling regarding the defendant's (*sic*) illegal possession and use of fireworks is the Penal Law of the State of New York:... Regarding the noise nuisance created by the defendants' pool equipment, Chapter 42 of the code of the Village of Bayville contains the pertinent controlling provisions.... Thus, both (1) the possession and use of fireworks and (2) the violation of the Village of Bayville noise ordinances are criminal offenses punishable by fine or imprisonment of up to 15 days. Because the defendants' conduct in creating both nuisances is based upon acts which are unlawful, they may be considered as nuisances, *per se*. [citation omitted]. Nowhere in the defendants' motion papers is this indisputable application of the law mentioned by these defendants, In all of the cases cited by the defendants, not one of them involved conduct amounting to violations of criminal offenses. It is impossible that the defendants were unaware of this. This is the third instance of a wholesale failure by the movants to even allude to controlling law. This is evidence of a motion made in bad faith. Continuing their pattern of ignoring controlling law, the defendants do not deny that they were in possession and control of their property, yet they deliberately choose to ignore addressing this duty imposed upon them by law to ensure that no dangerous condition or events took place on their property which might endanger me, my guests and otherwise interfere with my quiet enjoyment of the premises. The duty imposed upon a property owner includes third parties who the owner invites

onto the property. This rule is particularly applicable to the defendants' illusory defense that because they might not have lit the fuses of the fireworks which they possessed and supplied to their guests, they are not civilly responsible. This is pure nonsense and contrary to the law.... Thus, the defendants have a duty to me as a property owner which extends not only to the defendants' conduct but also to the conduct of their guests and invitees. Even though the foregoing is clearly alleged in the complaint, once again the defendants refuse to discuss their wholesale violation of this duty by their behavior set forth in the complaint. As stated above, the court must accept the complaint and every inference therefrom in considering their motion. Thus, it is immaterial if the defendants themselves lit the fuses to cause the discharge of fireworks on each July 4th for the last 10 years, or on June 4, 2022, or on July 4, 2022, or simply allowed or authorized others to do so. Either way, they are liable. In conclusion, this court should draw the strongest of inferences against these defendants on account of their failure to even discuss the pertinent and controlling laws herein."

Plaintiff adds, in pertinent part, that, "[t]he defendants tacitly admit that for 10 years they have obtained, stored on their premises and discharged illegal fireworks from or near their premises. Every year in the past, they have in fact discharged those fireworks either from their backyard or the beach or both. This year, 2022, obviously because of my warning that I would report the incident to the police, (as will be discussed below) the defendants suggest that they only discharged fireworks from the beach directly behind their property. The fireworks discharged annually for 10 years were not firecrackers or sparklers. Every year they were commercial grade, exploding dangerous fireworks, skyrockets and rockets (as described in the Penal Law). The fireworks shot by the defendants lasted roughly one hour each year beginning around dusk. Scaldaferri puts forth a video snippet ... showing some of the 2022 illegal

fireworks discharge that the defendants' orchestrated and conducted. That video is a tiny fraction of the nearly hour long illegal and dangerous conduct committed by them on July 4, 2022. Those fireworks were shot by the defendants' invitees and guests, using fireworks stored on their premises and then provided by the defendants to their guests, facts which the court must accept as true and which Scaldaferri does not deny in his affidavit. How can Scaldaferri in good faith try to disassociate himself and Gangi from the illegal discharge of fireworks on July 4, 2022, without telling the court if the discharge was authorized by them, with fireworks stored on their premises and handed out by them to their guests to shoot off? Scaldaferri is trying to pull the wool over the eyes of the court. The video also seems to depict the defendants and some other guests seated enjoying on their patio their illegal spectacle. This will be taken up again below. As stated, in the past years prior to 2022, the defendants discharged their fireworks from their backyard and from the beach some 10 or 20 feet from their property line. On July 4, 2022, the defendants evidently and incorrectly believing that if they only used a location of the illegal discharge of fireworks at the beach immediately behind their backyard some, 10 or 20 feet from their property line, their illegal conduct would somehow be sanitized. Similarly, the defendants seem to believe that even if they each year obtain the fireworks, store massive amounts of fireworks in their residence, provide the fireworks to their guests, and authorize encourage and empower their guests to discharge their fireworks illegally, using their property as a base of operations, they still cannot be held responsible civilly because they did not actually light the detonation fuses themselves or because this year the detonation was done 10 or 20 feet away from the property. Scaldaferri actually makes this argument. This is complete lunacy and actually demonstrates that the mindset of these defendants which poses a serious and dangerous threat to me in the future. They actually believe that I should be without a legal remedy for their

