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SHORT FORM ORDER

INDEX No. 13-14478

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8-23-13 (001)
MOTION DATE 10-1-13 (002)
MOTION DATE 10-29-13 (003)
ADJ. DATE 10-29-13
Mot. Seq. # 001 - MG
002 - XMG
003 - MG; CASEDISP

AUGUSTIN REYES and LINDSAY PORTER, Plaintiffs, - against - JOSEPH CARROLL, MARY CARROLL and MCGRATH BUILDERS, INC., Defendants.	TWOMEY, LATHAM, SHEA, KELLEY, DUBIN & QUARTARARO, LLP Attorney for Plaintiffs 33 West Second Street, P.O. Box 9898 Riverhead, New York 11901 ESSEKS, HEFTER & ANGEL, LLP Attorney for Defendants 108 East Main Street, P.O. Box 279 Riverhead, New York 11901

Upon the following papers numbered 1 to 78 read on these motions for summary judgment and to dismiss counterclaims; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30, 33 - 46, 62, 75 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 76 - 78 ; Replying Affidavits and supporting papers 51 - 53, 54 - 59 ; Other memoranda of law 31 - 32, 47 - 48, 49 - 50, sur-reply 60 - 61 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint, cancelling the Notice of Pendency filed by the plaintiffs, and severing the counterclaims set forth in their answer is granted to the extent set forth herein; and it is further

ORDERED that the defendants are directed, within thirty days of the date of this order, to serve a copy of this order upon the plaintiffs and the Clerk of the County of Suffolk; and it is further

ORDERED that the Clerk of Suffolk County is directed to cancel the notice of pendency filed by the plaintiffs against the subject property; and it is further

ORDERED that this motion (#002) (incorrectly designated a cross motion) by the plaintiffs pursuant to CPLR 3211 (a) (7) dismissing the first counterclaim in the defendants' verified answer, is granted; and it is further

ORDERED that this motion (#003) by the plaintiffs pursuant to CPLR 3211 (a) (7) dismissing the second and third counterclaims in the defendants' amended answer, is granted.

The plaintiffs commenced this action pursuant to Real Property Actions and Proceedings Law article 15 to quiet title based on a claim of adverse possession to a portion of real property owned by the defendants which lies at the boundary line between their respective properties, which are located on Westwood Road in the Hamlet of Wainscott, in the Town of East Hampton. The real property in question is located on the northerly border of the defendants' property and abuts the southerly property line of the plaintiffs. The disputed property consists of an irregular shaped piece of property lying northwesterly of a stockade fence and a wire fence which run approximately 18.4 feet within the defendants' property line at the southwestern end of the fences and approximately 8.4 feet within the defendants' property line at the northeastern end of the fences.

It is undisputed that the plaintiffs purchased 12 Westwood Road, Wainscott, New York from Michael C. Pastena by deed dated November 13, 2000, recorded on November 27, 2000 at Liber 12086 page 876, and that the defendants Joseph Carroll and Mary Carroll purchased 22 Westwood Road, Wainscott, New York from Angie Lake by deed dated November 9, 2006, recorded at Liber 12479 page 563. It is also undisputed that the properties share a 200 foot common border, on the south of plaintiffs' property and the north of defendants' property, and that the deed from the plaintiffs' predecessor in title, and the deed into said predecessor both contain a metes and bounds description that included a southern boundary running 200 feet along the "division line between [the two lots]."

In their complaint, the plaintiffs allege that shortly after they purchased 12 Westwood, in or about November 2000, they erected a stockade fence in substantially the same location as a previously existing wire fence which was installed by the defendants' "predecessors in possession," and that they have "maintained, cultivated and improved" the stockade fence and the disputed property by "planting, a variety of shrubs, trees, ivy and flowering species, and by installing and maintaining an irrigation system thereon." The plaintiffs further allege that they have cultivated all vegetation growing on the disputed property by weeding, watering, fertilizing and insecticide spraying same on a usual basis, and that for a period of ten years prior to their acquiring title their predecessors in possession were in continuous, complete and exclusive possession of the disputed property, maintained the wire fence, and cultivated the vegetation thereon. The petitioners contend that they are entitled to a judgment that they have acquired title to the disputed property by adverse possession, to an award of damages for trespass based on the defendants' removal of their stockade fence and other improvements from the disputed area on or about April 5, 2013, and to a judgment enjoining the defendants from infringing on a certain easement over the defendants' property.

