Reilly v Achitoff
2013 NY Slip Op 32711(U)
October 10, 2013
Supreme Court, Suffolk County
Docket Number: 08-40612
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

INDEX No. 08-40612
CAL No. 10-01458EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 3-21-13
ADJ. DATE 5-30-13
Mot. Seq. #004 - MD
#005 - MotD

CHRISTINE REILLY and PETER MAGLIONE,

Plaintiffs,

- against -

SYLVIA ACHITOFF,

Defendant.

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Upon the following papers numbered 1 to 75 read on this motion and cross motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers 21 - 55; Answering Affidavits and supporting papers 56 - 71; 72 - 75; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint and granting judgment in her favor on the counterclaims is denied; and it is

ORDERED that the cross motion by plaintiffs for, inter alia, summary judgment in their favor on the complaint and dismissal of the counterclaims against them is granted to the extent set forth herein, and is otherwise denied.

This action was brought for, inter alia, a determination pursuant to article 15 of the Real Property and Proceedings Law as to the right to use a portion of an existing driveway on real property owned by defendant Sylvia Achitoff to access real property owned by plaintiffs Christine Reilly and Peter Maglione. Plaintiffs' real property, known as 93 Landing Road, Miller Place, is improved with a single-family residence built on a cliff overlooking Long Island Sound. Defendant's property, also improved with a single-family residence, abuts a portion of the southern boundary of plaintiffs' property. The driveway at issue, made up of dirt and gravel, runs along the eastern boundary line of defendant's property and continues up through plaintiff's property.

Significantly, both plaintiffs' and defendant's properties were at one time part of a large tract of land owned by James Pringle, who built an estate on it in the early 1900s. The Pringle estate, which extended to the beach fronting the Long Island Sound, included a single-family residence and a detached garage, with a driveway from Landing Road that encircled both the residence and the garage. By deed dated February 10, 1950, Joseph Pringle, individually and as devisee under the last will and testament of Susan Pringle, transferred property from the estate to John Wilden and Hedwig Wilden, including the lot which was improved with the residence and the garage.

Shortly thereafter, in January 1954, the Wildens transferred a small part of their land, located south of the residence and consisting of just .0174 acres, to defendant's husband, Louis Achitoff. The parcel of land transferred to Achitoff included the structure identified as a garage on a survey prepared for John Wilden in 1950 and as a garage apartment on a separate survey prepared for John Wilden and Louis Achitoff in 1953. The 1950 and 1953 surveys prepared for John Wilden also depict a driveway connected to Landing Road that forks left and right as it approaches the structure labeled garage or garage apartment. Traveling left at the fork, the driveway runs past the western side of the garage and the main residence, curves across the front of the main residence, runs past the eastern side of the residence and the garage, and then back to the roadway. The Court notes that the driveway configuration on the Wilden surveys is the same configuration depicted on a survey prepared for James Pringle in 1930. It appears the southwestern portion of the circular driveway for the Pringle estate has not been used since Louis Achitoff acquired the parcel from the Wildens in 1954. It is undisputed the Achitoff family has used the residence on the parcel as a vacation home since in the 1950s. In January 1981, Louis Achitoff executed a deed transferring his interest in the parcel to defendant.

Thereafter, in October 1997, plaintiffs acquired title to their property, which includes the single-family home constructed by James Pringle, by bargain and sale deed. The former Pringle residence, which had been vacant for years, required extensive renovations when it was purchased by plaintiffs. During the year-long renovation project, contractors, service providers, delivery people and others, including plaintiffs, used the portion of the former circular driveway that runs from Landing Road, alongside the eastern boundary of defendant's and plaintiffs' properties, to access and exit plaintiffs' property. For the more than ten years since taking title to the property, plaintiffs and visitors to their property have regularly driven on such driveway (hereinafter referred to as the eastern driveway), the grade of which is flat. Although a separate driveway on the western boundary of plaintiffs' property constructed after they purchased their property also provides access to plaintiffs' residence, the slope of that driveway allegedly is very steep. It is undisputed that since taking ownership of their property, plaintiffs have maintained the eastern driveway by replenishing the gravel and trimming bushes, and have plowed snow from its surface. It also is undisputed that defendant, who stays occasionally at her home on Landing Road, over the years has repeatedly voiced her objection to plaintiffs' use of the portion of the eastern driveway that runs through her property, and has refused plaintiffs' requests to move her parked car from such driveway.

