

**1528 56th St., LLC v Jaroslawicz**

2025 NY Slip Op 31051(U)

March 31, 2025

Supreme Court, Kings County

Docket Number: Index No. 512932/2023

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 31 day of March 2025.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

DECISION AND  
ORDER

-----X  
1528 56TH STREET, LLC,

Plaintiff,  
-against-

Index No.: 512932/2023  
Mot. Seq. 1, 2 & 4

Mendel Jaroslawicz, Sylvia Eisenstein, David Jaroslawicz, and Joshua Jaroslawicz as trustees of the MINA JAROSLAWICZ IRREVOCABLE TRUST under a trust instrument dated June 6, 2016,

Defendants.  
-----X

KINGS COUNTY CLERK  
FILED  
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After oral argument regarding MS#1 (MS#2 was submitted, MS#4 was without opposition), the following papers were read on MS#s 1, 2 & 4, pursuant to CPLR 2219(a):

<u>Papers</u>	NYSCEF DOC. #
Plaintiff's Notice of Motion dated November 13, 2023 seeking an order 1) Dismissing Defendants' first counterclaim seeking declaratory relief declaring that defendant owns exclusive use, title and all interest in and to the easement area contrary to any and all adverse claims of the plaintiff and second counterclaim pursuant to RPAPL Article 15 to issue a judgment establishing the defendants' exclusive ownership and utilization of the walkway area according to the metes and bound description of the properties. 2) Dismissing Defendants' third counterclaim for trespass and fifth counterclaim to permanently enjoin the plaintiff from interfering in any manner with defendants' exclusive use, enjoyment and title to the easement area, to the extent they seek relief arising out of Plaintiff's use of the Express Easement; and 3) Granting Plaintiff judgment on its first cause of action to quiet title to the expressed easement pursuant to Article 15 of the RPAPL and fourth causes of action for declaratory relief declaring that title and all interest and estates in the easement exists in favor of the plaintiff contrary to any and all adverse claims in the easement; Attorney Affirmation of Matthew R. Yogg, Esq., affirmed on November 13, 2023; Exhibits 1-5; Affidavit of Isaac Lefkowitz, affirmed on November 15, 2023; Exhibits 6-11; Plaintiff's Memorandum of Law dated November 13, 2023.....	11-25
Defendants' Notice of Cross Motion dated March 6, 2024 seeking an order 1) Pursuant to CPLR 3215 granting the Defendants a default judgment on their counterclaims and dismissing Plaintiff's complaint; 2) Pursuant to CPLR 3212 granting the Defendants summary judgment on their counterclaims and dismissing Plaintiff's complaint; 3)	

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Granting an injunction to permanently enjoin Plaintiff from parking any vehicles; Exhibits A-F; Affirmations of Defendants Mendel Jaroslawicz, Sylvia Eisenstein, David Jaroslawicz, and Joshua Jaroslawicz as trustees of the Mina Jaroslawicz Irrevocable Trust, affirmed on March 6, 2024; Exhibits A-B; Defendants' Memorandum of Law dated March 6, 2024.....	28-39
Plaintiff's Reply Attorney Affirmation of Matthew R. Yogg, Esq., affirmed on March 12, 2024 in further support of motion for partial summary judgment and in opposition to cross-motion for default judgment, summary judgment and injunctive relief, affirmed on March 12, 2024; Exhibit 12; Affidavit of Isaac Lefkowitz, sworn to on March 12, 2024; plaintiff's Memorandum of Law in Reply dated March 12, 2024.....	40-43
Plaintiffs OSC, signed February 7, 2025 seeking an order to compel defendants to accept a verified reply to counterclaims pursuant to CPLR 3012(d); Attorney Affirmation of Matthew R. Yogg, Esq., affirmed on June 28, 2024; and Exhibits 1-4 .....	52-59

MONTELIONE, RICHARD J., J.S.C.

This is an action, *inter alia*, pursuant to Article 15 of the Real Property Actions and Proceedings Law to quiet title regarding plaintiff's rights to a certain easement for a right of way for ingress and egress, commenced by filing the summons and complaint on May 1, 2023. Issue was joined by defendants filing an answer with counterclaims on July 21, 2023, which was amended on August 3, 2023. Motion Sequence 2 appeared on the court's calendar on April 17, 2024, and was adjourned to June 26, 2024 but did not appear on the court's calendar on that date and the respective counsel did not argue for or against the motion. Inasmuch as Motion Seq. No. 1 was argued on June 26, 2024, and no party is prejudiced by the submission of Motion Seq. No. 2, without oral argument, the court shall add Motion Seq. No. 2 *nunc pro tunc* to the court's calendar of June 26, 2024, and direct the clerk to mark both motions as fully submitted.

Motion Seq. No. 4 is an Order to Show Cause brought by plaintiff to compel defendants to accept service of plaintiff's August 31, 2023, verified reply to counterclaims, *nunc pro tunc*, pursuant to CPLR 3012(d). Any opposition thereto was directed to be uploaded to NYSCEF no later than 5:00 p.m. on February 13, 2025. No opposition has been filed.

Plaintiff moves to dismiss defendants' first counterclaim seeking declaratory relief, defendants' third counterclaim for trespass, and to quiet title by declaring that an expressed easement exists under RPAPL Article 15 in plaintiff's favor. (Motion Seq. No. 1.) Defendants cross move for default judgment on its counterclaims, for summary judgment on its counterclaims, to dismiss the complaint, and for injunctive relief to permanently enjoin plaintiff from parking any vehicles in the driveway. (Motion Seq. No. 2.)

Plaintiff's property at issue is a two-family home located at 1528 56th Street, Brooklyn, NY 11219. Defendants' property at issue is a two-family home located at 1524 56th Street, Brooklyn, NY 11219. Plaintiff alleges that the "[Defendants'] Property and the Plaintiff's Property were a single parcel and single tax lot in the common ownership of Israel Mikel and Erna Mikel (the "Subdividing Party") prior to 1962." Isaac Lefkowitz Affidavit sworn to on November 13, 2023, ¶ 6, NY St Cts Elec Filing [NYSCEF] Doc. No. 18. Further, "By deed dated September 10, 1962 which was recorded in the office of the New York City Register on

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September 11, 1962 in Liber 9048, page 106 (the “Subdividing Deed”), the Subdividing Party sold and conveyed the [Defendants’] Property to the [Defendants’] predecessors-in interest, Nathan Jaroslawicz and Mina Jaroslawicz.” *Id.* at ¶ 7. Neither party submitted a copy of this Subdividing Deed.

The defendants’ deed, dated June 6, 2016 (NYSCEF Doc. #30), indicates a conveyance from “MINA JAROSLAWICZ to MINA JAROSLAWICZ IRREVOCABLE GRANTOR TRUST.” Plaintiff claims this deed gives it an easement based on the following language reflected in Schedule “A” of the defendants’ deed:

*Reserving to the seller an easement for a right of way for ingress and egress of pleasure automobiles over the most southeasterly 5 feet of the above described premises fronting on 56th Street and running thence southwesterly to a depth of 79 feet and 4 inches. (Emphasis Added).*

Again, neither party provided a copy of actual Subdividing Deed which purportedly has an easement that runs with the land. *As only the seller* (NYSCEF Doc. #30), non-party Mina Jaroslawicz, and not the plaintiff, “reserves... an easement,” and there are no other documents provided to the court showing the creation of an easement that runs with the land, there is an issue of fact that precludes summary judgment. This court will not speculate as to the language found in the Subdividing Deed that conveyed the property to non-party Mina Jaroslawicz who then conveyed the deed to defendants. Conveyances occurring after the creation of an easement do not have to contain language indicating the existence of an easement, and such easement is enforceable, but the court must be able to look at the language within the deed or other conveyance document creating the easement to determine the legal rights of the parties regarding the easement. *See Highland Meadows Senior Hous. Dev. Fund Co., Inc. v Westchester County Health Care Corp.*, 226 AD3d 883, 885 [2d Dept 2024]:

When determining a dispute based on an easement agreement, a court must first look to the language of the easement agreement. As with any contract, unambiguous provisions of an easement agreement must be given their plain and ordinary meaning, the parties’ intent must be found within the four corners of the document, and interpretation is a question of law for the court (*see 114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 760, 114 N.Y.S.3d 100; *Goodman v. CF Galleria at White Plains, LP*, 39 A.D.3d 588, 589, 833 N.Y.S.2d 617).

The well-known standards to be applied by the trial courts regarding motions for summary judgment are found in *Ayers v City of Mount Vernon*, 176 AD3d 766, 769 [2d Dept 2019]:

‘[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’ (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853,

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487 N.Y.S.2d 316, 476 N.E.2d 642; see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). ‘Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers’ (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

There is an issue of fact as the court cannot make a determination as to the consequences of a purported easement because none of the papers provide the language creating the original easement and summary judgment must be denied. *Ayers v City of Mount Vernon*, 176 AD3d at 769.

Defendants move for default judgment for failure of plaintiff to reply to counterclaims and for summary judgment. The reply to counterclaims was served 8 days late and was rejected by the defendants. This short period of time is inconsequential, the defendants are not prejudiced, and the motion for default judgment is denied. (See *Walter v Rockland Armor & Metal Corp.*, 140 AD2d 335, 336 [2d Dept 1988], [“In view of the relatively short period of the delay, the absence of any claim of prejudice to the plaintiff, the existence of a possible meritorious defense, the absence of any willfulness on the appellants’ part and the public policy in favor of resolving cases on the merits, the Supreme Court should have denied the cross motion and granted the appellants leave to file late answers” (internal citations omitted).] (See also *Pizzarotti, LLC v CabGram Dev., LLC*, 219 AD3d 1352, 1353 [2d Dept 2023] “Although the general rule is that in order to vacate a default, a party must demonstrate a reasonable excuse for the default and a potentially meritorious defense, the sufficiency of an excuse is not as significant where the default is only a short period” (internal citations omitted).]

Finally, the motion brought by plaintiff to compel defendants to accept service of plaintiff’s August 31, 2023, verified reply to counterclaims pursuant to CPLR 3012(d), *nunc pro tunc*, (Motion Sequence No. 4), is granted without opposition. The plaintiff’s reply will constitute part of its pleadings.

Based on the foregoing, it is

**ORDERED**, that defendants’ Motion Sequence No. 2 is added to the to the court’s calendar of June 26, 2024, *nunc pro tunc*, without oral argument; and it is further

**ORDERED**, that plaintiff’s motion to dismiss defendants’ first counterclaim, second counterclaim, third counterclaim and fifth counterclaim are DENIED as the counterclaims state a cause of action (Motion Sequence No. 1); and it is further

**ORDERED**, that plaintiff’s motion for judgment on its first cause of action to quiet title, and fourth cause of action for declaratory relief, are DENIED as issues of fact exist (Motion Sequence No. 1); and it is further

**ORDERED**, that defendants’ motion for default judgment on their counterclaims and to dismiss the complaint are DENIED in light of this court’s determination of Motion Sequence No.

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4 herein (Motion Sequence No. 2); and it is further

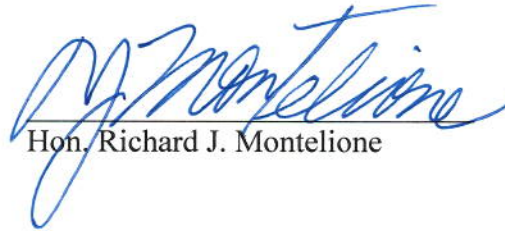
**ORDERED**, that defendants' cross motion for summary judgment on defendants' counterclaims, and for permanent injunctive relief, are DENIED as issues of fact exist (Motion Sequence No. 2); and it is further

**ORDERED**, that the plaintiff's motion to compel defendants to accept service, *nunc pro tunc*, of plaintiff's August 31, 2023, verified reply to counterclaims (NYSCEF Doc. No. 5) is GRANTED without opposition (Motion Sequence No. 4); and it is further

**ORDERED**, that the plaintiff's reply to counterclaims (NYSCEF Doc. No. 5) shall be deemed part of the plaintiff's pleadings; and it is further

**ORDERED**, that any other requests for relief are DENIED.

This constitutes the decision and order of the Court.

  
Hon. Richard J. Montelione

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FILED