The defendants now move for an order granting summary judgment dismissing the complaint, canceling the notice of pendency filed in this action, and severing the counterclaims set forth in their verified answer. In support of their motion the defendants submit, among other things, the pleadings,

five supporting affidavits, a number of surveys of the subject properties, copies of certain relevant deeds, and copies of two declarations providing an easement upon the defendants' property.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

In his affidavit, the defendant John Carroll (Carroll) swears that he and his wife, the defendant Mary Carroll were shown the property located at 22 Westwood Road in January or February 2006 by a real estate broker, Diane Saatchi. He and his wife retained Roy Greenburg, Esq. (Greenburg) to represent them in the purchase of said property, and in August 2006 a survey of 22 Westwood Road was prepared for them by Saskas Surveying Company, P.C. Said survey revealed a stockade fence extending from 12 Westwood Road, the property directly to the north, onto the northwestern corner of 22 Westwood Road (22 Westwood). Carroll states that he directed Greenburg to contact the attorney for the plaintiffs regarding the encroaching fence. As a result, sometime before the closing of title to 22 Westwood on November 9, 2006, the plaintiffs removed the encroaching fence. He indicates that, even though the stockade fence was removed, his title company refused to "insure our ownership" of the disputed property unless the plaintiffs also signed an affidavit confirming that they had no rights to the disputed property, and that the plaintiffs refused to sign said affidavit. Shortly after the closing, he and his wife began construction to renovate and expand the existing structures for resale. Carroll further swears that from the end of 2006 through 2007, the encroaching fence was not present, that he and his wife lost their financing for the construction due to the financial crisis, and that they ceased construction and fenced their property in late 2007, while seeking new financing. In or about March 2008, he learned from the builder who was working on the project, Kevin McGrath (McGrath), that the stockade fence had been reinstalled. He states that, while he was unhappy about the reinstallation of the fence, he and his wife decided to focus on obtaining new financing instead of fighting with their neighbors. In early 2013, they obtained new financing and transferred ownership of 22 Westwood in a deed to themselves and the defendant K. McGrath Builders, Inc. By letter dated February 6, 2013, Greenburg contacted the attorney for the plaintiffs and demanded removal of the reinstalled fence. When the plaintiffs failed to remove the fence, "we arranged for its removal ourselves in March of 2013." Carroll further swears that a post and wire fence was then installed "along the 200 foot northern boundary of our property," which runs along the edge of a patio on the southern side of the plaintiffs' property and does not interfere with the plaintiffs' use of their patio. He states that the new wire fence also runs over a portion of a well cover for a well located on the defendants' property that services the plaintiffs' property, and that the

defendants are aware of and recognize the plaintiffs' right to access the well pursuant to a certain Corrected Declaration Affecting Title dated May 12, 1978 signed by the previous owners of the two properties. He indicates that the plaintiffs have never notified the defendants that the new wire fence has interfered with their access to the subject well, and that the defendants have removed a portion of said fence to permit "full and unfettered access" to the well cover.

In his affidavit, McGrath swears that he is the president of K. McGrath Builders, Inc., that the Carrolls hired his company to act as general contractor for the expansion/renovation of 22 Westwood in the Fall of 2006, and that Thomas Heine (Heine) was the architect hired by the Carrolls in connection with the project. He states that he inspected 22 Westwood prior to the Carrolls' purchase, that he noticed an encroaching stockade fence, and that the fence was voluntarily removed by the plaintiffs before the Carrolls closed title to 22 Westwood and before he started construction of the project in January 2007. McGrath further swears that he was on the construction site six times a week between January 2007 and the end of 2007, and that the stockade fence was not present during that 12-month period. Because the Carrolls owed his company a substantial amount of money, he continued to visit the site on a monthly basis. In March 2008, he noticed that the stockade fence had been reinstalled. He states that the plaintiffs' patio does not extend onto the defendants' property as it did at the time the Corrected Declaration Affecting Title dated May 12, 1978 was drafted, and that the new wire fence installed by the defendants along the property line does not interfere with the plaintiff's use of their patio.

In an affidavit dated July 30, 2013, Heine swears that he is an architect licensed to practice in the State of New York, that the Carrolls hired him to develop plans for the project, and that he worked with McGrath during the construction process. He states that he "was on site 2 - 3 times a month" during the construction, that the stockade fence was not on the property when construction commenced in January 2007 and through the end of 2007, and that he took certain photographs, attached as exhibits, to document the progress of the construction, which indicate that the fence was not there during that time period.

