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APR 2 5 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
JOSE REYES, RAFAEL MARTINEZ, J& R AUTO CORP., and 3960 PARK AVENUE RELTY CORP.,

Plaintiff,

-against-

BSP REALTY CORP.,

Defendants.
X

Index No: **306541/2010**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **10** read on this **motion to amend complaint**

No On Calendar of **January 29, 2018**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1**
Answering Affidavit and Exhibits	**2, 4, 6, 8**
Replying Affidavit and Exhibits	**5, 7, 9**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	**3**
Stipulation -- Referee's Report --Minutes	**10**
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiffs move pursuant to CPLR 3025 to amend the complaint to include two additional causes of action, equitable easement and easement by implication. Plaintiff also moves to compel compliance with a discovery stipulation dated January 25, 2016 and to extend the time to file a note of issue. Defendant cross-moves to deny plaintiffs' motion and moves for summary judgment dismissing the complaint. This action arose as a result of a dispute over ownership or an easement over an area 22 feet wide and 100 feet long on real property (lot 20), deeded to defendants but claimed by plaintiffs. The encroachment property is adjacent to lot 18, which is deeded to plaintiffs. The encroachment area has been in use by plaintiffs since 1998.

Plaintiffs' first cause of action seeks to enforce plaintiffs' claim to the area of encroachment on grounds of adverse possession. The second cause of action

seeks to establish and enforce an easement by prescription upon the encroachment. The proposed third cause of action seeks to impose an equitable easement while the fourth cause of action seeks an easement by implication. Defendant has argued that plaintiffs' claims are inconsistent, however, "causes of action...may be stated alternatively or hypothetically." CPLR 3014.

Defendant argues that pursuant to RPAPL 531, a 20-year statute of limitations applies in this matter as plaintiffs were tenants. However, plaintiff's status as tenants or owners of the encroachment is an issue of fact and cannot be determined as a matter of law on this motion.

Plaintiffs affirmation of rejection of defendant's cross-motion was withdrawn by stipulation dated August 8, 2016.

ADVERSE POSSSESSION

> Where the occupant or those under whom the occupant claims entered into the possession of the premises under claim of right, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely;
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> N.Y. Real Prop. Acts. Law § 511

Defendants argue that plaintiff's claim for adverse possession fails because plaintiff's possession was not exclusive or hostile and under claim of right. However, there is evidence that plaintiff's maintained that they bought the area of

encroachment along with lot 18, which would amount to possession with claim of right. Also, the evidence submitted by defendant that the plaintiffs' possession was not exclusive are photographs of a pipe and a grill set on a roof. However, the area of encroachment was ground level, and there is an issue of fact as to what those pipes are and whether it is operational Therefore, there is an issue of fact precluding summary judgment.

PRESCRIPTIVE EASEMENT

"While adverse possession and an easement by prescription depend upon the same elements (*Di Leo v. Pecksto Holding Corp.*, 304 N. Y. 505), they differ fundamentally in that one is based on a claim of possession and the other on a claim of use (*Scallon v. Manhattan Ry. Co.*, 185 N. Y. 359)." *Rasmussen v. Sgritta*, 33 A.D.2d 843 [3RD Dept 1969]). It is uncontroverted that the plaintiffs have *used* the encroachment area for their auto repair shop. Since it cannot be held as a matter of law that plaintiffs have not adversely *possessed* the encroachment, it cannot be held that plaintiffs do not have a prescriptive easement on grounds they have not *used* the property, since plaintiffs *use* of the encroachment is longstanding. (emphasis added).

"It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination." *(Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]).

EQUITABLE EASEMENT

> Professor Reeves in his work on Real Property (§ 148) states as follows: 'From covenants or conditions in deeds, and even from oral agreements or representations, equity frequently raises or implies easements which are not recognized in a court of law. These are always negative in character. Hence, they are often designated as negative equitable easements.
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> *Nissen v. McCafferty*, 202 A.D. 528, 533 [2nd Dept 1922]).

The easement sought by plaintiffs is an affirmative easement to use the area of encroachment. Therefore, as a matter of law, plaintiffs' proposed third cause of action does not have any merit and is struck from the amended verified complaint.

EASEMENT BY IMPLICATION

> With respect to the [fourth] cause of action, for an implied easement, "a grantee claiming an easement implied by existing use must establish: (1) a unity and subsequent severance of title with respect to the relevant parcels; (2) that during the period of unity of title, the owner established a use in which one part of the land was subordinated to another; (3) that such use established by the owner was so continuous, obvious, and manifest that it indicated that it was meant to be permanent; and (4) that such use affects the value of the estate conveyed and that its continuation is necessary to the reasonable beneficial enjoyment of the estate conveyed" (*Monte v DiMarco*, 192 AD2d 1111, 1112 [1993], *lv denied* 82 NY2d 653 [1993]). "Stated another way, '[a]n implied easement will arise "upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate"'" (*Freeman v Walther*, 110 AD3d 1312, 1315 [2013]). "Implied easements are not favored by the law and the burden of proof rests with [plaintiffs] to prove such entitlement by

clear and convincing evidence" (*Hedden v Bohling*, 112 AD2d 23, 24 [1985], *appeal dismissed* 67 NY2d 758 [1986]).

Mau v. Schusler, 124 A.D.3d 1292, 1293–94 [4TH Dept 2015]).

In this action, lots 18 and 20 come from a common grantor. Arguably, during a period of unity of the properties, lot 20 was subordinate to lot 18. Arguably, given the continuous, obvious and manifest use of the encroachment it arguably could be permanent. Arguably, the use is necessary to the conduct of the mechanics business. Defendant states on page 19 of its Memorandum of Law in opposition, that plaintiffs failed to allege that the encroachment is "anything more than a convenience." However, plaintiffs clearly allege in paragraphs 84 and 85 of their proposed amended verified complaint that the easement is necessary to their business.

"Leave to amend the pleadings "shall be freely given" absent prejudice or surprise resulting directly from the delay (CPLR 3025, subd [b]; *Fahey v County of Ontario*, 44 NY2d 934, 935)." (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.,* 59 N.Y.2d 755, 757 [1983]).

Accordingly, plaintiffs may amend their complaint with the fourth cause of action.

CONCLUSION

That branch of plaintiffs' motion that seeks to amend their complaint is granted to the extent that the proposed fourth cause of action, easement by implication is included in the amended complaint. To the extent that plaintiffs

seek to include a proposed third cause of action for equitable easement, the motion is denied.

That branch of plaintiffs' motion that seeks an order to compel further disclosure is denied without prejudice to moving in the discovery part before Justice Douglas for such relief. That branch of plaintiffs' motion that seeks to extend the time to file a note of issue is granted and the time to file a note of issue is hereby extended to November 30, 2018.

Defendant's cross-motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 4/17/2018

KENNETH L. THOMPSON JR. J.S.C.