| **Chaikin v Karipas** |
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| 2015 NY Slip Op 31628(U) |
| August 17, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 70628/14 |
| Judge: Paul J. Baisley |
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[* 1]

Short Form Order

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

COPY

**PRESENT:**
**HON. PAUL J. BAISLEY, JR., J.S.C.**

INDEX NO.: 70628/14
MOTION DATE: 4/23/15
MOTION NO.: 001 MG

---------------------------------------------------------------X
CESAR CHAIKIN and ILONA CHAIKIN,

Plaintiffs,

-against-

PHILIPOS KARIPAS and ANTONIA KARIPAS,

Defendants.
---------------------------------------------------------------X

**PLAINTIFFS' ATTORNEY:**
PARIS & CHAIKIN, PLLC
14 Penn Plaza, Suite 2202
New York, New York 10122

**DEFENDANTS' ATTORNEY:**
LAW OFFICES OF FRANK
N. NAPOLI, P.C.
357 Veterans Memorial Hwy.
Commack, New York 11725

Upon the following papers numbered 1 to 28 read on this motion to dismiss complaint ; Notice of Motion/ Order to Show Cause and supporting papers 1-15 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 16-23 ; Replying Affidavits and supporting papers 24-28 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

***ORDERED*** that the pre-answer motion (motion sequence no. 001) of defendants Philipos Karipas and Antonia Karipas for an order pursuant to CPLR R. 3211(a)(1) and (a)(7) dismissing plaintiffs' complaint on the ground that there are no valid causes of action against defendants and that defendants are entitled to such relief as a matter of law, and for an order adding plaintiffs' attorney, Ian M. Chaikin (a/k/a Ianiv Moshe Chaikin), as a party plaintiff pursuant to CPLR R. 3025 and CPLR §1001 on the ground that he is a necessary party, and awarding defendants their costs and attorney's fees for defending this allegedly frivolous lawsuit under 22 NYCRR §130-1.1, is granted to the extent that Ian M. Chaikin a/k/a Ianiv Moshe Chaikin is directed to be joined as a plaintiff in the action and, upon such joinder, the complaint is dismissed, and the motion is otherwise denied.

Plaintiffs Cesar and Ilona Chaikin, owners of residential property located at 8 Edna Lane, Commack, New York, commenced this action against their adjoining neighbors to the north, Philipos and Antonia Karipas, who live at 6 Edna Lane. In their verified complaint, dated December 15, 2004, plaintiffs allege that the property of the defendants is higher in elevation than the property of the plaintiffs (Ver. Complaint ¶7), and that the two properties are separated by a wall, described as a "partition wall" (Ver. Complaint ¶10). Plaintiffs further allege that "the property of the defendants has and is continuing to cause the wall separating both properties to lean due to the load, pressure, weight and force it places on said wall" (Ver. Complaint ¶8). Plaintiffs allege that "due to said load, pressure, weight and force, said wall is in danger of collapse" (Ver. Complaint ¶9). Plaintiffs further allege that they "requested that defendants abate said danger by removing that soil which is causing the partition wall to lean and be in danger of collapse and said defendants have refused" (Ver. Complaint ¶10). Plaintiffs have asserted causes of action for nuisance, trespass, negligence and injunctive relief arising out of their claim that defendants' property "has and continues to shift" [*sic*] (Ver. Complaint ¶12) and that "the earth, soil, bushes, shrubs, trees and mulch of the adjoining property" have placed "excessive pressure" on plaintiff's property (Ver. Complaint ¶14).

Defendants now move to dismiss plaintiffs' complaint pursuant to CPLR R. 3211(a) on the ground that it fails to state a cause of action against defendants. In support of the motion defendants submitted the affirmation of their attorney, Frank N. Napoli, dated February 5, 2015, the affidavit of defendant Philipos Karipas, sworn to February 4, 2015, and the affidavit of Paul Bolton, a licensed land surveyor, sworn to February 5, 2015. In addition, defendants submitted documentary evidence including, *inter alia*, survey documents depicting stakes set along the boundary line between the parties' properties, photographs depicting the subject wall and the property line stakes, a copy of plaintiffs' verified complaint dated December 15, 2014, copies of recorded deeds pertaining to plaintiffs' property, a survey of plaintiff's property dated January 18, 1999 depicting a concrete wall and wooden retaining wall located entirely on plaintiff's property, together with copies of sections of the Town of Smithtown Zoning Law alleged to be applicable herein.

