Ubiles v Ngardingabe
2019 NY Slip Op 33250(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 151439/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

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JOSEPH UBILES, BERNICE UBILES

Plaintiffs,

- v -

NDINGFARAE NGARDINGABE, JULIE CAMISULI,

Defendants.

---X

INDEX NO. 151439/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 68, 69, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 101

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion to/for DISCOVERY.

Motion Sequence Numbers 002 and 003 are consolidated for disposition. The motion (MS002) by defendants to dismiss this action is granted. The motion (MS003) by plaintiffs to obtain an updated inspection and the cross-motion by defendants for a protective order are denied as moot.

Background

Plaintiffs and defendants are neighbors and they own adjoining properties on West 147th Street in Manhattan. Plaintiffs claim that rain water and snow melt flows from defendants' driveway into plaintiffs' property. Plaintiffs contend that as a result of this runoff, the foundation and the walls of their home have been damaged. They contend that defendants caused this

condition by impermissibly altering the water drainage system in defendants' driveway and defendants have done nothing to remediate the problem despite plaintiffs' complaints

Defendants move to dismiss based on the statute of limitations and on plaintiffs' failure to state a cause of action. Defendants claim that the driveway was installed in 1989 when two lots (431 and 433 West 147th Street) were merged. Defendants argue that the driveway is pitched towards the street and is not causing damage to plaintiffs' property. Defendants claim that in 2006, plaintiffs requested permission from defendants to access defendants' driveway to do pointing work and partial waterproofing on plaintiffs' wall. Defendants contend that by 2009, the work on plaintiffs' wall was deteriorating and rendered the property vulnerable to damage from rain and snow.

In 2014, plaintiffs again requested access to defendants' property and defendants insist they allowed plaintiffs to install a tarp over a portion of the subject wall. In May 2015, defendants received a letter from plaintiffs' attorney arguing that defendants' actions in 2009 or 2010 (cementing over the existing driveway) were deficient and caused the surface to pitch towards plaintiffs' property. Defendants admit that the driveway was paved in 2009.

Defendants also point out that they notified their insurance company after receiving this letter from plaintiffs' counsel but that their insurance company found that the driveway did not contribute to plaintiffs' damage. Defendants maintain that plaintiffs reached out to plaintiffs' insurance carrier, who also denied plaintiffs' claim based on the water runoff.

Defendants argue that this case is time-barred because the driveway was altered, at the latest, eight years before this action was commenced. Defendants also argue that the continuous wrong doctrine does not apply because the damage arises out of a single allegedly objectionable

act (the altering of the driveway). Defendants conclude that plaintiffs knew about the damage since at least 2006 and, therefore, they cannot claim a continuing trespass or nuisance.

In opposition, plaintiffs insist they did not know about the source of the water flow until 2015. Plaintiffs purportedly hired an architect in 2015, who found that the water was flowing from defendants' driveway. Plaintiffs argue that defendants expanded their driveway without the proper approval from the city. Plaintiffs dispute that they knew about the water damage in 2006 even though they claim that every time it rains or snows, their property is inundated with water runoff. Plaintiffs conclude that the water runoff constitutes a trespass to their property.

Discussion

"In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or [ ] raise an issue of fact as to whether the action was timely" (*MTGLQ Investors, LP v Wozencraft*, 2019 WL 2291865, 2019 NY Slip Op 04287 [1st Dept 2019] [internal quotations and citations omitted]).

"The continuous wrong doctrine is an exception to the general rule that the statute of limitations runs from the time of the breach though no damage occurs until later. The doctrine is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act. Where applicable, the doctrine will save all claims for recovery of damages but only to the extent of wrongs committed

within the applicable statute of limitations. The doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs. The doctrine is inapplicable where there is one tortious act complained of since the cause of action accrues in those cases at the time that the wrongful act first injured plaintiff and it does not change as a result of continuing consequential damages" (*Henry v Bank of America*, 147 AD3d 599, 601 48 NYS3d 67 [1st Dept 2017] [internal quotations and citations omitted]).

Here, the Court finds that the instant action is barred by the statute of limitations. This case was filed in 2017. The allegedly unlawful acts were either the construction of the driveway in 1989 or the paving of the driveway in 2009. Both of these acts (which purportedly caused the water runoff) occurred prior to the three-year statute of limitations applicable to plaintiffs' causes of action. Plaintiffs do not allege that defendants did anything else to cause the water runoff. Therefore, the Court finds that, assuming plaintiffs' claims are true, the paving of the driveway in 2009 was a single and distinct wrong that has had purportedly continuing effects rather than a series of independent acts. Put another way, because defendants have not altered the driveway since 2009, the water runoff when it rains or snows are not new wrongful acts by defendants.

Moreover, the record shows plaintiffs were experiencing water runoff problems since at least 2006. The letter correspondence between the parties makes clear that plaintiffs needed to have work done to keep their basement dry (NYSCEF Doc. No. 78). In fact, the parties' communications show that a wall was built by plaintiffs in 2006 for "drainage enhancement" (*id.*). In other words, plaintiffs clearly had water problems in 2006 and took actions to try and remediate the problem more than three years before they brought this action.

The opposition, an affidavit from plaintiff Joseph Ubiles, conveniently skips from a conclusory assertion that defendants' driveway had nothing to do with the 2006 work to 2015 (NYSCEF Doc. No. 86, ¶¶ 10-15). There is no explanation for why they did not seek to discover the cause of the water issues in 2006 despite the fact that they needed access to defendants' property to do the work. And that work involved the construction of a wall that defendants' claim was impermissibly built on their property. That plaintiffs waited until 2015 to hire an architect, who claims that the water runoff was from defendants' driveway, does not extend the statute of limitations. Plaintiffs cannot sit on their rights for over a decade after their property suffered water damage. Therefore, plaintiffs' claims are untimely (*see Alamio v Town of Rockland*, 302 AD2d 842, 755 NYS2d 754 [3d Dept 2003] [finding that continuing trespass and nuisance claims arising out of water runoff from an adjacent parking lot were time-barred because the damage was apparent more than three years prior to the commencement of the action]).

Accordingly, it is hereby

ORDERED that the motion (MS002) by defendants to dismiss the amended complaint is granted and the clerk is directed to enter judgment accordingly, with costs, upon presentation of proper papers therefor; and it is further

ORDERED that the motion (MS003) by plaintiffs and cross-motion by defendants are denied as moot.

10/31/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
APPLICATION:		GRANTED		DENIED		GRANTED IN PART	X	OTHER
		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE