DECISION AND ORDER

FILED & ENTERED
3/5/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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CYNTHIA R. INMAN and ALAN J. INMAN,

MOTION DATE:3/1/13
INDEX NO.: 60115/12

Plaintiffs,

-against-

SCARSDALE SHOPPING CENTER ASSOCIATES LLC d/b/a GOLDEN HORSESHOE SHOPPING CENTER, LEAH FINE and MANUEL FINE,

Defendants.

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The following papers numbered 1 to 7 were read on this motion by defendants for an Order pursuant to CPLR 2221 granting reargument and renewal, etc.

Papers Numbered

Notice of Motion - Affirmation (Kim) - Affidavit (Mendola) - Exhs. (A-J) 1-4
Answering Affirmation (Holman) - Exhs. (A-D) 5-6
Replying Affirmation (Kim) 7

Upon the foregoing papers, it is Ordered that this motion by defendants for an Order pursuant to CPLR 2221 granting reargument and renewal is denied.

This Court, in its 17-page Amended Decision and Order, dated, January 17, 2013, inter alia, had denied defendants' motion seeking summary judgment dismissing plaintiffs' claims for negligence and private nuisance, finding that there exist triable issues of fact as to whether defendants had breached their duty of care to plaintiffs to reasonably maintain their property by permitting the growth of Japanese knotweed thereon, and/or in failing to properly maintain the knotweed and contain its proliferation and, if so, whether the alleged damage to plaintiffs' property was reasonably foreseeable as a result of said breaches.[1] This Court specifically had noted that the record then before it did not include any evidence regarding how or when the knotweed first appeared on defendants' property, whether it had been a naturally occurring phenomenon, at what point knotweed had become recognized to be the invasive threat it apparently is, and whether there in fact exists scientific studies and literature with respect to knotweed having advantages as being a legitimate soil stabilizer.

Presently, defendants are moving pursuant to CPLR 2221 for reargument of the Court's earlier Decision to the extent that this Court allegedly had overlooked, misapplied and/or misapprehended

[1]This Court additionally had granted defendants' motion for summary judgment to the extent of dismissing plaintiffs' claims for public nuisance, negligent infliction of emotional distress and for a permanent injunction, and had denied plaintiffs' cross-motion for partial summary judgment on the issue of liability.

relevant facts and law, and for renewal pursuant to "the Court's request and inquiry as to whether there in fact exists scientific studies and literature with respect to knotweed having advantages and is a legitimate soil stabilizer ...," as well as additional invoice evidence supporting defendants' required maintenance of the knotweed. Upon the granting of reargument and/or renewal, defendants seek judgment dismissing the remaining claims and this action. In the event of denial of their motion, defendants lastly seek clarification as to whether plaintiffs' claims for punitive damages previously have been dismissed.

Addressing that portion of defendants' motion seeking reargument, the Court finds that defendants have failed to demonstrate that this Court, in reaching its prior Decision and Order, had misapprehended any of the relevant facts or had misapplied any controlling principal of law, and thus reargument is denied. See CPLR 2221, subd. (d), par. 2; Pro Brokerage Inc. v. Home Insurance Co., Inc., 99 A.D.2d 971 (1st Dept. 1984); Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept. 1979); see, also Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). Reargument does not afford a party successive opportunities to reargue that which has been decided, see Mazinov v. Rella, 79 A.D.3d 979 (2nd Dept. 2011); Pro Brokerage Inc. v. Home Insurance Co., Inc., supra, nor does it permit a litigant to advance new arguments or take new

positions that were not previously raised in the original motion. See V. Veeraswami Realty v. Yenom Corp., 71 A.D.3d 874 (2nd Dept. 2010); Gellert & Rodner v. Gem Community Management, Inc., 20 A.D.3d 388 (2nd Dept. 2005); Amato v. Lord & Taylor, Inc., 10 A.D.3d 374, 375 (2nd Dept. 2004); Spatola v. Tarcher, 293 A.D.2d 523 (2nd Dept. 2002); Matter of Mayer v. National Arts Club, 192 A.D.2d 863, 865 (3rd Dept. 1993); Lopez v. New York City Housing Authority, 7 Misc.3d 1006(A) (N.Y. Sup. Ct. 2005).

This Court's lengthy, well-reasoned Decision and Order speaks for itself. Contrary to defendants' instant argument, the Court had not "overlooked [defendants'] presentation of evidence" on the issue of how and when the Japanese knotweed first appeared on defendants' property; rather, this Court, specifically having recited in its earlier Decision the very evidence defendants reiterate and rely upon herein and expressly having noted that it is not disputed that the knotweed had not been planted by defendants and that it had existed on the shopping center property prior to plaintiffs' purchase of their home in the 1980's, plainly had found defendants' furnished limited "evidence" insufficient and inadequate with respect to assessing the critically important issues of defendants' duties as a landowner.

Also contrary to defendants' argument at bar, this Court additionally specifically had referenced in its earlier Decision

defendants' proffered evidence regarding New York's not yet having legislatively identified Japanese knotweed as an invasive species; manifestly, the Court had not overlooked said arguments or evidence, as defendants maintain herein. Instead, this Court had considered same in light of the other evidence comprising the record and properly had found that the evidence alone did not establish defendants' entitlement to judgment as a matter of law.

To the extent that defendants' motion is one for renewal, said motion too is denied. An application for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination ..." and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221, subd. (e), paras. 2, 3; see, also Sobin v. Tylutki, 59 A.D.3d 701 (2nd Dept. 2009). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit additional facts on the original application." Matter of Beiny v. Wynyard, 132 A.D.2d 190 (1st Dept. 1987), app. dsmd. 71 N.Y.2d 994 (1988). Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion, see Worrell v. Parkway Estates, LLC, 43 A.D.3d 436, 437 (2nd Dept. 2007); Sobin v. Tylutki, 59 A.D.3d 701 (2nd Dept. 2009), and renewal is not available as a second chance for parties who have

not exercised due diligence in making their first factual presentation. See Hart v. City of New York, 5 A.D.3d 438 (2nd Dept. 2004); Chelsea Piers Management v. Forest Elect. Corp., 281 A.D.2d 252 (1st Dept. 2001).

Necessarily then, this Court will not consider defendants' belatedly offered article from the Cornell Cooperative Extension of Oneida County which allegedly addresses the stabilizing soil effect of knotweed. It is beyond challenge that defendants were aware that the invasive as well as positive properties of knotweed are here in issue, and that the parties vigorously dispute knotweed's properties. Notably, the so-called stabilizing soil effect of knotweed previously had been referenced and relied upon by the New Rochelle Planning Board. Any and all evidence regarding this issue therefore properly should have been, but inexcusably had not been, earlier produced to the Court.

Upon further application of the law regarding renewal motions, this Court also shall not consider defendants' presently submitted correspondence, dated September 25, 2012, between Leah Fine and Paul Vacca, the Municipal Enforcement Officer, both of whom in any event originally had submitted affidavits, nor will this Court now consider the October 9, 2012, invoice from Mendola Landscaping allegedly establishing that pruning of the knotweed on defendants' property in fact had occurred in September, 2012, the omissions of

which evidence both had been expressly noted by this Court in its earlier Decision. Again, defendants clearly knew what are the issues at bar and it should have known the importance of these newly offered pieces of evidence regarding said issues. Defendants' earlier failures to have included them in their motion papers therefore cannot be excused.

Similarly, this Court will not now consider the offered and otherwise belatedly unexcused affidavit from Philip Mendola, who in any event has not established himself herein to be a licensed arborist or an expert capable of identifying knotweed, and whose factual statements in any event do not address the critical issue of whether defendants negligently had maintained their property and specifically the Japanese knotweed thereon.

Finally with respect to defendants' renewal motion, the new exhibits "H" and "J" at bar, while they did not exist at the time of the original motion and therefore obviously could not have been originally submitted by defendants, nevertheless constitute evidence which, even had they been earlier submitted, would not have resulted in any different determination by this Court. Accordingly, renewal based thereon is not appropriate.

Lastly, to the extent only that this Court's earlier Decision may not have been sufficiently clear on the issue of its having dismissed plaintiffs' claims for punitive damages, and

notwithstanding plaintiffs' failures herein to not only have addressed defendants' argument that clarification of this issue is required but also to have argued affirmatively that punitive damages are viable, and further notwithstanding that this Court's perusal of defendants' original moving papers reveals that defendants had not separately addressed the issue of punitive damages, albeit same had been pleaded as an affirmative defense, the Court now clarifies that punitive damages are not appropriate in the circumstances presenting and plaintiffs' request for imposition of punitive damages have been dismissed. Cf. Marinacco v. Town of Clarence, 90 A.D.3d 1599 (4th Dept. 2012).

All other arguments raised by the parties and not otherwise specifically addressed herein nevertheless have been considered and rejected by this Court.

The parties shall appear in the Compliance Conference Part, Room 800, at 9:30 a.m., on May 15, 2013.

Dated: March 5, 2013
White Plains, New York

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J.S.C.

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