The affidavit of defendant Philipos Karipas reflects that he and his wife have been the owners and residents of 6 Edna Lane for over 20 years. He states that the subject wall, which he characterizes as a "retaining wall," was built prior to 2004 by plaintiffs' predecessors in interest, at their sole cost and expense, to replace preexisting concrete block and wooden retaining walls located on 8 Edna Lane. He states that after a visit from plaintiff's attorney Ian M. Chaikin in October 2014, who demanded that defendants replace the retaining wall, defendants hired a surveyor in November 2014 to survey their property and place stakes along the boundary line between plaintiffs' and defendants' properties. The survey reflects that the wall lies completely inside of plaintiffs' property. Mr. Karipas states that there has been no construction or excavation on plaintiffs' side of defendants' property in over 20 years, that defendants have not exercised any dominion or control over the retaining wall, and that defendants did not take any action whatsoever that would have any effect on plaintiffs' retaining wall. He states that defendants have regularly maintained their property for all the years that plaintiffs' family have resided at 8 Edna Lane, have not physically done anything to plaintiffs' property, and never maintained or altered the subject retaining wall in any way. He alleges that the "weight" and "shifting" of defendants' property is an act of nature and that since plaintiffs' retaining wall is completely inside plaintiffs' property, the land/soil that is pushing up against the wall is actually plaintiffs' own property. He demands that the Court dismiss plaintiffs' complaint and award defendants their costs, disbursements and attorney fees.

The affidavit of Paul Bolton, defendants' surveyor, confirms that, based on the placement of the survey stakes set by his surveying company, the wall that is the subject of this action lies completely south of the boundary line of defendants' property and is completely within the boundaries of plaintiffs' property.

The affirmation of defendants' attorney reflects that based on online records and copies of recorded deeds obtained from the Suffolk County Clerk's office, plaintiffs' property is currently owned of record by Cesar Chaikin (49.5%), Ilona Chaikin (49.5%), and Ianiv Moshe Chaikin (1.0%) pursuant to a deed dated March 7, 2013. The affirmation further reflects that the 2013 conveyance was the most recent in a series of intrafamily transfers memorialized by recorded deeds. He alleges that plaintiff's attorney, Ian M. Chaikin (a/k/a Ianiv Moshe Chaikin) is a necessary party to this action since he resides at 8 Edna Lane and is an owner of said property, and that he should be joined as a plaintiff in this action in order for complete relief to be accorded. He

alleges that the facts establish that plaintiffs' complaint against defendants has no basis in fact, is frivolous, and has no purpose other than to harass defendants. He alleges that defendants are entitled to sanctions in the form of costs and attorney fees under 22 NYCRR §130-1.1.

Plaintiffs oppose defendants' motion, and submit the affirmation of their attorney, Ian M. Chaikin, dated April 6, 2015, the affidavit of Joseph Schmitt, a licensed professional engineer, sworn to March 26, 2015, and the affidavit of plaintiff Cesar Chaikin, also a licensed professional engineer, sworn to March 31, 2015, together with photographs depicting the wall and the leaning condition of which plaintiffs complain.

In his affirmation plaintiffs' attorney argues that the allegations of the complaint are sufficient to withstand a motion to dismiss. He states that the photographs submitted by defendants show "that defendants have chosen to maintain their land at an elevation higher than curb level and higher than that of the plaintiffs; that the plaintiffs [*sic*] wall is being utilized by the defendants; that defendants have done significant planting along the side of plaintiff's property line and within close proximity to the wall at issue and have placed soil, mulch, fence posts, plants and stones (preventing the proper run-off of water) along the property line and which have encroached past the property line up to and touching the wall; and that they have failed to grade their property away from the property line in such away the [*sic*] would eliminate the lateral pressure on the wall or install any drainage system that would have relieved the increased lateral pressure being placed on this wall by rain water or melting snow." He provides a photograph of the property north of defendants' property purportedly reflecting "how that property is graded to a significantly lower elevation and away from defendants' property." He claims that defendants have not provided evidence to support dismissal pursuant to CPLR R. R. 3211, and that discovery is required in order to permit plaintiffs to "fully and adequately oppose this motion and be more specific with regard to the claims asserted in the complaint."

In his affidavit, Joseph Schmitt states that he inspected the wall on the premises of 8 Edna Lane on December 9, 2014. He states that "the adjoining property [at 6 Edna Lane] and its soil are situated at a higher elevation" than plaintiffs' property. He states that the wall is leaning approximately 8-10 inches from the vertical. He opines that the leaning of the wall is "caused by the lateral (horizontal) soil pressure (load) on the wall by the soil at 6 Edna Lane." He further opines, "with a reasonable degree of engineering certainty," that the wall is collapsing, dangerous, and in need of immediate repair. Mr. Schmitt concludes that "[s]hould it collapse, it...will...cause the soil of the adjoining property to topple over onto the property below."