By their complaint, plaintiffs claim an easement over the portion of the eastern driveway that runs through defendant's property, and allege that defendant interferes with and obstructs their use of the easement by, among other things, parking vehicles on the driveway. Plaintiffs also allege that they have an easement over the western portion of defendant's property. The first cause of action seeks a determination that plaintiffs have acquired a prescriptive easement over the portion of the eastern driveway at issue, and the second cause of action seeks a determination that they possess a deeded easement over defendant's

property. The third cause of action is for a permanent injunction barring defendant, her agents and their employees from interfering and obstructing plaintiff's use of the portion of the eastern driveway that runs across her property. Defendant's answer denies the allegations in the complaint and asserts various affirmative defenses, including that the easement "expired as the apparent use of such easement as a circular driveway exceeds the scope of the purpose of the easement," namely, to provide access to the beach. It also interposes counterclaims for trespass, ejectment, injunctive relief, and a declaration that any deeded easement rights over her property, including the western fork of the driveway, were extinguished by adverse possession before plaintiffs' purchased their property.

Defendant now moves for summary judgment dismissing the complaint against her, arguing that plaintiffs do not have an easement by prescription over her property, as their use of the portion of the eastern driveway running across her property during the 10-year prescriptive period was permissive and intermittent. Defendant further argues that any deeded easement across her property was extinguished by abandonment. Defendant's notice of motion also seeks judgment in her favor on the counterclaims, though her affidavit and defense counsel's memorandum of law in support of the motion do not include any arguments with respect to the counterclaims. Defendant's submissions in support of the motion include copies of the pleadings, the 1997 deed transferring ownership of the property known as 93 Landing Road to plaintiffs, and an excerpt of the transcript of Christine Reilly's deposition testimony. Defendant also submits affidavits of Christine Reilly and Marie Reilly submitted in support of a prior motion in this action, as well as her own affidavit.

Plaintiffs oppose the motion and cross-move for an order granting summary judgment in their favor. Plaintiffs argue, in part, that the 1950 deed from Joseph Pringle to John Wilden and Hedwig Wilden created an easement appurtenant; that such easement includes the portion of the eastern driveway at issue, as well as the western portion of the driveway no longer in use; that such easement was designed to ensure access from Landing Road to the single-family residence that had been constructed on the Pringle estate in the early 1900s; and that such easement passed with the subsequent transfers of the property. Plaintiffs also argue that an easement by implication over the eastern driveway exists or, alternatively, that an easement by prescription over such driveway was established during their ownership of the property. In support of their cross motion, plaintiffs submit, among other things, copies of the 1930 survey prepared for James Pringle, the 1950 and 1953 surveys prepared for John Wilden, the 1997 survey prepared for them when they purchased their property, an excerpt of defendant's deposition testimony, an affidavit of Christine Reilly, and an affidavit of Matthew Crane, a professional land surveyor. Plaintiffs also submit certified copies of the various deeds, beginning with the 1950 deed from Joseph Pringle to John and Hedwig Wilden, recorded in the chain of title for the property known as 93 Landing Road.

"An easement is not a personal right of a landowner but an appurtenance to the land benefitted by it (the dominant estate). It is inseparable from the land and a grant of the land carries with it the grant of the easement" (***Will v Gates***, 89 NY2d 778, 783, 658 NYS2d 900 [1997]). An easement appurtenant occurs when the easement is conveyed in a writing, subscribed by the creator of the easement, which burdens the servient estate for the benefit of the dominant estate (***Djoganopoulos v Polkes***, 95 AD3d 933, 935, 944 NYS2d 217 [2d Dept 2012]; ***Bogart v Roven***, 8 AD3d 600, 601, 780 NYS2d 355 [2d Dept 2004]; ***Green v Mann***, 237 AD2d 566, 566-567, 655 NYS2d 627 [2d Dept 1997]). When the dominant estate is transferred, the easement passes to the subsequent owner through appurtenance clauses, even if there is no specific mention of it in the deed (*see* ***Djoganopoulos v Polkes***, 95 AD3d 933, 944 NYS2d 217; ***Green v***

