

**47 W. 36th St. LLC v ZDJ W. 37 LLC**

2025 NY Slip Op 30503(U)

February 7, 2025

Supreme Court, New York County

Docket Number: Index No. 156904/2024

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

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437 WEST 36TH STREET LLC

Plaintiff,

- v -

ZDJ W 37 LLC,

Defendant.

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INDEX NO. 156904/2024

MOTION DATE 08/21/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38

were read on this motion to/for VACATE LIS-PENDIS.

Upon the foregoing documents, and after oral argument, which took place on November 12, 2024, where Colin E. Kaufman, Esq. appeared for Plaintiff 437 West 36th Street LLC “Plaintiff”) and Simon L. Malinowski, Esq. appeared for Defendant ZDJ W 37 LLC “Defendant”), Defendant’s motion to dismiss Plaintiff’s Amended Complaint, impose sanctions, and to vacate Plaintiff’s notice of pendency on the real properties is granted in part and denied in part.<sup>1</sup>

**I. Background**

This is a property dispute in which Plaintiff alleges adverse possession, seeks to quiet title, and a permanent injunction. On January 16, 2025, Plaintiff filed an Amended Complaint also seeking a prescriptive easement and alleging “tort” by virtue of Defendant removing a fence and trees without Plaintiff’s consent (*see* NYSCEF Doc. 69). The parties are simultaneously litigating

<sup>1</sup> At oral argument on Plaintiff’s motion for a preliminary injunction, Defendant stated that he was electing to direct this motion to dismiss towards Plaintiff’s Amended Complaint (NYSCEF Doc. 69), which was amended while this motion was *sub judice*, and is essentially a repackaging of the allegations in the original Complaint (*see French v NYS Department of Labor*, 231 AD3d 620, 621 [1st Dept 2024]; *Donoso v New York University*, 160 AD3d 522 [1st Dept 2018]; *Fownes Bros. & Co., Inc. v JP Morgan Chase & Co.*, 92 AD3d 582, 582-83 [1st Dept 2012]; *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35 [1st Dept 1998]).

a RPAPL § 881 proceeding captioned *ZDJ W 37 LLC v 437 West 36th Street LLC*, Index No. 160022/2024. Plaintiff alleges it is the owner of 437 West 36 Street in New York, New York, also known as Block 734, Lot 13 (“Plaintiff’s Property”).<sup>2</sup> Defendant owns the real properties located at 429 West 36th Street, 430 West 37th Street, and 434 West 37th Street, New York, New York, also known as Block: 734, Lots 16, 52, and 55 (collectively “Defendant’s Properties”).

Plaintiff alleges the two retaining walls which occupy land extending easterly of the property line between 437 West 36th Street and 429 West 36th Street were installed sometime in the 1940’s or 1950’s and are used to support a six-story building located on Plaintiff’s Property. Plaintiff further claims that the encroachments by the retaining walls have established its right, through adverse possession, to certain property located at 429 West 36th Street. Plaintiff allegedly filed notices of pendency on Defendant’s Property.<sup>3</sup> Defendant filed the instant motion seeking to cancel the notices of pendency and to dismiss Plaintiff’s Complaint.

## II. Discussion

### A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373

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<sup>2</sup> Plaintiff alleges it is the owner of “Lot 3” in its Amended Complaint (see NYSCEF Doc. 69 at ¶ 4); however, Plaintiff’s deed (NYSCEF Doc. 4) and Defendant’s survey (NYSCEF Doc. 13) make clear that Plaintiff owns Lot 13.

<sup>3</sup> As of the date of this Decision and Order, NYSCEF reflects that the notice of pendency (NYSCEF Doc. 3) was returned for correction by the Clerk’s office because the notice failed to identify the subject property by physical address. The notice of pendency was never re-filed with the correct and requested information, and NYSCEF Doc. 3 still states it was “returned for correction.”

[2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

### **B. Adverse Possession, Quiet Title, and Prescriptive Easement**

Plaintiff's first and second causes of action, which seek declaratory judgments that it has acquired title over a portion of Defendant's Property through adverse possession, and fifth cause of action seeking a declaration that Plaintiff has obtained a prescriptive easement by virtue of adverse possession, are dismissed. New York law "has long disfavored the acquisition of title by adverse possession" and it is well established that "mere license to use the property from a prior owner does not ripen into title by adverse possession" (*Joseph v Whitcombe*, 279 AD2d 122, 126 [1st Dept 2001]). To state a claim for adverse possession, "the occupation of the property must be hostile and under a claim of right" (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]).