illegal, annual, recurring dangerous detonation of fireworks if it performed 10 or 20 feet off their property line. This, I submit, is precisely why one of the remedies for a private nuisance is an injunction. This case cries out for that injunction because the defendants are basically telling the court that they intend to continue their conduct because in their warped reasoning it is perfectly fine. The defendants are very aware that the people referred to by them in their papers who actually lit the fuses of the fireworks from the beach directly behind their house were their guests and invitees to whom the defendants supplied the fireworks. The defendants deliberately do not discuss or deny this. Scaldaferri's crafty affidavit is silent. The defendants' guests took fireworks from the defendants' on their property, exited the defendants' backyard, set up their discharge sites some 10 or 20 feet away and detonated the fireworks. After their detonation was over they returned to the defendants' yard. They were all the defendants' guests. During the discharge of the fireworks the defendant Scaldaferri called out to me and snidely and sarcastically shouted 'I guess I didn't get the memo about no fireworks' During the fireworks, after beckoning me to talk with him, the defendant Scaldaferri, with an audience of his guests and invitees, cursed and demeaned me shouting at me 'you are an ass, you always have been an ass and go [f*^k] yourself' I called the police twice on July 4, 2022. There was no response until well after the defendants were done shooting the illegal fireworks. The police officers did not observe any fireworks being shot firsthand so they told me that there was nothing they could do. They asked me if any damage was done to my property and I told them I couldn't tell at that point because it was dark. We went into my backyard in the dark and checked only my four lounge chairs which were not damaged. The officers went to the defendants' house and were falsely told by the defendants that they did not know anything about any fireworks. I personally observed the defendants' guests discharging fireworks from the beach directly behind the defendants'

premises some 10 or 20 feet away from the sea wall. Those fireworks traveled and exploded over my backyard causing tangible debris to land on my property and in my pool. The debris that landed on my property was gunpowder deposits, bulkheads or caps, and other tangible things that I discovered the next morning. Mr. Nofi twice makes seriously false assertions in his affirmation. He states. Plaintiff's SECOND cause of action for trespass, perhaps the most frivolous claim of the Complaint is premised upon 'paper debris' which is alleged to have fallen in plaintiff's backyard... Mr. Nofi makes the same false allegation in his affirmation at page 2, ¶ 5: 'Trespass (based upon paper debris from fireworks on July 4, 2022.' Mr. Nofi's allegations of 'paper debris' do not exist anywhere in the complaint, either in the second cause of action or anywhere else. I never alleged or used the term 'paper debris'. Rather, it was invented by the defendants in a deliberate effort to trivialize the trespass and mislead the court. These items which landed in my pool and property easily could have damaged my property and injured people on my premises. They did not cause any physical damage but damage to property or persons is not an element of any cause of action I have alleged. The defendants try to mislead the court into believing that physical damage to persons or property is an element of trespass and assault. It is not. This is an example of plainly deceptive motion papers." See Defendants' Affidavit in Support Exhibit 9; Defendants' Affirmation in Support Exhibit A.

With respect to plaintiff's causes of action to quiet title and for ejectment, plaintiff asserts, in pertinent part, that, "[t]he defendants do not claim that the elements of these causes of action are not alleged and they state no basis whatsoever to challenge these causes of action or raise any defenses thereto. Yet, the defendants move to dismiss them anyway. This is further evidence of desperation, a motion made in bad faith and a willingness to ask for relief that has no basis in law or fact. It is worth noting that when I notified the defendants about the

encroachment and gave them the opportunity to remove it, Scaldaferri claimed that he had a survey showing that there was no encroachment.... Of course, he did not produce that alleged survey either when he emailed me or thereafter. He does not put it before the court. If he has a survey controverting my survey, how can he swear 'there just is no controversy'? ...

