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publication in the New York Reports.

No. 99

Bloomington, Inc.,
Respondent,

v.

The New York City Transit
Authority,

Appellant.

(And Third-Party Actions.)

Lisa A. Sokoloff, for appellant New York City Transit
Authority.

Peter Cooper, for third-party appellant Judlau
Contracting, Inc.

Brendon T. Fitzpatrick, for third-party appellant Janus
Industries, Inc.

Kevin P. Westerman, for third-party appellant M-Track
Enterprises, Inc.

Harry Steinberg, for respondent.

PIGOTT, J.:

In September 1999, third-party defendant Janus
Industries, Inc., as part of a project undertaken by defendant
New York City Transit Authority, began excavation work between
59th Street and 60th street on the west side of Third Avenue in

Manhattan. In the course of the work, Janus cut a working drainpipe that ran down from plaintiff Bloomingdales, Inc.'s roof, believing it to be a "dead" water main. It then installed a conduit encased in concrete in its place. Sometime thereafter, Bloomingdales experienced flooding on the lower level of its store when it rained. In February 2002, Bloomingdales hired a contractor, who excavated the area of the drainpipe, determined that it had been cut and discovered the conduit. Bloomingdales alleges it was required to install a new drainpipe above the conduit costing in excess of \$165,000.

After filing a Notice of Claim, Bloomingdales then commenced an action against the New York City Transit Authority, in January 2003, alleging causes of action for negligence, trespass and nuisance. Third and fourth-party actions ensued involving various contractors and subcontractors on the project.

The Transit Authority and third-party defendants moved for summary judgment dismissing the complaint, invoking Public Authorities Law § 1212, General Municipal Law §§ 50-e and 50-i and CPLR 214, arguing that Bloomingdales' claim was barred by the statute of limitations because the action was commenced more than one year and ninety days after the complained-of negligent act - the severing of the drainpipe.

Supreme Court concluded that the moving parties established their entitlement to summary judgment, finding that, pursuant to the controlling statutes, the statute of limitations

was triggered when the drainage pipe was severed in September 1999. Bloomingdales appealed.

The Appellate Division reversed and reinstated the trespass and nuisance causes of action (52 AD3d 120). The majority held that the concrete conduit "physically interrupted [Bloomingdales'] storm drainpipe and interfered with [Bloomingdales'] easement and right of access to the sewer." Thus, it held that this was a "continuing" tort resulting in successive causes of action and because the claims were not tied to the single negligent act of severing the drainpipe, the actions were timely commenced.

The Appellate Division certified the following question to this Court: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?" We now answer the question in the affirmative.

Public Authorities Law § 1212 (2) and General Municipal Law § 50-i both require that an action for damages to real property be commenced within one year and ninety days after the occurrence of the event upon which the claim is based, irrespective of when the action accrued (see Klein v City of Yonkers, 53 NY2d 1011, 1013 [1981]). The Transit Authority and third-party defendants argue that this is the correct time period upon which to measure all of Bloomingdales' claims.

There is no dispute that if the happening of the event complained of by Bloomingdales was solely the severing of the

drain pipe, all of the causes of action would be time barred. However, another act occurred here- - the placement of the conduit.

The essence of trespass to real property is injury to the right of possession, and such trespass may occur under the surface of the ground. A person need not have title to the property, but must simply have sufficient property rights to maintain an action for trespass (see CJS Trespass §30). Although Bloomingdales did not have exclusive possession of the area of the drainpipe, it still had legal rights against trespass for an unlawful encroachment to its right of way. We have held that a trespass that constitutes an unlawful encroachment on a plaintiff's property will be considered a continuous trespass giving rise to successive causes of action (509 Sixth Ave. Corp. v New York City Transit Authority, 15 NY2d 48 [1964]). Thus, for purposes of the statute of limitations, suits will only be time barred by the expiration of such time as would create an easement by prescription or change of title by operation of law (id.).

Here, the presence of the concrete conduit interfered with Bloomingdales' access to its drainpipe and ultimately the City sewer, and as a result, Bloomingdales was required to install a new pipe following a new path over the conduit. Notably, the actual damages sought by Bloomingdales did not arise from the mere severance of its drainpipe, but from the need to install the new drainpipe in a different location. Thus, because

the conduit encroached on Bloomingdales' right of way, we find that the Appellate Division correctly concluded that Bloomingdales has a viable cause of action sounding in trespass, for which the statute of limitations has not yet run.

For the same reasons, we find that there is a viable claim for private nuisance, which is, in this case, simply another way of characterizing the trespass claim. There was a continuous interference with Bloomingdales' right to use and enjoy its property right, and as such the same statute of limitations as the trespass applies.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question should be answered in the affirmative.

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Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Pigott. Judges Ciparick, Graffeo, Read, Smith and Jones concur. Chief Judge Lippman took no part.

Decided June 11, 2009