In his affidavit, Greenburg swears that he is admitted to practice law in the State of New York, that he was retained by the Carrolls "in or about 2006" in connection with the purchase of 22 Westwood, and that a survey commissioned by the Carrolls at that time revealed that the plaintiffs had improperly installed a fence on the defendants' property. He states that he discussed the removal of the encroaching fence with the attorney for the plaintiffs, and that the plaintiffs' attorney "communicated to me that the plaintiffs would remove the fence and prior to the closing it was, in fact, removed." He indicates that he communicated the removal to Carroll on November 5, 2006, and that the Carrolls decided to proceed with the purchase of 22 Westwood based on the plaintiffs' voluntary removal of the fence upon the demand that they do so. He states that, in January 2013, he learned that the plaintiffs had reinstalled the fence and, per Carroll's instruction, he spoke with the attorney for the plaintiffs, who indicated that the plaintiffs would not voluntarily remove the reinstalled fence unless the defendants agreed to grant an easement over that portion of the defendants' property enclosed by the fence. He indicates that the Carrolls refused to agree, and that he advised the attorney for the plaintiffs in a letter dated February 6, 2013 that the encroaching fence would be removed by the defendants unless the plaintiffs removed the fence by February 11, 2013.

In her affidavit, Diane Saatchi (Saatchi) swears that she was the seller's broker for the sale of 22 Westwood from Angie Lake to the Carrolls, and that she also brought the Carrolls to the transaction. She recalls seeing the encroaching fence which prevented the owner of 22 Westwood from accessing a portion of the northwestern corner of the property, and recalls that the plaintiffs were advised that the Carrolls' survey indicated that said fence was encroaching on 22 Westwood and needed to be removed. Saatchi further swears that she visited 22 Westwood prior to the closing to ensure that the fence had been removed, and that she informed Greenberg that she had confirmed the removal.

A review of the survey of 22 Westwood prepared for the Carrolls by Saskas Surveying Company, P.C. and dated August 9, 2006 (Carrolls' Survey), reveals a wire fence enclosing a swimming pool and the rear of the property. The northerly course of said wire fence does not run parallel to the northerly property line of 22 Westwood, continuing an unknown distance[1] in a southwesterly/northwesterly direction. Said survey also indicates a fence in the northwest corner of 22 Westwood extending from 12 Westwood, substantially paralleling the wire fence an unknown distance[2], enclosing a quadrilateral area, with its western course encroaching 18.4 feet onto 22 Westwood and its eastern course encroaching 13.6 feet. Within the quadrilateral area, open to the plaintiffs' property, is a hedge along the westerly course of the stockade fence, and a portion of a triangular section of lawn that extends nine feet onto 22 Westwood near said hedge, with its extension onto the defendants property reduced to zero at the plaintiff's patio, which is located approximately 75 feet from westerly property line of the plaintiffs property. In addition, the survey indicates that the plaintiffs' patio encroaches 0.4 feet onto the defendants' property.

The defendants submit a copy of a survey prepared for the plaintiffs by Barylski Land Surveying dated October 23, 2006, updated November 1, 2007 and April 1, 2008 (Plaintiffs' Survey). Said survey indicates a wooden fence encroaching on 22 Westwood in substantially the same location as that set forth on the Carroll's Survey, and a brick patio ending at the common property line.

In addition, the defendants submit a survey of the plaintiffs' property prepared for the plaintiffs' immediate predecessors in title by JM Land Surveying dated March 7, 1998, updated July 8, 1999 (Predecessor Survey). Said survey indicates a metal post and wire fence encroaching on 22 Westwood in substantially the same location as the stockade fence appears later, with the northerly course of the wire fence presumably surrounding the pool on 22 Westwood and the southerly course of the encroaching fence appearing to run as a single course, and a "masonry patio" encroaching 3.6 feet onto 22 Westwood. Notably, the survey also indicates a course of wire fence which closes off the northerly end of the area enclosed by the encroaching fence, running essentially just inside the southerly property line of 12 Westwood, and blocking entry into the enclosed area. A notation dated March 7, 1998 on the survey indicates that this course of fencing is a "new fence south side of [the] pool [on 12 Westwood]."

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[1] According to the scale set forth on the survey, the northerly course of the wire fence is approximately 100 feet long.

[2] According to the scale set forth on the survey, the stockade fence parallels the wire fence for approximately 45 feet.

Only one of the two declarations submitted by the defendants in support of their motion need be addressed herein. The Corrected Declaration Affecting Title dated May 12, 1978 (Declaration) serves to correct an error in the first declaration which referred to the well servicing 12 Westwood and encroaching on 22 Westwood as a cesspool. The Declaration provides in pertinent part that the patio and well encroaching on 22 Westwood may remain subject to certain conditions not relevant herein, and that "[a]ny owner of [12 Westwood] shall have the right to enter upon [22 Westwood] in the area immediately surrounding the two aforesaid encroachments for the purpose of maintaining and servicing them but shall immediately thereafter restore any damage disturbance occurring to the surrounding area to the condition it was prior to such entry."