This is more deception by this unctuous defendant."

With respect to plaintiff's causes of action for breach of contract and promissory estoppel, plaintiff submits, in pertinent part, that, '[t]he breach of contract action and the action for promissory estoppel (the Fourth and Fifth Actions in the Complaint) seek the identical relief, namely the recovery of damages for the defendants' destruction of much of my backyard caused by the their construction project and then failure to perform their agreement to restore and repair my backyard as we agreed. It goes without saying that I cannot recover the same damages twice. But it is also black letter law that I can plead alternative theories under the same set of facts. This seems to have escaped the defendants. Scaldaferri's affidavit ... devotes a single paragraph to these causes of action. He does not deny that the damage done to my property was caused by the defendants' construction project. Their conduct not only caused a portion of my backyard to be sucked out to sea by a storm, but also because the support under my backyard retaining walls was left exposed, my yard was left completely vulnerable to any subsequent storms. Action had to be taken promptly. The defendants, both of them, admitted responsibility for the damage and agreed to immediately rectify the damage. Their backyard construction project was under the control and supervision of Gangi's brother, Frank Gangi, a contractor, who I believe had absolutely no experience with waterfront projects involving seawalls. After they wrecked my backyard, the defendants did not want me to pursue any claims against them either in litigation or through insurance carriers and they told me so. The defendants

were in the middle of their huge construction project and they did not want anything to interfere with that, whether it be insurance claims made by me, or insurance claims by them or through their own carrier. The defendants also did not want me to pursue legal claims directly against them. This might have had something to do with licenses, permits or other problems that litigation might expose. Thus, the defendants offered and I agreed that they would promptly and completely repair and restore my retaining wall, the fence in the backyard and the backyard itself by refilling the earth that was sucked out to sea and leveling the yard. This is the contract they breached. I agreed to forego litigation and insurance claims. I did not sue them and I did not make any insurance claims. They then defaulted... The defendants then point out that punitive damages are generally not awarded in contract claims.... This is another deliberate attempt to mislead the court. The complaint does not seek punitive damages for the breach of contract cause of action or the promissory estoppel cause of action. Further, no punitive damages are sought for the encroachment cause of action, the ejectment cause of action or even the cause of action for nuisance regarding the pool equipment. It is only the causes of action which involve the defendant's (*sic*) illegal and inherently dangerous conduct regarding the criminal discharge of dangerous fireworks at me, my guest, and my property for which those damages are sought, namely, the fireworks nuisance, trespass and assault causes of action. Punitive damages are awardable in cases of nuisance ... assault ... and trespass.... All of the causes of action for which punitive damages are sought involve criminal misconduct, the jeopardizing of persons and property which was either intentional or wantonly reckless. The defendant's (*sic*) argument that no 'one suffered bodily harm or injury' and that (my) apprehension of harm is 'feigned and unreasonable' ... hardly provides a basis for an order determining as a matter of law that punitive damages for shooting illegal dangerous fireworks at (or even in the vicinity of) persons

and property cannot serve as such a basis. Punitive damages are awardable for these torts and the issue should be left to a jury. Because the defendants' conduct is criminal, that alone, raises the possibility punitive damages. I have also alleged that the defendants acted with malice in committing these torts, especially because they weaponized their use of fireworks on June 4, 2022 and continued that on July 4, 2022. I am not required in opposing this motion to present evidence of malice, but some is plainly stated in the complaint."

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence;..." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Lift Ins. Co. of NY*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) citing *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) quoting *Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, *supra*, citing SIEGEL, PRACTICE COMMENTARIES; MCKINNEY'S CONSLAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) quoting *Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits,

deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). *See Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiff's factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The Court finds that the documentary evidence submitted by defendants does not resolve all factual issues as a matter of law and conclusively dispose of the claims at issue.