In his affidavit, plaintiff Cesar Chaikin states that "the wall...is suffering from deformation and is close to rupture," and opines, "within a reasonable degree of engineering certainty that the deflection of the wall is caused by the lateral pressure being exerted by the soil of 6 Edna Lane." He further opines that "the defendants have taken certain actions and have failed to take other actions which have and are continuing to cause damage to the wall at issue herein and have contributed to the pressure being exerted on our wall." These actions include their "failing to grade their land away from the wall in such a way that would eliminate the lateral pressure being exerted on the wall as well as their failure to install a draining system that would have reduced the increase of lateral pressure on the wall in times of rain or melting snow." Mr. Chaikin further alleges that defendants have "planted shrubs, placed a fence and it's [sic] post, spread mulch and placed decorative blocks near and along the wall and in doing so have trespassed onto our

property" and that "despite being asked to remove same, they continue to treat our property as their own despite their own survey showing that they are trespassing." He requests that the Court deny defendants' motion to dismiss "and allow this meritorious claim to be litigated."

In determining a pre-answer motion to dismiss a complaint pursuant to CPLR R. 3211(a)(7), "the standard is whether the pleading states a cause of action," and, in considering such a motion, "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Where a motion to dismiss a complaint is predicated on documentary evidence pursuant to CPLR R. 3211(a)(1), the motion may be granted "only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162-1163, 920 NYS2d 166 [2011]). Similarly, while affidavits and other evidentiary material may be submitted in support of a motion to dismiss pursuant to CPLR R. 3211(a)(7), such proofs "will almost never warrant dismissal under CPLR R. 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901 [2d Dept 2014]).

Applying the foregoing standards, plaintiffs' verified complaint fails to state a cause of action against defendants.

Plaintiffs' first and second causes of action sound in nuisance. In order to maintain a cause of action for a private nuisance, plaintiffs must establish that the conduct of the defendants "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 rules governing liability for abnormally dangerous activities *(Copart Industries, Inc. v Consolidated Edison Company of New York, Inc.*, 41 NY2d 564, 569 [1977]). Here, plaintiffs have alleged no conduct by the defendants that has caused plaintiffs' wall to lean. The sole factual allegation on which plaintiffs' nuisance claims are founded is that defendants' higher-elevation property has "shifted" to cause "excessive pressure" on plaintiffs' wall. There are no allegations of any construction or excavation, or any other actions or inactions by defendants, which may have caused the property to "shift." Plaintiffs do not allege that defendants are responsible for creating the difference in elevation between their two properties. The bare fact that the higher elevation of defendants' adjoining property and its appurtenant "earth, soil, bushes, shrubs, trees and mulch" may place "weight" and "pressure" on the retaining wall located on plaintiffs' lower-elevation property does not give rise to any liability for nuisance, as there is no allegation or showing of intentional, unreasonable, negligent or reckless conduct on the part of defendants, or that defendants created or engaged in any abnormally dangerous conditions or activities on the property.

Plaintiffs' third cause of action sounds in trespass, and is predicated solely on their allegations that defendants' *soil*, which is allegedly causing the wall to lean and be in danger of collapsing, is on plaintiffs' property. Plaintiffs demand that defendants remove the soil which is causing the "partition wall" to lean and be in danger of collapse. However, the documentary and other evidence submitted by defendants conclusively establishes – and plaintiffs do not dispute – that the wall is wholly located on plaintiffs' property. Accordingly, as defendants correctly point

out, the soil that is in direct contact with plaintiffs' wall is plaintiffs' soil. Moreover, the evidence reflects that the subject wall is not merely a "partition wall" as alleged by plaintiffs but is in fact a "retaining wall," that is, a wall designed for "the retention of earth, stone, fill or other materials" (Town of Smithtown Zoning Code §322-2).[1] Plaintiffs' own engineering expert concedes that collapse of the wall will "cause the soil of [defendants'] adjoining property to topple over onto the [plaintiffs'] property below" (Schmitt Aff. ¶11).[2] Accordingly, it is the wall that is holding defendants' soil in place. Plaintiffs' position herein that defendants as adjoining property owners have a duty to alter the natural state of their property in order to support plaintiffs' retaining wall turns a century of jurisprudence on its head and is a perversion of the traditional common law duty to provide lateral support to adjacent land in order to prevent damage and prevent erosion (*see, e.g., Kim v City of New York*, 90 NY2d 1 [1977]; *Suffolk County Water Authority v J.D. Posillico*, 191 AD2d 422 [2d Dept 1993]; *Capital v. Port Washington Yacht Club, Inc.*, 11 Misc 2d 987 [Sup Ct 1958]). In light of the foregoing, plaintiffs' demand that defendants remove the "offending" soil is both factually and legally unsound.

Plaintiffs have pleaded no other facts to support their conclusory allegation that "on numerous occasions since January 1, 2014 the Defendants have wrongfully, intentionally and without legal right, entered into and upon Plaintiffs' Property" (Ver. Complaint ¶28). Accordingly, plaintiffs' pleadings fail to demonstrate that defendants effected an "intentional entry onto the land of another without justification or permission" (*Marone v Kally*, 109 AD3d 880 [2d Dept 2013]). To the extent plaintiff's affidavit in opposition alleges incursions of defendants' shrubs, plants, mulch, fences and other items past the property line, such allegations are not contained in plaintiffs' pleading. In any event, the reply affirmation of defendants' attorney reflects that any such offending items have been removed.

Plaintiffs' fifth cause of action sounds in negligence and is predicated on the conclusory allegation that defendants have "failed to exercise reasonable maintenance, care and control of their premises so as not to cause injury to the plaintiffs" (Ver. Complaint ¶48). Negligence requires proof of facts establishing the existence of a duty, breach of the duty, and resultant damages (*Greenberg, Trager & Herbst*, 17 NY3d 565 [2d Dept 2011]), none of which is reflected in plaintiff's verified complaint. Plaintiffs have not alleged specific facts to support their claim that defendants were negligent in maintaining their own premises. Moreover, plaintiffs did not and cannot allege that defendants have a duty to maintain a retaining wall that is located exclusively on plaintiffs' premises, or that they breached any duty to plaintiffs by reason of the mere proximity of their property to plaintiffs or with respect to the natural forces and conditions (*e.g.*, sinking, gravity, erosion) that may affect it.

In light of all of the foregoing, plaintiffs have not established their entitlement to injunctive relief and accordingly their fourth and sixth causes of action must also be dismissed.

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[1] *See generally*, Retaining wall, https://en.wikipedia.org/w/index.php?title=Retaining_wall&oldid=672554703 (last visited July 29, 2015): "A retaining wall is a structure designed and constructed to resist the lateral pressure of soil when there is a desired change in ground elevation that exceeds the angle of repose of the soil."

[2] At common law, there was a nondelegable duty to provide lateral support to adjacent land in order to prevent damage and prevent erosion (*Kim v City of New York*, 90 NY2d 1 [1997]). The collapse of plaintiff's retaining wall and consequent "toppling" of defendants' soil predicted by plaintiffs' expert would thus arguably give rise to a cause of action of defendants against plaintiffs.

The submissions of plaintiffs in opposition to defendants' motion to dismiss fail to rebut the conclusive evidence of defendants that plaintiffs do not have a viable cause of action against them. Having owned their property for a period in excess of ten years, plaintiffs certainly have personal knowledge of specific acts or omissions of their defendant neighbors that allegedly damaged their wall. Their failure to plead such specific facts suggests that they do not exist, and there is no need for discovery in this matter. Moreover, plaintiffs have cited no authority to establish, as alleged in their attorney's affirmation and the affidavit of plaintiff Cesar Chaikin, that there is any duty imposed on defendants as adjoining landowners to "grade their land away from the wall in such a way that would eliminate the lateral pressure being exerted on the wall as well as... to install a draining system that would have reduced the increase of lateral pressure on the wall in times of rain or melting snow." Indeed, if anything, it is plaintiffs who have a duty to defendants to maintain the retaining wall that, according to plaintiffs' own expert, is the only thing keeping defendants' property from toppling over onto the property below.

As a final matter, the Court is constrained to agree with defendants that plaintiffs' attorney, Ian M. Chaikin, is a necessary party herein as a part-owner of the subject premises in order for complete relief to be afforded and to prevent a multiplicity of lawsuits or inconsistent results (CPLR §1001(a)). Accordingly, the verified complaint and all other papers and proceedings herein are deemed amended to include Ian M. Chaikin (a/k/a Ianiv Moshe Chaikin as a party plaintiff and, upon such amendment, the verified complaint is hereby dismissed in its entirety.

Dated: August 17, 2015

**PAUL J. BAISLEY. JR.**
J.S.C.