Here, the defendants have established their prima facie entitlement to summary judgment dismissing the plaintiffs' first cause of action for adverse possession. On July 7, 2008, the New York legislature significantly amended the law of adverse possession to address a perceived unfairness in its use as a weapon for persons acting in bad faith. The amendment provided that "[t]his act shall take effect immediately [July 7, 2008], and shall apply to claims filed on or after such effective date" (L.2008, c. 269, § 9). This action was commenced after the effective date of the act. Under RPAPL 522, as amended, a party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel was possessed and occupied "[w]here there have been acts sufficiently open to put a reasonably diligent owner on notice" (RPAPL 522[1]) or "protected by a substantial enclosure" (RPAPL 522[2]). In addition, a person claiming adverse possession must now show that he or she had "a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL 501[(3]), and certain acts of routine maintenance and cultivation are now deemed permissive without an express grant by the record owner of the disputed property. Those acts include "lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property" (RPAPL 543[2]). Finally, "de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls shall be deemed to be permissive and non-adverse" (RPAPL 501[1]). Additionally, a party must also satisfy the common-law requirement of demonstrating that the possession of the parcel was hostile, under claim of right, open and notorious, exclusive, and continuous for a period of 10 years or more (*see* ***Walling v Przybylo***, 7 NY3d 228, 818 NYS2d 816 [2006]; ***Klumpp v Freund***, 83 AD3d 790, 921 NYS2d 121 [2d Dept 2011]; ***Walsh v Ellis***, 64 AD3d 702, 883 NYS2d 563 [2d Dept 2009]; ***DeRosa v DeRosa***, 58 AD3d 794, 872 NYS2d 497 [2d Dept 2009]; ***City of Tonawanda v Ellicott Cr. Homeowners Assn.***, 86 AD2d 118, 449 NYS2d 116 [4th Dept 1982]).

The defendants have established prima facie that the plaintiffs did not have a "reasonable basis for the belief" that the disputed property belonged to them by submitting the deed by which they obtained title to 12 Westwood and the Predecessor Survey. Said deed clearly indicated the southerly property line of 12 Westwood to the plaintiffs at the time of the purchase, and said survey clearly indicated the pool fence along said southerly property line which marked the limit of said property and barred access to the disputed property. In addition, the defendants have established that the plaintiffs did not possess the disputed property hostilely, under claim of right, openly and notoriously, exclusively, and continuously for ten years or more. The Predecessor Survey indicates that as late as July 8, 1999, the plaintiffs' predecessor in title maintained a wire pool fence along the southerly property line of 12 Westwood which marked the limit of said property and blocked access to the disputed property. In

addition, it is undisputed that the stockade fence which enclosed a portion of the disputed property was erected by the plaintiffs shortly after they acquired title to 12 Westwood on November 13, 2000, less than the required ten years statute of limitations when measured to the date of the effective date of the amendment of RPAPL article 5. The defendants have also established that the remaining portion of the disputed property was used by the plaintiffs and their predecessors in title with permission pursuant to the Declaration. Finally, the defendants have established that the plaintiffs acknowledged that their possession of the disputed property was subordinate to that of the defendants when they removed the encroaching fence to permit the Carrolls to close title to 22 Westwood, negating the elements of hostility and continuous possession necessary to obtain title by adverse possession.

An acknowledgment or recognition of a record owner's title by a party asserting an adverse possession claim breaks the period of continuous possession and requires the claimant to establish adverse possession of the disputed property for ten years prior to the date of said acknowledgment (***Manhattan School of Music v Solow***, 175 AD2d 106, 571 NYS2d 958 [2d Dept 1991]; *see* ***Van Gorder v Masterplanned, Inc.***, 78 NY2d 1106, 578 NYS2d 126 [1991]; ***Walling v Przybylo***, 24 AD3d 1, 804 NYS2d 435 [3d Dept 2005]). Generally, an express declaration by the claimant is not necessary, and such recognition may be established by proof of acts and conduct on his or her part which are in themselves an acknowledgment of the record owner's superior right (***Walling v Przybylo***, *id.*; ***Reynolds v Arnold***, 221 AD2d 733, 633 NYS2d 662 [3d Dept 1995]; ***Manhattan School of Music v Solow***, *supra*). In addition, it has been held that such an acknowledgment negates the element of hostility and defeats any claim of right by the adverse possessor (*see* ***Oak Ponds, LLC v Willumsen***, 295 AD2d 587, 745 NYS2d [2d Dept 2002]; ***Albright v Beesimer***, 288 AD2d 577, 733 NYS2d 251 [3d Dept 2001]; ***Reynolds v Arnold***, *supra*; *see e.g.* ***Guariglia v Blima Homes***, 224 AD2d 388, 637 NYS2d 769 [2d Dept 1996], *affd* 89 NY2d 851, 652 NYS2d 731 [1996]; ***Garrett v Holcomb***, 215 AD2d 884, 627 NYS2d 113 [3d Dept 1995]). Moreover, under RPAPL article 5, as amended, the plaintiffs' fencing, the hedge, shrubbery, and plantings, as well as the lawn and vegetation maintenance they allege that they performed, are deemed to be permissive and non-adverse (RPAPL 543[2]).

Additionally, the defendants have established their prima facie entitlement to summary judgment dismissing the plaintiffs' second cause of action for trespass and third cause of action for interference with easement. Trespass is an intentional entry onto the land of another without justification or permission (***Carlson v Zimmerman***, 63 AD3d 772, 882 NYS2d 139 [2d Dept 2009]; ***Woodhull v Town of Riverhead***, 46 AD3d 802, 849 NYS2d 79 [2d Dept 2007]; ***Long Is. Gynecological Servs. v Murphy***, 298 AD2d 504, 748 NYS2d 776 [2d Dept 2002]). Here, the defendants have shown that they have title ownership of the disputed property, and established that the plaintiffs have not acquired title thereto by adverse possession. Although a party in actual possession may maintain an action for trespass, the defendants have established their superior title to the disputed property justifying their actions (*see* ***Farrer v Piecuch***, 278 AD 1011, 106 NYS2d 157 [4th Dept 1951]; ***Nance v Town of Oyster Bay***, 41 Misc 2d 446, 244 NYS2d 916 [Sup Ct, Nassau County 1963], *mod on other grounds* 23 AD2d 9, 258 NYS2d 156 [2d Dept 1965]). Accordingly, the defendant have established their entitlement to summary judgment dismissing the plaintiffs' second cause of action for trespass.

Finally, the defendants have established that the wire fence installed by the defendants along the common property line does not interfere with the plaintiffs' patio or the well cover which are the subject of the Declaration. In addition to the language set forth above, the Declaration provides that "[i]f any owner of [12 Westwood] shall remove either or both of the said encroachments at any time, the right to maintain such encroachments on [22 Westwood] shall immediately cease and terminate." The Plaintiffs' Survey dated October 23, 2006, updated November 1, 2007 and April 1, 2008 clearly indicates that at some point the plaintiffs or their predecessor in title removed the encroaching portion of the subject patio. Moreover, the defendants have established that the plaintiffs were not denied access to the subject well cover due to said installation, did not request such access at any time prior to this action, and now have direct and easier access by virtue of the removal of a portion of said fence. Accordingly, the defendant have established their entitlement to summary judgment dismissing the plaintiffs' third cause of action for interference with easement.

Having established their entitlement to summary judgment dismissing the complaint against them, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the defendants' motion, the plaintiffs submit, among other things, five affidavits and two copies of the Predecessor Survey, now updated on November 10, 2000 and certified to the plaintiffs (Plaintiff/Predecessor Survey). One of the two copies of said survey has been marked up by an unknown person to allegedly show the disputed area and an area entitled "Boundary Landscaping." The markings on this copy of the survey have not been authenticated and have been considered herein only as they are reflected in the admissible testimony submitted.

In his affidavit, the plaintiff Augustin Reyes (Reyes) swears that he and his wife, the plaintiff Lindsay Porter (Porter) purchased 12 Westwood on November 13, 2000, and that a wire fence existed near the common boundary line running in a northwesterly to southeasterly direction. At the time, extensive trees, shrubbery, bushes and plants formed a barrier alongside the wire fence and continuing to Westwood Road. He and his wife believed that the disputed property was for their sole use and enjoyment because the easement in favor of 12 Westwood was granted because the disputed property had become part of 12 Westwood during the 1960's. In or about November 2000, he and his wife asked their landscaper, Phouvanh Syhavong (Syhavong), to erect a stockade fence alongside the wire fence. Reyes states that he and his wife have been in continuous, complete and exclusive possession of the disputed property from the time of their purchase of 12 Westwood, and that they have maintained the stockade fence and vegetation on the disputed property. He indicates that he and his wife believe that their predecessor in title also had been in continuous, complete and exclusive possession of the disputed property, and had maintained the wire fence and vegetation on the disputed property. Reyes further swears that in or about October or November 2006 he and his wife were approached by Angie Lake, the prior owner of 22 Westwood, who asked them to "temporarily remove the Stockade Fence so that Defendants Joseph and Mary Carroll could purchase 22 Westwood Road from her," and that Ms. Lake assured them that the defendants did not intend to challenge their ownership of the disputed property. He states because he and his wife felt that the stockade fence needed repair they agreed to the removal, and then replace the fence approximately two weeks later. On or about April 5, 2013, the defendants removed the wire fence, the stockade fence, an irrigation system, and landscaping on the disputed property without permission from him or his wife. He indicates that the patio on 12 Westwood has

never been moved since their purchase, and that he and his wife never saw a wire fence south of their pool blocking access to the disputed property.