Mann, 237 AD2d 566, 655 NYS2d 627; ***Strnad v Brudnicki***, 200 AD2d 735, 736, 606 NYS2d 913 [2d Dept 1994]). Once created, an easement appurtenant by grant passes with the dominant estate unless extinguished by abandonment, conveyance, condemnation or adverse possession (***Gerbig v Zumpano***, 7 NY2d 327, 330, 197 NYS2d 161 [1960]; ***Corrarino v Byrnes***, 43 AD3d 421, 841 NYS2d 122 [2d Dept 2007]; ***Spier v Horowitz***, 16 AD3d 400, 791 NYS2d 156 [2d Dept 2005]; ***Green v Mann***, 237 AD2d 566, 567, 655 NYS2d 627). Further, the mere nonuse of an easement, even if for a substantial duration, will not establish a claim of abandonment (*see* ***Snell v Levitt***, 110 NY 595, 602, 18 NE 270 [1888]; ***Gold v DiCerbo***, 41 AD3d 1051, 837 NYS2d 887 [3d Dept], *lv denied* 9 NY3d 811, 846 NYS2d 601 [2007]; ***M. Parisi & Son Constr. Co., Inc. v Adipietro***, 21 AD3d 454, 800 NYS2d 723 [2d Dept 2005]).

In addition, a grantee of land takes title subject to any duly recorded easements that were granted by his or her predecessors in title (*see* ***Corrarino v Byrnes***, 43 AD3d 421, 841 NYS2d 122 [2d Dept 2007]; ***Pomygalski v Eagle Lake Farms, Inc.***, 192 AD2d 810, 596 NYS2d 535 [3d Dept], *lv denied* 82 NY2d 656, 602 NYS2d 805 [1993]), as well as to any unrecorded easements of which he or she has actual or constructive notice (***Stasack v Dooley***, 292 AD2d 698, 700, 739 NYS2d 478 [3d Dept 2002]; ***Breakers Motel v Sunbeach Montauk Two***, 224 AD2d 473, 474, 638 NYS2d 135 [2d Dept], *lv dismissed* 88 NY2d 1016, 649 NYS2d 382 [1996], *lv denied* 90 NY2d 810, 665 NYS2d 401 [1997]). A person who purchases a servient estate with actual or constructive notice of an easement is estopped from denying the existence of such easement (***Strnad v Brudnicki***, 200 AD2d 735, 606 NYS2d 913; *see* ***Zunno v Kiernan***, 170 AD2d 795, 565 NYS2d 900 [3d Dept 1991]), and may not unreasonably interfere with the rights of the owner of the dominant estate to use and enjoy the easement (***B.J. 96 Corp. v Mester***, 262 AD2d 732, 733, 692 NYS2d 185 [3d Dept 1999]; ***Green v Mann***, 237 AD2d 566, 567-568, 655 NYS2d 627; ***Wilson v Palmer***, 229 AD2d 647, 647, 644 NYS2d 872 [3d Dept 1996]; *see* ***Herman v Roberts***, 119 NY 37, 23 NE 442 [1890]; ***Scappa v Herzig***, 92 AD3d 751, 938 NYS2d 346 [2d Dept 2012]; ***Rozek v Kuplins***, 266 AD2d 445, 698 NYS2d 866 [2d Dept 1999], *lv denied* 95 NY2d 754, 711 NYS2d 156 [2000]).

