1735 University Ave. Assoc. LLC v Andrews Dev. Corp.
2009 NY Slip Op 33360(U)
December 18, 2009
Supreme Court, Bronx County
Docket Number: 6610/07
Judge: Jr., Kenneth L. Thompson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
1735 UNIVERSITY AVENUE ASSOCIATES LLC,

Plaintiff,

-against-

ANDREWS DEVELOPMENT CORP.,

Defendant.

Index No. 6610/07

DECISION/ORDER

Present:

HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to ___ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1, 1a, 1b
Answering Affidavit and Exhibits	2
Replying Affidavit and Exhibits	3
Affidavit	4
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	5, 6
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff's motion for an Order pursuant to CPLR § 3212 granting partial summary judgment on Plaintiff's cause of action sounding in Trespass, and dismissing Defendant's Seventh Affirmative Defense, and for an Order pursuant to RPAPL § 871 granting injunctive relief; and Defendant's cross-motion for an Order pursuant to CPLR §§ 214 and 3212 dismissing Plaintiff's Complaint are consolidated for Decision herein.

Plaintiff's motion is denied.

Defendant's cross-motion is denied.

Background

Defendant purchased a parcel of land located at 1740-1746 University Avenue, Bronx, NY ("Parcel I") from the City of New York at a foreclosure sale on August 15, 1985. (Eshaghoff Aff. at ¶ 2.) Plaintiff purchased a parcel of land located at 1735 University Avenue, Bronx, NY ("Parcel II") in approximately June 1999. (Id. at ¶ 3.) Plaintiff's Parcel II sits behind Defendant's Parcel I. Also, along the rear of each Parcel

of land was a "retaining wall" consisting of railroad ties, which Defendant claims was present on Plaintiff's property when Plaintiff purchased it in 1999. (Id. at ¶ 7.)

In December 12, 2000, Plaintiff sent a letter to Defendants wherein they complained that, "the retaining wall located at the rear of the property has deteriorated to the extent that it is now leaning against and over [Parcel II]." (Id. at ¶ 8; Houlihan Aff. at Ex. A.) Defendants claim that although it did not own the retaining wall, they "agreed to repair the portion of the wall located in the rear of [Parcel II] and installed a masonry wall consisting of 8 inch CMU blocks." (Eshaghoff Aff. at ¶ 9.)

On June 13, 2001, Plaintiff sent another letter to Defendant informing them that the wall they erected "was constructed on [Parcel II] and constitutes an impermissible encroachment on [their] land." (Houlihan Aff. at ¶ 8 & Ex. B; Eshaghoff Aff. at ¶ 9.) Defendant contends that "[r]ather than debate the fact that we replaced their deteriorated wall without cost to them, we removed the wall and set a new 12 inch CMU block wall several feet back along the property line." (Eshaghoff Aff. at ¶ 9.)

Motions

Plaintiff commenced this action, alleging, *inter alia*, that Defendants' placement of the retaining wall on its property constituted a trespass. Defendant interposed an Answer containing the Affirmative Defense that Plaintiff's cause of action was barred by the Statute of Limitations. Plaintiff is now moving for summary judgment on its trespass cause of action, as well as injunctive relief, requiring Defendant to remove the retaining wall. Defendant is cross-moving for summary judgment as to Plaintiff's claims, or in the alternative, for dismissal of the trespass claim based on the statute of limitations.

Trespass

"Liability for civil trespass requires the fact-finder to consider whether the person, without justification or permission, either intentionally entered upon another's property, or, if entry was permitted, that the person refused to leave after permission to remain had been withdrawn." Long Island Gynecological Servs., P.C. v. Murphy, 298 A.D.2d 504 (citations omitted); see also Carlson v. Zimmerman, 63 A.D.3d 772, 773 (stating that "[t]respass is an intentional entry onto the land of another without justification or permission"); Juiditta v. Bethlehem Steel Corp., 75 A.D.2d 126 (stating that "[a] trespasser is one who goes upon the premises of another without invitation, expressed or implied, and does so out of curiosity or for his own purposes or convenience, and not for the performance of any duty to such owner").

> In New York, a defendant's unlawful encroachment upon the property of a plaintiff by construction of a permanent structure constitutes a continuous trespass giving rise to successive causes of action. Consequently, suits predicated on a continuous trespass are barred only by the expiration of such time which would create an easement by prescription or change title by operation of law.

Sova v. Glasier, 192 A.D.2d 1069, 1070 (citing 509 Sixth Ave. Corp. v. NYCTA, 15 N.Y.2d 48).

Analysis

The Court finds that there are triable issues of fact regarding Plaintiff's cause of action sounding in trespass. First, a jury needs to decide who "owned" the original wall constructed of railroad ties located at the rear of each property since both parties claim/imply that this wall belonged to the other party.[1] See Con Ed. v. Jet Asphalt

[1] Although Defendant forwards the argument that it may own the retaining wall due to adverse possession, thus, there can be no encroachment, that argument was waived when Defendant failed to include adverse possession as an Affirmative Defense in its Answer. See Falco v. Pollitts, 298 A.D.2d

Corp., 132 A.D.2d 296 (holding that "it is improper to resolve questions of credibility on a summary judgment motion, unless it clearly appears that the issues are not genuine, but feigned"). Defendant's expert, Gilbert P. Chevalier, averred that, "at some point in time, the prior owners of plaintiff's building constructed a wooden railroad tie crib wall between the rear of its property and the adjacent properties." He failed, however, to provide an evidentiary basis for this assumption. On the other hand, Plaintiff's expert, Erich Plan, stated that "[i]t is clear that the above ground visible portion of an irregular retaining wall is located UP TO one foot seven inches onto the Plaintiff's property." Yet, he also failed to mention upon whose property the original wall made of railroad ties was built. The Court finds that this ownership question is integral to this cause of action because the answer would shed light on whether Defendant constructed the two subsequent retaining walls on Plaintiff's property with their permission.

Given that the Court has found a triable issue of fact as to whether the wall Defendant constructed on Plaintiff's property amounts to a trespass, it is premature to grant its request for an injunction requiring Defendant to remove the wall. Town of Fishkill v. Turner, 60 A.D.3d 932, 933 (stating that one seeking injunctive relief under RPAPL § 871 must demonstrate the existence of an encroachment). It is also premature to determine whether the statute of limitations contained in CPLR § 214 is applicable to this matter.

The foregoing shall constitute the decision and order of this Court.

Dated: DEC 18 2009

J.S.C.

838, 839 (holding that "[a] failure to plead adverse possession as an affirmative defense constitutes a waiver of that affirmative defense").