In her affidavit, Porter swears that she has reviewed her husband's affidavit, and that she concurs with all of the allegations and statements made therein.

In an affidavit dated September 9, 2013, Syhavong swears that he worked as a landscaper at 12 Westwood for the plaintiffs' predecessor in title from approximately 1997 to on or about November 2000, and for the plaintiffs from November 2000 to the present. His duties have consisted of "cultivating, mowing, and maintaining the lawn and planting, cultivating and maintaining the trees, shrubs and plants" at 12 Westwood, and he has "cultivated, tended to, and maintained" the disputed property. From the time that he started work at 12 Westwood to April 5, 2013, he observed the wire fence on 22 Westwood, the extensive trees, shrubbery, bushes and plants that formed a barrier alongside the wire fence and beyond, the patio on 12 Westwood, and an irrigation system that extended onto the disputed property. Syhavong further swears that he erected the stockade fence in November 2000 at the request of the plaintiffs, that the plaintiffs asked him to remove and repair the stockade fence in November 2006, and that he replaced the fence within approximately two weeks.

In essentially identical affidavits, John Rodgers and Rebecca Ashley each swear that he or she is a "close family friend" of the plaintiffs, that he or she has a personal recollection of walking within the disputed property during "my regular visits", and that he or she observed the wire fence on 22 Westwood, the extensive trees, shrubbery, bushes and plants that formed a barrier alongside the wire fence and beyond, the patio on 12 Westwood, and an irrigation system that extended onto the disputed property.

A review of the Plaintiff/Predecessor Survey submitted by the plaintiffs reveals that as late at November 10, 2000, three days before the plaintiffs took title to 12 Westwood, the wire fence located within said property, running at the south end of the plaintiffs' swimming pool and blocking access to the disputed property, was in place. In addition, the affidavits submitted do not establish that the plaintiffs had full access and exclusive possession of the disputed property for more than the approximately six years that ran before they removed the stockade fence. In their complaint, the plaintiffs allege that "[u]pon information and belief, for a period of at least ten (10) years prior to the Plaintiffs acquiring title, the Plaintiffs' predecessors in possession were in continuous, complete and exclusive possession of the Disputed Property." However, the only admissible evidence on this issue is Syhavong's affidavit, which does not address the issue of the "blocking" fence or otherwise express his personal knowledge regarding the Declaration or the intent of the predecessor in title in transferring possession of the allegedly disputed property to the plaintiffs.

Where the party claiming adverse possession has not possessed the property for the statutory period, the owner may "tack his adverse possession to that of his predecessor to satisfy the applicable statutory period" (***Brand v Prince***, 35 NY2d 634, 637, 364 NYS2d 826 [1974]; *see* ***Stroem v Plackis***, 96 AD3d 1040, 948 NYS2d 90 [2d Dept 2012]; ***Ram v Dann***, 84 AD3d 1204, 924 NYS2d 482 [2d Dept 2011]). Even where the disputed property is omitted from a deed description, tacking is permitted if it

appears that the adverse possessor intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed (*see* ***Brand v Prince***, *supra*; ***BME Three Towers v 225 E. Realty Corp.***, 3 AD3d 444, 772 NYS2d 7 [1st Dept 2004]). However, in the absence of evidence of an intent by a predecessor in title to transfer possession of land not covered by deed, there is no privity and tacking is precluded (***Brand v Prince***, *supra*; ***Reis v Coron***, 37 AD3d 803, 830 NYS2d 589 [2d Dept 2007; ***Jacobs v Lewicki,*** 12 AD2d 625, 208 NYS2d 140 [2d Dept 1960], *affd* 10 NY2d 778, 219 NYS2d 619 [1961]; ***Rogoff v Vanderbilt Sons Corp***., 263 AD 841, 31 NYS2d 570 [2d Dept 1941), *affd* 290 NY 666 [1943]). In addition, a party is not entitled to tack possession where it is not established that the party's predecessors in title ever asserted an adverse claim to the disputed property (***Garrett v Holcomb***, 215 AD2d 884, 627 NYS2d 113 [3d Dept 1995]; ***Meerhoff v Rouse***, 4 AD2d 740, 163 NYS2d 746 [4th Dept 1957]; ***Firsty v Swan***, 17 Misc 2d 57, 184 NYS2d 250 [Sup Ct, Westchester County 1959), *mod on other grounds* 11 AD2d 692, 204 NYS2d 609 [2d Dept 1960]). Absent an affidavit from the plaintiffs' predecessor in title, or other admissible evidence that said individual asserted an adverse claim as to the disputed property and of his or her intent to transfer such claim to the plaintiffs, the plaintiffs have failed to raise a triable issue of fact regarding their claim that they had met the statutory period before they removed the stockade fence or before the amendment of RPAPL article 5.