Plaintiffs' evidence in support of the motion establishes a prime facie case of entitlement to judgment in their favor on the claim that an easement appurtenant exists over the portion of the eastern driveway that passes over defendant's property and that, as owners of the property known as 93 Landing Road, they are entitled to use such easement for ingress and egress to their property (*see* ***Djoganopoulos v Polkes***, 95 AD3d 933, 944 NYS2d 217; ***Green v Mann***, 237 AD2d 566, 655 NYS2d). Plaintiffs' submissions also establish that defendant had notice of such easement (*see* ***Djoganopoulos v Polkes***, 95 AD3d 933, 944 NYS2d 217; ***Corrarino v Byrnes***, 43 AD3d 421, 841 NYS2d 122; *cf.* ***Witter v Taggart***, 78 NY2d 234, 573 NYS2d 146 [1991]). Here, the recorded 1950 deed conveying ownership of the lots from the Pringle estate improved with the residence and garage from Joseph Pringle to John Wilden and Hedwig Wilden states. in relevant part, that the grant of such parcel of land is "[t]ogether with an easement or rights-of-way over all existing rights of way as now constituted or as these rights of way may hereafter be constituted, within the boundaries of the rest of the tract of land known as the Pringle Tract, as presently shown on survey made by Herman P. Hawkins, C.E., for James Pringle, dated June 1930." The 1930 survey of the Pringle estate depicts a driveway leading from Landing Road that forks left and right, encircling two structures. According to the affidavit of plaintiffs' expert, Matthew Crane, the structures on the 1930 survey are the same structures identified as the residence and the garage, or the garage apartment, on the surveys prepared for John Wilden in 1950 and 1953, and the driveway encircling such structures is the same driveway labeled "existing driveway" on the 1953 survey for John Wilden. Crane also asserts that the eastern driveway is not merely a walking path, as defendant alleges, as it is covered with gravel and

approximately nine feet in width. Defendant's claim that the eastern driveway is intended only to provide beach access is belied by evidence showing that she and plaintiffs, as well as invitees to their properties, regularly drive upon it to access their properties. In fact, defendant's affidavit states that she and her family members have used the eastern driveway "for the last 58 years."

Furthermore, while the existence of the easement providing ingress and egress to the improved lot is not specifically set forth in the 1957 deed conveying John Wilden's and Hedwig Wilden's interest in the property to the next owners, Howard Libel and Doris Libel, such deed does state that the conveyance is "[s]ubject to all restrictions, reservations, covenants, conditions, easements and rights of way, if any, of record." Documentary evidence submitted with the cross-moving papers shows the easement appurtenant benefitting the property known as 93 Landing Road passed to subsequent property owners through general appurtenance clauses (*see* ***Strnad v Brudnicki***, 200 AD2d 735, 606 NYS2d 913). Moreover, the 1954 deed conveying the Wildens' interest in the parcel of property to Louis Achitoff states that such property is part of the premises conveyed by Joseph Pringle by deed dated February 10, 1950, and that such transfer was subject to "all restrictions, reservations, covenants, conditions, easements and rights of way, if any, of record." The deed transferring Louis Achitoff's interest to defendant refers to the 1954 deed from the Wildens to Achitoff and states that it is subject to all easements of record. Defendant's contention that the easement appurtenant was destroyed when the Wildens conveyed the parcel of real property improved with the garage to Louis Achitoff is rejected. An easement appurtenant is not destroyed where a dominant estate is subdivided, and the subsequent owner of the dominant estate continues to have the right to use the easement so long as no additional burden is placed on the servient estate (*see* ***Djoganopoulos v Polkes***, 95 AD3d 933, 944 NYS2d 217; ***Cronk v Tait***, 279 AD2d 857, 719 NYS2d 386 [3d Dept 2001]; ***Green v Mann***, 237 AD2d 566, 655 NYS2d 627).

