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SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 103720/11**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 001, 002**

NAVIN AGGARWAL and
MEENAKESH AGGARWAL,

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

ZAKA YOUSSEF,

Defendant

The following items were considered in the review of the following motion for summary judgment and cross-motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Defendant's Sur-Reply Affirmation	3
Reply Affirmaiton of Ilana Sable, Esq.	4
Defendant's Sur-Reply Affirmation in Response to Ilana Sable, Esq.	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The plaintiffs and defendant each move for summary judgment. The defendant seeks summary judgment dismissing the plaintiffs' complaint. The plaintiffs' cross-move seeking summary judgment on the cause of action for a judicial declaration as to existence, boundaries and limited rights that the parties to this action possess in connection with a right of way easement. The plaintiffs' also seek the denial of the defendant's motion for summary judgment. The defendant's motion is granted to the extent that the following causes of action are dismissed: first cause of action for continuing trespass; third cause of action for a declaratory judgment; and the fourth cause of action for unjust enrichment. Consequently, the plaintiffs' cause of action for nuisance is all that remains. The plaintiffs' cross-motion is denied.

Facts

This is an action between neighbors living on a cul-de-sac that share a common entry point. The plaintiff resides at 147 Four Corners Road, Staten Island, New York. The defendant reside at 153 Four Corners Road, Staten Island, New York; and the non-party Visciano property is located at 143 Four Corners Road, Staten Island, New York. All three properties share a common driveway that is an easement approximately ten feet wide that begins in front of the defendant's home and proceeds to the driveway of the plaintiffs' home.

The Declaration of Easement and Maintenance dated July 21, 2000 states as follows:

> NOW, THEREFORE, the Declarants do hereby make this said Declaration of Easement and Maintenance as follows:
>
> 1. The RIGHT OF WAY as described on Exhibit "B1" and "B2" is hereby established as a permanent and perpetual easement to be used by the Owners of all lots and free right, with or without vehicles, for all purposes connected with the use of the land of the Declarant to pass and re-pass along said driveway, roadway and turnaround.
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> ***
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> 6. The Owners of all lots cannot obstruct any easement area in any way so as to prohibit or obstruct ingress and egress.
>
> 7. There shall not be permitted the parking of any vehicles on the RIGHT OF WAY, except as permitted by law.

Plaintiffs and defendant each accuse the other of parking on the easement causing an obstruction of ingress and egress to their property. The plaintiffs sue the defendant, Youssef, alleging four causes of action: trespass, nuisance, declaratory judgment of easement, and unjust enrichment. The plaintiffs fail to sue the Visciano occupants of 143 Four Corners Road, Staten Island, New York that are subject to the aforementioned Declaration of Easement and Maintence.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[1] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[2] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[3] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[5]

The defendants have come forward with proof demonstrating an entitlement to judgment as a matter of law dismissing several causes of action. A trespass involves ". . . an intentional entry onto the land of another without justification or permission."[6] Here, the Declaration of Easement and Maintenance clearly allows the defendant to enter upon the land in question.

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[1] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[2] *American Home Assurance Co., v. Amerford International Corp*., 200 AD2d 472 [1st Dept 1994].

[3] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

[4] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[5] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989].

[6] *Woodhull v. Town of Riverhead*, 46 AD3d 802 [2d Dep't. 2007].

Moreover, the land in question is not held exclusively by the plaintiffs.[7] Consequently, the plaintiffs' cause of action for trespass must be dismissed.

Similarly the plaintiffs' third cause of action for a declaratory judgment must be dismissed as well. The Appellate Division, Second Department held in *Katz v. Village of Southampton*, that in an action seeking a declaration of rights in an easement those that may be inequitably affected by a judgment must be joined as a party.[8] In an attempt to distinguish this factual situation from that encountered by the court in *Katz* the plaintiffs assert that they ". . . do not seek an adjudication as to the actions of other parties . . ." However, the Appellate Division, Second Department did not speak of intentions when it rendered its decision in *Katz.* The court stated that the unnamed party ". . . [was] a necessary party which *might* be inequitably affected by a judgement in this action."[9] Consequently, the third cause of action seeking a declaratory judgment is dismissed for failing to add a necessary party.

The plaintiffs' fourth cause of action for unjust enrichment must also be dismissed. To state a cause of action for unjust enrichment a party must allege that, ". . . 1) the other party was enriched; 2) at the party's expense; and 3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered."[10] Here, after the close of discovery, there is no evidence offered that supports this cause of action. Therefore, it is dismissed.

An individual may recover under a theory of "private nuisance" ". . . if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is: (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the

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[7] *See, Krosky v. Hatgipetros*, 150 AD2d 344 [2d Dep't. 1989].

[8] *Katz v. Village of Southampton*, 244 AD2d 461 [2d Dep't. 1997].

[9] Id. (emphasis added)

[10] *Citibank, N.A. v. Walher*, 12 AD2d 480 [2d Dep't. 2004].

rules governing liability for abnormally dangerous conditions or activities."[11]

The plaintiffs' second cause of action for nuisance is plead as follows:

> 27. Defendant's actions have unjustifiably and wrongfully interfered with Plaintiffs' use and enjoyment of Plaintiffs' Property.
>
> 28. By reason of the foregoing, Plaintiffs have sustained damages and are entitled to judgment, including punitive damages, for a sum to be proven at trial but believed to be in excess of Five Hundred Thousand ($500,000.00) Dollars.

The plaintiffs have not included a cause of action for negligence, nor have they alleged that it was the defendant's negligence that caused the alleged nuisance. The actions allegedly taken by the defendant are clearly not actionable under the rules governing liability for abnormally dangerous conditions or activities, therefore the only theory of private nuisance that is viable is intentional and unreasonable interference with the plaintiffs' use and enjoyment of land. The elements of such a private nuisance 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."[12]

Here, the plaintiffs allege that the defendant has repeatedly blocked the Right of Way easement in violation of the Declaration of Easement and Maintenance thereby restricting their ability to freely enter and leave their property. Moreover, the plaintiffs further contend that the defendant continued this conduct after being asked to refrain from such violations. "Each case of alleged nuisance stands on its own facts. It depends upon the location, character of the neighborhood, nature of the use, extent and frequency of the injury, the effect upon the

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[11] *Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 NY2d 564 [1977].

[12] Id. at 570.

enjoyment of life, health and property, and the like."[13] Consequently, a trier of fact must determine whether the defendant's conduct was intentional and unreasonable. Therefore, the plaintiffs' second cause of action for nuisance is viable and cannot be dismissed on summary judgment as a matter of law.

Accordingly, it is hereby:

ORDERED, that the defendant's motion for summary judgment is granted to the extent that the plaintiffs' first, third and fourth causes of action are dismissed; and the Clerk is directed to enter judgment accordingly; the plaintiffs' second cause of action for nuisance shall remain viable and continue to trial; and it is further

ORDERED, that the plaintiffs' motion for summary judgment is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, May 20, 2013 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: April 22, 2013

Joseph J. Maltese
Justice of the Supreme Court

[13] *Durand v. Board of Co-Op. Educational Services,* 70 Misc2d 429, 431[Sup Ct, Westchester County 1972] *affd* 41 AD2d 803 [2d Dep't. 1973]; see also, *Domen Holding Co. v. Aranovich*, 1 NY3d 117 [2003] (Issues of fact found as to whether certain actions by defendant constitute a nuisance.)