Moreover, the plaintiffs have failed to raise a triable issue of fact regarding their removal of the stockade fence. Regardless of the time that the fence was absent and not encroaching on 22 Westwood, Reyes states that the plaintiffs removed the fence at Lake's request "so that the Defendants Joseph and Mary Carroll could purchase 22 Westwood Road from her." Said admission is a clear indication that the removal was an act which acknowledged Lake's superior title to the disputed property (***Walling v Przybylo***, *supra*; ***Reynolds v Arnold***, *supra*; ***Manhattan School of Music v Solow***, *supra*). Thus, as discussed above, in order to defeat the defendants motion for summary judgment, the plaintiffs must raise a question of fact whether they possessed the disputed property for ten years prior to the date of said acknowledgment. As discussed above, they have failed to submit any evidence that they are entitled to tack their alleged adverse possession to that of their predecessor in title.

Thus, the plaintiffs have failed to raise an issue of fact whether they obtained title to the disputed property prior to the removal of the stockade fence or before the effective date of the amendment of RPAPL article 5. Assuming for the sake of argument that the stockade fence was absent for approximately two weeks, the second period of alleged adverse possession began in November 2006, approximately 20 months before said effective date. It has been held that RPAPL article 5 as amended cannot be applied retroactively to deprive a party claiming property by adverse possession that vested prior to the commencement date of the new legislation (*see* ***Sprotte v Fahey***, 95 AD3d 1103, 944 NYS2d 612 [2d Dept 2012]; ***Shilkoff v Longhitano***, 94 AD3d 974, 943 NYS2d 144 [2d Dept 2012]; ***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]). Here, it is determined that the plaintiffs did not have a vested right to adverse possession herein before said commencement date.

In addition, the plaintiffs have failed to raise an issue of fact whether the encroaching fencing, hedge, shrubbery, and plantings were more than "de minimis non-structural encroachments" under the amended statute (*see* ***Wright v Sokoloff***, 110 AD3d 989, 973 NYS2d 743 [2d Dept 2013]; *but see*

Sawyer v Prusky, 71 AD3d 1325, 896 NYS2d 536 [3d Dept 2010]). Therefore, the plaintiffs have failed to raise an issue of fact whether the law as amended applies herein.

Finally, the plaintiffs have failed to raise an issue of fact regarding their claim that the defendants have interfered with their rights under the subject easement. They have not submitted any evidence that their patio continues to encroach upon 22 Westwood entitling them to any rights under the Declaration. In addition, in their opposition to the defendants' motion they do not address the defendants' contentions that they have not attempted to access the area near the subject well, or that they have complete and unfettered access thereto. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County 2009]).

Accordingly, the defendants' motion for summary judgment dismissing the complaint is granted.

In light of the Court's determination herein, that branch of the defendants' motion which seeks to cancel the notice of pendency filed by the plaintiffs in this action is granted. A notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (*see* CPLR 6501; ***5303 Realty Corp. v O & Y Equity Corp.***, 64 NY2d 313, 320, 486 NYS2d 877 [1984]; ***Nastasi v Nastasi***, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). Cancellation of a notice of pendency is mandatory where the action has been "settled, discontinued or abated" (CPLR 6514 [a]). As the defendants' motion for summary judgment dismissing the plaintiff's complaint has been granted, the Suffolk County Clerk is ordered to cancel the notice of pendency filed in reference to this matter. In addition, for the reasons set forth below, the defendants' request to sever their counterclaims is denied as academic.

The plaintiffs now move (#002) pursuant to CPLR 3211 (a) (7) to dismiss the first counterclaim for abuse of process set forth in the defendants' verified answer dated July 31, 2013. Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Lucia v Goldman***, 68 AD3d 1064, 1066, 893 NYS2d 90 [2d Dept 2009]; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

In their first counterclaim, the defendants allege that the plaintiffs filed the notice of pendency in this action "maliciously, in bad faith, and for the sole purpose of preventing, interfering with or delaying the sale of the 22 Westwood Road property." In ***Board of Educ. Of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assoc., Inc., Local 1889, AFT-CIO***, 38 NY2d 397, 380 NYS2d 635 (1975), the Court of Appeals stated the necessary elements of an abuse of process claim. The elements are: (1) there must be a regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; (2) the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as an economic or social excuse or justification, and (3) the defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process (*see* ***Parr Meadows Racing Assn. V White***, 76 AD2d 858, 428 NYS2d 509 [2d Dept 1980]).