Defendant's submissions are insufficient to establish her affirmative defense that the easement over the portion of the eastern driveway located on her property was extinguished by adverse possession (*see* ***Gold v DiCerbo***, 41 AD3d 1051, 837 NYS2d 787; ***McGinley v Postel***, 37 AD3d 783, 830 NYS2d 588 [2d Dept 2007]; *cf.* ***Spiegel v Ferraro***, 73 NY2d 622, 543 NYS2d 15 [1989]). A party seeking to extinguish an easement through adverse possession must, as with any other adverse possession claim, establish that possession of the subject property was hostile to the owner of the easement, under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory 10-year period (***Spiegel v Ferraro***, 73 NY2d 622, 625, 543 NYS2d 15; *see* ***Gold v DiCerbo***, 41 AD3d 1051, 837 NYS2d 787; *see also* ***Estate of Becker v Murtagh***, 19 NY3d 75, 945 NYS2d 196 [2012]; ***Walling v Przybylo***, 7 NY3d 228, 818 NYS2d 816 [2006]; ***Brand v Prince***, 35 NY2d 634, 364 NYS2d 826 [1974]; ***Galchi v Garabedian***, 105 AD3d 700, 961 NYS2d 588 [2d Dept 2013]; ***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]). As the acquisition of title to land by adverse possession is not favored under the law, the elements of such a claim must be proven by clear and convincing evidence (***Estate of Becker v Murtagh***, 19 NY3d 75, 81, 945 NYS2d 196; ***Ray v Beacon Hudson Mtn. Corp.***, 88 NY2d 154, 159, 643 NYS2d 939 [1996]).

Furthermore, prior to July 2008, a party seeking to establish title by adverse possession on a claim not based upon a written instrument had to show that the land was "usually cultivated or improved" or "protected by a substantial enclosure" (RPAPL 522). The type of cultivation or improvement sufficient under the statute varied with the character, condition, location and potential uses for the property (*see* ***Zeltser v Sacerdote***, 52 AD3d 824, 860 NYS2d 624 [2d Dept 2008]; ***Blumenfeld v DeLuca***, 24 AD3d 405,

807 NYS2d 99 [2d Dept 2005]; ***Barnett v Nelson***, 248 AD2d 656, 670 NYS2d 326 [2d Dept 1998]; *see also* ***Ramapo Mfg. Co. v Mapes***, 216 NY 362, 110 NE 772 [1915]), and only needed to be consistent with the nature of the property to indicate exclusive ownership (*see* ***Gaglioti v Schneider***, 272 AD2d 436, 707 NYS2d 239 [2d Dept 2000]; ***Katona v Low***, 226 AD2d 433, 641 NYS2d 62 [2d Dept 1996]; ***City of Tonawanda v Ellicott Creek Homeowners Assn.***, 86 AD2d 118, 449 NYS2d 116 [4th Dept 1982], *appeal dismissed* 58 NY2d 824 [1983]). Amended by the Legislature in 2008, RPAPL 522 now states that, after July 7, 2008, a party without a claim of title based upon a written instrument making a claim of ownership of land based on adverse possession must establish either that the land at issue had been "protected by a substantial enclosure" or that "there have been acts sufficiently open to put a reasonably diligent owner on notice." RPAPL 501, also amended by the Legislature in 2008, now defines the common law element of "claim of right" as meaning "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case might be." As with the Third and Fourth Departments, the Appellate Division, Second Department, has ruled that the Real Property Actions and Proceedings Law as amended cannot be applied retroactively to deprive a claimant of a property right that vested prior to the commencement date of the new legislation (*see* ***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144; ***Hogan v Kelly***, 86 AD3d 590, 927 NYS2d 157 [2d Dept 2011]; *see also* ***Hammond v Baker***, 81 AD3d 1288, 916 NYS2d 702 [4th Dept 2011]; ***Barra v Norfolk S. Ry. Co.***, 75 AD3d 821, 907 NYS2d 70 [3d Dept 2010]; ***Franza v Olin***, 73 AD3d 44, 897 NYS2d 804 [4th Dept 2010]).

Significantly, there is no evidence that defendant, who uses her property as a vacation home, exercised exclusive and continuous use of the disputed portion of the eastern driveway under a claim of right for a ten-year period (*cf.* ***Ray v Beacon Hudson Mtn. Corp.***, 88 NY2d 154, 643 NYS2d 939). Thus, in view of the determination that plaintiffs have an easement appurtenant over the portion of the eastern driveway located on defendant's property, summary judgment dismissing the first, second, third and fifth counterclaims, which pertain to the eastern driveway, is granted.

