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| <b>Farrugia v Dopart</b>                                                                                                                                                                                                       |
| 2024 NY Slip Op 35483(U)                                                                                                                                                                                                       |
| December 4, 2024                                                                                                                                                                                                               |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 724210/2023                                                                                                                                                                                           |
| Judge: Karina E. Alomar                                                                                                                                                                                                        |
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE KARINA E. ALOMAR  
JUSTICE

IAS PART 23

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VICTORIA CORBIN FARRUGIA,

Index No.: 724210/2023

Plaintiff,

Motion Date: 10/24/24

Motion Seq. No.: 2

-against-

ARTUR DOPART,

Defendant.

-----X

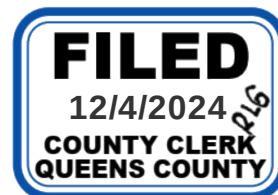
The following numbered papers 39 to 61 read on this motion by defendant Artur Dopart for an order pursuant to CPLR §§3211(a)(1) and (a)(7) dismissing plaintiff's complaint

| PAPERS                                     | NUMBERED       |
|--------------------------------------------|----------------|
| Notice of Motion, Affidavit, Exhibits..... | EF No: 39 – 47 |
| Affirmation in Opposition, Exhibits.....   | EF No: 49 – 56 |
| Affirmations in Reply.....                 | EF No: 58 – 61 |

Upon the foregoing cited papers, it is ordered that defendant Artur Dopart's motion for an order pursuant to CPLR §§3211(a)(1) and (a)(7) dismissing plaintiff's complaint is decided as follows:

On November 14, 2023, plaintiff commenced the instant action for an order, inter alia, directing the removal of defendants alleged encroachment into plaintiff's property. Plaintiff is the owner of the premise located at 59-83 60 Place, Queens, New York. Whereas defendant Artur Dopart is the owner of the premises at 59-81 60 Place, Queens, New York, having purchased the property in October 2014. Each of the properties have an easement and right of way over the adjoining property on the portions of the driveway belonging to the adjoining property.

It is alleged that defendant started remodeling the exterior appearance of his property in or around July 2019. It is further alleged by defendant that following the completion of defendant's remodeling work, on December 11, 2019, Roguski Land Surveying carried out a new survey considering the new exteriors. According to the new survey, all the relevant areas remained in the confines of Defendant's property, and Defendant did not encroach on the Plaintiff's property. According to the new survey, the land on defendant's side of the driveway is wider compared to the Plaintiff's side, thereby allowing for more space within the driveway. It is further alleged that when defendant built a boundary fence setting the property line in the rear of his house, he built the fence one (1) inch into his own property. Defendant now moves for an order dismissing plaintiff's complaint on the grounds that the subject fence and exterior house improvements does not intrude in plaintiff's property.



In support of his motion, defendant submits a copy of the indenture. The indenture provides that the entirety of the right of way consists of two strips of land, each measuring three (3) feet six (6) inches in width (taken together these parcels form seven feet right of way), for the ingress and egress to and from the properties. Additionally, defendant submits a 2014 and a 2019 certified Survey of the land demonstrating that no encroachment has been made into any of the parties three (3) feet six (6) inch easement.

Moreover, defendant submits, inter alia, his affirmation dated October 23, 2024, and the affidavit of Szczepan H. Roguski, a duly licensed Professional Land Surveyor in the State of New York, representing Roguski Land Surveying, P.C., dated October 18, 2024. Roguski averred that the 2019 Survey is a true and accurate representation of the property's stakeout survey related conditions as existed on and observed on December 11, 2019. Additionally, defendant affirmed that the remodeling work on the façade of his building commenced after the 2014 survey and was completed before December 11, 2019.

In opposition, plaintiff submits a 1927 builder's blueprint survey of the land demonstrating that the driveway which encompasses the easement is actually seven (7) feet eleven (11) inches in width. However, the court notes that the builders blueprint explicitly states that the buildings shown in the blueprint are "under construction." Thus, plaintiff fails to provide that the 1927 builder's blueprint survey accurately depicts the measurements of the land, including the driveway measurements.

Pursuant to CPLR §3211(a)(7), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleadings fail to state a cause of action.

Pursuant to CPLR §3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the nonmoving party the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Soodoo v LC, LLC*, 116 AD3d 1033 [2d Dept 2014]; *Alan B. Greenfield, M.D., P.C., v Long Beach Imaging Holdings, LLC*, 114 AD3d 888 [2d Dept 2014].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010], quoting *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) Additionally, "whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017] [internal citations omitted]).

#### *Prescriptive Easement- First and Second Cause of Action*

An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period (315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC, 62 AD3d 690 [2d Dept 2009]). Herein plaintiffs cause of action for prescriptive easement fails as a matter of law in as much as the use

was permissible. As previously discussed, the indenture provides that the entirety of the right of way consists of two strips of land, each measuring three (3) feet six (6) inches in width (which is the entirety of the driveway width). As such, defendant's branch of motion dismissing plaintiff's cause of action for prescriptive easement is granted.

*Written Easement- Third Cause of Action*

An easement appurtenant occurs when the easement (1) is conveyed in writing, (2) is subscribed by the creator, and (3) burdens the servient estate for the benefit of the dominant estate. (*Djoganopoulos v Polkes*, 95 AD3d 933 [2d Dept 2012]). Herein plaintiff's amended complaint concedes that the right of way consists of two strips of land, each measuring three (3) feet six (6) inches in width but alleges that pursuant to the "original builder's survey" the original width of the driveway was approximately 8 feet wide. However, plaintiff's assertion that the actual width of the driveway exceeds the seven (7) feet easement is unavailing. As previously discussed, plaintiff fails to provide that the 1927 builder's blueprint survey accurately depicts the measurements of the land, including the driveway measurements. Plaintiff also fails to provide any evidence substantiating his assertions whereas defendant submits two certified surveys providing that the width of the driveway is seven (7) feet. Most significant the 2019 survey provides that the building facade project did not encroach into plaintiff's three (3) feet six (6) inches right of way. As such, defendant's branch of motion dismissing plaintiff's cause of action for interference with written easement is granted.

*Private Nuisance and Trespass- Fourth and Fifth Cause of Action*

"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.'" (*Donnelly v Nicotra*, 55 AD3d 868 [2d Dept 2008]). The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification of permission." (*Reyes v Carroll*, 137 AD3d 886 [2d Dept 2016]).

Herein, plaintiff alleges that defendant's new backyard fence encroaches several inches into his property and interferes with the use of his above-ground pool. However, plaintiff's complaint fails to set forth any allegations that defendants alleged interference was intentional in origin. More significantly, defendants 2014 and 2019 certified surveys demonstrate that the measurements of the parties' backyards remained the same after the new fence was installed. Thus, the new fence installed by defendant did not encroach into plaintiff's property. In opposition plaintiff merely submits photographs of a measuring tape near the new fence. However, the photographs do not show what is being measured, what plaintiff is using as the starting point of his measurement, or even the inches recorded on the measuring tape. The Court is unable to make measurements of objects by the mere observation of photographs. As such, defendant's branch of motion dismissing plaintiff's cause of action for private nuisance and trespass is granted.

Accordingly, it is hereby

**ORDERED**, that defendant's motion for an order pursuant to CPLR §3211(a)(7) dismissing plaintiff's complaint is granted in its entirety, it is further

**ORDERED**, that defendant shall serve a copy of this motion, with notice of entry, upon plaintiff within thirty days of the date of entry.

This constitutes the decision and order of the Court.

Dated: December 4, 2024

  
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HON. KARINA E. ALOMAR, J.S.C.