Accordingly, the branch of defendants' motion, defendants' motion, pursuant to CPLR § 3211(a)(1), for an order dismissing plaintiff's Verified Complaint, is hereby **DENIED**.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), "the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d

647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander’s Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). “In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez*, *supra* at 88.

To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with the use or enjoyment of land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant’s conduct. *See Anderson v. Elliot*, 24 A.D.3d 400, 807 N.Y.S.2d 101 (2d Dept. 2005).

The primary and indispensable feature of a private nuisance is conduct which results in interference with the use or enjoyment of land. *See Volunteer Fire Ass'n of Tappan, Inc. v. County of Rockland*, 101 A.D.3d 853, 956 N.Y.S.2d 102 (2d Dept. 2012). The plaintiff must prove that the interference is substantial, both in frequency and severity. Liability does not attach unless the plaintiff further proves that the interference is the result of activity by the defendants which is intentional and unreasonable, or abnormally dangerous under strict liability principles or negligent or reckless.

The Court finds that plaintiff has failed to sufficiently allege an interference with his right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by defendants' conduct. *See Wheeler v. Del Duca*, 151 A.D.3d 1005, 58 N.Y.S.3d 409 (2d Dept. 2017) citing *Schulz v. Dattero*, 104 A.D.3d 831, 961 N.Y.S.2d 308 (2d Dept. 2013); *Ward v. City of New York*, 15 A.D.3d 392, 789 N.Y.S.2d 589 (2d Dept. 2005); *Kaplan v. Incorporated Vil. of Lynbrook*, 12 A.D.3d 410, 784 N.Y.S.2d 586 (2d Dept. 2004).

"The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission" (*Reyes v. Carroll*, 137 A.D.3d 886, 888, 27 N.Y.S.3d 80; *see Boring v. Town of Babylon*, 147 A.D.3d 892, 893, 47 N.Y.S.3d 419). "The invasion of, or intrusion upon, the property interest 'must at least be the immediate or inevitable consequence of what [the defendant] willfully does, or which he does so negligently' " (*Behar v. Quaker Ridge Golf Club, Inc.*, 118 A.D.3d 833, 835, 988 N.Y.S.2d 633, quoting *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331, 121 N.E.2d 249).

Generally, intangible intrusions, such as by noise, odor, or light alone, are treated as nuisances, not trespasses, because they interfere with nearby property owners' use and

enjoyment of their land, not with the exclusive possession of it. *See Ivory v.*

International Business Machine Corp., 116 A.D.3d 121, 983 N.Y.S.2d 110 (3d Dept. 2014).

A civil assault “is an intentional placing of another person in fear of imminent harmful or offensive contact” *Charkly v. Altman*, 252 A.D.2d 413, 678 N.Y.S.2d 40 (1st Dept. 1998).

“The elements of a cause of action to recover damages for breach of contract are

(1) the existence of a contract, (2) the plaintiff’s performance under the contract,

(3) the defendant’s breach of the contract, and (4) resulting damages.” *Kausal v.*

Educational Prods. Info., 105 A.D.3d 909, 964 N.Y.S.2d 550 (2d Dept. 2013);

Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 A.D.3d 804, 921 N.Y.S.2d 260

(2d Dept. 2011); *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 893 N.Y.S.2d 237

(2d Dept. 2010); *Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dept. 1986).

To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise. *See Rogers v. Town of Islip*, 230 A.D.2d 727, 646 N.Y.S.2d 158 (2d Dept. 1996) *see, Ripple's of Clearview v. Le Havre Assoc.*, 88 A.D.2d 120, 122, 452 N.Y.S.2d 447).

When viewing plaintiff’s Verified Complaint in light of the criteria set forth above, the Court finds that plaintiff has failed to state causes of action against defendants that fall within cognizable legal theories. The requisite elements of any cause of action known to our law cannot be discerned from the factual averments set forth in plaintiff’s Verified Complaint.

Therefore, based upon the above, the branch of defendants' motion, pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiff's Verified Complaint, as well as plaintiff's claim for punitive damages, is hereby **GRANTED**.

This constitutes the Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
June 29, 2023

ENTERED

Jun 29 2023

NASSAU COUNTY
COUNTY CLERK'S OFFICE