Here, as alleged by Plaintiff, the encroachment giving rise to a claim of adverse possession arises from a retaining wall on the property line between 437 West 36th Street and 429 West 36th

Street. However, pursuant to N.Y.C. Administrative Code § 28-305.1.1,<sup>4</sup> the responsibility for maintaining retaining walls on the lot line of adjacent properties and which exist partially on both properties is to be shared, with one half of the costs to be borne by each property owner (*see also 230-79 Equity, Inc. v Mancuso*, 95 AD3d 785 [1st Dept 2012]). The permissive and mutually beneficial existence of the retaining walls are buttressed by Plaintiff's own submissions, namely its argument that the retaining walls are necessary to support the foundation of the building located on Plaintiff's Property (*see also Mentiplay v Foster*, 201 AD3d 1051 [3d Dept 2022]). Common sense dictates that a retaining wall on a property line that prevents a building on one property from collapsing onto the adjacent property is a permissive and mutually beneficial structure<sup>5</sup> (*see also Chatsworth Realty 344 LLC v Hudson Waterfront Co. A, LLC*, 309 AD2d 567, 568 [1st Dept 2003] [permissive use of strip of land negated element of hostility]). Thus, Plaintiff's own allegations and submissions, coupled with applicable statutes and Defendant's survey, establish that Plaintiff cannot plead hostility. Therefore, Plaintiff's first, second, and fifth causes of action alleging adverse possession and seeking to quiet title and a prescriptive easement are dismissed.

### C. Injunctive Relief

Plaintiff's third and fourth causes of action seeking injunctive relief are dismissed. Plaintiff seeks permanent injunctions preventing Defendant from altering, demolishing, or cantilevering over the retaining walls, and argues it is entitled to injunctive relief because it is likely to succeed on the merits of its adverse possession claim. However, as explained above, Plaintiff does not have a claim for adverse possession. As Plaintiff cannot succeed on the merits of its adverse possession

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<sup>4</sup> That statute provides "[t]he owners of adjacent properties shall be responsible jointly for the proper maintenance and repair of retaining walls, partition fences and other site structure, or portions thereof, that are located along the common lot line and on both their properties; and each such owner shall be responsible for one-half of the costs of maintaining and repairing such fences, retaining walls and other site structures, or such portions thereof."

<sup>5</sup> Aside from common sense, the permissive and mutually beneficial nature of the wall is also codified in NYC Admin Code § 28-305.1.1.

claim, its causes of action for injunctive relief are dismissed (*see e.g. Rainbow Coop v City of New York*, 63 AD3d 415 [1st Dept 2009]; *see also Sugarman v Malone*, 30 AD3d 197 [1st Dept 2006]).

#### **D. Tort**

However, Plaintiff's cause of action alleging "tort" for the removal of a fence and trees from Plaintiff's property survives. Accepting the facts alleged as true, if Defendant entered Plaintiff's land and unilaterally removed trees and a fence, Plaintiff may be entitled to damages (*see e.g. Barklee 94 LLC v Oliver*, 124 AD3d 459 [1st Dept 2015]). To the extent Defendant unilaterally removed trees and a fence from the retaining walls, NYC Admin Code § 28-305.1.1 requires maintenance and repairs to be the joint responsibility of the parties – meaning absent an agreement or license, neither party should alter the wall unilaterally (*see also 70 Pinehurst Ave. LLC v RPN Management Co., Inc.*, 123 AD3d 621 [1st Dept 2014]).

#### **E. Notice of Pendency**

Because the causes of action affecting title are dismissed, the notice of pendency, which was purportedly filed (albeit returned for correction by the Clerk of the Court) is cancelled (*Guberman v Rudder*, 85 AD3d 683, 684 [1st Dept 2011]). However, the Court, in its discretion, declines to impose sanctions against Plaintiff.

Accordingly, it is hereby,

ORDERED that Defendant's motion to dismiss Plaintiff's Amended Complaint, cancel the notices of pendency filed by Plaintiff, and to impose sanctions is granted in part and denied in part; and it is further

ORDERED that the branch of Defendant's motion seeking dismissal of Plaintiff's Amended Complaint is granted to the extent that Plaintiff's first through fifth causes of action are dismissed; and it is further

ORDERED that the branch of Defendant’s motion seeking dismissal of Plaintiff’s Amended Complaint is denied as to Plaintiff’s sixth cause of action alleging tort; and it is further

ORDERED that the branch of Defendant’s motion to cancel Plaintiff’s notice of pendency (NYSCEF Doc. 3), to the extent it was ever filed, is granted; and it is further

ORDERED that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel the aforesaid notice of pendency; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website); and it is further

ORDERED that Defendant’s motion seeking sanctions is denied; and it is further

ORDERED that within twenty days of entry, counsel for Defendant shall serve a responsive pleading to what remains of Plaintiff’s Amended Complaint; and it is further

ORDERED that within ten days of entry, Defendant shall serve a copy of this Decision and Order on Plaintiff, with notice of entry, via NYSCEF and on the Country Clerk in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

This constitutes the Decision and Order of the Court.

2/7/2025  
DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

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|-----------------------|--------------------------|----------------------------|-------------------------------------|-----------------------|--------------------------|
| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |                          |
|                       | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       | <input type="checkbox"/> |
|                       |                          |                            |                                     | DENIED                | <input type="checkbox"/> |
| APPLICATION:          | <input type="checkbox"/> | SETTLE ORDER               | <input type="checkbox"/>            | SUBMIT ORDER          |                          |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
|                       |                          |                            |                                     | REFERENCE             |                          |