In addition, defendant's submissions in support of her motion are insufficient to establish a prima facie case of adverse possession with respect to the portion of the driveway depicted on the Pringle and Wilden surveys that forks west across her property (*see* ***Gold v DiCerbo***, 41 AD3d 1051, 837 NYS2d 787; *see also* ***Wilcox v McLean***, 90 AD3d 1363, 935 NYS2d 220 [3d Dept 2011]; ***Matter of Perry***, 33 AD3d 704, 823 NYS2d 413 [2d Dept 2006]; ***Pegalis v Anderson***, 111 AD2d 796, 490 NYS2d 544 [2d Dept 1985]). As the proponent of a motion for summary judgment, defendant had the burden of making a prima facie showing of entitlement to judgment as a matter of law by offering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Here, in support of her claim of adverse possession, defendant merely avers in her answer that she and her predecessors in title "have cultivated and improved the subject property by planting grass, raking, removing debris, planting, transplanting, pruning trees and bushes, building and maintaining various structures including a house, a shed and steps, and [ ] constructed and maintain[ed] a brick patio." There is no evidence that the dominant estate was prevented from using the easement running across the western portion of defendant's property for the statutory period.

However, plaintiffs' submissions also fail to make out prima facie case that they are entitled to enjoy an easement over the area where the western fork of the former circular driveway was located, or that

such the easement was not extinguished by defendant by adverse possession. It is noted that the excerpt of defendant's deposition testimony included with the cross-moving papers, which was submitted without defendant's signature or the stenographer's certification, and without proof that such deposition was forwarded to defendant for review, was not in admissible form (*see* ***Marks v Robb***, 90 AD3d 863, 935 NYS2d 593 [2d Dept 2011]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). Summary judgment in plaintiffs' favor on the second cause of action and on the fourth counterclaim, therefore, is denied.

Finally, as to plaintiff's claim for injunctive relief, a permanent injunction is an extraordinary remedy that will not be granted absent a clear showing by the party seeking such relief that irreparable injury is threatened and that no other adequate remedy at law exists (*see* ***Kane v Walsh***, 295 NY 198, 66 NE2d 53 [1946]; ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; ***McDermott v City of Albany***, 309 AD2d 1004, 765 NYS2d 903 [3d Dept 2003], *lv denied* 1 NY3d 509, 777 NYS2d 19 [2004]; ***Staver Co. v Skrobisch***, 144 AD2d 449, 533 NYS2d 967 [2d Dept 1988], *appeal dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]). Here, the documentary evidence in the record demonstrates the longstanding existence of the eastern driveway running northward on the eastern side of the parties' properties. By her affidavit, defendant admits that she and members of her family members use the portion of such driveway on her property to park their cars. Furthermore, the uncontroverted deposition testimony of Christine Reilly shows that defendant repeatedly has blocked plaintiffs' use of the portion of such driveway on her property by refusing to move her parked vehicle. In opposition, defendant failed to establish that she lacked an alternative place to park her vehicle, arguing simply that she and her family members have parked their vehicles on the eastern driveway for years, and that recognizing the easement would require her to "carve" out an area on her property for use as a parking spot. While the question of whether an obstruction constitutes an unreasonable interference with easement rights generally is a question of fact (*see* ***Green v Mann***, 237 AD2d 566, 655 NYS2d 627), in view of the undisputed evidence, the Court finds that defendant has unreasonably interfered with plaintiffs' use of the easement over the eastern driveway. Plaintiffs, however, failed to establish their entitlement to an injunction permanently enjoining defendant from interfering with their use and enjoyment of the alleged easement running across the western portion of defendant's property. Summary judgment in their favor on the third cause of action, therefore, is denied.

Accordingly, defendant's motion for summary judgment dismissing the complaint and awarding judgment in her favor on the counterclaims is denied. Plaintiffs' motion for summary judgment in their favor is granted as to the first cause of action in the complaint, and as to the first, second, third and fifth counterclaims asserted against them. Plaintiffs' remaining causes of action and defendant's fourth counterclaim are severed and continued.

Dated: 10/10/13

A.J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**