As noted above, a notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property. Where the pleading fails to allege some irregular activity in the use of judicial process for a purpose not sanctioned by law, or that the process unlawfully interfered with the plaintiff's property, an action to recover damages based upon the alleged abuse of process must fail (*see* ***Curiano v Suozzi***, *supra*; ***Williams v Williams***, 23 NY2d 592, 596, 298 NYS2d 473 [1969]; ***Mago LLC v Singh***, 47 AD3d 772, 851 NYS2d 593 [2d Dept 2008]; ***Panish v Steinberg***, 32 AD3d 383, 819 NYS2d 549 [2d Dept 2006]; ***Reisman v Kerry Lutz, P.C.***, 6 AD3d 418, 774 NYS2d 345 [2d Dept 2004]). Here, the first counterclaim fails to allege any irregularity in the judicial process or unlawful interference with the defendants' property. Accordingly, the plaintiffs' motion to dismiss the defendants' first counterclaim for abuse of process is granted.[3]

The plaintiffs now move (#003) pursuant to CPLR 3211 (a) (7) to dismiss the second counterclaim for trespass and the third counterclaim for fraud set forth in the defendants' amended answer dated September 18, 2013. As set forth above, trespass is an intentional entry onto the land of another without justification or permission (***Carlson v Zimmerman***, supra; ***Woodhull v Town of Riverhead***, *supra*; ***Long Is. Gynecological Servs. v Murphy***, *supra*). However, an "action for trespass over the lands of one property owner may not be maintained where the purported trespasser has acquired an easement of way over the land in question" (***Havel v Goldman***, 95 AD3d 1174, 945 NYS2d 332 [2d Dept 2012], quoting ***Kaplan v Incorporated Vil. of Lynbrook***, 12 AD3d 410, 784 NYS2d 586 [2d Dept 2004]; ***Curwin v Verizon Communications (LEC)***, 35 AD3d 645, 827 NYS2d 256 [2d Dept 2006]).

Here, the affidavits submitted by the defendants establish the plaintiffs' easement over the disputed property pre-dates any alleged trespass herein. When evidentiary material is considered in determining a motion to dismiss, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]).

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[3] The defendants' amended answer includes the first counterclaim and repeats the same allegations as those set forth in the answer. The dismissal of the first counterclaim herein is intended to apply to the first counterclaim set forth in the amended answer as well.

Dismissal under CPLR 3211 is not warranted unless it is established "conclusively that the plaintiff has no cause of action" (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010] quoting ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]; ***Rovello v Orofino Realty Co.***, *supra*). The acknowledgment by the defendants that the plaintiffs' have a limited easement over the disputed property conclusively establishes that the defendants do not have a cause of action for trespass. Accordingly, that branch of the plaintiffs' motion which seeks to dismiss the defendants' second counterclaim is granted.

The elements of a cause of action for fraud, as pleaded in the defendants' third counterclaim, are (1) a misrepresentation of fact, (2) which was false and known to be false by the [plaintiff], (3) made for the purpose of deceiving the [defendant], (4) upon which the [defendant] justifiably relied, (5) causing injury (*e.g.*, ***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.***, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; *see also* ***Ozelkan v Tyree Bros. Envtl. Servs.***, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]; ***Eades v Tadao Ogura, M.D., P. C.***, 185 AD2d 266, 587 NYS2d 209 [2d Dept 1992]; ***Ruse v Inta-Boro Two-Way Radio Taxi Assocs.***, 166 AD2d 641, 561 NYS2d 70 [2d Dept 1990]). Here, the affidavits submitted by the defendants establish that, before they closed title to 22 Westwood, they were aware that the removal of the stockade fence did not ensure that the plaintiffs could not, or would not, assert a claim to the disputed property. Said affidavits conclusively establish that the defendants did not justifiably rely on the removal of the fence in closing title to 22 Westwood. Thus, they do not have a cause of action for fraud. In addition, the defendants' contention that their cause of action for fraud is not barred by the subject statute of limitations is without merit. Accordingly, that branch of the plaintiffs' motion which seeks to dismiss the defendants' third counterclaim is granted.

Dated: Dec. 30, 2013

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION